

REFERENCE NO - 21/503585/FULL			
APPLICATION PROPOSAL			
Section 73 - Application for Variation of condition 30 (to vary the trigger point for the delivery of the Willington Street/Deringwood Drive improvements, to prior to occupation of 100 units, rather than prior to commencement above floor slab level) pursuant to application 19/506182/FULL (Residential development for 421 dwellings with associated access, infrastructure, drainage, open space and landscaping, allowed on appeal)			
ADDRESS Land West of Church Road, Otham, ME15 8SB			
RECOMMENDATION – ADVISE THE PLANNING INSPECTORATE THAT THE COUNCIL WOULD HAVE APPROVED PERMISSION SUBJECT TO CONDITIONS			
SUMMARY OF REASONS FOR RECOMMENDATION			
<ul style="list-style-type: none"> For the reasons set out in the report, officers advise it is likely that a refusal based on the proposed ground would not be sustainable at the now lodged Appeal and would result in an award of significant costs against the Council for unreasonable behaviour. It is therefore recommended the Planning Committee decides to advise the Planning Inspectorate that they 'would have' approved permission as per the original recommendation contained in the officer's report to 17th February 2022 meeting but with an amendment to condition 30 to remove reference to '31st December 2023' for the reasons set out in this report. 			
REASON FOR REFERRAL TO COMMITTEE			
<ul style="list-style-type: none"> Otham Parish Council strongly objects to the proposals for the reasons outlined in the original report. Councillor Newton has requested the application is considered by the Planning Committee. 			
WARD Downswood & Otham	PARISH COUNCIL Otham	APPLICANT Bellway Homes Ltd AGENT None	
DECISION DUE DATE: 25/02/22	PUBLICITY EXPIRY DATE: 15/11/22	SITE VISIT DATE: Various in 2021/2022	
RELEVANT PLANNING HISTORY			
App No	Proposal	Decision	Date
19/506182	Residential development for 421 dwellings with associated access, infrastructure, drainage, open space and landscaping.	REFUSED & ALLOWED AT APPEAL	07/01/21
19/501600	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)	REFUSED & ALLOWED AT APPEAL	07/01/21

1.0 BACKGROUND & PROCEDURE

1.01 This application was heard at Planning Committee on 17th February 2022. The application was recommended for approval and the Committee Report and Appeal Decision is attached at the **Appendix**. Contrary to the recommendation of the Head of Planning and Development, a motion was proposed and seconded to refuse the application for the following reason:

The impact of construction traffic and from 100 dwellings, in advance of the approved Willington Street/Deringwood Drive junction improvement, would result in unacceptable and severe impacts upon highway safety conditions for pedestrians and cyclists crossing the existing junction, as considered by the Appeal Planning Inspector. The junction is very well used by pedestrians and cyclists providing a link between major residential areas and Mote Park on national Cycle Route 17. This would be contrary to policy DM21 of the Maidstone Borough Local Plan (2017), policies ST1 and ST2 of the Otham Parish Neighbourhood Plan (2020-2035), and Paragraphs 110 and 111 of the National Planning Policy Framework.

1.02 This Motion triggered the procedure set out in paragraph 31.3 of Part 3.1 of the Council's Constitution. Pursuant to that procedure, the Head of Planning and Development advised the Committee he did not consider the reason for refusal was sustainable at Appeal and that it would more likely than not cause significant cost implications to be incurred by the Council because of unreasonable behaviour. The threshold for 'significant costs' under this procedure is set at £50,000. As a result, the Constitution requires that the Committee's decision be deferred to its next meeting on 24th March 2022 to enable the provision of further advice on the risks involved in pursuing a refusal.

1.03 Paragraph 31.3 (b) of Part 3.1 states at the next meeting (24th March),

"If, during consideration at the next meeting of an application deferred under Rule 31.3(a), after a motion has been proposed and seconded, the Head of Planning and Development or their representative, in consultation with the Legal Officer present at the meeting, believes that the Planning Committee's reasons to justify refusal/the imposition of conditions would not be sustainable at appeal and would more likely than not cause significant cost to be incurred by the Council because of unreasonable behaviour, then they will inform the Committee that if the motion is agreed it will be referred to the Policy and Resources Committee upon the agreement of the Planning Committee Chairman and Vice-Chairman; or failing which, a resolution of the Planning Committee to that effect."

1.04 Paragraph 31.3(c) then states,

"Following the vote, if the motion was agreed, the Head of Planning and Development or their representative will ask the Chairman and Vice-Chairman if they agree to refer the decision to Policy and Resources Committee. If they do not both agree to the referral, the Committee will take a vote on whether to refer the item to the Policy and Resources Committee."

If either consent is given, the item will be referred. If neither consent is given, the decision will be implemented."

2.0 UPDATES & ADVICE

2.01 During the intervening period since 17th February meeting,

- (1) The Applicant has lodged an Appeal with the Planning Inspectorate;
- (2) Although not relevant to the reason for refusal, the Applicant has provided further evidence as to the traffic impacts on the road network to 2024; and
- (3) Officers have sought Counsel's advice on the proposed ground of refusal and the associated risk of costs at appeal. Instructions to Counsel together with Counsel's full advice (which pre-dates the appeal being lodged) are attached as an **Exempt Appendix** to this report.

New Appeal

2.02 On 10th March the applicant submitted an Appeal to the Planning Inspectorate (PINS) on the grounds of 'non-determination' of the application following expiry of the agreed determination date of 25th February. The applicant has requested a Public Inquiry and officers have advised PINS they consider this procedure is appropriate given the level of local interest. PINS have advised that, subject to validation, the appeal will follow this procedure but at the time of publishing this report, no 'start date' for the appeal has been given by PINS.

2.03 This means the decision on this application now lies with PINS and not the Council. The decision now made by Committee will be to inform PINS what decision the Council 'would have' made and therefore what position MBC will take at the Appeal. It remains the case that any refusal must be defended by the Council at the Appeal.

Additional Transport Evidence

2.04 As outlined at paragraph 6.09 of the original committee report, the application is supported by traffic modelling in 2023 when the occupation of 100 houses is predicted at the end of that year. The applicant has now submitted additional traffic modelling up to 2024 and states,

"We are still of the view that the 100 occupation forecast by the end of 2023 is appropriate and robust but want this to be part of the application documents for completeness, should the application/appeal process stretch on further than current timescales."

2.05 This forecasts that the WS/DD junction would still remain within capacity in 2024 and KCC Highways have been consulted, agree with the evidence, and maintain their position of raising no objections. This does not affect the grounds for refusal proposed by Members as they relate to highway safety and not traffic congestion. However, if Members decide that they would have approved permission, within this, condition 30 should be amended to remove

reference to 31st December 2023 and just have a trigger point of '100 occupations'.

Advice

2.06 As outlined in the original committee report at paragraph 6.07, the Planning Inspector's explanation for the condition being set at 'slab level' when asked in relation to this current application is as follows (*my emphasis*):

"The only comment I can make is that my decision states the following at paragraph 185:

Also in the interests of highway safety, conditions are necessary requiring the provision of the site accesses, off-site highway improvements, measures to maintain the access visibility splays and the provision of parking/turning areas for each building (conditions Nos. 7, 29, 30 and 32). However, I have amended the suggested condition relating access to ensure that the access points are provided prior to the commencement of any development above slab level.

*The reason for the condition is in the interest of highway safety. This was discussed in the 'round table session' on conditions. It was my view that the off-site traffic management measures should be completed as soon as possible before substantive deliveries of materials and construction works occurred. This was not an amenity issue **but a highway safety matter** given the nature of the surrounding highway network and the relative matters discussed in the Inquiry."*

2.07 The key issue in determining this Section 73 application is therefore whether new material has come to light which justifies a different view to that of the Planning Inspector as to the safety implications of construction traffic upon the highway network prior to the highway improvements coming forward.

2.08 The applicant has provided new material/evidence relating to the additional traffic impact within their application and their view on the impact of construction traffic in their Transport Technical Note (June 2020 paragraphs 1.3.1 and 1.3.2) as follows:

"...the sole purpose of the WS/DD signalisation scheme is to mitigate the impact of the additional vehicle, pedestrian and cycle trips arising from the permanent development, rather than its construction phase. The existing junction layout is of a sufficient standard to safely and efficiently accommodate larger vehicle turning movements, and indeed already does so on a regular basis (being on a high-frequency bus route, for example).

Construction traffic will be low-intensity and scheduled outside of the network peak hours wherever possible, as confirmed in the submitted Construction Environmental Management Plan (April 2021)."

and in their Technical Note (October 2021 paragraph 1.6.6) as follows:

"The Construction and Environmental Management Plan confirms that construction vehicles will be timed to arrive and depart the site outside of the network peak hours. Moreover, it is noted that the WS/DD junction is currently accessed by buses, refuse and delivery vehicles on a daily basis and as such is safe and suitable to accommodate these larger vehicle types."

2.09 KCC Highways have assessed this new material/evidence and in relation to highway safety impacts from construction traffic and from up to 100 houses (which is the grounds for refusal) advise that (*my emphasis*),

"I can confirm that KCC Highways have assessed the impact of the proposals in safety, as well as capacity terms.

The existing junction arrangement is designed to a high standard. This is characterised by extensive carriageway widths, junction widths, wide junction radii and the provision of a ghost right turn lane (GRTL) on Wellington Street itself. In addition, as highlighted within KCC Highways final consultation response and the applicant's further Transport Technical Notes Deringwood drive is a bus route. Consequently, large vehicles already use the junction without adversely impacting upon overall levels of highway safety.

*I have checked the personal injury collision (PIC) record at the junction in question and can confirm that in the last 5-year period up to September 2021 3 collisions have been recorded. All 3 collisions were slight in severity, with driver error a contributory factor in all the recorded collisions. The layout or geometry of the junction is not a contributory factor in any of the collisions. **The good PIC record at the junction, coupled with the fact that the junction is already used by large vehicles demonstrates that there is no evidence to indicate that construction traffic would adversely impact upon overall levels of highway safety.***

2.10 Therefore, new material/evidence has been provided by the applicant which was not before the Planning Inspector at the original Appeal, and the advice on this new material/evidence from the qualified expert highways officers at KCC is:

- There is no evidence that construction traffic would adversely impact upon highway safety in advance of the WS/DD highway improvements coming forward.
- The proposal (to move the condition trigger point) would not result in a severe residual impact upon the highway network (congestion).
- By implication, the proposed change to condition 30 would not result in a development which is contrary to the NPPF and/or the Local Plan.

Proposed Reason for Refusal

2.11 In considering the ground of refusal it is important that Members are reminded of the need to give full, clear, and precise reasons and refer to all relevant Development Plan policies. Whilst they may be briefly stated, the courts have stated that the reasons must be "proper, adequate and intelligible" particularly in controversial cases where they disagree with an officer's recommendation.

2.12 In terms of the guidance on the award of costs at appeal, Paragraph: 028 Reference ID: 16-028-20140306 of National Planning Practice Guidance states (*my emphasis*):

"The aim of the costs regime is to [inter alia]:

- *encourage local planning authorities to properly exercise their development management responsibilities, **to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case**, not to add to development costs through avoidable delay, ..."*

2.13 Paragraph 049 Reference ID: 16-049-20140306 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.***

(This list is not exhaustive.)"

2.14 It is therefore necessary to consider:

- Whether there is evidence to substantiate the proposed reason for refusal; and
- Whether the proposed reason for refusal is supported by objective analysis or whether it would be likely to be categorised as 'vague, generalised assertions' about the proposals impact.

2.15 In respect of the ground that the change to condition 30 would, "*result in unacceptable and severe impacts upon highway safety conditions for pedestrian and cyclists crossing the existing junction, as considered by the Appeal Planning Inspector*", officers advise that the ground does not identify any specific reasons why construction vehicles will give rise to unacceptable risks to safety. There is also no evidence, such as accident data, to counter the points made by KCC officers relating to the standard of the junction, the layout of the junction, that large vehicles (buses) already use the route without safety implications, the good personal injury collision record, and the absence of layout or geometry contributing to the accidents which have occurred.

2.16 In short, it is advised that the ground does not offer a specific explanation backed up with evidence as to why the junction will become unsafe for pedestrians and cyclists from the addition of construction traffic.

- 2.17 In respect of the assertion that, "*The junction is very well used by pedestrians and cyclists providing a link between major residential areas and Mote Park on national Cycle Route 17*", officers advise that this must be backed up by evidence such as walking/cycling surveys of the WS/DD junction to show it is well-used by pedestrian and cyclists, and this would need to be outside network peak hours (8am-9/5pm-6) because the approved construction management plan requires construction/delivery vehicles are timed to arrive and depart outside these hours. The Council does not have this specific evidence, and so officers advise that this is also likely to be viewed as a 'generalised assertion'.
- 2.18 It is advised that the reference to the Appeal Inspector within the grounds of refusal cannot be relied upon as the material/evidence presented by the applicant and accepted by KCC Highways for this new application was not before him. As the Inspector did not have any evidence of the impact of construction traffic beyond slab level or from 100 units before him, or the updated material/evidence relating to highway safety, it would be unreasonable to rely upon the Inspector's previous conclusions relating to highway safety.

3.0 CONCLUSION

- 3.01 Officers advise that the proposed reason for refusal does not provide a rational basis for refusing the section 73 application and could not be sustained at the appeal. Since the proposed reason for refusal could not be sustained and the circumstances fall within those the NPPG identifies as meriting an award of costs against a local planning authority, it is likely that a refusal based on the proposed ground would not be successful at the Appeal and would result in an award of significant costs against the Council for unreasonable behaviour.
- 3.02 The Appeal is likely to proceed under the Public Inquiry procedure and the applicant would have legal representation, and present expert highways and planning evidence to rebut any case presented by the Council. In the opinion of officers, the costs implications of this will exceed the £50,000 threshold for 'significant' costs within the Council's Constitution.
- 3.03 Given their consultation responses, KCC would not be able to support the local planning authority at the Appeal so the Council would need to appoint an external highways consultant to defend any refusal. Whilst unknown at this stage, Members must be aware there is a possible scenario whereby the Council may not be able to secure a qualified highways witness willing to defend the ground of refusal.
- 3.04 For the reasons outline above, our advice is that the Committee should reconsider its position in relation to this application and advise the Planning Inspectorate that they 'would have' approved permission as set out in the original committee report subject to the change to condition 30 in the terms set out at paragraph 2.05.
- 3.05 Notwithstanding this advice, should Members continue with the ground for refusal it is recommended that the following amendments are made:

- Remove reference to the Appeal Inspector for the reasons outlined at paragraph 2.18.
- Remove reference to the traffic impact from 100 dwellings as the 'slab level' trigger was only applied in relation to safety implications from construction traffic; and correct to Cycle Route 177 (not 17).

The ground for refusal would therefore read:

*The impact of construction traffic ~~and from 100 dwellings~~, in advance of the approved Willington Street/Deringwood Drive junction improvement, would result in unacceptable and severe impacts upon highway safety conditions for pedestrians and cyclists crossing the existing junction, ~~as considered by the Appeal Planning Inspector~~. The junction is very well used by pedestrians and cyclists providing a link between major residential areas and Mote Park on national Cycle Route **177**. This would be contrary to policy DM21 of the Maidstone Borough Local Plan (2017), policies ST1 and ST2 of the Otham Parish Neighbourhood Plan (2020-2035), and Paragraphs 110 and 111 of the National Planning Policy Framework.*

3.06 Members are reminded that they are required to give reasons for their decision. As outlined above, the reasons must be "proper, adequate and intelligible" and can be briefly stated.

Case Officer: Richard Timms