



## Appeal Decision

Inquiry Opened on 20 August 2019

Site visit made on 19 August 2019

**by B J Sims BSc(Hons) CEng MICE MRTPI**

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

**Decision date: 20 September 2019**

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**Appeal Ref: APP/B1605/W/19/3227293**

**Land at Oakhurst Rise, Charlton Kings, Cheltenham, GL52 6NR**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
  - The appeal is made by William Morrison (Cheltenham) Limited and The Trustees of the Carmelite Charitable Trust against the decision of Cheltenham Borough Council.
  - The application Ref 18/02171/OUT, dated 24 October 2018, was refused by notice dated 22 March 2019.
  - The proposed development is described in the original application as 'outline application for residential development of up to 69 dwellings (revision to application reference 17/00710/OUT')
  - The Inquiry sat for 4 days on 20 to 23 August 2019.
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### Decision

1. The appeal is dismissed.

### Procedural Matters

#### **Rule 6 Party**

2. Charlton Kings Friends (CKF) were represented at the Inquiry under Rule 6 of the Inquiries Procedure Rules.

#### **Outline Application**

3. The application and appeal are in outline but with matters of Access, Layout and Scale for consideration in detail at this stage.

#### **Council Consideration, Amended Scheme and Basis of Decision**

4. Cheltenham Borough Council (CBC) officers recommended approval of the original submitted scheme for up to 69 dwellings but the Planning Committee refused the application for five reasons related, briefly, to planning policy, trees, heritage, ecology and visual impact. However, this appeal is decided on a fresh and independent appraisal of the cases for and against the proposed development.
5. Following the refusal of the original application, the Applicants, William Morrison (Cheltenham) Limited and The Trustees of the Carmelite Charitable Trust (now the Appellants) amended the proposed scheme and put forward a revised layout for up to 68 dwellings. This was in response to post-Hearing

advice by the Inspector currently examining the draft Cheltenham Plan, proposing a Main Modification (MM) to the allocation of the appeal site for residential development, to reduce the area for built development. To date, the MMs to the emerging Plan are not agreed for public consultation. However, a MM suggested by CBC to the allocation of the site is made public strictly for the purpose of this appeal. I return to this matter of emerging policy in connection with the description of the amended proposal and the issue of the principle of the development, below.

6. CBC did not publish the amended development proposed for consultation. However, the Appellants themselves undertook public consultation on the modified scheme. CBC accepts that this consultation was equivalent to a statutory consultation on the revised application. It was agreed by all parties at the Inquiry that, in the circumstances, the amended scheme should form the basis for the determination of this appeal.
7. I am satisfied that the revision of the proposals is within the parameters of the well-known *Wheatcroft* judgment and that no injustice would result to any party from this approach. Accordingly, I consider the appeal and base my decision on the amended proposal, as described below.
8. Whilst the original application was expressly made in terms of the original scheme for up to 69 dwellings and the modified proposal for up to 68 dwellings, the application was submitted as a modification to a previously refused scheme for 90 dwellings. For the avoidance of doubt, the modified proposal for up to 68 dwellings now forms the basis of this decision on a fresh assessment of its individual merits, in the light of current planning policy and circumstances.
9. Although the matter of layout is for detailed consideration, the description, in terms of 'up to' 68 dwellings, provides an acceptable degree of latitude for adjustment of the internal configuration of the several blocks of dwellings in any future application for approval of the reserved matter of design.

### ***Reasons for Refusal and Other Representations***

10. Subsequent to its original determination of the application, CBC subsequently withdrew its fourth and fifth reasons for refusal on ecology and visual impact. CKF, as Rule 6 Party, continue to object on grounds of ecology as well as heritage. All oral and written representations by CKF and other interested third parties are taken into account in this decision.

### ***Planning Obligation***

11. The appellants have provided a planning obligation under Section 106 of the Act (as amended) to construct 40% of the dwellings as affordable housing units, in response to adopted policy provisions. The planning obligation has been executed as a deed in compliance with the relevant legal requirements. Its provisions are considered further below in connection with the planning benefits of the proposed development.

### ***Site Visit***

12. By agreement with the main and Rule 6 parties, I conducted an accompanied visit to the appeal site with their respective representatives on the day before the Inquiry opened. This was necessary to inform myself properly of the

features of the site and neighbouring Listed Buildings before hearing the evidence. I viewed Ashley Manor from the carriage drive and entered both Ashley Manor and Charlton Manor to observe views from windows facing the appeal site, variously at ground and upper floor levels. I also toured the wider area to observe more distant viewpoints and I drove via the local road network leading to the access point at Oakhurst Rise. It was left open at the start of the Inquiry whether a further accompanied site visit would take place but, by the close, no further site visit was requested or deemed necessary.

### **Description of the Site and Surrounding Area**

13. The principal part of the appeal site is an undeveloped area of land, which extends to 4.29ha. It is located in the eastern part of the Principal Urban Area of Cheltenham, some 2km south east of the town centre, in an elevated position above the town, within Charlton Kings.
14. The site is mainly grassland, divided into two areas by an outgrown hedgerow running approximately north to south and now incorporating a number of large, mature trees. There are other mature trees around and on the site. The area to the west of the hedgerow amounts to about one third of the total site. The site is largely bounded on three sides by the rear gardens of residential properties fronting Birchley Road and Ashley Road to the north and east and Oakhurst Rise to the west. Adjacent to the south are the functional grounds of St Edward's Preparatory School.
15. Currently, the appeal site forms part of the wider St Edward's School grounds, being leased to the School by its owners, the co-Appellant, Carmelite Charitable Trust.
16. The larger, eastern part of the appeal site slopes generally southward and the smaller western area has a relatively steeper gradient to the west.
17. The buildings of St Edward's School lie directly to the south east of the appeal site and include the Grade II\* listed Ashley Manor, now the School administration block, facing approximately west and approached via a winding carriage drive from the main London Road. The most northerly School building is a modern nursery block which stands closer than the Manor to the south east corner of the appeal site.
18. Adjacent to the eastern appeal site boundary, occupying one of three large residential curtilages, is the Grade II listed Charlton Manor.
19. A former Ice House, now infilled and identifiable as a mound with trees above, occupies a central position within the eastern part of the site.
20. Some 46% of the trees on the site are subject to Tree Preservation Order (TPO) No1 1981, covering 18 individual and 8 groups of trees.
21. In the central northern part of the site is a large badger sett (BS1) with outlying setts in other parts of the site, including within the hedgerow to the west and at the Ice House to the east.
22. The appeal site also includes two narrow strips of land to the south west within the School grounds to facilitate the connection of drainage runs to the sewerage system.

## **Description of the Amended Proposal**

23. The amended outline proposal now at appeal is for 68 dwellings with access, layout and scale defined in detail.
24. The sole access would be from the end of the present cul-de sac of Oakhurst Rise, in the north western corner of the site.
25. The dwellings would be arranged in groups, pairs and terraces fronting a network of access roads and would range in size from one- to six-bedroom flats and houses in buildings from one to three storeys. The 40% (28 No) affordable units would be distributed throughout the development.
26. The Ice House mound would be left between the west of plots 31-34 and the estate road, as an historic feature with public interpretative information available.
27. The development would include the removal under licence of the main badger sett, which is situated roughly north of proposed plots 48-50 and south of plots 40-42. The proposal includes the creation of an artificial, relocated badger sett near the south west corner of the site.
28. The development, in particular plots 48-50, would require the felling of a protected tree, Ref 3014, from the central part of the site. The trunk of this tree would be removed to the south west of the site and retained as a feature and 'monoxyle' wildlife habitat. All other protected trees would be retained.
29. Toward the south eastern site boundary there would be a water feature, annotated as a 'rill', and a surface water drainage attenuation pond.
30. Compared with the original 69-dwelling scheme, the built development would be arranged to leave a landscaped space south of plots 16-17 in the southernmost part of the site, to the north west of the front of Ashley Manor. There would be a further landscaped space between the easternmost plots 31-34 and the western boundary with Charlton Manor. These aspects of the amended layout were introduced after the submission of the application in response to the post-Hearing advice of the Inspector conducting the draft Cheltenham Plan examination.

## **Main Issues**

31. On consideration of all the written and oral evidence from the Main and Rule 6 parties and other interested persons, including the several statements of common ground, I consider that the main issues in the appeal are:
  - i. the acceptability of the proposed development in principle, having regard to adopted and emerging planning policy,
  - ii. the potential effect of the development on protected trees,
  - iii. the effect the development would have on the settings of neighbouring heritage assets, in particular the listed Charlton Manor and Ashley Manor and the associated Ice House,
  - iv. the effect of the development on biodiversity, with particular respect to protected badgers and reptiles on the site,

- v. the provision of access and the effects of road traffic that would be generated by the development, and
  - vi. any benefits of the proposed development and, in particular, its contribution to the market and affordable housing land supply in Cheltenham, in the context of a housing land supply agreed to be less than five years.
32. I also consider matters of flood risk and drainage, visual impact in the vicinity of the Cotswolds AONB, adequacy of community infrastructure and residential amenity (noise and disturbance, education, sports, health care).

## **Reasons**

### ***Principle of Development***

#### *Adopted Policy*

33. The current statutory development plan comprises saved policies of the Cheltenham Borough Local Plan Second Review 2006 (CBLP) and the adopted Gloucester, Cheltenham and Tewkesbury Joint Core Strategy 2011-2031 (JCS).
34. The appeal site lies within the defined Principal Urban Area of Cheltenham but is not allocated for any form of development. However, neither is the site subject to any policy restriction on development.
35. There is accordingly no objection to the principle of residential development on the appeal site with respect to adopted policy.

#### *Emerging Policy*

36. In terms of emerging policy, the whole of the present appeal site is allocated, by Policy HD4 of the draft Cheltenham Plan, for approximately 25 dwellings, to a layout that respects the existing urban characteristics of the vicinity and the character, significance and setting of heritage assets that may be affected by the development, subject also to protection of key biodiversity assets.
37. At the Hearings within the ongoing Examination of the Cheltenham Plan, draft allocation HD4 has been considered in the light of conflicting expert heritage evidence. On consideration of this evidence, the Examination Inspector has issued post-Hearing advice to the Council that:

*'there is good reason to amend the boundaries of the development area from that proposed in the draft Plan and to require new tree planting around the east and south boundaries to safeguard the settings of both listed buildings. New housing should be located away from the setting of the west elevation of Ashley Manor. This could be achieved through the amendment to the southern boundary of the allocation site so that it continues in a straight line westwards from the rear of the northernmost school building. In addition, to provide an undeveloped buffer between the rear garden boundary of Charlton Manor and the new development, the eastern boundary of the site should be repositioned at least 30 metres west of the rear boundary with Charlton Manor. The Ice House would remain within the confines of the site, but its future could be secured. A MM is required to Policy HD4 to identify the boundaries of the site as suggested above; to identify the level of new housing which could*

*realistically be accommodated within the new site boundary; to identify the need for new tree planting around the east and south boundaries of the site; and to require the improvements to the Ice House ..... .’*

38. It was in response to this advice that the amended 68-dwelling scheme now under consideration was put forward. The Council has meanwhile suggested a MM to Policy HD4 stipulating a ‘minimum of 25 dwellings’ with a series of additional criteria to constrain any built development in the same terms as the post-Hearing advice and, in addition, to require the long-term protection of mature trees and hedges.
39. However, at the time of the Inquiry, the Examination Inspector had not yet agreed the MMs for public consultation and ultimately all proposed MMs to the draft Cheltenham Plan must be subject to full public consultation before the Inspector reaches any final conclusion on the soundness of allocation Policy HD4 or the draft Plan as a whole.

#### *Conclusions on the Principle of the Development*

40. It is evident that, before formulating the post-Hearing advice, the Examination Inspector visited the appeal site but did not find it necessary to enter the adjacent listed buildings. In terms of normal practice, that approach was proportionate to the appraisal of the draft allocation of the site in the local plan, as distinct from a specific application or the current appeal for planning permission now for determination.
41. In the circumstances, whilst the emerging allocation Policy HD4 and the associated post-Hearing advice and suggested MM are material to the present appeal, they can be accorded only little weight, compared with the policies of the current adopted development plan, in this fresh assessment of the amended scheme and the detailed evidence for and against its approval.
42. It follows that, whilst there is no objection in principle to residential development on the appeal site, the proposal now subject to appeal falls to be assessed and determined primarily with respect to the adopted development plan, subject to its consistency with the National Planning Policy Framework (the Framework).

#### **Protected Trees**

##### *Policy and Guidance*

43. The development plan policy of greatest relevance to the loss of protected trees is GE6 of the CBLP. This resists the loss to development of sound and healthy protected trees of high value with at least ten years of life remaining and which make a significant contribution to the character and appearance of the locality of the site or locality. Policy GE6 expressly provides for retention of trees and planting of new trees in conjunction with development, as well as adequate measures to protect trees during construction. Policy GE6 is cross-referenced to BS5837:2005 for guidance on trees in relation to construction.
44. Policy GE5 of the CBLP is also cited in the refusal of the application as well as in several previous appeal decisions<sup>1</sup> as a development management policy resisting the unnecessary felling of healthy and safe protected trees on

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<sup>1</sup> Core Documents E11-13

private land, where they are causing no harm. Policy GE5 applies even to dead trees that are contributing to biodiversity. Notwithstanding the expressed view of the Appellants in connection with this appeal that Policy GE5 is inapplicable as unrelated to new development, it appears to be consistently and appropriately applied in this case, as in previous appeals, as a provision also relevant to development proposals.

45. Policy INF3 of the JCS essentially supports the aims of Policies GE5-6 in terms of avoidance of impact on protected trees and the incorporation into development of measures to mitigate any loss of trees on the site or in its immediate environs.
46. These policies are not entirely consistent with the thrust of the Framework, which makes allowance at paragraph 175 for wholly exceptional circumstances, including public benefit, to justify significant harm even to veteran trees. Any departure from these adopted policies will be subject to consideration in the light of other material circumstances in any event, under section 38(6) of the Act, as amended.
47. Other guidance on trees in relation to construction is contained within the now applicable BS5837:2012 as well as in Natural England and Forestry Commission Standing Advice on protecting veteran and ancient trees.

#### *Loss of Protected Tree Ref 3014*

48. Tree 3014 (T11 in the TPO) is a mature oak. It falls within Category B, of moderate quality, in terms of BS5837, due to impaired condition but still with estimated remaining life expectancy of at least 20 Years. That is not to say that it cannot be regarded as a tree of high value in terms of Policy GE6.
49. The tree is not regarded as more than a successional veteran even by CBC, despite displaying some veteran characteristics, due to current absence of longevity. However, it is assessed as having a potential retained life expectancy of at least 40 years by the Appellants and up to 100 years by CBC.
50. The location of Tree 3014, within a private site of over 4ha, constrains its visual amenity value to external receptors, albeit the site is periodically open for public events associated with the adjacent School.
51. Notwithstanding its current non-veteran status and impaired condition however, the tree plainly contributes to the rural character of the site and provides amenity value in terms of the greening of the appeal site. This would be of potential benefit to future residents if the site were ultimately developed in line with draft allocation Policy HD4 of the Cheltenham Plan, which would not necessarily require its removal.
52. On a balanced assessment of the evidence of the main parties to the appeal, Tree 3014 is of high value and its loss would be harmful and contrary to Policy GE6 of the CBLP, as well as to the aims of Policy GE5 of the CBLP and INF3 of the JCS.
53. That harm would be mitigated to some extent due to the 'moderate' categorisation of the tree in terms of BS5837 and by the retention of its trunk as a 'monoxyle' habitat, with relevance also to biodiversity, considered below.

54. It remains, in any event, to take account of the adverse effect of the loss of Tree 3014 in the overall balance of planning considerations in the appeal.

*Retained Protected and Veteran Trees*

55. It is first appropriate to note the evidence of the Woodland Trust that a significant number of veteran and ancient trees on the appeal site have not been identified as such in the assessment submitted by the arboricultural consultants to the Appellants, including Tree 3014.
56. That assessment is based upon the in-house identification system of the consultants, known as RAVEN<sup>2</sup>. Criticism is based upon the Ancient Tree Inventory of the Ancient Tree Forum and Natural England standing advice for ancient woodland. It turns, in part, on alleged over-reliance by RAVEN, upon the mere size of the tree in assessing its veteran or ancient status.
57. However, it is apparent that the assessment covered all the trees on the site in light of the applicable definition of veteran and ancient trees in the Glossary of the Framework, in terms of age and condition, as well as size, in relation to biodiversity, cultural or heritage value. Furthermore, many trees referenced by the Woodland Trust are retained in the proposal now at appeal.
58. The scheme as a whole, and its measures to protect existing trees in particular, must be considered primarily in relation to the policies of the development plan and the Framework and a realistic assessment of its impacts. I therefore consider it appropriate to proceed on the basis of the agreement between the main parties that the veteran and other trees for retention on the site have been properly identified. The question to be addressed is whether the trees proposed to be retained in the development would be protected effectively.
59. At the Inquiry, it was equally established that there was no substantive dispute among all parties to the appeal that the root protection areas (RPAs) and veteran tree buffers (VTBs) of the trees proposed to be retained in the development have also been correctly defined in terms of BS5837 and Natural England standing advice.
60. It is clear from the detailed amended layout that, in a number of cases, built development would stand relatively close to veteran trees. In some cases, proposed private gardens would extend into the VTB or RPA of a veteran tree and certain elements of construction would take place even potentially among the roots of a veteran tree.
61. For example, a significant part of the RPA of Tree 3007, an oak, would be within the garden of plot 35 at the north east corner of the site. In a further example, a raised walkway and parking bays would occupy about 5% of the VTB of Tree 3018, also an oak, situated towards the north west part of the site. In the case of Tree 3021, an ash, there would be drains constructed within the RPA as well as potential increased public access after development.
62. CBC maintains that these incursions are contrary to the relevant protective planning policies because of their departure from the strict terms of BS5837 and Natural England Standing Advice. However, these advice documents expressly make provision for professional judgement in their application.

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<sup>2</sup> Recognition of Ancient, Veteran and Notable Trees



63. In relation to the foregoing examples, the detailed specialist evidence of the Appellants includes assurance that the crown of Tree 3007 covers less than 25% of the RPA, that the raised walkway partly within the VTB of Tree 3018 would be constructed by 'no-dig' methods and its design would have a minimal ground footprint. Drainage works within the RPA of Tree 3021 would be undertaken by 'trenchless' working and 'below-root boring' techniques and a footpath placed relatively distant from the tree itself. Furthermore, permitted development rights applicable to dwellings and their curtilages would not override the safeguarding provided by the TPO.
64. There is no dispute that the foregoing working arrangements are based upon tried and tested methodologies. The question is whether it can be judged, in this particular case, that they would be effective.
65. On balance overall, I am satisfied that the measures proposed to safeguard the long-term welfare of all the retained protected and veteran trees from the potential impacts of the proposed built development have a reasonable prospect of success. However, that cannot be certain. I am persuaded that there would remain some degree of risk to the longevity of the trees concerned, given the relative degree of density of those parts of the proposed development closest to those concerned, leading to greater public access and activity in close proximity.
66. To that extent, with respect to the retained protected and veteran trees, I find the proposed development to be in some conflict with Policies GE6, GE5 and INF3. This potential harm counts in some measure against the approval of the scheme. The degree to which this conflict will affect the overall planning balance will depend on whether a development of the layout and density proposed is acceptable in terms other planning effects.

### **Heritage Assets**

#### *Policy and Law*

67. Policy CP3 of the CBLP and SD8 and SD10 of the JCS together provide that development should protect, conserve, sustain and enhance designated heritage assets and their settings and avoid harm to views into and out of areas of acknowledged importance, including with respect to listed buildings.
68. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (PLBCA) contains a statutory duty to have special regard to the desirability of preserving the setting of listed buildings.
69. Framework paragraph 193 gives great weight to the conservation of designated heritage assets and paragraphs 195-6 consider harm to heritage assets in terms of whether it would be substantial or less than substantial. Paragraph 196 provides that, where development would 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. The significance of a heritage asset is defined to include its archaeological, architectural, artistic or historic interest, derived not only from its presence but its setting, in which it is experienced. National Planning Practice Guidance (PPG) refers to the extent and importance of the setting to the visual relationship between the asset and proposed development, including that views of or from an asset will play an important part. The PPG also notes that

the contribution a setting makes to the significance of an asset is not dependent upon public access.

70. It is now trite law<sup>3</sup> that this less than substantial harm must be accorded considerable weight in the overall planning balance. However, the judgment in the case of *Shimbles*<sup>4</sup>, with reference also to the earlier *Palmer*<sup>5</sup> case, makes clear that, whilst there is no allowance for any sub-categories of harm within the Framework definition, planning judgement must be exercised. That is with regard to the level of the less than substantial harm, the great weight accorded to the conservation of the asset and the extent of the public benefits.

#### *Contribution of the Site and the Ice House to the Settings of Listed Buildings*

71. The appeal site was historically and remains in the same ownership as Ashley Manor. Although the land evidently was never part of the managed parkland of the Manor, it had a functional relationship with the Manor as farmland, and as the location of its Ice House, which survives as an historic feature.
72. It is disputed whether there was ever a substantial tree belt along the southern appeal site boundary, visually separating the rural appeal site from the formal grounds of the Manor in views from its front, the approaches over the carriage drive from the south or from further afield. That remains a moot point; but whether or not there has, from time to time, existed such a visual barrier, the historical association is beyond dispute.
73. The present circumstances are that the Manor and the site are intervisible through the current boundary vegetation and direct views are available from at least one north-facing window onto the currently mainly open, eastern part of the site, including the tree-covered mound of the Ice House. I observed this for myself, unlike the Inspector dealing merely with the draft allocation Policy HD4. Moreover, the site, rising to the north, provides a green backdrop to the Manor in distant views.
74. At the more recently constructed Charlton Manor, against the eastern boundary of site, there has been historic variation in the degree to which this boundary has been vegetated and screened. The main entrance to the house is on its south-facing side and its road entrance is to the east. However, its western elevation, directly facing the appeal site contains its ground floor kitchen as well as significant habitable rooms on the first and second floor.
75. The windows of the upper rooms especially afford open views across the appeal site, past the Ice House mound and as far as the mountains of South Wales on the far side of the Severn Estuary. Again, unlike the Inspector examining the draft Cheltenham Plan, I was able to experience these views personally.
76. I recognise an historic and visual association between the appeal site and Ashley Manor and a strong visual interrelationship between the site and Charlton Manor. In terms of the relevant guidance to which I refer above, I consider that the appeal site, with the Ice House it encompasses, contributes

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<sup>3</sup> *Barnwell C1/2013/0843*; *Forge Field [2014] EWHC 1895 (Admin)*; *Forest of Dean [2016] EWHC 421 (Admin)*; *Jones and Mordue [2015] EWCA Civ 1243*

<sup>4</sup> *Shimbles v City of Bradford et al [2018] EWHC 195*

<sup>5</sup> *Palmer v Herefordshire Council and Anr [2016]*

importantly to the historic and current visual setting of both these listed buildings, as designated heritage assets.

77. In the proposed scheme, the Ice House itself would not be directly affected by built development and would potentially be promoted with information on its history and significance as an aid to its public appreciation.

*Effect on the Setting of Ashley Manor*

78. By avoiding built development in the southernmost part of the site, the amended layout mitigates to some extent the effect of the proposed development on the setting of the west-facing, former Ashley Manor House and its surrounding associated buildings and carriage drive. However, the proposed introduction of new landscape planting, screening that boundary, would obstruct the relationship of the Manor to this part of its setting.
79. Moreover, that part of the development comprising plots 27-30, in the south eastern corner of the site, would intervene prominently in views to the north from the Manor House, including from its interior, impeding appreciation of the historic Ice House and the rural backdrop the site currently provides.
80. I recognise that the main front of the Ashley Manor House does not face directly towards the appeal site and that the character of its immediate surroundings has been altered by the addition of modern school buildings, including that closest to the appeal site boundary and north of the Manor itself.
81. Nevertheless, I consider that these effects on the visual relationship between the Grade II\* Ashley Manor and the appeal site would have a very significant adverse impact upon the setting of the Listed Building.
82. Having regard to the statutory duty under s66 of the PLBCA, this would be contrary to the protective aims of Policy CP3 of the CBLP and SD8 and SD10 of the JCS and result in less than substantial harm to the designated asset in terms of Framework paragraph 176.

*Effect on the Setting of Charlton Manor*

83. The amended scheme avoids built development within 30m of the curtilage of Charlton Manor and provides for intervening landscaping to soften the appearance of the new houses in views from the Manor, as advised by the examining Inspector regarding draft allocation HD4.
84. Be that as it may, the presence of the new built development would still be visible from Charlton Manor and prominent in views available from its important west-facing windows. Distant views would be partly obstructed and, furthermore, the Ice House would be obscured by the intervening dwellings on plots 31-34. The appreciation of the Manor in views from within its setting to the west would be compromised, including for residents and members of the public living in or visiting the proposed dwellings.
85. As in the case of Ashley Manor, I consider that these effects on the visual relationship between the Grade II Charlton Manor and the appeal site would have a very significant adverse impact also upon the setting of this Listed Building. Having regard to the statutory duty under s66 of the PLBCA, the effect of the development on the setting of Charlton Manor also would be

contrary to Policy CP3 of the CBLP and SD8 and SD10 of the JCS and result in less than substantial harm to the designated asset in terms of Framework paragraph 176.

#### *Overall Conclusions regarding Heritage Assets*

86. The high significance of Ashley Manor is primarily indicated by its Grade II\* listing and the recognition in its statutory list entry as one of the finest villas in Cheltenham. Charlton Manor, although more recent and listed Grade II, is also of high significance, being the first house erected on the Battledown Estate, taking advantage of its elevated position and belonging to the Victorian Gothic Revival, of which it remains a complete and well preserved example.
87. Thus, the harm to the settings of both these designated heritage assets, whilst less than substantial in terms of Framework paragraph 176, is nonetheless also significant. It requires consideration against the significance of the assets themselves as well as that of the level of any public benefit resulting from the development, in the final planning balance, addressed below.
88. I give no significant weight to the prospect of public access to and information upon the Ice House, as a mere an incidental to the development.

#### **Biodiversity**

##### *Policy*

89. Policy SD9 of the JCS encourages biodiversity enhancement and Policy NE2 of the CBLP seeks to safeguard protected species. These aims are consistent with Framework paragraph 170, which states that planning decisions should contribute to and enhance the natural environment, including by protecting and enhancing valued sites of biodiversity, minimising impacts on and providing net gains for biodiversity. Paragraph 175 also encourages net gains in biodiversity. Paragraph 175 further provides that, where significant harm to biodiversity resulting from development cannot be avoided, or adequately mitigated or, as a last resort, compensated for, permission should be refused.

##### *Badgers*

90. The amended development layout proposed would require the removal of the major, central badger sett, Ref BS1, and its replacement with an artificial sett of detailed design for future approval. On the evidence, I am satisfied that this is tried and tested methodology in common use and that the artificial sett could be provided with sufficient chambers to accommodate displaced badgers choosing to use it and constructed to floor and entrance levels high enough to avoid any local flooding.
91. The badger population currently resident and breeding in BS1 would be removed under licence. Badgers are common, subject even to official culling and legislative protection mainly for their welfare and against illegal and cruel persecution. That is not to say that any harm to them would not give rise to a planning objection, just as in the case of any other protected species.
92. Moreover, from the standpoint of CKF, as objectors to the housing scheme as a whole, it is understandable that they submit that the layout ignores the

'avoid-mitigate-compensate' sequence of Framework paragraph 175, in placing built development and access roads so close to BS1 in the first place. However, if the layout is necessary to the development of the site for other reasons, the question becomes whether the mitigation and compensation measures would be effective.

93. In practice, the evidence is that badgers displaced under licence are as likely to remove to outlying setts or create new ones as they are to inhabit the artificial one provided; also, if they inhabit the artificial sett, that they would potentially extend it and add more chambers themselves.
94. Even though this level of compensation is not strictly necessary and direct harm to the protected badgers could be avoided, the remaining badger population would potentially be subject to more human pressure and interference and their present foraging area would be substantially reduced by the presence of the proposed housing. This implies a reduction in the biodiversity value of the site in respect of its currently resident badger population.

### *Reptiles*

95. In response to local concern, the Appellants undertook a reptile survey shortly before the Inquiry. This, visual observation and local information provides little evidence of the presence of protected reptiles, other than a family of slowworms and a single grass snake.
96. The survey is criticised by CKF in terms of its seasonal timing, the hours and number of survey visits made and the size of the 'refugia' used to attract and count any reptiles present. The Appellants pointed out that a greater number of smaller 'refugia' were used to increase the likely count and that the number of visits accorded with accepted practice. At the same time, the Appellants agreed, at the Inquiry, that the timing of the survey had been sub-optimal in comparison with established guidance. However, there is no countervailing evidence to indicate a greater presence of reptiles on the site.
97. It is further evident that only 14 key wildlife species have been recorded on the site, compared with the 20 required for its consideration of a Key Wildlife Site.
98. On balance, I do not consider it likely that protected reptiles are present on the appeal site to justify objection to the amended outline scheme on grounds of harm to such species. I consider that it would be sufficient to require, by planning condition, a full ecological survey and assessment to be submitted, with measures for the protection and management of any protected species found, and its submission to the Council for approval before any development could commence.

### *Overall Effect on Biodiversity*

99. It is possible that some incidental, improvement to biodiversity could result from the positive management of the site, including the retention of the main part of felled Tree 3014 as ecological habitat.
100. On the other hand, CKF determine that there would be a measurable reduction in biodiversity due to the occupation of much of the site by housing development. However, this is calculated using a metric approach, criticised

by the Appellants and not established as accepted methodology, whereas other professional metric assessment would show enhancement.

101. It is my impression that little weight can currently be given to the results of such conflicting metric assessments, at least in as much as they represent evidence to the present appeal.
102. Overall, I consider that the net effect of the proposed development on biodiversity is likely to be either neutral or negative to some degree and certainly not an enhancement as sought by the thrust of current national and local policy. This factor militates to a degree against the appeal proposal.

### ***Access and Traffic***

103. The route to the sole access point to the appeal site is over a network of residential access roads via an established housing area, with much on-street parking in place for much of the time. The cul de sac of Oakhurst Rise, which would be extended to form the on-site access roads to the proposed development, has a steep gradient.
104. I acknowledge that there are no technical objections to the route in traffic or highway safety terms, whether with regard to width, gradient or alignment of the carriageways, junction or forward visibility, or existing traffic flows.
105. However, such technical issues are not the only consideration in the assessment of the suitability of the access arrangements for new development. In this case, there are genuine local concerns that the additional traffic from the proposed development, amounting to a likely 30 or so vehicle movements in any peak period, would add to congestion and inconvenience to existing frontage residents.
106. I am satisfied that such an increase in traffic flow would not have a significant impact on the wider highway network.
107. However, it is telling that one resident of Oakhurst Rise has been officially advised that an ambulance required to transport a person with mobility difficulties on a regular basis would no longer attend due to difficulty in parking at the frontage once the road was extended. That is a transient personal matter of relatively little planning weight and might be at least assisted by the provision of an additional turning head proposed within the site. However, it helps to illustrate that the access route, as a whole, is tortuous and far from ideal.
108. Notwithstanding the lack of any objection from the highway authority, this factor militates to some degree against the grant of permission for built development of the scale now proposed for the appeal site.

### ***Benefits***

#### ***Affordable Housing and the Planning Obligation***

109. The Appellants put forward a considerable body of written evidence that there is a particularly acute need for more affordable housing in Cheltenham. It is undisputed that there is identified need for 231 affordable homes per annum, in a range of size and tenure, equivalent to 1,155 from 2014-18, compared with a delivery 182 in that period and only 507, in the past 18 years, 76 of these in Charlton Kings.

110. A contribution of 40%, or some 28 units, of the proposed housing would be secured by the completed planning obligation. At the Inquiry CBC accepted, and I agree, that this benefit carries very considerable weight in the balance of planning considerations.

#### *Market Housing*

111. It is common ground that, for the purposes of this appeal, the Cheltenham Borough housing land supply amounts to 4.6 years, calculated with reference to the requirement of the currently adopted development plan in relation to available sites. That is as compared with the minimum five year supply sought by Framework paragraph 73. Accordingly, the proposed development would make a significant, beneficial, 68-unit contribution to the overall housing supply.

#### *Other Benefits*

112. There would be a number of other potential benefits, as discussed above, in relation to heritage and biodiversity, but these would not offset negative impacts of the development for the reasons explained in connection with those main issues.

#### **Other Matters**

##### *Flood Risk and Drainage*

113. I recognise public concern regarding local flooding and drainage issues. However, there is insufficient evidence to show that a detailed scheme could not be satisfactorily drained. Surface water discharge could be limited to existing run-off rates by the attenuation pond indicated on the layout plan, once designed in detail to provide suitable capacity. Foul water would be connected, within the grounds of Ashley Manor, to the main sewerage system, also as indicated on the submitted layout plan. Wider local concerns expressed at the Inquiry regarding the matter of flood risk are outside the scope of this appeal.

##### *Visual Impact*

114. The elevated site is widely visible in distant views within the attractive, undulating landscape and its development would have significant visual impact on its immediate surroundings, close to the listed buildings and residential properties, considered above. However, any built development on the site would be relatively well vegetated and enclosed from the wider area. I do not therefore consider that it would cause harm to the appearance and character of the nearby Cotswolds AONB.

##### *Community Infrastructure*

115. There is no substantive evidence to justify objection to the introduction by the proposed development of up to 68 households to justify a planning objection on grounds of a lack of community infrastructure with respect to education, sports or health care facilities.

##### *Residential Amenity*

116. Details of the design and landscaping of the development are for later determination as reserved matters. At that stage I consider that it would be

possible to ensure, by appropriate design, that there would be no unacceptable harm to the amenity of the new residents or those already living at the surrounding properties, such as by way of noise, disturbance, overlooking or overshadowing. That is in the context of an already largely residential area within the Principal Urban Area of Cheltenham.

### ***Balance of Planning Considerations***

#### *Policy*

117. At the heart of the Framework is the presumption in favour of sustainable development, which paragraph 11 requires to be applied in planning decisions. Paragraph 11d(i) requires permission to be granted where the development plan policies which are most important for the determination of the appeal are out of date, unless the application of Framework policies that protect areas or assets of particular importance, including designated heritage assets, provide a clear reason for refusal.
118. Footnote 7 to the Framework makes clear that for housing proposals, as in this case, the lack of a five year housing land supply renders development plan housing provisions out of date and causes the balance set down by paragraph 11d(i), now commonly termed the tilted balance, to be engaged.
119. However, Framework paragraph 11d(ii) provides, in the alternative, for granting permission unless any adverse effects of doing so would significantly and demonstrably outweigh the benefits of the development, when assessed against the policies of the Framework as a whole.

#### *Overall Assessment*

120. It is established above that the less than substantial harm to designated heritage assets that would be caused by the proposed development carries considerable weight. In my judgement, for the reasons explained above, this harm is of a very significant level and both Listed Buildings whose settings would be harmed are themselves of very high significance. I therefore consider that the less than substantial harm identified amounts to the requisite clear reason to dismiss this appeal, in terms of Framework paragraph 11d(i).
121. However, very considerable weight is also to be accorded to the contribution the development would make to the supply of affordable housing in the face of an acute shortage. The contribution to market housing also carries significant weight, in the absence of a current overall five year housing land supply for Cheltenham. These are the net total of benefits identified in favour of the amended proposal now at appeal.
122. In my overall judgement, the adverse impact by way of the less than substantial harm to the significance of designated heritage assets in this case would alone outweigh these benefits to housing. I therefore consider that dismissal of the appeal is warranted on that ground, with respect to Framework paragraph 11d(ii).
123. Moreover, it is also appropriate to take into account the harms I have identified by way of the loss of a protected tree and the degree of long-term risk to those trees to be retained, the potential net loss of biodiversity and the disadvantage due to the less than ideal nature of the highway access to the



appeal site. I do not consider that these further adverse effects would, either individually or jointly, outweigh the significant benefits to the supply of affordable and market housing. Nevertheless, they do further support the case for dismissal of this appeal.

124. Finally, the weight to be ascribed to the benefit to housing supply is fairly to be regarded as being constrained by the prospect that, even if the present proposal is rejected, there is still potential for the site to be developed in line with an emerging local plan allocation, albeit for a lesser scheme, as well as by the likelihood that, within the foreseeable future, the Cheltenham Plan, currently under examination, will be adopted, with a resultant increase in housing land supply for Cheltenham to above five years. These prospects too, although conjectural and not determinative, still militate against the approval of the current proposal.

**Overall Conclusion**

125. For the reasons explained, I conclude overall that this appeal should be dismissed.

*B J Sims*

Inspector

## **APPEARANCES**

### FOR CHELTENHAM BOROUGH COUNCIL

Mr G A Grant of Counsel

He called:

Ms L Mulraine Tech Cert (Arbor A) TMAA  
Senior Arboriculturalist – Environmental Dimension Partnership Limited

Mr C Morris BA(Hons) BTP MSc(HistCon) PostCertUD  
Senior Heritage and Conservation Officer, Cheltenham Borough Council

Mr R Williams BTP MRTPI MRICS  
Manging Director – Asbri Planning Limited

### FOR WILLIAM MORRISON (CHELTENHAM) LIMITED AND THE TRUSTEES OF THE CARMELITE CHARITABLE TRUST CHELTENHAM BOROUGH COUNCIL - APPELLANTS

Mr S Choongh of Counsel

He called:

Mr A Colebrook MICF MAA MRFS  
Associate Director – Forbes-Laird Arboricultural Consultancy Limited

Ms L Markham BA PGDip PGCert MRTPI IHBC  
Associate – Montague Evans Chartered Surveyors

Mr A Baxter BA(Hons) MA (Oxon) MSc CEcol CEnv MCIEEM  
Director – Aspect Ecology

Mr P J Frampton BSc(Hons) TP MRICS MRTPI  
Director - Frampton Town Planning Ltd

Mr M Glaze LLB(Hons) Eng Tech MIHE  
Associate Director - Cotswold Transport Planning

Mr A de Croos BEng  
Associate - Simpson Associates Consulting Engineers LLP

### FOR CHARLTON KINGS FRIENDS – RULE 6 PARTY

Mr L Glenister of Counsel

He called:

Mr P Bell BA MA PDD IHBCo  
of Asset Heritage Consulting

Mr S T Watson BSc(Hons) MICEEM  
Principal Ecologist – Bioscan (UK) Limited

## OTHER THIRD PARTIES AND INTERESTED PERSONS

Mrs S Walker

Mr P Walker and

Mr A Walker of Charlton Kings Friends also spoke on their own behalves

Cllr L Savage also on behalf of Mr A Chalk MP for Cheltenham and Cllr M Babbage

Cllr B Fisher

Cllr P McCloskey

Cllr S Harvey

Ms E Gilmartin and

Mr J Taylor on behalf of The Woodland Trust

Mr R Wilbourn on behalf of The Trustees of the Battledown Estate

Mr T R Gander on behalf of Cheltenham Flood and Drainage Panel

Mr D Edwards MICE

Mr M J Bowles – local resident and arboriculturalist

Mrs J Waite – local resident

Mr A Thurlow – local resident

Mrs L Lythgoe – local resident

Mr C Lythgoe – local resident

Mr R Grimshaw

## **PLANS**

Dwg No PL004 Revision A Proposed Block Plan

Dwg No PL005 Revision D Proposed Site Layout

Dwg No PL006 Revision A Indicative Mass Building Plan

Dwg No PL007 Revision A Affordable Housing Distribution

Dwg No PL010 Revision A Indicative Street Scenes

Dwg No PL011 Revision A Indicative Street Scene

Dwg No PL014 Revision A Nolli Plan

Dwg No 38-1036.03-B Tree Protection Plan

Dwg No 19073.101 Landscape Strategy

## **DOCUMENTS**

### *General and Interested Persons*

- 1 Letter of Notification of the Inquiry
- 2 St Edward's Schools Trust - letter of support
- 3 Mr Alex Chalk MP and Cllrs Savage and Babbage - written statement
- 4 Mr Wilbourn, Trustees Battledown Estate – transcript
- 5 Mrs Waite – transcript
- 6 Mr P Walker – transcript
- 7 Cllr Fisher – transcript
- 8 Mr Edwards – transcript
- 9 Mr A Walker – transcript
- 10 Mr Thurlow – transcript
- 11 Mrs Lythgoe – transcript
- 12 Mr Lythgoe – transcript
- 13 Mr Taylor and Ms Gilmartin, Woodland Trust – transcript
- 14 Mr Bowles – transcript
- 15 Mr Gander, CFDP – transcript
- 16 Planning Obligation
- 17 Suggested Conditions
- 18 Scott Schedules
- 18A Draft suggested MM to Cheltenham Plan allocation HD4

### *Submissions*

- 19ab CBC Opening and Closing Statements
- 20ab Appellants Opening and Closing Statements
- 21ab CKF Opening and Closing Statements

### *CBC Proofs and Appendices*

- 22abc Ms Mulraine
- 23ab Mr Morris

24ab Mr Williams

25 *number not used*

*Appellants Proofs and Appendices*

26ab Mr Colebrook

27abc Ms Markham

28ab Mr Baxter

29ab Mr Frampton

Mr Glaze (Mr Frampton Appendix 4)

Mr de Croos (Mr Frampton Appendix 2)

30abc Mr A Moger BA(Hons) MA MRTPI– Affordable Housing evidence taken as read

*CKF Proofs and Appendices*

31abc Mr Bell

32ab Mr Watson