



Appeal Decision

Site visits made on 21 September and 3 October 2023

by Bhupinder Thandi BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21st November 2023

Appeal Ref: APP/B1605/W/23/3316744

Land off Oakhurst Rise, Charlton Kings, Cheltenham

- 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 22/00112/OUT, dated 17 January 2022, was refused by notice dated 17 November 2022.
 - The development proposed is residential development of 25 dwellings.
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Decision

1. The appeal is dismissed.

Background and Preliminary Matters

2. The appeal site is allocated for residential development in the Cheltenham Plan (2020) (CP) under Policy HD4. The detailed policy sets out a number of constraints and site-specific requirements including a minimum number of dwellings; protection of key biodiversity assets and for development to have regard to the character, significance and setting of heritage assets.
3. I have been made aware of the planning history for the site which includes two appeals in 2019 and 2021, both of which were dismissed. In summary the 2019 appeal¹ was for 69 dwellings and the 2021 appeal² was for 43 houses. Whilst I have had regard to these appeal decisions my determination is focused upon the development proposals before me.
4. The application has been submitted in outline with access, layout and scale to be considered at this stage. I have determined the appeal on this basis.
5. The appellant has submitted an unexecuted planning obligation under Section 106 of the Town and Country Planning Act 1990 (the Act). The planning obligation intends to secure affordable housing, open space and a Local Wildlife Area (LWA) on site and financial contributions towards libraries and secondary education. I have addressed this in my reasoning below.

Main Issues

6. The main issues are:
 - The effect of the proposed development upon the setting of designated heritage assets Ashley Manor and Charlton Manor; and

¹ APP/B1605/W/19/3227293

² APP/B1605/W/20/3261154

- The effect of the proposed development upon the natural environment with regard to the impact upon badger setts.

Reasons

7. The appeal site sits within the Principal Urban Area (PUA) of Cheltenham and comprises a broadly rectangular parcel of land formed of grassland that rises from south to north. The site is divided by a mature belt of vegetation and other mature trees. A number of trees protected by Tree Preservation Order are located within the site. The site also contains protected species including badgers and their setts and is designated as a Local Wildlife Site.
8. The site forms part of the grounds of St Edward's Preparatory School with areas on the lower slope fenced off and used to house animals as part of the school farm. The school extends over a large area and includes Grade II* listed Ashley Manor, modern buildings, sports pitches and extensive hard surfaced areas.
9. Neighbouring the site to the north and east are the rear gardens of dwellings extending along Ashley Road and Birchley Road, including Grade II listed Charlton Manor. These properties form part of the Battledown Estate, which is characterised by large individually designed dwellings set within substantial plots. To the west are the rear gardens of suburban housing extending along Oakhurst Rise and Charlton Court Road.
10. The appeal scheme comprises a residential development of 25 dwellings formed of 15 market dwellings and 10 affordable units. The development would take access from Oakhurst Rise with the road extending to the east with culs de sac leading off a spine road. The development would punch through the vegetation belt resulting in the removal of several trees.
11. Just over 75% of the site would be retained as open space, mainly the eastern and southern part of the site. This area would also include an attenuation pond and the LWA accommodating relocated artificial badger setts. Ongoing management of these areas would be secured by condition and by the planning obligation.

Setting of designated heritage assets

12. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires the decision maker, in considering whether to grant planning permission for development which affects a listed building or its setting, to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest.
13. Located on the school site is Grade II* listed Ashley Manor which accommodates the school's nursery. Its origins date back to around 1832 and was originally constructed as a modest plain stucco villa. The dwelling was much altered when it was sold to Nathaniel Hartland – a notable local banker. Its significance is derived from its architectural detailing as one of the finest villas in the Cheltenham area and its association with Nathaniel Hartland.
14. The building is built from ashlar stone with hipped slate roofs. The western elevation to which the historic tree lined carriage sweep aligns forms the main entrance with Tuscan pilasters and a Corinthian portico. The south elevation displays a bow column with Corinthian columns.

15. Having regard to the appellant's Heritage Impact Assessment it is evident that the most notable architectural characteristics of Ashley Manor are orientated to the south overlooking what once were the formal gardens. However, this aspect and setting of Ashley Manor has been eroded by the development of the school including utilitarian school buildings and sports pitches.
16. Charlton Manor is a Grade II listed mansion dating back to the mid nineteenth century designed by Henry Dangerfield in an eclectic Gothic Revival style. It has part stone, part rendered and mock timber framed facades and mullioned and transomed windows. There is a steep ornate tiled gabled roof with numerous decorative bargeboards. It derives its historical significance as the first of many of the mansions to be built on the Battledown Estate and its architectural detailing.
17. Historically its garden extended southwards but which has been sold off and developed as part of the Battledown Estate. The immediate setting of the dwelling has been much altered through development within its plot including an annexe and swimming pool which to some level undercuts its significance.
18. Based on the evidence before me the appeal site did not have an ornamental association with Ashley Manor, and does not form part of its designation, but it nonetheless had a functional relationship with the building and the Ice House is a physical reminder of this historic relationship.
19. There is also nothing to suggest that the site had any association with Charlton Manor or the wider Battledown Estate. Despite this, there is a strong interrelationship between Ashley Manor and Charlton Manor in visual terms due to the open sloping terrain. The site also provides an unspoilt green backdrop to both buildings. The nature of the site provides an insight to the historical landscape setting. In my judgment the site contributes to the setting of these heritage assets, making a positive contribution to their architectural and historical interest and significance.
20. Both main parties agree that the proposal would lead to less than substantial harm to the designated heritage assets through development within their setting. The area of dispute is the resultant level of harm with the appellant submitting a low level of harm. The Council, on the other hand, contend that the harmful impact on the setting of Ashley Manor is slight to moderate and the harmful impact on the setting of Charlton Manor to be slight and that the overall impact would lead to substantial harm.
21. The proposed development would be contained to the western and central parts of the site maintaining an extensive swathe of green space along the southern and eastern areas of the site, aligning with one of the requirements of CP Policy HD4. There would be a notable degree of separation between the designated heritage assets and the development would not infringe on the visual relationship between Ashley Manor and Charlton Manor.
22. Denser development would be positioned at the entrance of the site reflecting the neighbouring built form in Oakhurst Rise. Dwellings with a larger scale would be positioned on the periphery of the development reflecting the scale of development in the Battledown Estate. In numerical terms just over 75% of the site would be formed of managed green space serving to soften the development and assimilate it into the local landscape. Mindful that the site sits between two areas with distinct and differing characters and the site-specific

requirements set out in CP Policy HD4, I do not find that the layout would be unduly awkward.

23. Despite the above, developing the site would undermine its rural aspect by extending the built form into an unspoilt landscape closer to and into the setting of both designated heritage assets. This would cause harm to the significance of Grade II* listed Ashley Manor and Grade II listed Charlton Manor. The proposal would therefore conflict with CP Policy HD4 and Policy SD8 of the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy (2017) (JCS) which, amongst other things, seek to conserve and enhance the significance of heritage assets.

Heritage Balance

24. The proposed development would erode the unspoilt and green appearance of the site through the introduction of built form, associated infrastructure and domestic paraphernalia. This level of harm would be at the low end of less than substantial, in my judgement.
25. In accordance with Paragraph 202 of the National Planning Policy Framework (the Framework), it is for the decision maker, having identified harm to designated heritage assets, to consider the scale of that harm. This harm should be weighed against the public benefits of the proposal including, where, appropriate, securing its optimum viable use.
26. The public benefits of the proposed development include the provision of 15 market homes and 10 affordable dwellings; the creation of public open space; biodiversity net gain; a protected LWA for badgers and capital investment into school facilities.
27. In my judgement these benefits would clearly outweigh the less than substantial harm to the significance of nearby designated heritage assets and therefore the proposed development would accord with the historic environment objectives set out in the Framework.

Natural environment

28. Badgers are a protected species, not for their rarity, but for their welfare and against illegal cruelty. A total of 6 badger setts are present within the site with several badger paths extending across it. The main sett BS1 is located more or less centrally within the site and is the key breeding sett. Setts 5 and 6 are considered to be annexe setts to BS1.
29. It is argued that the proposed development ignores the avoid-mitigate-compensate sequence set out in the Framework and as advocated by Natural England and the Department for Environment, Food and Rural Affairs, in placing plots 16 – 20 near to setts BS1, BS5 and BS6.
30. To my mind it would not be possible to develop the appeal site and avoid completely harm to the natural environment. As such, there is a tension and a balance to be struck between the desirability of avoiding harm to protected species and developing the site as per the allocation.
31. It is not for me in consideration of this appeal to speculate on whether alternative layouts are feasible, but rather it is incumbent upon me to assess the merits of the case as presented. Therefore, taking the layout as necessary

- for development of the site, the issue is whether the mitigation and compensation measures would be effective.
32. The proposed layout would require the removal of the main breeding sett BS1 and setts BS5 and BS6 replaced by two artificial setts located in the southern area of the site. The appellant advises that this area would be closer to the badgers prime foraging areas and away from human activity. The area would be designated a LWA and would not be publicly accessible.
 33. It is apparent that there is no one mandatory approach to undertaking survey work. In this instance, there is no substantive information before me to indicate that the walkover survey is not an appropriate method to establish the approximate number of badgers and their activity in and around the site.
 34. Whilst surveys cannot establish with absolute certainty the number of badgers and activity taking place, they do provide a 'snapshot in time' of the situation underground, overground as it may be. Whilst the report was completed over two years ago, it is only beyond 'its best before date' by a few months. In any event, I concur with the appellant that to discard or disregard the conclusions of the report on its two-year anniversary seems a rather simplistic view. As such, in my judgement, the Badger Survey Report establishes a robust baseline, despite the concerns expressed by the Council and interested parties.
 35. Based on the evidence before me relocation of setts is a tried and tested methodology and subject to an appropriate mitigation plan there is no reason to suggest that the welfare of badgers would be compromised in the short, medium and long term. There is also protection through the licencing regime and Natural England would not issue a licence if it was not satisfied that the replacement setts were suitable. In such an event, the existing setts could not be removed, and the development could not proceed.
 36. The mitigation strategy has been developed taking into account the ground conditions and vegetation, the potential for an enlarged population and to enable further excavations by badgers. Furthermore, the setts would be located in a protected area, on the whole free from human activity and influence maintaining badger welfare. I am also mindful that the precise details would be addressed at license stage and under this process the appellant would be required to carry out further survey work and revise the mitigation strategy if necessary.
 37. Therefore, in this regard I am satisfied that adequate measures to mitigate and compensate the disturbance to badgers have been explored and identified. The proposed development would accord with JCS Policy SD9 and the Climate Change Supplementary Planning Document (2022) which, amongst other things, seek to protect and enhance biodiversity resources and the creation of habitats that positively enhance biodiversity.
 38. I note the Council have referred to the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2017 in the second reason for refusal, but with regard to the specific planning merits of the case I have given them limited weight in coming to my decision.

Planning obligation

39. A planning obligation has been submitted and which intends to secure affordable housing, open space and a protected LWA and financial contributions towards libraries and secondary education.
40. There is no dispute between the main parties that the planning obligation is required and that the contributions would satisfy the tests for planning obligations set out in Regulation 122 of the Community Infrastructure Levy Regulations (2010).
41. The appellant, St Edward's School, Cheltenham Borough Council and Gloucestershire County Council have agreed the terms of the planning obligation. However, the Trustees of the Carmelite Charitable Trust (CCT), who have an interest in the site, have indicated that they are unable to enter into the agreement at this juncture.
42. The Planning Practice Guidance (PPG) states that conditions should not be used for the payment of money or other considerations. A positively worded condition requiring an applicant to enter into a planning obligation under the Act or other agreement is unlikely to pass the test of enforceability.
43. The PPG does say that, in exceptional circumstances, a negatively worded condition, such as the condition suggested by the appellant, requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate. However, the PPG infers caution with regard to the imposition of such conditions.
44. Crucially the obligations and specifically the provision of affordable housing and the LWA are fundamental to the acceptability of the scheme. Without an executed planning obligation there is no certainty that these would be delivered as part of the proposed development to make the scheme compliant with the development plan. In addition, the planning obligation as currently drafted could well be amended or altered upon further review by the CCT or by another interested party.
45. As set out in the PPG ensuring that any planning obligation is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed.
46. In coming to my decision, I have paid regard to the appellant's alternative planning obligation restricting commencement of development. However, this would not overcome my concerns in relation to this matter.
47. I note the reason behind the CCT's reluctance to sign the agreement. However, there is nothing before me to indicate that delivery of the development would otherwise be at serious risk. Having regard to the PPG and the evidence before me does not lead me to reach a conclusion that these factors are exceptional circumstances that would justify use of a negatively worded condition rather than a completed planning obligation.
48. Therefore, in the absence of a completed planning obligation I am not satisfied that the proposed development would secure contributions to make the development acceptable in planning terms.

Planning Balance

49. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires planning applications to be determined in accordance with the Development Plan unless material considerations indicate otherwise. Therefore, whilst the development plan has primacy in decision making, there are circumstances where by material considerations may indicate that a decision otherwise than in accordance with the development plan should be taken.
50. The Framework is one such material consideration. It states at paragraph 11(d) that where the development plan policies that are most important for determining the application are out-of-date planning permission should be granted unless one of two scenarios apply.
51. Firstly paragraph 11(d i. states that permission should not be granted when the application of policies in the Framework that protect areas or assets of particular importance, as set out in Footnote 7, provides a clear reason for refusing the development proposed.
52. In this regard the Council contend that the impact on the setting of nearby designated heritage assets means that this paragraph is triggered, as this is listed in the footnote. However, I have found that the public benefits would outweigh the less than substantial harm and this does not provide a clear reason for refusing the application, therefore this paragraph is not applicable.
53. The second scenario is paragraph 11(d ii. which states that planning permission should not be granted where any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
54. The Council acknowledge that they cannot demonstrate a five-year supply of deliverable housing land. In such instances paragraph 11(d ii of the Framework and the 'tilted balance' is engaged.
55. The Council's housing land supply position stands at 2.9 years. This represents a further deterioration from 3.7 years at the time of determination of the previous appeal. Therefore, it is evident that there is a significant pressing and urgent need for new housing in light of this substantial shortfall. The delivery of 15 market units on an allocated site attracts substantial weight in favour of the proposal. This is also the case for the delivery of 10 affordable dwellings including units of different sizes and tenures.
56. The site is located within the PUA of Cheltenham within a short distance of a range of day-to-day services. Future occupiers would be able to reach these on foot, providing them with transport choice and an alternative to car use.
57. The construction of 25 dwellings would provide jobs, albeit this would be largely short term limited to the construction phase. Future occupiers would help to maintain the vitality of services and facilities in the town through increased spending. These benefits would be moderate.
58. The proposed development would result in biodiversity net gain in both habitat and hedgerow through additional landscaping, which would be a benefit, but this would be moderate in the overall balance.

59. The proposed development would avoid significant harm in respect of the natural environment and protected species. But this would be a neutral factor in the planning balance.
60. The financial contributions towards libraries and secondary education would essentially mitigate the impact of the proposed development in planning terms. As such, these are matters of neutral consequence in the overall balance.
61. Notwithstanding the above, the absence of a planning obligation and the adverse impact of failing to provide financial contributions towards libraries and education and the delivery of affordable housing and a LWA would significantly and demonstrably outweigh the benefits set out above. The presumption in favour of sustainable development therefore does not apply in this case.
62. I conclude that the proposal conflicts with the development plan, when read as a whole. There are no other considerations that outweigh that harm. The appeal is therefore dismissed.

Other Matters

63. I note the representations made by local residents raising additional concerns. However, given my findings overall it is not necessary for me to consider these matters in detail.

Conclusion

64. For the reasons set out above the appeal does not succeed.

B Thandi

INSPECTOR