

Development Control Committee **7 October 2020**

Planning Application DC/18/1425/FUL - The Woodyard, Stores Hill, Dalham

Date registered: 07 November 2018 **Expiry date:** EOT – 10 October 2020

Case officer: Adam Ford **Recommendation:** Approve application

Parish: Dalham **Ward:** Chedburgh and Chevington

Proposal: Planning application - Entry Level exception site for 2no affordable dwellings and ancillary access arrangements (partly retrospective)

Site: The Woodyard, Stores Hill, Dalham

Applicant: Mr Gordon Smith

Synopsis:

Application under the Town and Country Planning Act 1990 and the (Listed Building and Conservation Areas) Act 1990 and Associated matters.

Recommendation:

It is recommended that the Development Control Committee determine the attached application and associated matters.

Contact Case Officer:

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Background:

1. This application was deferred from consideration at the Development Control Committee meeting on 2 September 2020.
2. Members resolved that they were minded to refuse planning permission due to advice contained within the 2015 Written Ministerial Statement¹ which relates to intentional unauthorised development and over concerns that the dwellings proposed are not affordable.
3. The Decision Making Protocol states that "where Development Control Committee wishes to overturn a recommendation and the decision is considered to be significant in terms of overall impact; harm to the planning policy framework, having sought advice from the Assistant Director of Planning and Regulatory Services and the Assistant Director for Legal and Democratic Services (or officers attending committee on their behalf)
 - A final decision on the application will be deferred to allow associated risks to be clarified and conditions/refusal reasons to be properly drafted.
 - An additional officer report will be prepared and presented to the next Development Control Committee detailing the likely policy, financial and reputational etc. risks resultant from overturning a recommendation, and also setting out the likely conditions (with reasons) or refusal reasons. This report should follow the Council's standard risk assessment practice and content.
 - In making a decision to overturn a recommendation, Members will clearly state the material planning reason(s) why an alternative decision is being made, and which will be minuted for clarity."
4. The purpose of this report is to provide a risk assessment for Members in accordance with the Decision Making Protocol, should planning permission be refused for the development, contrary to the officer recommendation, having regard to its accordance with the development plan, the 2019 National Planning Policy Framework (NPPF) and the absence of objections from relevant consultees such as Suffolk County Council Highways Authority, the Local Planning Authority's (LPA) Conservation Officer, the LPA's Strategic Housing team or Public Health & Housing.
5. The officer recommendation, which is set out at the end of this report, remains that planning permission should be approved.
6. For details of the proposal, site, planning history, consultations, representations, policy, and Officer comment, please refer to the full Officer report as prepared for the Development Control Committee meeting dated 2nd September 2020.

¹ HCWS423: Green Belt protection and intentional unauthorised development

Summary of additional public comments submitted to the LPA

7. Since the item was presented to the committee on 22 July 2020, a number of further public comments have been submitted to the LPA and these are summarised below.
 - Visibility splays cannot be met
 - Late papers prevented members considering the application in detail
 - Committee report was biased
 - S106 agreement was published on website without notice
 - Scheme is not compliant with NPPF's definition of affordable housing
 - Section 70c of the Town and Country Planning Act has been misapplied
 - Scheme is not materially different to that already refused

Risk Assessment:

8. The purpose of this report is to advise Members of the risks associated with the 'minded to' resolution to refuse planning permission for the development proposal, having regard to the development plan and the officer recommendation to approve planning permission. For the reasons set out in this report it remains officers' recommendation that planning permission be approved. If Members remain minded to refuse the application, they must be satisfied that any risks associated with doing so have been properly considered.
9. Members will recall that the previous officer recommendation was to approve planning permission as the proposal is considered to meet the provisions of local and national policy. As proposed the scheme will result in two affordable housing units being secured with no material reasons to justify the refusal of planning permission.
10. During the meeting on the 2 September however, Members expressed concern that the two dwellings proposed would not be affordable and that the 2015 Ministerial Statement should weigh heavily against the proposal.

Concerns relating to affordability of the dwellings

11. The NPPF very clearly sets out the definition of affordable housing with 4 specific products offered in annex 2 of the document. The NPPF is a material consideration and represents the Government's policy on planning matters. If a proposal meets with the definition of 'affordable housing' as set out within the document, it must be considered as such. The definition as prescribed by the NPPF is set out within appendix 1 of this report. In considering whether the units are 'affordable' within the context of the NPPF, Members must be aware that the specific price is not relevant and cannot therefore underpin a refusal reason which would withstand scrutiny at appeal.
12. The LPA's strategic housing team have offered further comments which confirm this position clearly for Members and the full response is shown in appendix 3 of this report. An important point to note within this response from Strategic Housing

is that is clarifies, clearly, that house price is not what determines whether the property meets the NPPF's definition.

13. Officers remain satisfied that the proposal as submitted represents compliance with the definition as set out within the NPPF and paragraph 71 of the NPPF with respect to entry level exception sites.
14. It was suggested by Members that the proposal could not be considered against product D as only a particular section had been highlighted in the previous report. This is because product D provides a number of options, but the relevant part with respect to this application is the reduction in price to at least 20% of the open market value. The applicant is not proposing shared ownership units or relevant equity loans. Whilst the retrospective nature of the application is noted, as a matter of fact, the scheme complies with the definition of affordable housing as within the NPPF.
15. With respect to the affordability concerns, members' attention is drawn to the Unilateral Undertaking which has been submitted by the applicant. This agreement legally requires the applicant to only offer the units to first time buyers and at a price of at least 20% below the open market value. Members had concerns that a 20% reduction would not be sufficient for first time buyers and officers acknowledge this concern. However, in this scenario, because the legally binding S106 agreement states the houses may **only** be sold to first time buyers, the only option available to the applicant without breaching the S106, would be to increase the level of discount by more than 20% until such a time as a first time buyer *could* afford the unit. The first-time buyer / renter restriction and the price reduction therefore operate together to control this development and ensure it remains compliant with the affordable housing provisions set out within the NPPF. This degree of control prevails in perpetuity and therefore controls each and every disposal as may take place.
16. Finally, members expressed concern that the units could be privately rented to individuals. Having sought further clarification from the LPA's strategic housing team, the S106 agreement will be amended so that rent is specifically prohibited. The S106 Agreement on the Council's website will be amended accordingly and should members resolve to approve this application it would be subject to the amended terms of the S106 being agreed prior to the issuing of a decision. This will mean that in order to comply with the S106 agreement, the units may only be sold in line with the scenario set out in paragraph 13.
17. With respect to the units being rented in breach of the S106, Officers consider this to be exceptionally unlikely on the basis that the S106 agreement is publicly available. Furthermore, members are reminded that permission cannot be refused for hypothetical or unsubstantiated reasons. To do so places the LPA at the risk of having costs awarded against it. To refuse this application on the basis that the applicant may not comply with the voluntarily signed S106 would represent such a risk.

18. To clarify, 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.

19. In this instance the applicant has agreed to enter into a legally binding S106 agreement which obligates him to comply with the terms contained within. It would, therefore, with reference to the advice in paragraph 16, be unreasonable and unjustified to refuse this application on the assumption that the S106 will not be adhered to.

Concerns relating to the weight afforded to the Written Ministerial Statement HCWS423

20. As noted during the meeting on the 2 September 2020, the Written Ministerial Statement (WMS) which refers to intentional unauthorised development was cited as being a reason by members to refuse this application. For clarity, the complete statement is set out within appendix 2 of this report.

21. As advised during the committee presentation, whilst this is a factor which marginally weighs against the scheme, the materiality of this Ministerial statement in the overall balance of considerations is a matter for the decision maker in each case. In the opinion of the LPA and given the outcome of the associated public inquiry, the development undertaken on this site can *potentially* be considered as intentional unauthorised development, noting the specific circumstances. However, it is important to note that the ministerial statement in question was published in December 2015 which predates the decision issued by the Inspector in February 2016 following the public inquiry. Given that the statement was in force and valid at the time of the Inspector's decision, had the Inspector felt the statement to be relevant to the determination of the appeal, it is fair to suggest it would have been mentioned or at least referenced within the appeal decision notice. However, it is not and at no point does the Inspector conclude that the development was carried out as a deliberate attempt to intentionally circumnavigate the jurisdiction of the planning system. Therefore, to refuse the proposal on this basis represents a significant risk to the Planning Authority and one that Officers do not consider as being able to withstand the scrutiny of an appeal.

22. It follows, consequentially, that modest weight against this proposal must therefore be attached to this fact in the balance of considerations. However, given the conclusions reached within the main report with regards to the acceptability and degree of policy compliance exhibited, it is not considered that the weight to be attached to this conclusion should be such that a refusal could be justified.
23. This approach is entirely consistent with the way in which several Planning Inspectors have interpreted the WMS statement.
24. Although this example is within a different district, planning appeal PP/X0360/C/16/3153193 relates to an Enforcement Notice issued by Wokingham Borough Council. The Enforcement Notice required the cessation of an unauthorised use and the subsequent removal of supporting operational development. The Inspector², at paragraph 40 of the appeal ascribes only moderate weight to the intentionally unauthorised nature of the development in considering the overall balance of the planning matters.
25. A further useful insight is offered within paragraph 33 of planning appeal³ APP/F9498/C/16/3145918 which is an appeal against an Enforcement Notice issued by the Exmoor National Park Authority requiring the demolition of an unauthorised building. In this appeal decision, at paragraph, the appointed Inspector notes that the intentionally unauthorised nature of the development but goes on to very clearly state that it is **not** sufficient in isolation to render the development as unacceptable. This is directly comparable to the current situation with respect to the Woodyard on the basis that there are, in Officer's view, no other material planning reasons to justify the refusal of this planning application.
26. This also reflects the approach taken by West Suffolk Council⁴ with respect to planning application DC/17/1763/FUL which sought planning permission to retain an unauthorised residential development. In considering this application, paragraph 56 of the committee report confirms that the WMS alone does not represent a sufficient reason to refuse an otherwise policy compliant scheme.
27. A similar position arises here with respect to the proposal before members. Officers have outlined that with the exception of the Written Ministerial Statement, there are no significant factors weighing against this scheme or material reasons to recommend the refusal of this application. The unauthorised nature of the development is noted, as is its potential to be intentionally so, but officers would maintain that this alone does not represent a robust reason for refusal.

² <https://prospectlaw.co.uk/wp-content/uploads/2018/01/APPEAL-DECISION-3153193-1.pdf>

³ <https://www.exmoor-nationalpark.gov.uk/about-us/meetings-agendas-reports/exmoor-national-park-authority/06-dec-2016/ar-enpa-06.12.16-Item-6.pdf>

⁴ <https://planning.westsuffolk.gov.uk/online-applications/simpleSearchResults.do?action=firstPage>

Planning Enforcement Matters

28. During the Development Control meeting on 2 September 2020, much discussion focussed on the extant enforcement notice which prevails across the site. Members are reminded that whilst this is a material consideration, the scheme as applied for has not been considered on its planning merits to date. It is therefore incorrect to state or assume that this application simply seeks to regularise the development that has been considered at appeal; it does not. The material difference between this scheme and the development as subject to the enforcement notice is clarified at the beginning of the appended committee report under the heading 'clarification'.
29. The position set out with respect to Section 70c of the Act remains unaltered as per the introduction set out at the beginning of the committee report.
30. The enforcement options with respect to the site are clarified within paragraph 16 of the attached committee report. In the event that planning permission is refused, the planning enforcement service would consider their options and pursue the most appropriate course of action based on an objective assessment which would consider expediency and the general public interest. Members are also advised that refusing this application does not, by default, mean that the units will be demolished or that further enforcement action will be pursued by the LPA.

Highway Safety

31. Although the application was not deferred on the grounds of Highway Safety, an amended visibility splay drawing has been submitted following a request from the Local Planning Authority due to an error on the plans. This amended visibility splay drawing (20-5650-201-REV C) has an upload date of the 22nd September 2020. Further comments from the Highway Authority have been submitted (23 September 2020) which confirm that they wish to raise no objection to the proposal and that the submitted visibility splays are acceptable.
32. Following the submission of this amended visibility splay, a public representation was made to the LPA which suggested that the submitted visibility splay was not achievable. In response to this, the Highway Authority have commented as follows:
- *"The plans are acceptable and meet current guidance. The photos (from a third party) are not taken from the points in which SCC would look at visibility and as such are not a reflection of the required vis splay. As stated before, the 120m towards the village is not technically needed (but was originally requested at a time before MfS (Manual for Streets) was proven to be suitable for this type of location), as MfS would require 43m or less if speeds are lower. I believe a planning inspector*

would not refuse this site on visibility in light of current guidance and lack of collision data since this site has been constructed.

Conclusion

33. It remains the professional opinion of officers that the proposal accords with the development plan and that there are no material considerations to indicate that a decision should be made contrary to the officer's recommendation. This is reflected in the recommendation made below.
34. Officers consider the development proposed in this case accords with policy. Section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 require decisions to be made in accordance with the development plan unless there are material considerations that indicate otherwise.
35. In the absence of material reasons to substantiate a reason for refusal it is your officer's view that an appeal would likely be allowed due to the scheme's compliance with both national and local policy. The applicant would have the right to recover their appeal costs (in full or in part, depending upon the circumstances) from the council should the Inspector conclude the Local Planning Authority has acted unreasonably.
36. Notwithstanding the above, if Members are minded to refuse the application on grounds of amenity impact, then without prejudice to the officer recommendation of approval, the following refusal reason is suggested:

Refusal reason

37. This application seeks to retain two dwellings which are subject to an extant enforcement notice, as upheld through planning appeal APP/H3510/C/14/3000236. The development as a whole is therefore unauthorised. The application represents an attempt to retain unauthorised development which the Local Planning Authority has deemed to be unacceptable previously and this remains the case, despite the proposal now being for 2 affordable units as opposed to open market dwellings. Section 70c of the 1990 Town and Country Act is specifically designed to prevent repeated attempts to retain development which has already been considered as unacceptable by the Local Planning Authority. Furthermore, the Written Ministerial Statement (UIN HCWS423) Entitled "Green Belt protection and intentional unauthorised development" advises that where development is intentionally undertaken without the benefit of planning permission, this is a factor which must weigh against the proposal in the overall planning balance. In this instance, whilst the affordable status of the two dwellings is noted, this is not considered sufficient to outweigh the intentionally unauthorised nature of the development.

Officer recommendation

38. Subject to an amended S106 agreement, it is recommended that planning permission be **GRANTED** subject to all of the conditions (with an updated drawing number for visibility splay, amended plan received 22 September 2020) as set out within the original committee report dated 2 September 2020, which is included with this report as Working Paper 1.

Documents:

All documents submitted within this application, including consultation responses

<https://planning.westsuffolk.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=PCB6WRPD03E00>

Appendix 1 - Definition of affordable housing as per 2019 NPPF

Appendix 2 - Written Ministerial Statement regarding intentional unauthorised development

Appendix 3 – Additional comments from Strategic Housing team dated 24 September 2020

Working paper 1 – Development Control Committee report – 2 September 2020