

TENDRING DISTRICT COUNCIL

PLANNING COMMITTEE

2ND FEBRUARY 2016

Report of Head of Planning

The Chairman of the Planning Committee has agreed to consider this report as an urgent item because the Council is required to submit its statement of case to the Planning Inspectorate by 05/02/2016 and so there is insufficient time to bring a report to the next scheduled meeting of the Planning Committee

15/01234/OUT - Land East of Halstead Road, Kirby Cross, Frinton On Sea, Essex, CO13 0LR

Erection of up to 240 dwellings with a community hub including either a 40-bed space care home (Class C2) or a healthcare facility (Class D1) together with access from Halstead Road, Woburn Avenue and Buckfast Avenue; a parking area for up to 30 vehicles; green infrastructure provision including children's play area, kick-about area, footpaths, structural landscaping and biodiversity enhancements; a sustainable drainage system including detention basin and swales and other related infrastructure and services provision.

The above referenced planning application was refused at Planning Committee held 17th November 2015. In refusing the application the following reasons were submitted:

1. Paragraph 32 of the National Planning Policy Framework requires Local Planning Authorities, when making decisions, to take account of whether:
 - the opportunities for sustainable transport modes have been taken up depending on the nature and location of the site, to reduce the need for major transport infrastructure;
 - safe and suitable access to the site can be achieved for all people; and
 - improvements can be undertaken within the transport network that cost effectively limit the significant impacts of the development. Development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.

Policy TR1a in the Tendring District Local Plan (2007) (the adopted Local Plan) requires that development affecting highways be considered in relation to reducing and preventing hazards and inconvenience to traffic including the capacity of the road network. Policy SD8 in the Tendring District Local Plan: Proposed Submission Draft (2012), as amended by the Tendring District Local Plan: Pre-Submission Focused Changes (the emerging Local Plan) states that developments will only be acceptable if the additional vehicular movements likely to result from the development can be accommodated within the capacity of the existing or improved highway network or would not lead to an unacceptable increase in congestion.

Furthermore, Policy QL10 of the adopted Local Plan seeks to ensure that all new developments meet functional needs which includes that access to the site is practicable and the highway network will be able to safely accommodate the additional traffic the proposal will generate. Information submitted in support of the proposed development shows that a section of the residential scheme (approximately 28 dwellings) is intended to be accessed from Buckfast Avenue and Woburn Avenue which, in turn, would lead to an increase in the number of vehicles seeking to join the busy Frinton Road via its

junctions with Elm Grove and Willow Avenue. The proposed development would intensify the use of these junctions onto a stretch of classified highway which carries significant traffic movements and the applicant has failed to demonstrate, to the Council's satisfaction that such increased usage would not result in a severely detrimental impact on highway safety. The development is therefore contrary to paragraph 32 of the National Planning Policy Framework and would be contrary to Adopted Local Plan (2007) Policies QL10 and TR1a and emerging Local Plan Policy SD8.

2. Paragraph 32 of the National Planning Policy Framework requires Local Planning Authorities, when making decisions, to take account of whether:
 - the opportunities for sustainable transport modes have been taken up depending on the nature and location of the site, to reduce the need for major transport infrastructure;
 - safe and suitable access to the site can be achieved for all people; and
 - improvements can be undertaken within the transport network that cost effectively limit the significant impacts of the development. Development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.

Policy TR1a in the Tendring District Local Plan (2007) (the adopted Local Plan) requires that development affecting highways be considered in relation to reducing and preventing hazards and inconvenience to traffic including the capacity of the road network. Policy SD8 in the Tendring District Local Plan: Proposed Submission Draft (2012), as amended by the Tendring District Local Plan: Pre-Submission Focussed Changes (the emerging Local Plan) states that developments will only be acceptable if the additional vehicular movements likely to result from the development can be accommodated within the capacity of the existing or improved highway network or would not lead to an unacceptable increase in congestion.

Furthermore, Policy QL10 of the adopted Local Plan seeks to ensure that all new developments meet functional needs which includes that access to the site is practicable and the highway network will be able to safely accommodate the additional traffic the proposal will generate.

Information submitted in support of the proposed development shows that, in order for the highway network to accommodate the additional vehicle movements that would result from the development, it is proposed that the existing Frinton Road/Halstead Road roundabout would be removed and replaced with a set of traffic signals as well as yellow box markings and pedestrian crossing facilities at the traffic signals.

It is the Council's opinion that the introduction of the proposed highways solution at the junction of Frinton Road and Halstead Road would worsen, rather than address, traffic problems currently experienced in this location and would instead result in an obstruction of a stretch of classified highway which carries significant traffic movements. Consequently the applicant has failed to demonstrate, to the Council's satisfaction, that the development would not lead to a severely detrimental impact on highway capacity and safety. The development is therefore contrary to paragraph 32 of the National Planning Policy Framework and would be contrary to Adopted Local Plan (2007) Policies QL10 and TR1a and emerging Local Plan Policy SD8.

3. Paragraphs 76 to 78 in the National Planning Policy Framework refer to the designation of 'Local Green Space' in Local Plans and Neighbourhood Plans as spaces of local importance where development can be ruled out, other than in very special circumstances. Local policies for managing development of Local Green Spaces is to be consistent with policy for 'Green Belts' as set out in section 9 of the Framework.

The proposed development is located within an area defined as Local Green Gap within the Tendring District Local Plan (2007) (the adopted Local Plan). Policy EN2 in the adopted Local Plan states: "During the Plan period, land within Local Green Gaps, as defined on the Proposals Map, will be kept open, and essentially free of development. This is to prevent the coalescence of settlements, and to protect their rural settings. Minor development proposals may be permitted if they do no harm, individually or collectively, to the purposes of a Local Green Gap or to its open character. These may include the improvement of existing leisure and recreational facilities, and development for agricultural purposes. In Local Green Gaps, where resources and opportunities permit the Council will encourage the improvement of public rights of way."

The specific purpose of the Local Green Gap in this location, as set out in supporting paragraph 6.11 of the adopted Local Plan is to:

- Safeguard the identity, character and rural setting of Kirby-le-Soken and Great Holland as free standing villages in the countryside; and
- Protect the remaining village character of Kirby Cross and its rural setting.

The application site is similarly located within the Strategic Green Gap as depicted in the Tendring District Local Plan Proposed Submission Draft (2012) as amended by the Tendring District Local Plan: Pre-Submission Focussed Changes (2014) (the emerging Local Plan). These gaps have been carefully defined in specific locations where there is a genuine risk, due to the close proximity of settlements or neighbourhoods that any development approved could undermine (in whole or in part) the remaining undeveloped gap and jeopardise those settlements individual identities. Within these Green Gaps, the Council will resist all development proposals unless there is a genuine functional reason why a particular development must take place in that specific location and cannot be located on an alternative piece of land outside of the designated gap. The intention of this policy is broadly consistent with Paragraph 80 of the National Planning Policy Framework in respect of Green Belt and that of Paragraphs 76 to 78 in respect of Local Green Space.

It is acknowledged, at the time of this decision, that the adopted Local Plan in respect of housing land supply is out of date and the Council is unable to identify a five year supply of deliverable housing sites against its objectively assessed requirements. Whilst the development of up to 240 homes would make a significant contribution toward addressing housing need in Tendring, the Council considers that the adverse environmental impact caused by development in the Local Green Gap, and the consequent negative impact on the identity, character and rural setting of Kirby Cross and Kirby-le-Soken, contrary to adopted Policy EN2, would significantly and demonstrably outweigh any social and economic benefits of the proposal and would not therefore constitute sustainable development.

4. Chapter 11 of the National Planning Policy Framework (NPPF) sets out the Government's objective of conserving and enhancing the natural environment with paragraph 118 identifying a number of principles against which planning applications should be considered in order to ensure that they conserve and enhance biodiversity.

In support of Governments objective as it relates to conserving and enhancing the natural environment, policies within Chapter 6 of the Tendring District Local Plan (2007) and Policy PLA4 of the Tendring District Local Plan Proposed Submission Draft (2012) as amended seek to ensure that where development is likely to harm nature conservation or geo-diversity interests, planning permission will only be granted in exceptional circumstances. The benefits of the development should clearly outweigh the harm caused and where appropriate mitigation measures must be incorporated into the development to the satisfaction of Natural England and other relevant Authorities.

When dealing with cases where a European Protected Species may be affected, a planning authority has a statutory duty to have regard to the requirements of the Habitats Directive in the exercises of its functions. Further the Directive's provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account.

Under Regulations 61 and 62 of the Habitats Regulations, local planning authorities as the 'competent authority' must have regard for any potential impact that a plan or project might have on European designated sites. The site is located close to Hamford Water which is designated as a Site of Special Scientific Interest (SSSI), Special Protection Area (SPA), Ramsar site, Special Area of Conservation (SAC) and National Nature Reserve (NNR).

Based on the above duty extended to Local Planning Authorities the Council considers that the submitted Ecological Assessment (EA) and Habitats Regulations Assessment completed in support of the application identifies the need for additional protected species survey work to update and clarify information submitted in the original application, but additional work has not yet been undertaken. In the absence of the required additional survey work, the Council feels unable to fully assess the impacts and implications of the scheme upon the biodiversity interests of the site itself and wider impacts on Hamford Water and therefore the proposal would be contrary to the aims and objectives of the NPPF as set out in Chapter 11 while also being contrary to Policies EN6, EN6a and PLA4 in the adopted and emerging Local Plans.

5. The National Planning Policy Framework (2012), at its heart, promotes a presumption in favour of sustainable development that performs an economic, social and environmental role. Where local planning authorities are unable to identify a five year supply of deliverable housing sites against objectively assessed future needs, plus an appropriate buffer, policies relating to housing supply are considered out of date and the presumption in favour of sustainable development applies, requiring planning permission to be granted unless any adverse effects of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework as a whole.

However, paragraph 119 in the Framework specifically states that the presumption in favour of sustainable development does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered,

planned or determined. As explained in the fourth reason for refusal set out above, the Council is not satisfied that potential impacts of the development on Hamford Water as a designated site of international importance for wildlife have been fully assessed through the Habitat Regulation Assessment (appropriate assessment) and the other studies provided and therefore the presumption in favour of sustainable development does not apply, allowing the policies in the Tendring District Local Plan (2007) (the adopted Local Plan) to be given a high level of weight.

The development site lies outside of the settlement development boundary for the Frinton, Walton and Kirby Cross urban area and also falls within a Local Green Gap and is therefore contrary to both Policies QL1 and EN2 of the adopted Local Plan. Notwithstanding the acknowledged shortfall in housing land, on the basis that the presumption in favour of sustainable development does not apply for the reasons set out above, outline planning permission is refused.

6. Chapter 10 of the NPPF speaks to the need for developments to meet the challenge of climate change, flooding and coastal change. Paragraphs 99 through to 102 places an onus on planning authorities and applicants to ensure that planning applications have regard to and are determined to ensure that flood risk is not increased elsewhere. Paragraph 103 in part states that developments should be appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed, including by emergency planning; and it gives priority to the use of sustainable drainage systems.

Policy EN13 of the Adopted Local Plan (2007) and Policy PLA3 of the Draft Local Plan (2012) requires that all new development, excluding householder development, should incorporate Sustainable Drainage Systems (SuDS) as a means of reducing flood risk, improving water quality, enhancing the green infrastructure network and providing amenity benefit. Justification must be given for not using SuDS.

These policies are clear that planning permission for new development will not be granted unless it can be demonstrated that any surface/wastewater from the development can be dealt with within the confines of existing 'discharge consents' or that an acceptable alternative will ensure protection of the environment.

In the Council's opinion the proposed scale of development may present risks of flooding on-site or off-site if surface water run-off is not effectively managed. In the Council's opinion insufficient information exists to reach an informed decision on whether these risks can be properly mitigated and managed. The proposal is therefore contrary to the requirements of the National Planning Policy Framework, Policy EN13 of the Adopted Local Plan (2007) and Policy PLA3 of the emerging Local Plan (2012).

Since this refusal the applicant has lodged an appeal against the Council's decision and this Appeal will be heard at a Public Inquiry to be held on the 5th of July 2016. In order to inform the Council's Statement of Case that is due on 5th February 2016 officers sought independent legal advice from external Counsel with regard to the contents of the Council's case.

Detailed legal advice is exempt information for the purposes of Schedule 12A of the Local Government Act 1972 (as amended) however, the public interest test has been applied and it is considered in the public interest that a summary of the legal advice will be presented to the Planning Committee for the purposes of considering the Report and Recommendations.

A summary of the legal advice received in this regard indicates that:

- i) The Green Gap reason for refusal would be the only defensible reason for refusal with a realistic chance of success. The advice also indicated that it is possible that the Council would be successful at appeal on this ground alone.
- ii) The Highways reasons would not be defensible unless the Council can specifically identify shortcomings in the applicant's Transport Assessment. As the findings and solutions set out within these reports were considered and supported by Essex County Council Highways as the Highways Authority and without any evidence to the contrary being before the Planning Committee or available to the Council to defend this ground for refusal, there is a substantial risk of costs being awarded against the Council by continuing to rely on the Committee's reasons for refusal and the firm legal advice is that the Committee no longer pursue this ground.
- iii) The Ecological reasons again would not be defensible and advice suggested that Officers followed the correct approach with regard to their assessment of the ecological matters presented within the application and their presentation of the facts to the Planning Committee. Here again without any evidence to the contrary being before the Planning Committee or available to the Council to defend this ground for refusal, there is a substantial risk of costs being awarded against the Council by continuing to rely on the Committee's reasons for refusal and the firm legal advice is that the Committee no longer pursue this ground.
- iv) As with the two points discussed above the legal advice stated that the Flooding reason would also not be defensible unless the Council can identify flaws in the applicant's Flood Risk Assessment. This Flood Risk Assessment was considered by Essex County Council SuDS as the Local Flood Authority who raised no objection with regard to its contents or recommendations. Members are also reminded that this was an outline application with all matters apart from access reserved for later consideration and as such the details of any drainage scheme can be secured by condition and presented as part of the detail application. Again there is a substantial risk of costs being awarded against the Council by continuing to rely on the Committee's reasons for refusal and the firm legal advice is that the Committee no longer pursue this ground.

Given the above advice the committee is asked to decide which of the reasons for refusal officers will defend at the Public Inquiry.

"The National Planning Practice Guidance deals with the awards of costs at Paragraph: 028 (Reference ID: 16-028-20140306) which states as follows:

"Parties in planning appeals and other planning proceedings normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.

The aim of the costs regime is to:

- encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case
- encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay.

The Planning Committee is under an obligation to take into account professional advice received and the Planning Practice Guidance, if departing from this detailed reasons must be provided for their decision.”

RECOMMENDATION:

- 1. The Planning Committee notes the summary legal advice received from external Counsel;**
- 2. In light of the clear legal advice the Planning Committee confirms that it does not wish to continue defending grounds 1,2, 4, 5 or 6 as set out above; and**
- 3. That Officers are instructed to work with Counsel to defend the planning appeal on the sole ground of reason for refusal 3 as set out above relating to the Green Gap policy.**