

Eakring Road, Bilsthorpe

Keepmoat Homes Ltd

ADVICE

Introduction

1. I am asked to advise Keepmoat Homes Ltd on its planning application to the Newark and Sherwood District Council (“**the Council**”) under reference 20/00873/FULM for the:

“Residential development of 103 dwellings and associated access and infrastructure [at] Field Reference Number 7108 Eakring Road Bilsthorpe Nottinghamshire”

2. On 6.10.20, Miss Laura Gardner – the Council’s Senior Planner – advised that she would recommend refusal for the scheme:

“for two reasons relating to the principle issue in separating the residential and retail of the site allocation and also the design points which we’ve previously discussed in terms of a skew towards larger units when compared to the desired housing mix of the area and a significant proportion of the 4 bed units being served by 3 parking spaces in tandem.”

3. As I explain below, my view is that:

- (i) Those proposed reasons for refusal are **untenable**. They misunderstand the requirements of the Council’s development plan. They lack technical support. If permission is refused on those grounds, my view is that that refusal will be **highly vulnerable** to being overturned on appeal.
- (ii) That lack of technical support for the recommended reasons for refusal in relation to – in particular – highways and viability is “*unreasonable*” within the meaning of the Planning Practice Guidance on “Appeals”, and will support a **costs application** against the Council as part of that appeal.

Background

4. The site is next to the former Bilsthorpe Colliery which closed in 1997. A dismantled railway line lies to the north, now in use as a footpath. Land to the south is in commercial use. Land to the west of the Eakring road is in residential use:



5. In July 2013, the site was allocated by policy Bi/MU/1 in the Council's Allocations & Development Management DPD:

Policy Bi/MU/1

Bilsthorpe - Mixed Use Site 1

Land to the east of Eakring Road has been allocated on the Policies Map for mixed use development providing around 75 dwellings and retail development

In addition to the general policy requirements in the Core Strategy and the Development Management Policies in Chapter 7, with particular reference to Policy DM2 Allocated Sites, and Policy DM3 Developer Contributions and Planning Obligations, development on the site will be subject to the following:

- Appropriate design which addresses the site's gateway location and manages the transition into the main built up area;
- Pre-determination archaeological evaluation submitted as part of any planning application and post-determination mitigation measures secured by condition on any planning consent are likely to be required;
- Appropriate phasing of retail and residential uses.

6. In June 2018, the Council approved an outline application under reference 17/01139/OUTM for the residential development of up to 85 dwellings, up to 3,000 sqft of retail development and associated access works.
7. The illustrative masterplan and the phasing plan for this scheme was:



8. As can be seen, the retail unit was to be delivered before the commencement of Phase 2 of the residential development to the North.
9. The current application for 103 units was validated in June 2020. The scheme includes 10 2-bed homes, 58 3-bed homes and 35 4-bed homes. 10 of the units are to affordable. The proposed layout is:



10. The application was supported by a viability appraisal which supports the provision of affordable housing below the Council's 30% policy target. That was reviewed by White Land Strategies on behalf of the Council which concluded as follows:

"To conclude, it is clear that the viability of the development is suffering due to a combination of lower values to cost ratio. This is in effect compounded by the land value which is not a strategic greenfield land value but a residential consented site value.

The land value factor alone doubles the costs attached to the land value target that might otherwise be available for S106 if this was a strategic site.

[...]

To conclude, findings were as follows:

- A 30% policy compliant scheme and S106 package is not viable.
- Any combination of S106 with Affordable housing requires the Applicant to reduce profit expectations.
- A 4% scheme with policy compliant S106 is unviable but would be viable with no S106.
- A 10% affordable housing scheme is viable with no S106 against benchmark viability targets in that the Open Market profit return is within the NPPF range i.e. above 15% of OMGDV.

- A 10% affordable housing scheme is unviable with S106 against benchmark viability targets unless the Applicant takes a view on the land value and/or the Open Market profit return.”

11. On 22nd June, Laura Gardner raised a number of issues with the scheme over email – including:

“Site allocation - As was already raised as a concern at pre-application stage the application for solely residential development clearly cannot present an appropriate phasing with any retail development envisaged by the site allocation;

Housing Mix – My initial concern with the housing mix is that in the market sector there would be no 2 bed units but the affordable sector (notwithstanding a significant under-provision) would be totally reliant on 2 beds. I would therefore suggest that some of the three bed units should be given over to the affordable sector and the 2 beds incorporated within the market provision. We are currently in the process of updating the Councils Housing Needs Survey and clearly if the results of this are available during the life of the application I will share the implications with the presented housing mix asap;

[...]

Parking provision – Whilst the overall number and position of spaces is not disputed, there are a significant level of the proposed 4 bed dwellings which have been presented with their three parking spaces in tandem with one another. This is not an acceptable solution and is likely to be raised as a cause of concern from NCC Highways when their comments come through. (I’ll also spotted a small error on the parking plan where plots 8 and 9 have been labelled the wrong way around) [...]

12. Elizabeth Woodhouse of Keepmoat responses on 19th August, noting that:

“Site allocation

We have a statement from the Retail purchaser which outlines their intentions now the full application been submitted along with their timescales. I have attached an email from our land department.

Housing Mix

We have attached a statement to justify the evidence behind the proposed housing mix for this scheme. It demonstrates the market need for 3 & 4 bed housing as we appeal to the wider market enticing people into Bilsthorpe, whilst also offering an affordable market housing family size options for the residents that already live within the area, considering the average earnings outlined. The range included as part of the proposed mix offer some of our most popular house-types and have all been successfully used at other Keepmoat developments

elsewhere within the region. To help demonstrate the considered and informed approach followed in establishing the proposed mix and property types included in the proposed scheme, I have attached both the sales statement and market research report.

This has been highlighted more recently since there has been a shift in priority with working from home and the demand for 3 to 4 bed properties has increased as they offer more flexible spaces with additional room. [...]"

13. The email attached another email from Sam Heathershaw, a Development Manager in the Property Department of the Lincolnshire Co-operative Limited:

"Please accept this letter as confirmation of our commitment to the retail parcel on Eakring Road in Bilsthorpe. As you know, we are under contract with Harworth Estates Investments Limited on the land and therefore have an established legal position to purchase the site subject to planning. We are currently working on the last few elements of our planning application and we currently envisage the application will be submitted on or around end of August 2020. For the benefit of the doubt please find attached our current site layout plan. Hopefully this is sufficient to give you and the District Council comfort on our commitment to the site ahead of your residential planning application being considered."

14. A further email from Elizabeth Woodhouse on 20th August 2020 said that:

"Parking Provision – Where possible we have demonstrated bay park parking to 4 beds to avoid tandem parking, however there are instances whereby it's is not achievable. Additionally NCC comment referred to the depth of the parking spaces which we have addressed in the detail previously attached."

15. On 22nd September 2020 Miss Gardner wrote:

"Unfortunately there are still fundamental outstanding issues which are preventing me making a recommendation of approval.

Clearly we are awaiting comments from NCC Highways on the latest revisions but I understand they are being worked on and so await Dave Albans comments.

For me, the biggest issues remains the principle of development (i.e. omitting the retail element) and the viability case.

I have been discussing with legal colleagues re: the principle and if there is a way around it and they have suggested that a S106 could be entered into to prevent the residential coming forward unless or until the retail use comes forward. My concern is that this would not be reasonable given that you have no control on when / how the retail unit comes on site. You as

the applicant would therefore not be able to comply with the obligation. Unless of course you would be willing to take that risk and enter into the agreement but I appreciate that is unlikely to be palatable.

On the viability matter, I managed to briefly catch up with Chris this morning (he was on the way to a meeting so due to call back this afternoon). Notwithstanding his more detailed comments the biggest discrepancy for me is that the viability case presents 4% affordable housing and limited contributions whereas the plans and application submission presents 10% affordable housing. Perhaps you could clarify exactly what is being proposed? From an Officer perspective I would not be able to recommend approval for less than 10%.

On the basis of the above I am not in a position to take the application to October Committee with a positive recommendation (reports are due today). I shall await your response on the above matters before proceeding with a recommendation but as it currently stands I would be recommending refusal on the principle of development issue at the very least.”

16. On 29th September, Alan Staley of Keepmoat sent an email stating:

“Having considered matters internally and, given our requirement to ensure we have a commencement of development early next year, should it ensure Officer support we are willing to make a compromise offer as follows:

- A provision of 10% affordable dwellings
- A Section 106 contribution of £258k for the Council to spend as they best see fit, taking into account the overall planning balance considerations for the scheme.

With respect to the offer of 10% affordable housing provision, this is based on your apparent interpretation of Para 64 of the NPPF requiring a minimum overall onsite provision. As a business we have always interpreted this as an ‘expectation’ that 10% of the overall affordable housing provision for a site should include an affordable home ownership product. From this regard can you clarify whether, based on your interpretation of the Policy, the 10% provision offered should be made up entirely of affordable homeownership tenure product?

The above is obviously despite the viability clearing demonstrating a lack of residual to cover any S106 costs, and so offers a notable risk from our perspective.”

17. In response to the suggested section 106 obligation preventing occupation of the residential part of the development until the retail provision is operational, Chris Dwan of DLP responded on 30th September 2020, citing Policy Bi/Ph/1 then stating:

“As you are aware, the delivery of the residential and retail elements are proposed via separate developers. From this, it is our understanding that a submission for the retail element is due imminently. Crucially, financially, the delivery of the two elements are mutually exclusive in this instance, albeit the delivery of the residential element will assist with the delivery of the retail element in part, given that the initial part of the road to which the retail element will be accessed by will be provided by Keepmoat, whilst the retail scheme will be able to plug into the wider residential scheme infrastructure from a drainage perspective.

As such, the residential scheme needs to come forward first to facilitate the delivery of the initial infrastructure required to assist in the delivery of the retail unit. However, from a financial perspective, the delivery of the residential part of the allocation will in no way fund the delivery of the retail scheme. Notably, there is no requirement as part of the above-mentioned policy wording for it to do so, nor as demonstrated by the recent viability exercise is there any money available within the context of the residential delivery to assist from this regard.

Bi/MU/1 requires appropriate phasing of retail and residential uses without a defined order. Given that the residential element cannot viably fund the delivery of the retail element, the financial models accordingly require to remain mutually exclusive. What the residential element can however do is provide the necessary infrastructure to assist in delivery, which effectively means that appropriate phasing means the residential development coming forward first. To do so would reflect on site and infrastructure provision and constraints and would not be unviable for the developer to implement. Crucially, the coming forward of the residential part of the mixed use scheme first in no way compromises the potential future delivery of the retail unit. Clearly, there is likely to be a residual spend capacity available within the area to ensure such a development will be commercially viable in its own right, as supported by the evidence base that informed the mixed use allocation and the inclusion of the retail element in the first instance.

Looking more specifically at the suggested imposition of a S106 agreement obligation to prevent the residential coming forward unless or until the retail use comes forward - technically, we do not see how this can possibly work given that Keepmoat do not have any influence over the delivery of the retail element, due to its provision by a separate developer on a part of the site that falls outside of their control and their application redline. Furthermore, we cannot see how the imposition of such a requirement would adhere to the regulations governing planning obligations / paragraph 56 of the NPPF in any case. The delivery of retail unit is not necessary to make the development of the residential scheme acceptable in planning terms nor is it fairly and reasonably related in scale and kind to the development, whilst from a financial perspective, for the reasons outlined above, the suggested imposition of a phasing trigger requirement upon the residential element actually puts at risk the delivery of the overall allocation altogether.”

18. In response, Miss Gardner stated in an email of 6th October 2020 that:

“Unfortunately after discussions with my manager my Officer position is that my recommendation will be for refusal of the application for two reasons relating to the principle issue in separating the residential and retail of the site allocation and also the design points which we’ve previously discussed in terms of a skew towards larger units when compared to the desired housing mix of the area and a significant proportion of the 4 bed units being served by 3 parking spaces in tandem.”

Analysis

(i) “Separating the residential and retail of the site allocation”

19. In my view, this proposed recommended reason for refusal relies on a misunderstanding of the terms of the Council’s development plan.

20. What do the policies actually require?

(i) Bi/MU/1 says that development will be subject to *“appropriate phasing of retail and residential uses”*; and

(ii) Bi/Ph/1 adds that *“phasing in all cases must be appropriate to the size of the development, reflect on site and infrastructure provision and constraints and not be unviable for the developer to implement.”*

21. So there is **no policy requirement** to show phasing of retail and residential uses on this site in circumstances where:

(i) It is inappropriate to require a phasing plan given e.g. on site constraints; or

(ii) Delivering a phasing plan would be unviable

22. Further, there are **no policy requirements** for the residential and retail parts of the Bi/MU/1 allocation to be delivered:

- (i) By the same developer;
- (ii) At the same time;
- (iii) Subject to an overall site masterplan; and
- (iv) As part of a comprehensive piece of development.

23. In this case, the key facts are straightforward:

- (i) The delivery of the residential and retail elements will be delivered by separate developers – that is perfectly consistent with the terms of Bi/MU/1;
- (ii) The Co-op have, I am instructed, recently submitted the application for the retail unit; and
- (iii) In any event, it follows from the Council’s own independent viability review that there is no excess profit from the residential scheme to support bringing forward retail scheme.
- (iv) So the schemes are legally, functionally and financially independent

24. In those circumstances, a phasing plan would be impractical, inappropriate and unviable. In consequence, and unsurprisingly, the development plan does not require one.

25. A section 106 obligation to link the schemes is not only impractical, it would be completely unnecessary (because it cannot be said – and has not yet been said – that the delivery of retail unit is somehow necessary to make the residential development of the residential scheme acceptable in planning terms).

(ii) “Skew towards larger units when compared to the desired housing mix of the area”

26. Again, the starting point is to consider what the policies actually require. Core Policy 3 in the Core Strategy states that:

“The District Council will seek to secure new housing development which adequately addresses the housing need of the District, namely:

- Family housing of 3 bedrooms or more
- Smaller houses of 2 bedrooms or less.
- Housing for the elderly and disabled population.

Particular emphasis will be placed on securing smaller houses of 2 bedrooms or less and those for housing for elderly and disabled population.

The District Council will seek to secure an **appropriate mix** of housing types to reflect local housing need. Such a mix will be dependent on the local circumstances of the site, the viability of the development and any localised housing need information.”

27. So whether a given mix is appropriate depends on (a) local need, (b) local circumstances and (c) the viability of the development.

28. The explanatory text at §5.13 – but **not** the policy itself – states that “*in general terms, the indicated split in the study is that 50% of all new dwellings should be 1 or 2 bedroom dwellings and 50% should be of 3 bedrooms and above*” but that is a generality which is to be applied subject to local circumstances and the viability of the development, as the policy makes clear.

29. In this case, the preponderance of the proposed units are 3-4 bed. That does not match with the general 50-50 mix suggested by the explanatory text at §5.13, but **it does not have to** because:

- (i) That 50% general suggestion is not a policy requirement;
- (ii) It is a general preference, not fixed in policy, which is subject to site-specific circumstances;

- (iii) In this case, the **agreed** marginal viability position (summarised above) would completely inconsistent with requiring more 2-bed dwellings; and
- (iv) In any event, as the August 2020 Keepmoat local need document, there has been an understandable influx in demand for 3-4 bed homes due to the shift in priority for working from home, and local house prices confirm a strong demand for 3-4 bedroom homes consistent with Keepmoat’s target market of first time buyers and affordable family homes.
30. In consequence, the **uncontested** evidence does not support the idea that a 50-50 mix of 1-2 and 3-4 bedroom homes, or anything like it, would be “*appropriate*” within the meaning of Core Policy 3 on this site. On the contrary, it would plainly be unviable.
31. Again, in particular given the Council’s position on the scheme’s marginal viability, this proposed recommended reason for refusal is totally misconceived.
- (iii) “a significant proportion of the 4 bed units being served by 3 parking spaces in tandem”
32. This proposed reason for refusal is – it appears – completely unsupported by any technical evidence or development plan policy. In particular:
- (i) The Nottinghamshire County Council – the relevant highways authority – does not object to the scheme.
- (ii) It is not alleged – nor could it be – that the proposed parking arrangements would be unsafe measured against the high hurdle of §108 NPPF, or would lead to an unacceptable impact on highway safety, or severe residual cumulative impacts on the road network within §109 NPPF.

- (iii) Indeed, there appears to be no support in the Council's local plan for the idea that tandem parking presents a problem. Let alone a problem which could justify the refusal of permission for residential development on an allocated site.
33. The Council's objection seems to hang on the terms of the Council's August 2020 consultation draft "*Residential Cycle and Car Parking Standards & Design Guide Supplementary Planning Document*" which was presented to its Economic Development Committee in early September. "Key principle 2" in the draft SPD expresses a "*preference*" against tandem parking, and says that it will "*not normally be supported*".
34. The consultation draft SPD is a material planning consideration. However, given the SPD's early stage in the process, given that it may change before it is adopted, and given its subservience to local and national policy, the SPD is a consideration that cannot yet attract more than limited weight – and certainly not enough weight to justify refusing an application on an allocated site which is otherwise supported by local and national policy.
35. But in any event, and regardless of its weight, the SPD's terms are not absolute. Its "*preference*" is against tandem parking which will "*not normally be supported*". The topic paper is more equivocal still – it talks about "*discouraging*" what is referred to as "*over reliance on tandem parking*". So even if the SPD was given full weight – and that would obviously be wrong – professional technical judgment would be required in any given case whether or not the level of tandem parking in this case is acceptable or unacceptable. Again, as above, the Highways Authority do not object to the scheme.
36. In the end, permission should only be refused if the issue reaches the very high thresholds on public safety and severe impacts in §108 and §109 NPPF, which is not alleged in this case, and which could not be tenably be alleged given the Highway Authority's support for the scheme.

Conclusions

37. In my view, should permission be refused for the reasons in Miss Gardner's 6th October 2020 email, that refusal would be **highly vulnerable** to appeal. They lack technical support, and are based on fundamental misconceptions of what the Council's development plan actually requires.
38. That lack of technical evidence to support the refusal – both on highways and viability – would also support a **costs application**.
39. Those instructing me should not hesitate to contact me in Chambers with any questions arising out of this advice.



ZACK SIMONS

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8th OCTOBER 2020