



# Appeal Decision

Inquiry held on 5 February 2008

Site visit made on 5 February 2008

by **Mrs A L Fairclough MA, BSc(Hons),  
LLB(Hons) MRTPI, IHBC**

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

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**Decision date:**  
12 June 2008

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## Appeal Ref: APP/D1835/A/07/2053645

### Industrial Units at White Ladies Close, Worcester, WR1.

- 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 Gemini Properties/Tim Oakley against the decision of Worcester City Council.
- The application Ref P07A0295, dated 3 May 2007, was refused by notice dated 5 July 2007.
- The development proposed is described as an outline application for the erection of 14 no. dwellings with the matter of landscaping reserved for subsequent approval.

**Summary of Decision: The appeal is allowed, and planning permission granted subject to conditions set out below in the Formal Decision.**

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### Application for costs

1. At the Inquiry an application for costs was made by the Appellants against the Council. This application is the subject of a separate Decision.

### Procedural matters

2. The appeal proposal relates to an outline application for the erection of 14 dwellings with matters of landscaping reserved for future consideration. The planning application form is inconsistent with the description of the development given. However, both parties at the Inquiry indicated that landscaping was the only reserved matter. Therefore, although many of the plans were labelled as indicative, I consider that the site plan and dwelling details form an essential part of the appeal scheme and it is on this basis that I determine the appeal.
3. During the course of consideration by the Council amended plans were submitted by the Appellants. It is on this basis that I determine the appeal.
4. Furthermore, in its evidence to the inquiry, the Council explained that it took the view that planning permission should be granted subject to a condition which would require the potential for affordable housing to be re-assessed prior to implementation of the development.

### Planning Obligation

5. At the inquiry, the Appellant submitted a Unilateral Undertaking as deeds of Planning Obligation under s.106 of the Act. Should the appeal succeed, the Undertaking effectively ensures that the Appellants would pay an open space contribution of £12,894. The Council confirmed at the Inquiry that it was
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satisfied with the content of this Undertaking which fulfilled the requirements of LP Policy CLT34. I have assessed its contents against Circular 05/2005: *Planning Obligations* and I agree it would overcome any objections raised by lack of on-site provision of open space. It is a material planning consideration and I have taken it into account in determining this appeal.

### **Main Issue**

6. The Council gave one reason for refusal which related to the lack of provision for affordable housing. I consider the main issue to be whether the appeal proposal would be consistent with policies for new residential development with particular regard to affordable housing.

### **Planning Policy**

7. The development plan includes the *City of Worcester Local Plan* dated 2004 (LP). LP Policy H10 states that where a residential development on a windfall site of at least 0.8ha in total or is capable of accommodating 24 dwellings or more, the City Council will negotiate affordable housing based on 30% of the net area. However, the appeal application was determined against Policy H7 within the then emerging Development Plan Document entitled *Balanced Housing Market* (DPD). The DPD was subsequently adopted on 11 December 2007. This document refers to affordable housing and supersedes LP Policy H10.
8. DPD Policy H7 states that where residential development on a windfall site of at least 0.5ha in total size or is capable of accommodating 12 dwellings or more, the City Council will seek an element of affordable housing based on 40% of the net site area.
9. Paragraph 29 of *Planning Policy Statement 3: Housing* (PPS3) sets out a national indicative minimum size threshold of 15 dwellings for the provision of affordable housing. However PPS3 indicates that local authorities can set lower minimum thresholds where viable and practicable.
10. Supplementary Planning Guidance entitled *Provision for Affordable Housing* (SPG9) was adopted in 2005. Although designed to supplement the superseded affordable housing policies in the LP, it was agreed at the Inquiry that SPG9 was still current.

### **Reasons**

11. The appeal site is some 0.22 hectares and is currently used for commercial / industrial purposes. There are 3 units on the appeal site. The structures on the appeal site include a 2-bay light steel truss building with a single storey office, a 2-storey warehouse constructed of brick and block walls and a single storey workshop with flat roof and yard. The surrounding area includes high density housing. Thus the appeal site is previously-developed land within a residential area, which is highly sustainable. In addition there are listed buildings close to the appeal site and part of the appeal site is within a conservation area.
12. At the inquiry the Council were unable to demonstrate a 5 year supply of housing in relation to the Preferred Housing Option. PPS3 requires that

where a 5 year supply of housing cannot be demonstrated, local authorities should treat residential applications favourably.

13. The Council is concerned that if the appeal proposal is unviable for the maximum number of affordable units required by policy, a lesser number of affordable units should be considered. The appeal proposal is for 14 dwellings. At the time the application was submitted and determined, the appeal proposal fell below the affordable housing threshold required by LP Policy H10. Therefore, the provision of affordable housing would not have been required. However, the appeal proposal was determined against the emerging DPD which required a 40% allocation of affordable housing under the revised lower threshold of 12 units.
14. Even though the Appellants considered that the proposal fell under the threshold in LP Policy H10, a financial appraisal was submitted. This appraisal illustrates that the provision of 30% affordable housing, required by LP Policy H10, would produce a net value below the existing use value, which would render the scheme unviable. Supplementary Planning Guidance entitled Provision for Affordable Housing dated 2005 (SPG9), which supported LP Policy H10, indicates at paragraph 4.12 that the Council will take into consideration exceptional development costs which a developer may feel would render the provision of a site economically unviable for affordable housing.
15. A further financial appraisal relating to the requirements of DPD Policy H7 was submitted with the appeal documents. Again this appraisal demonstrated a net value below the existing use value, which rendered the proposal to provide 40% affordable housing as unviable. Paragraph 4.57, which supports DPD Policy H7, states that the Council would be prepared to consider a reduced proportion should it be impossible to reconcile the 40% proportion requirement with an economically viable scheme. Thus the Council contends that the Appellants have not produced any information to prove that a lower percentage of affordable housing cannot be achieved.
16. DPD Policy H7 requires that an independent valuation to confirm non-viability is produced and an independent verification of this valuation. The Appellants have demonstrated that if affordable housing was provided, then the scheme would be commercially unviable. The Council appointed an independent financial expert who concurred with the Appellants' conclusions regarding the non-viability of the scheme.
17. The Council has sought to demonstrate, using the Appellants' financial appraisal data, that the provision of one affordable unit within the appeal proposal could be viable. However, given the Council's suggested low profit margins of between £2,468 and £40,648, I consider that the difference between a viable scheme and an unviable one is very narrow. Given the recent uncertainty in the housing market, I consider that it would be unreasonable to expect the Appellants to provide even one affordable unit within the appeal proposal.
18. The Inspector's report from the Independent Examination of the DPD specifically refers to SPG9 and acknowledges that there are circumstances

where it is not appropriate for sites to deliver affordable housing including financial constraints.

19. The Council is aware of the extremely narrow margin between viability and non-viability. On this basis they suggested their concerns could be overcome by the imposition of a condition allowing for the reassessment of the viability in the near future. This was contested by the Appellants.
20. Although the Council has agreed that the principle of housing on the appeal site is acceptable, it considers that whilst the provision of any affordable housing is presently economically unviable based on the recent financial appraisal, it could become economically viable within the life of the permission if the appeal scheme is allowed. The Council argues that the current uses on the appeal site that includes a 2 year lease which has recently been agreed. On this basis the Council contends that development would not commence on site until 2010 at which time the fluctuating market could allow for the provision of one or more affordable units.
21. They argue that this could be overcome by condition similar to an archaeological 'watching brief' type condition on the basis that the financial appraisals submitted by the Appellants do not show that within the three year life of a planning permission the provision of an element of affordable housing would be impossible to achieve. However, the Appellants consider that such an approach would be unreasonable on the basis that it would create uncertainty in terms of what is permitted and consequently the value of the land. In my view there is nothing in DPD Policy H7 to justify the imposition of such a condition. Whilst the condition would fulfil a planning purpose and could relate to the development permitted, to impose it would be unreasonable as well as perverse and irrational as it would create uncertainty. Moreover, I consider that the proposed condition would not satisfy the tests within Circular 11/95: *The Use of Conditions in Planning Permissions*. It would not be similar to an archaeological type condition as it would not provide clarity of what the planning permission is for. Thus it would not be precise, enforceable, reasonable or necessary. Therefore I do not consider it to be acceptable.
22. Therefore, for the reasons given above, I conclude that the requirement of any affordable housing as part of the proposal would render the appeal proposal economically unviable. To my mind the suggested condition would also create uncertainty and I consider that it would be unnecessary having regard to the justification in Policy H7. In these circumstances the proposal, without affordable housing, would not conflict with DPD Policy H7, SPG9 or national policy and guidance.

### **Other Matters**

23. There are several listed buildings within the vicinity of the appeal site. I am required to have special regard to the desirability of preserving the building or its setting or any special features. To my mind the design and scale of the appeal proposal would be appropriate to its context. Therefore, I consider that the appeal proposal would not harm these listed buildings and as such would preserve them and their setting.

24. In addition, part of the appeal site lies within the Shrubbery Avenue Conservation Area. The Council has not raised concerns regarding the effect of the appeal proposal on the conservation area. Given that I consider that the design and scale of the proposal is appropriate to the context and that the proposal would be a significant improvement on the existing buildings on the site, I have no reason to disagree with the Council's approach. Therefore, I consider that the proposal would preserve and enhance the character and appearance of the Shrubbery Avenue Conservation Area.

### **Other Conditions**

25. I have considered the conditions put forward by the Council in the event that the appeal is allowed having regard to the advice contained in Circular 11/95. In addition to the time limit condition, the parties have agreed 22 conditions in the SCG. The conditions relating to hard and soft landscaping, bin storage, design details, materials, external lighting and retaining walls are all reasonable and necessary in ensuring that the appeal scheme respects the character and appearance of the locality including the nearby conservation area. However, those conditions relating to planting and hard and soft landscaping would be more appropriate at the reserved matter stage. Therefore I propose to omit these.
26. In addition, the condition relating to foundations with respect to the effect on nearby trees and proposed trees is also reasonable and necessary to ensure that the character of the locality is retained and enhanced. However, a condition relating to the domestic use of the garaging/car ports is not reasonable or necessary as any non-domestic use would require planning permission.
27. A condition relating to an archaeological assessment of the application site is reasonable given the historical nature of the locality in terms of nearby listed buildings and the adjacent conservation area. This condition would enable recording of the historical and archaeological potential of the site. The conditions relating to access gates and doors, the turning area and parking facilities are reasonable and necessary in the interests of highway safety. The conditions relating to the withdrawal of permitted development rights including new windows, extensions and curtilage buildings are also reasonable and necessary in terms of protecting the neighbours' living conditions. Also a condition relating to drainage is reasonable to ensure satisfactory foul and surface water disposal.
28. Moreover, I consider that the suggested conditions relating to the specified hours of operation, the provision of parking for site operatives and visitors and wheel cleaning would be reasonable to respectively safeguard neighbours' living conditions, highway safety and to prevent nuisance. I have amended some of the suggested conditions in the interests of precision and enforceability having regard to Circular 11/95.

### **Conclusions**

29. I conclude that the appeal proposal would not conflict with the current policies for new residential development with particular regard to affordable housing. In coming to my conclusion, I have taken into account local,

regional and national policy as well as other Ministerial statements. For the reasons given above I conclude that the appeal should be allowed.

### **Formal Decision**

30. I allow the appeal, and grant planning permission for the outline application for the erection of 14 no. dwellings with the matter of landscaping reserved for subsequent approval at the Industrial Units at White Ladies Close, Worcester in accordance with the terms of the application, Ref P07A0295, dated 3 May 2007, and the plans referenced P001A: Site Layout; P002: Site location Plan; P003C: Proposed Street Scenes; P004: Existing Street Scene; P005: Existing Street Scene; P010: Proposed Plans Type A; P011: Proposed Elevations Type A; P012: Proposed Plans Type B; P013: Proposed Elevations Type B; P014: Proposed Plans Type C; P015: Proposed Elevations type C; P016: Proposed Plans Type D; P017: Proposed Elevations Type D; P018 Proposed Plans Type E; P019 Proposed Elevations Type E; P020 Proposed Plans Type F; P021: Proposed Elevations Type F; P022 Proposed Plans Type G; P023: Proposed Elevations Type G; P024: Proposed Plans Type H and P025 Proposed Elevations Type H, subject to the following conditions:

- 1) Application for approval of the reserved matters shall be made to the local planning authority not later than three years from the date of this permission
- 2) The development hereby permitted shall begin not later than two years from the date of approval of the last of the reserved matters to be approved.
- 3) Details of the landscaping of the site (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development begins and the development shall be carried out as approved.
- 4) The details to be submitted in accordance with condition 3 hereof shall make specific provision for a biodiversity/ecology enhancement scheme.
- 5) The landscaping scheme submitted in accordance with condition 3 hereof shall include details of all screen walls, fences, surface treatments to drives, cycle and footways, tree and shrub planting including treatment of the landscaped buffer areas with provision for tree planting to be carried out prior to the commencement of development.
- 6) Provision shall be made before any dwelling is occupied for the storage of refuse in relation to that dwelling in accordance with a scheme to be submitted to and agreed in writing by the Local Planning Authority prior to the commencement of the development
- 7) No development shall take place within the appeal site until the applicant, or their agents or successors in title, has secured the implementation of a programme of archaeological work in accordance with a written scheme of investigation which has been submitted by the applicant and approved in writing by the local planning authority. The details shall include an archaeological field evaluation of the development area to accompany the reserved matters application; provision for preservation in situ of

archaeological remains identified as of national importance; further archaeological investigation in areas identified as of archaeological significance; and an archaeological watching brief in areas identified as of potential archaeological significance.

- 8) If during the course of the works hereby approved medieval artefacts or structural remains are uncovered, the local planning authority shall be notified immediately and no works affecting such features shall take place until they have been inspected by persons authorised by the local planning authority and a scheme for their retention and/or treatment agreed in writing.
- 9) Notwithstanding any details shown on the submitted plans full details of the following matters shall be submitted to and approved by the local planning authority in writing before the development is commenced. The development shall not be undertaken other than in full accordance with the approved details. Schedule: - Cills and headers; gates to undercroft accesses to parking areas; rainwater goods; doors and windows including colour finishes; cycle parking; dormer windows and rooflights; canopies over doors; sample panel of rendered stucco finish(to include texture and colour finish); and boundary treatments, including walls, fences and other means of enclosure.
- 10) No development shall take place until samples of the materials to be used in the construction of the external surfaces of the building hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 11) Details of any external lighting shall be submitted to and approved in writing by the local planning authority before the first building is occupied. Development shall be carried out in accordance with the approved details.
- 12) Details of retaining walls shall be provided in accordance with a scheme to be approved in writing by the local planning authority beforehand. Such retaining walls shall be provided before the occupation of the property to which they relate.
- 13) The design of the foundations for the proposed development shall take account of both nearby trees and any approved landscaping or tree planting as part of the application, and must be as prescribed in appropriate guidelines (BS 5837:2005, BRE Digests 240:1980, 298:1985 and NHBC Standards, Chapter 4.2) as a minimum standard. The foundations must be constructed to withstand any influence of existing trees or proposed landscape vegetation with regard to future potential indirect/direct tree related building damage. No development shall take place until there has been submitted to and approved in writing by the local planning authority full details of the proposed foundations to include their dimension and position in relation to existing ground levels.
- 14) Any new gates/doors abutting the highway shall not open over the highway and shall be made to open inwards only.
- 15) The development hereby permitted shall not be occupied until the access, turning area and parking facilities shown on the approved plan have been

properly consolidated, surfaced, drained and otherwise constructed in accordance with details to be submitted to and approved in writing by the local planning authority before development commences. These areas shall thereafter be retained and kept available for those uses at all times.

- 16) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any order revoking, re-enacting or modifying that Order), no windows/dormer windows [other than those expressly authorised by this permission] shall be constructed on the elevations or roofs of dwellings hereby approved.
- 17) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any order revoking, re-enacting or modifying that Order), the dwellings hereby approved shall not be extended nor curtilage buildings erected.
- 18) The development hereby approved shall not commence until a scheme for the disposal foul and surface waters has been submitted to and approved in writing by the local planning authority. The scheme shall be implemented in accordance with the approved details before the approved use is first operational and shall incorporate measures to include sustainable urban drainage techniques.
- 19) No demolition or construction work shall take place outside the following times: 0800 to 1800 hours from Monday - Friday and 0900 to 1300 hours on Saturdays. There shall be no working on Sundays or bank holidays.
- 20) Construction of the dwellings hereby permitted shall not commence until space for the parking of vehicles visiting the site for the purposes of its development has been provided in accordance with a scheme to be submitted to and approved in writing by the local planning authority. The parking space shall be retained until all construction work has been completed
- 21) Construction of the dwellings hereby permitted shall not commence until wheel washing facilities have been provided in accordance with a scheme to be submitted to and approved in writing by the local planning authority. The wheel washing facilities shall be retained until all construction work has been completed.

Mrs A Fairclough

Inspector

## APPEARANCES

### FOR THE LOCAL PLANNING AUTHORITY:

Michael Bedford of Counsel

Instructed by Doreen Porter, Legal and Democratic Services Manager, Worcester City Council

He called  
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He called  
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## DOCUMENTS

- 1 Letter of Notification
- 2 Statement of Common Ground
- 3 Unilateral Undertaking
- 4 Conservation Area Plan