Section 78 Town and Country Planning Act 1990

Appeal by W. Morrison (Cheltenham) Ltd and the Trustees of the Carmelite Charitable Trust

LPA Reference: 20/00683/OUT

Planning Inspectorate Reference: App/B1605/W/20/3261154

Land adjacent to Oakhurst Rise, Cheltenham

Outline application for 43 dwellings including access, layout and scale, with all other matters reserved for future consideration

Closing Submission on behalf of the LPA

Introductory Points

1. The principle of some form of development on the application site is not contested by the LPA. The site is an allocation within the recently adopted Cheltenham Plan (July 2020). Policy HD4 of the plan provides for a minimum of 25 dwellings subject to master planning to demonstrate that any development can be achieved in accordance with the requirements specified within the policy.

2. One such requirement is that the layout and form of any development must respect the character, significance and setting of heritage assets that may be affected by the development.

3. Heritage assets that are affected by the development include Ashley Manor Grade II*, Charlton Manor Grade II, Glen Whittan non-designated and the Ice House non-designated but curtilage listed to Ashley Manor.

4. The LPA and the Appellant are agreed that the proposed development will cause less than substantial harm to Ashley Manor, Charlton Manor and Glen Whittan. The LPA has not sought to make a case in respect of harm to the Ice House.

5. The LPA also assert that the proposals in respect of their layout and form also fail to respect the character, significance and setting of the heritage assets and consequently are in conflict with policies HD4 and SD8 (JCS) of the development plan.

6. The Appellants case in respect of heritage is that the less than substantial harm is “at the low end” and when applying the balancing exercise required by paragraph 196 of

the NPPF, that the public benefits the development will bring outweigh the less than substantial harm caused by the development to the designated heritage assets. The LPA do not agree.

The impact on the heritage assets

7. A central feature of the development proposal is the creation of a substantial and continuous tree belt of some length. The aim of this barrier in the appellant's words (CD K1 – paragraph 2.11) is to "visually contain the new housing development" which in their view will form a "new wider setting to the two listed buildings". This is their less than substantial harm.

8. The effect of this substantial tree belt will be to create a considerable barrier, clearly hiding the new development behind it as it grows and matures but also removing all of the site behind the trees from the setting of the heritage assets. Visually to the eye when viewing the plan of the development (CD C12 page 9) this is well over one-half of the site although Mr Frampton claims it is no more than 51%. In any event it is more than one-half.

9. In terms of the setting of both Ashley Manor and Charlton Manor the evidence of Mr Holborow is clear, the impact of this tree belt will diminish the former open setting and sense of openness to the north-west of Ashley Manor and to the west of Charlton Manor (CD H4 paragraphs 6.3 & 6.4).

10. The LPA's concerns with the proposals go beyond the visual impact of the tree barrier. The LPAs evidence is that the appellant's proposal to simply hide the new development from the heritage assets fails to sufficiently heed guidance from Historic England and in so doing is producing a layout and form of development that is not appropriate within the setting of these heritage assets. This failure, in the evidence of Mr Holborow, also causes less than substantial harm to the heritage assets and amounts to a failure to respect the heritage assets as required by HD4.

11. Mr Grover in his evidence (CD H1 Paragraphs 3.32 and 3.35) provided that he had had due regard to Historic England's "Historic Environment Good Practice Advice GPA 2 - Managing Significance in Decision-Taking in the Historic Environment" (CD H16) and "GPA 3 - The Setting of Heritage Assets" (CD H17) when providing his advice on the layout and form of the development. In cross-examination Mr Grover was referred to these documents, and in particular requirements relating to, amongst other things, the size and the density of the development in relation to existing and neighbouring uses, the staged approach within GPA 3 which included ways to maximise enhancement and avoid harm to heritage assets. Unfortunately,

there are no enhancements proposed to the designated heritage assets. There is a minor benefit to the ice house although, the appellant's position on the status of this structure, following Mr Frampton's evidence, is now unclear.

12. In respect of GPA 3, Mr Grover confirmed that he was also cognisant of paragraph 40 which advises that screening ought never to be regarded as a substitute for well designed developments within the setting of heritage assets.

13. It is submitted that the layout and form of development in this appeal should be contrasted with the advice provided by Historic England in these documents. Does it reflect this advice?

14. In his evidence, Mr Holborow considered that if the Historic England advice were adequately followed the resulting layout and form would not be required to hidden by a continuous and substantial tree barrier because it would be more reflective of the Battledown area and the setting of the heritage assets. Mr Holborow believed this to be important due to the fact that the appeal site falls within the Battledown character area (CD H24 & CD H4 paragraph 6.1). Unfortunately, the proposed development is of a similar format and scale to that of Ewens Farm which is the post-war housing development to the west of the site. This is confirmed by the appellant's DAS (CD A36). Mr Holborow's evidence (CD H4 Paragraphs 5.2.2 – 5.2.4) confirms the contrast with the setting of the heritage assets within Battledown which does not relate positively to the surroundings of the heritage assets (CD K4 Paragraph 7).

15. Mr Holborow's evidence was that a less intensive from of development, closer to 25 houses would permit a layout and form that would have a more sympathetic relationship with the setting of the heritage assets (CD H4 Paragraph 7). That is not to say that development should be limited to 25 or 26 houses. The evidence of both Mr Holborow and Mr Williams was clear that a figure greater than 30 was entirely possible. The LPA's case in respect of concerns with the layout including form, car parking and possible over-development were clearly outlined in the proofs of evidence of Mr Holborow and Mr Williams.

16. The key to the layout and form respecting the heritage assets was masterplanning as provided by policy HD 4 (CD D4). The National Design Guide (CD J31) recommends a holistic approach to masterplanning however the DAS here (CD A36) has one scheme. In cross-examination Mr Frampton was invited to provide detail as to the steps taken to arrive at the figure of 43 dwellings. Although Mr Frampton advised that there was an input from a range of professionals to produce the final proposal whether a higher or lower number than 43 or alternative layouts were considered is not clear.

17. The appellant agrees that the proposal causes less than substantial harm. In respect of designated heritage assets there are three categories of harm; there is substantial harm, less than substantial harm and no harm. There are no sub-categories of harm, less than substantial harm is less than substantial harm. This is the position as established by the case of **R.(On the application of Shimbles)v Bradford MDC [2018] EWHC 195 (Admin) (CD L22)**. This approach was confirmed in the more recent case of **R.(On the application of James Hall and Company Limited) v Bradford MDC [2019] EWHC 2899 (Admin) (CD L15)** where HHJ Belcher at paragraph 34 provided:

    "In my judgment the three categories of harm recognised in the NPPF are clear. There is substantial harm, less than substantial harm and no harm. There are no other grades or categories of harm, and it is inevitable that each of the categories of substantial harm, and less than substantial harm will cover a broad range of harm. It will be a matter of planning judgement as to the point at which a particular degree of harm moves from substantial to less than substantial, but it is equally the case that there will be a number of types of harm that will fall into less than substantial, including harm which might otherwise be described as very much less than substantial. There is no intermediate bracket at the bottom end of the less than substantial category of harm for something which is limited, or even negligible, but nevertheless has a harmful impact. The fact that the harm may be limited or negligible will plainly go to the weight to be given to it as recognised in Paragraph 193 NPPF. However, in my judgment, minimal harm must fall to be considered within the category of less than substantial harm".

    This case confirms the point on there are only three types of harm and no sub-classifications. However, the case also suggests that there is a spectrum within each category of harm and where the harm falls on this spectrum will relate to the weight to be given to it as referred to in paragraph 193 of the NPPF. In the LPA's submission it is important therefore to look to the cause of the less than substantial harm to assist with defining that point on the spectrum.

    The appellants consider the harm equates to the tree belt and is at the low end of the scale. It is the LPA case that the harm is wider than the tree belt and also includes the wider layout and form of the development which is to be constructed within the setting of the heritage assets and is significant.

18. The appellant's in their case for suggesting harm at the low end of less than substantial harm make this a finding for both Ashley Manor and Charlton Manor despite one building being Grade II* and one Grade II. Mr Holborow has assessed the designated heritage assets in conjunction with their status and believes that although magnitude of impact in both cases is minor having regard to the differing status of the two assets overall impact is moderate to take account of the greater weight impact on Ashely Manor as a grade II* listing.

19. The LPA submits, that by causing less than substantial harm, in the manner described, the proposed development fails to respect the character, significance and setting of the heritage assets as required by policy HD4.

The Planning Balance

20. Paragraph 196 of the NPPF provides "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use" and in weighing that harm paragraph 193 of the NPPF provides "When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance".

21. A balancing exercise is therefore necessary. However, it is the LPA's case that in undertaking that exercise, at the outset the competing interests of conservation of heritage assets and public benefit are not equal. There is a strong statutory presumption against development which neither enhances or preserves. This can be seen from the case of **East Northamptonshire DC v Barnwell Manor Wind Energy [2015] 1 WLR 45 (CD L21).** In the case of **R.(Forge Field Society) v Sevenoaks DC [2014] EWHC 1895 Admin** Lindblom J, as he was, provided the following analysis:

"46. As the Court of Appeal has made absolutely clear in its recent decision in Barnwell, the duties in ss.66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in Barnwell it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight

22. A finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted, it is not just a material consideration. Although, it is not irrebuttable. This is the start line for the balancing exercise required by Paragraph 196.

23. It is agreed between the appellant's and the LPA that the proposed development brings a with it a number of public benefits. These include market housing, affordable housing, the availability of self-build plots and others which are listed in the SoCG between the appellant and the LPA. The LPA cannot demonstrate a 5 year housing land supply and Cheltenham like other areas faces significant challenges in respect of the supply and availability of affordable housing and the problem for Cheltenham is acute. There are also challenges in respect of the supply of self-build plots. On this basis the LPA agrees that the public benefits brought by this development will be substantial.

24. However, this does not automatically mean that these benefits outweigh the harm to the heritage assets. The conservation of heritage assets carries great weight and with reference to paragraph 193 of the NPPF the more important the asset the greater the weight should be. Ashley Manor is listed as Grade II*; this places it in the top 8% of listed buildings in the country. It is submitted the weight which this asset attracts in terms of conservation should be considerable.

25. In considering the balancing exercise, and as was said in opening it is not, insofar as the LPA submit, a balance between the benefits of 43 dwellings and no dwellings and thus no benefits. The site is allocated with a minimum of 25 dwellings, so it will deliver. It will deliver benefits with a better layout and form which reduces the negative impact on the heritage assets although as the number of houses reduces from 43 the benefits will reduce proportionately as well

26. Consequently, it is accepted that this approach will mean less market houses and less affordable houses. However, planning is about more than emotional arguments, although they have their place. The protection of designated heritage assets requires rational decisions based on policy, fact and analysis.

27. The appellant has made reference to a number of appeal decisions where inspectors have found that the balance lies with the public benefits under paragraph 196 rather than with the less than substantial harm to the designated heritage asset. Appeal decisions, by their nature are based on their own individual facts, and, as there are other appeal decisions which find that the benefits outweigh the harm there are also decisions which do not. One such decision can be found in the core documents (CD L20); Appeal 3246937 – Land at Swinley Field, Maisemore, Gloucester. In this case the less than substantial harm was found to outweigh the public benefits even though the local planning authority, Tewkesbury BC, could not demonstrate a 5 year housing land supply.

28. In respect of the test under paragraph 196, do the benefits of the current proposal outweigh the harm to the heritage assets? The, LPA submits that they do not.

29. As indicated above the LPA cannot demonstrate a 5 year housing land supply. It is the LPAs submission that paragraph 196 of the NPPF provides a clear reason for refusal in terms of paragraph 11d(i) of the NPPF. Therefore, for the purposes of the balancing exercise under paragraph 196 the tilted balance will not apply (See .

30. If there is a finding that the public benefits of the proposed development do outweigh the heritage harm the tilted balance would apply.

31. Notwithstanding the tilted balance and the weight of the public benefits a conflict with the requirement to respect the heritage assets under policy HD4 still provides a sound reason for refusal of the application. The LPA submit that such a finding would amount to the harm of the proposals significantly and demonstrably outweighing the benefits of the proposal and by virtue of paragraph 11d(ii) of the NPPF and once more, the tilted balance, would not apply.

Conclusion

32. For the reasons submitted above the Inspector is invited to dismiss the appeal proposals and refuse the appellants planning application.

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