
Appeal Decision

Hearing Held on 18 August 2020

by Zoe Raygen Dip URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th September 2020

Appeal Ref: APP/T4210/W/19/3242597

Andrew Textile Industries Ltd, Walshaw Road, Bury BL8 1NG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Andrew Textile Industries Ltd against the decision of Bury Metropolitan Borough Council.
 - The application Ref 64720, dated 26 September 2019, was refused by notice dated 22 November 2019.
 - The application sought planning permission for an outline application for the demolition of all existing buildings and erection of up to 108 no. dwellings with new vehicle and pedestrian access, landscaping and associated works and details of access (matters of layout, scale, appearance and landscaping are reserved) without complying with a condition attached to planning permission Ref 64128, dated 31 July 2019.
 - The condition in dispute is No 17 which states that: The development authorised by this permission shall not begin unless and until the Local Planning Authority has approved in writing a scheme to secure 25% Affordable Housing provision. The scheme for affordable housing shall include a mechanism for delivery, in accordance with policy H4/1 – Affordable Housing and its associated SPG5 – Affordable housing Provision in New Residential Developments. The scheme shall be submitted as part of the reserved matters application and the affordable housing provision shall be delivered in full accordance with the approved details.
 - The reason given for the condition is: To ensure that the development would contribute to satisfying the need for affordable housing provision pursuant to Bury Unitary Development Plan Policy H4/1 – Affordable Housing and the associated Development Control Policy Guidance Note 5 – Affordable Housing Provision in New Residential Developments.
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Decision

1. The appeal is allowed and planning permission is granted for an outline application for the demolition of all existing buildings and erection of up to 108 no. dwellings with new vehicle and pedestrian access, landscaping and associated works and details of access (matters of layout, scale, appearance and landscaping are reserved) at Andrew Textile Industries Ltd, Walshaw Road, Bury BL8 1NG in accordance with the application Ref 64720, dated 26 September 2019, without compliance with condition number 17 previously imposed on planning permission Ref 64128, dated 31 July 2019 and subject to the conditions as set out on the attached schedule, including an amended condition 17.

Preliminary matter

2. In response to travel restrictions currently in place due to the COVID-19 pandemic, I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the information already available, supplemented by additional evidence at the hearing. The main parties have agreed to the appeal proceeding on this basis.

Background and Main Issue

3. Planning permission was granted for the erection of up to 108 no. dwellings with new vehicle and pedestrian access, landscaping and associated works and details of access (matters of layout, scale, appearance and landscaping are reserved) at the appeal site¹. Condition 17 of that planning permission required that the Council approve in writing a scheme to secure 25% Affordable Housing provision.
4. The appellant considers that Vacant Building Credit (VBC) should apply to the proposal, which would have the effect of reducing the amount of affordable housing provided below that required by the appealed condition. Therefore, a S73 application was submitted to "vary" the condition on the original permission to allow for VBC to be taken into account when determining the amount of affordable housing to be provided on the site.
5. The Council refused that planning application as it considered that the appellant had failed to demonstrate that the building had not been vacated for the sole purpose of redevelopment.
6. In that context, the main issue in this case is whether the appealed condition is necessary and reasonable having regard to VBC provisions and national planning policy and guidance.

Reasons

7. Policy H4/1 of the Bury Unitary Development Plan 1997 (UDP) states that the Council will encourage the provision of affordable housing through negotiation, partnership agreements and the identification of land suitable for such purposes. There will be a particular emphasis given towards encouraging the development of affordable housing as an integral part of large housing developments.
8. The Council's Development Control Policy Guidance Note 5: Affordable Housing Provision in New Residential Developments 2004 (DCPGN) requires that on housing developments of 25 or more houses, 25% should be provided as affordable homes. That is reflected in the wording of the appealed condition No 17. The proposal before me now, which would have the effect of reducing the level of affordable homes on the appeal site to less than 25%, would be contrary to Policy H4/1 and the DCPGN.
9. Planning law requires that applications be determined in accordance with the development plan, unless material considerations indicate otherwise. Both the National Planning Policy Framework (the Framework) and associated Planning Practice Guidance (PPG) which both post-date adoption of the development plan and the DCPGN, are material considerations in this case. Paragraph 63 of the Framework states that "*to support the re-use of brownfield land, where vacant*

¹ Ref 64720 (the original permission)

buildings are being reused or redeveloped, any affordable housing contribution due should be reduced by a proportionate amount". This is reiterated in the PPG which confirms that national policy provides an incentive for brownfield development on sites containing vacant buildings, cross referencing back to paragraph 63 of the Framework². This is a clear statement of national policy to be applied by Councils within the wider application of the S.38 (6) development plan balance.

10. The footnote to paragraph 63 of the Framework explains that VBC does not apply to buildings that have been abandoned. As such, the application of VBC is not a blanket policy to apply to all vacant buildings on brownfield land. However, there is no suggestion here that the building has been abandoned. Instead the Council maintains that the appellant has failed to demonstrate that the building has not been vacated for the sole purpose of redevelopment, a matter which the PPG suggests may be appropriate for authorities to consider when having regard to the intention of national policy. In essence, the Council considers that this is not a vacant building for the purposes of VBC.
11. There is no definition of vacant for the purposes of VBC, within legislation or the PPG. In the absence of such, the Council has used three criteria to assess whether or not the building is vacant for the purposes of VBC: the reason the previous occupier left the building; the length of time it has been vacant; and the period of marketing.
12. In two letters from Lydall (the previous occupiers of the building) it is confirmed that the company vacated the building on the appeal site as it was no longer suitable for their business needs. The Council does not dispute this and, having viewed the evidence, I see no reason to disagree. Indeed, this is not a case where the company ended its tenancy early. Rather, the tenancy came to an end and the company chose not to renew. On that basis, I am satisfied that the building has not been vacated solely for redevelopment purposes.
13. The Council requires details of marketing to demonstrate that no other potential employment uses, or any alternative users, would be interested in the building or the site. It suggests that if a site was offered to market and there were many interested parties in the site, there would not be a need to incentivise development of the site through the application of VBC and, on the other hand, if there was no interest, that might be an indication that the site would require incentivising. However, it couldn't be ruled out that persons interested in the site during any marketing process may expect to benefit from VBC. In any event, such considerations are of little relevance in this instance given that the site benefits from an existing planning permission for residential development. Additionally, the Council's Employment Land Review 2013 (ELR) concluded that the site was an inappropriate location for employment use, based on site access, amenity of adjacent occupiers, local facilities for the workforce and whether the site was suitable for alternative uses.
14. I appreciate that the ELR relates to the site as a whole, rather than the building itself. However, the officer's report regarding the original scheme for 108 dwellings confirms that the proposal meets the requirements of Policy EC2/2, which requires clear demonstration that an existing employment site or premises is no longer suited in land use terms to continued employment use. Moreover, the Council confirmed at the hearing that the requirement to demonstrate at

² Paragraph: 026 Reference ID: 23b-026-20190315

- least 12 months marketing applies to planning applications on employment sites that are considered suitable in land use terms for continued employment use, which this site is not.
15. Turning to the length of time the building has been vacant, again I am far from convinced that this has any material bearing in terms of demonstrating that the building has been vacated solely for redevelopment purposes. A building may have been vacated for a day or a year, but the reasons behind its vacancy may be very different. In this instance it is clear that the building, and wider site, were no longer fit for the previous occupier's purpose.
 16. I recognise that the appellant sought pre-application advice regarding VBC in July 2018 well before the building was vacated. However, this was in the knowledge that the current tenants would not be renewing the lease due to site inadequacies.
 17. In addition, delaying the development of the site for up to three years, as suggested by the Council in aligning its view of vacancy with the test for determining whether a building is "in-use" within the Community Infrastructure Levy Regulations 2010 (CIL), means that the intention of national policy to incentivise development of brownfield land would be materially undermined. While there may be some potential for a developer to be in receipt of two incentives to development if the two regimes were not aligned, since the Borough does not have a CIL charging regime, the appellant would not be able to apply for the two incentives in this case.
 18. The Council referred me to Bath & North East Somerset Council's Guidance notes on applying VBC to affordable housing contributions which uses the CIL definition of "in-use" to ascertain whether a building is vacant for the purposes of VBC. However, this is a document from a different Council, and I am not aware of the process undertaken in the preparation and adoption of the document, or whether the particular circumstances that might prevail in that authority are directly comparable to the situation in Bury.
 19. There is no dispute between the parties that VBC exists to incentivise brownfield development. Although the officer's report worded it as being to "incentivise brownfield land that might not otherwise come forward", it confirmed at the hearing that it was not pursuing a viability case. It did not therefore, require the appellant to demonstrate that the site would not otherwise come forward unless VBC were applied.
 20. However, the Council also suggests that as well as incentivising brownfield land, the intention of national policy as referred to in the PPG³ is the provision of affordable housing. This is because the reference to VBC within the Framework is contained within the section which deals with affordable housing.
 21. I heard considerable evidence regarding the need for affordable housing in Bury and this is not disputed by the appellant. I do not doubt therefore that there is a pressing need, particularly given extensive Green Belt constraints in the Borough. As a result, many of the sites in the Borough are brownfield, and if VBC were to be applied to all of them then there would be a serious shortfall of affordable housing. The Council suggest therefore that it should not be correct

³ Paragraph:028 Reference ID:23b-028-20190315

that the incentive to develop brownfield land granted by VBC would always outweigh affordable housing.

22. Yet, it states in the Framework that any affordable housing contribution **should** be reduced by a proportionate amount (my emphasis). This seems clear to me that there is an acceptance that the level of affordable housing would be reduced where development involves re-use or redevelopment of vacant buildings on brownfield sites. I accept that paragraph 28 of the PPG provides supporting guidance, which gives the decision maker some limited discretion as to whether VBC applies. The Council has chosen to interpret this through application of the three criteria referred to earlier. It confirmed at the hearing that the appellant would not need to meet all three of those criteria in order for the building to be considered vacant. It is clear that one of those criteria is fulfilled. In relation to the other two, I am firmly of the view, in this instance, given the specific characteristics of the site and the existing planning permission on site, that they do not serve any practical purpose.
23. While therefore the application of VBC is not a blanket policy and it may not be applicable to all vacant buildings on brownfield sites, in this instance, based on the evidence before me I am satisfied that the building has not been made vacant solely for the purpose of redevelopment. Consequently, VBC should be applied to the proposal in accordance with paragraph 63 of the Framework.

Other matters

24. Comments that have been raised by interested parties relate to the principle of housing on the land, and the loss of trees/effect on the environment, together with details relating to the implementation of the extant planning permission. As the site already has outline planning permission for housing it will be for the Council to consider the detailed issues in any submission for reserved matters. My consideration has been solely based on condition 17 and the principle of the application of VBC when considering the quantum of affordable housing required on the site.

Planning balance and conclusion

25. In not providing a policy compliant level of affordable housing, the proposal would be contrary to the development plan as a whole. However, in this instance the Framework and the PPG, which post-date the development plan and the Council's DCPGN and introduce the concept of VBC are a significant material consideration sufficient to outweigh the conflict with the development plan whether or not Policy H4/1 is up to date.
26. In this instance therefore, I conclude, that a condition securing affordable housing is necessary. However, the way the existing condition is worded is not reasonable as it takes no account of the application of VBC. Therefore on balance, the appeal should be allowed and condition 17 amended to take account of VBC.

Conditions

27. The guidance in the PPG makes clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. It was agreed at the hearing that all of the conditions that were imposed on the original planning permission should be imposed should be appeal be allowed as work has not started at the

- the site shall be submitted to, and approved in writing by, the Local Planning Authority;
- ii) Where actual/potential contamination and/or ground gas/landfill gas risks have been identified, detailed site investigation and suitable risk assessment shall be submitted to, and approved in writing by the Local Planning Authority;
 - iii) Where remediation/protection measures is/are required, a detailed Remediation Strategy shall be submitted to, and approved in writing by, the Local Planning Authority.
- 5) No development shall commence unless and until:-
- i) An intrusive site investigation report to assess the actual/potential coal mining risks shall be submitted to and approved in writing by the Local Planning Authority;
 - ii) Where actual/potential coal mining risks have been identified, detailed site investigation and suitable risk assessment shall be submitted to, and approved in writing by the Local Planning Authority;
 - iii) Where remediation/protection measures is/are required, a detailed Remediation Strategy shall be submitted to, and approved in writing by, the Local Planning Authority.
- 6) Following the provisions of Conditions 4 and 5 of this planning permission, where remediation is required, the approved Remediation Strategy must be carried out to the satisfaction of the Local Planning Authority within agreed timescales; and A Site Verification Report detailing the actions taken and conclusions at each stage of the remediation works, including substantiating evidence, shall be submitted to and approved in writing by the Local Planning Authority prior to the development being brought into use.
- 7) Prior to the commencement of the development hereby approved, a scheme for the provision of electric vehicle charging points shall be submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be implemented prior to occupation of the building hereby approved.
- 8) No development shall commence unless and until surface water drainage proposals have been submitted to and approved in writing by the Local Planning Authority. The scheme should be in accordance with the submitted Surface Water Sustainable Drainage Assessment and must be based on the hierarchy of drainage options in the National Planning Practice Guidance and be designed in accordance with the Non-Statutory Technical Standards for Sustainable Drainage Systems (March 2015). This must include assessment of potential SuDS options for surface water drainage with appropriate calculations and test results to support the chosen solution. Details of proposed maintenance arrangements should also be provided. The approved scheme only shall be implemented prior to first occupation and thereafter maintained.
- 9) Foul and surface water shall be drained on separate systems.
- 10) As part of the reserved matters application, an updated bat assessment shall be submitted to and approved in writing by the Local Planning Authority. Any required mitigation measures shall be fully implemented

- prior to the commencement of the demolition works and remain in situ on the site for an agreed period of time.
- 11) No works to trees or shrubs shall occur between the 1st March and 31st August in any year unless a detailed bird nest survey by a suitably experienced ecologist has been carried out immediately prior to clearance.
 - 12) No development shall commence until full details of a scheme for the eradication and/or control of Japanese Knotweed (*Fallonica Japonica*, *Rouse Decraene*, *Polygonum Cuspidatum*) and Himalayan Balsam (*Impatiens Glandulifera*) is submitted to and approved in writing by the Local Planning Authority. The approved management plan shall include a timetable for implementation and be implemented in accordance with that timetable. Should a delay of more than one year occur between the date of approval of the management scheme and either the date of implementation of the management scheme or the date of development commencing, a further site survey must be undertaken and submitted to the Local Planning Authority.
 - 13) As part of the first reserved matters application, a detailed proposal to compensate for the loss of on-site biodiversity will be submitted to and approved in writing by the Local Planning Authority. The off-set mitigation proposal shall include:
 - i) Full details of the off-set requirement resulting from the loss of habitats on the development site utilising the Defra off-set matrices version 2 or equivalent;
 - ii) Identification of a receptor site;
 - iii) Habitat enhancement and creation proposals on the receptor site;
 - iv) Full details of the off-set benefits from the habitat enhancement and creation proposals utilising the Defra off-set matrices version 2 or equivalent that demonstrate a minimum of 5% net gain;
 - v) A management and monitoring plan for a period of 25 years. The approved scheme shall be implemented in full in accordance with an agreed timetable.
 - 14) As part of the first reserved matters application a bird box scheme, which shall include a timetable for implementation, will be provided to and agreed in writing by the Local Planning Authority targeting local and national priority species such as house sparrow, starling, swift and house martin as well as generalist next boxes to benefit a wider range of species. The scheme shall be implemented in accordance with the agreed timetable.
 - 15) All trees to be retained on site shall be protected in accordance with BS 5837:2012 "Trees in relation to design, demolition and construction". The development shall not commence unless and until the measures required by the British Standard are implemented and all measures required shall remain in situ until the development has been completed.
 - 16) In the event of the development comprising 10 units and a combined floorspace of more than 1000 square metres or 11 units or more (regardless of floorspace), the development authorised by this permission shall not begin unless and until the Local Planning Authority has approved in writing a scheme to secure recreation provision, which shall include a mechanism for delivery, in accordance with policy RT2/2 – Recreation Provision in New Housing Development and its associated SPD1 – Open

Space, Sport and Recreation Provision in New Housing development. The scheme shall be submitted as part of the first reserved matters application and the recreation provision shall be delivered in full accordance with the approved details.

- 17) No development shall take place until a scheme for the provision of affordable housing as part of the development shall have been submitted to and approved in writing by the Local Planning Authority. The affordable housing shall be provided in accordance with the approved scheme and shall meet the definition of affordable housing in Annex 2: Glossary of the National Planning Policy Framework or any future guidance that replaces it. The scheme shall be submitted as part of the first reserved matters application and shall include:
- i) the numbers, type, tenure and location on the site of the affordable housing provision to be made. The level of affordable housing provision shall be in accordance with policy H4/1 – Affordable Housing and its associated SPG5 – Affordable Housing Provision in New Residential Developments subject to the application of Vacant Building Credit in relation to the existing vacant building on site (as at the date of the grant of this permission);
 - ii) the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing;
 - iii) the arrangements for the transfer of the affordable housing to an affordable housing provider or the management of the affordable housing;
 - iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and
 - v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.
 - vi) A mechanism for delivery of the scheme

The affordable housing shall be retained in accordance with the approved scheme.

- 18) As part of the first reserved matters application, a scheme to improve Bridleway No. 143, Bury, shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall include:
- i) The removal of vegetation and debris build up at the edges to the path;
 - ii) The re-surfacing of the section of the Bridleway from Moreton Drive to the adopted highway at Leigh Lane (Currently, there is 60 metre bitmac surface and the remainder is crushed stone) The approved works shall be completed in accordance with a timetable to be agreed with the Local Planning Authority within the submission.
- 19) As part of the first reserved matters application, a Framework Residential Travel Plan shall be submitted to and approved in writing by the Local Planning Authority. The Plan shall include:
- i) A range of measures promoting a choice of transport mode and a clear monitoring regime with agreed targets;
 - ii) A travel plan budget and resources for the implementation and day to day management of travel plan measures;

- iii) Appropriate management structures;
- iv) Detailed time frames for the delivery;
- v) Handover arrangements for the travel plan or its components when the developer's responsibility ceases;
- vi) Targets and monitoring arrangements.

A full Travel Plan Strategy shall be submitted to the Local Planning Authority within 6 months of first occupation. The approved Full Plan shall be retained thereafter.

- 20) Notwithstanding the details indicated on approved plan reference 2313-F01 Revision A and Illustrative Masterplan reference 1932-VW-002-06-Masterplan Revision P01, full details of the following highway aspects shall be submitted on a topographical based survey of the site and adopted highways at first reserved matters application stage:
- i) Dilapidation survey, to a scope to be agreed, of the footways and carriageways abutting the site in the event that subsequent temporary and permanent remedial works are required following demolition/construction of the development;
 - ii) Formation of the proposed site access onto Walshaw Road to a specification to be agreed, incorporating the full reconstruction of the footway abutting the site, reinstatement of the redundant westerly industrial access, relocation/replacement of the affected street lighting column and road gully, provision of dropped crossing facilities for pedestrians and appropriate tactile paving in positions to be agreed, removal of the existing Armco barrier, demarcation of the limits of the adopted, measures to improve the ability to cross Walshaw Road to access the bus stop opposite the site and all associated highway and highway drainage remedial works;
 - iii) Review of existing /provision of new waiting restrictions in the vicinity of the junction of the site access with Walshaw Road;
 - iv) Proposed internal road layout to a specification to be agreed and, in the event that it is intended for the proposed residential estate roads to be adopted, to current adoption standards incorporating 5.5m minimum carriageway widths and 2.0m footway widths;
 - v) Adequate turning facilities within the curtilage of the site and associated swept path analysis;
 - vi) Swept path analysis of the proposed estate roads to ensure a refuse collection vehicle can pass a private car and manoeuvre at all junctions;
 - vii) A scheme of 20mph traffic calming measures on the proposed internal roads to a scope to be agreed, including details of proposed materials, road markings and signage at the interface with the adopted highway and within the development;
 - viii) Provision of visibility splays and forward visibility envelopes at all internal junctions and bends in accordance with the standards in Manual for Streets appropriate for a design speed of 20mph;
 - ix) Provision of long sections and cross sections at positions to be agreed through the proposed estate roads and turning heads to ensure that, in the event that it is intended for the proposed residential estate roads to be adopted, adoptable gradients and minimum 1 in 3 batters

- can be achieved along, and adjacent to, the proposed adopted highways;
- x) Provision of a street lighting assessment of the junction of the site access with Walshaw Road and proposed internal estate roads, and, if required as a result of the assessment, subsequent scheme of improvements on the existing adopted highway;
 - xi) Measures to provide sufficient links to the surrounding pedestrian and cycle network.
 - xii) A timetable for the implementation of the works

The highway works subsequently approved shall be implemented in accordance with the agreed programme.

- 21) No development shall commence unless and until a 'Construction Traffic Management Plan' (CTMP), has been submitted to and approved in writing by the Local Planning Authority and shall confirm/provide the following:
 - i) Access point for demolition/construction traffic from Walshaw Road;
 - ii) Hours of operation and number of vehicle movements;
 - iii) A scheme of appropriate warning/construction traffic speed signage in the vicinity of the site and its access;
 - iv) Arrangements for the turning and manoeuvring of vehicles within the curtilage of the site, including any requisite phasing of the development to accommodate this;
 - v) Parking on site of operatives' and demolition/construction vehicles together with storage on site of demolition/construction materials, including any requisite phasing of the development to accommodate this;
 - vi) Proposed site hoarding/gate positions, including the provision, where necessary of temporary pedestrian facilities/protection measures on the adopted highway and the adjacent Public Right of Way;
 - vii) Measures to ensure that all mud and other loose materials are not carried on the wheels and chassis of any vehicles leaving the site and measures to minimise dust nuisance caused by the operations

The approved plan shall be adhered to throughout the demolition/construction period and the measures shall be retained and facilities used for the intended purpose for the duration of the demolition and construction periods. The areas identified shall not be used for any other purposes other than the turning/parking of vehicles and storage of demolition/construction materials.

- 22) No development shall be commenced unless and until details of the proposed arrangements for future management and maintenance of the proposed estate roads within the development have been submitted to and approved in writing by the Local Planning Authority. The estate roads shall thereafter be maintained in accordance with the approved management and maintenance details until such time as a private management and maintenance company has been established.
- 23) There shall be no direct means of vehicular access between the site and Bridleway No. 143 (Leigh Lane), Bury.

- 24) A minimum hardstanding of 5.5m measured between the highway/estate road boundary and any proposed garage doors shall be provided and thereafter maintained.
- 25) Where dwellings are constructed without a garage, a minimum hardstanding of 5.0m measured from the highway/estate road boundary shall be provided within the curtilage of each dwelling and thereafter maintained.

*****END OF CONDITIONS*****