



Appeal Decision

Site visit made on 27 January 2010

by **Joanna C Reid BA(Hons) BArch(Hons)**
RIBA

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

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Decision date:
18 February 2010

Appeal Ref: APP/Q1445/A/09/2111237

Plots 1 and 2, Land off Braypool Lane, Brighton BN1 8ZH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
- The appeal is made by Mr David Ince against the decision of Brighton & Hove City Council.
- The application Ref BH2009/01170, dated 7 May 2009, was allowed on 22 July 2009 and planning permission was granted subject to conditions.
- The development permitted is "Outline application for the erection of two detached chalet bungalow style dwellings (one storey with rooms in roof level over)".
- The conditions in dispute are No 7 and No 8 which state that:
 - 7 *Unless otherwise agreed in writing by the Local Planning Authority, no residential development shall commence until: (a) evidence that the development is registered with the Building Research Establishment (BRE) under the Code for Sustainable Homes and a Design Stage Report showing that the development will achieve Code level 5 for all residential units have been submitted to the Local Planning Authority; and (b) a BRE issued Interim Code for Sustainable Homes Certificate demonstrating that the development will achieve Code level 5 for all residential units has been submitted to, and approved in writing by, the Local Planning Authority. A completed pre-assessment estimator will not be acceptable.*
 - 8 *Unless otherwise agreed in writing by the Local Planning Authority, none of the residential units hereby approved shall be occupied until a Building Research Establishment issued Final Code Certificate confirming that each residential unit built has achieved a Code for Sustainable Homes rating of Code level 5 has been submitted to, and approved in writing by, the Local Planning Authority.*
- The reason given for conditions 7 and 8 is:

To ensure that the development is sustainable and makes efficient use of energy, water and materials and to comply with policy SU2 of the Brighton & Hove Local Plan and Supplementary Planning Document SPD08 Sustainable Building Design.

Decision

1. I allow the appeal and vary the planning permission Ref BH2009/01170 for "Outline application for the erection of two detached chalet bungalow style dwellings (one storey with rooms in roof level over)" at Plots 1 and 2, Land off Braypool Lane, Brighton, BN1 8ZH, granted on 22 July 2009 by Brighton & Hove City Council, by deleting conditions numbered 7 and 8 and substituting for them the following condition:
 - 1) The dwellings shall achieve Code Level 3 in accordance with the requirements of the Code for Sustainable Homes: Technical guide (or such national measure of sustainability for house design that replaces that scheme). No dwelling shall be occupied until a Final Certificate has been issued for it certifying that Code Level 3 has been achieved.

Procedural matter

2. The appellant's architect, on behalf of the appellant, requested that the description of the proposed development be changed from "erection of two detached dwellings on Plots 1 & 2. Dwellings two storey – 4 bedroom" to "Outline application for the erection of two detached chalet type dwellings (one storey with rooms in roof level over)" by email to the Council on 17 July 2009. The description in the Council's decision notice closely reflects that description, and I have used it in the heading above.

Main issue

3. The main issue is whether the conditions in dispute are reasonable and necessary in the interests of sustainable development.

Reasons

4. The appeal site is within the countryside where there is strict control over development. However, next to the site there are other dwellings and an animal shelter in a ribbon of development along the same side of Braypool Lane. The site is close to the A23 and A27 roads, and it is exposed to substantial road traffic noise. The appellant's acoustic assessment shows that based on the data obtained, noise mitigation measures are a critical part of the development and they will impact on the design criteria. The Council do not object to the development of the site for 2 dwellings as described subject to adequate noise mitigation measures, and I see no reason to disagree.
5. The Development Plan includes *The South East Plan - Regional Spatial Strategy for the South East of England* (SEP) and the saved policies of the *Brighton & Hove Local Plan* (LP). Of the SEP Policies cited, Policy CC4 states that the design and construction of all new development will be expected to adopt and incorporate sustainable construction standards and techniques. Amongst other things it makes clear that when proposing any local requirements for sustainable buildings, local planning authorities must be able to demonstrate clearly the local circumstances that warrant and allow this and set them out in development plan documents (DPD). Saved Policy LP Policy SU2 aims for development to be efficient in the use of energy, water and materials.
6. The Council's Local Development Framework is being prepared, so the Core Strategy and relevant DPD are not in place. The Council's adopted Supplementary Planning Document *SPD08 Sustainable Building Design* (SPD) provides guidance.
7. Sustainable development is the core principle underpinning planning. National policy in Planning Policy Statement: *Planning and Climate Change: Supplement to Planning Policy Statement 1* states that local planning authorities should adhere to a number of principles in determining planning applications. These include that controls under the planning, building control and other regulatory regimes should complement and not duplicate each other.
8. The aim of the Code for Sustainable Homes is to improve the overall sustainability of new homes by setting a single national standard, within which the home building industry can design and construct homes to higher environmental standards. Compliance with the Code Levels, which have been set above the current Building Regulations, is currently voluntary.

9. The conditions in dispute require the dwellings to achieve Code Level 5, which is substantially in excess of the requirements of the current Building Regulations. Condition 7 seeks a Design Stage Report and an Interim Code Certificate. These would only assess the Code Level that would be likely to be achieved. Planning permission would not need to be refused if they were not to be provided, and the time and cost of checking them could be wasteful of the Council's resources. Registration with the Building Research Establishment could prevent the appellant from exercising choice. Thus, Condition 7 would not be reasonable or necessary so it would fail to satisfy the tests in Circular 11/95 *The Use of Conditions in Planning Permissions*. For the very same reasons, the Council's suggested condition 1 would fail the same tests.
10. The requirement for a Final Code Certificate for Code Level 5 is not reasonable, because the Code is voluntary, and the appellant has not offered to achieve this. Furthermore, it is not necessary to satisfy national or Development Plan policy. The reference to the Building Research Establishment would prevent the appellant from exercising choice. Therefore, Condition 8 would not be reasonable or necessary so it would fail to meet the tests in the Circular. Again, the Council's suggested condition 2 would not be reasonable.
11. However, in the light of the appellant's intention to achieve Code Level 3, the anticipated changes to the Building Regulations, the major noise constraints at the site, and saved LP Policy SU2, a new condition for a Final Certificate at Code Level 3 to be submitted before each dwelling is occupied would be reasonable and necessary. It would satisfy the tests in the Circular.
12. I agree that higher Code Levels may not necessarily incur significantly higher costs and that in some cases costs have been reduced. The site comprises greenfield land where the SPD seeks Code Level 5. However, the proposal is also a small-scale development with 2 or fewer residential units where the SPD seeks Code Level 3. There is no adopted DPD which has been subject to independent scrutiny that demonstrates clearly the local circumstances that warrant and allow Code Level 5 at this site. Moreover, the noise at the site will have a serious impact on the design and construction of the dwellings. The Council say that in the event that Code Level 5 could not be achieved, then it would review the condition. This is contrary to the advice in the Circular which is that an unduly restrictive condition can never be made acceptable by offering the prospect of informal relaxation of its effect.
13. I have had regard to my colleague's decision ref APP/Q1445/A/08/2081266, for 24 flats which would benefit from economies of scale. Condition 4 in that proposal requires a scheme which details measures to achieve Code Level 4 or higher or an equivalent level of performance, but requires no Final Certificate. So, that proposal differs in its details from the proposal before me, which I have dealt with on its merits. I conclude that the conditions in dispute are not reasonable or necessary in the interests of sustainable development and I shall delete them, but, for the reasons given above, I shall add a new condition requiring a Code Level 3 Final Certificate to be issued before each dwelling is occupied. It would satisfy saved LP Policy SU2. For the reasons given above and having regard to all other matters raised, the appeal succeeds.

Joanna C Reid

INSPECTOR
