

**LAND EAST OF ALBION ROAD AND NORTH OF COPPER LANE, MARDEN**

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**LPA'S OPENING STATEMENT**

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**INTRODUCTION AND SCOPE OF THE APPEAL**

1. Maidstone Borough Council refused planning permission for the appeal scheme in December 2023, citing 7 reasons for refusal.
2. In March 2024 the Council adopted the Maidstone Borough Local Plan Review 2024 ('LPR'). As a result the appeal site is now allocated for development of "approximately 113 homes" by policy LPRSA295, and has been brought within the amended settlement boundary for Marden. It follows that the principle of development in this location is now established.
3. The appeal was submitted in June 2024. The Council reviewed its position, given the changed local policy context, but maintains that planning permission ought to be refused. Revised reasons for refusal were provided within the Council's statement of case to reflect the fact that the appeal site is now allocated for development and to provide updated policy references.

Reasons for refusal 1 and 2

4. The first reason for refusal has been withdrawn, because it was based on the location of the site in the countryside outside the settlement boundary.
5. The second reason concerned the impacts of the appeal scheme on landscape character and visual amenity. This reason has been substantially amended in view of the changed policy context, and now focusses on the extent to which the appeal

scheme will comply with the allocation policy (LPRSA295), so far as it seeks to address the landscape sensitivities of the site.

#### Reasons for refusal 3 and 4

6. On 17 September 2024 the Appellant submitted amended plans to revise the design of the proposed access on Albion Road and to construct a new footway linking the development into the existing footway at the junction with Seymour Drive. This necessitates a reduction in carriageway width to Albion Road north of the proposed site access, and the introduction of a 46m long “priority working arrangement”.
7. Consultation has been carried out by the Appellant, and the appeal can fairly be determined on the basis of the new plans, applying the approach to appeal amendments laid down in the relevant case law.<sup>1</sup>
8. The amended plans were intended to resolve reasons for refusal 3 and 4, both of which related to highways and access matters. Although Kent County Council (as local highway authority) have said that it is “disappointing” that a more straightforward solution is not being proposed, they have confirmed that the amendments are sufficient to address their concerns. The Council largely agrees. Reason for refusal 4 is withdrawn, and reason 3 is withdrawn in respect of pedestrian access. However the Council maintains that the proposals are unacceptable because they fail to demonstrate that consideration has been given to need to prioritise cyclists.

#### Reasons for refusal 5-7

9. Reason 5 (ecology) remains in dispute between the parties, but only so far as turtle doves and yellowhammers are concerned. As a result of further information provided by the Appellant, the Council accepts that other matters can be addressed via conditions.

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<sup>1</sup> *R (Holborn Studios Ltd) v LB Hackney* [2018] PTSR 997, [2017] EWHC 2823 (Admin)

10. Reason 6 (open space) also remains in issue.

11. Reason 7, relating to the absence of mitigation for the scheme's impact on education services, will be resolved via a s.106 agreement, a draft of which has been agreed.

## **POLICY LPRSA295 AND THE OUTLINE NATURE OF THE APPEAL SCHEME**

12. Paragraph 1 of policy LPRSA295 allocates the appeal site for “the development of approximately 113 dwellings”. It follows that the policy does not set a precise number of homes to be delivered and allows some flexibility. There is no dispute that 117 homes is within the acceptable range indicated by the word “approximately”.

13. It does not follow that any form of development of “approximately 113 homes” will be acceptable on the appeal site. Paragraphs 2 - 22 of policy LPRSA295 contain “conditions” which “are considered appropriate to be met before development is permitted”. Each condition seeks to address the potentially harmful impacts of development and ensure that the allocation will be delivered in an acceptable way. It is clear that these are cumulative requirements, and all of the conditions need to be met. They are all important in striking the balance between the need for new housing and the need to protect the natural environment and the character and appearance of the area.

14. The appeal scheme was submitted as an outline planning application, with all matters reserved save for access. The only matters for determination in this appeal are the details of the two proposed accesses on Albion Road and Copper Lane, and the principle of building up to 117 dwellings within the red line.

15. Outline planning applications are often accompanied by parameter plans or schematic masterplans for determination, to control matters such as which parts of the site are to be developed for housing or to be landscaped; or to control

building heights or densities across the site. Such plans can fix the fundamental elements of a scheme and shape future reserved matter submissions. No such plans have been submitted for determination in this case.

16. Policy LPRSA295 requires that the conditions are met “before development is permitted”. In the case of an outline application, development is “permitted” by the grant of outline consent. That is the planning permission, hence any necessary conditions have to be imposed on the outline consent. Applications for reserved matters approval are not applications for planning permission, and the reserved matters cannot cut down the scope of the outline permission.

17. Several of the conditions in LPRSA295 relate to layout and landscaping, both of which are reserved matters. Whilst it is of course open to an applicant to submit an outline scheme, it is also the case that the policy requires applicants to demonstrate that their proposed scheme of “approximately 113 homes” can and will meet all of the conditions. The policy wording is clear: it is necessary to have certainty about this now, before granting outline planning permission for 117 homes. If the development is permitted, the Council will not be able to withhold reserved matters approval for a 117-home scheme on the basis that, for example, that number of homes and necessary infrastructure leaves insufficient space for the level of landscaping needed to comply with the policy. The acceptable quantum of dwellings would be fixed, with no realistic opportunity to insist that more space is left undeveloped for landscaping.

18. The Council does not suggest that the Appellant must commit, or be held, to the full details of matters which are properly reserved for future determination. That would be inappropriate. But given the terms of the adopted policy, it must be demonstrated that an acceptable detailed scheme can come forward. It is legitimate to assess the illustrative material to decide whether this has been done; indeed that is the only way a conclusion can be drawn. This approach is fully in

line with established authority on the treatment of outline applications: see e.g *Crystal Property (London) Ltd v SSCLG* [2016] EWCA Civ 1265.<sup>2</sup>

## **NON-COMPLIANCE WITH POLICY LPRSA295**

### Ability to comply with landscaping policy conditions

19. It cannot be concluded that the appeal scheme will be able to comply with the conditions of LPRSA295 which relate to landscaping matters, in particular conditions 4, 5, 9 and 10. These conditions all respond to the fact that the site is sloping, is visible from several locations to the south and south east, and is in a sensitive location because it will form the outer edge of Marden once developed.
20. There are four existing ponds in the south of the site. A large attenuation basin would also be required and, given the topography, would also inevitably have to be in the south of the site. The Copper Lane access, with associated visibility splays and thus vegetation loss, is applied for in detail and would be fixed by the grant of permission. Any development of “approximately 113 homes” will see a large part of the site being subject to built development, with further space taken up by necessary infrastructure, internal roads, driveways, domestic gardens and amenity space. It will also be necessary to provide areas of scrub and grassland to mitigate impacts on protected species (in particular, reptiles and turtle doves). All of these elements have an impact on the space left available for structural landscaping.
21. The illustrative material which has been submitted does not adequately demonstrate that it will be possible to design a detailed scheme of 117 homes, with an access on Copper Lane, whilst maintaining an undeveloped buffer to the south of the site, retaining and enhancing existing boundary vegetation and providing structural landscaping along the south and throughout the site. It may be that the conditions of LPRSA295 can only be satisfactorily met with a lower quantum of development than what is proposed. The scheme has not been

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<sup>2</sup> CD xx see para 39 in particular

designed with those conditions in mind and fails to demonstrate how it will be possible to meet them through the reserved matters.

22. It should be concluded that the appeal scheme is in conflict with policy LPRSA295, because at this outline stage it cannot be concluded that all of the conditions will be met.

#### Open space provision

23. The requirements for the different typologies and quantum of open space areas are set out in policy LPRINF1. The precise amounts of open space to be delivered would be a matter for detailed layout at reserved matters stage. However, as already explained, space is constrained given all of the other elements that need to be delivered on this site so there is little wriggle room.

24. The open space calculation originally provided by the Appellant was flawed because it included all of the internal roads and verges as usable open space. A new plan and calculation has been provided with proofs of evidence. The Council maintains this still indicates an under provision of children's play and natural/semi-natural open space. It is unclear how these could be increased without impacting on the quantum of development or the ability to provide other necessary elements of the scheme. As such, compliance with the open space conditions of LPRSA295 cannot be assured at the point of determining whether development should be permitted, and there is conflict with the policy as a result.

### **DESIGN AND DENSITY**

25. Density is a function of the quantum of development and the size of the developed area, and therefore turns on the detailed layout of the scheme. However, the illustrative materials are the only basis for judging whether reserved matters for a 117 dwelling scheme can come forward in an acceptable manner. The illustrative layout plan shows pockets of development at the main site entrance and in the NE corner with densities of almost 60 dph, which would be out of keeping in this edge

of settlement location, particularly where this would be visible on arrival into the village along Albion Road.

26. This would give rise to additional policy conflicts, with LPRSP15 and policy BE1 of the Marden Neighbourhood Plan.

## **CYCLING INFRASTRUCTURE**

27. The amended plans for the main site access and footway link along Albion Road have resolved the key issue of pedestrian accessibility. However, no provision is made for cyclists within the plans and there is little indication that the implications of the priority working arrangement for cyclists have been specifically considered, particularly bearing in mind the relatively long section of priority working proposed.

28. This is not so much a matter of safety, but rather a failure to ensure that cyclists have priority and that provision for them is improved with layouts which encourage cycling and which are direct and convenient. The proposed layout is likely to act as a disincentive to cycling. Cyclists will potentially have to stop and wait for vehicles to travel through the priority arrangement immediately on leaving the site entrance. Other vehicles using the arrangement would include vans and lorries, which are wider than cars. Cyclists using Albion Road (in either direction) may perceive the journey through the priority arrangement as being risky and undesirable due to the potential for close passes from impatient drivers either approaching or coming up behind.

29. The scheme fails to comply with several local and national policies in this regard including LPRSP12, policy In2 of the Marden Neighbourhood Plan and paragraphs 89, 96, 108 and 116 of the NPPF.

## ECOLOGY

30. Since the refusal of planning permission in December 2023, the Appellant has provided additional information to address the concerns raised by Kent County Council (ecological advice service) and Kent Wildlife Trust. This includes breeding bird survey results, updated reptile survey results, amended plans showing where additional areas of habitat for turtle doves and reptiles could be located and where cat proof fences could be installed, updated BNG calculations and details on the mitigation strategy for great crested newts. Some of this information was provided two days before the exchange of proofs, and further information (such as information about hedgerows and the methodology for the breeding bird surveys) has only been provided in the last few days. There is no good explanation for this, and is noted that the last breeding bird survey was completed on 27 June 2024.
31. As a result of the new information, the Council is now satisfied that the majority of the issues raised in reason for refusal 5 can be addressed via the imposition of planning conditions. However, concern remains over the impact of the appeal proposals on turtle doves and yellowhammers.
32. Turtle doves are at risk of extinction at a European and global scale. The UK population has crashed since the 1970s. 32% of the drastically reduced UK population occurs in Kent. It is imperative that these beautiful birds are protected. Further incremental habitat loss must be avoided, fully mitigated, or compensated.
33. The Appellant acknowledges that the dense scrub in the NW parcel of the appeal site provides suitable nesting habitat for turtle doves. The hedgerows to the East of the site may also be suitable. There are turtle dove feeding areas near to the site, which are part of a programme funded by DEFRA and the RSPB. Although the birds are difficult to detect, there is a body of data which indicates that they use the appeal site and may breed here. KWT data indicates the presence of nesting birds on the eastern boundary and on land immediately adjacent to the site in 2022, and birds were also recorded on the southern and eastern boundaries in

2023. Marden Wildlife Group have also recorded probable breeding birds in May and June 2024. The Appellant's breeding bird surveys recorded a turtle dove on the site's eastern boundary on 5 June 2024, but it was not considered to be nesting.

34. The Council's position is that regard should be had to all of the available evidence. Relying only on the Appellant's survey data clearly risks under-estimating the extent to which the site is used by turtle doves, and thus the amount of mitigation required. It also appears that the amount of mitigation proposed is driven by the space available in the illustrative layout rather than being treated as a constraint on the scheme. This is a matter which needs to be resolved now, before any planning permission is granted.

35. Further, the proposed on-site mitigation – principally, the provision of 0.629ha of replacement scrub areas – is unlikely to be suitable. Turtle doves are wary of human presence and easily disturbed. The replacement scrub habitat is indicated to be highly fragmented and located close to buildings, gardens and pathways and likely to be subject to recreational pressure. Cat predation is also an issue which would need to be addressed, and no clarity has been provided about the suggested cat-proof fencing. As a result, the Council's view is that off-site compensation measures are essential.

36. The Appellant's surveys also recorded yellowhammers singing along the SE and SW boundaries of the site. This is another species on the red list. KWT have a colour-ringing project for these birds, and since that project began 78% of Kent's yellowhammers have been ringed on fields which are a few hundred metres away from the appeal site. Many of the on-site issues concerning turtle dove mitigation would also apply to yellowhammers.

37. The Council therefore maintains that the appeal scheme conflicts with policy LPRSP14(A) and policy NE4 of the Marden Neighbourhood Plan as well as para 180 and 186 NPPF.

## **PLANNING BALANCE AND CONCLUSION**

38. For the above reasons, the appeal scheme conflicts with policies LPRSA295, LPRSP12, LPRSP14(A), LPRSP15 and policies BE1, NE4 and In2 of the Marden Neighbourhood Plan. It is not in accordance with the development plan as a whole. No other material considerations exist which are sufficient to justify granting permission in these circumstances.

39. The Council will therefore ask you to dismiss the appeal.

**Emma Dring**

**12 November 2024**



### **Appearances:**

Emma Dring, of counsel, instructed by MidKent Legal Services

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