

**TOWN AND COUNTRY PLANNING ACT 1990**

**PLANNING APPEAL BY MARDEN HOMES LIMITED**

**IN RESPECT OF LAND ADJOINING THE GABLES, KELVEDON ROAD, TIPTREE CO5 0LU**

**PINS REF. APP/A1530/W/21/3278575**

**CLOSING SUBMISSIONS ON BEHALF OF**

**COLCHESTER BOROUGH COUNCIL**

**MAIN CONSIDERATIONS**

1. The Principal Parties agree that the main items for consideration in this appeal are whether the proposal:
  - meets a housing need in the context of local and national planning policy;
  - is appropriate in terms of design; and
  - comprises sustainable development in an overall planning balance.

Mr Firth (“**JF**”) confirmed that there should be no additions to this list (JF xx).

**DEVELOPMENT PLAN AND NATIONAL PLANNING POLICY**

2. The statutory development plan for Colchester comprises: (i) Colchester Local Plan (“**CLP**”) Section 1 - North Essex Authorities Shared Strategic Section 1 Plan 2013-2033. (adopted February 2021) (CD8.5); (ii) Colchester Core Strategy (2008) as amended by the Focused Review (2014; “**CCS**”) (CD8.1); Site Allocations DPD (2010; “**SADPD**”) (CD8.3); and Development Policies DPD (2010; “**DPDPD**”) (CD8.2).

3. Colchester-specific policies and allocations are set out in emerging CLP (“**eCLP**”) Section 2 (CD9.5), which is very close to adoption. Tiptree-specific policies are set out in the emerging Tiptree Neighbourhood Plan (“**eTNP**”) (CD14.15), albeit its contents cannot now be given weight due to its present status.
4. So far as policy concerning the real question in this appeal, the Borough Council emphasises at the outset:
  - i. JF’s agreement both that recent changes to the Framework concerning the requirement for a high standard of design and attainment of beauty and place-making are significant (see JF Rebuttal [4.6] **Rayne Road, Braintree** (CD14.14 pdf p.10), and that these are necessary ingredients to a finding that any proposed development is sustainable “*as per [126] of the Framework*” (JF xx & Main PoE [8.176]). Mr Ryan (“**JR**”) fairly referred to these changes to the Framework as a sea change (JR xx);
  - ii. Further agreement clarifying the absence of any tension, by reference to [124 & 125] of the Framework, between the requirements to make effective or optimal use of land and achieve a high standard of design or beauty (JF xx; & JR rx). That the second requirement is cast in terms of “*beauty*” (not less) emphasises that the required standard is genuinely “high” (JR eic);
  - iii. Agreement that statutory development plan policies CLP Policy SP7 (Place Shaping Principles), CCS Policy UR2 (Built Design & Character), and DPDPD Policy DP1 (Design and Amenity) are not out-of-date and carry full force (JF xx). The Borough Council is clear that CCS Policy ENV1 (Environment) also remains up-to-date so far as relevant to the current appeal, though this may not much matter in the grand scheme of things; and
  - iv. Agreement that eCLP Policies ENV1 (Environment), and DM15 (Design and Amenity) – which are plainly up-to-date – carry a high degree of weight bearing in mind their proximity to adoption (JF xx).

## MEETING A HOUSING NEED

5. These submissions address the nature and extent of housing need, and unmet housing need in particular, in both the Borough and Tiptree.

### *Housing land supply: past & present*

6. The following points are also all agreed:
  - i. Colchester Borough has an excellent track-record of housing delivery (see also eCLP [12.16] (CD9.5 pdf p.15);
  - ii. delivery has been both consistently and well above the Borough's minimum target;
  - iii. the Borough has passed the Housing Delivery Test comfortably and consistently (see also Ms Jones ("BJ") [4.6-11]); and
  - iv. its track-record is impressive set alongside other Essex authorities (see also BJ Table 1) (see Mr Hollingsworth ("SH") xx).
7. It is in this very positive context that the Appellant agrees that the Borough Council is able to demonstrate a minimum 5.74 years five year housing land supply ("**5YHLS**"). This is measured against an up-to-date development plan housing requirement itself designed to meet the objective of significantly boosting the supply of housing ("**the housing objective**") (SH agreed in xx by ref CLP Section 1 (CD8.05 [4.1-4.2] pdf p.24)). SH agreed, finally, that there is no basis on the evidence to suppose that the Borough Council is not now set fair to maintain that track-record into the future – aided by an up-to-date Local Plan (xx).
8. SH endeavoured to make a point about past under-delivery against projection. The point was, however, contrived because it relied upon amalgamating years, rather than reflecting fairly the impact of the pandemic on delivery in one of the years referred to (see BJ's ID4 instead). The point goes nowhere, in any event, in light of agreement concerning the 5YHLS, and that the Borough Council is "set fair" to maintain it (see above).

9. **Canterbury** (CD 14.5 [108] pdf p.65) reflects that an LPA is entitled to consider that the housing objective does not cease to apply notwithstanding an ability to demonstrate a 5YHLS (see JF [8.36], also agreed by SH). The prospect that the housing objective should carry weight in this instance is diminished from the outset, however, by the fact that the Inspector should have regard to the fact that the housing objective informed the CLP minimum HLS requirement (SH xx).
10. SH seeks to challenge the weight attaching to the agreed HLS position and bolster weight attaching to the housing objective by reference to re-calculation of the Objectively Assessed Need ("**OAN**"), and the housing requirement calculated now in accordance with the standard method ("**SM**"). Neither of these endeavours succeeded.

*the OAN*

11. SH's challenge to the effectiveness of the adopted, OAN-based, housing requirement in meeting housing needs (per SH [4.44]) are without foundation for the following reasons.
12. The OAN at 920 dpa found sound initially based upon the Objective Assessment of Housing Needs Study 2016 ("**OAHNS 2016**") was re-considered twice in the course of the CLP Examination. SH provided his best evidence in support of a market signals uplift for Colchester at the second and third stages at least (SH confirmed in xx). The suggestion, with reference to the housing Statement of Common ground ("**SoCG**"), that the evidence to the CLP Examination was not updated by means of these further stages is not understood, and remains (with respect) misleading.
13. SH's evidence third time-around (at Ms Howick ("**CH**") Rebuttal App. D) sought to persuade the Plan Examiner that the situation had changed since OAHNS 2016. The Inspector registered that there may be some evidence of worsening of affordability but rejected (as CH clearly explained in xx & rx) the necessity for any discrete market signals uplift. That being so, it is essential to note that SH did not seek to go behind or challenge the Examiner's findings, or suggest that the OAN at 920 dpa was otherwise than sound upon adoption of CLP, in February 2021 (see SH xx).

14. The issue then was whether factors had “*emerged since*” in accordance with SH Main PoE [4.10], i.e. whether there has been a material change since February 2021. SH agreed the affordability ratio tables provided in CH’s Rebuttal evidence that updated the evidence he had presented to the Examiner. He also confirmed that there had been no material change concerning those factors relevant to any market signals uplift (SH xx; see also CH rx in that regard).
15. This last point is very important indeed. CLP & eCLP have been developed in accordance with the requirement at the 2018 version of the Framework [214] to continue to promote those Plans in reliance on the OAN methodology, and they incorporate an OAN that SH has confirmed to be up-to-date. There is therefore no requirement for review of the OAN that arises from application of the methodology from which it was derived, and therefore no reason at all to infer that there has now been shown any requirement for review earlier than referred to in the Framework.

*the SM*

16. SH [4.51] provides the starting point here. It provides three reasons why the SM-derived local housing needs figure (1101 dpa) should bear on the weight attaching to the HLS position and the housing objective.
17. SH’s first two reasons have fallen away completely. Contrary to the first, CH has shown that the CLP market signals position was emphatically not founded on the OAHNS 2016. SH has agreed that this is so and that the OAN was sound upon adoption. Contrary to the second reason, SH agrees that there has not been any worsening of affordability in the Borough since targets were adopted.
18. SH’s third reason is also without substance. He emphasised in eic, and it was put to CH (xx), that the Secretary of State (“**SoS**”) revised the Framework by adoption of the SM precisely in order to increase housing land requirements, and support increased delivery (CH agreed). It therefore comes or should come as no surprise at all that the annual requirement according to SM is higher than that according to the OAN methodology. This is, indeed, a glimpse of what should be blindingly obvious.

19. CH explained clearly that her reference to the difference between the SM and OAN requirements being immaterial was that difference being itself incapable of making a difference to the outcome of the appeal – and not to the difference not being a lawful consideration as a matter of law (see CH xx).
20. Nothing is actually noteworthy at all about a difference of 20%, bearing in mind that the Framework was revised precisely to result in a policy-driven uplift. The difference is therefore neither remarkable nor (per CH) capable of making a difference. Furthermore, the difference is less than the 27% regarded as of “*limited relevance*” – and playing no active part in decision-making – in the **Reading** decision (CH Rebuttal Appendix C [188]). To place these percentages in context, CH referred to an SM requirement triple the OAN warranting having a look at by review (CH xx).
21. Finally, it important to have regard to the reasoning for the finding of limited relevance in the **Reading** decision itself (at [188]). That reasoning concerned the period remaining before Local Plan review was to be envisaged. Suffice it to say that CLP was adopted just 14 months ago (February 2021) as against 28 months in respect of the Reading Local Plan (November 2019). There is therefore no substantial basis for review of CLP otherwise than in accordance with the timescale that the Framework envisages – to which CLP Policy SP4 (CD8.5) commits in any event.
22. There is no reason why weight should attach to the comparison here between a housing requirement calculated in accordance with the SM and OAN methodology.

*Other*

23. There exists a strong track record of delivering housing in Tiptree via both the Local Plan process and windfalls (BJ composite table at App. 1 agreed). There exists also a substantial existing pipeline of supply in Tiptree, within the 5YHLS (335 dwellings agreed) – with a windfall allowance on top. The appeal site is also available, which confirms that housing delivery is not dependant upon eTNP or allocations (SH agreed).
24. The minimum 400 dwellings figure is not a housing need figure in any event, and there is no reason to consider that there are insurmountable problems that will preclude eTNP from making those allocations in due course (SH agreed). Cllr Greenwood makes clear, indeed, that there is a collective determination to get on with enabling the local community to influence

decisions that affect it. Aside from the Borough-wide position described above, it has not been demonstrated that there exists an unmet housing need or need for further HLS within Tiptree itself.

25. The facts concerning both the requirement for and delivery of affordable housing (“AH”) Borough-wide are agreed. The Borough Council accepts in that context that there exists an unmet need for AH across the Borough – though not comparable to that in the **Colney Farm** decision (CD14.2; as SH agreed).
26. It may be difficult to quantify AH need in Tiptree (SH Main PoE [5.22] refers)), but the evidence does not suggest that the position there is worse than that Borough-wide. Over and above AH to be delivered at Factory Hill, Barbrook Lane is set to deliver 60 affordable homes that reflect the needs profile, whereas grossing up the eTNP Housing Needs Survey requirement from 28 to 82 homes is simply not realistic because this takes no account of properties being vacated or churn within the housing stock (SH agreed), and (other things being equal) households with a housing need are more likely than others to have completed the survey form.

#### *Conclusions*

27. The Borough Council acknowledges that the provision of market housing is of itself a benefit. The first issue here concerns, on the other hand, the nature and extent of housing need. The evidence has shown that there is not a substantial unmet Borough-wide or Tiptree-specific housing need or need for further HLS. Neither does the evidence justify a decision to attach additional weight to the housing objective.
28. The excellent track record of the grant of planning permissions in Colchester has not, moreover, made housing within it more affordable, and affordability has instead followed the regional trend (SH agreed xx). Setting aside, then, any contribution to meeting housing need, the grant of additional planning permissions in Colchester should not be relied upon also to the address the issue of affordability.

## APPROPRIATENESS IN TERMS OF DESIGN

29. It is a matter for regret, and remarkable, that both the detailed planning application that underlies the current appeal should have been made without seeking pre-app advice, and that appeal was made against non-determination. The outcome has been, unusually, debate at inquiry concerning fundamental issues of design in respect of a proposal that had become one for an inescapable fixed and inappropriate number of dwellings (if the appeal was not to be withdrawn). It will not have gone unnoticed that the application was conceived and submitted in the context of the 2018 version of the Framework and the now superseded Neighbourhood Plan.

### *Policy matters*

30. The Framework could not be clearer. What one might refer to in composite as “good design” is integral to the social dimension of sustainable development, whilst protecting or enhancing the natural and built environment lie at the heart of the environmental dimension ([8b/c]; see also JF xx). The creation of high quality, beautiful and sustainable buildings and places is fundamental to what the planning and development process should achieve, and good design is a key aspect of sustainable development ([126]). Development that is not well or is poorly designed should be refused (one of a handful of instances where the Framework adopts this robust terminology: JF agreed) – especially where it fails to reflect local design policies and Government guidance on design ([134] & PPG Ref. ID 26-002-20191001).
31. Most particularly, it is abundantly clear from the Framework at [124-5] that (a) making optimal or efficient land involves (b) taking account, inter alia, of both the desirability of maintaining an area’s prevailing character or promoting change, and the importance of securing well-designed, attractive and healthy places. There is, JF agreed, no “*tension*” between (a) & (b) above (xx).
32. The recent Framework revisions represent a sea-change, with reference to “*beauty*” taking design expectations to a new height (JR eic).
33. Arguments that development of the appeal site to any particular density and dwelling mix justifies compromise of good design to any degree at all should therefore be rejected in accordance with the Framework. Failure to provide a good standard of design results (a) in



unsustainable development and (b) a requirement for refusal. That being so a balance of benefits justifying the grant of planning permission should logically be required to be exceptional - yet more so on the flat balance.

34. For the status of relevant development plan policy, see paragraph 4 above.

*A design failure*

35. There is room for misgivings about whether design issues might have been identified more clearly by means of formal examination or round-table session (“RTS”). Be that as it may, clear differences emerged. The Borough Council has identified in particular - through the evidence of Mr Cairns (“SC”), Mrs Bailey (“CB”) and JR - fundamental failings in terms of non-contextual design and the absence of place-making.
36. The starting point for design is or should be area-based contextual assessment (SC & JR xx). Analysis of context here failed to appreciate rural fringe character of the site. From that has flowed identification of a development typology in conflict with the site’s edge of settlement location, as identified within adopted local design guidance, the Essex Design Guide (“EDG”). This has led in turn to a proposal for an inappropriate character and density of development, whereas a genuinely landscape-led approach would have resulted in a scheme with more open space provision and higher landscape quality (SC RTS closing summary).
37. It became apparent from Mr Plant’s contributions to the RTS that development reflecting the wrong typology had been driven instead by the appellant’s desire to deliver a specific or high number and mix of units on the site and meet housing need (see Mr Plant’s evidence to the RTS). This is instead of the contextual analysis and approach now required by CLP, the revised Framework and National Design Guidance (SC RTS closing summary).
38. This over-intensive development proposal results in, inter alia:
- i. dominance of built-form, with the potential for significant exacerbation of this should eTNP’s link road ambitions come to fruition;

- ii. a suburban density of 25 dwellings per hectare (“**dph**”) which dominates inappropriately, and contrasts with adjoining development off Grange Road (northern part 14dph, southern 20dph);
- iii. substantial three-storey blocks - one as an immediately discordant gateway feature on Kelvedon Road, the other close to the open countryside edge of the site;
- iv. Sparse open space provision, and over-intensive multi-use of the single usable space proposed instead;
- v. a claim concerning biodiversity net gain (“**BNG**”) that is implausible in terms of delivery, bearing in mind the pond and extent of hedgerow for removal, apparent reliance on the single public open space and roadside verges for BNG, and tree canopies from planting of semi-mature specimens in roadside verges and modest garden spaces (see CB); and finally
- vi. an absence from the scheme of any hint of place-making that reinforces local distinctiveness. There has been no attempt to lay out the development to enable or encourage residents to have any sense that any part of the site is a place to meet, socialise or belong to.

39. So far as other matters are concerned:

- i. The Essex vernacular architectural design palette chosen is uncharacteristic of Tiptree, which is a twentieth century creation (JR eic) where well-designed contemporary buildings would fit in better; and
- ii. The proposal is self-evidently poorly connected to its wider surrounds not simply Kelvedon Road, with a failure to integrate – most obviously to the Public Right of Way to the west (“*the key route*” (SC RTS)) - should not be accepted as an inevitability arising from land ownership issues.

40. For these reasons, the scheme is a failure when assessed against the characteristics of well-designed places identified in NDG (CD12.2). It conflicts accordingly with up-to-date statutory development plan policies: CLP Policy SP7 (Place Shaping Principles), CCS Policies ENV1 (Environment) and UR2 (Built Design & Character), and DPDPD Policy DP1 (Design and Amenity) - and eCLP Policies ENV1 (Environment) and DM15 (Design and Amenity), and adopted local design guidance provided within the EDG.

### **SUSTAINABLE DEVELOPMENT IN AN OVERALL PLANNING BALANCE**

#### *Compliance with development plan policy as a whole*

41. Proper identification of the most important development plan policies is critical to determination whether proposal in accordance with DP as a whole (**Corbett** [45] (CD14.28 pdf p.17)). It is critical to enable that proper identification, as JR explained, to identify the real question in any case and then to distinguish between that are relevant and others that are most important in light of the real question arising (**Broad Piece** appeal decision [19 & 20] (CD14.27 pdf p.4)).
42. The question that lies at the heart of the current appeal concerns appropriateness of design in accordance with the Framework and development plan policy, and it is natural that this should also be central within the main considerations. Resolution of design matters alone stands between the Appellant and the grant of planning permission for residential development on the appeal site (JF agreed).
43. That real question or central main consideration requires as a matter of law application of design policies in both the Framework and development plan (JF agreed).
44. CLP Policy SP7, CCS Policies ENV1 and UR2, and DPDPD Policy DP1 are therefore development plan policies that are “most Important for determining the application” (Framework [11(d)]). They must feature in the **Wavendon** basket (**Wavendon Properties Ltd v. SSHCLG** [2019] EWHC 154 (CD14.22)). eCLP Policies ENV1 and DM15 are their emerging equivalents.

45. JF's failure to ensure that these policies feature in his **Wavendon** basket is inexplicable and self-evidently wrong. The effect of leaving them out is that JF's evidence fails to reflect breach of up-to-date most important development plan (& Framework) policy. That failure undermines in turn JF's evidence on the planning balance because it does not reflect design matters adequately – and is impeded by reference to other matters (see below).
46. However, it is not as if JF's basket has a hole in it: it contains instead other development plan policies concerning loss of employment land, impact on gypsy/traveller plots, and breach of the Settlement Boundary. These relate to matters that are not in issue between the Principal Parties. The **Wavendon** basket is designed, by contrast, to enable identification of those policies at the heart of the decision in hand, and identification whether they are out-to-date by comparison with the Framework.
47. Whether or the extent to which the proposal accords with any of these last policies or they are out-of-date is wholly immaterial to the question that lies at the heart of the current appeal. Their inclusion undermines, again, JF's analysis of compliance with the development plan as a whole and his planning balance.
48. To conclude, the application is not in accordance with the up-to-date development plan policy considered as a whole and the most important policies in particular. Those policies are up-to-date, and breach of them attracts full weight. The full force of these conclusions should be brought to bear in a genuinely plan-led system and decision (Framework [15]). It remains to be considered whether other material considerations indicate nonetheless that the planning balance favours the grant of planning permission on the flat balance

*Planning balance*

49. There is no issue of principle between the Principal Parties. It should therefore be assumed that planning permission would be granted for residential development of a high standard of design on the appeal site based on the current policy context. It is also clear from the Borough Council's case that achievement of a high standard of design would result in development at lower density, and therefore fewer dwellings on site. Residential development of a lower number of dwellings to a high standard of design is the appropriate baseline for consideration of the planning balance in this case (JR eic explained). Mr Barrett's emphasis, in Cllr

Greenwood's xx, upon the absence from eTNP of land use objection to development of the land of which the appeal site forms part serves to confirm this baseline.

50. The facts that the Appellant appealed against non-determination and elected not to pursue further achievement of a high standard of design involving a reduced number of dwellings have resulted in the number of dwellings at issue being unidentified. This is the consequence of the Appellant's decision-making. It is understandable that provision of market and affordable housing should be at the absolute forefront of JF's planning balance. That planning balance is undermined, however, by JF's inability to identify the increased number of dwellings resulting from a scheme that fails to achieve a high standard of design (as JR clearly explained).
51. No genuine assistance derives from JF's references to decision letters where the principle of development was in issue, and the number of dwellings on the positive side of the planning balance was therefore known.
52. The planning balance is discussed below under the headings "Social", "Economic" and "Environment" recognising that some benefits or impacts may appear legitimately under one or other or more of these headings. The starting point, however (and again), that failure to achieve a high standard of design – whether or the extent to which the scheme is "*bespoke*" or not - does not accord with the social or environmental dimensions of sustainable development and results in unsustainable development instead. That is a disbenefit or disadvantage, grounded in breach of up-to-date planning policy, to which very substantial weight indeed attaches.

#### *Social*

53. The Appellant accords, by contrast, very substantial weight to the social benefits of the addition of market and AH. The Council freely acknowledges that these are both benefits. The weight otherwise attaching to the first of these is moderated, however, by the unknown number of additional dwellings at issue, the Borough Council's track-record of delivery, its ability to demonstrate a 5YHLS, and the overriding fact that it is proposed that these additional homes be provided by means of a scheme that is not to a high design standard, i.e. not sustainable . In these circumstances, limited (if any) weight attaches to the provision of additional market housing.

54. The weight otherwise attaching to AH delivery is undermined by the number of additional dwellings being not known, and delivery (again) by means of a scheme that is not to a high design standard, i.e. not sustainable. Limited (if any) weight therefore also attaches to additional AH provision.
55. So far as other benefits under this heading are concerned, (a) part linked road provision might be argued to be a limited benefit, though it also contributes to poor urban design. (b) The new footway outside the site attracts limited weight, whereas dropped kerbs and highway improvements are otherwise required to facilitate development and mitigate its effects. (c) The efficient or optimal use of land, listed as a benefit by JF, is a requirement of the Framework, which does not envisage that it should or can be secured at the expense of high design quality. (d) The community-based financial contributions are first and foremost mitigatory, albeit they contribute benefit more widely.

#### *Economic*

56. The development would create jobs during the construction phase, generate expenditure that would support local services and significant Council Tax receipts and New Homes Bonus payments. However, the Borough is buoyant notwithstanding the pandemic – a point with which no issue was taken during the course of the inquiry. The economic benefits would not, moreover, materially reduce if the scheme were to be re-designed. The sum of economic benefits do not therefore attract more than moderate weight overall.

#### *Environmental*

57. Biodiversity matrix calculations are in their infancy and problematical generally. The Council is not (through Ms Bailey) persuaded that the BNG claimed is realistic. This is so bearing in mind in particular: that the baseline includes substantial hedging across the site (much of which is proposed for removal or reduction), and ambitious assumptions about the scale and success of tree planting. BNG attracts limited, not more, weight in any event since it is a eCLP policy requirement and would feature to greater degree as part of a well-designed scheme. The RAMs contribution should properly be considered to be neutral in the planning balance, notwithstanding that a measure of benefit to others would derive from it.

*Conclusions*

58. The appeal proposal is in significant conflict with up-to-date policy in the development plan and Framework considered as a whole, and the most important development plan and emerging development plan policies in particular.
59. Those breaches are indicative of very substantial planning harm that significantly and demonstrably outweighs the limited benefits of the proposal overall.

**CONCLUSION**

60. For the reasons summarised above, the Inspector is respectfully invited to dismiss this appeal.

SIMON PICKLES

12 April 2022

**Landmark Chambers**

**London EC4A 2HG**