

LAND SOUTH OF KIRKLEVINGTON

ADVICE

1. I am asked in this case to advise on behalf of Stockton-on-Tees Borough Council in relation to a proposed residential development on land south of Kirklevington.
2. The proposal is for up to 145 dwellings with associated community and sports facilities. All matters were reserved (access having been included initially but later removed from the scope of the application).
3. The proposal was considered by the Council's Planning Committee on 27th July 2016. Members were provided with an officers' report which recommended approval but they voted to refuse the application. The reasons put forward by members for that decision are itemised in my instructions.
4. The Council operates a protocol whereby further consideration may be given to decisions of the Planning Committee which are contrary to officer recommendation. Officers invoked the protocol in this case because of concerns in relation to the reasons for refusal proposed by members. The vote which has been taken operates effectively as a "minded to refuse" resolution for the time being.
5. My advice is sought in this context. I am asked to advise on the reasonableness of the reasons for refusal, the likelihood of any of them being successful at appeal and the risk of a costs awards in respect of the same.
6. It is convenient therefore that I turn immediately to the proposed reasons for refusal.
7. The first proposed reason for refusal relates to the sustainability of Kirklevington and the fact that the village has previously been assessed as unsustainable in the Council's study "*Planning the Future of Rural Villages*".

8. I am told in my instructions that this study has been considered by inspectors in a number of planning appeals and has not been given weight. If that is correct, there is nothing in my instructions which provides any reason for thinking that, were the matter to go to appeal following a refusal, an inspector would now be likely to take any different approach. For instance, no material change of circumstances is identified which might justify a reassessment of the weight which can be afforded to the study. On the basis of what I have been told it does not therefore seem to me to be likely that seeking to place significant weight on the study would be successful at appeal. Indeed, it could well be considered unreasonable to seek to do so given the views expressed by planning inspectors. I return to the issue of sustainability when considering the seventh and eighth reasons for refusal.
9. The second proposed reason for refusal is that the development will change the character of the village by increasing its size by one third. I do not think that this proposed reason for refusal would be successful on appeal. It seems to me that the reason is simply too vague in the absence of any evidence of specific harm that would flow from the increase in size of the village such as to render the proposal unacceptable. For instance, there does not appear to me to be evidence which would demonstrate an unacceptable impact on village infrastructure or show clearly (or at all) why there would be an unacceptable impact on village character. As so expressed the proposed reason for refusal is simply an unsubstantiated assertion of over-development and, as such, arguably unreasonable. The Planning Practice Guidance advises that one example of unreasonable behaviour which might justify an award of costs against a local planning authority is “*vague, generalised or inaccurate assertions about a proposal’s impact, which are unsupported by any objective analysis*”.¹
10. The third proposed reason for refusal is that the proposal lies outside development limits. I do not consider that this would be likely to be a successful reason for refusal. The Council lacks a five year housing supply and the development limits (in common with housing supply policies in the development plan) would accordingly be regarded as not up-to-date in accordance with the National Planning Policy Framework (“the

¹ Paragraph: 049 Reference ID: 16-049-20140306.

NPPF”).² Although the fact that a facet of a development plan is not up-to-date does not, as such, determine the weight which should apply, I do not think it likely that an inspector would accord weight to out-of-date development limits in the borough in general or Kirklevington in particular. And, of course, the absence of a five year supply triggers the presumption in favour of sustainable development in the NPPF such that the application should be approved unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole.³

11. The fourth proposed reason for refusal relates to members’ concern that access should not have been reserved. In my view this reason for refusal will not succeed. Highway officers are satisfied that an acceptable access can be achieved and there is nothing in my papers which suggests that this is an exceptional case where that judgment is not one which is capable of being made in the absence of a full submission. Departure from officers’ advice on technical issues of this nature poses a clear risk of an adverse costs award on appeal.

12. The fifth proposed reason for refusal refers to the risk of flooding and the poor drainage of the application site. Again, it strikes me that this proposed reason for refusal contradicts all sources of expert technical advice (both internally from the Council’s own officers and from external consultees) which were placed before members. Local concerns, which appear to have informed the Committee’s decision on this issue, were taken into account by the Council’s officers in coming to the advice they formulated and the condition they recommended. I do not think that this is a reasonable reason for refusal and it is one which, to my mind, poses a real risk of an adverse costs award on appeal.

13. The sixth proposed reason for refusal is an insufficiency of education places. I do not see how this is a reason for refusal which could possibly be substantiated. The officers’ report explained that the impact of the proposal on school places could be acceptably mitigated by a financial contribution provided by a section 106 agreement which would

² Paragraph 49.

³ Paragraph 14.

embody the Council's standard formula in this respect. This is a perfectly acceptable approach to the matter and is routinely employed up and down the country. It is unreasonable to make this issue the subject of a reason for refusal and the Council would, in my view, be at every risk of a costs award against it on this issue were it to be carried forward.

14. The seventh proposed reason for refusal relates to the lack of facilities in the village leading to more car trips with a consequent adverse impact on sustainability. This reason for refusal needs to be considered in connection with the eighth proposed reason for refusal that there would not be a permanent bus service. A proposed planning obligation would provide for the maintenance and funding of a bus service for a five year period. Members were concerned that the bus service would be lost after that period if it were not self-sustaining by then and that the proposal would, accordingly, be only temporarily sustainable.
15. Kirklevington is not a settlement which entirely lacks facilities. It has a primary school, a church, a community centre, a public house, a children's play area and a garage. The proposal also seeks to increase facilities by, for example, the provision of a village shop. Nevertheless, Kirklevington has a poor bus service and the officers' report saw the provision of a regular, daily bus service as key to making the development acceptable in locational or accessibility terms (this being one aspect of sustainability but not, of course, the whole picture). Members appear to have taken the view that the provision of such a service for a five year period would not be sufficient because it was unlikely that it would be commercially viable thereafter.
16. A development could not be expected to provide an indefinite subsidy for a bus service. Planning obligations can only be taken into account as a reason for granting planning permission if, inter alia, they are fairly and reasonably related in scale and kind to the development.⁴ A subsidy which was to last in perpetuity would hardly satisfy that requirement. A five year subsidy period is typical of these sorts of cases. Yet if there could be no confidence in the reasonable prospect of a bus service standing on its own two feet thereafter it seems to me that there is a potential argument to be made about

⁴ See regulation 122(2)(c) of the Community Infrastructure Levy Regulations 2010.

the locational sustainability of the development. The question of the likelihood of the service persisting in the longer term is therefore one which perhaps merits further consideration in the review period afforded by the protocol. I am aware of the fact that a good bus service does not appear to be a commercial proposition at the moment (for it does not exist) but I can see that, at least in principle, a better service might lead to increased use as, indeed, might the greater potential patronage when residents of the development are added into the picture. However, I am in no position to provide any analysis which goes beyond these very general remarks. As things presently stand I am not convinced that there is a reason for refusal here which would stand the test of an appeal but nor am I of the view that members' present position is necessarily unreasonable on an issue where room for reasonably differing judgments is more possible than on some of the other aspects of the case.

17. The ninth proposed reason for refusal is the lack of safe walking and cycling routes to Yarm to access facilities there. This reason focuses on safety (rather than distance or convenience). I am told that officers do not consider that routes are unsafe. Again this proposed reason for refusal seems to me to fall into the trap of departing from professional advice without justified reasons for doing so. For that reason I doubt very much whether it could be sustained on appeal and, equally, I consider that there is potential here for an adverse costs award on the basis of unreasonable conduct.

18. I trust that the above provides my views on the proposed reasons for refusal.

19. I would add only that if members continue to take the view that there should be refusal it would be sensible to refine and restrict the reasons for refusal so that a much more focussed case is built around the issue of locational sustainability. I think that it would also assist if members were reminded of their obligation to strike an appropriate balance so that the undoubted benefits of the development (not least in its contribution to addressing the shortfall in market and affordable housing) are seen to be taken into account and that an overall sustainability judgment is itself seen to be treated as the outcome of a balancing process.

20. If I can assist further, my Instructing Solicitor should not hesitate to contact me.

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Alan Evans
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LAND SOUTH OF KIRKLEVINGTON

ADVICE

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