The Planning Inspectorate

Appeal Decisions

Inquiry held on 24, 25 and 26 May 2016

Site visits made on 23 and 26 May 2016

by Chris Preston BA (Hons) BPl MRTPI

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

Decision date: 7 October 2016

APPEAL A:
Appeal Ref: APP/V2255/C/15/3133113
The land and buildings situated at the rear of Seager Road, Sheerness, Kent ME12 2BG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Moat Homes Ltd against an enforcement notice issued by Swale Borough Council.
- The Council's reference is PH/ENF/GEN.
- The notice was issued on 27 July 2015.
- The breach of planning control as alleged in the notice is: Planning permission was granted under reference SW/10/0050 for the development of 35 dwellings and for the provision of open space, landscaping, car parking, cycle storage and for a footpath link to access Marine Parade. The development has, however, not been carried out in accordance with the plans submitted and approved under planning permission SW/10/0050, with significant variations to the details referred to in those approved plans. In the opinion of the Council, the development does not have the benefit of planning permission.
- The requirements of the notice are: (i) demolish the dwellings and all ancillary buildings on the land; (ii) remove all engineering operations associated with the dwellings including the roads and hardstanding on the Land; (iii) remove all supporting services and infrastructure within the Land; (iv) remove any materials or debris etc from the Land resulting from compliance with the requirements of (i)-(iii) above; and (v) restore the Land to its original condition.
- The period for compliance with the requirements is within 6 months from the date that the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

APPEAL B:
Appeal Ref: APP/V2255/W/15/3133112
The land and buildings situated at the rear of Seager Road, Sheerness, Kent ME12 2BG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Moat Housing against the decision of Swale Borough Council.
- The application Ref 15/500955/FULL, dated 10 February 2015, was refused by notice dated 26 May 2015.
- The development proposed was described on the application form as: Residential development to provide 35 dwellings, comprising 27 houses and 8 flats; access to Marine Parade; Open Space; Landscaping; Car Parking; Footpath link to Beckley Road and cycle storage.

Decisions

Appeal A

1. The enforcement notice is corrected: by the deletion of the description of the alleged breach of planning control at section 3 and the substitution of the following description; "without planning permission, the erection of 35 dwellings, comprising 27 houses and 8 flats; access to Marine Parade; open space; car parking and cycle storage". Subject to these corrections the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the erection of 35 dwellings, comprising 27 houses and 8 flats; access to Marine Parade; open space; car parking and cycle storage on land at the rear of Seager Road, Sheerness, Kent ME12 2BG, referred to in the notice, subject to the conditions set out in the schedule attached to this decision.

Appeal B

2. The appeal is allowed and planning permission is granted for the erection of 35 dwellings, comprising 27 houses and 8 flats; access to Marine Parade; Open Space; Landscaping; Car Parking; and cycle storage on land at the rear of Seager Road, Sheerness, Kent ME12 2BG in accordance with the terms of the application, Ref 15/500955/FULL, dated 10 February 2015, subject to the conditions set out in the schedule attached to this decision.

Procedural Matters

The Nature and Description of the Alleged Breach

3. The enforcement notice issued by the Council described the breach of planning control in the manner set out in the banner heading, above. That description is, to some extent, a narrative describing the planning history of the site and setting out the Council's view that the development, as built, does not benefit from planning permission by virtue of the 'significant variations' from the plans approved in relation to application SW/10/0050 (the 2011 permission).

4. Although the description refers to non-compliance with the approved plans it is clear, from the evidence presented, that the Council considers that the development, in its entirety, is unauthorised as a result of the difference between what has been erected and the details previously approved. In other words, they do not allege that the breach of planning control amounts to a breach of condition 2 of the 2011 permission but that it amounts to unauthorised operational development.

5. Prior to the Inquiry, the appellant had not raised the suggestion, through the evidence submitted, that the breach should be described as a breach of condition. In seeking to regularise the position regarding the disparity between what had been constructed and what had planning permission they had submitted a retrospective application which sought planning permission to retain the development, as built. From the information presented, they had not sought to argue that the changes amounted to minor material amendments to the approved scheme, nor had they applied to vary the details agreed under condition 2. To my mind, the fact that the appellant submitted a retrospective application for the development was an indication that they accepted, at that

point, that the development was substantially different from that approved and that the alterations were not simply a breach of condition.

6. Within closing submissions the appellant suggested that the as built development matches the description of the approved development in all respects, save for the non-provision of the footpath link to Beckley Road. It was also suggested that what has been built is essentially the same development in terms of layout, orientation, access, number of units and that the overall design is substantially the same. However, the appellant accepted that a planning judgement[1] is required to determine whether the differences between the as built scheme and the 2011 permission are so significant that the development would fall outside the scope of the approved scheme.

7. The differences between the as built scheme and the details approved by the 2010 permission are set out within the proof of Mr McCardle[2]. The houses are 1.44m higher to the ridge and 1.7m higher to the eaves; the flats are 1.2m higher to the ridge; the window design has been altered; balconies have been removed; the footprint of the houses is smaller by 1 square metre; the internal garages have been altered making them narrower; ground floor toilet and utility rooms have been removed from the dwellings; and the footpath link to Beckley Road has been removed. The appellant accepts all of those differences, with the exception of the footprint of the houses which, in their view, is the same as approved. It is not clear how the Council calculated the difference but, in any event, a reduction in 1 square metre is not material given the overall scale of the dwellings.

8. I also noted that the internal arrangement of certain dwellings has been altered such that first floor living rooms are now situated at the rear and not the front of the properties. In addition, it is accepted that the internal floor heights have been amended, such that the finished floor level of the first floor is 5.2m above ordnance datum (AOD) and not 4.9m AOD as approved.

9. The as built development is similar to the 2011 permission in a number of respects, including the number of residential units, the layout of the units, the split between houses and flats, the location and design of the access arrangements, with the exception of the footpath link to Beckley Road. With that exception, the development would match the description of development on the application form and decision notice for the 2011 permission. However, the description of development is merely one element of a planning permission and, in determining whether a proposal falls within the scope of a planning permission, it is also necessary to consider whether the development complies with the approved plans and details and any associated conditions.

10. In my view, there is a significant divergence from the approved plans in terms of the design and height of the units. That divergence does not relate to a limited number of units but applies to all 35 dwellings, none of which comply with the approved plans. The scale of the units is greater than approved in terms of ridge height and eaves height. In relation to the dwellings, the ridge height is 11.19m, compared to 9.75m as approved, and the eaves height is 7.9m, compared to 6.2m. Those changes represent a significant increase when viewed in proportion to the height of the approved scheme. All of the buildings are therefore taller, with a different profile and greater overall mass. In

[1] Paragraph 58 of the appellant's closing submissions
[2] Paragraph 5.2

assessing those changes I think it is reasonable to take account of the location of the site which is closely adjacent to neighbouring residential properties. It does not sit in isolation. I have viewed the materiality of the changes in that context.

11. In addition, the fenestration has been altered such that windows are of a different design and appearance. The first floor windows of the dwellings are set below the eaves line, as opposed to the approved scheme where the 'head' of the windows was set within the roofline, following the profile of the roof. Atrium windows have been introduced within the roofspace, giving the outward impression of an additional storey, a design alteration which emphasises the additional height of the buildings. The windows are not any larger than those approved but their design and position do not correspond to the approved details and that has given the buildings a markedly different outward appearance.

12. Other alterations, such as the removal of balconies from the flats and changes to the ground floor garage layout are relatively minor and have not resulted in any significant change from the approved scheme. The failure to provide a footpath link is a departure from the approved description of development and the approved plans, albeit that no condition was attached to the consent to require that the link was provided.

13. When taken in the round, I consider that the variations from the approved scheme are of such magnitude that the development, as constructed, is essentially a different scheme to that approved. Although the development matches the description of development given in relation to the approved scheme, save for the footpath link, the changes in design and scale are significant. The development is materially different from that approved and those differences are not of a minor nature. Thus, in my view the as built scheme represents unauthorised development which falls outside the scope of the 2011 permission and, as such, does not benefit from planning permission. It represents unauthorised operational development.

14. Accordingly, I have corrected the notice to ensure that the description of the breach accurately reflects the development that has taken place and I have considered the ground (a) appeal in relation to Appeal A in that context. The Council and the appellant were able to make submissions on the nature of the breach at the Inquiry and I am satisfied that neither will be prejudiced as a result of my decision to correct the notice as described. I have used the description given on the 2011 permission as the basis for that description but have removed reference to the footpath link to Beckley Road and the reference to landscaping because neither of those elements form part of the development as built.

15. In my decision relating to Appeal B, I have used the description of development given within the application form but have removed reference to the footpath link to Beckley Road as it is clear that this did not form part of the development considered by the Council[3].

Section 106 Agreements

[3] Plan number 604-P05 revision A identified that the footpath link was omitted, as identified in paragraph 2.01 of the officer report to committee dated 21 May 2015

16. Final draft versions of two section 106 agreements were submitted on the last day of the Inquiry and the obligations within those agreements were considered during a round table discussion at the event[4]. One of those agreements related to the 'as built' scheme of 35 dwellings, as is under consideration in relation to the ground (a) appeal in Appeal A and Appeal B. The same agreement covers both appeals and the obligations are identical in relation to both. The other related to an 'alternative scheme' of 29 dwellings, being the scheme as built with the exception of blocks B and C. The 'alternative scheme' was put forward by the appellant as a lesser step to complete demolition if I were to find that the 'as built' scheme was unacceptable.

17. I agreed that fully completed and executed versions of the two agreements could be submitted following the close of the Inquiry in line with an agreed timetable. The completed agreements were duly submitted on 02 June. Following the submission of the agreements I sought clarification with the main parties on the detailed provisions of the agreements with regard to the proposed mitigation in respect of ecological matters, children's play equipment, recycling and library facilities. The Council responded in writing to my queries on 28 June and the appellant on 01 July.

18. Both parties were in agreement that the submitted agreements needed to be amended to ensure that the library contributions would be used specifically for the provision of additional books at Sheerness Library, as opposed to any library within the Council's administrative area, in order to comply with the tests set out within regulation 122 of the Community Infrastructure Levy (CIL) Regulations (2010). In order to restrict the library contributions in that manner, executed deeds of variation, dated 21 July 2016, were submitted in relation to both agreements. Those deeds of variation also place obligations on the Council to use the contributions with respect of ecological matters, children's play equipment and recycling for their intended purpose, within a set timeframe; obligations that were missing from the originally executed agreements.

19. I have taken the agreements, as amended, into account in reaching my decisions and have provided detailed comments on the content of those agreements below.

Appeal A on ground (a) and Appeal B

20. An appeal on ground (a) is made on the basis that planning permission should be granted, in whole or in part, for what is alleged in the notice. In this case, the scheme is largely complete, with the exception of landscaping, some boundary treatments and the top surfaces to roads and pavements. The dwellings are unoccupied and development has been put on hold pending the outcome of the appeals.

21. The appellant's principal submission under ground (a) is that planning permission should be granted for the 'as built' scheme, subject to necessary conditions and s106 obligations. Similarly, they consider that Appeal B, which was submitted against the refusal to grant planning permission for the as built scheme, should be allowed.

[4] With reference to s106 of the Town and Country Planning Act 1990

22. A second scenario was also presented by the appellant in the event that I were to find that the impact of the scheme, as built, was unacceptable having undertaken the appropriate planning balance. Having noted that the reasons for issuing the notice and refusing to grant planning permission related to the impact of blocks B and C the appellant suggested that planning permission could be granted for part of the development under ground (a) – excluding those blocks – and that a split decision could be issued in respect of Appeal B to the same effect. That would see planning permission granted for an 'alternative scheme' of 29 units and, as noted above, a s106 agreement has been submitted in relation to that scenario.

23. If planning permission were to be granted for the alternative scheme, the enforcement notice would remain in force but, having regard to the provisions of s180 of the Act, would only have effect so far as it was inconsistent with any planning permission. In other words, the enforcement notice would only continue to have effect insofar as it required the demolition of Blocks B and C and not the remainder of the development.

24. I shall consider the two scenarios separately.

Appeal A on ground (a) and Appeal B – the 'as built' scheme

25. The reason for refusal in relation to the retrospective application and the reasons given by the Council for issuing the enforcement notice are essentially the same. Those reasons relate to the effect of the development on the living conditions of Nos 15, 17 and 19 Seager Road, with particular regard to the alleged overbearing impact resulting from the height of the development.

26. The Council also considered that the development would be unacceptable in the absence of appropriate mitigation in the form of a s106 agreement. As set out above, s106 agreements relating to Appeals A and B have been provided. The Council was involved in the drafting of those agreements and is satisfied that the obligations contained are sufficient to overcome the reasons for issuing the notice/ the refusal to grant planning permission. Consequently, the absence of a s106 agreement is no longer an area of dispute between the main parties.

27. In that context, the main issues in the determination of Appeal A on ground (a) and Appeal B are the same and I have considered both appeals together within the same decision. From the information presented, the main issue is:

    i) The effect of the development on the living conditions of neighbouring residents, particularly those residing at Nos 15, 17 and 19 Seager Road with regard to any overbearing impact resulting from the height and scale of the development;

The Effect on the Living Conditions of Neighbouring Residents

28. As noted above, the reason for refusal in relation to Appeal B and the reasons for issuing the enforcement notice refer to the effect of the development on the living conditions of the residents of 15, 17 and 19 Seager Road, with particular regard to overbearing impact. The closest blocks to those dwellings are blocks B and C. Block B is set at right angles to the rear boundary of Nos 13 and 15 Seager Road such that the side of the block faces onto those properties.

29. The rear of Block C runs parallel with the rear of Seager Road, and is located opposite from the dwellings at Nos 17, 19 and 21. The rear windows of that

block face directly onto the rear windows of the dwellings at Seager Road. That 'back to back' arrangement is replicated in Blocks D, E, F and G. However, the rear gardens of the dwellings at Seager Road get progressively longer as one moves in a southerly direction with the result being that the back to back distances between the new houses and the existing houses becomes greater. The distance between the rear of Block C and the rear of the houses opposite represents the closest point at which respective rear elevations face one another. The closest separation distance is 19.8m from the rear of Block C and the ground floor extension to the rear of No. 19 Seager Road. The distance to first floor bedroom windows at No. 19 is approximately 21.5m. The flank wall of Block B is approximately 13.6m from the rear elevation of No. 15 and 12.5m from No. 13, the closest dwelling[5].

30. There is no disparity between the footprint of the blocks as built and the footprint of the blocks as previously approved. In other words, the separation distances were considered to be acceptable by the Council in relation to the approved scheme. Having stood within the gardens and rear facing rooms of surrounding dwellings, including No. 19, I have no doubt that the development has significantly altered the outlook from those homes and their respective gardens. The flank wall of Block B and the dwellings within Block C are a dominant presence in the view from the rear of the houses opposite. That change in outlook has undoubtedly had a detrimental impact upon the living conditions enjoyed by adjacent residents, particularly when compared to the open outlook that was available prior to the development.

31. However, the site is an allocated housing site and it is inevitable, to my mind, that any new development would affect the outlook from adjacent dwellings. The main body of the site is roughly rectangular, being narrow but extending backwards from Marine Parade by some distance. I concur with the evidence of Mr Pardey that any development would be likely to contain dwellings set either side of a central access road in order to make efficient use of the land. Thus, any development of the site would be likely to result in housing that would back onto the dwellings at Seager Road. The flooding constraints exclude living accommodation at ground floor level and such accommodation would need to be situated at first and second floor level in any scheme; a constraint that has inevitable consequences for the form and height of any development at the site.

32. Therefore, as in most cases where new housing is accommodated in an urban environment, any scheme would be visible from neighbouring properties and would have an impact upon the outlook from those dwellings. The question in this case is whether the scale and proximity of the development, particularly Blocks B and C, is such that it has an unacceptable and overbearing impact upon the living conditions enjoyed by neighbouring residents, beyond what could reasonably be expected.

33. In terms of what may be considered as an acceptable separation distance I have been referred to a number of supplementary planning documents which provide guidance on the issue. The Council's *Designing and Extension – A Guide for Householders* recommends that a minimum distance of 21m is maintained between windows in rear elevations. The guidance goes on to state that extensions reducing the distance below 21m would need to be carefully

[5] Distances shown on Drawing number 604-P03 revision C

considered. That guidance relates to the matter of overlooking from extensions and not to the issue of whether a new development would have an overbearing impact. It was also published in 1993 and pre-dates the development plan and the National Planning Policy Framework (the Framework) by some distance.

34. One of the core planning principles of the Framework is to ensure the effective use of land by reusing land that has been previously developed and that aim is mirrored by policy SP4 of the Swale Borough Local Plan (2008) (the Local Plan) which seeks to promote the efficient use of urban land in order to limit the development of Greenfield sites to a minimum. In other words, since the Council's guidance was published there has been a change in local and national policy to make best use of urban land. The guidance needs to be considered in that context and the change in emphasis in policy terms regarding the way in which urban land is developed has, in my experience, resulted in a more flexible approach to the issue of separation distances across the country.

35. The appellant has referred to the Castle Point Borough Council Residential Design Guidance Supplementary Planning Document (2013) (SPD)which recommends a minimum separation distance of 9m for windows at first floor level, 15m for windows at second floor level and 18m for windows at third floor level. That document relates to another local authority and it has no statutory weight as a planning document in relation to Swale Borough Council's administrative area. Neither can I be certain of the character of the urban environment in Castle Point or the circumstances that led to the adoption of the guidance. I give the SPD very little weight in that regard. However, the guidance does provide an example of a flexible approach to the consideration of separation distances in the urban environment and that tallies with my experience of the approach to such matters in the context of current planning policy.

36. Taking account of the urban location, the constraints of the site, the fact that it is allocated for housing development, and the planning policy imperative to make best use of land, I consider that the separation distance between Blocks B and C and the neighbouring houses at Seager Road is within the confines of what can be considered acceptable. In my view, that distance is sufficient to prevent an unduly overbearing impact on the closest dwellings (Nos 13, 15, 17, 19 and 21 Seager Road) as a result of the scale and mass of the buildings within Blocks B and C. Given that the relationship between other blocks and the surrounding houses is less acute the same conclusions would apply to the rest of the development. I have noted the relationship between blocks F and A with the dwelling at 4 Barnsley Close. The flats in block F are set 28m from the rear conservatory of No. 4 and the dwellings in Block A face the rear garden of that property. Given the distances and orientation I am satisfied that the development does not lead to an undue loss of outlook or have an overbearing impact from number 4.

37. The officer report to committee, dated 21 May 2015, acknowledged that the Council has approved many housing developments with separation distances similar to those achieved at the appeal site and identified that the relationship between the new development and existing dwellings is 'compliant with generally applied standards'[6]. I concur with that view and consider that the

[6] Paragraph 2.12 of the report to committee, dated 21 May 2015

separation distances between the development and neighbouring dwellings are within the limits of what is generally considered acceptable for new development in an urban area and are sufficient to avoid an excessive or overbearing impact.

38. Mr McCardle referred to a number of other appeal decisions where Inspectors have considered the matter of appropriate separation distances and overbearing impact. I cannot be certain that any of those cases is comparable to the appeal site in terms of the constraints of the sites, the orientation and relationship with adjoining houses, the design of the schemes in question, whether the sites were allocated for housing development or whether previous schemes had been approved on those sites. Consequently, reference to those decisions does not affect my conclusions with regards to the current appeals.

39. I have also had regard to the orientation of the development and the effect in terms of overshadowing and loss of sunlight, taking account of the Daylight, Sunlight and Overshadowing Reports[7] submitted by the appellant and my own observations on site. Blocks B to G run to the west of Seager Road and, as a result, will not affect the levels of sunlight or create overshadowing for much of the day. Overshadowing into adjacent gardens will occur in late afternoon and early evening to a greater or lesser extent depending upon the time of year. That will impact negatively on adjacent residents when compared to the pre-development scenario of an undeveloped site.

40. However, for the reasons set out, any development to the west of Seager Road would have an impact to some extent in terms of overshadowing and loss of light. The additional height of the as built scheme will result in an increase in the extent of overshadowing; as the sun begins to set in the west the additional ridge height will prevent direct sunlight from reaching gardens, causing overshadowing for slightly longer than would have been the case in the previously approved scheme. However, that difference is limited in extent and the reports demonstrate that the gardens will receive full sun for much of the day. Whilst I appreciate that any overshadowing will be seen as a negative intrusion by existing residents I am satisfied that the development has not resulted in an excessive level of overshadowing or loss of sunlight beyond what could reasonably be expected.

41. The reason for refusal and the reason for issuing the enforcement notice related specifically to the alleged overbearing impact and not to the loss of privacy resulting from overlooking. Notwithstanding that point, Mr McCardle raised the issue of overlooking in his evidence and the matter was considered at the Inquiry.

42. Whilst I am satisfied that the separation distances between the development and neighbouring dwellings are acceptable, I find that the design of the windows pays little regard to the constrained nature of the site and the need to respect the privacy of neighbouring residents. In particular, the floor to ceiling height windows within the rear elevation of the blocks facing Seager Road creates a wide open expanse of glass and a feeling of mutual overlooking between dwellings.

43. The fact that accommodation is situated at first and second floor level adds to the feeling of being overlooked when stood within the rear rooms and gardens

[7] Daylight, Sunlight & Overshadowing Reports, Syntegra Consulting, dated February 2015 and April 2016

of neighbouring dwellings, particularly those closest to the rear of Block C. When stood at first and second floors within Blocks C and D the scale of the windows provides an uninterrupted and clear view into adjacent gardens. Whilst the degree of overlooking is greatest to the rear of the dwellings directly opposite Block C (Nos 17 to 21), the scale and design of the windows creates a strong sense of being overlooked to the rear of all dwellings at Seager Road.

44. I am mindful that the development is unoccupied and that future residents would be likely to install blinds and/or curtains, as would the residents of the houses opposite, if they have not done so already. Those measures would mitigate the impact to some degree. However, without any other mitigation the windows to the rear of Blocks C to G would continue to afford clear views of the gardens of dwellings at Seager Road and a strong perception of overlooking would remain by virtue of the scale and elevated position of the windows.

45. In mitigation, the appellant has proposed a landscaping scheme which includes a run of Japanese Privet trees along the rear boundary of Blocks C to G[8]. Those trees would have a mature height of 5-7m and would be at a height of 3.5m when planted to provide an instant screen. Information presented indicates that the trees are considered evergreen in the south of England, only losing leaves in harsh winters. Similar trees are proposed on the shared boundary with 4 Barnsley Close. I am satisfied that the proposed planting would provide a significant degree of mitigation. The trees would not exclude all views between properties but would filter views and mitigate against the oppressive feeling of being overlooked as a result of the full height windows. In time, I have no reason to doubt that the trees would grow into an effective screen, without being overly dominant of themselves due to their relatively compact mature height. That habit would be appropriate for the location and should avoid undue pressure to remove or prune trees along the majority of the boundary of the site.

46. For most of the development I am satisfied that the trees would provide adequate mitigation from the effects of overlooking. However, I do have concerns regarding the effectiveness of the tree planting to the rear of Block C. Not only is that block closer to the houses opposite than other blocks but the depth of gardens of the three houses within the block is just 7m. Given that the trees would have a spread of 3-6m that may lead to pressure for removal in future if the trees take up a significant proportion of the garden. I note that the proposed trees appear to be spaced further apart to the rear of Block C than is the case in other blocks, perhaps in recognition of the limited size of the gardens. Therefore, despite the commitment to on-going maintenance of any planting through the s.106 agreement, I am not satisfied that tree planting alone would mitigate against the overlooking from windows to the rear of Block C.

47. The appellants have put forward a scheme of mitigation in the form of obscured glazing for certain windows within the rear of Block C and the front of Blocks A and L, which overlook 4 Barnsley Close, albeit that they made clear that they do not consider the mitigation to be necessary to make the development acceptable in planning terms. In the absence of obscure glazing I remain of the view that the rear windows of Block C would have an unacceptable effect on the levels of privacy enjoyed by the residents of opposing dwellings, due to

[8] As shown on landscaping plan, numbered 0713-01 revision D

the limited distance between the two and my concerns regarding the future effectiveness of tree planting as a result of the limited size of the gardens.

48. I am also mindful that the living rooms of the units in Block C are situated at the rear of the first floor, as opposed to the layout approved in the 2011 permission which contained kitchen and dining areas at the rear. To my mind, those using a living room are more likely to spend longer periods within the room for recreational purposes. It would be logical to locate an armchair or sofa next to the windows for light and to allow views onto the garden whilst reading or relaxing. Thus, even though the windows are of a comparable size to those approved in the 2011 permission, the as built layout is likely to result in more frequent use and overlooking than would be the case for a kitchen where domestic tasks are being undertaken.

49. Consequently, I consider that the obscure glazing proposed to the rear of Block C would be necessary to ensure that acceptable levels of privacy are maintained for those residing opposite. The proposed glazing would retain a window through which residents could see out but would obscure the lower section of each window and a side panel above. That arrangement would maintain a reasonable living environment for future residents whilst being effective in reducing overlooking to the rear of Block C.

50. Due to the comparatively greater distance between existing dwellings and other blocks to the rear of Seager Road the proposed tree planting and landscaping would provide adequate mitigation. Due to the separation distance between Blocks A and L and No. 4 Barnsley Close, and the orientation of those units, I am satisfied obscure glazing within those blocks is not necessary in order to maintain acceptable levels of privacy.

51. In view of the above, whilst I recognise neighbouring concerns regarding the size and design of the windows the separation distances are within normal planning standards and the effects can be mitigated through a combination of tree planting and the use of obscured glazing to the rear of Block C, in addition to any curtains and/or blinds that householders are likely to install. Those measures will not prevent overlooking between neighbouring properties but will minimise the extent of that overlooking and bring it in line with what could reasonably be expected in an urban environment.

52. Therefore, I am satisfied that the development, as constructed, will maintain acceptable living conditions for existing residents, subject to the mitigation measures described above being secured through the imposition of conditions and through the s.106 agreement. For those reasons I conclude that the development complies with the aims of policies E1 (8) and E19 (8) of the Local Plan in terms of scale, height, massing, and the effect on the living conditions of existing and future residents.

Other Matters

53. The Council and the appellant dispute whether development approved by the 2011 permission was commenced and, as a consequence, whether it represents a legitimate fall-back position. However, I have considered the impact of the development on its own merits and find it to be acceptable for the reasons given. As such, it is unnecessary for me to reach a conclusion on whether the 2011 permission was commenced or to reach a finding on the legitimacy of the suggested fall-back scenario.

54. It is common ground that the Council cannot demonstrate a five-year supply of deliverable housing land and that there is a pressing need for affordable housing within the Borough as a whole and particularly on the Isle of Sheppey[9]. The comments of the Head of Housing in the report to Committee of 21 May 2015 identified the lack of new affordable homes on Sheppey and commented on growing numbers of low income households competing for increasingly unaffordable housing in the private rented sector. Proposals within the emerging local plan for a zero percentage contribution of affordable housing from new build schemes on the Island were also noted; a factor due to the lack of viability of new housing as opposed to the lack of a defined need. The Head of Housing concluded that it was imperative that the 35 homes within the development were provided to ensure at least some of the existing need is met.

55. In the face of that combination of a lack of supply, high demand, and the difficulty in securing new affordable housing as part of future housing schemes, the contribution that the scheme would make towards meeting local housing need is a matter that attracts significant weight in its favour.

56. Due to their height, the dwellings and flats on the site are taller than neighbouring dwellings at Seager Road, Barnsley Close and Marine Parade. However, although of a greater scale than neighbouring properties, I am satisfied that the design of the scheme, in terms of its outward appearance, is well suited to the coastal location of the site, particularly the use of steeply pitched roofs and weatherboarding. The dwellings are largely surrounded by existing built development and are not overly prominent in the wider area although the development can be seen on the skyline when looking across open countryside from Minster. However, from distance the roofline blends into the rest of the townscape of Sheerness and the scheme has not caused harm to the character of the wider area.

57. The development has been constructed without providing the access to Beckley Road, as previously approved. I have noted correspondence submitted with regard to private rights of access over the land to the rear of Beckley Road, including a suggestion that part of the land on which the dwellings fronting Beckley Road have been constructed is not within the ownership of the appellant. Matters relating to private access rights and land ownership fall outside the scope of the planning system and it would be inappropriate for me to comment on those matters within my decision. In planning terms the Council has not objected to the omission of the link to Beckley Road and it does not appear to be essential in terms of providing access to any particular services or destination. As such, the absence of the footpath link is not a matter that weighs against the development in planning terms.

58. Similarly, reference has been made to works that have altered the surface of the private footpath which serves properties to the rear of Seager Road. Any works to that path fall outside the application site and are private matters that fall outside the scope of my decision.

59. A number of third party letters have referred to the level of car parking within the development. The level of car parking is the same as the approved scheme and I am satisfied that it is sufficient to meet the needs of the development. The size of the ground floor garages is relatively generous and, although the

[9] Paragraphs 11 to 13 of the Statement of Common Ground

dimensions of those garages have been altered in comparison to the previously approved plans I am satisfied that there is sufficient width for residents to park and access their vehicles.

60. In terms of foul drainage, Southern Water wrote to the Council in relation to the retrospective planning application and requested that a condition be attached to any permission to secure full details of foul and surface water discharge[10]. Following that response to the Council Southern Water wrote to the appellant's civil engineering consultant to confirm that an application to connect to the existing foul sewer had been approved[11]. Surface water drainage is required to be separated from foul water and the site will be drained via a Sustainable Urban Drainage system (SUDs). Details of the proposed system have previously been approved by the Council in relation to condition 7 of the 2011 scheme and the approved details involved surface water drainage being collected in a large swale on the site[12]. The system was designed to ensure that run off levels into adjacent drainage ditches would be lower than the pre-development run off rates. Therefore, the evidence before me indicates that the development will not increase the likelihood of flooding within the local area or increase discharge into local drainage ditches, subject to full details being approved by condition, as requested by Southern Water.

61. There was much discussion at the Inquiry as to why the design of the scheme was altered, with particular regard to the increase in height. The flood risk assessment (FRA) requires that first floor accommodation is a minimum of 4.9m AOD and the development has been constructed with a first floor level of 5.2m AOD. That increase was driven by the decision of the appellant and not as a result of the requirement of the FRA. Whilst the FRA requires any sleeping accommodation to be at least 5.2m AOD, that does not apply to living rooms.

62. The appellant indicated that the first floor living rooms were intended to be adaptable to accommodate sleeping for people whose mobility may be temporarily impaired by way of illness or accidents, hence the construction to a height of 5.2m AOD. That aim reflected the requirements of the Lifetime Homes standard which sought to provide entrance level bed space. Accommodation at first floor level could constitute 'entrance level' for the purpose of Lifetime Homes if accessed by an 'easy going stair'. However, the staircase to the first floor of the dwellings does not comply with the design requirements for an easy going stair and sleeping accommodation at first floor would not constitute entry level on that basis.

63. Thus, I am not satisfied that the increase in finished floor level was justified on the basis of either the requirement of the FRA or other design criteria. The change in floor level led to further alterations due to the fact that second floor ceiling height was more restricted within the roof space, resulting in a higher eaves and ridge height. There is no evidence to suggest that those incremental changes came about as a deliberate attempt to breach the planning approval and, however the changes came about, I am required to consider the development on its merits.

[10] Southern Water letter to Swale Borough Council, dated 05 March 2015, produced at Inquiry Document 3
[11] Appendix 9 to the proof of Mr Rhodes
[12] As explained in a letter from the Civil Engineering Practice, dated 19 April 2016, produced at Appendix 9 of Mr Rhodes' proof

64. At the Inquiry I heard from a number of interested parties who expressed concern that a dangerous precedent would be set if the development were to be approved on the grounds that it would indicate that it was acceptable to erect new development without complying with the terms of a planning permission. Enforcement of the planning system is intended to be remedial rather than punitive. In other words, if an unauthorised development is considered to be acceptable in planning terms, planning permission should be granted. Enforcement action should not be taken simply because a development does not have permission or fails to comply with the terms of a planning permission. That was explained to the planning committee in the officer report of 21 May 2015 which stated that members should not let the fact that the application was retrospective influence their decision.

65. Clearly, any unauthorised development faces the risk of enforcement action if found to be unacceptable in planning terms but that is a judgement that needs to be taken on the merits of each individual case. As such, my decision in relation to this development does not set a precedent or indicate that any other breach of planning control would necessarily be immune from the threat of enforcement action.

Conditions

66. Suggested conditions, if I were minded to allow the appeal, were considered at a round table discussion at the Inquiry. The conditions attached to the 2011 permission formed the basis of that discussion. I have attached those conditions that meet the tests set out at paragraph 206 of the Framework making amendments to the suggested wording, where necessary, in the interests of precision and enforceability.

67. Although the Council suggested that the conditions attached to the 2011 permission should be attached to any approval it was clear in the discussion that a number of those conditions would no longer be necessary. As the development is retrospective and largely complete I am satisfied that a condition to ensure that it is built in accordance with the approved plans in unnecessary – permission is being sought for the development as built. The development has been constructed in materials approved previously by the Council and there is no need for details of materials to be submitted and agreed. Bin storage areas have been incorporated at ground floor level of the flats and ample room is available within dwellings for domestic storage and I am satisfied that no further details are necessary in that respect.

68. The majority of construction activity has been completed and I am satisfied that conditions are no longer necessary to control the parking arrangements for site personnel/ visitors and construction vehicles, wheel washing facilities, measures for the suppression of dust and noise or the control of working hours for construction activity. Similarly, the condition relating to measures to address any unexpected contaminated land found during construction is no longer necessary.

69. Conditions are necessary to secure the implementation of a landscaping scheme in accordance with details that should first be submitted to and approved in writing by the Council. The landscaping scheme should include measures to provide screen planting in accordance with the details shown on the revised landscaping plan, numbered 0713-01 revision D. In order to ensure that the landscaping scheme is managed and retained in perpetuity the

s.106 agreement requires that a landscape management plan is submitted to and approved in writing by the Council setting out how the landscaping scheme secured through condition would be managed. That management scheme would also make provision for the replacement of any trees and plants that die or become seriously damaged or diseased during the lifetime of the development. Thus, I am satisfied that the imposition of a condition to secure the implementation of the scheme and the planning obligation to secure on-going maintenance will provide sufficient surety that the required screen planting will be maintained.

70. A condition to ensure that obscured glazing is fitted to the rear windows of Block C, in line with details that shall first be submitted and agreed by the Council, is also required for the reasons set out above.

71. Not all of the boundary treatments have been erected on the development and a condition to secure appropriate boundary treatments is necessary, in the interests of neighbouring amenity and to ensure a satisfactory appearance. Condition 14 of the 2011 permission removed permitted development rights for the erection of any walls or means of enclosure between the front of any dwelling and the edge of the highway. That condition was imposed in the interests of visual amenity. The estate is a cul-de-sac and the front gardens and driveways have little visual impact outside the site. Government advice is that permitted development rights should only be removed in exceptional circumstances and I am not satisfied that the erection of low walls or other means of enclosure to the front of dwellings, in line with normal permitted development rules, would harm the character of the estate. No compelling reason for the condition has been advanced and I consider it to be unnecessary.

72. A condition is required to ensure that the development complies with the requirements of the FRA in the interests of flood prevention and the safety of future occupants. It is also necessary to remove permitted development rights to prevent the future conversion of garages to living accommodation in the interests of the flood prevention and the safety of future residents.

73. The estate road, visibility splays and footpaths are largely complete, including the manhole covers/ drains. However, it is not clear exactly which elements of the road network, footpaths and associated drains and services remain to be completed. I have therefore attached a condition, in line with condition 9 of the 2011 permission to ensure that the roads and services are completed, in line with details to be agreed in writing by the Council, prior to the occupation of any of the dwellings. In the interests of securing adequate parking provision and highway safety a condition is necessary to ensure that the visitor parking is provided in line with details on plan number 604-P05 revision A. A separate condition relating to the design of public street lighting to be installed within the development is also required, in line with condition 20 of the 2011 permission.

74. For the reasons set out above, conditions are required to ensure that the means of surface and foul water drainage are submitted, approved and provided prior to the occupation of any of the dwellings, in the interests of flood prevention and the quality of the water environment. The surface water drainage will be managed through a SUDs system and the information

submitted to discharge the condition in that respect will also need to identify how the system will be maintained in future.

75. Details of a habitat mitigation strategy were submitted to and approved by the Council in relation to the 2011 permission on 21 January 2015. The on-site works and relocation of reptiles has taken place in accordance with that strategy. However, part of the approved strategy was to monitor the receptor site for a period of 5 years following the occupation of the development and, in the interests of habitat and wildlife conservation, a condition is required to ensure compliance with the details previously approved.

76. From the information presented, and in the absence of any local planning policy that would require it, I am not satisfied that a condition relating to the provision of superfast fibre optic broadband is necessary to make the development acceptable in planning terms.

S106 Agreement

77. As set out above, a single s.106 agreement has been submitted in relation to the ground (a) appeal and Appeal B. The provisions are the same in relation to both.

78. The contributions relating to the provision of primary education and library books have been calculated using standard formulae in line with the approach outlined within Kent County Council's guide to developer contributions. I am satisfied that the contributions are fairly and reasonably related in scale based on the increased level of demand for those services that would be generated by the development. The contributions would be used towards the construction of the new Thistle Hill Primary School; a school required because the level of demand for primary accommodation cannot be met in existing schools. The assessment provided by Kent County Council also confirms that there is a deficiency in the stock of books at Sheerness library and the contribution would be used towards meeting the additional demand generated by the development.

79. The County Council have confirmed that the identified projects are not already being funded by 5 or more s106 agreements. Therefore, based on the information presented, the obligations in those respects comply with the terms of regulation 122 of the CIL Regulations (2010) and paragraph 204 of the Framework.

80. The s106 agreements also contain obligations on the appellant to make a financial contribution of £7825.30 towards ecological mitigation of the effect of the development on nearby areas which have designation as Special Protection Areas. The Council and the appellant have confirmed that the contribution would be used towards Strategic Access and Management Mitigation (SAMMs) in relation to the Swale Site of Special Scientific Interest. The development is within a 6km radius of the SSSI where additional residential development would add pressure on the protected asset. The parties have confirmed that the contribution would be for management and maintenance of existing areas, as opposed to the provision of new 'infrastructure' in the form of Suitable Alternative Natural Greenspace (SANGs). From the information before me, I have no reason to depart from the agreed position between the parties and am satisfied that the contribution is necessary to mitigate against the effect of the development on the site of ecological importance; that the contribution would

not be used for the provision of infrastructure; and also that the contribution is reasonably related in scale and kind, based upon the locally agreed approach.

81. The proposed 'recycling contributions' have been calculated on the pro-rata cost of providing recycling bins and facilities for each dwelling and I am satisfied that the contribution is proportionate, necessary to make the development acceptable in planning terms and directly related to the needs of the development. Moreover, I am satisfied that the obligations to secure the provision and maintenance of open space within the development are necessary to make the development acceptable in planning terms and that those open spaces are proportionate, having regard to the scale of development and the needs of future occupants. Similarly, the development will generate additional use of children's play equipment and the contributions in that respect are related to the impact of the development, necessary to make it acceptable in planning terms and proportionate in scale and kind. For reasons explained above, the on-going maintenance of landscaping, as secured by the landscaping management plan, is necessary, related to the impact of the development and reasonable, having regard to the need to protect neighbouring privacy.

82. In addition, the s106 agreement requires that a minimum of 30% of the units will be provided as affordable housing. That would equate to 11 units; 3 two bedroom houses and 8 three bedroom houses. Eight of those units would be available for rent with three 'intermediate' or shared ownership units. In reality, the appellant is a social housing provider and their intention is that all of the dwellings would be occupied as affordable housing, 32 as affordable rented units and 3 as shared ownership dwellings. However, that is a matter of choice for the appellant. In terms of local planning policy, a s106 agreement that required the entirety of the scheme to be occupied as affordable housing would be disproportionate and not related in scale and kind to the development. The 30% requirement in the s106 is derived from the s106 agreement of the 2011 permission which itself was based upon policy H3 of the Local Plan. The Council and the appellant are in agreement that the requirement of 30% conforms to local planning policy and I am satisfied that the requirements of the s106 agreements are proportionate in that respect.

Conclusion on Ground (a) in relation to Appeal A and Appeal B – in relation to the scheme 'as built'

83. Subject to appropriate mitigation measures that can be secured through conditions and the terms of the s106 agreement I am satisfied that the effect of the development on the living conditions of neighbouring residents will be acceptable.

84. Necessary contributions can also be secured towards the provision of community facilities and services, to off-set the environmental impact of the development, and to secure affordable housing. The social benefits of the scheme in terms of the provision of housing and specifically the provision of much needed affordable housing are matters that weigh strongly in favour of the development, particularly considering the absence of a demonstrable five-year supply of housing land and the acute shortage of affordable housing in the area. Having regard to the balance of economic, social and environmental factors identified at paragraph 7 of the Framework I conclude that the scheme

represents sustainable development. No adverse impacts have been identified that would demonstrably outweigh the benefits of the scheme.

85. In view of the above I conclude that Appeal A should succeed on ground (a) and that Appeal B should be allowed. I shall therefore grant planning permission in relation to both appeals.

Ground (a) on Appeal A and Appeal B – the alternative scheme

86. Given my conclusions above, and the fact that I intend to grant planning permission for the development as built it is unnecessary for me to consider the merits of the alternative scheme.

Appeal A on Grounds (f) and (g)

87. Given that the appeal will succeed on ground (a) and planning permission will be granted it is unnecessary for me to consider the appeal on grounds (f) and (g).

Chris Preston

INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Mr Simon Bird QC	Instructed by Moat Homes Ltd

Assisted by Mr Hugh Flanagan of Counsel (in relation to s.106 agreement)

He called

Mr John Pardey RIBA	Architect
Mr John Rhodes BSc MICS	Planning Consultant

FOR THE COUNCIL:

Miss Emmaline Lambert of Counsel	Instructed by the Borough Solicitor

She called

Mr Ross McCardle BA MA MRTPI	Senior Planner

INTERESTED PERSONS:

Mr Gordon Henderson MP	Member of Parliament
Mrs Homes	Local resident
Mr G Smith	Local resident
Mr W Featherstone	Local resident
Miss D Franklin	Local resident
Mr Bell	Interested party
Mr P MacDonald	Local resident and member of Minster Parish Council
Cllr Booth	Local Councillor
Cllr Ellen	Local Councillor
Cllr Galvin	Local Councillor

List of Documents Submitted at the Inquiry:

1) Layout sketches prepared by Ubique Architects, covering note, extract from Building Regulations approved Document K, extract from Lifetime Homes Standard and extract from Moat Housing Employers Requirements in relation to minimum room standards.
2) Code for Sustainable Homes Pre-Assessment Report, Ubique Architects, dated 10 October 2013
3) Transcript of the comments of Mr G Smith, including Appendices 1-23
4) Transcript of the comments of Mr P MacDonald

Appendix: Conditions in Relation to Appeal A & B

1) Full details of a landscaping scheme comprising both hard and soft landscape works shall be submitted to the Local Planning Authority within 2 months of the date of this decision. Those details shall include existing trees, shrubs and other features, planting schedules of plants, noting species (which should be native species where possible and of a type that will enhance or encourage local biodiversity and wildlife), plant sizes and numbers where appropriate, details of hard surfacing materials, and shall include a timetable for implementation. The tree planting within the landscaping scheme submitted to the Council shall be in accordance with the planting shown on the soft landscape plan numbered 0713-01 revision D.

2) None of the dwellings hereby permitted shall be occupied until the landscaping scheme has been approved in writing by the Local Planning Authority and, thereafter, the approved scheme shall be implemented in accordance with the approved timetable.

3) Prior to the occupation of any of the dwellings hereby approved boundary treatments shall have been erected, planted or installed in accordance with details that shall first have been submitted to and approved in writing by the Local Planning Authority.

4) The development hereby approved shall be carried out in accordance the following mitigation measures:

   i) The eventual occupants shall be made aware of the flood risk to the site and should ensure they are registered with the Agency's Flood Warning service:

   ii) All appropriate flood-proofing measures shall be incorporated into the proposed development up to a level of at least 5.2m AOD;

   iii) The finished floor level for all living accommodation shall be no lower than 4.9m AOD with all sleeping accommodation above 5.2m AOD. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking or re-enacting that Order) the garages hereby approved shall not be converted to living accommodation and no living or sleeping accommodation shall be provided below the heights specified above;

   iv) An effective means of escape shall be provided at the first-floor level or above.

5) Before any part of the development hereby approved is first occupied details of the public street-lighting columns within the development shall be submitted to and approved in writing by the Local Planning Authority. Details shall also include which columns, if any, shall incorporate the "Hawkeye" surveillance system at the time of their installation. The details submitted to and agreed by the Local Planning Authority shall include a timetable for implementation. Thereafter, the street lighting columns shall be erected/ installed in accordance with the approved details, in line with the approved timetable.

6) Prior to the occupation of any of the dwellings hereby approved the estate roads, footways, footpaths, verges, junctions, retaining walls,

service routes, vehicle overhang margins, embankments, visibility splays, accesses, driveways, car parking and street furniture shall be completed in accordance with details that shall first have been submitted to and approved in writing by the Local Planning Authority, such details to include the design, layout, levels, gradients, materials and method of construction.

7) The areas indicated on drawing no. 604-P05 revision A as vehicle parking space shall be provided, surfaced and drained before any of the dwellings are occupied, and shall be retained thereafter for the use of the occupiers of, and visitors to, the premises. No permanent development, whether or not permitted by the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking and re-enacting that Order), shall be carried out on that area of land so shown or in such a position as to preclude vehicular access to this reserved parking space.

8) Before any of the dwellings within block C are first occupied, the fixed panes of first and second floor windows in the rear elevation (with the exception of the top windows to the vaulted ceiling), shall be obscure glazed to a level of obscurity that shall first be agreed in writing by the Local Planning Authority, in accordance with details shown on drawing number 604-SK-20. Thereafter the obscured glazing within those windows shall be maintained as such and any replacement glazing shall be fitted with glass of the same level of obscurity.

9) None of the dwellings hereby permitted shall be occupied until a Sustainable Urban Drainage System (SUDS) has been constructed in accordance with details that shall first have been submitted to and approved in writing by the Local Planning Authority. The details submitted to the Local Planning Authority for approval shall include measures to secure the on-going maintenance of the SUDS following the completion of the development. Thereafter, the SUDS shall be maintained in accordance with the approved details.

10) None of the dwellings hereby approved shall be occupied until a drainage system to allow for the disposal of foul and surface water sewerage has been completed in accordance with details that shall have first been submitted to and approved in writing by the Local Planning Authority.

11) Any further work at the site shall be carried out in accordance with the details previously approved by the Council on 21 January 2015 in relation to condition 11 of application SW/10/0050 including the Habitat Management Plan, Reptile Survey and Mitigation Strategy, and Receptor Site Report. In line with the approved details, the receptor site shall be monitored for a period of 5 years following the first occupation of the development.