The Planning Inspectorate

Appeal Decision

Site visit made on 14 November 2023

by Stephen Wilkinson BA BPl DIP LA MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 December 2023

Appeal Ref: APP/H5960/Q/22/3315346
Battersea Reach, York Road, Wandsworth, London SW18 1GJ

- 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 Battersea Reach Owner's Association and St George Battersea Reach Limited against the decision of the Council of the London Borough of Wandsworth.
- The application Ref 2021/5234, dated 19 November 2021, was refused by notice dated 1 July 2022.
- The appeal is made under S106A of the Town and Country Planning Act 1990, as amended to vary the legal agreement dated 2 January 2008 for planning permission ref 2006/4533 (as varied by 6 other Deeds of Variation).

Decision

1. The appeal is dismissed.

Procedural Matters

2. S106A of the Town and Country Planning Act 1990 (as amended) is the legal basis of this appeal. S106A(6) allows for the modification and discharge of covenants included in the completed agreement.

3. The application was not supported by an application form as the Council do not have a specific form for the proposed development. Instead, the details of the variations were included in a covering letter. The description of development used in the banner heading has accordingly been taken from the applicant's letter.

4. The appeal is accompanied by a draft Deed of Variation (DoV) to the Section 106 Agreement dated 2 January 2008. The proposed variation of the legal agreement include:

   - Modification of 'Public Access Areas' to make Ensign and Genoa Gardens private amenity space with no public access,
   - Removal of 'Public Right of Way' and Access Point 9 (Mendip Gate), east of Ensign House and amalgamation of land within Ensign Gardens,
   - Modify public access to courtyards east of Jasmine House and west of Discovery House from between 9.00am and half an hour after sunset each day and between 6.00am and 10.00pm each day, and
   - Replacement of Plan D (Public Access Areas) and (Plan E Public Rights of Way), replacement of clause 16.1.2 (Public Access and Phasing), deletion

of clause 16.7 (access to Mendip Gate) and clause 31(option for dedication of identified land for public use).

5. The officer's report to Committee states that it had no objection to the revised designation of Genoa Gardens as private open space and the revised times for the two 'curfew' areas in the courtyards east of Jasmine House and west of Discovery House. This is reflected in the Council's decision.

6. Accordingly, the outstanding differences between the parties relate to:

- The modification of 'Public Access Areas' to make Ensign Gardens a Private Amenity Area' with no public access,
- The proposed removal of 'Public Right of Way' and Access Point 9 (Mendip Gates and the amalgamation of this land into Ensign Gardens as part of a private amenity area')
- The deletion of Clause 16.7. This would have the effect of losing an opportunity to secure access from Battersea Reach at Mendip Gate through to Mendip Road and Chatfield Road, and
- The proposed replacement clause 16.1.2. This would have the effect of preventing reasonable public access to the 'Public Access Areas' (which also include Ensign Gardens).

This decision focuses on the above matters.

7. Whilst the Council's reasons for refusal include references to its Core Strategy and Development Management policies adopted in 2016 these have now been superseded by the Wandsworth Local Plan 2023. This together with the London Plan 2021 comprise the Development Plan on which this decision is based.

8. In the determination of applications made under S106A case law[1] requires that for each obligation the following sequential tests are addressed:

- what is the current obligation,
- the purpose of each obligation,
- whether or not these purposes are useful, and
- if they each serve a useful purpose can that purpose be served equally well by the suggested modification.

9. These tests form a framework for this decision.

10. I wrote to the parties seeking their views on the new Local Plan as this had been adopted after the Council had issued its decision and have included any comments received into this decision.

Reasons

Context

11. The appeal site, known as Battersea Reach (the estate), occupies 5.2ha with a frontage of around 300m to the south bank of the River Thames. It was

[1] R(Garden and Leisure Group Ltd) v North Somerset Council and Another [2003] EWHC 1605 (Admin at para 1.5)

developed over several years pursuant to three planning permissions for residential led mixed use schemes. The first involved the development of four blocks of flats (C/99/0580) subject to a S106 Agreement. A subsequent planning permission for eleven blocks (2006/4533) was granted in 2008 subject to a further S106 Agreement which has been the subject of a series of DoV and is the subject of this appeal. A further permission comprising five blocks was granted in 2012 (2011/0324).

12. Along the site's Thames frontage is an adopted Riverside Walk and cycle path, the Thames Path.

Description of areas which are the subject of the suggested variation

Ensign Gardens

13. Ensign Garden is a landscaped area of around 900m2 area with Mendip Court (residential block) to its east, the 'Access' storage building to the south and Jasmine House (within the scheme) to its west. It is entirely fenced off with a gate to its south with its northern boundary facing the Riverside Path.

14. Its use as an area of public open space was subject to a curfew between the hours of 9.00 and half an hour after sunset each day. The statement of the Battersea Reach Owners Association (BROA) identifies that despite the curfew the garden attracted anti-social behaviour (ASB), crimes including sexual assault and voyeurism and was a location for rough sleepers. These concerns led to the erection of a 1.2metre high rail fence around the whole site in 2008 restricting public use. The BROA has plans to enhance the gardens to address its concerns.

The Ensign Path

15. The Ensign path lies on both the west and south side of Ensign Gardens and was originally laid out for public access but was gated at its northern point in 2021.

16. The Ensign path runs to a 3metre wide gate, the Mendip Gate which lies on the site's southern edge adjacent to the car park serving the 'Access' storage building.

Public Access Area throughout Battersea Reach

17. The landscaped areas between the residential blocks throughout the Battersea Reach allow public access rights through the estate.

Proposed variations

18. Each proposed variation is considered against the four tests.

Ensign Gardens

Current obligation

19. The obligation included in the S106 Agreement requires this area to form part of the 'Public Access Areas' open for public use between 9.00am and half an hour after sunset each day.

What purpose does this fulfil?

20. The obligation allows for an area of public open space for recreation to the benefit of the health and well-being of the wider community.

Is this a useful purpose

21. The site includes landscaping and shrub planting demonstrating its versatility as an area of public open space with a particular value given its location towards the edge of the estate by the Thames Path.

22. The security risk assessment[2] submitted by the appellants identifies that the low railings surrounding this space do little to actually restrict access in the evenings when it is understood most ASB occurs. It is therefore unclear how the use of this area for public use would lead to a concentration of criminal activity when compared to its present state. The comments of the DOCO[3] are instructive in this regard.

23. An open and fully accessible space would benefit from casual surveillance from its users and passers-by and is overlooked from the windows serving the flats in the upper floors of Ensign House.

24. I do not know the full details of the decision of my Inspector colleague[4], cited by the appellant regarding a proposed ATM. The ATM would, however, have been a singular attraction for criminal behaviour compared to an area of public open space.

25. The retention of this site as publicly accessible open space is supported by policies GG2(F), G4 and D8 of the London Plan and policies LP1(7) and LP15 of the Local Plan. These identify that public open space fulfils a useful purpose in allowing local communities to enjoy recreation and its related health benefits.

26. The obligation serves a useful purpose.

Can that purpose be served equally well by the suggested modification

27. The effect of the suggested modification would be to create an area of private amenity space. This runs entirely counter to the purpose of the obligation. The purpose cannot be served equally well by the suggested modification.

Public Right of Way to the Mendip Gate and incorporation of land into Ensign Gardens.

Current obligation

28. An unadopted Public Right of Way leading from the Riverside Path along the Ensign Path around Ensign Gardens to the Mendip Gate.

What purpose does this fill?

29. The obligation allows for public access from the Thames Path to Ensign Gardens and to the Mendip Gate.

Is this a useful purpose

[2] KASBEC consultancy June 2021
[3] Designing Out Crime Officer
[4] APP/J2373/W/18/3204012

30. This pathway allows for public access to Ensign Gardens and to the Mendip Gate.

31. Policies of the Development Plan including T2 and T3 of the London Plan and LP53, LP58 and SI16 of the Local Plan support the creation of safe and accessible pedestrian and cycle networks across the Borough and to the River Thames.

32. The obligation serves a useful purpose and furthermore is important to enable permeability to other areas.

Can that purpose be served equally well by the suggested modification

33. The suggested modification runs entirely counter to the intentions of the original obligation in incorporating land over which there are public access rights into an area of private amenity space.

Removal of Clause 16.7

Current obligation

34. Clause 16.7 requires that works which could prejudice access to the Mendip Gate from adjacent land are not to be carried out without the prior consent of the Council.

What purpose does this fulfil?

35. The obligation allows for public access around the site with the prospect of securing access to Chatsworth Road via the Mendip Gate.

36. It would seem that the Council's original intention when the first application for planning permission was granted (C/99/0580) for the development of the estate was for a direct west-east route from Bridgend Road to Chatsworth Road which would have allowed for pedestrian movement away from York Road.

37. Indeed consistent with this intention, the Council included in a planning permission (2001/3684) for the redevelopment of the 'Access' storage site Condition 7 requiring the construction of a public footpath along the north side of the site to link to the Mendip Gate.

38. However, through the granting of subsequent deeds of variation and the implementation of a children's nursery, outside play area and Flotilla House within Battersea Reach the delivery of a dedicated public access route through the heart of the estate is not possible although the public access rights through the Mendip Gate would allow for permeability. Indeed, the Council sought through an application for planning permission in 2021 (2020/4285) to secure an improved access route through the 'Access storage site although the application was subsequently refused.

39. I recognise that access through the Mendip Gate is entirely dependent on the permission of the BROA which they refuse[5]. In support of their position, the appellants cite a decision[6] of one of my Inspector colleagues which involved a suggested Grampian condition where the landowner refused to engage in

[5] Letter from BROA dated 25 August 2023
[6] APP/R2520/W/20/3250667

negotiations and prevented the development from proceeding. However, in the appeal before me there is a legal obligation and planning permission has been granted and the development has been completed. The two cases do not merit comparison.

40. The clause maintains the possibility of public right of access.

Is this a useful purpose

41. The covenant is important in enabling public access to/from the River Thames Pathway from the residential areas to the south.

42. It is supported by Development Plan policies T2 and T3 of the London Plan and LP53, LP58 and SI16 of the Local Plan support the creation of safe and accessible pedestrian and cycle networks across the Borough and to the River Thames.

43. Whilst the appellants indicate that an alternative route exists through Riverside Plaza the advantage of the route through Mendip Gate is that it is at grade.

44. The obligation involving public access rights through the Mendip Gate still serves a useful purpose in supporting permeability.

Can that purpose be served equally well by the suggested modification

45. The modification would adversely impacts on public rights of access through the Mendip Gate.

46. For these reasons, I find that the deletion of the clause would not serve the stated purpose equally well.

Proposed replacement clause 16.1.2

Current obligation

47. The clause defines areas throughout the estate where the public has permitted access. It places an onus on the owner to maintain the public access areas and routes at their expense subject to the satisfaction of the Borough Engineer. These areas include the whole of the landscaped areas between the residential blocks and a public access route along Juniper Drive towards the centre of Battersea Reach.

48. It includes a requirement for the closure of the public access areas on no more than 7 days each year in order to prevent the acquisition of public rights presumably through adverse possession. It is clear that no part of the public access areas or public access route constitute public highway. It defines the curfew areas across the estate and allows for passive recreation.

What purpose does it fulfil

49. Within reason it allows full public access through the estate including for passive recreation with the burden of maintenance on the site's owners. It is clear that these routes are not dedicated public highway. It reflects the importance for permeability through an estate with an area of around 5.2ha with a 300m long river frontage and affects the route to the Mendip Gate.

Is this a useful purpose

50. The clause maintains permeable access through the estate which leads to the Thames Path. No evidence is before me to demonstrate how this clause is not enforceable. It still serves a useful purpose.

51. It is supported by Development Plan policies T2 and T3 of the London Plan and LP53, LP58 and SI16 of the Local Plan support the creation of safe and accessible pedestrian and cycle networks across the Borough and to the River Thames and those policies which seek to protect public open space.

Can that purpose be served equally well by the suggested modification

52. The suggested clause allows for public access through the central areas of the estate only and would not allow passive recreation subject to the appellant's discretion on how to manage this. This tips the balance against public access through the estate undermining the obligation as originally drafted. Furthermore, it would not allow for passive recreation or for the public access route.

53. A new clause, 16.1.3, would confirm that there should be no public access to the private amenity areas which include Ensign Gardens. The suggested revision would serve to undermine the function of this space for public use.

54. These suggested modifications would not serve the original purpose of the covenants equally well.

Planning balance and conclusions

Policy Framework

55. Each of the proposed variations require consideration of matters of security and personal safety balanced against the retention of public access rights and public accessible open space.

56. There is considerable policy support for the retention of the covenants included in the S106 Agreement. These include policies GG2(F), G4 and D8 of the London Plan and policies LP1(7) and LP15 of the Local Plan which identify that public open space fulfils a useful purpose in allowing local communities to enjoy recreation and its related health benefits. For these reasons, the policies require that public open space should be protected and where its loss is proposed compensatory provision should be made. Other policies including T2 and T3 of the London Plan and LP53, LP58 and SI16 of the Local Plan support the creation of safe and accessible pedestrian and cycle networks across the Borough and to the River Thames.

57. Policies LP1(11), D8 and D11 of the London Plan seek a need to minimise opportunities for crime and ASB.

58. Policies requiring public access, provision of open space and safe communities are supported by Chapter 8 of the Framework.

59. The appellants refer to anecdotal evidence of reported crime and ASB across the site since 2008. Whilst the hotspot data[7] and ward data carry more weight they are for only for limited periods and are unclear on whether they actually cover the areas of Battersea Reach which are the subject of this appeal.

[7] PoE BROA para 6.37

60. Despite the concerns of the appellants, the ballet school and the nursery that incidents have occurred since 2008, there is no substantiated body of evidence before me which demonstrates that public safety has been continually undermined by the covenants.

61. The comments of the DOCO are instructive in that both Ensign Gardens and the Ensign path could be re-designed to address these concerns. These suggestions do not undermine the obligations as currently drafted and would be consistent with them.

62. Furthermore, whilst the route through the Mendip Gate has been blocked by the BROA this does not in itself undermine the value of this route and its potential contribution to permeability through the area.

63. The publicly accessible routes through Battersea Reach and the use of the open spaces for passive recreation contribute to the wider recreational needs of the area. Given the extent of the site's river frontage and the importance of the Thames Path permeability through the site is important.

64. The covenants are entirely consistent with the adopted policies for enhanced public access and open space and whilst these matters have to be balanced against those policies which aim to minimise opportunities for crime and protection of personal safety the evidence is not sufficiently robust on this point to merit agreement with the suggested revisions.

65. The appellants cite a range of other factors in support of their application which I address below:

The Public Sector Equality Duty (PSED)

66. The PSED embraces three aims designed to eliminate discrimination, advance equality and foster good relations. It is unclear how the covenants which are the subject of this appeal run counter to each of these aims.

67. The appellants advance an argument without evidence that many of the residents of Battersea Reach who wish to make use of Ensign Gardens as a private space would be people with 'protected characteristics'. However, a counter argument can be advanced for those sharing similar characteristics from the wider community who are currently denied access in breach of the S106 Agreement. If the Garden was made publicly accessible this would not preclude the estate's residents whereas the reverse situation advanced by the appellants would preclude the wider community.

68. In this regard I find that the suggested variation would in fact be counter to the PSED.

Human Rights

69. The appellants refer to the Tchenguiz case[8] as a precedent in support of the revised clauses included in the DoV. In this case Westminster City Council introduced parking bays to the front of the claimant's property which they successfully argued infringed their human rights.

70. However, the appeal before me is markedly different in that the provision of public amenity space and access routes were included in the S106 Agreement

[8] Robert Tchenguiz v. Westminster CC [2022] EWHC 469 (Admin)

agreed by the developers and the completion of the S106 Agreement was contingent on the grant of planning permission.

71. The BRRA, representing leaseholders, jointly submitted the application with the site owners and is included as a party to the draft DoV. However they were not a party to the S106 Agreement completed in January 2008 and cannot be a party to the DoV. It is not the remit of this decision, however, to address the legal status of the BRRA or that of the individual leaseholders.

Other Matters

72. The appellants identify that the amount of private open space included in the Landscape Masterplan which accompanied the 2008 permission is below the adopted standards of the recently adopted Local Plan. However, the issue before me refers to whether the original obligation still serves a useful purpose and not whether another purpose is to be preferred.

73. Whilst cost is not a planning issue, I recognise that the BRRA's suggested security measures designed to adhere to the existing covenants, particularly those affecting Ensign Garden and footpath may lead to additional costs. These would fall to both the developer and individual leaseholders to pay.

74. However, it is unclear how the suggested costs would differ from those likely to arise from the BROAs suggested remedies if the land is to be retained with the existing covenants complied compared to the cost implications of adhering to their suggested covenants. This is particularly important given the scenarios included in the Security Risk Assessment.

75. Finally, I am satisfied that each of these covenants as originally drafted in the S106 Agreement fall within the provisions of Regulation 122 of the CIL Regulations and Paragraph 57 of the Framework.

76. I have considered the impact of the physical changes around the estate since the S106 Agreement was originally completed. However, the covenants included in the S106 Agreement each still serve a useful purpose and the modifications would undermine their stated purpose.

77. Accordingly, the appeal is dismissed.

78. I recognise that this outcome will be disappointing to those in favour of the appeal proposals who, in particular are concerned about crime and personal safety. However, the views of local people, very important though they are, must be balanced against other considerations including the operation of the four tests. In coming to my conclusions on the suggested variations to the S106 Agreement, I have taken full and careful account of all the representations, the provisions of the Development Plan and the Framework. On balance though, the evidence in this case leads me to the view that the appeal should fail.

Stephen Wilkinson,

INSPECTOR