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# Appeal Decision

Inquiry Held on 6, 7, 8 and 9 June 2017

Site visit made on 8 June 2017

**by R W Allen B.Sc PGDip MRTPI**

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

**Decision date: 26 July 2017**

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**Appeal Ref: APP/Z4718/W/16/3162164**

**Land off White Lee Road, Batley, West Yorkshire**

- 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 Jones Homes (Yorkshire) Limited and M62 Developments Limited against the decision of Kirklees Metropolitan Borough Council.
  - The application Ref 2015/62/92944/E, dated 14 September 2015, was refused by notice dated 23 June 2016.
  - The proposal is described on the application form as comprising residential development (66no dwellings).
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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. Prior to the Inquiry, the appellants undertook amendments to the layout which resulted in the deletion of one dwelling from the total number sought. I ruled at the Inquiry that I am content to determine the appeal on the revised scheme for 65 units on the basis that the layout is not significantly altered from that considered by the Council at application stage, and that adequate consultations on those changes have been undertaken with appropriate persons. Thus the *Wheatcroft Principle*<sup>1</sup> test has been met.
3. Because of this, the Council is no longer defending its second and third reasons for refusal in respect of the adequacy of on-site open space, and on the effect of the proposed development on the living conditions of the occupiers of surrounding properties in relation to two of the proposed units. Following the submission of a viability report, the Council is also not defending its fourth reason for refusal in respect to the quantum of affordable housing provision.
4. As no other party has advanced any further representations in respect to the changes to the layout or on site open space provision, and no substantial concerns were raised at any point on the appropriate provision of affordable housing, I am content to find these matters as being resolved and, other than allowing that the provision of affordable housing is a benefit of the scheme to be weighed in the overall planning balance, I do not consider them further in my decision. I will however deal with the more general concerns of residents in

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<sup>1</sup> Bernard Wheatcroft Ltd vs. Secretary of State for the Environment [JPL 1982]

respect to the effect on their living conditions from the proposed development as a whole.

5. A legal agreement under s106 of the Town and Country Planning Act is before me, dated 7 June 2017, which makes provisions for local services and facilities made necessary by the proposed development. However, because I am dismissing the appeal on the main issue, it is not necessary for me to find on its adequacy.

### **Main Issue**

6. Mindful of the above, the main issue before me is whether or not the proposed development on land identified as 'Urban Greenspace' in the development plan is justified.

### **Reasons**

#### *Policy context*

7. The development plan for the area is the Kirklees Unitary Development Plan 1999 (with saved policies) (UDP). Common ground exists between the main parties that the appeal site forms part of a wider area of land designated within the UDP as 'Urban Greenspace' (UG), where UDP policy D3 applies. The policy seeks to protect identified open land within urban environments, which the Council says is of strategic functional importance to the borough. Development is generally resisted (save for some exceptions which are not relevant in this case) for a number of reasons set out in the preamble to the policy<sup>2</sup>. Pertinent to the appeal is its contribution to character and visual amenity, the appeal site being specifically identified by the Council in its evidence as a natural and semi-natural greenspace. The appeal site is currently open land and within private ownership, and it is not available for public use.
8. The main parties agree that the proposed development would not accord with UDP policy D3, insofar as it would result in the loss of natural and semi-natural UG land. I have no reason to take an alternative view. The extent to which the proposed development might undermine and cause significant harm to the site's visual amenity function is contested; a point to which I return later in my decision.
9. The parties dispute the appropriate weight to be applied to UDP policy D3 and whether it is consistent with the National Planning Policy Framework (the Framework). At the Inquiry, my attention was frequently drawn to the New Lane appeal decision (also referred to as the Strata Homes Development)<sup>3</sup>, in which similar arguments on the matter were rehearsed. The Inspector in that decision found that the policy is out-of-date. This is because at that time, the Courts held that a policy relevant to the supply of housing included those which also constrain or affect housing. Undoubtedly, UDP policy D3 does just that.
10. However, subsequent clarification from the Supreme Court in the Suffolk Coastal case<sup>4</sup> has now narrowed the definition of a housing policy to that relating only to the control of supply, thus the Inspector's wider interpretation is now redundant. The policy is not out-of-date for the purposes of paragraph

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<sup>2</sup> Paragraph 2.7 Kirklees Unitary Development Plan

<sup>3</sup> Appeal decision APP/Z4718/W/16/3147937

<sup>4</sup> Suffolk Coastal District Council v Hopkins Homes and SSCLG, Richborough Estates Partnership LLP and SSCLG v Cheshire East Borough Council [2017] UKSC 37

49 of the Framework. Moreover, it is not apparent from the previous decision that the New Lane Inspector subjected UDP policy D3 to a health check against other parts of the Framework, particularly paragraph 73. This was not unexpected given the circumstances before him at that time, but it is necessary for me given the matters at hand.

11. The appellants suggest that UDP policy D3 is inbuilt with confusion, inflexible, and fails to take a balanced approach towards development. I do not find this to be the case. The policy's primary purpose is to protect designated UG, and as such it cannot be overtly criticised for its purportedly unfriendly or unwelcoming tone to new development. However, it does not impose a blanket ban on development. It allows flexibility for the decision maker to consider the merits of a case particularly if community benefits are deemed to exist, and I am alive to the fact that the definition of said community benefits can be open to interpretation. While UDP policy D3 may not precisely mirror the Framework's approach to balance, it is broadly consistent with it, sufficient for me to afford significant weight to the policy in this particular regard.
12. The opening sentence of paragraph 73 of the Framework states that access to high quality open spaces and opportunities for sports and recreation can make an important contribution to the health and well-being of communities. The term '*open space*' and whether it should be considered independently of, or in conjunction with '*sports and recreation*' is a matter of dispute between the parties, and I acknowledge it is somewhat ambiguous.
13. However, from my reading of both paragraph 73, and the Glossary section contained in Annex 2 of the Framework, I do not find that open space and sports and recreation are conjoined in the manner suggested by the appellants. Furthermore, I find no obvious reason why visual access, in addition to physical access, is not a valid purpose of the provision of open space, and cannot be of public benefit in its own right particularly when it is possible to experience the space at close proximity, for example through the existence and use of public footpaths. Therefore the function of UDP policy D3 in seeking to protect the visual amenity of UG is not, I find, inconsistent with the Framework.
14. The second sentence of paragraph 73 of the Framework states that planning policies should be based on up-to-date and robust assessments for the needs for open space, sports and recreation facilities and opportunities for new provision. Here, the Council relies on its Kirklees Open Space Strategy 2015 (updated 2016) (KOSS). This states that the area is deficient of natural and semi-natural greenspace when measured against a standard of two hectares per 1000 population. The Council says this justifies the continued protection of the appeal site as UG.
15. The KOSS's area of search focuses only on urban sites, including UG. It does not consider other sites within the vicinity, particularly Green Belt land as identified by the appellants, where accessible natural and semi-natural greenspace is also said to exist. Had the Council included such sites within the KOSS, the appellants say that instead of there being a deficit, there would in fact be a considerable surplus of natural and semi-natural greenspace in the area. Thus, they say, the loss of the appeal site would have little overall bearing on the availability of such sites to local people. The Council has not sufficiently explained why the KOSS did not include Green Belt sites, and I see

- no obvious reason why it could not and should not have taken a wider and more rounded assessment of all such sites within the area.
16. Having said that, it does not follow that the KOSS is necessarily flawed as a result. I heard little substantive evidence to suggest that, in its own right, the KOSS is not a thorough qualitative and quantitative assessment of the sites it has evaluated. Furthermore, the appellants' survey of other natural and semi-natural greenspace sites it has identified has not been subjected to the same or similar qualitative and quantitative assessment as those within the KOSS, but rather identified by a relatively simple radial search taken from a centre point of two adjoining wards, as well as a site visit.
  17. Without equivalent comparable evidence, I cannot conclude with any degree of certainty that a surplus of natural and semi-natural greenspace sites must exist. While I acknowledge that the KOSS is a document to inform the emerging Local Plan and has not yet been subjected to external examination, I find nothing on the evidence before me to suggest that it is not a sound, robust and up-to-date assessment of the natural and semi-natural greenspace within the urban area covered by UDP policy D3.
  18. Therefore, for reasons given above, I find that UDP policy D3 is not out-of-date because of any inconsistency with the Framework on matters of balance; that its purpose to protect open spaces for visual amenity reasons accords with the definition within the Framework, and its purpose is supported by a robust and up-to-date assessment. I therefore find that the policy, notwithstanding its age, accords with the Framework's approach to promote healthy communities, and I afford substantial weight to it in my decision.
  19. The main parties initially disputed whether paragraph 74 of the Framework is relevant to the appeal, and whether the proposal accords with it. However at the Inquiry, the Council conceded that it did not apply. This is because open space, protected for its visual amenity, could not realistically ever be deemed to be 'surplus to requirement' or replaceable by 'equivalent or better provision' in common sense terms. This follows the findings of the New Lane Inspector, and I agree with those sentiments.
  20. The main parties agree that the Council cannot demonstrate a five year housing land supply, with a shortfall ranging between 2.2 and 2.6 years depending on whether I accept the appellants or the Council to be correct. The so called tilted balance set out at paragraph 14 of the Framework is engaged in either case and the dispute over the precise figure between the parties is not a determinative matter, on the basis that in either case, the shortfall can be considered as substantial.

*Whether development is justified*

21. The appeal site is a parcel of undeveloped land. It spurs off from the wider UG to its south and south east; separated by a Public Right of Way footpath. The appeal site is surrounded on three sides by residential development, although the dwellings on the eastern boundary are at a much lower level. I find that the appeal site reads as part of, and significantly contributes towards the strategic function of the wider UG, albeit that it is not a strategically important site in its own right. Additional residential development on the site's western and northern boundaries in recent years has not undermined this contribution.

22. The public footpath provides a physical connection between Enfield Close and White Lee Road. But I find little evidence which suggests that it is used merely as a convenient shortcut by residents and others. By contrast, I am persuaded that it is an important route which transports its users into a semi-rural environment, bounded by attractive natural and semi-natural open greenspace along both sides, while offering some stunning views across the wider landscape for those travelling in an easterly direction. It provides visual relief and a sense of openness and rurality within fairly dense urban surroundings. I concur with the UDP Inspector's findings<sup>5</sup> that the appeal site itself has a pleasant, semi-rural character; that it positively contributes to and enhances the enjoyment of the use of the public footpath; and that its designation as UG is merited.
23. The UDP Inspector nevertheless quantified his comments, referring to a need to balance preservation of the attractive character with housing supply<sup>6</sup>. While he did not, at that time, need to allocate the appeal site for housing, he concluded that it could accommodate development without causing undue harm to the overall UG, providing the erosion of the open area is kept to a minimum. Noting the Framework's requirement to significantly boost housing supply, I find nothing inherently wrong with this approach to the appeal site. However, it is the balance referred to by that Inspector which I find is not achieved in this case by some considerable margin.
24. Including the estate roads and parking areas, the proposed development would consume nearly all of the site area, with the built form extending considerably and unwelcomely close to the public footpath, despite the proposed provision of an open space separation buffer. As a result, the openness and visual relief currently provided by this part of the UG would be substantially eroded. The feeling of rurality, surrounded by natural and semi-natural space, would give way to a semi-urbanised environment. Users of the footpath would be unable to escape or ignore not only the visual intrusion from dwelling houses, but also the associated domestic paraphernalia and inevitable noise. The sense of openness, a key attribute of the UG experience, as well the distant views and appreciation of the attractive wider landscape particularly of White Lee, would be obstructed and in some cases entirely lost.
25. I do not share the appellants' view that, panoramically, there would be little overall harm in views from the public footpath. To take this judgement would, I find, require the footpath user to walk sideways along it with his or her back to the appeal site, as from any other viewpoint the scale and proximity of dwellings would be obvious, unduly apparent and significantly harmful.
26. I acknowledge that the proposed development would include provision of publicly accessible open space adjacent to the public footpath, something which does not currently exist. I also appreciate the appellants' intentions to place seating along this land, which would allow footpath users to sit, rest, and enjoy the wider natural and semi-natural UG scenery. However, this would in my judgement amount to scant compensation for the harm caused by the proximity and encroachment of built form in relation to the footpath that would be an inevitable consequence of the development proposed, and the tangible loss of openness that would result. As I have alluded to above, that the site is not currently publicly accessible and cannot be used for physical exercise does

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<sup>5</sup> Paragraph 21.33.4 of the Kirklees Unitary Development Plan – Inspector's Report

<sup>6</sup> Paragraph 21.33.5 of the Kirklees Unitary Development Plan – Inspector's Report

- not undermine the role it plays in promoting healthy communities simply by its very existence and appreciation of open space and views of the surrounding landscape by its users.
27. I am less concerned in respect to the visual effect of the proposed development from longer range views. I viewed the appeal site specifically from two areas at the invitation of both main parties; from the appellants' identified Viewpoint 6 to the south of the site, and Viewpoint 3 from the Bagshaw Museum, which lies some distance to the north east but from which views of the appeal site can be readily afforded. While the addition of dwellings would undoubtedly be visible and identifiable in the landscape, I find that overall it would not detract from the wider and panoramic appreciation and understanding of the UG and surroundings. I reach the same conclusion in relation to other identified viewpoints. However, the absence of significant harm from longer ranges is not sufficient to outweigh the considerable adverse visual effects from the adjacent public footpath that I have identified.
28. The Council's five year housing land supply position is acutely short. Engaged paragraph 14 of the Framework states that planning permission for development should be granted unless any adverse impacts significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole.
29. The main parties agree that the proposed development would bring social and economic benefits. The appeal site is sustainably located, being sited close to a good number of local services and facilities, and I have no reason to disagree. The proposed development could also provide local construction employment opportunities as well as additional custom for local services in the area.
30. The most significant benefit would be the addition of much needed market and affordable housing to meet the needs of present and future generations. Importantly, it would make a sizeable and welcomed contribution to the Council's housing stock at a time of pressing need. I do not underplay the importance of housing delivery in this area, particularly where the five year housing land supply of the Council is severely short of where it should be. I attach considerable weight to these identified benefits.
31. However, the quantum and extent of development proposed would cause very considerable visual harm to the users of the public footpath, whose enjoyment and experience of the openness of this natural and semi-natural greenspace and wider views, and the site's sense of rurality would be severely impaired. It would fail to provide the necessary balance of protectionism against housing need. The effect on visual amenity would undermine the role and function of the UG.
32. In my judgement, this harm would significantly and demonstrably outweigh the benefits of the scheme. I therefore conclude that the proposal would not amount to sustainable development in applying the Framework as a whole, and that the development on designated UG is not justified in this instance. The proposed development would not accord with UDP policy D3 which, as set out above, can be afforded significant weight in my decision. As this policy goes to the heart of the appeal, the proposed development is contrary to the development plan as a whole, irrespective of whether other policies in the UDP are accorded with.

### **Other Matters**

33. Concerns have been raised by residents in respect to the effect of the proposed development on the local highway network caused by increased traffic in the area. I observed a steady stream of vehicular movement passing along White Lee Road in both directions. However, I did not observe any particular traffic issues, and insufficiently robust or substantiated evidence has been advanced to demonstrate that the proposed development would cause significant harm to the function of the local highway network or in terms of highway safety. The Council has not raised this as an issue and, in the absence of evidence to the contrary, I have no reason to disagree. Similarly, there is no substantive evidence to support concerns as to the capacity of the existing bus services in relation to additional demand as a consequence of the appeal scheme.
34. Concerns have also been raised in respect to the effect of the proposed development on the living conditions of occupiers of surrounding residential properties, particularly to those residents in Enfield Drive, Enfield Close and Oakwell Avenue, which sit in some cases at a considerably lower level than the appeal site. I note particularly that Nos. 89, 91 and 93 Enfield Close are positioned within close proximity of the boundary with the appeal site. However, I am satisfied that an adequate and satisfactory separation distance would be retained between the dwellings, and that whilst their outlook may change, there would be no material harm to privacy or outlook for existing occupiers. I am also satisfied that other dwellings are either sufficiently distant, or aligned away from the appeal site such that no significant harm would occur to the living conditions of the occupiers of these properties.
35. Local residents suggest that there would be harm to wildlife. However, there is no substantiated evidence to indicate that any notable or protected species have been recorded on the site. The Council has not raised wildlife matters as a concern, and in the absence of evidence to the contrary I have no reason to reach an alternative view.

### **Conclusion**

36. For the reasons given above, I conclude on balance that the appeal should be dismissed.

*R Allen*

INSPECTOR

## **APPEARANCES**

### **FOR THE LOCAL PLANNING AUTHORITY:**

Mr Alan Evans	Instructed by Julie Muscroft, Director of Legal Governance and Monitoring, Kirklees Council
He called:	
Ms Emma Mills CMLI	Landscape Officer
Ms Louise Bearcroft BA Hons MSc MRTPI	Planning Officer

### **FOR THE APPELLANTS:**

Mr Andrew Williamson and Mr Josh Kitson	Instructed by Mr Josh Kitson on behalf of the appellants
They called:	
Mr Leigh Ogden MIHE, MCIHT	Highways Consultant
Ms Pauline Randall BSc MALA FLI	Landscape Consultant
Mr Paul Bedwell BA (Hons) Dip TRP MRTPI	Planning Consultant

### **INTERESTED PERSONS:**

Ms Cynthia Mallard	Local Resident
Ms Nell McIntyre	Local Resident
Mr Ian Taylor	Local Resident

### **DOCUMENTS SUBMITTED:**

1. Copy of the s106 Legal Agreement submitted by the appellants.
2. Copy of the Bernard Wheatcroft Ltd v SoS Judgement dated 1982 submitted by the appellants.
3. The Guidelines for Landscape and Visual Impact Assessment Third Edition submitted by the appellants.
4. Kirklees Council's Landscape Character Assessment dated Autumn 2016 submitted by the appellants.
5. Copy of the Suffolk Coastal District Council v Hopkins Homes Judgement dated 10 May 2017 submitted by the Council.
6. Second Supplementary Statement of Common Ground dated 31 May and 5 June 2017, updated drawings list and drawings nos. 639A.03C; 639A.01C; 2654-1-001 Rev Y; 8694/004 Rev C; 639\_034A; and 639\_04A submitted by the appellants.
7. Consultation response of Ms Mills in respect to site at Fieldhead Farm, White Lee Road submitted by the appellants.



8. Updated list of suggested conditions submitted by the appellants.
9. Drawing illustrating road calming measures for White Lee Road as part of 'Phase 1' development submitted by the appellants.
10. Updated plans list submitted by the appellants
11. Signed and engrossed s106 Legal Agreement dated 7 June 2017 submitted by the appellants.
12. Questions for Ms Randall submitted by Mr Taylor.