

**APPEAL BY JM AND MW HAMPTON AGAINST THE DECISION OF THE BOROUGH COUNCIL TO REFUSE TO GRANT OUTLINE PLANNING PERMISSION FOR RESIDENTIAL DEVELOPMENT (MAXIMUM 138 DWELLINGS), WITH DETAILS OF ACCESS, AT HAMPTON'S SCRAPYARD AND ADJACENT FIELD, KEELE ROAD.**

<b><u>Application Number</u></b>	<b>14/00948/OUT</b>
<b><u>Officer Recommendation</u></b>	<b>Refusal</b>
<b><u>LPA's Decision</u></b>	<b>Refused by Planning Committee 28<sup>th</sup> April 2015</b>
<b><u>Appeal Decision</u></b>	<b>Appeal allowed and planning permission granted</b>
<b><u>Date of Appeal Decision</u></b>	<b>14<sup>th</sup> September 2016</b>

The Inspector noting that whilst the planning permission had been refused for 5 reasons, the Council were no longer pursuing reason for refusal 2 concerning the proposed development restricting or constraining activities to be carried out at the adjoining waste management facility, or reason 5 dealing with an obligation for an appropriate contribution towards off-site open space. The Inspector identified that the main issues in this appeal were:

- (a) Whether the occupiers of the proposed development would be likely to experience unacceptable living conditions because of odour emissions from the adjoining Walleys Quarry landfill site.
- (b) The effects of the development on education and affordable housing provision in the area, having regard to the contributions proposed, and to the viability of the proposed development.

In allowing the appeal the Inspector made various observations including as follows:-

**Planning Policy**

- The Council cannot demonstrate a five-year housing land supply.
- Paragraph 49 of the NPPF provides that housing applications should be considered in the context of the presumption in favour of sustainable development, and that relevant policies for the supply of housing should not be considered to be up-to-date if the LPA cannot demonstrate a five-year supply of deliverable sites.
- Therefore, for decision-taking, paragraph 14 of the NPPF provides that the presumption in favour of sustainable development means that permission should be granted unless any adverse impacts of doing so would significantly or demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole (limb 1), or specific NPPF policies indicate the at the development should be restricted (limb 2).

**Odour**

- Walleys Quarry was granted Interim Development Order permission in November 1997 for minerals workings and the deposit of waste materials subject to conditions which, amongst other things, restrict the materials to be tipped at the site. Such restrictions prevent domestic waste from being imported onto the site.
- The landfill site is also subject to an Environmental Permit (EP) which also specifies the type of waste that can be deposited. The County Council advised that the type of commercial and industrial wastes that can be deposited differ little from domestic waste and that there was no conflict between the planning and permit conditions.
- The EP includes an Odour Management Plan. This identifies three potential sources of odour (tipping of fresh waste, generation of landfill gas and leachate management). Other works could result in significant odour on a temporary basis such as drilling of landfill gas wells, works on landfill gas and leachate infrastructure, and activities requiring excavation into previously deposited waste. The potential odour from

tipping fresh waste would significantly reduce after 1 January 2027, when the extant permission would only permit inert waste to be tipped.

- The landfill site has been the subject of complaints in the past resulting in litigation (which is confidential and not in the public domain). Infrastructure has subsequently been improved for the collection of landfill gas and to deal with leachate, and independent biannual odour reviews have since been conducted. Complaints more recently relate to intermittent events or circumstances that have resulted in periodic complaints in the number of complaints, but measures have been taken to deal with the causes. This indicated to the Inspector that controls can be effective.
- The Inspector was not convinced that the modelling of odour emissions undertaken by the LPA undermined the appellants' view that odour emission amounts to a risk of a minor degree of future harm (due to uncertainties in the assessment of odour impacts from this landfill site and because the operators of the landfill were apparently uncooperative in the modelling exercise).
- The sniff testing undertaken in the vicinity of the landfill on behalf of the appellants are a 'snapshot' and the Inspector considered that they may not be very helpful in assessing odour impacts that are acknowledged to be intermittent.
- The Inspector gave little weight to the appellants' submission about the sale of residential properties in the vicinity of the landfill as it is not possible to determine how the issue of odour emissions from the landfill might have featured amongst the factors that led to the decision to purchase such properties.
- The proximity of existing sensitive receptors to the potential source of odour is a relevant factor in the administration of the EP, which includes an Odour Management Plan. This has important implications for assessing the likely odour impact on any future residential occupiers of the appeal site, especially as the NPPF provides that it should be assumed that the pollution control regime will operate effectively.
- The Odour Management Plan includes an Odour Action Plan (OAP) including measures that are to be implemented should an odour complaint be received. Such measures might be required at times, to safeguard the living conditions of existing nearby residents and would be likely to effectively safeguard the residential amenity of any future occupiers of the appeal site. The Inspector gave more weight to this consideration than to the evidence submitted about the modelling of odour emissions, the past complaint record, and the sniff testing results.
- Given the extant planning and pollution controls for the operation of the landfill, along with the proximity of existing sensitive receptors, the Inspector did not consider that the occupiers of the proposed development would be likely to experience unacceptable living conditions because of odour emissions from the adjoining use. The Inspector found no conflict with paragraph 120 of the NPPF which provides that to prevent unacceptable risks from pollution, planning decisions should ensure that new development is appropriate for its location, taking into account the effects on general amenity and the potential sensitivity of the area or proposed development to adverse effects from pollution.

### Viability

- The appellants indicated a willingness to proceed with the development on the basis of a scheme that provided for 20% affordable housing and a residual land value of £743,000. There was disagreement between the parties as to the value of the scrapyard, but this sum was less than any of the estimates for market value of the site. Also in dispute was the sale value to be attributed to the social rented component of the affordable housing, and developer's profit. It was clear at the Inquiry that any outcome of the disputed matters that resulted in a residual land value in excess of £743,000 would be considered to be a viable scheme.
- The Inspector found the Council's evidence on the disputed sale value of the affordable housing element was unconvincing, and preferred the appellant's submission on this point, which was supported by evidence from a local provider (Aspire).
- The Inspector was satisfied on the basis of the evidence that the proposed development would be likely to be unviable with 25% affordable housing and the policy compliant required education contribution of £319,899.

- With regard to what should be allowed for developer's profit, the Inspector agreed with the Council that it is appropriate to consider an apportionment between open market and affordable housing units – reflecting the reality of the reduced risk involved for affordable housing, which should be properly reflected in profit expectations. The evidence indicated the tipping point for viability lies somewhere between 17.5% and 20% for developer's profit on open market units. However, the agreed figures indicate that viability here would be likely be achievable with developer's profit on open market to be achievable with developer's profit for open units just below 20%. This indicated to the Inspector that requiring the full education contribution would be unlikely to render the scheme unviable.
- The appellant sought to argue that following 'Brexit' it is material that the economic future of the UK, and for the Council, is less certain now than it was before that decision. Whilst the Inspector accepted that the current uncertainty is a material consideration, deciding what weight should be given to the current uncertainty would be a highly speculative exercise, and the evidence before the Inspector provided no realistic basis for doing so. This issue was not, therefore, given much weight by the Inspector and it did not alter his views on the likely viability of the scheme.

#### Other matters

- The scheme would introduce dwellings in an open area on the edge of the town, but would replace a commercial enterprise that by its nature and activity has an adverse effect on this approach to Newcastle. The Inspector considered, overall, that the proposal would have a neutral impact on the character and appearance of the area.
- The Inspector was satisfied that there is scope to design, construct and retain a suitable noise bund that would provide an appropriate standard of residential amenity. Drainage and land contamination, landfill gas migration, and any legacy from previous mining could be addressed by the imposition of suitable planning conditions.

#### Planning Balance

- The provision of up to 138 dwellings would be a considerable benefit given the current housing land supply position. It would bring with it commensurate economic benefits. The proposal would provide up to seven affordable units less than the policy requirements which is a dis-benefit to be weighed in the balance. The supply of up to 28 affordable units, albeit seriously deficient in policy terms, would nonetheless be considered a benefit.
- The only significant potential harm is from odour from the landfill, but this is controlled under the EP and the tipping of non-inert fresh waste is time limited. The evidence does not indicate that likely odour pollution is a weighty consideration in this case.
- The Inspector did not give much weight to the benefits of consolidating the appellants' business on the Holditch House site, as there was no conclusive evidence that allowing this appeal would secure the completion of that development. Even if it did so, this would be more of a private benefit.
- The benefits of the additional housing in this case would be substantial and would be sufficient to outweigh any likely harm from odour emissions from the adjoining landfill.

#### Conclusions

- There is conflict with policy as the amount of affordable housing is not met, however the scheme could provide for the required financial contribution towards education, and would not be viable with a policy compliant affordable housing contribution. The conflict with the provision of the development plan is not a consideration that weighs heavily against the proposal.
- Paragraph 14 of the NPPF applies because of the housing land supply shortfall. However any harm by reason of likely odour would fall far short of significantly and demonstrably outweighing the substantial housing benefits of the proposal. The planning balance here does not indicate that the appeal should be refused by reason of limb 1 of paragraph 14. The Council also relies on limb 2 and whilst there is no reason why potential pollution and amenity considerations could not be capable of

being of such substance that development should be restricted the likely harm from pollution in this case falls far below this threshold.

**Your Officer's Comments on this appeal decision**

In reaching his decision, the Inspector does not conclude that odours won't arise from the adjoining landfill site but he does consider, due to the controls in place in the EP, that the residents of the proposed development would not be likely to experience unacceptable living conditions because of odour emissions. The Council's case clearly fell far short, in the Inspector's opinion, of demonstrating that the harm by reason of odour pollution outweighed what the Inspector saw as the substantial housing benefits of the proposal. In light of the appeal site being directly adjacent to a landfill site which is known to cause odour nuisance, albeit less frequently more recently, this appeal decision nonetheless highlights how difficult it to successfully defend a refusal in circumstances where limb 1 of paragraph 14 of the NPPF apply (i.e. where the development plan is absent, silent or relevant policies are out of date planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits).

With regard to the issue of viability, the Council were able to demonstrate that the education contribution could be secured as well as 20% affordable housing against the appellants' case that the scheme would be rendered unviable if anything more than 20% affordable housing was secured i.e. the scheme would be unviable if an education contribution was secured. The education contribution that was successfully secured amounts to £319,899 and will ensure that the impacts of the development on existing educational provision within the area are suitably mitigated.

**Recommendation**

**That the decision be noted.**