
Appeal Decision

Hearing Held on 19 July 2017

Site visit made on 19 July 2017

by Nick Palmer BA (Hons) BPI MRTPI

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

Decision date: 17 August 2017

Appeal Ref: APP/M1005/W/17/3167093

Amber Valley Rugby Club, Lower Somercotes Road, Somercotes, Derbyshire

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Mr Roger Carter of Carter Construction (Derby) Limited against the decision of Amber Valley Borough Council.
 - The application Ref AVA/2014/0804, dated 2 September 2014, was refused by notice dated 14 November 2016.
 - The development proposed is residential development for up to 200 dwellings including landscaping, open space and storm water balancing.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Carter Construction Limited against Amber Valley Borough Council. At the Hearing an application for costs was made by Somercotes Against Development against Amber Valley Borough Council and Carter Construction Limited. Those applications are the subject of separate Decisions.

Procedural matters

3. The application is for outline permission with all matters reserved. An illustrative layout plan has been submitted and I shall consider that plan on this basis.
4. The Council's single reason for refusal concerns insufficient information having been submitted. This is not explained further on the decision but subsequent correspondence indicates that the information required concerns ground conditions and contamination. The Council did not contest its decision at the Hearing but has advised that its Planning Board remains dissatisfied with the contamination issue. Evidence has been presented by interested parties on this matter. I shall consider this as the main issue between the parties.
5. A Unilateral Undertaking dated 31 July 2017 was submitted by the appellant after the Hearing closed. This makes some amendments to the Unilateral Undertaking previously submitted and I shall take the amended document into account.

Main Issue

6. The main issue in the appeal is whether or not the information submitted in respect of ground investigations is sufficient to demonstrate that the site is suitable for residential development.

Reasons

Background

7. The appeal site lies just outside the village of Somercotes and adjoins the main B600 road which passes through the village. It is 6.81 hectares in area and comprises two sports pitches with a club house building and car park that are used by Amber Valley Rugby Club. There is scrub land at both ends of the site and wooded banks where the land level rises towards the north and west. There is also a belt of trees along the road frontage.
8. The site and adjoining land to the north and east were historically used for opencast coal mining. After mining operations ceased the site and adjoining land were used for disposal of waste before being restored. The land immediately to the north of the site was previously used for disposal of hazardous waste both prior to, and after the grant of a Licence in 1978 (ref. LS01) for this activity. Other land to the north-east of the site (known as Somercotes LOM) was similarly used although this took place prior to the Control of Pollution Act 1974 and there are no records available in respect of the waste that was deposited on that land. There were other potentially polluting former uses in the immediate vicinity including a former gas works to the east of the site.
9. The materials recorded as being accepted on the LS01 site include a range of hazardous waste materials¹. That Licence also authorised a cell for hazardous waste within the appeal site for a limited period in September 1978. This was intended to enable waste disposal to continue without interruption when the main area had been filled to its planned capacity. It is not clear however whether or not that cell was ever constructed or used. Aside from this the appeal site was used in the late 1970s/early 1980s for deposit of non-hazardous industrial wastes, construction wastes and rubber under Licence LS41. The permitted volume of waste under that Licence was between 75,000 and 250,000 tonnes per year.
10. Local residents who lived in the area when landfill operations were underway have personal recollections of tipping taking place at night from tankers arriving from other parts of the country. This suggests that unauthorised substances may have been tipped. There has also been concern that radioactive waste has been tipped and that contaminated demolition waste from a factory explosion was deposited in one of the landfills. There is no firm evidence as to the nature and exact location of any unauthorised tipping but the Council's and residents' concerns in this respect have been taken into account by GeoDyne on behalf of the appellant in its investigations.

¹ Aromatic hydrocarbons, contaminated rubbish /bags/sacks, empty used containers, industrial non-flammable non-hazardous wastes, industrial effluent treatment sludge, iron compounds, mercury compounds, metal scrap, mineral oils, mineral processing wastes, other resins and polymeric materials, paint waste, phenol-formaldehyde resins, phenols (analogues or derivatives), polyester resins, slag, boiler/flue cleanings, tar/pitch/bitumen/asphalts and vanadium compounds.

11. The appellant originally engaged Applied Geology (AG) to investigate ground conditions. AG carried out investigations in 2006 and 2014 including a number of borehole investigations which were limited to shallow depths within the made ground of the appeal site. This work has been developed further by GeoDyne. Those investigations have been designed and carried out in consultation with the Council's Scientific Officer and Land Quality Management Ltd (LQM) on behalf of the Council. A local residents group, Somercotes Against Development (SADG) has presented opposing evidence which has been prepared by Mr Fryer of GeoDelft. This evidence questions the extent of the investigations that have been carried out and the techniques used.

Planning Policy

12. The site is outside the settlement boundary for Somercotes and in the countryside as identified in the Amber Valley Local Plan (2006) (LP). Saved policy H5 of the LP restricts housing development in such locations. However the Council said at the Hearing that it could only demonstrate a 3.33 year supply of housing sites at 1 April 2017. On this basis the National Planning Policy Framework (the Framework)² provides that relevant policies for the supply of housing should not be considered up-to-date. Paragraph 14 of the Framework states that where relevant policies are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. The proposal would not accord with saved policy H5 but because that policy is not up-to-date I give limited weight to that conflict.
13. Saved policy EN1 of the LP restricts development that may take place within the countryside. Although this has a similar effect to saved policy H5 it is not specifically a policy for the supply of housing. Its requirement to protect the countryside from development is broadly consistent with the Framework. The proposal would not accord with that policy and I give this significant weight reflecting the need to recognise the intrinsic character and beauty of the countryside which is a core planning principle of the Framework.
14. The Council resolved to prepare a new Local Plan in January 2016 and the Statement of Common Ground states that the site is identified as one of a number of proposed Housing Growth Sites in policies HGS1 and HGS3 of that plan. Because this document is at a very early stage of preparation it can carry only very limited weight.
15. Saved policy EN18 of the LP states that permission will be granted for the re-use of contaminated land providing that a detailed and independent assessment is undertaken to identify the nature and extent of contamination and any remedial or mitigating measures that need to be undertaken. Conditions may be attached to secure such remedial or mitigating measures.
16. National policy in the Framework requires that the site is suitable for its new use taking account of ground conditions including from pollution arising from previous uses and that adequate site investigation information is presented. The Planning Practice Guidance³ advises a proportionate approach but that sufficient site investigation information is obtained in order to carry out a risk

² NPPF paragraph 49

³ ID: 33-007-20140612

assessment. This requires full information on the nature and extent of any contamination and adequate identification of the sources, pathways and receptors in order that risk may be adequately assessed.

Ground Investigations

17. The investigations by GeoDyne have built upon the initial investigations by AG. A significant number of additional boreholes were provided with many of these at sufficient depth to establish the depth of the made ground over the previous mine workings. Soil and water samples from those boreholes have been analysed and this exercise has included testing for any elevated level of radioactivity. An electromagnetic geophysical survey has been undertaken of the made ground to establish the nature of any waste material mixed with the soil, including any metal containers. A resistivity survey has also been carried out in an attempt to establish the presence or otherwise of the previously licenced hazardous waste cell within the site.
18. LQM confirmed that the design of the investigation and its implementation appeared to be in line with current good practice. The risk assessment has been developed over time and LQM consider it to be technically reasonable and appropriate. The soil contamination risk assessment was found to be appropriate but LQM considered that there remained significant uncertainty with regard to the gas and vapour risk assessments. LQM concluded that it is possible, but probably unlikely that further investigations may show that these risks are more extensive than GeoDyne have currently concluded. If this were to be the case the proposed development may not be viable, either because sites with high gas risk are not suitable for residential development or because of the potential cost of the remedial measures that may be required.
19. Mr Fryer on behalf of SADG has voiced concerns over a number of aspects of the GeoDyne investigations. The plan which has been provided by both the appellant and SADG shows that the LS01 landfill partially adjoined the northern boundary of the appeal site and the Somercotes LOM landfill partially extended into the site albeit within the banked area along its north-eastern boundary. AG established that natural ground lies between the part of the site proposed to be developed and the former LS01 landfill but it is established that toxic wastes were deposited in the adjacent landfills both of which are in very close proximity to the proposed residential development. County Council officers observed empty or part empty drums and a "fair amount of tarry substances" being tipped along the southern boundary of the LS01 landfill in 1977⁴ with no clay lining. Investigations by British Coal in respect of the Somercotes LOM in relation to an adjacent proposed opencast quarry to the east revealed significant levels of toxic contamination. This was of such seriousness that permission was not granted for the area of the proposed quarry adjacent to that former landfill.
20. Both the AG report and the GeoDyne Phase I Desk Study recommended further detailed investigations along the northern boundary of the appeal site. However the further investigations that have been carried out in this area are limited. The plan⁵ submitted with the Ground Condition Report indicates that two boreholes were sunk near the foot of the bank in the northern and north-western parts of the site but none within the area of the bank despite this

⁴ DCC Minutes of meeting on 25.05.1990

⁵ Ref 34224/P2-GC/01

being recommended in the Phase I desk study. The excavations in the eastern part of the site are limited to trial pits and window sample boreholes which are of limited depths and not within the banked area. Mr Fryer raised concern that an inadequate level of investigation has been carried out in this respect. There is a lack of information about the contamination that is known to exist in close proximity to the site and the pathways to the site. This leads to uncertainty in any risk assessment.

21. The resistivity survey was undertaken in the area of the possible hazardous waste extension cell. The results clearly show areas of much lower resistance at about 18-22m below ground level. This may indicate perched water but this has not been conclusively demonstrated. The subsequent single borehole investigation in this area did not reveal the presence of any anthropogenic material. However this survey was limited in its scope and not targeted specifically to the area of low resistance shown on the survey. Other detailed concerns about the techniques used were raised by Mr Fryer. There is no evidence of the hazardous waste extension cell ever having been constructed or used but this matter is somewhat inconclusive and therefore provides further uncertainty.
22. The levels of contamination found within the near-surface soils are at levels which would be suitable for residential development subject to provision of a capping layer of clean material. Elevated levels of methane and carbon dioxide have been found across the site with a very high methane concentration in a well in the central/western part of the site (BH6). Ground gas risk is assessed by reference to Characteristic Situation (CS). The appellant stated that only one of the readings was in the CS3 category (moderate risk) while about 75% and 22.5% were in the lower risk categories of CS1 and CS2 respectively. The proposed measures for capping the site with clean topsoil to a thickness of 1m for residential gardens and 0.6m for public open space would be suitable for the CS3 category of risk and would therefore be in excess of the minimum requirement across much of the site. However a significant amount of further investigation work has been identified as being necessary in order to characterise gas and vapour risk. As well as this work, further investigation of any former mine workings underneath the site is required in order to design foundations and ground works. This further investigation work would in turn have implications for gas and vapour risk. There is thus significant uncertainty as to characterisation of gas and vapour risks and their implications for the detailed design of the development and the remedial and mitigation measures required.
23. Mr Fryer pointed out that although the part of the site in the area of BH6 is currently assessed as being at moderate risk it is close to the high risk category (CS4). If any part of the site were to subsequently fall into that category as a result of the further investigations identified as being necessary then the viability of the development would be in question.
24. The Council and the appellant have agreed a list of conditions that should be applied if permission were to be granted. These include three conditions which would require further investigations in respect of coal mining legacy issues, further gas and vapour risk characterisation and design of foundations and ground works. It is necessary for me to consider whether the imposition of the suggested conditions would meet the tests set out in paragraph 206 of the Framework. One of those tests is that conditions must be reasonable. If it is

possible that the extent of works required under the conditions would make the development unviable then it is unlikely that the conditions would meet that test. LQM have called into question the potential viability of the development on the basis that the full extent of risk from ground gas is not known. LQM acknowledges that it is probably unlikely that the risks are more extensive than revealed by the investigations undertaken but nonetheless that there is "significant uncertainty" in this regard.

25. The viability of the development is already significantly affected by the remediation and mitigation measures that have been identified and the need to fund the relocation of the rugby club. On the basis of the viability assessment presented it is likely that any further significant expenditure on remedial and mitigation measures would affect overall viability, or would be at the expense of the other contributions identified as being necessary. Given the identified uncertainty with regard to necessary remedial and mitigation measures and the implications for viability of the proposed development, the suggested conditions would not be reasonable and would not accord with national policy as set out in the Framework.
26. The remaining uncertainties as to potential migration of contaminants from the adjacent land and the possibility of hazardous waste previously having been deposited on the site also raise doubt as to the risks to any future residential occupiers and the suitability of the site for the proposed development. Because further remedial or mitigation measures may be required and there is significant doubt as to whether conditions could reasonably be imposed in this respect, the proposal would not accord with saved policy EN18 of the LP.
27. The proximity of buried hazardous waste and the ground gas and vapour arising within the site could potentially affect human health and result in unacceptable living conditions in terms of odour both for residents of the proposed development and others nearby. I give these potential harms very considerable weight. For the reasons given I find that the submitted ground investigation information is insufficient to demonstrate beyond doubt that the site is suitable for residential development.

Other Considerations

28. Having found this harm, the proposal would be of clear benefit in delivering needed housing. It is clear that the Council has a significant under-supply of housing sites. The number of dwellings making up that shortfall has not been provided to me but nonetheless the 200 proposed homes would be likely to make a significant contribution towards addressing that shortfall. The site has generally quite good accessibility in that it is close to Somercotes which has a range of facilities. Walking along the road is not ideal as footpaths are narrow but there are bus services along the road and any car journeys to Somercotes would be short. For these reasons the generally accessible location supports the proposal. I give significant weight to the benefit arising from the contribution of the proposed development to housing supply.
29. The proposal would also be of economic benefit in terms of the jobs that would be created through construction and the attendant benefits to the local economy including the additional spending that would result from the residents of the proposed homes. The proposal would also be of financial benefit to the County and Borough Councils in terms of New Homes Bonus payment which is

stated by the appellant to be £1.1 million and a further £277,000 to the County Council over 6 years. I give further significant weight to these considerations.

30. The appellant submitted a viability appraisal to the Council which has been broadly agreed with the Council's consultant who recommended a contribution towards affordable housing provision of £250,000, calculated on the basis of the viability information. In the Unilateral Undertaking dated 31 July 2017 this contribution has been increased to £329,000 because of adjustments to infrastructure contributions. Details of the number of affordable homes that could be provided by this contribution have not been provided but it would appear to be a very small proportion of the 200 dwellings proposed and far below the 20-30% expected under saved policy H10 of the LP. Because the proportion of affordable housing would be substantially reduced due to issues of viability I can give only limited weight to this benefit.
31. Contributions would be secured towards education and public open space facilities and open space would be provided on the site but these provisions would be required to address the needs of the development. The Unilateral Undertaking would secure funding for the relocation of the rugby club. Planning permission has been granted for a replacement facility which would provide three rugby pitches and floodlighting. In these respects the replacement facility would represent an improvement over the existing facility but nevertheless considered overall this provision would compensate for the loss of the existing sports facility and is a policy requirement under saved policy LC3 of the LP. For these reasons I cannot give these matters material weight as benefits in the overall balance.

Overall

32. I have given very considerable weight to the clear potential for harm in terms of effects on health and living conditions of residents. This, together with the significant and limited weights that I have given to the conflict with saved policies EN1 and H5 of the LP significantly and demonstrably outweighs the two significant weights and further limited weight that I have given to the benefits. The very limited weight that I have given to the draft Local Plan is not sufficient to alter the overall balance. I find that the proposal would not accord with the development plan as a whole.
33. The proposal would accord with the social and economic dimensions of sustainable development in terms of the provision of needed housing including affordable homes and the benefits to the local economy arising from construction of the development and increased spending in the area. However the clear potential for harm to health and living conditions would weigh heavily against those dimensions. Because that harm would be as a result of environmental conditions this would also not accord with the environmental dimension. For these reasons when considered as a whole the proposed development would not be sustainable.

Conclusion

34. For the reasons given I conclude that the appeal should be dismissed.

Nick Palmer

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Guy Longley	Planning Director, Pegasus Group
Julie Russell	Senior Associate, Freeths
Jason Hollands BSc (Hons), MSc, MEnvSc, CGeol FGS	Director, GeoDyne Limited
David Hooton BSc (Hons), MSc FGS, C.WEM, CEnv, MEnvSc	Principal Geo-Environmental Engineer, GeoDyne limited
Roger Carter	Carter Construction (Derby) Limited
Louise Whinnet	Pegasus Group
Richard Spencer	GeoDyne Limited

FOR THE LOCAL PLANNING AUTHORITY:

Rae Gee	Principal Planning Officer, Amber Valley Borough Council
Ian Shaw	Environment Manager, Amber Valley Borough Council

INTERESTED PARTIES

Stephen Fryer BEng (Hons), BSc, MSc, CGeol FGS, CEnv, CEng IoM3	Independent Consultant, GeoDelft Environmental, on behalf of Somercotes Against Development
Kellie Judson	Somercotes Against Development
Councillor Jason Parker	Amber Valley Borough Council
Councillor John McCabe	Amber Valley Borough Council
Councillor Brian Lyttle	Amber Valley Borough Council
Mr T Smith	Local resident
Craig Harrison	Local resident
Diana Dixon	Local resident
Joan Judson	Local resident
Linda Coleman	Local resident
Richard Barnsley	Local resident

DOCUMENTS SUBMITTED AT THE HEARING

SUBMITTED BY SOMERCOTES AGAINST DEVELOPMENT

- 1 Application for costs
- 2 Geodelft Environmental Review of evidence submitted on the environmental status of the site version 01
- 3 Documents relating to Smotherfly opencast coal site: Note of International Mine Water Association proceedings 1994 and letter from L Marriott (local resident)

SUBMITTED BY THE LOCAL PLANNING AUTHORITY

- 4 Response to the appellant's application for costs
- 5 Response to Somercotes Against Development's application for costs
- 6 Review of the applicant's financial viability appraisal by Commercial Property Real Estates

SUBMITTED BY THE APPELLANT

- 7 Photographs and 1978 Ordnance Survey Plan
- 8 Envirocheck report and Disposal Licence application form

DOCUMENTS SUBMITTED AFTER THE HEARING CLOSED

SUBMITTED BY THE APPELLANT

- 9 Letter from Pegasus Group dated 21 July 2017 and copy of e-mail from Education Authority
- 10 Unilateral Undertaking dated 31 July 2017