
Appeal Decision

Site visit made on 24 May 2022

by F Wilkinson BSc (Hons), MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 July 2022

Appeal Ref: APP/Z4718/W/21/3289729

Land to the rear of St Luke's, Bierley Marsh

- 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 Mr Stephen Owens of Owens Developments Ltd against the decision of Kirklees Council.
 - The application Ref 2020/62/94345/E, dated 11 December 2020, was refused by notice dated 7 September 2021.
 - The development proposed is 5 dwellings in two blocks – one 4 terraced houses, one single bungalow type house.
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Decision

1. The appeal is allowed and planning permission is granted for the erection of 5 dwellings in two blocks – one 4 terraced houses, one single bungalow type house on land to the rear of St Luke's, Bierley Marsh in accordance with the terms of the application, Ref 2020/62/94345/E, dated 11 December 2020, subject to the conditions in the attached schedule.

Applications for costs

2. An application for costs was made by Mr Stephen Owens of Owens Developments Ltd against the Council. This application is the subject of a separate decision.

Main Issues

3. The main issues are:
 - the effect of the proposed development on the character and appearance of the area; and
 - whether the loss of open space is outweighed by other considerations.

Reasons

Character and Appearance

4. The appeal site is an open parcel of land along Bierley Marsh, an unadopted road, and opposite an area of public open space. Bierley Marsh serves a small number of dwellings. The site lies in between St Luke's Church on the corner of Bierley Marsh and South View Road and a dwelling known as Thornfield. It is adjacent to the East Bierley Conservation Area (the Conservation Area). The proposed development would comprise five dwellings, with a terrace of four two storey dwellings facing onto Bierley Marsh and a bungalow to the rear of the site.

5. There is a mix of property types within the vicinity of the site. St Luke's Church is a large stone-built building. Thornfield and the adjacent property are two storey brick and render dwellings, with other dwellings along Bierley Marsh being mainly render or stone. The properties to the rear of the site on Moorhouse Drive are mainly bungalows of varying sizes and design. Other nearby properties, including many within the adjacent Conservation Area, are stone built terraced dwellings with pitched stone slate roofs and stone built detached properties.
6. As the proposal would introduce built development on a site that is presently essentially open, it would inevitably lead to an intensification of its use. However, the site is viewed in conjunction with the roofs of the dwellings to the rear from a number of vantage points in the area. The proposed terrace would be reasonably consistent in terms of form with the surrounding townscape and would have a similar relationship to Bierley Marsh as the existing properties that front on to it. The materials proposed would be sympathetic to the palette of materials in the area as would the use of low walls with railings above in between the dwellings in the terrace.
7. The proposed bungalow would have a more contemporary design although would still include natural stone within the walls and a slate roof. It would be located closer to the bungalows on Moorhouse Drive and would be less visible within the site. Considering the context of the site, the proposed bungalow would be of a suitable design and scale and would introduce a mix of property types and design within the site, reflecting the mix of built form within the vicinity.
8. A number of trees within the site would need to be removed, one of which is identified as being of moderate quality and the others of low quality¹. Although not protected, the trees on the site frontage are visible from within the wider area. Appropriate replacement planting could be secured through a landscaping scheme. Tree protection measures could be secured to ensure that the mature trees on the boundary would have suitable protection during construction. These factors, together with the positioning of the built form within the site and the massing, density, scale and design of the dwellings, mean that the proposal would not diminish the setting of the public open space.
9. On this basis, I therefore conclude that the proposed development would not harm the character and appearance of the area. Accordingly, it would accord with the design objectives of Policy LP24 of the Kirklees Local Plan Strategies and Policies, adopted 2019 (the Local Plan) and chapter 12 of the National Planning Policy Framework (the Framework), as well as the design principles set out in the Council's 2021 Housebuilders Design Guide Supplementary Planning Document (the SPD).

Open Space

10. The site is identified as a small open space subject to the requirements of Policy LP61 of the Local Plan. The policy only permits development on open space if certain exceptions are met. Criteria b and c relate to the provision of a replacement or an alternative open space for sport or recreational facilities and are not relevant in this case. The exception in criterion a requires that an assessment has shown that the open space is clearly no longer required to

¹ Arboricultural Impact Assessment, prepared by Iain Tavendale, December 2020

meet local needs for open space, sport or recreational facilities and does not make an important contribution in terms of visual amenity, landscape or biodiversity value.

11. The site is identified as a small open space to be protected under Policy LP61 based on evidence from the Kirklees Open Space Study 2015 (revised 2016) (the KOSS). The KOSS identified that the site appeared to be used for growing purposes as an allotment site and recommended that it should be retained as open space due to the deficiency of allotment provision in the relevant ward.
12. The appellant has submitted information about the previous uses at the site. This includes a statement from the landowner, whose family has owned the site since the early 1930s. The statement identifies that the site, along with additional adjacent land, formed Whinfield Nurseries, and was used as a market garden. Photographs dating from the 1950s, and around 1980 and 1993 were included to support the statement. The site is currently unused and is in an overgrown state. It continues to be in private ownership with no public access.
13. The appellant's Preliminary Ecological Appraisal² (PEA) identified the site as comprising improved grassland with scattered trees and did not identify any potential for protected or notable species or habitats. Although the PEA dates from 2020, there is no evidence before me to indicate that there has been any material change to the habitats or species since it was prepared. While the site is open and undeveloped, the KOSS assessed the site as having a low value as open space. It would therefore have a relatively limited public value in terms of its importance for sport and recreation purposes, visual amenity, landscape and biodiversity.
14. Despite its low quality rating, the KOSS did not identify the site as surplus to requirements based on its classification as allotment due to the deficiency of such provision in the area. There would therefore be some conflict with Policy LP61 of the Local Plan. However, based on the evidence before me, it appears to me likely that the site has not and does not provide an open space, sport or recreation function as an allotment. I conclude that this is a material consideration of sufficient weight to outweigh the conflict with parts of the development plan.

Other Matters

15. The nearby War Memorial is Grade II listed and is located within a small garden. Its significance is derived in part from it being a place of quiet reflection and remembrance and its communal heritage value. The significance of the Conservation Area lies in part from the appearance of the traditional vernacular architecture and external facing materials of the buildings within it and their relationship to the adjoining highways and public spaces.
16. Due to the configuration of the proposed dwellings within the site, the scale of the bungalow and its positioning behind a garden wall and the additional planting proposed, the prominence of the War Memorial in the street scene would be retained, its important commemorative and community role would not be eroded and the atmosphere in which it is experienced would not be diminished. For the same reasons, the character and appearance of the

² Prepared by ADK Environmental management Ltd, 16 February 2020

Conservation Area would be preserved. Overall, therefore, the proposed development would not harm the setting of the listed War Memorial or the character or appearance of the Conservation Area or their significance as designated heritage assets.

17. The Council has not raised any concerns in terms of parking provision or parking pressures. In addition, the Council's highway officers concluded that, while the proposed access road is not considered suitable for adoption, the proposal would not cause any significant or unacceptable highway safety issues. In addition, no comments or concerns were raised in relation to traffic generation, visibility, access to the site, access for emergency vehicles or the shared use of Bierley Marsh with a Public Right of Way. In the absence of any substantive evidence to the contrary, I have no reason to conclude that the proposal would be unacceptable in these respects.
18. Having regard to the separation distances between the proposed dwellings and existing properties including those closest to the site, the nature of the rooms with windows facing the site and the separation distances set out in the SPD, the proposal would not have a materially harmful effect on the living conditions of nearby residents through overlooking, loss of light or outlook. While the access to the site would be relatively close to the gable elevation of Thornfield, the traffic movements generated would likely be small given that it would mainly be only vehicles from the end terrace dwelling that would pass by. The potential effects from additional light, noise and disturbance and pollution would not therefore be unacceptable. The appearance and location of the boundary treatment could be finalised as part of a condition to ensure that it would not have a dominating effect on outlook from adjoining properties.
19. From the evidence before me, the proposed dwellings would provide floorspace broadly in line with the Nationally Described Space Standards, which I note are not currently adopted in the Local Plan. Although not large, the outdoor amenity areas proposed would be sufficient to meet the day to day needs of future occupants for outdoor living space.
20. The appellant is proposing to manage surface water and foul sewage through the mains sewer, and there is no evidence to suggest that there would be an unacceptable increase in flood risk. Appropriate ground investigations and remedial measures to address potential coal mining legacy issues and contamination could be secured through appropriate conditions.
21. There is no evidence to suggest that the site is of a high ecological value. While some vegetation would have to be removed, a landscaping scheme could provide appropriate mitigation as well as opportunities for biodiversity net gain.
22. I have had regard to the concerns about precedent. However, no clear details of other proposals are before me. Other potential uses for the site have been suggested including public garden use. However, these are no more than a theoretical possibility. In any event, I am required to determine the application on its own merits.
23. There is no substantive evidence before me to clearly demonstrate that the proposal would result in damage to neighbouring properties and that, even if so, it would not be covered under separate legal rights; that it would prevent the functioning of St Luke's Church; or that the maintenance of Bierley Marsh would be adversely affected.

24. The site lies close to the village centre and public transport routes. It has not been demonstrated that there is insufficient capacity within the existing services to meet the demand that would be generated by the proposed development.
25. The appellant states that no impact on common land would be necessary to enable the development. While the Council's Officer Report appears to concur, interested parties dispute this position. Based on the information within the email from the Senior Registry Officer – Highways Registry & Local Land Charges dated 16 September 2021, the Council appear to own the common land. I note that the appellant has served notice on landowners, including the Council. This email also identifies that there is a process to follow should the appellant require to incorporate any of the registered extent of common land into the proposed development. The grant of planning permission would not override this process. The appellant would have to apply under the Commons Act 2006 either to carry out works on the common land or to exchange land, that is to provide another area to become common land to replace common land they used as part of the development.
26. Rights of access along Bierley Marsh would be a matter for the appellant to address.
27. I note that these issues did not form part of the Council's case at appeal. While I acknowledge those points, they are nevertheless insufficient to outweigh or alter my reasoning regarding the overall acceptability of the scheme.

Conditions

28. I have considered the conditions suggested by the Council and consultees, having regard to the six tests set out in the Framework, and have amended the wording of certain conditions in that light (without altering their fundamental aims).
29. As well as the standard time condition, and for certainty, one is required to ensure that the development is carried out in accordance with the approved plans.
30. A number of conditions are required prior to commencement of development to ensure that the relevant details are acceptable and compliance with their requirements at a later time could result in unacceptable harm. These are summarised in the following paragraph.
31. To conserve and enhance biodiversity and in line with Policy LP30 of the Local Plan, an ecological design strategy is necessary. In the interests of highway safety and in line with Policies LP21 and LP22 of the Local Plan, a requirement to carry out a highway condition survey and a scheme for improvements to Bierley Marsh are necessary. Details of the construction phase is necessary to ensure that the impacts of construction on public safety and living conditions of neighbouring residents are minimised. In the interests of public health and safety a scheme of intrusive investigations is required to establish the risks posed to the development by past shallow coal mining activity, the implementation of any remedial work and confirmation that the site is safe and stable for the development.
32. In the interests of the character and appearance of the area, it is necessary to require samples of the external materials to be used on the development, hard

and soft landscaping details, to safeguard trees during construction and to require that further tree works would require approval.

33. In the interests of living conditions of neighbouring residents as well as the character and appearance of the area, details of the boundary treatments and bin collection point are necessary. For the same reasons, it is necessary to remove rights for works permitted to take place without the need for express planning permission on a selective basis, referring to classes of the GPDO³ concerned with the enlargement, improvement or other alteration; additions etc to the roof; porches; buildings etc incidental to the enjoyment of a dwellinghouse; and the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.
34. A scheme to address land contamination risks is necessary in the interests of public health and safety.
35. A condition restricting hours of operation during the construction phase is necessary to minimise the impacts for neighbouring residents.
36. It is necessary to restrict when certain works take place in the interests of protecting nesting birds.
37. In the interests of highway safety, a condition is necessary to require that all associated accesses and car parking are constructed and available for use.
38. The Council has suggested a condition requiring details of electric vehicle charge points. Amendments to the Building Regulations have recently been introduced relating to requirements for installing electric vehicle charge points in new homes. The Planning Practice Guidance sets out that conditions requiring compliance with other regulatory requirements such as Building Regulations will not meet the test of necessity and may not be relevant to planning. I have not therefore imposed this condition.

Conclusion

39. For the reasons given above, having considered the development plan as a whole along with all other relevant material considerations, I conclude that the appeal should succeed.

F Wilkinson

INSPECTOR

³ Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: Location Plan - 19.157.101; Proposed Site Layout - 19.157.104B; North and West Facing Elevations - 19.157.105; South and East Facing Elevations - 19.157.106; Ground and First Floor Plans - 19.157.107; Front and Rear Elevations - 19.157.108; Section A - 19.157.109; Section B - 19.157.110; House Type B Floor Plan - 19.157.111; House Type B Elevations - 19.157.112; House Type B Elevations - 19.157.113; Sections - H20017-260 P4; Drainage Layout H20017-200 P4.
- 3) Prior to the commencement of development, an ecological design strategy addressing mitigation and enhancement shall be submitted to and approved in writing by the Local Planning Authority. The ecological design strategy shall include the following:
 - a. Purpose and conservation objectives for the proposed works.
 - b. Review of site potential and constraints.
 - c. Detailed design(s) and/or working method(s) to achieve stated objectives.
 - d. Extent and location/area of proposed works on appropriate scale maps and plans.
 - e. Type and source of materials to be used where appropriate, e.g. native species of local provenance.
 - f. Timetable for implementation demonstrating that works are aligned with the proposed phasing of development.
 - g. Persons responsible for implementing the works.
 - h. Details of initial aftercare and long-term maintenance.
 - i. Details for monitoring and remedial measures.
 - j. Details for disposal of any wastes arising from works.

The ecological design strategy shall be implemented in accordance with the approved details and timetable and all features shall be retained thereafter.

- 4) Prior to the commencement of development, a conditions survey of that part of Bierley Marsh within the application boundary as shown on plan 19.157.101 shall be submitted to and approved in writing by the Local Planning Authority. On completion of the development, a second condition survey of the same part of Bierley Marsh shall be carried out to identify defects attributable to the construction traffic associated with the development, the findings of which shall be submitted to and approved in writing by the Local Planning Authority. Any damage that is identified to have occurred between the period of the two surveys shall thereafter be remedied prior to any dwelling being first occupied.
- 5) Prior to the commencement of development, a scheme for the re-surfacing of that part of Bierley Marsh within the application boundary as shown on plan 19.157.101, shall be submitted to and approved in writing by the Local Planning Authority. The approved scheme shall thereafter be implemented in its entirety and completed prior to any dwelling being first occupied.
- 6) Prior to the commencement of development, a Construction Management Plan shall be submitted to, and approved in writing by the Local Planning Authority.

The approved Construction Management Plan shall be adhered to throughout the construction period for the development.

- 7) Prior to the commencement of development:
- a. a scheme of intrusive investigations shall be carried out to establish the risks posed to the development by past shallow coal mining activity; and
 - b. any remediation works and/or mitigation measures to address land instability arising from coal mining legacy, as may be necessary, shall be implemented in full in order to ensure that the site is made safe and stable for the development hereby permitted.

The results of the site investigation shall be made available to the local planning authority before any development takes place.

- 8) Prior to the first occupation of the development hereby permitted, a signed statement or declaration prepared by a suitably competent person confirming that the site is, or has been made, safe and stable for the development hereby permitted shall be submitted to and approved in writing by the Local Planning Authority. This document shall confirm the methods and findings of the intrusive site investigations and the completion of any remedial works and/or mitigation necessary to address the risks posed by past coal mining activity.
- 9) Prior to the commencement of any groundworks, other than those required for a site investigation report, a Phase II Intrusive Site Investigation Report shall be submitted to and approved in writing by the Local Planning Authority.
- 10) Where site remediation is recommended in the Phase II Intrusive Site Investigation Report approved pursuant to condition 9, further groundworks shall not commence until a Remediation Strategy has been submitted to and approved in writing by the Local Planning Authority. The Remediation Strategy shall include a timetable for the implementation and completion of the approved remediation measures.
- 11) Remediation of the site shall be carried out and completed in accordance with the Remediation Strategy approved pursuant to condition 10. In the event that remediation is unable to proceed in accordance with the approved Remediation Strategy or contamination not previously considered in either the Preliminary Risk Assessment or the Phase II Intrusive Site Investigation Report is identified or encountered on site, all groundworks in the affected area (except for site investigation works) shall cease immediately and the Local Planning Authority shall be notified in writing within two working days. Works shall not recommence until proposed revisions to the Remediation Strategy have been submitted to and approved in writing by the Local Planning Authority. Remediation of the site shall thereafter be carried out in accordance with the approved revised Remediation Strategy.
- 12) Following completion of any measures identified in the approved Remediation Strategy or any approved revised Remediation Strategy a Validation Report shall be submitted to the Local Planning Authority. No part of the development hereby permitted shall be first occupied until such time as the remediation measures have been completed for the site in accordance with the approved Remediation Strategy or the approved revised Remediation Strategy and a

Validation Report in respect of those remediation measures has been approved in writing by the Local Planning Authority.

- 13) No above ground construction work shall be undertaken until details/samples of the materials to be used in the construction of the external surfaces of the development hereby permitted have been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved details.
- 14) No above ground construction work shall be undertaken until details of the boundary treatment of the development hereby permitted have been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved details and retained thereafter.
- 15) No above ground construction work shall be undertaken until a hard and soft landscaping scheme indicating the type, height, species and location of all new trees and shrubs, and hard surfacing materials has been submitted to and approved in writing by the Local Planning Authority. The landscaping works shall be carried out in accordance with the approved scheme before the dwellings hereby permitted are first occupied. Any trees or plants which within a period of 5 years of planting die, are removed, or become seriously damaged or diseased, shall be replaced with others of similar size and species.
- 16) Prior to the first occupation of the development hereby permitted, details of the bin collection point shall be submitted to and approved in writing by the Local Planning Authority. The collection point shall be made/constructed in accordance with the approved details before the dwellings are first occupied and retained thereafter.
- 17) Construction works shall take place only between 07:30 to 18:30 hours on Mondays to Fridays and 08:00 to 13:00 hours on Saturdays and shall not take place at any time on Sundays or on Bank or Public Holidays.
- 18) No removal of or any works to hedgerows, trees and shrubs shall take place between 1st March and 31st August inclusive unless a competent ecologist has inspected the area no more than 24 hours prior to its removal and has provided written confirmation to the Local Planning Authority that no nests or breeding birds will be harmed and/or that there are appropriate measures in place to protect nesting bird interest on the site.
- 19) The development shall be completed in accordance with the advice and directions (recommendations) contained in the Arboricultural Method Statement, reference Iain Tavendale, Land at St Lukes, Bierley Marsh, East Bierley. These shall be implemented and maintained throughout the construction phase.
- 20) Details of any additional tree works required during the construction process, that are not identified within the submitted information, shall be submitted to and approved in writing by the Local Planning Authority prior to the works being carried out. The works shall thereafter be carried out in accordance with the approved details.

- 21) Prior to the first occupation of the development hereby permitted, the accesses to the site shall be set out and constructed in accordance with the approved plans and retained as such thereafter.
- 22) Prior to the first occupation of the development hereby permitted the parking areas shown on the approved plans shall be laid out on site and retained thereafter for that purpose and clear of any obstructions.
- 23) Notwithstanding the provisions of Article 3 and Part 1 and Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (or any order revoking or re-enacting that Order with or without modification), no development as specified in Classes A, B, D or E of Part 1 and Class A of Part 2 of Schedule 2 of that Order shall be carried out, other than those expressly authorised by this permission.