



Appeal Decision

Hearing held on 12 September 2022

Site visits made on 15 February 2022 and 11 September 2022

by R Hitchcock BSc(Hons) DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 September 2022

Appeal Ref: APP/Z4718/W/21/3282541

**Land Off Old Bank Road, Mirfield, West Yorkshire WF14 0HX
(420175, 421353)**

- 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 Yorkshire Property Estates Ltd against the decision of Kirklees Metropolitan Council.
 - The application Ref 2019/60/91105/E, dated 11 March 2019, was refused by notice dated 10 March 2021.
 - The development proposed is 'an outline application for a residential development to the site north of Old Bank Road, Mirfield. As part of the application we will seek to demolish 2no. dwellings to Old Bank Road, to allow a proposed access road to the site'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application was submitted in outline with all matters reserved save for the means of access to the site and I have determined the appeal on that basis. During the course of the Council's consideration of the planning application, the appellant provided some additional site monitoring data and an amended plan revising the proposed access. As the detail on which the Council made its decision, I have also taken it into account.
3. For clarity, I have had regard to: Proposed Site Plan 0560-EA-A-PL02 Rev A showing the proposed access point, Site Access General Arrangement Plan 19019/P/001 Rev B, and Swept Path Analysis Plan 19019/P/02 as the plans providing the detail of the proposed access. Proposed Site Plan 0560-EA-A-PL02 Rev A and Indicative and Proposed Sections Plan 0560-EA-A-PL03 Rev A show a potential layout of the site; however, I have considered the layout and appearance shown as for illustrative purposes only.
4. The address appearing above is taken from the Council's Decision Notice. The site was identified only by grid reference on the planning application. For clarity, I have use both identifiers.
5. The description appearing in the banner heading above is taken from the planning application form. This was changed by agreement during the Council's consideration of the planning application to 'Outline Application for erection of residential development including means of access to the site north of Old Bank Road, Mirfield (up to 63 dwellings).' It did not change the development for

which outline planning permission was sought and on which the relevant parties were consulted.

6. At the hearing it was agreed by all parties that, given the nature of the Council's reason for refusal, and having regard to all other matters, it was not necessary to conduct an accompanied site visit. Having visited the site on 2 occasions, including the day prior to the hearing, I am satisfied that sufficient views of the site and surrounds have taken place for the purpose of my determination of this appeal.

Main Issue

7. The main issue is whether or not the extent of land and groundwater contamination has been adequately assessed to demonstrate that the site can be safely developed for housing.

Reasons

8. The site consists of an area of open rough ground and part of a row of terraced houses fronting on to Old Bank Road. The land is primarily surrounded by residential development and community facilities, including a school. The open ground has a gentle incline and is predominantly covered by scrub and pioneer plant species. Some established trees exist close to the site peripheries. A fenced telecoms mast and cabinets lie close to the south-western boundary.
9. Amongst other things, the site has a history of use as a brickworks. Parts of the land are identified as having been excavated and subsequently backfilled with waste. Some landfilling was carried out under licence, which included for the disposal of spent chemical wastes. The site also lies in an area of known shallow coal seam workings.
10. Policy LP53 of the Kirklees Local Plan Strategy and Policies [2019] (the KLP) requires that for unstable or contaminated land, the Council will require an appropriate contamination and instability risk assessment. This should incorporate measures to remediate the land or ensure that contamination does not have the potential to cause harm to people or the environment. This reflects the requirements at Paragraphs 174 and 183 of the National Planning Policy Framework (the Framework).
11. The Framework is clear that adequate site investigation information should be available to inform the risks associated with instability and contamination. It also requires assessment of the risks associated with mitigation, including those to the natural environment.
12. There is no dispute between the main parties that parts of the land are contaminated by a range of pollutants. These include those arising from known and unknown deposited materials, ground gases generally associated with the degradation of the wastes and some potential for groundwater contamination. These matters have previously been the subject of discussions between the main parties and assessment under 2 relatively recent planning applications¹, which were withdrawn, and an earlier refused proposal dating back to 2003.
13. Due to the acknowledged complexity of known and unknown contaminants – particularly those in the location of a former clay pit, the Council has sought a

¹ 2016/91074 and 2018/91713

rigorous assessment of the contaminants and the ground conditions including the local groundwater regime. This was in order to establish an accurate baseline of site conditions and identify existing, or potential, pathways between pollutants and sensitive receptors. From this position the necessary remediation and methods for the protection of prospective occupiers of the site, neighbouring land users and the wider environment would be informed for all phases of the development.

14. In relation to ground gas, the Council had requested that a minimum of 24 dates of sampling should take place over a 12 month period. This follows the advice in the Construction Industry Research and Information Association's guidance² relating to the assessment of risks posed by hazardous ground gases to buildings. Amongst other things, this is to establish the effects of seasonal fluctuations, including atmospheric pressure and precipitation changes, which have potential to affect gas flow rates.
15. Recent sampling has taken place over a 3 year period, however, this was limited to 8 occasions and was intermittent. Not all periods of the calendar year were covered and only on 2 occasions were atmospheric pressures falling. In support of the gas flow monitoring undertaken by the appellant, readings previously carried out by a third party were used to corroborate the more recent findings.
16. However, alongside the concern in relation to the frequency of sampling, I heard that the extent of sampling in the identified areas of worst contamination was limited and that the exact nature of the contaminants had not been established. According to the Council, the method used to determine the extent of volatile organic compounds (VOCs) was susceptible to interference by the presence of methane. Despite the Council raising this concern, opportunities to assess and identify them by alternative approaches have not been utilised.
17. In relation to 2 samples provided using a photo ionization detector (PID), the results were not accompanied by qualifying supporting information to verify the findings. The Council indicated that this was necessary to provide the confidence and the comprehensive level of information expected in baseline modelling.
18. Accordingly, the actual breakdown of contaminants is unknown. Whilst there was no dispute that they could be generally classified, the appellant conceded that a higher degree of testing, such as bench/lab testing, would be necessary to identify them and assess their interactions in order to fully inform a remediation strategy to remove or stabilise them.
19. Furthermore, there was general agreement between the main parties that the limited assessment in relation to groundwater has not adequately determined the potential pathways between the site and the nearby sensitive land uses. Although some measured fluctuations in groundwater levels were deemed to have negligible effects on corresponding ground gas flow rates, the appellant accepted that, in the circumstances of perched groundwater within the area of the clay pit, there could be fluctuations in gas levels over time due to differing rates of decomposition. This might be dependent on whether aerobic or anaerobic conditions prevailed and, in contrast to domestic waste emission

² CIRIA C665

- profiles, could result in greater emissions over time. In my view, this supports the Council's case for a year-round monitoring approach.
20. I note the appellant's contention that an industry recognised method of a continuous period of gas monitoring for a month could yield sufficient results to give confidence to a worst-case scenario assessment. However, even if that were the case, that monitoring had not taken place in the run up to the hearing.
21. Based on the current level of information the main parties were able to agree that the site characterisation would likely be classified as CS3 using methodologies set out in BS8485 in relation to ground gas. Furthermore, it could be anticipated that the implementation of numerous procedures which exist to treat, remove or contain contaminants might reduce the site's ground gas characterisation.
22. However, the Council highlighted that the Government's Land Contamination Risk Management guidance³ requires modelling of the site circumstances and continuous review at every stage in the planning and implementation of a development. The uncertainties in relation to the actual contaminants, the groundwater regime – particularly potential linkages to human receptors and a deeper lying aquifer, and, the absence of a detailed method of remediation fail to provide a baseline model from which the associated risks can be assessed.
23. The appellant highlighted an extensive range of measures potentially at their disposal to treat, remove or mitigate for the effects of ground gas and groundwater contamination. However, it was accepted that, without further testing and modelling, the detail of remediation and any potential risks associated with implementing it could not be provided.
24. Moreover, the appellant accepted that there were further implications arising from the Coal Authority's (the CA) identification of the land as a High Risk Area. This is due to known former coal mining activities below the site. The appellant's assessment recognises that further site investigation would be required to inform the nature and extent of stability issues and, if coal is found, the mine gas associated with it.
25. Whilst the appellant explained that initial investigations could take place without encroaching into the most contaminated parts of the site, any findings would need to feed into the overall strategy for site remediation. Complications or additional risks could arise particularly if stability in the area of the clay pit was identified or where piling of foundations might be necessary. This would have potential to adversely affect in-situ contaminants, perched groundwater within the pit and/or the deeper aquifer.
26. In contrast to the CA's position that, in isolation, ground stability and coal gas could be dealt with through the use of planning condition/s, in the context of the site's complexity and subsequent necessity for an integrated approach to remediation, I do not concur with that view.
27. I acknowledge that there is some necessity to take a pragmatic approach as to the level of detail required in association with an application for outline permission, not least due to their potentially significant cost implications. It can

³ <https://www.gov.uk/government/publications/land-contamination-risk-management-lcrm>

be proportionate to a decision at outline stage, but sufficient to give confidence that permission in full can be granted at a later stage.

28. However, in the absence of an established baseline in relation to site contamination and stability, or details of attendant necessary remediation measures, I cannot be sure that the associated risks would be within the scope of acceptability. Furthermore, there is little before me to demonstrate that any remediation would ultimately be either viable or practicable in the particular circumstances of the case. Accordingly, conditions requiring the necessary further site investigations and remediation could nullify the benefit of a permission they might be attached to. They are therefore unlikely to pass the test of reasonableness.
29. I recognise the Framework's backing for appropriate opportunities to remediate contaminated or unstable land to secure its effective use in meeting the need for homes, a matter which is highlighted in the supporting text to Policy LP53. However, this benefit is subject to protection of the environment and ensuring safe and healthy living conditions.
30. The elementary establishment of the site's baseline conditions and conceptual site model which would allow the continuous review of a site strategy have not been established. I find that the balance of existing evidence is insufficient to provide confidence that the site could be safely developed without undue risks to the environment, existing residents or those attending the adjacent school. Therefore, the appellant has failed to demonstrate that the risks associated with the site's development, including its remediation, are acceptable or, indeed, that remediation could make those risks acceptable.
31. For the reasons above, I find that the extent of land and groundwater contamination has not been adequately assessed to demonstrate that the site would be suitable for residential use. It would not comply with Policy LP53 of the KLP or the Framework as they require appropriate contamination and instability risk assessments and unarmful measures to remediate the land condition to one suitable for its intended use.

Other Matters

32. The proposal would lead to additional traffic on the local road network. The Council, in conjunction with its highway advisors, have indicated that the proposed access point and potential amount of traffic would not cause significant effects on the local road network capacity and would provide a suitable means of access to the site for users. Having had regard to the detail of the proposed access and visited the site, I have no reason to disagree with that finding.
33. In support of the proposal the appellant referred me to the contribution that the site would make to the housing supply in the locality. This would utilise a windfall site within an existing settlement area close to services and facilities. Although the site was removed as a housing allocation in the most recent review of the local plan, and little evidence was submitted to contest the Council's claim of a 5-year housing land supply, the development of the site for housing would meet the Government's aim of boosting significantly the supply of housing. Furthermore, it could deliver a policy compliant amount of affordable housing units. These are benefits of considerable weight.

34. I note the concerns of some third parties in relation to potential overlooking, loss of privacy, and young person safeguarding. As matters which relate to the detail of layout, scale and appearance of the development these lie outside of the scope of the outline application. The loss of a view over third-party land is rarely a matter of significant weight in planning decisions.
35. The potential other adverse effects of the construction phase of the development - including noise, dust and possible vibration concerns would be for a temporary period only. However, given the proximity to sensitive neighbouring land uses, these are matters which could be reasonably controlled through the use of planning conditions.
36. Concerns have been raised by third parties in respect of the use of the site by various forms of wildlife, however, there is little substantive evidence to support those claims. I am therefore unable to attribute significant weight to this argument.
37. I note some frustrations expressed by the appellant in relation to the level of communication from the Council leading up to this appeal. However, this is not a relevant matter in my determination.

Planning Balance and Conclusion

38. The site would contribute to housing delivery in the locality. It could provide a policy compliant amount of affordable housing. However, the complex site conditions have a high potential to cause adverse effects on the local environment and sensitive receptors. The degree of site assessment to date has not fully clarified the nature of the risks arising from land contaminants or their potential pathways. It is not therefore clear as to what methods would be necessary to remediate those contaminants or the effects of implementing them. Accordingly, on the basis of the evidence before me, I find the necessary level of confidence that the site can be safely developed has not been demonstrated.
39. On the important matters of protection of the environment and the health and safety of existing and prospective residents and local service users, I find the benefits of the proposals would not outweigh the potential harm and the proposal would conflict with the development plan taken as a whole. There are no material considerations that indicate the decision should be made other than in accordance with the development plan. Therefore, for the reasons given, I conclude that the appeal should not be allowed

R Hitchcock

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Alistair Flatman MRTPI
Adam Wilson
Owain Gwilym
Paul Robinson

Alistair Flatman Planning
GEO₂ Remediation Ltd.
ARP Geotechnical Ltd.
Yorkshire Property Estates Ltd

FOR THE COUNCIL

David Wordsworth
Dr Natalie Heaney

Team Leader Majors and Minerals
Environmental Health Officer

INTERESTED PERSONS:

Mr C K Bell

Local resident