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# Appeal Decision

Site visit made on 20 August 2024

**by K Savage BA(Hons) MPlan MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 17 September 2024**

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**Appeal Ref: APP/W3005/W/24/3338235**

**Former Garage Court and Allotments, off Lime Avenue, Huthwaite, Notts**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant outline planning permission.
  - The appeal is made by Mr & Mrs Tom and Iris Leah against the decision of Ashfield District Council.
  - The application reference is V/2022/0087.
  - The development proposed is an outline application with all matters reserved for residential development.
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## Decision

1. The appeal is dismissed.

## Application for costs

2. An application for an award of costs has been made by Mr & Mrs Tom and Iris Leah against Ashfield District Council. This is the subject of a separate decision.

## Preliminary Matters

3. The application was made in outline, with all matters reserved. This includes the matter of access. However, the evidence indicates that the existing entrance from Lime Avenue is the only practical means of accessing the site, and it is necessary to consider the matter of access in so far as its acceptability in principle is concerned, whilst matters of detail relating to its design would be reserved for later consideration.
4. During the appeal, I sought clarification from the Council in respect of planning obligations it was seeking as part of the proposal, including affordable housing. The appellants were afforded the opportunity to respond to the information received from the Council. As the evidence indicates differences between the main parties in several respects, I address affordable housing and impacts on local infrastructure as additional main issues below.
5. The Council advises that it has recently undertaken Regulation 19 stage consultation on its draft local plan. However, I have no indication that the plan has been submitted for examination, and thus it remains at a stage where policies may yet change. Regardless, neither main party has relied on policies of the draft local plan and I have assessed the appeal against the adopted Ashfield Local Plan Review (November 2002) (the ALPR).

6. On 30 July 2024, the Government published a consultation on "Proposed reforms to the National Planning Policy Framework and other changes to the planning system" and the "National Planning Policy Framework: draft text for consultation", alongside a Written Ministerial Statement (WMS) entitled "Building the homes we need". I have had regard to these as material considerations, albeit noting the Framework text is in draft and subject to change, which limits the weight to be afforded to it at this stage.

### **Main Issues**

7. The main issues are:
  - i) whether safe access can be provided to the development;
  - ii) the effect of the proposal on protected and priority species;
  - iii) whether, if necessary, the proposal would make adequate provision for affordable housing;
  - iv) whether if necessary, satisfactory provision is made to mitigate the impact of the proposed development on local infrastructure.

### **Reasons**

#### *Access*

8. The site comprises a large area to the rear of dwellings on Lime Avenue. To the northern end are a large storage building, two rows of garages and a red brick building close to the entrance, with the space in between hard surfaced. To the south, and comprising the majority of the site, are former allotments which have been vacated and are now in an overgrown state. Dwellings also abut the northern and southern boundaries and Huthwaite Cemetery stands to the western side.
9. Lime Avenue is a straight, residential street with housing and on-street parking on both sides which leads from Sutton Road, a main thoroughfare through Huthwaite. The street is not a through road as drivers travelling south either turn right into the cul-de-sac of Corner Croft, or turn left onto Crossley Avenue and immediately left again onto Beech Avenue where they return to Sutton Road.
10. The site is accessed from an entrance around 30 metres from the junction with Sutton Road. Though access is a reserved matter, the plans indicate that the red brick building at the entrance would be demolished to facilitate a new, two-way access for the site. The Council's concerns, stemming from the comments of Nottinghamshire County Council (NCC) as the local highway authority, relate to the safety of the site access. Initial concerns relating to the impact of additional traffic on the existing highway network have been addressed by a subsequent traffic survey undertaken by the appellants. I have no reasons to dispute the conclusions drawn in these respects.
11. The submitted plan shows achievable visibility splays of 20 metres to the north (towards Sutton Road) and 16 metres to the south at 2.4 metres setback. NCC indicates, based on speed survey data provided by the appellants, that the required sightline would be sufficient to the north, where 17 metres is required, but would fall short of the 25 metres sightline

required to the south. It is indicated that the required distance cannot be achieved due to the presence of a wall to the front garden of 3 Lime Avenue, the adjoining property to the south.

12. I saw on site that the wall in question is modest in both depth and height, and does not act as a significant impediment to views in a southerly direction, being set in behind the footpath. The implication of parked cars in the street also needs to be considered. Their presence along both sides of the street means that, in practice, traffic is funnelled down the centre of the street in a single lane. Thus, the sight line for a driver looking south is not to the nearside kerb, or even the centre of the nearside lane, but close to the centre of the whole carriageway. Parked cars on the near side also mean that drivers would have to pull further out to get a suitable view, taking them beyond the wall to No 3 where they would have a clearer view of the central traffic lane but also would be better able to see further along the street along the footpath and through gaps in the parked cars. From my own observations, drivers are in practice likely to be able to see oncoming traffic sufficiently in a southerly direction.
13. My view is reinforced by the appellants' traffic survey, which shows traffic to be generally low along Lime Avenue, reaching a peak of 19 vehicles per hour travelling north, fewer than one every three minutes on average, and a peak of only 8 per hour travelling south. 85<sup>th</sup> percentile speeds for northbound traffic were also recorded at 19.8mph. These figures reflect my observations of a lightly trafficked, non-through road with low speeds owing to the presence of parked cars preventing free flowing, two-way movements.
14. Added to this, the indicative proposal for 16 dwellings would generate a maximum of 11 weekday peak hour vehicle movements, which is limited in number. Even considering a scheme of up to 24 dwellings, the traffic generation would not be significant and, combined with the low numbers recorded using Lime Avenue, the risk of conflict at the access as vehicles emerge would be low.
15. I have had regard to the measures put forward to improve the highway environment, including a raised speed table proposed by the appellants and kerb realignment and double yellow lines at the junction radii and for 10 metres in either direction put forward by NCC. I note the points made that both parties' options are subject to separate processes involving public consultation and none are guaranteed to received support. However, the evidence indicates that there is scope for the parties to agree details of highway improvements at reserved matters stage. These measures, alone or in combination, would further reduce any risk of conflict.
16. In reaching a view, I have also noted the arguments made regarding the past use of the site as a coach depot and allotments, and continuing use as lock-up garages. No firm details of existing traffic levels to and from the site have been advanced, but it is reasonable to conclude it is sporadic and no longer includes large coaches. Moreover, there is little evidence to suggest that use for coach parking is likely to resume. Concerns about how existing parking on the site would be re-provided could be addressed at reserved matters stage.

17. I also note concerns regarding existing problems with the junction of Lime Avenue and Sutton Road due to the presence of parked cars limiting two way access. However, this has not been raised as a concern by the Council or NCC and the evidence does not indicate the proposal would have a direct adverse effect on operation of this junction.
18. For the reasons set out, therefore, I conclude that the proposal would be capable of providing safe site access and egress and would not cause harm to highway safety. The proposal would therefore accord with Policies ST1 and HG5(e) of the ALPR, which together permit development where it will not adversely affect highway safety, or the capacity of the transport system and where access for vehicles, pedestrians and cyclists and public transport where appropriate, is safe and convenient and integrated with existing provision.
19. There would also be no conflict with the Framework, which advises that development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe.

#### *Protected Species*

20. The appellants have submitted a preliminary ecological appraisal (PEA), undertaken in March 2023. With respect to bats, the PEA states that the red brick building to the front of the site is a confirmed bat roost, with a single, brown long-eared bat recorded in a niche within the internal brickwork. Potential roost features are also noted within the PEA, including gaps in the internal and external brickwork; lifted ridge tiles; gaps under the wooden fascias; small niches where external render has lifted and gaps in the boarding placed over the windows and doors. Separately, the PEA indicates that the habitats within the immediate vicinity will be exploited by bat fauna found within and around the local area for feeding and commuting.
21. The PEA states that provided the perimeter hedgerows are retained and a suitable lighting scheme implemented, there would be no significant adverse effect on foraging and commuting bats. However, with respect to the brick building containing a bat roost, the PEA sets out that further survey work is required during the active season, between May and September, as per relevant guidance.<sup>1</sup> It indicates that up to three dawn/dusk surveys will be required using ultrasonic bat detectors and cameras and concludes that further advice will be provided following these surveys. It also points to the potential need to apply to Natural England (NE) for a European Protected Species licence in order for work to continue in a legally compliant way.
22. The PEA adds that the allotment area has a high potential to support a population of common reptiles and further survey work is required in this respect. It is also noted that grass snake, common lizard and occasional slow worm records exist for the local area. Photographs within the PEA show the land as cleared of vegetation at the time of the survey. At my visit, this land had regrown extensively, such that access through the area was not possible. Such significant change in conditions reinforces the recommendation for further survey work.

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<sup>1</sup> Bat Conservation Trust Good Survey Guidelines 2016

23. The appellants have not provided evidence of further survey work for either bats or reptiles. It is argued that the recommendations of the PEA do not suggest that the principle of development is unacceptable, and could be conducted prior to development on site to inform suitable levels of mitigation.
24. However, all species of bats are protected by law under the Conservation of Habitats and Species Regulations 2017 and the Wildlife and Countryside Act 1981. Moreover, Circular 06/2005<sup>2</sup> states that the presence of a protected species is a material consideration when a development is being considered which would be likely to result in harm to the species or its habitat. Paragraph 99 states that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established *before* planning permission is granted (my emphasis).
25. The appellants point to the Council failing to advise that further surveys would be required, but the need for them has arisen directly from the appellants' own PEA. Moreover, contrary to the appellants, the PEA does not make any commentary on the principle of development on the site, but repeats the need for further survey work and licensing from NE. This, in my view, is not an indication that the findings of the PEA were inconsequential. In addition, the comments from NE in response to the application are clearly only made in relation to statutorily protected nature conservation sites or landscapes, and no comment is made regarding protected species.
26. The proposal would involve demolition of the building found to be a bat roost, which clearly would disturb any bats which may be roosting within. Without additional survey work recommended by the appellants' own PEA, it is not known to what extent bats are currently using the site for roosting and it is not possible to identify suitable mitigation measures to minimise the potential impacts on this protected species. Full details of any mitigation measures would need to be provided in order to apply for a licence from NE. However, in the absence of these details, I cannot have confidence that an application for a license would be successful.
27. Circular 06/2005 advises that surveys should only be required by condition in exceptional circumstances. This might be acceptable had the further surveys recommended by the PEA been undertaken, a mitigation strategy prepared on the basis of the findings and all that was required were final checks immediately prior to commencement of construction to ensure that no protected species had recently colonised the site. However, given the level of information currently available does not present a full picture of the extent to which bats are present on the site, use of a pre-commencement condition would not be an appropriate course of action in this case.
28. The absence of sufficient information means that I cannot rule out potentially significant harm to protected species, namely bats. Further survey works should also be undertaken in respect of reptiles. The Council does not cite conflict with any specific development plan policy, but the proposal would be contrary to the Framework which states that if significant harm to biodiversity resulting from a development cannot be avoided, adequately

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<sup>2</sup> Biodiversity and Geological Conservation – Statutory Obligations and Their Impact within the Planning System

mitigated, or, as a last resort, compensated for, then planning permission should be refused.

### *Affordable Housing*

29. The Council at appeal has sought that 10% of the dwellings provided are made available for affordable housing, or that a commuted sum is paid in lieu of on-site provision. Policy HG4 does not apply as it relates only to sites of 1 hectare or 25 dwellings, which is not expected to be the case here. However, the appellants accept that the request is reasonable having regard to Paragraph 66 of the Framework, which sets out that where major development involving the provision of housing is proposed, planning policies and decisions should expect at least 10% of the total number of homes to be available for affordable home ownership.
30. However, there is no mechanism before me that would secure the delivery of affordable housing or a financial contribution in lieu of on-site provision. I am not satisfied that the requirement could be secured by a planning condition. The Planning Practice Guidance (the PPG) sets out that a negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate other than in exceptional circumstances where there is clear evidence that the delivery of the development would otherwise be at serious risk. There is no clear evidence to suggest that such exceptional circumstances would apply here. Furthermore, the PPG also sets out that no payment of money can be positively required by condition.
31. Consequently, the proposal would fail to secure affordable housing on the site, contrary to the expectations of the Framework. Therefore, this is a matter weighing against, rather than for the proposal.

### *Local Infrastructure*

32. The Council in its officer report refer to requirements for financial contributions towards local infrastructure projects, including £9,100 for bus stop improvements, £94,535 towards additional primary school places and an unknown contribution towards off-site biodiversity net gain. At appeal, further requests for off-site public open space (£2,000 per dwelling), public realm improvements (£1,000 per dwelling) and a monitoring fee (£4,000) have been made. The appellants have not provided a completed planning obligation with the appeal.

### *Bus Stop Improvements*

33. The Council points to existing bus stops in the area not being to the standard set out in NCC's Public Transport Planning Obligations Funding Guidance<sup>3</sup>. The appellants challenge the status of this document, but I note it is part of NCC's overall Developer Contributions Strategy. The guidance sets out that contributions are triggers for developments of 10 or more dwellings and are based on numbers of likely trips generated and modal split of transport. It adds that contributions will either be for new bus stops where existing provision is too far, or improvements to bus stop infrastructure to encourage public transport use.

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<sup>3</sup> Reviewed January 2024

34. In this case, the contribution is sought to improve the stop at AS0131 North Street to provide a real time bus stop pole and display including electrical connections. NCC caveats that the same obligation is sought from another development, and the burden would be shared if both developments were approved and built, in which case provision would be made to share the requirement.
35. I am satisfied that this contribution is necessary to promote sustainable transport in accordance with Policy TR6 of the ALPR and the aims of the Framework, and that it is fairly and reasonably related in scale and kind to the development.

*Primary School Places*

36. The appellants point out that there is no certainty as to the number of dwellings to be provided, with the Council basing its calculation on a scheme of 24 dwellings<sup>4</sup> yielding an additional 5 primary, 4 secondary and 1 post-16 age pupils. Moreover, the Council accepts that, at present, there is 'marginal availability' of school places over the projection period that would be sufficient to accommodate the demand arising from the development.
37. The evidence before me is limited in this respect. The Council refers obliquely to demand from other developments, but I have no evidence of their planning status and the level of demand for school places they may generate. Moreover, no data on current enrolment numbers in local schools has been provided. Indeed, no school has been identified to which the contribution would relate or how it would be spent.
38. Consequently, I am not satisfied that a need for the education contribution has been satisfactorily demonstrated. Therefore, the absence of a planning contribution in this respect does not weigh against the proposal.

*Public Open Space and Public Realm Improvements*

39. Policy HG6 of the ALPR requires public open space to be provided on site, or a contribution to be paid where on-site provision is not possible to improve existing open space or create new off-site space. The appellants have challenged the level of the contribution. Despite the age of Policy HG6, its aims still accord with the Framework which stresses the importance of access to a network of high quality open spaces and opportunities for sport and physical activity for the health and well-being of communities. Given new residents would add to the usage of such areas, a contribution is reasonable in principle.
40. However, the Council has provided no information to justify the level of contribution sought. No methodology of cost has been provided, nor have details of existing demand or necessary improvements been advanced, and locations where the contribution would be spent are only given in general terms, with no specific improvements identified. As such, I am not satisfied that a contribution of £2,000 per dwelling is necessary to make the development acceptable in planning terms.

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<sup>4</sup> 18 to 24 being the potential number of dwellings indicated in the appellants' planning statement



41. The Council also refers to Policy HG6 in support of a separate contribution of £1,000 per dwelling for public realm improvements, but the policy makes no specific reference to this. This aside, no evidence has been provided to justify the level of the contribution or how it would specifically be spent. Therefore, I am not satisfied that it meets the relevant tests for planning obligations.

*Biodiversity Net Gain*

42. The Council's delegated report refers to an assessment for biodiversity net gain not having been carried out and that the implications of whether the site has potential to provide any biodiversity net gain on site or offsite via financial contribution is unknown. However, at appeal, the Council has not specified that such a contribution is required, and no further evidence has been advanced by either party. Thus, I have no basis to conclude whether a contribution is necessary and what the level of the contribution may be.

*Monitoring Fee*

43. A monitoring fee can be justified where a legal agreement contains terms which require multiple steps, staggered payments and/or ongoing assessment over a period of time to ensure compliance. As no agreement is before me, even in draft, it is not possible to ascertain where ongoing monitoring may be required. This aside, the Council has provided no evidence of expected officer time and costs to justify the level of contribution sought. Therefore, I am not persuaded that the monitoring fee sought is necessary to make the development acceptable in planning terms.

*Conclusions on Local Infrastructure*

44. For the reasons set out, I cannot be certain that the contributions sought in respect of education, public open space, public realm, biodiversity and the requested monitoring fee would be necessary to make the development acceptable or that they would be directly related to the development and fairly and reasonably related in scale and kind. Consequently, and notwithstanding the aims of development plan policy, I am unable to conclude that a planning obligation seeking to provide these contributions would comply with Regulation 122 of the Community Infrastructure Levy Regulations 2010 and paragraph 57 of the Framework. In these circumstances, the absence of a planning obligation to secure these contributions does not weigh against the development.
45. However, I find that the obligations in respect of affordable housing and bus stop improvements would be necessary to make the development acceptable in planning terms and accord with the above tests. As already set out, planning conditions would not be an appropriate mechanism to secure these obligations, and no planning obligation is before me to otherwise secure them. Therefore, the absence of a planning obligation to secure these contributions weighs against the development.
46. In reaching these findings, I stress that my judgement relates only to the specific evidence before me in respect of each contribution sought, and is not a judgement on the appropriateness or otherwise of a contribution in principle. Were any future application to come forward, it would be for the

main parties to address any infrastructure needs afresh based on the particular policy position and evidence available at the time.

### **Other Matters**

47. The Council has not opposed the principle of residential development and no objection has been raised in respect of flood risk or land contamination, subject to appropriate planning conditions were permission to be forthcoming.
48. No fundamental concerns have been raised in respect of the ability for a suitably designed scheme to come forward at reserved matters stage. On the evidence before me, I am satisfied that the particular characteristics of the site and its surroundings mean matters relating to scale, layout, appearance and landscaping could be addressed at reserved matters stage.
49. Although in outline, the Council has not raised objection to the potential effect of the proposed development on neighbours' living conditions. The indicative site layout shows a linear pattern that would run parallel to the dwellings on Lime Avenue and provide sufficient separation distances between dwellings such that material losses of privacy and light would not occur. Though outlook would inevitably change for residents of Lime Avenue, I am satisfied that there is space on the site to accommodate dwellings without creating an overbearing or enclosing form of development.
50. The Council has not opposed the proposal in other respects. I have had regards to comments made by interested parties on other matters, beyond those encapsulated by the main issues. I note the desire for alternative uses of the land as garden extensions, new allotments or an extension to the cemetery. However, no policy has been put to me which prioritises such uses over housing, nor has any alternative scheme been advanced. Ultimately, I am required to consider the proposal before me on its own merits. Elsewhere, whilst noting the concerns raised, I have not identified further material harms or benefits to weigh in the planning balance.

### **Planning Balance and Conclusion**

51. The Council accepts that it presently can demonstrate just 2.93 years<sup>5</sup> worth of deliverable housing sites. Based on the emerging local plan having reached Regulation 19 stage, and in accordance with Paragraph 226 of the Framework, the Council indicates that it is required to demonstrate a four year supply. However, in the circumstances, the test at Paragraph 11(d)(ii) of the Framework is engaged whether a four or five year supply is required.
52. Although numbers are not specified, the proposal would provide a notable new housing development in an accessible location at a time of a substantial shortfall in housing supply. This would align with the key aim of the Framework of boosting the supply of housing nationally, an aim given further importance and impetus in the recent WMS, as well as encouraging uptake of sustainable transport. These are benefits weighing strongly in favour of the proposal in these circumstances.

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<sup>5</sup> As of October 2023

53. There would also be economic benefits from trade and employment during construction of the development and subsequently from engagement by future residents in the local economy. However, in view of the scale of the proposal, these are benefits of limited weight.
54. The proposal indicates the potential for additional landscaping and ecological enhancements, though few details of these matters have been provided at this stage and based on indicative layouts there would be limited areas for meaningful gains in these respects. As such, they attract limited weight in the scheme's favour.
55. In other matters, I have found that suitable access could be provided, and whilst this is not a matter weighing against the scheme, neither does it attract favourable weight given it is a necessity for any development.
56. However, set against these benefits, the absence of comprehensive surveys and an agreed mitigation strategy means that the scheme would be harmful to bats, a protected species, and would conflict with the national guidance and the clear approach of the Framework to protect and enhance biodiversity. This conflict attracts very significant weight. The failure to secure delivery of affordable housing and necessary public transport infrastructure improvements also weigh against the proposal.
57. Even in the context of the Council's housing supply shortfall, I find that the identified harms, taken together, represent adverse effects that would significantly and demonstrably outweigh the identified benefits of the proposal when assessed against the policies in the Framework, taken as a whole. As a result the presumption in favour of sustainable development, as set out at Paragraph 11, does not apply.
58. Indeed, as indicated above, Paragraph 186 of the Framework makes clear that when determining planning applications, if significant harm to biodiversity resulting from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.
59. Overall, having considered the development plan as a whole and all other material considerations, I conclude that the appeal should be dismissed.

*K Savage*

INSPECTOR