



Appeal Decision

Hearing held and site visit made on 16 April 2013

by Robin Brooks BA(Hons) MRTPI

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

Decision date: 2 May 2013

Appeal Ref: APP/W4705/A/12/2178906

Land at Wilson Road, Wyke, Bradford BD12 9HA

- 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 H Birkby and Sons Ltd against the decision of City of Bradford Metropolitan District Council.
 - The application Ref 11/05703/OUT, dated 20 December 2011, was refused by notice dated 24 February 2012.
 - The development proposed is residential development (up to 30 No. dwellings).
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Decision

1. The appeal is dismissed.

Procedural matters

2. The application was submitted in outline with all matters of detail reserved for future consideration and was accompanied by an illustrative plan showing a layout of the site for 30 dwellings.
3. One of the reasons for refusal was that the application provided insufficient information on the scale parameters of the proposed dwellings to enable its proper consideration. At the Hearing the Council drew attention to a recent legislative change¹ which means that applicants for outline planning permission are no longer required to submit details of layout and scale; and in consequence withdrew the reason.
4. A draft planning obligation in the form of a S106 agreement, signed by the Appellant, has been submitted relating to financial contributions towards provision of affordable housing, recreation and education facilities and discount travel cards. At the time of the Hearing this had not been signed by the Council and I set a deadline of the end of 19 April for this to be done if I was to take it into account in my decision. The deadline was not met and the Council indicated that significant questions remained unanswered on the Appellant's title to the land.

Application for costs

5. At the Hearing an application for costs was made by the Appellant against the Council. This application is the subject of a separate Decision.

¹ The Town and Country Planning (Development Management Procedure) (England) (Amendment No. 3) Order 2012

Policy context and main issue

6. The site is a former landfill site, unallocated in the Replacement Bradford Unitary Development Plan (UDP). The Council confirmed that, aside from the question of its history, there was no objection in principle to the development. I see no reason to question that stance. It is evident that access could be provided without difficulty and that the site is large and unencumbered enough to accommodate a development of up to the number of dwellings referred to, a figure determined by the constraints imposed by a nearby hazardous installation. Accordingly, the determining issue in the appeal is whether there is sufficient evidence to ensure a satisfactory development in terms of site stability and absence of contamination.
7. Policies P6 and P16 of the UDP are relevant. The former states that planning permission will only be granted for development on potentially unstable land where a full site investigation has been carried out and, if instability is found, remedial measures are taken on commencement of development. The latter says that disturbance of old landfills will not be permitted unless it can be demonstrated that there would be no risk to the environment or public health and safety. Although this policy appears to be principally addressed at proposals for re-working or re-excavating former landfills, I accept that it can also reasonably apply to the appeal proposal where the tipped material would inevitably be disturbed, not only in construction of highways and dwellings, but also in laying out of gardens and open spaces.
8. Both policies broadly reflect guidance in the National Planning Policy Framework (NPPF)² that potential pollution and instability should be taken into account in planning decisions. The NPPF also states that where sites are affected by such matters, responsibility for securing a safe development rests with the developer and/or landowner; and that adequate site investigation information, prepared by a competent person, should be presented.

Reasons

9. In essence the Appellant's case is that the information submitted establishes beyond reasonable doubt that the site has been tipped with inert material and is stable; that further site investigations would be both unnecessary and an unjustified additional financial burden on the development; and that any residual concerns could be addressed by the site surveys that any developer would necessarily have to carry out for insurance and building control purposes. The Council's stance is that the information available is inadequate to establish that the site can be safely developed and that the Appellant has not discharged the onus upon him to show that it can.
10. Early records of tipping are sketchy. Planning permission was granted in 1962³ for *filling in of quarry with waste materials* but no plan survives and, as the Appellant has pointed out, reference to the site as *adjoining Storr Hill Brickworks* may mean that it related to land west of the appeal site. That permission carried only two conditions, one of which specified the manner in which *the waste material from the asbestos works* should be tipped, consolidated and covered. There is no information on whether or not asbestos was so tipped.

² Paras. 120 and 121

³ Document 4

11. Prior to the issue of a Waste Disposal Licence in 1982⁴ it seems that there was no formal control over what was tipped. However, the Appellant, who was the site operator at the time, says that the waste brought onto the site was checked by an operative and that only inert material was accepted, principally builders' and civil engineers' construction waste; waste considered unacceptable was turned away. There are no surviving records from this time and the Council are unable to corroborate or contest what the Appellant says.
12. The Waste Disposal Licence sets out a range of conditions for operating the landfill, including that only *solid, demolition and construction wastes* are to be tipped and *poisonous, noxious or polluting wastes* are to be excluded; requirements are also set out for layering and compacting of waste. Copies of site inspection reports by the Environment Agency between 1998 and 2005, submitted by the Appellant, indicate general compliance with the Licence condition on acceptable waste, with notes of non-compliant waste being removed from incoming waste and stored separately pending removal. A report on the landfill dated August 2008⁵ (by which time the site had closed), written prior to surrender of the then Environmental Permit by the Environment Agency, also states, on the basis of borehole evidence, that although the tip contained occasional biodegradable materials, in general the materials tipped were as permitted by the Licence conditions. As further evidence of the acceptability of the waste material handled, and its compatibility with housing, the Appellant points to the fact that some of it was used to raise the levels of back gardens in nearby Elizabeth Avenue, under a planning permission granted in 1996⁶, a process which he reasonably argues would not have taken place had contamination been suspected. Reports of gas monitoring in 1998, 1994 and 1996 do not show significant levels of methane as would be expected if decayable material had been tipped.
13. At the Hearing the Council produced a good practice guide for development on contaminated land⁷, used by local authorities throughout the north of England. This advises that planning applications for development of land known or suspected to be contaminated, and also for proposed uses vulnerable to contamination (including housing at a scale greater than a single dwelling), must be accompanied by an appropriate contamination assessment. A Phase 1 assessment, comprising a desk study, site walkover and conceptual site model, will enable a preliminary risk assessment to be made that will establish whether or not further, more detailed investigations are necessary. It seems to me that an apparent requirement for a contamination assessment for housing development proposals of any significant scale, regardless of site history, is probably over-zealous. However, I agree with the Council that it is a sensible, precautionary approach where previous use of the site had at least the potential to leave contamination.
14. The Appellant asserts strongly that there is no contamination on the site; that even if there had been it would long since have disappeared; and that the way in which the site was tipped, together with the length of time that has expired since tipping ceased, would guarantee that the site is stable. I agree that the thrust of his evidence points in this direction; and that it is likely (though not certain) that the material closest to the surface was tipped under the more

⁴ Document 5

⁵ Document 8

⁶ Document 7

⁷ Document 3

stringent regime of recent years and covers any possible questionable material at considerable depth.

15. However, the available documentary evidence was essentially collected as part of the management of a tip, and to ensure that that use caused no pollution or stability hazards to adjoining uses. None of it was collected with the ultimate development of the site in mind; and the Environment Agency's decision to accept surrender of the Environmental Permit in 2008 was based only on establishing that the landfill would cause no harm to human health or pollution. As the Agency have pointed out⁸, that decision offers no warranty as to the suitability of the site for development. The Appellant argues that the evidence produced amounts to a Phase 1 assessment, and probably a Phase 2 assessment as well, and the Council accept that it could well form a basis for such investigations. However, nowhere has the available information been systematically brought together and evaluated and a risk assessment prepared. Nor (and I intend no disrespect to the Appellant's agent) has the information been prepared by a competent person in terms of advice in the NPPF⁹. In the absence of such a systematic assessment the possibility of contamination and ground stability, at least on parts of the site, cannot be ruled out.
16. I agree with the Council that the presence of such potential problems would not necessarily rule out development but might influence how it was carried out, for example in terms of how excavations and foundation works were planned; and that it would be prudent for this to be established at the outset. To leave any further investigations to the developer, as the Appellant suggests, would be at odds with the certainty that the planning system should provide. Given the scale of the proposed development, and the history of the site, it is not something that could be satisfactorily left to a condition; and although in the final analysis a planning permission that could not be implemented because of site conditions would be a matter for the developer, it would be the antithesis of good planning. Nor do I accept that the initial consideration of the site for a housing allocation as part of the UDP indicates that in planning terms site risks were considered acceptable. Although that proposal was ultimately abandoned for other reasons, no evidence has been submitted that site investigations were carried out at the time.
17. Supplying an assessment of the type the Council seek would clearly involve the Appellant in further expense but, from what was said at the Hearing, the cost would not be disproportionate to the scale of the development, especially as a good deal of the material for a desk study is already available. And, although the NPPF seeks to promote economic growth and remove unnecessary burdens on development, it does not seek to do so at any price. It stresses that development should be sustainable and I consider that to sanction development of a former waste disposal site without adequate investigation would not be sustainable in the broadest sense of the word. I conclude on the main issue that there is insufficient evidence to ensure a satisfactory development in terms of site stability and absence of contamination and that, as it stands the proposal is contrary to the aims of UDP Policies P6 and P16 and of the NPPF.

⁸ Document 9

⁹ Para. 121 and Glossary. The latter defines competent person as: *A person with a recognised relevant qualification, sufficient experience in dealing with the type(s) of pollution or land stability, and membership of a relevant professional organisation.*

18. On the available evidence the S106 planning agreement, submitted in draft, would meet the statutory tests of necessity, relationship to the development and fairness and reasonableness. The provision of affordable housing is supported by policy in the UDP and the contributions sought towards education and recreation facilities would be justified by the extra demands that the development would place on such facilities locally, as well as being based on policies in the UDP. The sums specified were derived from tariffs and negotiated. However, all that said, questions over the title to the land have meant that the agreement has not been signed by the Council and so, whilst its intended purpose and substantive content may not be at issue, it cannot in law carry any weight in my decision making. In any event, even if it had been finalised its provisions would not have outweighed my decision on the main issue in the appeal.
19. I have taken account of all other matters raised, including the agreement between the parties that satisfactory access could be achieved, the proposed density of development was appropriate and development would not prejudice possible ultimate development of adjoining land to the west and east. I am also satisfied that, although the application is submitted in outline, in principle a satisfactory development could be achieved in terms of layout and design, particularly bearing in mind the existence of existing housing to the south-west and north-west. However, none of these other matters bear directly on the main issue and my decision on that issue leads me to dismiss the appeal.

Robin Brooks

INSPECTOR

