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## Appeal Decision

Site visit made on 21 January 2019

**by I Radcliffe BSc(Hons) MRTPI MCIEH DMS**

an Inspector appointed by the Secretary of State

Decision date: 13 March 2019

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**Appeal Ref: APP/C4615/W/18/3200460**

**Land off Bourne Street, Woodsetton, Dudley (Grid Ref Easting:393355, Northing: 293326)**

- 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 Real Homes One Limited against the decision of Dudley Metropolitan Borough Council.
  - The application Ref P17/0184, dated 3 February 2017, was refused by notice dated 19 October 2017.
  - The development proposed is outline residential development of up to 100 dwellings with all matters reserved except for access.
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### Decision

1. The appeal is allowed and planning permission is granted for residential development of up to 100 dwellings with all matters reserved except for access on land off Bourne Street, Woodsetton, Dudley (Grid Ref Easting:393355, Northing: 293326) in accordance with the terms of the application, Ref P17/0184, dated 3 February 2017, subject to the conditions in the schedule at the end of this decision.

### Application for costs

2. An application for costs was made by Real Homes One Limited against Dudley Metropolitan Borough Council. This application is the subject of a separate Decision.

### Procedural matters

3. The application was submitted in outline with only access to be determined at this stage. The illustrative plans that have been submitted as part of the application have been taken into account insofar as they are relevant to my consideration of the principle of the development on the appeal site.
4. A unilateral undertaking has been submitted which makes provision for contributions towards education and off-site affordable housing. The terms of the undertaking are addressed in more detail within the decision.

### Main Issue

5. The main issue in this appeal is whether the proposals to remediate and mitigate contamination on the site are sufficient to protect the health, amenity and safety of neighbouring residents and future occupants of the proposed development.

## **Reasons**

6. The appeal site is previously developed land within a suburban part of the Borough with good access to services and facilities. As an allocated housing site in the 2017 Dudley Borough Development Strategy in principle the residential development of the site is therefore acceptable.

### *Contamination*

7. The appeal site is an old open cast coal workings which was used as a tip from the 1950s to the 1980s. Since the tip closed there have been a significant number of investigations and reports prepared on the site regarding land contamination, ground conditions and gas. Taking the results of these reports into account, the 2010 Strategic Housing Land Availability Assessment found that the site was suitable for residential development. The most recent site investigation carried out by the appellant's consultants involved a high number of boreholes, trial pits and gas / groundwater monitoring standpipes and has provided more detail.
8. The site investigations confirm the presence of heavy metals, poly aromatic hydrocarbons, aromatic hydrocarbons and other chemicals with asbestos locally present in the soil matrix. There is also some evidence of ground gas.
9. The remediation approach proposed is based upon widely used technical guidance and involves isolating the contamination from the proposed development and causing minimal disruption to the existing ground. This would involve importing clean imported material, the laying of an appropriate geotextile layer and towards the south eastern corner of the site, where made ground is deepest, a low gas permeable membrane. Clean imported soil would then be laid on top. Foundations to dwellings on the site would incorporate ground gas precautionary measures. During development of the site gas monitoring is also proposed.
10. It is evident from the information provided that such measures have been used successfully to remediate a similar site on Middlepark Road in Dudley and other similar sites in Wolverhampton, Walsall and further afield. As a result, in the absence of submitted substantive evidence to the contrary, I therefore find that the contamination on the site could be effectively dealt with without harming the health, safety or amenity of local residents and future occupants of the proposed development. Subject to the attachment of suitable conditions, the proposed development would therefore comply with policy D3 of the Dudley Borough Development Strategy. This policy requires that where a site is known or suspected to be contaminated sufficient relevant information is presented to enable the proposal to be properly assessed.

## **Other matters**

### *Drainage*

11. Neighbouring residents have problems with surface water drainage and are concerned that run off from the proposed development would exacerbate these problems and also result in contamination of their gardens. However, the remediation approach of isolating contamination and providing a system of surface water drainage would prevent such problems from occurring.

### *Old mine shafts*

12. There are a number of old mine shafts across the site and shallow workings which would need to be stabilised. This work though would be controlled by a permit issued by the Coal Authority and so would be properly dealt with.

*Highway safety & congestion*

13. Two access points are proposed for the site: one off Bourne Street and the other off Cedar Avenue. Subject to the provision of suitable visibility splays to both accesses, and in relation to the Bourne Street access other traffic and parking management measures, the local planning authority has no objection to the proposed accesses. I saw no reason why such splays and improvements could not be provided and have no reason to disagree with those conclusions.
14. Concerns have been raised regarding traffic generated by the development resulting in congestion. The transport assessment identifies that the proposed development would result in a noticeable increase in traffic along Bourne Street during the morning peak, with longer queues during the morning and afternoon peaks onto Brook Street. However, other than this local impact the highway network has sufficient capacity to cater for the traffic that would be generated by the scheme. Moreover, a significant number of local facilities and services are within walking distance of the site thereby reducing the need to travel by car. The proposed development therefore would not have a material adverse effect on the highway network.

*Local Infrastructure and services*

15. The submitted unilateral undertaking has been properly completed. I have assessed it having regard to the requirements of Regulations 122 and 123 of the Community Infrastructure Levy Regulations 2010 (as amended) and the tests in paragraph 56 of the National Planning Policy Framework. The undertaking secures contributions towards education and off-site affordable housing.
16. In relation to education, the evidence is that Bramford Primary School is at capacity. Policy DEL 1 of the Black Country Core Strategy requires that the effect of new development on the infrastructure of an area is mitigated. A financial contribution is therefore necessary to alleviate the pressure resulting from the proposed development on primary education in the area.
17. With regard to affordable housing, policy HOU3 of the Black Country Core Strategy confirms that a significant need for such housing exists in the Borough. In order to address this the policy requires that 25% of a residential development should be provided as affordable housing unless financially unviable. Both this policy and policy L3 of the Dudley Borough Development Strategy support on site provision of such housing. Following a viability assessment of the proposed scheme, which has been reviewed by the Council, it is common ground that a contribution of £52,915.50 towards affordable housing is the amount that could be provided by the development. I have no reason to disagree with that position. Given the small amount of money involved it is sensible that if permission is granted it is used towards off site provision.
18. Financial contributions are therefore necessary in relation to education and affordable housing to make the proposed development acceptable in planning terms.
19. Based upon the information provided, I am satisfied that the sums and provisions sought are fairly and reasonably related in scale and kind to the

proposed development. As provision would either be made locally or within the Borough what would be provided would also be directly related to the proposal. Accordingly, these contributions pass the relevant tests and requirements.

20. Regulation 123(3) of the Community Infrastructure Levy Regulations 2010 (as amended) prevents the pooling of more than five planning obligations made since 6 April 2010 towards a specific infrastructure project or particular type of infrastructure. The provision of affordable housing is excluded from this requirement. In relation to the education contribution, the evidence is that, excluding expired unimplemented permissions, three planning obligations have been secured towards education infrastructure during this time. I therefore find that this contribution complies with regulation 123(3).
21. For the reason given above, I have therefore taken into account all the provisions of the submitted unilateral undertaking.
22. Concern has been raised that there is insufficient capacity at the local medical centre to cater for the future occupants of the proposed scheme. However, there have been no objections from commissioning health service bodies. In the absence of substantive submitted evidence demonstrating that the local medical centre is at capacity, I therefore find that there are insufficient grounds to find there would be inadequate health infrastructure to service the proposed development.

*Ecology & open access designation*

23. An Ecological Assessment of the site and associated survey work has identified the presence of an active badger sett, hedgehogs and limited use of the land by bats for foraging and commuting. Birds have also been found nesting on the site.
24. It is common ground between the parties that the measures set out in the Ecological Assessment would avoid wildlife harm. I agree with that position. The measures included in the assessment's recommendations would also maximise the ecological value of the site and ensure that Japanese Knotweed on the site has been effectively dealt with.
25. A local resident has stated that he has seen Great Crested Newts on the site. Owing to its isolation from bodies of water, it is unlikely that this species is present on the site and surveys have not found any. Nevertheless, the Ecological Assessment contains a precautionary recommendation should reptiles be encountered during development of the site.
26. The site was designated as open access land several years ago. However, there is no public access to the site and its remediation to facilitate access would involve removal of all the existing vegetation. As a result, I concur with Natural England and the local planning authority that this designation should not prevent its residential re-development.

*Living conditions*

27. Concerns have been expressed that the living conditions of neighbouring residents would be adversely affected by the development. However, on the basis of the indicative masterplan, there appears to be sufficient space on the site for a residential scheme of the size proposed to be constructed without problems occurring in relation to privacy, outlook or obstruction of natural light. In relation to remediation of the site, the Council has sufficient control

through the use of appropriately worded conditions to ensure that the living conditions and amenities of local residents are not adversely affected.

### **Conclusion**

28. There is no doubt that there is strong local feeling about this proposal, as reflected by the volume of objections received at application and appeal stage from residents and local ward councillors. This has included a petition signed by over 500 people. However, the extent of opposition is not, in itself, justification for refusing planning permission. With the conditions proposed the local planning authority has sufficient control to ensure that this allocated housing site is safely developed. Neither this issue therefore, or the other matters raised, indicate that permission should be refused for a proposal that accords with the development plan. For the reasons given above, and having regard to all other matters raised, I therefore conclude that the appeal should be allowed.

### *Conditions*

29. In the interests of certainty, I have imposed a condition specifying the relevant drawings that the development is to be carried out in accordance with - but only in respect of those matters not reserved for later approval. The principles established in the Design and Access Statement also need to be reflected in the reserved matters application.
30. To prevent the contamination of controlled waters and protect the health and wellbeing of future occupiers, contamination and ground gas / vapours on the site need to be further assessed and remediated as necessary. To protect controlled waters the infiltration of surface water drainage into the site needs to be strictly controlled. In the event of unexpected contamination being found this needs to be dealt with. To ensure land stability old mine shaft and shallow workings need to be stabilised.
31. In order to support the improvement of air quality across the Borough in accordance with the development plan, electric vehicle charging points and low emission gas boilers need to be provided. To ensure that the development complements its surroundings further details on site levels and boundary treatments are required. In order to protect the living conditions of neighbouring residents, dust, emissions and the hours of construction need to be controlled.
32. In the interests of highway safety, visibility splays need to be provided, redundant dropped kerbs removed and highway improvement measures on Bourne Street carried out. For the same reason, details of the access roads within the development and their construction are necessary.
33. To encourage the use of sustainable modes of transport, a Travel Plan and covered cycle storage is required. Proper management of the development of the site requires phasing details. To reduce flood risk off site and accord with government guidance, a sustainable drainage scheme is necessary. To promote sustainable modes of transport a travel plan and cycle storage is required. To protect and enhance biodiversity on the site identified measures need to be undertaken.
34. I have required all these matters by condition, revising the conditions suggested by the Council where necessary to reflect the advice contained within Planning Practice Guidance and to minimise duplication.

35. A condition was suggested removing a range of permitted development rights to protect the privacy and amenity of surrounding residents. However, as I have earlier noted, there appears to be sufficient space on the site to prevent problems in this regard. Moreover, Planning Practice Guidance advises conditions restricting the future use of permitted development rights will rarely pass the test of necessity and should only be used in exceptional circumstances<sup>1</sup>. On the basis of the evidence before me, such circumstances do not exist here.

*Ian Radcliffe*

Inspector

**Schedule**

- 1) Details of the appearance, landscaping, layout, and scale, (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development takes place and the development shall be carried out as approved.
- 2) Application for approval of the reserved matters shall be made to the local planning authority not later than 3 years from the date of this permission.
- 3) The development hereby permitted shall take place not later than 2 years from the date of approval of the last of the reserved matters to be approved.
- 4) The development hereby permitted shall be carried out in accordance with the following approved plans: Bourne Street Proposed Access and Visibility Drawing No. P715/101D, Proposed Traffic Calming Bourne Street Drawing No. P715/107 and Cedar Avenue Proposed Access and Visibility Drawing No. P715/104 prepared by Banners Gate and Below Ground Surface Water Drainage Layout prepared by Integra Drawing No. 001 P1., but only in respect of those matters not reserved for later approval.
- 5) The reserved matters proposals for this site shall be in general accordance with the Design and Access Statement prepared by HOW Planning LLP and Illustrative Masterplan/Constraints Plan prepared by mck associates limited (Drawing No: MP01 Rev E) submitted in support of this outline application.
- 6) Prior to the submission of a reserved matters application, a scheme of intrusive site investigations for the mine entries and high walls and for the shallow coal workings shall be submitted to and approved in writing by the Local Planning Authority. Following approval of these schemes by the Local Planning Authority, the intrusive site investigations shall be carried out prior to the commencement of any development. Prior to the commencement of development, a report shall be submitted for approval by the Local Planning Authority of the findings arising from both of the intrusive site investigations referred to above, including the results of any gas monitoring undertaken, a layout plan which identifies the opencast high wall and appropriate zones of influence for the recorded mine entries on site, and the definition of suitable 'no-build' zones. Prior to the

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<sup>1</sup> Paragraph: 017 Reference ID: 21a01720140306 'Is it appropriate to use conditions to restrict the future use of permitted development rights or changes of use?'

- commencement of development, a scheme of treatment for the recorded mine entries and remedial works for the shallow coal workings shall be submitted to and approved in writing by the Local Planning Authority. Following approval of the remedial works, these works shall be implemented in accordance with the approved details and retained for the lifetime of the development.
- 7) Prior to the commencement of development, details shall be submitted to and approved in writing by the Local Planning Authority of existing and proposed levels across the whole of the site. The scheme shall be implemented in accordance with the approved levels and retained for the lifetime of the development.
  - 8) Prior to the commencement of development, details shall be submitted to and approved in writing by the Local Planning Authority of the proposed boundary treatments associated with the development across the whole of the site. The scheme shall be implemented in accordance with the approved boundary treatments and retained for the lifetime of the development.
  - 9) Prior to the commencement of development, a preliminary risk assessment of contamination of the site containing the following components shall be submitted to and approved in writing by the Local Planning Authority:
    - all previous uses
    - potential contaminants associated with those uses
    - a conceptual model of the site indicating sources, pathways and receptors
    - potentially unacceptable risks arising from contamination at the site.
  - 10) Prior to the commencement of development, a site investigation scheme based on condition 9 to provide information for a detailed assessment of the risk to all receptors that may be affected by contamination from the site, including those off site, shall be submitted to and approved by the local planning authority in writing.
  - 11) Prior to the commencement of development, the site investigation scheme approved by condition 10 shall be carried out and the results together with a detailed risk assessment, options appraisal and remediation strategy shall be submitted to the local planning authority for approval in writing. The submitted documentation shall include full details of the remediation measures required, how they are to be undertaken and a verification plan providing details of the data that will be collected in order to demonstrate that the remediation works are complete. It shall also identify any requirements for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action. Monitoring of pollution linkages, maintenance and contingency action shall be carried out in accordance with the approved details.
  - 12) Prior to the occupation of any phase of the development as approved by condition 15, a verification report demonstrating completion of the works set out in the remediation strategy as approved by condition 11 and the effectiveness of the remediation shall be submitted to and approved, in



- writing, by the Local Planning Authority. The report shall include results of sampling and monitoring carried out in accordance with the approved verification plan to demonstrate that the site remediation criteria have been met.
- 13) No infiltration of surface water drainage into the ground is permitted other than with the express written consent of the Local Planning Authority, which may be given for those parts of the site where it has been demonstrated that there is no resultant unacceptable risk to controlled waters.
  - 14) No above ground development shall commence until details of the electric vehicle charging points, to be provided for the dwellings in accordance with the Council's standard (Parking Standards SPD), has been submitted to and approved in writing by the local planning authority. Prior to first occupation the electric vehicle charging points shall be provided in accordance with the approved details and shall be maintained for the life of the development.
  - 15) No development shall commence until a phasing plan and programme of implementation of works (timing) in respect of the development has been submitted to and agreed in writing by the Local Planning Authority. The development shall be implemented in accordance with the phasing plan and programme of implementation of works (timing) unless otherwise varied with the written agreement of the Local Planning Authority.
  - 16) No development shall commence until an assessment of the risks posed by contamination, ground gases and vapours on the site has been submitted to and approved in writing by the Local Planning Authority. Such an assessment shall be carried out in accordance with authoritative UK guidance.
  - 17) Where the approved risk assessment (required by condition 16 above) identifies contamination, ground gas or vapours posing unacceptable risks, no development shall commence until a detailed remediation scheme to protect the development from the effects of such contamination, ground gas or vapours has been submitted to and approved in writing by the Local Planning Authority. Following approval, such remediation scheme shall be implemented on site in complete accordance with approved details unless otherwise agreed in writing by the Local Planning Authority.
  - 18) Prior to the occupation of any phase of the development as approved by Condition 15, the developer shall submit to the Local Planning Authority for approval a validation, monitoring and sampling report to confirm that that particular phase of the development has been built in accordance with the approved remediation scheme as approved by condition 17.
  - 19) In the event that contamination is found at any time when carrying out the approved development which was not previously identified, development shall STOP on that part of the site affected by the unexpected contamination and it must be immediately reported in writing to the Local Planning Authority. An additional investigation and risk assessment must be undertaken and where remediation is necessary, a remediation scheme must be prepared, which shall be submitted to and approved in writing of the Local Planning Authority. Following approval, such remediation scheme shall be implemented on site in complete

accordance with approved details unless otherwise agreed in writing by the Local Planning Authority.

- 20) No development shall commence until measures to protect and enhance biodiversity on the site have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 21) No development shall commence (excluding demolition, site clearance and initial ground investigation works) until details of the design, implementation, maintenance and management of a sustainable drainage scheme have been submitted to and approved by the Local Planning Authority. The scheme shall be implemented and thereafter managed and maintained in accordance with the approved details.

Those details shall include:

-A timetable for its implementation

-A management and maintenance plan for the lifetime of the development which shall include the arrangements for adoption by any public body or statutory undertaker, or any other arrangements to secure the operation of the sustainable drainage scheme throughout its lifetime of the development.

None of the development shall be occupied until surface water drainage works have been implemented in accordance with the approved details.

- 22) No development shall commence (excluding demolition, site clearance and initial ground investigation works) until details of the access roads into the site based on Drawing Nos. P715/101D and P715/104 together with parking and turning area(s) [including details of lines, widths, levels, gradients, cross sections, drainage and lighting] have been submitted to and approved in writing by the Local Planning Authority. The development shall not be occupied until the access(es) into the site, together with parking and turning area(s) within the site have been laid out in accordance with the approved details. These area(s) shall thereafter be retained and not be used for any other purpose for the life of the development.
- 23) No development shall commence (excluding demolition, site clearance and initial ground works) until details of the Highways Works as indicated on Drawing Nos. P715/107 & P715/101D, including the Traffic Regulation Order Prohibition of Waiting, traffic calming measures and the parking lay by on Bourne Street have been submitted to and approved in writing by the Local Planning Authority. The development shall not be occupied until the agreed Highway Works have been completed in accordance with the approved details.
- 24) No development shall be commenced (excluding demolition, site clearance and initial ground investigation works) until details of the proposed highway retaining structures, including sections and calculations to prove the structure is capable of supporting likely future loadings have been submitted to and approved in writing by the Local Planning Authority. No part of the development shall thereafter be occupied until the retaining structure has been provided in accordance with the approved details.

- 25) Work shall not begin on the construction of the development until a method statement for the control of dust and emissions arising from the construction of the development has been submitted to and approved by the local planning authority. All works which form part of the approved scheme shall be implemented throughout the construction phase of the development.
- 26) Construction works shall not take place outside 1800 hours to 0700 hours Mondays to Fridays and 1700 hours to 0800 hours on Saturdays nor at any time on Sundays or Public Holidays.
- 27) In order to minimise the impact of the development on local air quality, any gas boilers provided within dwellings must meet a dry NO<sub>x</sub> emission concentration rate of <40mg/kWh. The specification of the gas boiler(s) shall be submitted to and approved in writing by the Local Planning Authority before they are fitted, and the approved specification shall be implemented, prior to the first occupation of the development and shall be maintained for the lifetime of the development.
- 28) No part of the development shall be occupied until visibility splays to both new accesses have been provided at the junctions between the proposed means of accesses and the highway with an 'x' set back distance of 2.4 metres and a 'y' distance of 43 metres. No structure or vegetation exceeding 600mm in height above the adjoining highway shall be placed or allowed to grow within the visibility splay for the life of the development unless otherwise agreed in writing by the Local Planning Authority.
- 29) The development shall not be occupied until a Travel Plan has been submitted to and approved in writing by the local planning authority, including details of a Travel Plan Co-ordinator, public transport, walking and cycling initiatives, Publicity and Marketing, set targets and monitoring and to join a Travel Wise scheme in Dudley together with a timetable for the implementation of each such element. The Travel Plan shall be implemented in accordance with the details approved by the local planning authority and remain operational for the life of the development.
- 30) Prior to first occupation all redundant dropped kerbs should be replaced with matching full height kerbs and the adjacent Highway made good.
- 31) The dwelling(s) on the site shall not be occupied until details of secure and covered cycle storage have been submitted to and approved in writing by the Local Planning Authority. These facilities shall be provided in accordance with the approved details prior to the first occupation of the dwelling(s) and shall thereafter be retained and maintained for no other purpose, for the life of the development.