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## **TOWN AND COUNTRY PLANNING ACT 1990**

### **SECTION 78 APPEAL BY DAVID WILSON HOMES LIMITED**

Outline Application For Up To 150 Dwellings, Together With New Open Space, Landscaping, And Drainage Infrastructure, With All Matters Reserved Except For Access

(As Amended To Include Proposed Junction Improvement Works At Barkby Road Cross Roads, Received 20/05/2022)

**BARKBY ROAD, QUENIBOROUGH**

**PLANNING APPLICATION REF: P/20/2380/2**

**APPEAL REFERENCE: APP/X2410/W/23/3316574**

**CHARNWOOD BOROUGH COUNCIL**

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## **REBUTTAL of Appellant's Proof**

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### **PLANNING (Development Management)**

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By Liam Ward

# 1. General

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## The Appeal Proposal

1.1 The Proofs of Evidence offered by the appellant's representatives refer to a development proposal which is materially different from the proposal considered by Charnwood Borough Council (CBC) during the processing of the application, and to which the refusal of planning permission relates. The parties differ about which proposal this appeal is considering.

1.2 The CBC view is that the proposal upon which the decision to refuse planning permission was based should be the basis for this appeal's assessment of the matter. In addition to the arguments in Section 2 of my Proof of Evidence it is important to review the timetable of events in this appeal process.

- Appeal submitted on 13<sup>th</sup> Feb 2023, including a list of documents (the refused application proposal)
- The start date letter was issued on 7<sup>th</sup> March 2023.
- The appellant's Landscape Statement of Case dated 14<sup>th</sup> March 2023 (refers to the refused proposal)
- The Council's Statement of Case was submitted on 11<sup>th</sup> April 2023.
- A case management conference was held on 19<sup>th</sup> April 2023 and main issues identified (based on the refused proposal)
- The appellant submitted three drawings to the Inspectorate on 28<sup>th</sup> April 2023, which were intended to modify the proposal.
- On 9<sup>th</sup> May 2023, being the next working date following the appellant's agent's return from holiday, the council replied to the appellant and to PINS saying that these revised drawings could not be accepted in the appeal proceedings, being contrary to the guidance at section 16 of the Inspectorate's guidance on appeal procedures.
- On 19<sup>th</sup> May 2023 I wrote again to the Inspectorate to seek guidance on how the Inspector intended to deal with this matter.
- On 23<sup>rd</sup> May 2023 Proofs of Evidence exchanged, addressing different schemes, the refused proposal and the modified proposal.

1.3 When the application was made 65 neighbours were notified. The council received 155 objections. Interest was not limited to the notified properties.

1.4 None of the previously notified households have had an opportunity to participate in a conversation about the modified proposal. Neither have any other interested parties, whether involved in this application or appeal before now.

### Material Change

1.5 The parties agree that paragraph 11d(ii) of the National Planning Policy Framework describes the policy test upon which the Inspector's decision is likely to be based. It requires a balanced judgement to be undertaken which assesses any adverse impacts against any benefits. In this case the adverse impacts are largely to aspects of landscape protection. Therefore, the assessment of the site, and its potential impact on the environment is key to any appreciation of the proposal.

1.6 It is common cause that the site lies outside the limits of development for Queniborough, and that it would, if allowed, be outwith the plan-led process. That ongoing plan making process includes a wide area assessment of the landscape, which is the subject of public examination, and which can impose limitations upon sensitive landscapes.

1.7 For example, the appellant's Proof, at paragraph 5.21 explores the allocation of site HA64 and HA65 to the north-west of Queniborough, within an Area of Local Separation (ALS). Within the deliberative plan-making process the map below was produced, which illustrates how the housing within an allocation site might be limited in extent, so that the identified sensitivity of the location, and impact of development on the separate settlement identities, could be respected.

Figure 1- Extract from draft Charnwood Local Plan (page 65)



- 1.8 In this appeal's context the Inspector is being asked to make a decision about the acceptability of a development proposal within a sensitive area, where part of the assessment is likely to be based upon the degree to which planting could protect against any otherwise unacceptable adverse impact. Whilst acknowledging that the proposal seeks outline planning permission, the degree to which its visual impact can be enclosed must, I contend, be a weighty material consideration.
- 1.9 Similarly, the purpose of the ALS in maintaining separation between the settlements of Syston and Queniborough is self-evidently diminished to some degree when the separation distance is reduced. If the assessment of that ALS is made along the length of the remaining stretch of Public Right of Way 184, which has not been engulfed by built development, this proposal, as originally submitted, would reduce that length from approximately 530m to 290m (see Figure 5, page 39 of the CBC Planning (Development Management) Proof of Evidence). Based on the modified proposal that length of undeveloped PRow would reduce to around 276m.
- 1.10 Taken together, the necessity to provide visual enclosure and the further reduction in the length of the remaining section of undeveloped PRow are, I contend, substantial differences between the original proposals and the modified proposal, which could materially alter the consideration. The policy test in 11d(ii) involves a balancing of matters forming the competing material considerations. If anything is added to either side of the scale, which has the potential to tip that balance decisively, it must surely be regarded as substantial.

### **Wheatcroft Principles**

- 1.11 The PINS guidance at its paragraph 16.1 acknowledges that it is important that what is considered by the Inspector should be "essentially the same scheme" which the LPA and interested parties considered. It is acknowledged that the guidance goes on to discuss the application of the Wheatcroft Principles where, exceptionally amendments are proposed during the appeal process.
- 1.12 The appellant may argue that the additional landscaping proposed is permitted development, and sits outside the application, or appeal's remit, but that cannot be correct. Together with a planting plan, a revised location map and a modified masterplan, it is being offered as an essential component of the proposal, presumably in order to improve the appellant's case, inseparable from the original proposal, and controlled by overlapping planning agreements and conditions, if allowed.

- 1.13 Given the potentially determining importance of landscaping to the planning judgement to be undertaken in the making of the decision, it seems undeniable that interested parties should not be excluded from discussion of the modified scheme. Paragraph 16.3 of the PINS guidance acknowledges that “even minor changes can materially alter the nature of an application and lead to possible prejudice to other interested parties”.
- 1.14 We say that the modification would conflict with the Wheatcroft Principles.

### **Holborn Studios**

- 1.15 The judgement in *Holborn Studios Limited vs The Council of the London Borough of Hackney* [2017] EWHC 2823 (**CD8.20**) takes the Wheatcroft principles further.
- 1.16 Dove J disaggregates the conflation he sees in Wheatcroft of substantive and procedural constraints (pp73-80). Even if a change to a proposal during the processing of the application is not regarded by the decision taker as substantial, or fundamental, the procedural obligation to consult or publicise is not obviated. “In my judgement it is preferable to ask what fairness requires in the circumstances.”

### **Application of those principles to this application**

- 1.17 If, having considered all the arguments, the Inspector were to weigh the balance on the basis of the original scheme, and then undertake the same balance again on the basis of the modified scheme, might the scales be altered, however modestly? If so, the two versions of the proposal are materially different, and so the Wheatcroft test on substance is met.
- 1.18 It seems unlikely that the appellant will now argue that the appeal proposal would be equally strong if based upon the original submission, and so by modifying their proposals they hope to improve their prospects of the appeal being allowed. That would suggest that they believe that the modifications make a substantial difference to the case.
- 1.19 Even if the Inspector took the view that the modified scheme was not substantially different from the original, or that the additional landscaping outside the red line was severable, the Holborn Studios judgement would impose an obligation on the decision taker to publicise the modification. The decision taker cannot know who interested parties might be, and whether they might wish to make representation. The question posed by the Holborn Studios judgement is whether it is fair to the potentially interested parties that a change to the proposal is being assessed, without them having had an opportunity to have their say.

## 2. Commentary on Appellant's Proof

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### General Approach to Policy Weight

- 2.1 The approach taken by the appellant, as set out in section 5 of their Planning Proof of Evidence (PPoE), to the application of planning policy to the assessment of the proposal would appear to be at odds with the statutory primacy afforded to the development plan(s) by section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004.
- 2.2 In order to diminish the weight to be afforded to policies cited in the reasons for refusal the appellant has founded their arguments on the premise that the NPPF is superior. In the narrative in sections 5 and 6 of their PPoE, summarised in Table 1 on page 44, they begin by reflecting upon the weight to be afforded to development plan policies **after** applying the tilted balance.
- 2.3 It is acknowledged that the judgement in *Gladman Developments Limited vs Secretary of State for Housing, Communities and Local Government and Corby Borough Council and Uttlesford District Council* [2021] EWCA Civ 104 (**CD8.19 pp62-67**) provides some discretion for the decision taker in how to assess the proposal. If that assessment is sequential, the development plan should be taken first, and then other material considerations, such as the NPPF. Alternatively, a holistic approach might be lawful, if the decision taker keeps in mind the statutory primacy of the development plan and the statutory requirement to have regard to other material considerations, including the policies of the NPPF.

*“This is not to merge the two presumptions – the statutory presumption in favour of the development plan and the national policy “presumption in favour of sustainable development”. It is to acknowledge the existence and status of both presumptions, but also to recognise that they can be lawfully applied together (pp67in the Gladman judgement)”.*

- 2.4 It is common ground that the proposal (original or modified) conflicts with the development plan policies, and that paragraph 11c of the NPPF is not engaged. The council cannot demonstrate a 5-year supply of deliverable housing sites, and there are no assets of particular importance, and so paragraph 11d(ii) is engaged. It requires the decision taker to make assessment against the policies in the Framework, but that does not set aside the statutory obligation to have regard to the development plan, and the requirement that the

determination be made in accordance with the plan unless material considerations indicate otherwise.

- 2.5 I contend that the approach taken in the PPOE to individual policies, from paragraph 5.28 to 5.77 and from 6.18 to 6.56 is flawed. In Gladman (CD8.19) at paragraphs 33-34 Lindblom LJ discusses the interrelationship between the NPPF and development plans, and in particular the status of each. In particular, at 34(2) the Judgement records that the presumption in favour of sustainable development:

*is not irrebuttable and is not automatically decisive of any particular outcome.*

- 2.6 It cannot therefore be correct to infer that the policies in the NPPF have determining weight, in order to reduce weight to policies in the statutory development plan.

### **Framework Policies taken as a whole**

- 2.7 The planning system must deal with a plethora of competing objectives, and the 11d(ii) test does not simplify the decision maker's task. The Framework, read as a whole, supports a plan-led system, delivery of a sufficient supply of homes, conservation of the natural environment, well designed places amongst its policy areas. When applied to the appeal case the appellant emphasises one objective, in the delivery of homes above all others.
- 2.8 It is acknowledged that 11d invites the decision taker to grant planning permission, unless there is reason to do otherwise arising from limb (i) or limb (ii), but those tests are further caveated in limb (ii) by requiring the assessment to be made against the policies in the Framework as a whole.
- 2.9 The practice of decision takers in respect of previous applications for planning permission on lands outwith the limits of development in Charnwood Borough during recent years has been to weigh the shortfall in housing land supply decisively. During the years when the emerging local plan was at a very early stage in its preparation that may well have been the correct approach. However, I contend that the proximity of the adoption date for the Charnwood Local Plan 2021-37 necessitates a fresh look to be given to the phrase "Framework as a whole."
- 2.10 The primacy of the development plan described in Gladman, and in s.38(6) of the 2004 Act, when added to the material consideration of paragraph 15 of the NPPF which requires that we operate within a "genuinely plan-led" become more important as the nearness of adoption begins to overtake the shortfall in housing land supply in the balancing of competing policies in the Framework as a whole.

2.11 Following a pattern of policy interpretation from decisions taken in past cases, as the appellant has done throughout their PPOE, would be inappropriate, and would fail to properly apply the test in the second part of 11d(ii). How the balance is weighed is a matter for planning judgement, but any failure to adjust the interpretation of the reading of the “Framework as a whole” in response to changed material considerations would be errant, in my opinion.

## **Relevance of other decisions**

2.12 Decisions taken by the Inspectorate are based upon the particular circumstances of the case being considered. It is rare for two cases to be on all fours with one another. Often it is the physical characteristics which distinguish them, but in Charnwood Borough we have had the additional complexity of an evolving local plan position, which alters the planning balance over time. The appellant has drawn upon some decisions made a year or longer ago. I look at two of those decisions, and relate those to the current case to exemplify how it can be unsafe to rely too heavily on previously determined cases.

### **APP/X2410/A/13/2196928-9 Mountsorrel Lane, Rothley (CD6.08)**

2.13 Decision date 8<sup>th</sup> April 2014.

2.14 The decision dealt with two related planning applications submitted in 2012. One proposing 250 dwellings and the other was a biodiversity park. The appellant records in the PPOE paragraph 5.63 that the Secretary of State confirmed that Policy CT/4 had only limited weight. That is incorrect.

2.15 The Inspector’s report does discuss the limited impact the proposals in that case would have upon the ALS. At its paragraph 8.17 the Inspector gives that policy due weight.

2.16 At the date of this report the 2012 version of the NPPF was extant. The Charnwood Local Plan Core Strategy was at pre-submission draft stage.

### **APP/X24/W/21/3287864 Cossington Road, Sileby (CD6.07)**

2.17 Decision date 13<sup>th</sup> June 2022.

2.18 The proposal was an outline planning application for up to 170 dwellings, by the current appellant. The factual context differed from the current appeal. Whilst the Sileby site was also within an ALS the assessment of the impact upon that ALS will differ from a similar assessment on the current appeal site.



- 2.19 Paragraph 5.69 of the PPOE, recites some passages from the Inspector’s report, wherein the Inspector compares one paragraph of the NPPF with Policy CT/4. That approach would seem to be at odds with the requirement to weigh the balance against the “policies in the Framework taken as a whole” described in paragraph 11d(ii).
- 2.20 At the date of that appeal the emerging Charnwood Local Plan 2021-37 had only recently been submitted for examination. The hearing sessions for that examination have now concluded and the Inspectors have written to the council seeking updated information (CD8.17). This was the next planned step following the close of the hearing sessions in February 2023, and will be followed by a four week consultation period.
- 2.21 The nearness in time of adoption of the emerging plan reduces the weight of the benefit of additional housing, and other claimed benefits which might flow from the development.
- 2.22 Drawing upon the Inspector’s report and decision in the Sibleby case is not particularly helpful, given the factual and evidential differences between the two proposals.

## **Borough of Charnwood Local Plan (2004) Policy CT/4**

### **Mind the Gap**

- 2.23 In undertaking their planning balance, the appellant has relied upon their landscape evidence to a significant degree. At paragraph 8.9 of the PPOE, drawing upon the landscape evidence the assertion that “there is no narrowing of the gap in physical terms” is patently errant. From that unsound base position, they reach a series of conclusions about how the planning balance should be adjudged.

### **The Policy**

- 2.24 The appellant argues in their PPOE that Policy CT/4 is belittled because it would prohibit sprawl into the Area of Local Separation, and that this is in conflict with one objective in the Framework. The policy wording is:

*In areas of local separation development acceptable in principle will only be permitted where the location, scale and design of development would ensure that:*

- i) the predominantly open and undeveloped character of the area is retained; and*
- ii) the already narrow gap between settlements is not reduced.*

2.25 The wording is not a blanket ban on development as the PPOE infers at pp5.61. Firstly, it is expressly permissive of development, which is acceptable in principle, without limiting the nature of that development. The two caveats then guide how any development should maintain the objective of the policy.

### **Alternatives to ALS**

2.26 The decision taker in a planning application, or appeal, can only deal with the proposals before them.

2.27 The logic expressed in the PPOE is that Charnwood doesn't have a sufficient supply of housing, therefore a tilted balance applies, therefore the plan-led approach to development should be set aside, and approval for development granted, regardless of a site's sensitivities. That cannot be right.

2.28 Where the PPOE argues that the weight afforded to policy CT/4, and by extension its successor in the emerging Local Plan, policy EV3, should be limited because the policy would hinder unconstrained housing supply, that is to presume that the only potential housing sites are within Areas of Local Separation. The policy at CT/4 lists 13 ALS sites, which are indicated on the adopted Proposals Map (CD5.02). There are many settlements within the Borough which do not have an adjacent ALS, and others which have an ALS to only one, or two sides of the built form. Queniborough has an ALS along part of its southern boundary, and all along its north-western boundary, but none to the north-east, the east, nor to the south, east of Barkby Road.

2.29 The Inspector is not responsible for the selection of sites from the many alternatives, but the appellant could have selected a site without a protective policy area if their concern was to address the sufficiency of housing supply in the Borough.

2.30 Making an assessment against the Framework as a whole, the decision taker must be cognisant of the objective of operating a "genuinely plan-led" system (NPPF pp15). Whilst we collectively seek to address the housing supply a plan-led system would acknowledge that some sites have less merit than others.

2.31 In a context where the 5-year supply position is to be restored in a matter of weeks after the likely decision date, there is no need to allow the harm to a site identified in a plan-led system as being deserving of more protection than alternative sites at the same village.

## **Other Settlements**

- 2.32 The PPoE correctly records at pp4.9 that Queniborough is designated as an “Other Settlement” in Policy CS1, with a policy objective to see at least 500 homes provided for across the 12 listed settlements.
- 2.33 There have been 784 completions since the start date of the Core Strategy (2011) within “Other Settlements”. In addition to this there are a further 796 homes that have been permitted. Those 1580 homes are three times higher than the objective, 5 years earlier than the objective. Regardless of how the housing supply is performing elsewhere within the Borough, the Other Settlements have provided for significantly more than were thought necessary in the settlement hierarchy defined within a plan-led approach to housing distribution.

## **Officer Reports**

- 2.34 The appellant draws upon several passages from the reports prepared by case officers. As is appropriate these reports explore the arguments presented, and consider these against the policy context extant on the day of drafting. Their purpose is not equivalent to an Inspector’s report, which can sometimes be challenged, paragraph by paragraph. Rather it is intended to inform the decision takers who sit on the Council’s Plans Committee.
- 2.35 Officer Reports are not decisions and should not be relied upon to support arguments by either party.

## **3. Correspondence re Holborn Studios**

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- 3.1 We acknowledge receipt of the correspondence received from the Inspectorate on 1<sup>st</sup> and 2<sup>nd</sup> June 2023, wherein the Inspector recorded having regard to the Holborn Studios judgement.
- 3.2 The council notes the differences between the instructions given in the three emails (07.03 on 1<sup>st</sup> June, 16.05 on 1<sup>st</sup> June and 10.42 on 2<sup>nd</sup> June)
- 3.3 The council also notes that in the earliest of those emails the Inspectorate said that the Inspector was minded to accept the “revised plan” but would not confirm her ruling until after “all interested parties” had been “made aware” of the revised plan. Subsequent emails attempted to guide the consultation with parties.

## 4. Planning Balance

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- 4.1 The emails from the Inspectorate during the past few days would require the council to consider both the proposals which informed the council's decision and the modified scheme submitted after the Case Management Conference.

### **Alternative A – The Refused Proposal**

- 4.2 My assessment of the planning balance is articulated in chapter 7 of my Proof of Evidence.

### **Alternative B – The Modified Proposal**

- 4.3 The modified scheme adds a 10m landscaped strip along the length of the southern boundary, and outside the red line. It effectively adds 4,300 sqm to the appeal site, or 7.5% to the site area.
- 4.4 It seems likely that the modified proposal was intended to reduce the impact upon the landscape quality of the proposal. Mr Neesam's evidence, and rebuttal assess that impact in respect of each of the schemes, and concludes that the harm would be reduced by the addition of a 10m landscape belt along the southern boundary.
- 4.5 If the addition of that belt is decisive in the weighing of the balance, it could not then be regarded as being severable from the proposal. It should then be regarded as a different scheme, and publicised, in accordance with the principles described in the Holborn Studios judgement (**CD8.20**).
- 4.6 Were that belt to be added to the scheme, and subject to any unknown issues which might be raised by the public consultation exercise, in my opinion the planning balance would alter somewhat by reference to that balance discussed in respect of the refused proposal.

### **Weight Given to Benefits**

- 4.7 The weight to be afforded to the benefits claimed by the appellant remains unchanged, in my assessment, between the two alternative proposals.

### **Adverse Impacts**

- 4.8 The adverse impact on the landscape character achieved by the modified proposal would be reduced by the addition of the 10m landscaping strip, secured by a unilateral undertaking

connected with the proposal. I rely on Mr Neesam's Rebuttal Proof wherein, at its Section 3 he records a Moderate-Minor adverse significant to landscape character arising from the revised proposal.

- 4.9 His assessment of the visual amenity, when assessed from critical viewpoints is that it would be Major-Moderate from viewpoint 6 and Moderate from viewpoint 5.
- 4.10 Whilst Mr Neesam acknowledges that over time a mature landscape belt along the site's southern boundary could offer betterment by comparison with the refused proposal, the main appreciation of the separation is along the public right of way. By extending the extent of the disturbed lands by an extra 10m into the predominantly open and undeveloped area of separation would reduce the extent of that separation even further.

### **Planning Balance**

- 4.11 It is accepted that the modified scheme offers a potential reduction in the adverse impact upon the landscape, by comparison with the refused scheme. On the other hand, the additional 10m incursion into the ALS causes more harm by reducing the separation between Queniborough and Syston still further.
- 4.12 The National Planning Policy Framework, read as a whole, includes amongst its objectives the delivery of a sufficient supply of homes, conservation and enhancement of the natural environment, achieving well-design places, and the management of all of its objectives via a genuinely plan-led system. The benefits described by the appellant rely upon the council's inability to demonstrate a five-year housing land supply. Given that the housing supply position is so close to be resolved by the adoption of the emerging Local Plan, and that significant progress has been made on this between April 2022 and April 2023, the weight given to those benefits is limited.
- 4.13 I am also conscious of the statutory primacy afforded to the development plan(s) by section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004.
- 4.14 The purpose in the adopted plan and mirrored in the emerging plan of maintaining an Area of Local Separation has been made more important given losses of such areas, and especially the now developed housing off Millstone Lane in Syston. The appellant has argued that the piecemeal erosion of ALS's is justification, or precedent for further erosion. I read precisely the opposite conclusion. The lost separation makes remaining areas even more meriting of protection.

4.15 Albeit more finely balanced than my judgement in respect of the refused proposal, my opinion remains that in respect of the revised proposal the adverse impacts would significantly and demonstrably outweigh the benefits claimed by the appellant, when assessed against the policies in the Framework taken as a whole.

## 5. Conclusions

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- 5.1 Within their evidence the appellant's team has relied heavily upon references to past decisions, or reports taken out of context, and errors in the assessment of the site's history and characteristics to make their case.
- 5.2 The approach they take to diminishing the importance of development plan policies one by one seems to me to be contrary to the judgement in *Gladman Developments Limited vs Secretary of State for Housing, Communities and Local Government and Corby Borough Council and Uttlesford District Council* [2021] EWCA Civ 104 (**CD8.19**).
- 5.3 The appellant ascribes weight to the alleged benefits of this proposal on the basis of Inspectorate decision taken in a different context, which are wholly inappropriate to the current circumstances.
- 5.4 On the basis of the appealed proposal, I have concluded that having weighed the relevant matters as required by law and policy, I would ask the Inspector to dismiss the appeal.
- 5.5 If the Inspector admits the modified scheme, it remains my view that a full public consultation should be undertaken before assessment is made. However, if the Inspector elects to proceed without such a consultation response my assessment is that the appeal assessed against the modified proposal should also be dismissed, albeit that the planning balance is more finely judged.
- 5.6 The opinions and judgements expressed in this document are mine, and are informed by my professional experience, my reading of the Core Documents and my assessment of the main issues in this appeal, as described by the Inspector.