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## Appeal Decision

Hearing Held on 4 & 5 October 2017

Site visit made on 4 October 2017

**by Cullum J A Parker BA(Hons) MA MRTPI IHBC**

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

**Decision date: 24<sup>th</sup> October 2017**

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**Appeal Ref: APP/U1430/W/17/3175306**

**Land at Foundry Close, Hurst Green, TN19 7QW**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Millwood Designer Homes Ltd against the decision of Rother District Council.
  - The application Ref RR/2016/1577/P, dated 9 June 2016, was refused by notice dated 19 April 2017.
  - The development proposed is residential development of site to provide 60 dwellings.
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### Decision

1. The appeal is dismissed.

### Preliminary Matter

2. At the Hearing, reference was made by the Council to the Supreme Court Judgement in the case of *Suffolk Coastal District Council (Appellant) v Hopkins Homes Ltd and another (Respondents) Richborough Estates Partnership LLP and another (Respondents) v Cheshire East Borough Council (Appellant)* on 10 May 2017 [2017] UKSC 37. Both main parties were given the opportunity to provide comments on this matter, and I have taken these into account.

### Main Issues

3. The main issues, identified at the Hearing, are:
  - i) The effect of the proposed development on the character and appearance of the area, including on the High Weald Area of Outstanding Natural Beauty and any other landscape features, and;
  - ii) The effect of the proposal on highway safety, with specific regard to parking and layout, and;
  - iii) The effect of the proposed development on the living conditions of occupiers of nearby residential dwellings, with specific regard to outlook, and;
  - iv) The effect of the proposal on local biodiversity including on trees and identified 'Habitat of Principal Importance', and;
  - v) Whether the mix of dwellings proposed, including affordable and market housing, would address the need to support balanced, mixed and sustainable communities, and;
  - vi) Whether the proposed development would make adequate provision in respect of local infrastructure, and;
  - vii) The overall planning balance in the context of housing land supply.

## Reasons

### *Character and appearance*

4. The appeal site is located on the eastern edge of Hurst Green, a village located at the juncture of the main roads A21, A229 and A256. The site lies adjacent to the development boundary for the village as defined by saved policy DS3 of the *Rother District Local Plan 2006* (RDLP). Access to the site would principally be from the eastern end of Foundry Close. The site comprises mainly open fields with a generally unmanaged appearance. Two Public Rights of Way (PROWs) Nos 31 and 33, lie on the southern and northern edges of the site. The appeal site (together with Hurst Green) lies within the High Weald Area of Outstanding Natural Beauty (AONB).
5. The site is bounded by a mixture of mature trees and hedgerows. More specifically, there is also a row of trees and hedges which line a ditch running on an east-west axis between two lower fields. This is identified as one the key characteristic of the High Weald AONB; with smaller fields bound by hedgerows and trees, and in particular on this edge of Hurst Green. To the north of the site is a cluster of trees subject to a Tree Preservation Order (TPO).
6. The appeal scheme seeks the erection of 60 dwellings, including a mixture of two and two-and-a-half storey houses and flats. These would be laid out along a central spine road with off-shoots serving small clusters of dwellings. There would be three areas of Public Open Space (POS) and a mixture of individual parking spaces and parking courts.
7. The layout proposed would see the loss of the tree and hedgerow lined ditch, which is a significant landscape features within the site; effectively dividing the site into two areas. The loss would result in the erosion of a feature which contributes positively to the wider landscape in terms of understanding the overall field structures within the AONB and how these differ from other areas of the country where field patterns can be very different.
8. The appellant suggests that the significance of the ditch is being overplayed by the Council. However, I disagree. Whilst it may be a common feature within the AONB to have small fields created by such features as ditches or other boundary treatments, the commonality of this within this landscape is not necessarily something that should equate to its loss being acceptable. Indeed, it is because of the importance of this field pattern to the AONB that it should be retained if possible so as to ensure that any development here reinforces local distinctiveness. The loss of this feature would therefore result in harm to the character and appearance of the High Weald AONB.
9. More generally, the layout proposed would result in one that does not entirely reflect the prevailing pattern of development within the locality. For example, the appellant has used large areas of shared surfaces where the village typically has pavements and roads. Another difference is that the part of the village along the High Street has both a variation in built form and a closer knit physical appearance. To the contrary, rather than reflecting the rural character of the village by incorporating landscape features such as the tree-lined east-west ditch, the appeal scheme appears as a suburban development with surface car park areas and small blocks of flats for example.

10. In terms of the areas of POS, the Council has concerns that the three areas would not result in meaningful areas for residents to relax, play or socialise. Given that one area would be directly in front of the main vehicle entrance to the development and that the proposed flats would have no clearly defined external areas I agree with the Council. The problem is that the lack of any discernible private external areas for the flats means that daily tasks, such as drying washing, would have to occur indoors. Whilst the appellant has sought to provide areas of POS, it is unclear as to how it is envisaged future occupiers would use such areas in a practical sense. This is indicative of poor design.
11. I acknowledge the appellant has sought to devise a scheme that is considered to be well-conceived. I have identified but a few of the Council's design concerns and I share many of these. I have also found that the proposal would fail to protect and enhance the High Weald AONB, which is a nationally designated landscape. It would also fail to represent high quality design by not contributing positively to the character of the site and its surroundings.
12. I therefore conclude that the proposed development would have an adverse impact on the character and appearance of the area, including specific harm to the High Weald AONB. Accordingly, it would be contrary to Policies OSS4, RA1, RA2, RA3, EN1, EN3 and EN5 of the *Rother Local Plan Core Strategy 2014* (CS) and Policy DS3 of the RDLP, which, amongst other aims already cited, seek to ensure the protection of the locally distinctive character of villages, historic buildings and settings, with the design of any new development being expected to include appropriate high quality response to local context and landscape.
13. It would also conflict with the Policies of the *National Planning Policy Framework* (the Framework) which include that planning should always seek to secure high quality design and that it is proper to seek to promote and reinforce local distinctiveness. It would also fail to conserve landscape and scenic beauty within the AONB which have the highest status of protection in relation to such matters, and which Paragraph 115 of the Framework specifically indicates great weight should be given to.

#### *Highway safety*

14. With regard to highway safety, the Council was concerned with the lack of details on matters such as which roads were to be adopted, tracking and turning details, and the lack of parking spaces in the vicinity of plots 1 to 3 and 8 to 10. The latter also links to the concerns raised by local residents as to parking pressures more generally and the proximity of the site to the A21.
15. In terms of parking pressures, I saw that to the rear of Meadow View Cottages there is a large area of hardstanding that provides access to small blocks of garages. There is also a parking area to the side of Nos 1 and 2 Foundry Close (directly to the south of Foundry Close). With such provision, it is unclear as to where the current demand for using Foundry Close for on street parking arises. Nevertheless, with the High Street/A21 – which also links to other A-roads in Hurst Green - being a fairly busy road for most of the time it is fairly obvious as to why most road users would favour a no-through road for parking rather than the main road.
16. The issue here is that there is already a degree of parking pressure on Foundry Close. Whilst it is not for the appellant to necessarily improve this situation per se, the proposal should, at the very least, not make it worse. I heard at the

Hearing from the Appellant's transport witness who explained that in relation to parking for Plots 1 to 3 and 8 to 10, additional spaces could be provided within the plots. However, this misses the point that sufficient practical parking provision should be provided in the first instance and it is not clear that such spaces could be. I share the Council's concerns that the use of on street parking for residents and/or visitors to these dwellings near the entrance to an estate of some 60 dwellings is not practical or desirable in this case.

17. I acknowledge that there is the ability to use conditions to rectify some of the Council's other highways concerns, and that the appellant has provided information for vehicle tracking and provided the number of parking spaces required for a development of this size. However, the location of these parking spaces are indicative of the concerns that remain in respect of the design layout.
18. I therefore conclude that the proposal would fail to properly address highway safety issues with specific regard to parking and layout. It would therefore be contrary to Policies TR3 and TR4 of the CS, which, amongst other aims, seek to ensure that proposals meet the residual needs of the development for off-street parking having taking into consideration localised circumstances and to any safety, congestion or amenity impacts of a reliance on parking off-site whether on-street or off-street.

#### *Living conditions*

19. In terms of living conditions the Council is primarily concerned with the proximity of the buildings on plot 7 in relation to 2 Pentwood Place and plot 60 in relation to Byways. I heard that these concerns centred on the height and form of the proposed buildings and that they would create oppressive living conditions or a feeling of enclosure for the occupiers of 2 Pentwood Place and Byways.
20. The building on plot 7 would be located some 25 metres or more from the rear elevation of 2 Pentwood Place as Mr Nightingale confirmed at the Hearing. A majority of the built form, which would be located at the end of the garden of 2 Pentwood Place, would be single storey as it would serve a garage area. I acknowledge that the pitch of the roof form proposed would be steep, but this would slope away from the shared boundary with 2 Pentwood Place. What is more, the majority of the height near to the boundary would be not much higher than that of a typical garage or outbuilding structure. In such circumstances, I do not find that this proposed relationship would be unacceptable.
21. In terms of Byways, this is a detached bungalow located on a spacious and landscaped plot. The proposal would result in a building on plot 60 where there is currently none. However, at the Hearing the Council confirmed that the flank wall closest to the boundary would be about 7.5 metres in depth, compared to an overall boundary length of some 45 metres or so. In practice the occupiers of Byways would not be subjected to a visually intrusive flank wall, but rather that part of the outlook towards the east would alter. However, I do not find that this amounts to a materially harmful loss of outlook which would be detrimental to the occupiers of Byways.
22. Accordingly, I conclude that the proposed development would not have a materially harmful impact on the living conditions of occupiers of nearby

residential dwellings, with specific regard to outlook. As such, the proposal would accord with Policy OSS4 of the CS insofar as relevant to living conditions, which, amongst other aims seeks to ensure that development does not unreasonably harm the amenities of adjoining properties.

#### *Local biodiversity*

23. On the northernmost part of the site, along the northern and eastern edge of the site, there are a number of trees subject to an area TPO. I saw these during my site visit, and it is clear that the trees within the boundary of the site subject to the TPO and trees more generally along the eastern boundary and south western corner of the site near to Byways make an important contribution to the character of the area.
24. The appellant has submitted an *Arboricultural Impact Assessment* dated 6 June 2016 (AIA). In particular, the drawing attached to the AIA entitled 'Tree Survey Drawing' shows that whilst there would be some development in the possible Root Protection Areas (RPA) for trees subject to the TPO, as shown for tree T9 on that plan, this would be in the form of private drives. I heard at the Hearing of the various ways in which roadways could be provided so as to minimise the impact on RPAs, including the use of no-dig driveways for example.
25. I acknowledge the Council's point in respect of future pressure to prune such trees. However, the canopies would in the main be situated over turning areas and away from residential buildings and their gardens. It is unlikely that such issues would any greater than one would expect with good Arboricultural management practices. The trees subject to the TPO benefit from a level of control and there would be the reasonable opportunity for the appellant to improve the eastern tree boundary through a landscaping condition, for example. Taking all these factors in the round, I do not find that the proposal would result in unacceptable harm to trees as either visual features within the local area or in terms of their biodiversity value.
26. The Habitat of Principal Importance (HPI) is identified within the *Preliminary Ecological Survey* (PES) dated 8 June 2016, and relates to the 115 metres of tree/hedgerow which run along the ditch on an east-west axis. Beyond this, the hedgerow continues in an easterly direction, and links to an area of Ancient Woodland, which the Appellant's ecologist confirmed was likely to be the principal source of dormice that may be located on the appeal site.
27. As detailed within the PES, Dormice are a European Protected Species and are also afforded protection under the *Wildlife and Countryside Act 1981*, as amended. The PES goes on to state that '*Given the risk of dormouse presence and the loss of suitable habitat, it will be necessary to clarify whether hazel dormice are utilising onsite / boundary habitats*<sup>1</sup>'. No site specific surveys for this species have been submitted in relation to this appeal. It is not therefore possible to determine whether dormice are present on site and if so what the population size is, for example. The evidence before me suggests that there is a reasonable likelihood of dormice, and/or their habitat, being present on the appeal site which includes the east-west axis hedgerow and ditch.

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<sup>1</sup> PES Page 23, Paragraph 10.47



28. The PES also identified that the grassland areas present on site provide suitable habitat for reptiles<sup>2</sup>. At the Hearing I heard from the Appellant that it was very likely that the site contained a good population of slow worms and a population of grass snakes. Indeed, it was suggested that although no site specific surveys for these species having been submitted for the appeal, survey work undertaken in 2016 identified such animals on the appeal site. Given these facts, it is not illogical to conclude that there is a reasonable likelihood of these creatures being present on the appeal site.
29. The *Planning Practice Guidance* (the Guidance) indicates that an ecological survey will be necessary in advance of a planning application if the type and location of development are such that the impact on biodiversity may be significant and existing information is lacking or inadequate.<sup>3</sup> The type of development here would require substantial ground works and cover almost the entire appeal site; factors which would have a significant impact on the currently unmeasured levels of biodiversity on or near to the site. I am reinforced in this interpretation by the fact that at the Hearing the Appellant's ecologist confirmed that the proposal would lead to a net loss of habitat, including for reptiles.
30. I sought further views from the main parties at the Hearing, referring both to the Framework and *Circular 06/2005: Biodiversity and geological conservation* (the Circular). The only ecological information provided by the appellant is of a general nature; with no species specific surveys or assessments of likely population sizes, which in turn would inform any mitigation strategy, were protected species identified on or near to the appeal site.
31. The Circular sets out that that a survey should be carried out before planning permission is granted and that surveys should only be required by condition in exceptional circumstances (again this is reflected in the above extract from the Guidance). No 'exceptional circumstances' have been suggested in this case. Furthermore, there is uncertainty as to whether, and indeed which, protected species are or may be present on the site which could include dormice and reptiles, and if appropriate mitigation measures suggested would be possible.
32. Given such a degree of uncertainty, and considering the responsibilities under Section 40(1) of the *Natural Environment and Rural Communities Act* for public bodies to have regard to the purpose of conserving biodiversity and the advice within the Guidance and Circular, I consider that the use of the suggested condition by the main parties would not be reasonable in this case. Moreover, the absence of this information means that it is not possible to be certain that the proposal would not result in significant harm to biodiversity as envisaged by Paragraph 118 of the Framework.
33. I note the Appellant's point that the site is contained within the emerging Sites Allocation Plan under Policy HUR1. Notwithstanding the fact that this is an emerging draft policy, this does not negate the need to apply a precautionary approach in relation to ecological matters; particularly when there is a large degree of uncertainty. Nor does this provide justification for departing from the clear direction set out in the Circular and Guidance in dealing with such matters.

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<sup>2</sup> PES Page 14, Paragraph 7.45

<sup>3</sup> *Planning Practice Guidance*, Paragraph: 016 Reference ID: 8-016-20140612, Revision Date 12.06.2014

34. I therefore conclude, on the basis of the evidence before me (or lack thereof) that the proposed development would fail to protect local biodiversity. It would therefore conflict with Policies EN1 and EN5 of the CS, which, amongst other aims, seek to require developers to integrate biodiversity into development schemes by avoiding adverse impacts from development on biodiversity or habitat, or where wholly unavoidable, provide appropriate mitigation against or compensation for any losses. Developers will also be expected to consider and promote opportunities for the creation and/or restoration of habitats appropriate to local context.
35. For similar reasons, the proposal would be contrary to the Policies of the Framework identified above, which in addition to the aforesaid aims at Paragraph 118, include Paragraph 109 which seeks to minimise the impacts on biodiversity and providing net gains in biodiversity where possible, and contributing to the Government's commitment to halt the overall decline in biodiversity.

#### *Housing mix*

36. Policy LHN1 of the CS sets out that in rural areas, developments should provide a mix of dwelling types and sizes, with at least 30% one and two bedroom dwellings. The appeal scheme would provide 4 two bedroom market dwellings, and 16 two bedroom and 8 one bedroom affordable housing dwellings. This would result in a total of 28 dwellings being within the one or two bedroom dwelling size. This would represent roughly 46% of the proposed dwellings. As such, the proposal would exceed the percentage mix sought by Policy LHN1 of the CS. The policy does not seek to distinguish between dwelling types in terms of flats, bungalows or houses for example, but rather that the size is directed by the number of bedrooms sought.
37. Policy LHN2 sets out that in rural areas, proposals of this size should provide 40% on site affordable housing provision. The proposal would contribute 24 affordable housing units and therefore meet this percentage requirement. The Council considers that Policy LHN2 should then be read in conjunction with Policy LHN1(i) of the CS in terms of meeting current and projected needs. To this end, the Council's Housing Team considers that the Housing Needs Register survey (*Strategic Housing Research Project 2017*) indicated that 34.2% of residents needing or wanting to move will require a 3 bedroom property and 61.3% require a house over any other dwelling type<sup>4</sup>.
38. The Appellant sought advice from a Housing Association operating within the district, which indicated that they 'would be happy' with the mix proposed. The problem here is that Policy LNH2 only indicates a percentage of affordable housing and does not require or set out the mix of such housing. Slightly differently, Policy LHN1 requires housing developments to meet housing needs within the district and locally. Yet when asked at the Hearing to provide a breakdown of housing delivery by dwelling type or bedroom size, the Council was unable to do so, with the *Local Plan Monitoring Report April 2017* focusing on the high level numbers of delivery.
39. Nonetheless, I see no reason to doubt the results of the Council's Housing Needs Register survey which identified a need for three bedroom dwellings to be provided within the affordable housing mix. What is more, when Chapter 6

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<sup>4</sup> Council's Statement, Page 23, Paragraph 5.5.5

of the Framework is read as whole, it is clear that the thrust of government Policy is to provide a mix of housing based upon the needs of different groups and to contribute to the objective of creating mixed and balanced communities. The appeal schemes shows, with the provision of 3, 4 and 5 bedroom market housing dwellings, it is possible to provide such dwellings on the appeal site. Instead the appellant would provide the 40% affordable housing policy requirement in four blocks of flats with none of these providing 3 bedrooms and this is the only use of flats on site as a residential unit.

40. In such circumstances, I conclude that the mix of affordable housing dwellings proposed, would not address the need to support balanced, mixed and sustainable communities. Accordingly, the proposed development would be contrary to Policies LNH1 and LNH2 which seek the aforesaid aims. It would also be contrary to the Policies of the Framework, which include local planning authorities using their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing.

#### *Local infrastructure*

41. Policy LHN2 of the CS seeks to secure 40% of the proposed dwellings to be affordable housing on rural sites of 5 dwellings or more. To this end, a signed and completed legal agreement under Section 106 of the TCPA was submitted to the Council after the Hearing had closed (as agreed at the Hearing). This would secure 24 dwellings as affordable housing; albeit not in the mix the Council seeks.
42. Paragraph 204 of the Framework and CIL Regulation 122(2) set out the three tests for seeking planning obligations: that they must be '*necessary to make the development acceptable in planning terms, directly relate to the development, and fairly and reasonably related in scale and kind to the development.*' The obligation in this case is necessary, directly related, and fairly and reasonably related to the development. Therefore, it meets all the tests within the CIL Regulations 122 and 123, and should be taken into account in the decision. What is more, the provision of affordable housing in accordance with an adopted development plan policy is a public benefit that weighs in favour of the grant of permission.
43. Concerns have been raised by the Council in respect of the enforceability of the legal agreement. However, I have found that the appeal proposal is unacceptable on other grounds, and there is no need for me to consider this matter further.

#### *Implication of housing land supply*

44. The Council's decision notice confirmed that it was not able to demonstrate a five year supply of deliverable housing sites. This position had not changed at the time of the Hearing. As such, Paragraph 49 of the Framework (relating to housing supply) results in Paragraph 14 of the Framework (relating to the presumption in favour of sustainable development) being engaged.
45. Paragraph 14 of the Framework indicates that for decision-making this means approving proposals that accord with the development plan and where relevant policies are out of date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies of the Framework as a whole.



46. In this case, as identified above, the proposal would not accord with a number of Policies of the adopted development plan. In terms of the adverse impacts these include the conflict with the development plan policies, the harm to character and appearance including to the nationally designated AONB, biodiversity and trees, highway safety, and the inability of the overall mix of dwellings proposed to fulfil the aim of creating sustainable and mixed communities.
47. Set against these the proposal would result in some benefits, including the provisions of market and affordable housing, both of which would be provided in an area that currently cannot demonstrate a five year supply of deliverable housing sites. These benefits should be afforded significant weight.
48. On balance, I find that the adverse impacts would significantly and demonstrably outweigh the benefits of the scheme. Accordingly, the proposal would not represent a sustainable development for which the presumption in favour of would apply.

### **Conclusion**

49. Section 38(6) of the *Planning Compulsory Purchase Act 2004*, as amended, sets out that in the determination of proposals, this must be made in accordance with the development plan, unless material considerations indicate otherwise. The proposal here would not accord with the Policies of the adopted development plan including Policies EN1, EN3, EN5, RA1, RA2, RA3, OSS4, LHN1, TR3 and TR4 of the CS and Policy DSS of the RDLP. What is more, the Framework does not indicate otherwise nor do any other material considerations.
50. Accordingly, for the reasons given above, and taking into account all matters raised, I conclude that the appeal should be dismissed.

*Cullum J A Parker*

INSPECTOR

## APPEARANCES

### FOR THE APPELLANT:

Roger Nightingale, MRTPI	KWL – Planning Agent
Chris Pitchford	MDH – Appellant
Ross Dryburgh	Lloyd Bore – Arboriculture
Stuart Hubert	Lloyd Bore – Landscape
David Smith	Lloyd Bore – Ecology
Kean Elliot, RIBA	ECE Architecture – Architect
Lawrence Stringer	GTA Civils – Transport Planning

### FOR THE LOCAL PLANNING AUTHORITY:

John McSweeney	Senior Planning Officer
Diane Russell	Conservation and Design Officer
David Marlow	Planning Policy Manager

## DOCUMENTS SUBMITTED AT HEARING:

- LPA1 - Excerpt of 'Villages with site allocations - Hurst Green' and emerging Policy HUR1 from the *Rother District Council Development and Sites Allocation Local Plan Options and Preferred Options*
- LPA2 – Supreme Court Judgement in the case of *Suffolk Coastal District Council (Appellant) v Hopkins Homes Ltd and another (Respondents) Richborough Estates Partnership LLP and another (Respondents) v Cheshire East Borough Council (Appellant)* on 10 May 2017 [2017] UKSC 37
- LPA3 – *Local Plan Monitoring Report – Housing Land Supply and Housing Trajectory at 1<sup>st</sup> April 2017* (June 2017)

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