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## Appeal Decision

Hearing held on 21 June 2016

Site visit made on 21 June 2016

**by Lesley Coffey BA Hons BTP MRTPI**

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

**Decision date: 14 September 2016**

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**Appeal Ref: APP/W1525/15/3003304**

**The Lower Garden, Rear of 21 Seven Ash Green , Chelmsford CM1 7SE**

- 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 Mr L Foley against the decision of Chelmsford Borough Council.
  - The application Ref 13/01852/OUT, dated 18 December 2013, was refused by notice dated 7 October 2014.
  - The development proposed is a residential development comprising three dwellings incorporating new access road and landscaping.
  - This decision supersedes that issued on 3 August 2015. That decision on the appeal was quashed by order of the High Court
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### Decision

1. The appeal is dismissed.

### Procedural Matters

2. The proposal is an outline application for 3 dwellings. Although the application form indicates that landscaping is not one of the reserved matters, at the hearing the appellant confirmed that this was incorrect. I have therefore assessed the proposal on the basis that all matters, except the access, are reserved for subsequent approval. The Appellant submitted a plan showing how the development might be accommodated, but the plan is for illustrative purposes only and there could be alternative layouts for the site. It nevertheless provides a useful guide when considering the proposal before me.
3. The appellant submitted a Unilateral Undertaking under S106 of the Act. This covenants to layout and maintain an ecology area within the appeal site and I have taken it into account in reaching my decision.

### Main Issues

4. I consider the main issues to be
  - Whether the Council can demonstrate a five year supply of housing land; and
  - The effect of the proposal on the character and appearance of the surrounding countryside.

## Reasons

5. The development plan for the area includes the Chelmsford City Council Core Strategy and Development Control Policies Development Plan Document (adopted 2008), the Chelmsford Site Allocations Development Plan Document (SADPD) (adopted 2012), and Chelmsford City Council Core Strategy and Development Control Policies Focused Review (adopted 2013).
6. The Focussed Review identified those development plan policies that could be readily amended to be consistent with the provisions of the National Planning Policy Framework (NPPF) without the need to prepare further evidence in respect of those specific policies. Therefore it did not update or consider the housing requirement within the Core Strategy. The amendments were considered at an Examination in Public and found to be sound.
7. The appeal site lies outside of the defined settlement boundary for Chelmsford and within the open countryside as defined by policy DC2 of the Focussed Review and policy DC9 of the Core Strategy. Policy DC2 seeks to prevent the erosion of the intrinsic beauty and character of the countryside from inappropriate forms of development and sets out the detailed criteria against which proposals outside of the settlement boundaries will be assessed. It restricts development to a specified list of acceptable development. These include affordable housing, the replacement of existing dwellings and residential infilling in accordance with policy DC12. In addition, it includes the carrying out of engineering or other operations, or the making of a material change of use of land, where the works, or use concerned, would have no material effect on the appearance and character of the countryside in the Rural Area beyond the Metropolitan Green Belt.
8. The appellant does not seek to rely on policy DC12 which restricts development to small gaps in an otherwise built up frontage. However, the appellant contends that the proposal would comply with policy DC2 in that it would come within the scope of 'other operations' and would not have a material effect on the appearance and character of the countryside.
9. The reasoned justification for the policy provides no guidance as to the meaning of 'engineering or other operations' in the context of the policy. The definition of development at Section 55 of the Town and Country Planning Act 1990 includes 'other operations normally undertaken by a builder.' In my view, in the absence of any evidence to the contrary, I consider that the erection of dwellings would come within part C of policy DC2 provided it has no material effect on the appearance and character of the countryside.

## Housing Land Supply

10. National planning policy in relation to housing is set out in the NPPF. This seeks to significantly boost the supply of housing. It encourages local planning authorities to ensure that their local plan meets the need for market and affordable housing in their housing market area and to identify a supply of deliverable sites sufficient to provide 5 years' worth of housing against their requirements. To ensure choice and competition in the market an additional buffer of 5% is required or, where there has been a record of persistent under delivery, a buffer of 20%.

11. The assessment as to whether a Council is able to demonstrate a 5 year supply of housing land needs to take account of the housing requirement, any previous shortfall in delivery, the appropriate buffer, and the available housing land supply. The appellant does not dispute the housing requirement, the extent of the shortfall, or the buffer. The difference between the parties relates to the supply of housing land, in particular, whether a lapse rate should be applied to the supply of housing and the inclusion of specific sites.
12. The agreed housing requirement is for 775 dwellings per annum (dpa). When the shortfall of 237 dwellings is included and a 20% buffer added the five year housing requirement is 4,934 dwellings which equates to 987 dpa. The Council states that it has a housing land supply sufficient to deliver 6,212 dwellings which equates to a 6.29 year housing land supply.

#### *Lapse Rate*

13. The appellant considers that the Council's housing projections consistently over estimate the number of completions. As a consequence the appellant considers that a lapse rate of between 15% and 20% should be applied to the housing land supply.
14. The appellant explained that the projections for any particular year tend to be revised downwards the closer in time to the year concerned. This concern is illustrated by the delivery year 2013/14. The 2005/06 Annual Monitoring Report (AMR) projected 1,319 completions; this was subsequently increased to 1,464 in the 2008/09 AMR and reduced to 1,098 in 2010/11 and finally to 423 in June 2013.
15. Paragraph ID 3-033-20150327 of Planning Practice Guidance (PPG) states that local planning authorities should ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record. Such assessments, including the evidence used, should be realistic and made publicly available in an accessible format.
16. The Council explained that previously it had relied on the Essex County Council approach to the assessment of housing land supply, but it now uses a published methodology which is both comprehensive and transparent. The current approach relies on a greater number of site visits and contact with the developers. This includes evidence in relation to the completion rate on individual phases of development provided by developers. Moreover, 83% of the sites within the housing land supply either have planning permission or there is a resolution to grant planning permission. The appellant did not suggest that the Council's methodology was flawed and in my view the methodology used by the Council at the present time is entirely consistent with this guidance.
17. The appellant doubts that all of the sites within the housing land supply will be delivered in the next five years. A very high proportion of the sites within the trajectory (83%) benefit from planning permission and other than in the case of the specific disputed sites no evidence has been put forward to suggest that the remainder of the sites within the trajectory will not be delivered.

18. Whilst the Council can ensure that sufficient housing land is made available to allow the delivery of the planned supply, many other factors outside of the Council's control can influence the number of dwellings completed. Paragraph 47 of the NPPF does not require local planning authorities to ensure that dwellings are completed, but to identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements. Footnote 11 states that sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years. I consider the Council's approach to the assessment of housing land supply to be entirely consistent with the guidance in PPG.
19. The purpose of the 20% buffer is to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land. It is not an additional housing requirement, but is moved forward from later in the plan period. Therefore even if 20% of the sites within the housing land supply were not delivered during the 5 year period there would remain a realistic prospect of achieving the planned delivery. Moreover, the housing land requirement is updated annually and any previous undersupply would be added to the requirement. I therefore do not consider that a lapse rate should be applied in addition to the 20% buffer. I am aware that the inspector in respect of the Lion Inn appeal considered it improbable and unrealistic that all the sites in the Council's housing trajectory will come forward within the 5 year period. On this basis he applied a lapse rate of 5% for sites with planning permission and 10% for other sites. Whilst I acknowledge that not all of the sites within the trajectory are likely to come forward in the next five years, for the reasons given above I do not consider a lapse rate should be applied to the housing land requirement.

#### *Disputed Sites*

20. The appellant considers that the Council's housing trajectory is overly optimistic in relation to three sites: Land at Back Lane East Hanningfield, Royal and Sun Alliance Parkview House and 21 Seven Ash Green.
21. The Land at Back Lane East Hanningfield is identified within the SADPD for 10 affordable dwellings. A recent application for 28 dwellings on the site was refused. In the light of this recent application and other historical applications for a higher level of development the appellant considers that there is no realistic prospect of the site being developed in the next five years. Whilst it is clear the site is available, there is little information to indicate that the development of the site for 10 dwellings is viable, therefore it is debateable whether it will come forward in the next 5 years.
22. In April 2015 prior approval was granted for the change of use from office to flats for the Royal and Sun Alliance Parkview House building. The Council consider that this site will deliver 55 dwellings in the next 5 years. However more recently in February 2016 a building regulations application was submitted to form offices on the ground, first, second, third and fourth floors. In light of the recent building regulations application to facilitate the continued use of the building as offices, I consider that it is questionable whether the building will deliver any dwellings in the next five years.
23. The site at 21 Seven Ash Green is owned by the appellant and benefits from a planning permission for 2 additional dwellings. At the hearing the appellant

stated that the dwellings would be unlikely to be delivered in 2017/18 as indicated in the trajectory, but accepted that they would be delivered in the next five years. Therefore there is no reasonable basis on which to exclude them from the 5 year housing land supply.

24. Together Back Lane, Hannington and Royal Sun Alliance, Parkview House would provide 83 dwellings. Excluding these from the housing land supply would mean that there is sufficient land available to deliver 6,129 dwellings, which comfortably exceeds the five year housing land supply requirement.

### ***Character and Appearance of the Surrounding Countryside***

25. Seven Ash Green is located on the edge of the urban area of Chelmsford. Although it is situated close to areas of suburban housing, it has a distinctly rural character. This is derived from the narrow width of the road which is bound by trees and hedgerows and the absence of formal footpaths along much of its length, as well as the fields and other open land along its western boundary.
26. The site is bounded by residential development to the east and south and open fields to the north and west. The appeal site is a former quarry and had been used as part of the garden of 21 Seven Ash Green for many years. It is distinct from the original garden of the dwelling by reason of its appearance and is accessed by a steep flight of steps. The site is surrounded by steep banks on all sides. The main part of the site, where the dwellings would be located, is relatively flat. The north and western boundaries include a woodland TPO whilst individual trees along the southern boundary are protected by a separate TPO.
27. The illustrative plans show three detached dwellings, with the access road leading from a spur that serves the properties immediately to the south of the site. The proposal also makes provision for a biodiversity area.
28. Policy DC9 seeks to protect and enhance the open character of the river valleys and associated floodplains, providing a network of natural habitats to nurture biodiversity and provide areas of informal recreation between the urban areas of Chelmsford and the countryside beyond. Only development falling within a specified list of development, which does not include new housing, is acceptable. Accordingly the proposal would conflict with policy DC9.
29. The appellant considers that in the light of the Richborough decision<sup>1</sup> the weight to be afforded to policy DC9 is reduced in that it is a policy for the supply of housing. Although policy DC9 does restrict the supply of housing its essential purpose is to maintain and protect the open character of the landscape of the river valleys. I have found above that the Council can demonstrate in excess of a five year housing land supply, and therefore I accord policy DC9 significant weight.
30. Although the appellant does not dispute that the proposal is contrary to policy DC9, it is submitted that the proposal is a solely a definitional breach of policy and that the benefits of the proposal to biodiversity and the lack of harm to openness outweigh any conflict with policy DC9. In support of this view

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<sup>1</sup> Suffolk Coastal District Council v Hopkins Homes Limited and Richborough Estates Partnership LLP v Cheshire East Borough Council.

- reference was made to an appeal at Main Road Broomfield<sup>2</sup> where the Inspector concluded that the benefits of the proposal combined with a lack of harm to openness were sufficient to override a definitional policy breach.
31. The appeal site is located on the periphery of the Chelmer Valley and although the site is sunken with trees around the upper level, the openness provided by the site contributes to the open character of this part of Chelmsford.
  32. The appellant suggests that the proposed dwellings would not be noticeable within the wider landscape due to the depth of the pit. The appellant's landscape appraisal describes the site as a 10 metre deep pit, however this is at odds with the submitted topographical survey which shows that the differences in height between the rim of the pit and its base to vary between about 8 metres in the area closest to the existing garden, decreasing to about 4 metres towards the western boundary with the remainder of the Green Wedge. Indeed, the illustrative site sections indicate that the roofs of the proposed dwellings would extend above the height of the surrounding land. If the dwellings were to include chimneys they would be even taller by comparison with the dwellings shown on the illustrative plans. In addition, it is possible that a pumping station will be required as part of the drainage strategy, although there are no details of this before me. The boundary trees are largely deciduous and therefore whilst they would provide a degree of screening when in leaf, during winter months, the dwellings would be particularly noticeable, especially at times when the occupants of the dwellings are using internal and external lighting.
  33. The proposed access road would continue from the part of Seven Ash Green that serves the dwellings immediately to the south of the site. At the time of my visit, views from this part of the road towards the site were screened by the existing vegetation. However it is apparent from photographs submitted by third parties at the time of the application that although such views are filtered by the vegetation, the site is visible during winter months. The proposed access road would require the removal of much of the vegetation and trees that currently screen this part of the boundary adjacent to the access road. The tree survey submitted by the appellant identifies these trees as category C trees on the basis of BS: 5837:2012 . Whilst I accept that individually these trees do not make a significant contribution to amenity, as a group they screen views of the site and make a significant contribution to the biodiversity of the site. In view of the steepness of the sides of the pit the road is also likely to require significant engineering works, although the extent of these works and the necessary alteration in levels is unclear from the submitted information. Accordingly there is insufficient information for me to conclude that these trees could be retained. The proposal would introduce an urbanising effect into the Green Wedge and the loss of openness would be apparent from this part of Seven Ash Green.
  34. I appreciate that the application is an outline scheme and therefore the dwellings may vary from those shown on the submitted illustrative drawings. Nonetheless, on the basis of the available information I consider that the proposal would be noticeable within the wider landscape and would represent a significant visual intrusion into the Green Wedge. I am aware that the SADPD inspector found that the site was not readily visible from public vantage points.

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<sup>2</sup> APP/W1525/E/13/2189880

However, her views related to the undeveloped site which I agree is not visible within the wider landscape, although the openness that it provides is apparent. Moreover, the SADPD Inspector also concluded that the incursion of residential and other development into the valley sides would be likely to undermine the existing and potential biodiversity value of the Green Wedge and that the inclusion of the appeal site within it was justified.

35. The appellant submitted an extended phase 1 Habitat Survey. This found that subject to the recommendations in the report there would be no significant effect on protected species. The submitted surveys identify a badger sett towards the north eastern part of the site and badger foraging activity across the site and in the field areas to the north. The badger monitoring Report concluded that the active setts could be retained provided connectivity with any off-site setts and foraging areas could be maintained. The report make a number of recommendations to ensure that there would be no conflict during the construction phase with the badgers on site, particularly in the vicinity of the access road. Although it may be possible to accommodate these requirements there is little information before me to demonstrate how this would be achieved. Whilst there was no evidence of bats roosting within the site there was evidence that they forage/commute across the site.
36. The presence of bats and badgers on the site emphasises the importance of the site as part of the Green Wedge and its contribution towards green infrastructure within Chelmsford. The provision of a managed biodiversity area on the site would be a benefit of the proposal and would mitigate any limited harm. Subject to the retention of the trees around the upper part of the quarry, the majority of which fall outside of the appeal site, the site would continue to provide a foraging area for bats.
37. Although I have had regard to the Landscape Appraisal submitted by the appellant it would appear to be based on the premise that the pit is 10 metres below adjacent ground levels and therefore the weight to be afforded to it is considerably reduced.
38. The appeal site contributes to the openness of the Green Wedge and is designated as a site of environmental value by the Essex Wildlife Trust. In its present form it makes a significant contribution to the character of the Green Wedge, and the proposed dwellings, together with the access road and associated engineering works represent far more than a definitional breach to the Green Wedge. I therefore conclude that the proposal would considerably harm the character and appearance of the surrounding countryside contrary to policies DC2 and DC9 of the Core Strategy.

### **Other Matters**

39. The appellant considers the site to be previously developed land and submits that the proposal would accord with policy CP2 which seeks to make best use of previously developed land.
40. Although the site was formerly used as a quarry it has been in use as garden land for many years. On the basis of the limited information available it would seem that the quarrying operation ceased in about 1900. Mr Foley stated that at the time he acquired the land, in about 1977 there were two buildings on the site and these were removed in about the mid 1980's. The buildings comprised Nissan hut and a single storey wood and asbestos building.

41. The NPPF defines previously developed land as land which is, or was, occupied by a permanent structure, including the curtilage of the developed land and any associated fixed surface infrastructure. However it excludes land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time. I consider that the appeal site falls within this latter description in that the only structures visible on the appeal site are two low boundary walls to the side of the quarry. Any other structure have either been removed or blended into the landscape.
42. The appellant suggests that if the land is not previously developed land as a consequence of its previous use as a quarry, then it is previously developed land in that it is garden land and is not within a built up area. In this regard the appellant referred to *Dartford Borough Council V Secretary of State for Communities and Local Government [2016] EWHC 635(Admin)*, where it was held that garden land within the curtilage of developed land and away from built up areas was previously developed land.
43. What is defined as the curtilage for a particular house will vary according to a number of factors, but in most cases it will comprise the area of land around the original house, including the garden and grounds of the house. But the curtilage may be a smaller area in some cases, especially in the case of properties with large grounds set in the countryside. In the case of the appeal proposal is it evident that the appeal site did not form part of the original garden area associated with the dwelling. Therefore, although the appeal site is used as a garden by Mr Foley, in my view and as a matter of fact and degree, the former quarry is not part of the curtilage of the dwelling house. On this basis the appeal proposal is not comparable with the Dartford case.
44. However, even if I am incorrect in relation to this matter, whilst policy CP2 supports the development of previously developed land, it also seeks to safeguard and enhance key existing environmental, social and economic assets and resources. Therefore as a consequence of the erosion of the Green Wedge the proposal would not be in accordance with policy CP2 as a whole.
45. The parties agree that the appeal site is situated in an accessible location, and is not remote from shops and services. The proposal would be socially sustainable in that it would provide 3 new dwellings. The proposed ecological area would provide additional ecological habitats. This matter adds some weight in favour of the proposal, but should be balanced against the loss of trees associated with the access, and the introduction of built development and day to day activity into an area that is currently tranquil.

## **Conclusion**

46. The appeal proposal would be harmful to the character and appearance of the countryside and would conflict with the aims of policy DC9. Due to the harm to the character and appearance of the countryside the proposal would also fail to comply with policy DC2. The proposal would also be contrary to paragraph 17 of the NPPF due to the intrinsic harm to the countryside and its failure to take account of the different roles and character of different areas. In this regard the proposal would not be environmentally sustainable. Sustainable development has three dimensions, economic, environmental, and social. Paragraph 152 of the NPPF states that significant adverse impacts on any of

these dimensions should be avoided. Therefore I conclude that looked at in the round the proposal would not be sustainable development.

47. I conclude that the proposal would not accord with the development plan as a whole. When the benefits of the proposal, including the provision of housing, are balanced against the harm to the countryside, I conclude that the adverse impacts of the proposal would significantly and demonstrably outweigh the benefits.
48. For the reasons given above, and taking account of all material considerations. I conclude that the appeal should be dismissed.

*Lesley Coffey*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT:

David Whips	Solicitor
Emma Gladman	Planning Consultant
Kieron Lilley	Planning Consultant
Larry Foley	Appellant

### FOR THE LOCAL PLANNING AUTHORITY:

Matthew Perry	Senior Planning Officer
Jeremy Potter	Acting Planning Policy Manager
Laura Percy	Senior Planning officer

### INTERESTED PERSONS:

Angela Weadon  
Lindsey York  
Tracy Nichol  
Peter Treadwell

### DOCUMENTS

- 1 Statement of Common Ground in relation to housing land supply
- 2 Unilateral Undertaking submitted by appellant
- 3 Key to Local Plan submitted by Council
- 4 TPO 2012/003 submitted by Council  
Schedule of housing sites without planning permission submitted by Council