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## Penderfyniad ar yr Apêl

Ymweliad â safle a wnaed ar 12/01/21

gan Clive Nield, BSc (Hon), CEng,  
MICE, MCIWEM, C.WEM

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 2<sup>nd</sup> February 2021

## Appeal Decision

Site visit made on 12/01/21

by Clive Nield, BSc (Hon), CEng, MICE,  
MCIWEM, C.WEM

an Inspector appointed by the Welsh Ministers

Date: 2<sup>nd</sup> February 2021

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**Appeal Ref: APP/A6835/A/20/3260460**

**Site address: Land to the south of New Brighton Road, New Brighton, Mold, CH7 6RB**

**The Welsh Ministers have transferred the authority to decide this appeal to me as the appointed Inspector.**

- 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 Stewart Milne Homes (North West England) Limited against the decision of Flintshire County Council.
  - The application Ref: 060220 dated 10 July 2019, was refused by notice dated 28 October 2020.
  - The development proposed is residential development for the erection of 92 dwellings including the provision of affordable units, areas of public open space, landscaping and associated works.
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### Decision

1. The appeal is dismissed.

### Procedural Matters

2. The application was originally made for 97 dwellings but was subsequently amended to 92, and it is the amended scheme that is subject to appeal.
3. The appeal was originally made against the failure of the Council to determine the application within the prescribed period of time. However, the Council then refused the application during the period of dual determination, and so the appeal is now considered to be against that refusal.
4. The Appellant has submitted a Section 106 Unilateral Undertaking covering the provision of affordable housing, the payment of contributions towards education costs, and the provision of an open space management plan.
5. An application for costs was made by Stewart Milne Homes (North West England) Limited against Flintshire County Council. This application is the subject of a separate Decision.

### Main Issues

6. The Council was not opposed to the principle of the proposed development and refused it on just 2 matters of detail: firstly, it was not possible to demonstrate that the proposal would take adequate account of the possible presence of great crested
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newts, a European Protected Species; and secondly, that the proposal provides an inadequate level of on-site play and recreational space. Consequently, the 2 main issues to be considered are: whether or not the proposal would be likely to be detrimental to the favourable conservation status of the great crested newt, a European Protected Species; and whether or not the proposal would provide adequate on-site play and recreational space.

7. The local residents group, several local residents and their representatives have also raised a number of other matters, in particular whether there is a "safe route to school", the difficulties of draining the land, the location of the site outside the settlement boundary and partly within a designated Green Barrier; and whether making a decision would be premature in view of the stage reached in the emerging Local Development Plan. These are also important issues that need to be considered.

## **Reasons and Conclusions**

### ***Great Crested Newts***

8. The Council has relied on advice from Natural Resources Wales (NRW), as well as its own ecologist, in formulating its first reason for refusal, which says "*the proposal has the potential to cause disturbance to great crested newts and/or loss or damage to their resting places*" and that "*In the absence of adequate surveys, mitigation and reasonable avoidance measures it is not possible to demonstrate that the proposal adequately takes account of the European Protected Species and as such is contrary to policies GEN1 and WB1 of the Flintshire Unitary Development Plan*".
9. In considering this issue, it is pertinent to be clear what the relevant policies say. UDP Policy GEN1 requires, amongst other things, that development should not have a significant adverse effect on recognised wildlife species and habitats. Policy WB1, Species Protection, says "*Development which would have a significant adverse effect on important species or their habitats will not be permitted unless appropriate measures are taken to secure their long term protection and viability*". Great Crested Newts (GCNs) fall within the definition of "*important species*". These policies are consistent with national policy in Planning Policy Wales, which refers to development proposals which would be likely to result in disturbance or harm to the species or its habitat, and with similar wording in national guidance document Technical Advice Note 5 (TAN5), Nature Conservation and Planning.
10. It is clear that assessment against these policies should consider whether the proposed development would be likely to disturb or harm the species or habitat and whether any effects would be significantly adverse.
11. The Council's refusal is couched in much more precautionary terms, "*the potential to cause disturbance*", and NRW's advice is that "*it is possible that the species utilises the site for foraging, dispersal and sheltering purposes*". It is not surprising that NRW's consultation response was expressed in those terms as it was based on just 4 records of sightings of GCNs in the vicinity of the site. The Appellant has investigated the details of those sightings and explained that 3 of them no longer have much relevance and that the 4<sup>th</sup> has not been confirmed as being a GCN (as opposed to some other type of reptile). In the absence of any comments on this from the Council, I have no reason to doubt the Appellant's assessment.
12. The Appellant has also carried out several surveys to assess the likelihood of GCNs being present on the site for foraging, dispersal and sheltering purposes. There are 2 ponds near to the site, and the Appellant has been able to sample one of those and carry out a DNA investigation, which shows no evidence of any use of the pond by

GCNs. Access to the second pond has not been possible but the Appellant has carried out a remote study to assess its suitability for use by GCNs. That study concluded that the second pond was unlikely to provide a suitable habitat. A study has also been carried out on the site itself and found no evidence of GCNs on the site. Whilst NRW has criticised the quality of these studies, I consider them to be reasonable and adequate.

13. Some evidence has been provided by local residents which is intended to show that GCNs have been seen in the local area. However, even taking these at face value, they do not materially change the paucity of evidence of GCNs using the appeal site.
14. NRW also considers the compensatory element of the proposed scheme to be unsatisfactory. However, if the evidence of any use of the site by GCNs is highly questionable, as in this case, then extensive compensatory measures cannot be justified.
15. Although it is possible that the site does provide useful GCN habitat, I consider the lack of meaningful evidence indicates it is more likely that it does not. I do not consider the proposal conflicts with the policy requirements that development should not be likely to disturb or harm the species or its habitat and that any effects should not be significantly adverse. I conclude that the proposal would not conflict with development plan or national policies in respect of GCNs.
16. In addition to consideration against planning policies, as the competent authority for the appeal, I have a legal duty to have regard to relevant legislation, in this context the Conservation of Species and Habitats Regulations 2017 (as amended). I have considered the requirements of these Regulations and have taken a precautionary approach to my assessment. However, on the basis of the evidence described above, I conclude that the proposal would not be likely to offend the Regulations.
17. There has been some disagreement amongst the parties on the tests required by the Habitats Regulations, particularly those involved in a licence pursuant to derogation powers. However, as I have concluded that disturbance would be unlikely, those tests are not engaged.
18. My overall conclusions in respect of GCNs are that the proposed development would not conflict with development plan or national policy or with the requirements of the Habitats Regulations.

### ***On-Site Play and Recreational Space***

19. Turning to the second reason for refusal, the Council says that the provisions for on-site play and recreational space are inadequate for the number of dwellings proposed. UDP Policy SR5 says "*New residential development will be expected to include outdoor playing space at a minimum rate of 2.4 hectares per 1000 population*" and that "*this provision will include outdoor sport and recreation space together with equipped play space*". The policy also says provision can be off-site in exceptional circumstances, but that is not being proposed in this case.
20. The supporting text explains that outdoor playing space is split into 2 types of land: children's playing space at 0.8 hectares per 1000 population; and sports grounds for use by all at 1.6 hectares per 1000 population. The former should comprise formal equipped playing space and informal playing space (0.25 and 0.55 hectares respectively). The latter should be split into land for sports pitches (1.2 ha) and other outdoor recreation (0.4 ha).

21. LPGN 13, Open Space Requirements, provides supplementary planning guidance that is a material consideration and expresses the minimum standard for this size of development as 56.65 square metres per dwelling, which for 92 dwellings equates to 5,211.8 square metres. This requirement is not in dispute. In its committee report the Council says there is a shortfall of approximately 3,000 square metres of public open space, though it provides no details of how this has been calculated.
22. The Appellant, on the other hand says the proposal includes 7,044 square metres of outdoor play space if the area earmarked for the SUDS pond is included or 5,492 square metres if the pond is excluded, both of which are in excess of the calculated requirement. These calculations are based on 7 areas within the development (though Area 4 seems to have been excluded from the calculation):
  - Area 1 – 1340 square metres, around the SUDS pond;
  - Area 2 – 969 square metres, landscaped area along southern boundary of site;
  - Area 3 – 1270 square metres, equipped play area and surrounding open area;
  - Area 4 – 243 square metres; small open space near equipped play area;
  - Area 5 – 1280 square metres, informal area with small pond and PROW diversion in north west corner of site;
  - Area 6 – 634 square metres; narrow strip along northern boundary;
  - Area 7 – 1552 square metres; the SUDS pond.
23. In the absence of information from the Council on how they have assessed the provision of playing space, I have considered the suitability of these areas myself, taking into account the UDP policy and the Council's planning guidance note on open space requirements (LPGN 13), which is a material consideration. The latter is currently under review, but an updated version has not yet been adopted.
24. It is clear that there is no provision for adult sports pitches, as required by the policy, and that some of the areas do not meet the wider definition of public recreation space. Certainly, the SUDS pond falls outside this definition, as does the very narrow strip of land along the northern boundary, which has no recreational value other than as a green corridor. Although it is not quite so limited, I reach the same conclusion on the landscaped area along the southern boundary. Thus, I consider there to be a substantial shortfall in the provision of on-site play and recreation space, contrary to the requirements of UDP Policy SR5.
25. The Appellant has drawn my attention to provisions in LPGN 13 such that, in some instances, particularly where site constraints are such that the provision of an outdoor recreational area is not possible or because of the type of residential development proposed (e.g. retirement homes), other types of space may be considered to be appropriate replacements. The guidance includes "*woodlands, ponds and other amenity green spaces*" and "*green corridors*" as possible replacements. However, there are no significant site constraints or qualifying type of development here, and the possibility of alternative space provision does not apply.
26. The Appellant has also mentioned that the policy can sometimes be met by off-site provision or financial contributions towards it and that the Council has not been helpful in responding to approaches by the Appellant to try to agree suitable provisions. Nevertheless, although the policy does make that allowance (and the Council's guidance describes a sequential approach to the consideration of such matters), the

Appellant has made it clear that the appeal proposal is based solely on on-site provision of playing space, and no alternative arrangements have been put forward.

27. Whilst the basis of the Council's reason for refusal is not fully explained, my overall conclusion on this issue is that the proposed development makes inadequate provision for outdoor play and recreation space and conflicts with UDP Policy SR5 in this respect.

### **Safe Route to School**

28. I turn now to a number of other matters raised by local residents, the first of which is whether or not provision is made for a "safe route to school". The Council says that Sychdyn is the closest primary school and that travel to that school (along New Brighton Road) would be along a route considered "hazardous" in its assessment of potential "safe routes to school". Local residents say it is a busy road at times, lacks footways and lighting, and is dangerous for pedestrians.
29. The Appellant maintains that Mynydd Isa is the closest primary school to the site and that it is the route to that school that should be taken into account, particularly as that route is through a 30 miles per hour area with streetlights and footways. The assessment is complicated by the fact that the infant school at Mynydd Isa is further away from the appeal site, and it is this school that leads the Council to argue that Sychdyn primary school is the closest.
30. I notice that the Council's supplementary planning guidance (SPGN 23) uses the term "*nearest suitable school*", and there are arguments in favour of adopting both of the alternatives as the preferred option. There is also, of course, the element of parental choice of school, and it is entirely possible that some of the children of future residents of the proposed new development would attend one school and some the other. Thus, the question of whether the route to Sychdyn school is safe or not is a matter that is relevant in any case.
31. Notwithstanding this conclusion, the Council explains that it considers it would be possible to negotiate a fairly simple scheme or measures to overcome its concerns such that it was not considered to amount to a reason for refusing the application. However, no information has been provided to indicate what that scheme or measures might be. The Appellant says the Council originally had in mind possible safety improvements to New Brighton Road but now does not seem to be pursuing that option.
32. I agree with the Council that, if there is a relatively simple solution, this matter is not one that warrants refusal of the application. However, I do not know whether the solution could be achieved by means of a suitable planning condition or would require a legal undertaking. The set of planning conditions suggested by the Council does not address this matter, and it has not been satisfactorily addressed in any other way. Thus, whilst not a reason for refusal in its own right, I consider it supports the conclusion I have reached on the previous issue.

### **Drainage**

33. Local residents have raised concerns about the drainage of the site. The Appellant indicates that a sustainable drainage scheme (SUDS) is proposed to deal with surface water drainage, and that scheme would include a pond near the western corner of the site, next to the Cae Isa development. That is the lowest part of the site and is known to become waterlogged at times. Indeed, when I visited the site, that part of the field was covered by standing water. Some residents have said the Appellant intends to

discharge water to another pond nearby, which that landowner is unlikely to permit. In the light of these various uncertainties, concern has been expressed that a satisfactory scheme would not be achievable and so there would be harmful effects on adjoining properties.

34. It is Welsh Government policy that all new development above a certain size is served by sustainable drainage arrangements, and since January 2019 the SUDS proposals for all qualifying developments have been subject to requirements for approval by the SUDS Approval Body (SAB) before construction work begins. Thus, SUDS proposals are no longer part of planning permission procedures. SUDS approval would be required for this development.
35. The Welsh Government advises developers that applications for SUDS approval ought to be made at the same time as the planning application, as the maximum benefits and opportunities can only be achieved if the SUDS scheme is an integral part of the design of the overall development rather than a retrofit. However, in this case, the Appellant has chosen not to do that and would intend to pursue the necessary SUDS approval at a later date. Whilst this involves an element of risk that it may not be possible to gain approval for a SUDS scheme which meets the standards required within the constraints of the current housing scheme design, it is an approach that is permitted. Should SUDS approval not be gained, it would not be possible to implement any corresponding planning permission.
36. Clearly, on a greenfield site such as this it is entirely feasible to provide a satisfactory SUDS scheme so that the effect of the development on surface water drainage is entirely neutral. However, in the absence of details of the scheme, I cannot judge whether or not the intended SUDS scheme would meet the required Welsh Government standards, and it is outside the scope of this appeal to consider the matter any further.

### ***Settlement Boundary and Green Barrier***

37. The third matter raised by local residents is the relationship of the site to the settlement boundary and the designated green barrier. It is explained in the Council's committee report that most of the site lies outside the settlement boundary and that it is adjacent to the edge of the green barrier. The Council considers the proposed development would be a relatively small urban extension, rounding off the existing settlement form, and that it would not conflict with the purpose of the green barrier between New Brighton and Sychdyn. Nothing has been raised that leads me to disagree with that assessment.
38. Nevertheless, the fact that most of the site is outside the settlement boundary means there is a conflict with UDP Policy GEN3, which says that development proposals outside settlement boundaries will not be permitted, except under certain circumstances; and none of those exceptions apply to this proposal.
39. The Council has addressed this policy conflict by reviewing the principle of the development in terms of its sustainability on the edge of a category B settlement in the adopted UDP and in a Tier 3 sustainable settlement in the emerging Local Development Plan. On this basis it has concluded that the principle of residential development of the site is acceptable.
40. The appeal site is also being proposed as a candidate site for housing in the emerging LDP. However, it has not yet been subject to examination by a Planning Inspector, and so that possible designation carries little weight at present.

41. My conclusions on this matter are that the proposal would be contrary to UDP Policy GEN3 on account of its location partly outside the settlement boundary, but that this should carry only limited weight on account of its (otherwise) sustainable location on the edge of the settlement of New Brighton.

### ***Emerging Local Development Plan***

42. Finally, I turn to the question of prematurity with regard to the emerging Local Development Plan. It has been submitted that it would be premature to grant permission for the proposed development whilst the emerging Flintshire Local Development Plan is still subject to examination procedures. The appeal site is under consideration as a candidate housing development site in the draft Plan.

43. Prematurity can be an important consideration. However, Welsh Government Guidance (the Development Plans Manual) advises that: *"Refusing planning permission on grounds of prematurity will not usually be justified except in cases where a development proposal goes to the heart of a plan and is individually or cumulatively so significant, that to grant planning permission would be to predetermine decisions about the scale, location or phasing of new development which ought to be properly taken in the LDP context"*.

44. In this case, the proposal for 92 homes represents less than 5% of the allocations for new housing in the emerging Plan. As such, it is not considered to go to the heart of the Plan, and it would not be premature to grant planning permission.

### ***Overall Conclusion***

45. In addition to the issues above, a number of other matters have also been raised by local residents and their representatives, and I have taken these into account so far as they are material.

46. I have concluded above that the proposed development would make inadequate provision for outdoor play and recreation space, contrary to the requirements of UDP Policy SR5, and that the need to provide a "safe route to school" in respect of Sychdyn school has not been addressed in accordance with the Council's supplementary planning guidance, SPGN 23. The development would also be contrary to UDP Policy GEN3 as most of the site is outside the settlement boundary. In all other respects I consider the proposal would be in accord with development plan policy, and my overall conclusion involves balancing the benefits and conflicts.

47. Whilst the provision of much needed housing, including affordable dwellings, in a location that is sustainable in many respects would provide useful benefits, I consider the shortcoming in the provision of outdoor play and recreation space to be a serious matter that outweighs the benefits of the scheme. This shortcoming is also reinforced by the failure to adequately address the need for a "safe route to school".

48. These are matters that it should be possible to resolve quite readily, but no mechanism for doing so has been put forward. I have considered whether they could be resolved by the use of suitable planning conditions but am not satisfied that would be possible. Certainly, the draft conditions suggested by the Council would not provide any help. In addition, they are not matters that are covered by the Appellant's Section 106 Unilateral Undertaking.

49. Overall, and for the reasons given above, I conclude that the appeal should be dismissed.

50. In reaching my decision, I have taken into account the requirements of sections 3 and 5 of the Well Being of Future Generations (Wales) Act 2015. I consider that this decision is in accordance with the Act's sustainable development principle through its contribution towards the Welsh Ministers' well-being objectives of promoting good health and well-being for everyone and building healthier communities and better environments.

*Clive Nield*

Inspector