



Appeal Decision

Inquiry held on 29 May–4 June 2024

Site visit made on 4 June 2024

by Siobhan Watson BA(Hons), MCD, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 August 2024

Appeal Ref: APP/W4325/W/23/3329105

Birkenhead School Sports Ground, Noctorum Road, Noctorum, Wirral, CH43 9UQ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant outline planning permission.
 - The appeal is made by Birkenhead School against the decision of Wirral Metropolitan Borough Council.
 - The application Ref is OUT/23/00478.
 - The development proposed is the demolition of the existing pavilion and erection of up to 33 dwellings and associated infrastructure. All matters are reserved except for access.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application was made in outline with all matters reserved except for access. A layout plan and a landscaping plan are before me for indicative purposes only.
3. Two reasons for refusal were withdrawn before the Inquiry opened. These were the first reason, which related to a Local Green Space designation in the emerging Local Plan (eLP) and the third reason which related to ecology. The first reason was withdrawn following an appeal decision at Grange Road¹. However, although the Council formally withdrew the first reason for refusal, the draft Local Green Space designation was discussed at the Inquiry. The third reason was withdrawn after further information addressed the Council's concerns.

Main Issues

4. The main issues are (i) whether the playing field to be lost by the proposed development would be replaced by equivalent or better provision in terms of quantity and quality and (ii) whether the planning obligations would be necessary to make the development acceptable in planning terms; directly related to the development and fairly and reasonably related in scale and kind to the development.

¹ APP/W4325/W/23/3318758

Reasons

Playing field replacement

5. The site is identified as a Sports Ground and a Primarily Residential Area in the Wirral Unitary Development Plan (UDP). UDP Policy HS4 permits housing within Primarily Residential Areas subject to various design principles. There is no claim from the Council that the proposal is contrary to Policy HS4.
6. UDP Policy GR1 The Protection of Urban Greenspace is noted on the decision notice. Sites designated as Urban Greenspace are listed in UDP Policy GR2 but this site is not listed. Therefore, it is not an Urban Greenspace.
7. UDP Policy RE6 – Sports Grounds for Protection from Development lists Birkenhead School Playing Fields, Noctorum (Noctorum Field) as falling within the urban area and to be protected from development, subject to criteria within Policy RE5. Policy RE5 is not a saved policy, therefore, I will have regard to paragraph 103 of the National Planning Policy Framework (the Framework) which indicates that existing open space, sports and recreational buildings and land, including playing fields should not be built on unless one of 3 criteria are satisfied. The appellant maintains that the proposal satisfies criterion(b) which is “the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location”.
8. The *Mapledurham*² case establishes that both quantity and quality are relevant in the overall judgement that the new provision is equal or better. One can be offset against the other in appropriate cases.
9. Sport England’s Playing Fields Policy and Guidance (PFPG), Exception 4 advises that the replacement area of playing field should be “of equivalent or better quality and of equivalent or greater quantity”. However, this is a slightly different wording to that of para 103(b). The appellant believes the Exception 4 wording is more onerous. For the avoidance of doubt, in this respect my focus is on the wording of the Framework as clarified by *Mapledurham*.
10. That said, the PFPG is the published guidance of Sport England, a statutory consultee. It is highly specific to playing fields and guides the work of Sport England and other related professionals. Therefore, the document, as a whole, attracts great weight.
11. Sport England, the statutory consultee, has objected to the proposal. In accordance with *Shadwell Estates Ltd*³ I must give this objection great or considerable weight unless there are cogent and compelling reasons not to.
12. Noctorum Field was previously used by Birkenhead School for rugby and cricket but the school now uses more conveniently located sports facilities. The amount of playing field to be lost at Noctorum Field is agreed between the parties to be 1.64ha. It accommodated one junior cricket square and one undersized rugby union pitch on the cricket outfield. It is naturally drained. There is a pavilion and a small car park. There is no floodlighting.
13. The proposed mitigation would be across 3 sites: Prenton RUFC, Old Parkonians RUFC; and McAllester Fields.

² R(Brommell) v Reading Borough Council [2018] EWHC3529 (Admin)

³ *Shadwell Estates Ltd v Breckland DC* WL 127846 (2013) paragraph 72

14. At Prenton, the appellant maintains that 1.68ha of playing field would be created. This area would deliver a new full-size pitch and training grids with multi-use capacity. The appellant's position is that the new pitch could sustain 3.5 Match Equivalent Sessions (MES). MES is a unit of measurement relating to capacity and usage. There would also be 6 new floodlights and community use would be secured in accordance with a letter submitted as part of the approved planning application⁴ for the works. Wirral Borough Council Playing Pitch and Outdoor Sport Strategy and Action Plan, July 2021 (PPOSS) contains a recommended action to support the Club's aspiration to create a floodlit senior pitch in place of its current training area. The mitigation supports this objective.
15. At Old Parkonians drainage would be installed to Pitch One. Currently the pitch gets waterlogged and matches are frequently cancelled. The drainage system would increase the capacity of the pitch, according to the appellant, from 2 MES to 3 MES. The PPOSS contains a recommended action to improve the drainage and pitch quality to eradicate overplay. The mitigation supports this objective.
16. At McAllester Fields a new cricket square has been created to replace the cricket activity at Noctorum Field. The retention of the cricket square would be secured by a planning obligation.
17. Overall, according to the appellant, the capacity across the mitigation sites would be increased by 4.5 MES. They say that the current MES at Noctorum is 0 because it has no community use. The Council disputes the MES figures provided by the appellant and claims that only 1 MES would be created across both sites, which the Council says is what would be provided if the appeal site were brought back into use. The parties were calculating MES differently. Nevertheless, the MES metric does not appear in the Framework, the PFPG or Sport England's Equivalent Quality Assessment of Natural Turf Playing Fields Briefing Note 2015 (EQA). It is not a metric that is generally used in decision making and there are other uses of playing fields than matches. The figures presented to me are therefore helpful but not critical to my decision. Nevertheless, I have no doubt that the mitigation would clearly increase both rugby club's cumulative capacity for usage.
18. At Prenton, part of the claimed proposed replacement playing field is what the appellant describes as being an unusable area. This area is referenced in the PPOSS as being a training area and the appellant's appeal documents have referred to it as both a training area and junior pitch. There are aerial images of it marked out as late as 2022 and of rugby union posts in 2007. It is maintained and distinguished from the surrounding scrubland.
19. The appellant's written evidence⁵ is that this area is used in summer evenings for rugby; for mini football on summer Saturday mornings; and for mini rugby on summer Sunday mornings. I appreciate that it cannot be used during the rugby season because of poor drainage but this does not mean that it cannot be used in the summer. Therefore, this area falls within the definition of "playing field" in the Town and Country Planning (Development Management Procedure)(England) Order 2015.

⁴ APP/23/00601

⁵ CD2 LPA 06

20. In putting it to me that this training area can be included as part of the quantity of the replacement, the appellant has pointed out that Sport England did not object to a loss of playing field at Manchester College when the mitigation was on an existing playing field in Wythenshawe Park. However, the circumstances of the Manchester case were very different to the appeal before me. Amongst other factors, the playing field in Wythenshawe Park had been disused for around 9 years and an agronomy report showed that the land was incapable of being used as playing field without significant works being undertaken. In Prenton, the evidence is that the training area can be used in the summer and that it has been used in the recent past. I find that improving it to allow it to be used throughout the year would be a qualitative improvement rather than a quantitative improvement.
21. The training area is some 0.62ha and as I do not class it as replacement provision, this means that the quantitative replacement is some 1.06ha and not 1.68ha as put forward by the appellant. This is some 0.58ha smaller than the 1.64ha of playing field that would be lost. This would represent a significant shortfall in terms of quantity.
22. I will now turn to the quality of the replacement playing field at Prenton and the improved playing fields at Prenton and Old Parkonians. I accept that all the new and improved playing field land would be level, firm, well-drained field which exceeds Sport England's standards for the quality of playing pitches. The area at Prenton would also be floodlit, extending the hours the field could be used.
23. The drainage system across the mitigation sites would be of a pipe and slit type. Providing that the system is properly maintained, it would be of equivalent quality to the field to be lost. However, it would need annual top dressing with the correct specification of sand; secondary drainage maintenance likely to include replacement at least every 10 years; and primary drainage replacement about every 25 years. I heard that this would be costly for the rugby clubs and there is no business plan to show how the maintenance would be afforded in the future. Furthermore, I heard that Old Parkonians had a drainage system installed in 1994 but this has since failed and has not been replaced.
24. To secure maintenance, the submitted unilateral undertaking (and Condition 9 of the Prenton planning permission) requires approval and implementation of a maintenance/management scheme for the drainage works. I heard that a maintenance/management condition is considered acceptable by Sport England in appropriate cases and that such a condition was used in the Beaconsfield appeal decision⁶. However, the circumstances of that appeal were different to the one before me and I must consider the appropriateness of such a condition or obligation for this specific appeal case.
25. Of course, such a condition/obligation could be enforced by the Council if the clubs did not keep up the maintenance. Nevertheless, enforcement relies on the intervention of the Council using discretionary action and it can be a lengthy process. In addition, the Council indicated at the Inquiry that there could be circumstances where enforcement action might not occur even if there were a breach. In particular, the Council's witness said it may not be expedient to enforce if a club had financial difficulties.

⁶ APP/N0410/W/23/3326343

26. In comparison, Noctorum Field is free draining. It does not require an artificial drainage system and has operated for about 100 years. Although I note the appellant's case that a small part of Noctorum Field displayed signs of waterlogging, the Council's agronomist disagreed. Even if the appellant's agronomist was correct that there was evidence of waterlogging, I heard that this could be explained by a blocked culvert mentioned in the appellant's Flood Risk Assessment. Such a blockage could be removed. On balance, I consider it unlikely that there is any significant waterlogging caused by the soil or geology.
27. Such a breach of planning control could not arise in the case of Noctorum Field as there is no drainage system to maintain. In essence, a natural drainage system is without the risk of failure by poor maintenance or the need for enforcement proceedings. Moreover, paragraph 59 of the PFIG indicates that a new area of playing field should allow the same level of competitive play to take place without requiring any additional maintenance input. The scheme would be contrary to this guidance as the mitigation requires more maintenance than the appeal site.
28. I note the appellant's point that the planning system would cease to operate properly if conditions and planning obligations were not used because of a fear of a breach. However, I am not simply considering whether to grant planning permission for a playing field. I am comparing quality and Noctorum Field does not have the same risks in respect of drainage as the mitigation scheme.
29. Noctorum Field, of course, requires some maintenance, such as cutting grass, but this is also required at the mitigation sites. Noctorum Field only requires limited, non-specialist, maintenance, which I heard could be undertaken by a community club. I appreciate that there is no legal obligation to require maintenance at Noctorum Field. However, as there is a deficit of playing fields in Wirral there is no obvious reason before me why it could not be brought back into use and maintained by a user as it was for generations before.
30. In addition to the good quality natural drainage, Noctorum Field also contains a pavilion which would not be replaced. I could see at my visit, that although the pavilion at Noctorum is somewhat damaged by fire, it provides changing rooms, toilets and a social area. Whilst there is no specific policy requirement to replace the pavilion, paragraphs 58 and 59 of the PFIG indicate that ancillary facilities contribute to the quality of a playing field and I heard at the Inquiry that the pavilion adds to the user experience. I understand that Prenton aspires to providing a community hub which would include improved changing rooms. However, this is not part of the mitigation and the appellant's mitigation proof of evidence admits that the current facilities at Prenton are in need of improvement.
31. The cricket square has already been provided at McAllester Field but it is on an existing playing field. Paragraph 69 of the PFIG says the "intensification or increasing the use of existing areas of playing field on the application site or off site, including marking out playing pitches on areas of a playing field not currently marked out for playing pitches does not meet the requirements of this Exception 4. This is because it does not provide a new area of playing field (quantity) and may also cause deterioration of existing playing fields."
32. The cricket square at McAllester Field has a better orientation than the one at Noctorum Field. It is also larger so that it can accommodate under-17 cricket. However, I heard at the Inquiry that the orientation at Noctorum Field has not

- interfered with play and that there is no reason why it could not be reorientated.
33. The appellant's unilateral undertaking (UU) requires that the cricket square at McAllester is retained for the purpose of holding cricket games and other related uses. There is no covenant to retain a cricket square at Noctorum Field. Nevertheless, as the cricket square is an additional use of an existing field, the qualitative benefits of retaining the square are negligible.
34. The PPOSS states that there is community use at Prenton and Old Parkonians, whereas Noctorum Field is not listed as having a community use. Community use through the hire of facilities is also available at McAllester Fields. Both rugby clubs want to expand, e.g., by reintroducing women's rugby, increasing junior play and in the case of Prenton, allowing junior football to take place. Prenton has ambitions to establish itself as a community hub and plans to extend its clubhouse. The planning permission for the pitch improvements also contains a condition requiring multi-use and community use. It is agreed between the parties that community use would be better in the mitigation package than there currently is at the appeal site. There is no community use at the appeal site and there is nothing to secure such a use in the future. However, this does not mean that a community use could never occur.
35. I acknowledge that Noctorum Field has not been used by the school in recent years. However, paragraph 103 of the Framework does not differentiate between used and unused playing fields. Furthermore, there is no evidence that the site could not be used in the future as a playing field. In particular, the Football Foundation commented in response to the planning application that it could potentially meet a need for football and that it does not perceive there to be any barriers preventing community clubs from using the site. I understand that Noctorum Field is large enough to host 3 youth football pitches, for which there is great unmet demand in the area.
36. I note the appellant's comments that the PPOSS cites an option for the appeal site as "redevelop site and use developer contributions to appropriate (sic) mitigate the provision in line with NPPF and Sport England's Playing Field Policy." However, this option is forth in priority. The others are 1) explore feasibility to bring back into use, 2) retain/allocate site as strategic reserve, and 3) use as open space to meet local needs. There is no substantive evidence that the first option has been pursued.

Summary of quantity v quality

37. The replacement field would be significantly less in quantity than what would be lost. The artificial drainage of the replacement field would have a maintenance burden that Noctorum Field does not have. There would also be a loss of ancillary facilities in the form of the pavilion at Noctorum.
38. The additional qualitative improvements must also be weighed in the balance. The drainage provided on the existing area of playing field at Prenton and on Pitch One at Old Parkonians are qualitative improvements for each club. The floodlighting at Prenton would also be a qualitative improvement. The cricket square at McAllester Fields is a negligible improvement on quality over what already existed there.

39. There is community use at the receptor sites but there is evidence that Noctorum Field could be used for community clubs.
40. Overall, and taking into account all of the above, I conclude that the playing field to be lost by the proposed development would not be replaced by equivalent or better provision in terms of quantity and quality and the proposal is contrary to UDP Policy RE6 which seeks to retain the site as a playing field and paragraph 103 of the Framework. I give this harm very substantial weight.

Planning Obligations

41. The fourth reason for refusal refers to a lack of planning obligations in respect of affordable housing, off site ecological mitigation, community infrastructure (e.g. health and education contributions), open space and sporting mitigation. The Council has not pursued contributions relating to health and education at the appeal. A unilateral undertaking (UU) has been submitted and the appellant has made the requested contributions but there is dispute between the Council and the appellant over them. As I am dismissing the appeal, I will only deal with the main areas of dispute.

Housing

42. The appellant proposes 10% affordable housing. UDP Policies HSG2 and HS6 require the provision of affordable housing. No figure is set in either policy. The policies indicate that the mix and amount will be secured by negotiation. Policy WS3.3 of the eLP indicates that the appeal site should require 10% and this figure has taken account of viability. This is based on the latest Strategic Housing Market Assessment. The UDP secures the requirement for the affordable housing and although it requires 20% it would be unreasonable to require that level when having regard to the most up to date information. Therefore, I consider that 10% provision of affordable homes is reasonable and necessary to make the development acceptable in planning terms; directly related to the development and fairly and reasonably related in scale and kind to the development.
43. The UU includes an obligation to submit and agree an affordable housing scheme. The submitted scheme would include, amongst other details, the numbers, size, type and location. The Council would prefer more specific details to be set out in the obligation, such as the tenure mix, in order to avoid a costly dispute at a later date. Indeed, it is good practice to set out such matters in order to avoid disputes. Nevertheless, the obligation is enforceable as the Council could refuse the submitted scheme, therefore, it crosses the threshold of acceptability.

Sports contribution

44. The UU includes an obligation to pay a sports contribution. There is no UDP Policy requiring sports contributions. The contribution required by the Council derives from eLP Policy WS5.3 Outdoor Sports Provision. The Planning Practice Guidance says that policies for planning obligations should be set out in plans and examined in public. I heard that there are objections to this draft policy. Therefore, I give WS5.3 limited weight. As there is no adopted or uncontested emerging policy, I conclude that the sports contribution is neither reasonable nor necessary to make the development acceptable in planning terms and I have not taken it into account.

Open Space

45. The UU includes an obligation to pay a contribution towards open space. The UDP policies the Council relies on are GR6 Greenspace within New Family Housing Development Proposals and RE11 Criteria for Children's Play Facilities. Policy GR6 requires that 60 square metres of open space for every new dwelling but it does not apply to proposals of 35 dwellings or less. Therefore, it does not apply to this proposal for up to 33 dwellings. Policy RE11 relates to the design of the open space and is not related to contributions.
46. Policy WS5.2 of the eLP indicates that new residential development will be required to contribute to the improvement and enhancement of open space, which may be secured through a mix of on-site provision and/or financial contributions. Where it is not required or achieved on site, an equivalent financial contribution will be required. Nevertheless, there are objections to the draft policy and therefore I give it limited weight. The Council has also referred to the PPOSS but this is not a policy requiring open space contributions.
47. I conclude that the Open Space Contribution is not supported by an adopted policy that has been subject to public consultation. Therefore, it has not been demonstrated that it is reasonable or necessary. I have not taken it into account in determining the appeal.
48. An open space management plan would be submitted as a requirement of a planning obligation but the details of what it would contain have not been specified. The Council would prefer the parameters of what would be submitted to be set out in the obligation in order to avoid disputes at a later date. However, as the Council could refuse to approve a management plan if it were not to its satisfaction, the obligation is acceptable.

Habitat Regulation

49. National and internationally protected sites are accessible from the site. These sites are protected by the Habitat Regulations. Therefore, recreational pressure from residential development must be mitigated. Wirral Council has an adopted mitigation approach set out in *Information and Guidance Note: Interim Approach to Avoid and Mitigate Recreation Pressure in Wirral, May 2022*. The contribution of £280.26 per dwelling is set out in this document. This is to manage and mitigate the potential impact to protected habitats and species which are protected by law. This is necessary to make the development acceptable in planning terms; directly related to the development and fairly and reasonably related in scale and kind to the development.

Biodiversity Net Gain

50. Schedule 7A (Biodiversity Gain in England) of the Town and County Planning Act 1990 has introduced a mandatory 10% net gain. However, the mandatory requirement does not apply in this case because the planning application was submitted before 12 February 2024. It would be excessive for the council to impose an effective statutory requirement when that requirement does not apply.
51. Nevertheless, just because it is not mandatory does not mean that the Council cannot require a net gain. The Framework expects development to provide a biodiversity net gain. That said, the biodiversity plan, implementation and

management could be dealt with by a condition as there is no suggestion that it needs to be provided off-site.

52. This would mean that no monitoring fee can be required in relation to a 30-year maintenance period but the absence of a monitoring fee would not prevent the Council undertaking its normal duties in respect of compliance with conditions.
53. The biodiversity net gain obligation is neither reasonable nor necessary and I have not taken it into account.

Other Matters

54. The appellant has put forward benefits of the scheme, which are in addition to the improvements at the receptor sites. These include that the sale of the appeal site would provide funds for Birkenhead School to deliver its new Sports Hall which would improve the wellbeing of its pupils and facilitate additional community use. However, there is no mechanism before me to secure this and therefore, I give this factor little weight.
55. The proposed development would have some economic benefits in respect of its construction but this would be temporary. I give this some weight. Also, as an economic benefit, the appellant says that the sport investment would assist the sustainability, quality, and affordability of the school, adding to the attraction of the area. However, there is little in the way of substantiated evidence to quantify these benefits so I give them minimal weight, especially as the provision of the sports hall is not part of the mitigation.
56. The appellant also says that if there were residual funds remaining after delivering the planning permission and the sports hall, these residual funds would go towards the school's bursary scheme. There is nothing before me to secure that so I give this factor minimal weight.
57. The UU makes several provisions. The 10% affordable housing provision would be a benefit of the scheme. I give significant weight to the provision of affordable housing. The remainder of the provisions in the UU pertain to make the development acceptable and are neutral considerations in the planning balance.
58. On 30 July the Government issued a Written Ministerial Statement, *Building the Homes we Need* and draft revisions to the Framework. The draft revisions propose that the standard method for calculating housing need is changed. The change would result in Wirral requiring very significantly more housing than required under the current standard method. The effect would be that should the eLP be adopted, it would have to immediately begin preparing a new local plan to address the shortfall. However, the draft framework is subject to current consultation and is not policy. Nevertheless, the current Framework already seeks to boost the supply of housing. Therefore, I give the provision of housing in a sustainable location significant weight.
59. There is no dispute between the main parties that there would be no harm to the character and appearance of the area, highway safety, waste disposal, drainage and flood risk, or biodiversity. However, lack of harm is a neutral consideration.
60. The appeal site is subject to a draft Local Green Space designation in the eLP.

As this policy is subject to objection, I give it only limited weight against the proposal.

61. The appellant has drawn my attention to paragraph 97(b) of the Framework which advises that to provide the social, recreational and cultural facilities and services the community needs, planning decisions should take into account and support the delivery of local strategies to improve health, social and cultural well-being for all sections of the community. The proposals would bring such benefits to the users of the receptor sites. However, this would be at the expense of the permanent loss of Noctorum Field which would never again be available to deliver the objectives of paragraph 97(b).

Planning Balance and Conclusion

62. Whilst there are some benefits to the scheme these do not outweigh the harm I have found in relation to playing field provision in Wirral. The proposal therefore conflicts with the development plan as a whole and does not represent sustainable development. Therefore, I dismiss the appeal.

Siobhan Watson

INSPECTOR

APPEARANCES

APPELLANT

Ian Ponter of Counsel called:
Dr Richard Earl HND, MSc, PhD, CEng, FIAgrE
Neil Allen BA (Hons)
Paul Shuker BSc, DipTP, MRTPI

Roundtable Discussion

Mr Hyder, Solicitor, Ward Haddiway

COUNCIL

Sioned Davies of Counsel called:
Martin Klabou, BSc (Hons), MA, Senior Planning Officer, Wirral Borough Council
Steven Wright, BSc (Hons), Principal Consultant and Director, Knight Kavanagh & Page Ltd.

Roundtable Discussion

Mrs Roberts, Solicitor on behalf of Wirral Borough Council

SPORT ENGLAND

Hugh Richards of Counsel called:
Christopher Carroll, BA (Hons) MA MRTPI
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INTERESTED PARTIES

Brian Elkerton, Prenton Rugby Club
Tamsin Collister, Local Resident
Brian Roche, Local Resident
Jane Pigot, Local Resident
Linda Sampson Jones, Local Resident
Sheila Evans, Local Resident
John Mok, Local Resident
Gary Reynolds, Birkenhead Park Rugby Club and Member of the Public.