

LAND OFF PACKSADDLE WAY, FROME

LPA REFERENCE: 2023/0864/RUL

APPEAL REFERENCE: APP/E3335/W/25/3363055

APPEAL BY LIVE WEST

CLOSING SUBMISSIONS OF SOMERSET COUNCIL

1. The key issue from the Council's perspective is whether the proposed development offers suitable alternative open space that is of equal or greater benefit as compared to the Site, such that it satisfies the requirements of national and/or local policy. This is ultimately a planning judgment which the Council has demonstrated, quite simply, has not been met here.
2. Mr Dunlop accepted that the Site meets the definition of open space within the NPPF due to the use of the permissive path alone. Ms Foxford also confirmed that there is visual amenity afforded by the entire Site; like any other public right of way or permissive path, what is seen as one walks along the paths in the Site is a recreational resource.
3. The Council's position is straightforward: both DP16 and para.104 apply and have been breached, resulting in substantial harm which significantly and demonstrably outweighs the benefits of granting permission. There is active and passive use of the entire site which amounts to public value irrespective of whether there is an ongoing right to use it. Both in this context – and even on the Appellant's position that the land beyond the path should be excluded from consideration - the new provision is worse quantitatively and qualitatively.

Policy DP16

4. The Appellant's position regarding the application of DP16 of the Local Plan and para. 104 of the NPPF ('para. 104') has been, respectfully, hard to follow. Ultimately Mr Dunlop accepted in cross-examination that both DP16 and para 104 have the same purpose of protecting open space, and that the definition of open space under DP16 would be the same as the NPPF. Yet an overwhelming amount of Inquiry time has been spent on what is now a self-professed academic interrogation of whether DP16 does apply.
5. The Appellant's position appears to be that open space is only protected by the development plan where either:
 - a. The Site is on the policies map as approved by the Local Plan at the time of adoption; or
 - b. It is 'new'.
6. This interpretation of DP16 is not derived from any of the language within the policy itself. Rather, this solely relies on reading paragraph 6.149 of the supporting text into the policy.
7. Nonsensically, this would lead to DP16 being inconsistent with the NPPF since open space that would be protected by para.104 would not be protected under the development plan. On the one hand Mr Dunlop agreed that when the policy wording is read by a reasonable reader they would not recognise that those qualifications found at para.6.149 were relevant for the engagement of DP16. Yet he maintained that supporting text was the reason why DP16 could not apply. Indeed, he accepted that if para 6.149 were deleted, DP16(1) would be engaged and would need to be satisfied.
8. The Appellant's approach is wrong in law. Supporting text can be important context but it simply cannot introduce requirements above and beyond the text of the policy. This is well-established in ***R (Cherkley Campaign Limited) v Mole Valley District Council*** [2014] EWCA Civ 567:

[16] Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct

*focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. **That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the polices will be implemented.***

(emphasis added)

9. Read properly in accordance with legal principles of interpretation, Policy DP16 complies with the NPPF and should be afforded full weight.
10. Even if the Appellant's interpretation is accepted, all that the Policies Map does is reflect the open spaces that the Council were *aware* of at the time as opposed to being a conclusive log of all open spaces that existed and were capable of falling under DP16. The fact that the Council knew the Site existed as a piece of land when the map was created does not preclude land that was not included later being properly defined as open space for the purposes of the policy. Indeed, the paragraph specifically envisages the fact that the Council's position as at the Local Plan adoption is not conclusive. One's awareness that a site is open space is intrinsically linked to having comprehensive knowledge of its use. As Mr Jones explains, knowledge has progressed due to the evidence compiled through the ACV application process; there is no reason why this cannot be taken into account now in reaching a judgment on whether land should be protected as open space by DP16.
11. The Appellant's rigid approach to DP16 also fails to acknowledge that judgments about whether a site is open space can change over time and the policies map is not intended to preclude this. Indeed, the Council did not regard the Site as being open space when they determined the application, let alone when the policies

map was being generated. This is also relevant to the fact that the officer recommendation for approval in this matter is of little relevance, given that Mr Dunlop accepts that officers did so on a flawed premise that the Site does not constitute open space as far as national policy is concerned. It is only through this appeal that this became apparent to the Council. Indeed, the Appellant has seemingly been in the same position given they seemingly denied that the Site was open space, certainly as far as national policy is concerned, until this inquiry.

12. Given that Mr Dunlop accepted in cross-examination that paragraph 104 of the NPPF is engaged and needs to be satisfied, it begged the following question: what is the relevance of the protracted debate and circumstances underpinning the adoption of DP16 to the appeal? Mr Dunlop fairly accepted that the debate actually makes no difference to the outcome of the appeal and was therefore 'academic'.

13. In re-examination, the suggestion was made to Mr Dunlop that this issue was not academic as it speaks to the s.38(6)¹ statutory test. It is obviously correct that determining whether there is compliance with the development plan requires that the policies in the development plan be interpreted correctly. But in practical terms, even if the Appellant's interpretation to DP16 is preferred (which we say would be a legally incorrect approach), ultimately Sir you are still required to determine this appeal having regard to paragraph 11(d)(ii) of the NPPF, which requires you to judge the proposal against the policies in the Framework as a whole. Thus, this requires para 104 to be applied. Put another way, irrespective of this debate concerning DP16, you still need to apply the test within para 104. In this context, it was unclear (and certainly Mr Dunlop could not assist) as to what practical difference this debate had.

The conflict with DP16 and para. 104

14. Turning to the actual judgment of whether the provision is equivalent or better than the existing open space, the Appellant claims that the weight given to the Site's value as open space should be reduced because there is no public right of

¹ Planning and Compulsory Purchase Act 2004

access beyond the permissive path. Whilst the Council does not dispute that there is no right to access the land beyond the permissive path, this is a fundamentally incorrect approach.

15. The Appellant's own rationale for why the Site amounts to open space takes into account the views from the path over the land i.e. its capacity to afford passive recreation. Thus, the Appellant itself has accepted that land which one has no right to be on can provide public value in the context of open space. This is consistent with the recognition in para. 6.141 of the Local Plan that open space need not always be public space. Indeed, there are numerous examples of recreational areas such as sports fields which are privately owned and thus do not confer a public right of access yet still amount to open space because of their value to the public. Likewise, there is no qualification regarding a right of access in the NPPF.
16. Mr Dunlop maintained that the action previously taken by the Council to prevent public rights accruing is relevant. However, he could not clarify what part of the decision-making process this is relevant to. Thus, insofar as it may be inferred from the rest of the Appellant's case that the suggestion is that public value of the open space is reduced because of those intentions and actions, this is not supported by the NPPF. To suggest otherwise would undoubtedly frustrate the purpose of protecting open space since the subjective intentions of a landowner or their misunderstanding of the true value of land as open space could override years of actual public value.
17. In any case, as the Council has in actual fact never attempted to limit the use of the Site and members of the public have used the Site without restriction. Thus it is entirely arbitrary to discard the value that the use has given to the public simply because a landowner did not wish for the public to have unfettered rights to their land.
18. The Appellant argues that the active recreation value gained from use of the land beyond the permissive paths should not be taken into account because it considers that it amounts to 'unlawful trespass'. This is not accepted as a matter of principle nor on the facts.

19. First, the Appellant has not pointed to anything to substantiate its claim that recognising value from unlawful use would go against some generic public policy. Second, even if this were correct in principle, the application here is incorrect. Although trespass is an *element* of various criminal offences, the bare fact of being on private land is not in and of itself unlawful. It is worth remembering that the Council has not prohibited entry, neither is there any evidence that it has told members of the public to leave the land, nor taken action to pursue – let alone be granted – an injunction restraining the use of any land off the paths.
20. The Rule 6 party has expressed its views on the likelihood of there being a lawful recreational use of the Site through the Council having granted a bare licence and/or immunity having accrued for recreational use of the Site. This is not the forum in which to decide whether there has been any unlawful activity, but it is a matter of fact that in the absence of a clear Court ruling on civil and/or criminal liability, the Appellant’s claim that the use is unlawful remains a mere assertion and there are arguable cases to the contrary. It follows that the premise on which the Appellant argues that the public value of the active recreational use beyond the path is irrelevant is fundamentally flawed.
21. It is agreed that the relevant point for determining the existing status of the land as open space and the application of policy to the Site is the situation now. Thus, it must be accepted that the Site *currently* provides public value via active and passive recreation across the entirety. The Council is not restricting the use and the fact that there is no public right for that use does not alter this fact.
22. The Inquiry has heard from numerous residents of the extensive physical and mental health benefits the Site as a whole has provided over 50+ years. The use has been undertaken by residents of all ages, alone and with their families. The number of residents who attended to watch the Inquiry and organised and contributed to the fundraising of People for Packsdale is indicative of the extremely high value that the Site affords the public.
23. To suggest that any value of roaming off the permissive path must be ignored because the landowner could theoretically take action to prevent such access

goes against the principle established in *Renew Land Developments Ltd v Welsh Ministers* at [38].

24. The fact that there is no right of access off the path does not override the status of the whole Site as open space. As such, what falls to be assessed under DP16 and para. 104 should be 3.6ha of open space against the proposed 0.8ha. In such circumstances it was sensibly agreed by Mr Dunlop that, if regard can be had to this use beyond the permissive path, the proposed provision is neither equivalent to or better than what currently exists.
25. The loss of 2.8ha of open space is substantial in and of itself. Yet Mr Paley could not estimate what proportion of that 0.8ha would actually be accessible, thus there are potentially greater reductions in quality as a consequence than this figure initially suggests.
26. Mr Jones explained how there would be a significant quality reduction as the public value is derived from more than just the ability to pass and repass on the permissive path; the views that are intrinsic to that value would be entirely changed from a sense of being surrounded by nature and open fields to being in the centre of a residential development. Even if the Appellant's position is preferred and the active recreational use beyond the paths is disregarded from the assessment, this would be an existential loss in quality.
27. There would also be a big practical difference for active recreation in having to restrict one's movement to the paths. This would be particularly detrimental to the experience of dog walkers and those with families, but even to the general public the connection to nature which is central to the value of this open space would be lost. This could not be compensated adequately for by the small and isolated pockets of greenery provided for by the proposal.
28. It follows that there is undeniably a conflict with DP16 and/or para.104. The weight to give to these conflicts is increased by the ongoing and increasing shortfall of open space in Frome. The Rule 6 party identified a 42% shortfall, and the Appellant has not put forward evidence to the contrary. Mr Jones identifies the

nearest area of open space at a 15 minute walk, and of an entirely different typology (being a playground), thus the loss is even more significant.

29. Insofar as the fallback position is concerned, the intention of the Council is highly relevant. Mr Jones is best placed to anticipate what the Council's behaviour would be given his professional employment within the Council. He gave evidence that just as the Council has not taken any action on the ground to dissuade members of the public from using the entire Site, neither would they be likely to do so in the event the appeal is dismissed. The details of the Option are not before this Inquiry, but even if accepting Mr Dunlop's claim that conversations with the Council and Live West would continue, this does not mean it is likely that the Council would prohibit access before any sale was complete. Indeed, there is no evidence the Council's approach to management of the Site has changed since the Option was granted, meaning the situation the Appellant warns of is even more unlikely to manifest in reality.

Conclusion

30. The Council accept that the tilted balance under para. 11(d)(ii) of the NPPF applies and that there are various benefits to the scheme. However, there is a substantial loss of open space, which is currently being used in its entirety and providing members of the public with opportunities for active and passive recreation. There is no equivalent or better provision being supplied by the development and an already significant existing shortfall of open space in the area. In this context, the harm significantly and demonstrably outweighs those benefits. It is notable that Mr Dunlop indicated that he was unaware of any appeal decision where paragraph 104 has been breached and yet permission has been granted.²

31. The Council therefore submit that the appeal be dismissed.

² The Council do not suggest that such an outcome is precluded by law. For the avoidance of doubt, the failure to comply with paragraph 104 of the NPPF remains a material consideration in the balance. But it is a material consideration of such significance that it ought to justify the refusal of planning permission. It is unsurprising therefore that Mr Dunlop was unaware of a decision where 104 has been breached and permission has been granted

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15 August 2025