DRAFT LOCAL PLAN REFERENCES ES25 AND SS04

RE: WHETHER THESE PLAYING FIELDS HAVE BEEN ABANDONED

OPINION

Introduction

1. I am asked to advise Sport England in respect to the following parcels of land:

   i. Land north of Bawtry Road, Tinsley ('Site A'); and
   ii. Former Hazelbarrow School, Land to the west of Jordanthorpe Parkway, Jordanthorpe ('Site B').

2. Both Sites fall within the administrative boundaries of Sheffield City Council ('the Council'), as the relevant local planning authority. The Council are currently in the midst of an examination in public in relation to the Sheffield City Council Local Plan ('the Emerging Plan'). The Emerging Plan seeks to allocate both sites as Sites ES25 (Site A) and SS04 (Site B).

3. Both Sites are playing fields. However, during the examination, the Council have sought to suggest that the use of these Sites as playing fields/open space has been abandoned. Essentially, the Council seek to argue that the requirements of paragraph 99 of the NPPF do not apply in respect to the Sites for this reason. For the reasons below, I do not regard this argument has been properly made out.

Sheffield City Council's Position

4. The key paragraphs from the Council in relation to Land north of Bawtry Road, Tinsley are:

> ***12.20 Would the development of sites ES22, ES25, ES27, ES46 and ES47 be consistent with paragraph 99 of the Framework?***
>
> *12.20.1 Paragraph 99 of the Framework protects existing open space, sports and recreational buildings and land, including playing fields.*
>
> *12.20.2 Site ES25 is a former sports ground which has been disused for over 8 years, and not laid out or maintained for formal sports for some time before that. Buildings on the site (former sports and social club building and gym) were demolished following prior notification in 2018 which indicated they had been out of use for six years previously. The site is privately owned and is not publicly accessible and therefore does not meet the definition of open space in the Framework, having no public value. There is no realistic prospect of the site being brought back into use for sports provision.*
>
> *12.20.3 The Site Selection Methodology (CD56) indicates that the site is surplus for its current (former) function (sports provision), although may be needed for another function. This reflects the position in the East area, which has an overall surplus of formal open space provision, as set out in the Open Space Assessment, although it should be noted that there is demand for cricket in the area. However, the Site Selection Methodology also found that there is insufficient informal open space in the surrounding area. Bringing forward the site for development in accordance with Policy NC15 (where a minimum 10% of the site should be open space) provides the opportunity to meet the needs of residents of the site and surrounding area in terms of providing accessible, useable, managed and maintained informal open space provision and children's play. This is considered to be of substantial benefit to the local*

community, compared to the current position, and consistent with paragraph 99 of the Framework.

12.20.4 In recognition of the site's former role as a sports facility, a developer contribution towards improved sports provision off-site would be appropriate.

5. The key paragraphs in relation to Former Hazelbarrow School, Land to the west of Jordanthorpe Parkway, Jordanthorpe (Draft Local Plan ref: SS04) are:

14.15 Would the allocation of sites SS01 and SS18 be consistent with paragraph 99 of the Framework?

14.15.1 Paragraph 99 of the Framework protects existing open space, sports and recreational buildings and land, including playing fields. Site SS01, along with adjacent site SS04 previously accommodated Hazlebarrow Primary School, which was demolished in 2003 as part of a Local Education Authority review. There has been no formal open space provision on the site since that time. The site now has a number of informal footpaths across it but the majority of the land consists of long, overgrown grassland which cannot currently be used by the public. There is no realistic prospect of the site being brought back into use for sports provision. The Site Selection Methodology (CD56) indicates that existing open space areas of the site are required for their current function. The site is assessed as being in an area with insufficient open space. Bringing forward the site for development for new homes, in conjunction with adjacent site SS04, with at least 10% of the gross site area remaining for non-residential uses including publicly accessible, managed and maintained open space in accordance with policy NC15, including in the Urban Green Space Zone as indicated on the Policies Map (CD14), provides the opportunity to meet the needs of residents of the site and surrounding area in terms of informal open space provision and children's play. This is considered to be of benefit

to the local community, compared to the current position, and consistent with paragraph 99 of the Framework.

In recognition of the site's former role as a school playing field, a developer contribution towards improved sports provision off-site would be appropriate.

6. As seen above the Council have not specifically stated that the sites have been 'abandoned' within their written submissions or evidence. This issue was raised at the Examination in Public hearing sessions.

Law on Abandonment

7. The law on abandonment is well settled. In ***Pioneer Aggregates (UK) Limited v SSE*** [1985] AC 132, the House of Lords held that where a planning permission had authorised a use of land, in the absence of an intervening use or an Act of Parliament, that permission could not be spent and thus:

> *… there is no principle in planning law that a valid permission, capable of being implemented according to its terms, can be abandoned*

8. Accordingly, the House of Lords created binding judgment that in circumstances such as apply in the current matter, it is not possible for a planning permission to be abandoned.

9. The principle in ***Pioneer Aggregates*** was considered more recently in ***The Council Borough of Stockton on Tees v SSCLG*** [2010] EWHC 1766 (Admin). In that case, Langstaff J considered a challenge to an Inspector's decision to grant a LDC. The facts of that case are highlight relevant to this matter and thus I set them out in some detail below.

10. A site had been granted planning permission in 1961 to be used for 80 seasonal chalets and caravans. The question was whether the site could still

be used for 80 caravans in 2009 pursuant to that permission, notwithstanding that for several years the use as a caravan park had simply ceased (see paragraph 1 of the judgment).

11. The Council had resisted this appeal on the basis that the use had been abandoned (see paragraph 2 of the judgment).

12. The Inspector noted that there had been no other use to which the land had been put (as in the current matter) per paragraph 3 of the judgment.

13. In that appeal, the Inspector had concluded as follows (per paragraph 3 of the judgment):

> *In this case, the use permitted by the 1961 permission has simply dwindled away such that it is now very many years since there was any appreciable use as a caravan site. Nevertheless, the 1961 planning permission was implemented, it has not been revoked and it has not been superseded by the use of the site for a different permitted or lawful purpose. The permission may therefore be relied upon for the use of the land as a caravan site for up to 80 caravans, subject to the use being undertaken in accordance with the 1971 [he must have meant 1961] permission.*

14. Accordingly, the Inspector had found that it was not open to him to conclude that the use of the Site had been abandoned. The Council had challenged that conclusion, arguing that the Inspector was obliged to consider the question of abandonment.

15. The Court summarised the legal question as follows:

> *4. The appeal before me gives rise to a point of law which is easily stated but less easily resolved. It is essentially whether, in a situation in which there has been planning permission for a lawful change of use, and that*

planning permission has been implemented in that there has been such a change of use and the site is no longer used for its former purpose, the owner of the land requires a new planning permission should he wish to resume the formerly permitted use.

16. Accordingly, the case revolved around whether a use can be abandoned where it was authorised by virtue of a planning permission and there has been no intervening use.

17. The Secretary of State argued that, in accordance with ***Pioneer Aggregates (UK) Limited v SSE*** [1985] AC 132, a use could not be abandoned where it was authorised by a planning permission in the absence of an intervening use (paragraph 5 of the judgment):

> *5 … For the Secretary of State Mr Morshead contends that there is no such principle in planning law as to regard a planning permission as spent and having no continuing effect once the development has been started or achieved, and that, upon proper application of the principles expressed by Lord Scarman, with whom their other Lordships agreed in the case of Pioneer Aggregates (UK) Limited v the Secretary of State for the Environment and Others [1985] AC 132 , as interpreted by other cases since, the answer has to be that the planning permission could not in this case be abandoned and therefore it remained effective.*

18. The Court entirely agreed with this position, saying as follows (with emphasis):

> *32. In my view* ***the starting point has to be the general principle in Pioneer*** *in the light of the statute.* ***There is no obvious rule within the principle itself which Lord Scarman espouses that would support the local planning authority's arguments in this case****. Its arguments do not fall within any of the three excepted classes of cases Lord Scarman recognised, nor do they fall within the factual circumstances which gave*

rise to the Cynon case. Everything, as it seems to me, depends for its force upon the argument which Mr Ponter addresses as to the meaning of the words "capable of being implemented". This is not the same expression as "spent". I note that there is no reference in the Act to planning permission being spent, nor is there any reference in authority, other than that to which I have been taken, to that as a matter of principle, and I accept the argument by Mr Morshead that if there were such a principle that it would have been easy as an answer to refer to it in resolving many of the cases which have otherwise troubled the courts as to the application of the abandonment of principles.

33. I accept what Mr Morshead has submitted about the context within which those words came to be said. It follows that I do not think that Lord Scarman here was speaking about a planning permission which had been granted but as to which no action had been taken to start the development to which it related.

34. ***That being the view which I take of the decision of the House of Lords, plainly that is binding upon me****. So, too, is the decision in principle in Cynon , but this is not a case in which the principle there expressed is directly relied on by the appellant. It does not answer the question I am posed. Insofar as the decision of Wilkie J on this point is concerned, it is worthy of respect, though obiter , and has given me some hesitation; but I do not see how it can stand easily with the views Lord Scarman and the House expressed in Pioneer .*

35. It follows that in this case, ***bearing in mind that it is a case in which there has been no use of the land other than that permitted by the planning permission first granted for use as a caravan site, I consider that the planning inspector was correct in law to come to the decision which he did****. It follows that this appeal must be dismissed. I should not, however, leave this judgment without recognising the very considerable*

skill with which both counsel have addressed me, deploying their arguments with economy, efficiency and persuasion, and I am grateful to them both for their presentations.

19. I understand that during the examination into the Emerging Plan the Council relied on the judgment of ***Secretary of State for the Environment, Transport and the Regions v Hughes*** (2000) 80 P&CR 397. The Court in that case considered the question of whether a building had been abandoned. The building in question was described by the local authority as being 'beyond repair' and the inspector described it as, 'now in a ruinous state with its roof and part of its walls missing'. However, that case was dealing with whether a specific building was being abandoned. It is not relevant to whether the use of land can be abandoned.

20. I further note that the Supreme Court addressed the question of abandonment in ***Hillside Parks Ltd v Snowdonia National Park Authority*** [2022] UKSC 30 and endorsed the logic from ***Pioneer Aggregates***:

35. We do not accept that the decision in the Pilkington case can be explained on the basis of a principle of abandonment, nor indeed that there is any principle in planning law whereby a planning permission can be abandoned.

36. In the first place, this explanation is directly contrary to the court's reasoning in the Pilkington case. Lord Widgery said in terms, at p 1532H:

> *"My views on this matter are not based on any election on the part of Mr Pilkington; they are not based on any abandonment of an earlier permission … I base my decision on the physical impossibility of carrying out that which was authorised in [the earlier planning permission]."*

37. More fundamentally, the suggested explanation is also inconsistent with the decision of the House of Lords in Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132. In that case the House of Lords unanimously held that there is no principle, and no room for any principle, in planning law whereby a planning permission may be extinguished by abandonment. Lord Scarman, with whom the other members of the appellate committee agreed, gave two main reasons for this conclusion. The primary reason was that Parliament has provided a

comprehensive code of planning control and the courts should not introduce into planning law principles or rules derived from private law unless expressly authorised by Parliament or necessary to give effect to the purpose of the legislation (pp 140H-141C). From what is now section 75(1) of the 1990 Act (quoted at para 21 above) Lord Scarman derived the "clear implication" that "only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein" (p 141G-H). Introducing a doctrine of abandonment into planning law would be inconsistent with this, as it would allow the land to lose the benefit of a planning permission by a means not provided for either by the legislation or by the terms of the planning permission itself. It can therefore be seen that the Developer's assertion that recognising a principle of abandonment would avoid an impermissible judicial gloss on the legislative code is misplaced. It was precisely because it would involve such an impermissible gloss that the House of Lords decided that no such principle may properly be imported into planning law.

38. Secondly, Lord Scarman emphasised that the existence or otherwise of a valid planning permission should be capable of ascertainment by inspection of the planning register and of the land in question. That follows from the nature of planning permission as running with the land and as affecting third

parties. Introducing a doctrine of abandonment, not provided for in the planning legislation, would be inconsistent with this requirement of public accessibility. As Lord Scarman observed, at p 139E, if such a doctrine were recognised:

> *"The planning permission would be entered in a public register; but not so its abandonment. Nor would it be possible by inspection of the land to discover whether the permission had been abandoned, for the absence of implementation of a planning permission is no evidence that a valid permission does not exist."*

Recent Appeal Decisions

21. I note that the question of whether playing fields have been abandoned has been addressed in recent appeal decisions.

22. In the Birkenhead School Sports Ground appeal (appeal reference: APP/W4325/W/23/3329105), Inspector Watson said as follows (in dismissing the appeal) in a decision dated 16 August 2024:

> *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.*

23. Similarly, in the land off Barrows Lane appeal (appeal reference: APP/P4605/W/24/3342499), Inspector Nicholls dismissed an appeal in respect to the provision of housing on a former playing fields site as recently as 27 September 2024. The inspector said as follows:

19. The appellant's evidence suggests that the football pitches have been disused for around the last seven years. An overview summary of the reasons behind the closure are explained as resulting from a washout winter in 2014. This deterred any Clubs from returning the following season, owing to high maintenance overheads and insufficient income, even though the rent rates were apparently set lower than other facilities in the area. There was also an earlier failed lease arrangement. Nonetheless, Paragraph 103 of the Framework does not differentiate between used or unused playing fields. Nor does it differentiate between playing fields in public or private ownership.

24. In the Pitches Sports Club appeal, Inspector McCormack dismissed an appeal relating to housing development on green space (appeal reference APP/P4415/W/21/3278557), saying as follows:

36. Although the site is private and there is currently no public access to it, this does not diminish the overall amenity value of the site as Green Space to the local people and the area that has been demonstrated to exist both historically and currently.

25. In the Cuddington House appeal decision (appeal reference APP/A0665/W/23/3319531), Inspector Hickey dismissed an appeal relating to the conversion of a pavilion garage, saying as follows:

14. The appellant's case is in essence that the site is in private ownership, and the buildings and field could be used for agricultural purposes without the need for consent. Nonetheless, it should be noted that neither the development plan, the Framework or SEPFG differentiate between ownership types in regard to sports pitches. As such, proposals are still required to demonstrate compliance with the development plan in regard to the development on existing open space, sports and recreation facilities.

Discussion

26. The issue of abandonment appears to have been raised by the Council as a justification for the argument that paragraph 99 of the NPPF does not apply in respect to Sites A and B, given their use as a playing field/open space has been abandoned.

27. I have listened to the examination hearings relevant to this matter, as they were posted on Youtube. I note that the Council acknowledged that there had been no intervening uses on this Site. The Council's argument essentially seems to be that given the Sites have not been used for playing fields for a lengthy period of time (amongst other points), one can therefore say that the use of the Sites as playing fields has been abandoned.

28. However, in ***Pioneer Aggregates*** the House of Lords confirmed that one cannot abandon a lawful use established via a planning permission, in the absence of an intervening use. The Supreme Court re-affirmed this principle in ***Hillside***. To the extent that the Council seek to rely on the ***Hughes*** judgment, with respect, that reliance is misplaced. That dealt with the specific situation as to whether a building had abandoned, as opposed to a use. Furthermore, to the extent that the judgment contradicts the judgment in ***Hillside*** and ***Pioneer Aggregates*** which rejects the notion of abandonment, the Supreme Court/House of Lords takes precedence being the Higher Courts than the Court of Appeal (where ***Hughes*** was decided).

29. Accordingly, if the use of the Sites as playing fields was established via a planning permission, given there has been no intervening use (as confirmed by officers during the examination), this use cannot be abandoned as a matter of law.

30. I have seen nothing from the Council that considers the specific planning history of the Site in this respect to suggest that abandonment can apply here in this context.

31. Further, the Council sought to draw attention to the private nature of these Sites. But paragraph 99 of the NPPF does not distinguish between private or public ownership. Indeed, all of the appeal decisions I have ever seen on this question point one way – that private/public ownership is an irrelevance to the application of paragraph 99 (or more recently paragraph 103) of the NPPF (see the discussion of appeal decisions above wherein all the inspectors regarded this to be irrelevant).

32. Further, paragraph 99 of the NPPF does not differentiate between open space that is in use or not in use. Indeed, both the Birkenhead School Sports Ground appeal decision and Barrows Lane appeal decisions (from the last few months) make this explicit point. Whilst those decisions were made in respect to paragraph 103 of the NPPF, the language of paragraph 103 is identical to former paragraph 99 of the earlier NPPF (which the Emerging Plan is being examined against) and thus there is no reason not to follow them.

33. I note that emphasis was placed on the use of the word 'existing' open space within paragraph 99 of the NPPF during the examination hearing. However, if the use has not been abandoned (which legally might be impossible given the planning history of the Site), it follows that the Sites are existing open space, irrespective of whether they are in use.

34. Ultimately, in light of the principle that a lawful use established via a planning permission cannot be abandoned absent an intervening use, the evidence is not before the examination in my view to justify a finding that the use of Sites A or B has been abandoned.

35. I hope that my advice is clear and sufficient for present purposes. If I can assist further, please do not hesitate in contacting me.

Killian Garvey

Kings Chambers

11 November 2024