
Appeal Decision

Site visit made on 16 November 2016

by David Wildsmith BSc(Hons) MSc CEng MICE FCIHT MRTPI

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

Decision date: 2 December 2016

Appeal Ref: APP/N1160/Q/16/3145842

Land adjacent to Greenacres Care Centre, 12 Pearn Lane, Plymouth, PL3 5JF

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be discharged.
 - The appeal is made by Mr P Gerry against Plymouth City Council.
 - The development to which the planning obligation relates is the "erection of elderly person's complex including nursing home, residential home and independent shared unit and continue use of Bedford Park as public/private use".
 - The planning obligation, dated 3 December 1990, was made between the Council of the City of Plymouth and Geoffrey William King and Christina Ellen King and Midland Bank Plc.
 - The application Ref 15/01746/MDPO is dated 8 Jun 2015.
 - The application sought to have the planning obligation discharged.
-

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Plymouth City Council against Mr P Gerry. This application is the subject of a separate Decision.

Preliminary matter

3. The Council prepared a draft Decision Notice dated 22 January 2016, in which it indicated that it intended to refuse this application to discharge the planning obligation (a Section 106 (S106) agreement) relating to planning permission 90/01016/FUL. The formal decision was, however, never issued.

Main issue

4. The main issue is whether the obligation continues to serve a useful purpose.

Reasons

5. The appeal relates to an area of landscaped open space, formerly known as Bedford Park, lying to the east of the Greenacres Care Centre on Pearn Road and bordered on its southern, eastern, and part-northern boundaries by the rear gardens of a number of private dwellings. The appeal site is secured by fencing along its boundaries and is controlled by closed-circuit cameras, with the only existing formal entrance being through security doors in the Care Centre.
6. The plan attached to the S106 agreement shows an area referred to as "the red land", lying adjacent to Pearn Road, with an adjoining area referred to as "the blue land" lying to the east and having its own separate gated access to Higher

Compton Road, to the south. Under planning permission 90/0106/FUL, an elderly persons' complex was constructed on the red land, which had formerly accommodated allotments, owned by a charity. The blue land, to which the S106 agreement and this appeal predominantly relate, was owned by Devon County Council and had been used as playing fields for local secondary schools until no longer needed for such purposes. In March 1990, it was leased to former occupiers of the red land and under planning permission 90/0106/FUL it was landscaped for use in association with the elderly persons' complex.

7. The landscaping was controlled by conditions 4 and 5 which were attached to the planning permission and were also included as the First Schedule to the S106 agreement. Under paragraph 2 of the S106 agreement's Second Schedule, the blue land was required to be kept as open space, with a public access to be provided onto Higher Compton Road.
8. Paragraph 4 explains that the public was to be allowed access to this blue land at the invitation of the Applicants¹ from 0730-2130 hrs during summer months, and 0800-1630 hrs during winter months, for the purpose of public recreation consistent with both general residential amenity and use of the remainder of the land as elderly persons' accommodation. Certain activities were prohibited from taking place on the land², and the Applicants could restrict public access for one day in any calendar year, to prevent the acquisition of any public rights of way.
9. Under paragraph 5 of the Schedule, the Applicants were required to erect a sign at the Higher Compton Road entrance to inform the public of the availability of the facility only at the invitation of the Applicants, and the times thereof. In addition, under paragraph 6, a bowling green was to be provided on the blue land, which would not be for public use but should be available for persons or clubs booking at least 24 hours in advance.
10. In 2014 the Care Centre was purchased by the appellant, who now owns the red land and is the leaseholder of the blue land. There is some dispute between the parties concerning the extent to which the S106 agreement has been complied with in the past, but it is the case that at the present time there is no public access to the blue land. The gate onto Higher Compton Road is padlocked and, as already noted, the only access is through the Care Centre itself.
11. The appellant explains that circumstances have changed over the 26 years since the original planning permission was granted and that the Care Centre now operates as a secure unit care home for the elderly, caring for vulnerable adults. Many residents are stated to suffer from late stage dementia and exhibit challenging behaviour. As a result, all employees at the centre hold a Disclosure and Barring Service (DBS) certificate, and have significant and ongoing training in the care of such residents. The appellant contends that in these circumstances it is not appropriate to allow members of the public unsupervised access to the Care Centre's blue land, nor viable to provide supervision of the land by staff with the appropriate level of qualification and DBS cover.
12. Because of this, the appellant maintains that the S106 agreement no longer serves a useful purpose, and further questions whether or not the agreement was appropriate when first entered into. In this regard the appellant makes reference

¹ The original applicants for planning permission – and their successors

² The use of bicycles, skateboards and similar equipment were prohibited, as was access for dogs, the playing of ball games and the playing of radios

to the 3 tests for planning obligations³, which explain that planning obligations should 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.

13. With these points in mind the appellant questions why public access was considered necessary to make the original development acceptable in planning terms, as the blue land had been used as school playing fields and not public open space. He also questions in what way providing public access to the land was directly related to the development of the adjacent allotment site with a Care Centre. Moreover, he argues that maintaining the blue land for public access in perpetuity cannot be considered fairly and reasonably related in scale and kind to the Care Centre development, and that for this reason and the other points detailed above, the S106 agreement should be discharged.
14. However, whilst I acknowledge that the public has no automatic right of entry to this blue land, the evidence before me, which includes information supplied by interested persons, makes it quite clear that notwithstanding the former, formal status of the land as school playing fields, there has historically been a significant amount of public use of the area. This includes out-of-school use by youth groups, including scouts and cubs, as well as use as an informal recreation area by local children, and for archery practice. Indeed, at the time of a planning appeal into a proposal for residential use of both the red and blue land in 1989, shortly before the successful planning application for the elderly persons' complex, the potential loss of the blue land was referred to both as a serious blow to local residents, and a seriously harmful impact on the surrounding community.
15. Whilst no information has been submitted to indicate what matters were taken into consideration when the 1990 planning permission for the elderly persons' complex was granted, in light of the points just mentioned it seems highly likely to me that the community use of the blue land referred to above would have been a material consideration. This certainly seems to be the Council's view of the situation, as its appeal statement makes it quite clear that public access to recreational land was lost as a result of this planning permission.
16. In these circumstances I see nothing untoward with the provisions of the S106 agreement as it clearly sought to provide compensation for the loss of publicly accessible recreation land by retaining an element of public access to the land, albeit in a controlled manner. As such, it clearly served a legitimate planning purpose, and the submitted evidence from interested persons indicates that the public did make use of this land for recreational purposes in the years after the elderly persons' complex was initially opened.
17. In view of these points, I see no good reason why this planning obligation could not continue to serve a valid planning purpose in accordance with Policy CS33 of the Council's current, adopted Core Strategy (CS), which states that a S106 agreement should offset the loss of any significant amenity or resource through compensatory provision elsewhere.
18. That said, I share the appellant's view that there is no continuing need for the First Schedule to the S106 agreement, as it simply identifies the conditions to be attached to any planning permission, and does not seem to have any direct and

³ set out in both section 122 of the Community Infrastructure Levy Regulations 2010 and paragraph 204 of the National Planning Policy Framework ("the Framework")

separate function within the planning obligation. However, the matters covered by the Second Schedule fall into a different category, and relate to things which could and should still be in force and operating.

19. It is quite clear that at the present time the blue land is not being used in the manner anticipated by the original planning permission and the S106 agreement. But this situation does not seem to be as a result of any failing or deficiency in the S106 agreement itself, but rather has arisen as a result of the way in which the past and present site owners have chosen to operate the Care Centre.
20. In this regard I have noted that in terms of the site's current operation, the Council asked for a list to be provided of recent events and activities held at the Care Centre, and argues that as members of the public can attend some of these events it suggests that the S106 agreement is still serving a useful purpose. The appellant has confirmed, however, that these events were predominantly held in the buildings on the red land and, as such, do not support the Council's view of the current value of the S106 agreement. I see no reason to disagree with the appellant on this point.
21. Furthermore, in the context of the secure unit which now occupies the eastern end of the Care Centre complex I can understand and appreciate the health and safety concerns which the appellant has outlined, in terms of allowing unrestricted public access to this area. I have also had regard to the concerns expressed by the Care Centre's insurers, regarding the potential for unwarranted and unnecessary dangers to Care Centre residents, if the public had unrestricted access to these grounds and gardens. There is, however, no suggestion from the Council that any public access to the land should be unrestricted.
22. Indeed, the Council's Natural Infrastructure Team refers to the land as a significant green space which it considers could be managed in accordance with the terms of the S106 agreement, without leading to any anti-social behaviour, and therefore without resulting in issues of concern for residents with dementia. These views are supported by the Council's Planning Officers, who argue that as the blue land benefits from a separate entrance on Higher Compton Road, it could and should be possible to make arrangements to manage the overall extent of the land in a way which would provide valuable green space both for the benefit of Care Centre residents, and for the local community. This is what was plainly envisaged when the S106 agreement was first entered into.
23. I consider that these views and suggestions have merit, but there is no evidence to indicate that any such matters have been seriously investigated by the appellant who should, as stated by the Council, have been well aware of the requirements and obligations of the S106 agreement when purchasing or taking over the lease and the ownership of the appeal property.
24. In view of all the above points, and even though I accept that some sections and clauses in the S106 agreement are no longer necessary, I am not persuaded that the appropriate way forward would simply be to fully discharge the planning obligation. Although the terms of the S106 agreement are not currently being complied with, this does not mean that the planning obligation should be considered redundant. Indeed, I see no good reason why, with appropriate management of the blue land, the S106 agreement should not continue to serve a valid planning purpose in accordance with CS Policy CS33, as stated above.

25. I therefore have to conclude that the S106 agreement does continue to serve a useful planning purpose, although I acknowledge that for it to do so in practice would require some further work and action by the appellant. As no firm evidence has been placed before me to demonstrate that this would not be possible or practicable, I have to further conclude that this appeal should fail.
26. I have had regard to all other matters raised, but they are not sufficient to outweigh the considerations which have led me to my conclusion.

David Wildsmith

INSPECTOR