
Appeal Decision

Site visit made on 27 March 2017

by Veronica Bond LLB (Hons), Solicitor (non-practising)

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

Decision date: 24th April 2017

Appeal Ref: APP/U1105/W/16/3165906

Rolle College Playing Field, Douglas Avenue, Exmouth EX8 2HA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Bill Richardson of Blue Cedar Homes against the decision of East Devon District Council.
 - The application Ref 16/2227/VAR, dated 13 September 2016, was refused by notice dated 13 December 2016.
 - The application sought planning permission for 'outline planning application (all matters reserved except for access) for the upgrading of the former Rolle College playing pitches, development of changing pavilion, associated playing pitch (access via Maer Road Car Park), plus development of up to 23 age-restricted dwellings to be accessed via Douglas Avenue' without complying with a condition attached to planning permission Ref 16/0787/MOUT, dated 26 August 2016.
 - The condition in dispute is No 5 which states that: 'No development shall commence until a community use agreement has been submitted to and approved in writing by the Local Planning Authority [after consultation with Sport England]. The scheme shall apply to the proposed pavilion and playing pitches and shall include details of pricing policy, hours of use, access by non-educational establishment users/non-members, management responsibilities, a mechanism for review and a programme for implementation. The approved scheme shall be implemented upon the first occupation of the residential development and shall be complied with for the duration of the use of the development.'
 - The reason given for the condition is: 'To secure well managed safe community access to the sports facility, to ensure sufficient benefit to the development of sport and to accord with Policy RC7 of the Adopted East Devon Local Plan 2013-2031.'
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Decision

1. The appeal is allowed and planning permission is granted for the upgrading of the former Rolle College playing pitches, development of changing pavilion, associated playing pitch (access via Maer Road Car Park), plus development of up to 23 age-restricted dwellings to be accessed via Douglas Avenue at Rolle College Playing Field, Douglas Avenue, Exmouth EX8 2HA in accordance with application Ref 16/2227/VAR made on the 13 September 2016 without compliance with condition number 5 previously imposed on planning permission Ref 16/0787/MOUT dated 26 August 2016 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect and subject to the following new condition:

'5. No dwelling shall be occupied nor the pitches brought into use until a community use agreement (CUA) has been submitted to and approved in

writing by the Local Planning Authority (after consultation with Sport England) and thereafter entered into by the relevant parties. The CUA shall apply to the proposed pavilion and playing pitches and shall include details of pricing policy, hours of use, access by non-educational establishment users/non-members, management responsibilities, a mechanism for review and a programme for implementation. The pavilion and playing pitches permitted hereby shall not be used, occupied or operated other than in accordance with the approved CUA.'

Application for costs

2. An application for costs was made by the appellant against the Council. The Council has also made an application for costs against the appellant. These applications are the subject of separate Decisions.

Background and Main Issue

3. Viability information submitted during the course of the application with reference 16/0787/MOUT (Original Application) meant that no on site provision or contribution was required for affordable housing. The appellant therefore signed up to a planning obligation (the Original Section 106 Agreement) containing an overage covenant. This required that, if profit is achieved above the prescribed level, 50% of any additional profit would fall due to the Council.
4. Following grant of permission pursuant to the Original Application, the appellant submitted an application (the Variation Application) seeking permission for the development already approved but without complying with condition 5 of that permission. The Council was content with the amended form of wording proposed, as detailed in my formal decision above. I have no reason to disagree with that view given that this would still allow for appropriate control over the use of the pitches and pavilion.
5. However, the appellant was unwilling, in connection with the Variation Application, to sign up to a section 106 agreement with a requirement for overage in the form previously covenanted. The appellant proposed instead that overage be payable only if the proposed development is not completed within 24 months from the commencement of construction.
6. A completed Section 106 Agreement dated 13 March 2017 (the Second s106 Agreement) includes alternate provisions for immediate or delayed overage to operate, depending upon the outcome of this appeal. As such, the main issue is whether the overage requirements contained in the Second s106 Agreement should be subject to a 24 month delay.

Reasons

Local Policy

7. Strategy 34 of the East Devon Local Plan 2013-2031 (adopted 28 January 2016) (LP) sets out the Council's requirements for affordable housing. This policy then states that where levels of affordable housing fall below policy targets, 'an overage clause will be sought in respect of future profits and affordable housing provision'.
8. This overage requirement is not conditional upon whether the proposed development is a single or multi-phase scheme. It therefore applies in the case

of the appeal scheme which is identified as a single phase development. However, Strategy 34 offers no detail as to the form that the overage clause should take. It makes no stipulation as to whether immediate or delayed overage is required. As such, overage subject to a 24 month delay, as proposed by the appellant, would not be in conflict with Strategy 34.

9. Thus I turn to other considerations in order to determine whether delayed overage is appropriate in the circumstances of this case.

National Policy and Guidance

10. The National Planning Policy Framework (the Framework) states that to ensure viability, 'competitive returns' should be provided to a willing landowner and willing developer 'to enable the development to be deliverable'. The National Planning Practice Guidance (the Guidance) recognises that this return will vary significantly, including due to the risk profile of the development. The Guidance goes on to state that viability assessment should be based on current costs and values, but that changing values may be considered where a scheme requires phased delivery over the medium to long term.
11. Although national policy cited does not specifically refer to 'overage', the effect of the form of overage clause proposed by the Council is to require a post-completion assessment of viability. Thus the policy and guidance cited are of relevance.

Local policy and guidance

12. The appellant refers to the Council's Viability Guidance Notes 2 as stating that overage may be sought in respect of medium to long term schemes. The Council has indicated that the requirement for 'immediate overage' has though recently been re-endorsed by the Strategic Planning Committee and that a proposed Planning Obligations Supplementary Planning Document would also be intended to include such a requirement. The latter does not yet though appear to have been formally adopted and so is due only limited weight.

Immediate or delayed overage

13. As to which form of overage is appropriate in this case, practically here, the difference between the two forms of overage clause is that the appellant's lender is willing to offer development finance under the appellant's current facility only on the basis of delayed overage.
14. The Council details how the overage provisions would operate and considers that the concept of a 'competitive return' is specifically factored into the immediate overage clause proposed given that this is only triggered where profit exceeds the prescribed level, in which case the developer would still receive 50% of any additional profit. Whether or not the Council considers the lender's approach to be logical, the fact of the matter is that in this case, the requirement for immediate overage would render access to development finance more difficult and/or expensive.
15. Whilst viability assessment may be more difficult in respect of outline applications, no specific evidence is given as to how this would affect the present proposal. It might be open for the appellant to seek to revisit viability assessment at the reserved matters stage. However, there is no evidence to indicate any guarantee of a variation to the planning obligation at that stage.

16. As such, on the evidence before me, the immediate overage clause sought by the Council would impede the appellant's access to development finance, and put the likelihood of the proposed development coming forward in jeopardy. This is in the context of local support for the scheme and eagerness for the development to come forward in order to secure playing field provision, and in the absence of a properly adopted Supplementary Planning Document setting out the detail as to how the overage should operate.
17. Thus, I conclude on the main issue that the overage requirements contained in the Second s106 Agreement should be subject to a 24 month delay. This would not result in any conflict with the provisions of Strategy 34 of the LP for the reasons outlined. Any conflict with Strategy 50 of the LP which seeks developer contributions in respect of necessary infrastructure improvements is outweighed by other material considerations in this case as outlined.

Conclusion

18. For the above reasons, I conclude that the appeal should succeed.

Veronica Bond
INSPECTOR