
Appeal Decision

Hearing held and site visit made on 5 July 2017

by Thomas Bristow BA MSc MRTPI

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

Decision date: 23 August 2017

Appeal Ref: APP/U1105/W/17/3167556

Green Close, Drakes Avenue, Sidford EX10 9JU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Churchill Retirement Living against East Devon District Council.
 - The application Ref 16/0867/MFUL is dated 11 April 2016.
 - The development proposed is the demolition of a former residential care home and construction of 36 sheltered apartments including communal facilities, access, car parking and landscaping.
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Decision

1. The appeal is dismissed and planning permission is refused for the demolition of a former residential care home and construction of 36 sheltered apartments including communal facilities, access, car parking and landscaping.

Preliminary matters

2. The description of development used in the banner heading above is that given in the appeal form. This more accurately describes the development proposed than that used in the application form by specifying that the proposal involves the demolition of the existing building on site.
3. The appellants' case is supported by a viability report.¹ The appellants have confirmed that any references to commercial confidentiality in viability evidence should be disregarded as all relevant documents are in the public domain.
4. During the hearing the appellants explained that certain plans are illustrative rather than determinative, or relate to the implementation of conditions in the event that the appeal is allowed.² I have treated these as such.
5. The appeal site is within an area designated for the purposes of preparing a neighbourhood plan. However the Sid Valley neighbourhood plan is at an early stage of development and cannot be accorded significant weight.³ No specific policies thereof have been brought to my attention in this appeal.

¹ Undertaken by Bailey Venning Associates, dated May 2016, supported by several appendices.

² Plans 211983-SU-01, historic maps, 183 LS 001_A, 15404-BT3, V-R6091.16/ 100 revision 01, 10084SF – RF01.

³ Having yet to reach Regulation 14 of the Neighbourhood Planning (General) Regulations 2012 as amended.

Planning background and main issue

6. The appeal is against the Council's failure to determine application Ref 16/0867/MFUL within the relevant statutory period. However the Council resolved that the development should be approved 'subject to a section 106 agreement and conditions as per [officer] recommendation'.⁴ The Council's officer report recommends approval 'subject to the completion of a S106 agreement to secure the payment of a financial contribution of £41,208 towards affordable housing, with the inclusion of overage clauses'. In summary, the purpose of overage clauses is to re-coup part of any profit resulting from development which was not predicted to arise at application stage.
7. Following this resolution there have been exchanges between the appellants and Council regarding the drafting of a planning obligation. The Council proposed overage clauses in an iteration of an obligation reproduced at appendix G to their appeal statement. These clauses sought to require that the actual costs of undertaking the development would be evaluated post-completion and that 50% of any additional profit not forecast to result at application stage would be made as a further contribution towards affordable housing provision.
8. Whilst overage clauses have been proposed by the Council, there is no prescribed form or wording of such clauses established within the East Devon Local Plan (adopted 28 January 2016, the 'Local Plan'), the Council's Planning Obligations Supplementary Planning Document (adopted 22 June 2017, the 'SPD') or the Council's Viability Guidance Note 3 relating to overage. Guidance Note 3, informal advice produced by the Council, explains that overage clauses will need to 'suit the specific circumstances of the site' rather than taking a set form. My locus in this appeal is to determine whether or not the proposal before me is acceptable, it is not to comment on the wording of hypothetical clauses that may or may not be appropriate. In any event, the appellants contest the principle of overage clauses of whatever form.
9. A unilateral undertaking dated 5 July 2017 pursuant to section 106 of the Town and Country Planning Act 1990 as amended is before me (the 'undertaking'). This contains an obligation to pay the affordable housing contribution of £41,208.00 referred to above. However, in place of overage clauses the undertaking contains clauses requiring that the forecast viability of the development proposed is reviewed if implementation is delayed, and that a revised affordable housing contribution is made under certain circumstances.
10. Against this background the matter in dispute between the main parties is set out in paragraph 8.1 of the statement of common ground dated 28 June 2017 ('SoCG'): 'the Council set out that an overage clause is required to meet with the Council's policy. This is disputed by the appellant.' However this is only a summary of the true extent of the dispute between the main parties.
11. In this context I consider that the main issue in this appeal is whether or not the development proposed makes appropriate provision for affordable housing, with reference to the relevant provisions of local and national planning policy.

⁴ As explained in the minutes of the Council's Development Management Committee of 1 November 2016.

Reasons

12. The appeal site is a plot of land adjacent to Sidford Road, South Lawn and Drake's Avenue. It is located centrally within Sidford close to various services and facilities and, as such, the Council do not object in principle to residential development here. The site is occupied by a large building of understated design. This building was formerly operated as a 23 bedroom care home named Green Close, although it has been vacant for some time. The surrounding area is predominantly residential with properties of varied ages and designs.
13. The proposal is to demolish the existing building and to erect 36 sheltered apartments as defined in paragraph 4.6 of the SoCG. Therefore, whilst a C3 use,⁵ occupation would be age-restricted. The main parties agree that this could be achieved via a suitably-worded condition.⁶ Access would be via South Lawn, and the proposal also entails various other elements as shown on the associated plans including parking provision and landscaping.
14. Applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. The appellants have not made the case that the Council are unable to demonstrate a 5 year land supply of deliverable housing sites relative to needs, or by consequence that relevant policies for the supply of housing should be considered out-of-date.⁷
15. Strategy 34 'District Wide Affordable Housing Provision Targets' of the Local Plan establishes how the Council will seek to secure affordable housing delivery. Paragraph 16.25 supporting strategy 34 explains, on account of demographic and economic factors, that 'lack of affordable housing is a critical issue in East Devon'.
16. The appeal site falls outside of any area specifically listed in strategy 34 and therefore within an area to which the 'higher (50%) affordable housing targets apply'. Strategy 34 subsequently explains that '50% of the dwellings [proposed] shall be affordable subject to viability considerations'. In my view as 50% affordable housing provision is expressed as a target, this target would not be met where viability considerations demonstrate that only a lower level of provision is feasible.
17. Strategy 34 further explains that where a proposal does not meet affordable housing provision targets 'it will be necessary to submit evidence to demonstrate why provision is not viable or otherwise appropriate. An overage clause will be sought in respect of future profits and affordable housing provision, where levels of affordable housing fall below policy targets'.
18. The Council accept, based on the appellants' viability report, that a contribution of £41,208.00 towards off-site affordable housing provision is acceptable.⁸ This is provided for in the undertaking. The Council clarified during the hearing that

⁵ As defined in the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended.

⁶ Replicating the condition set out in page 50 of Retired Living Explained, dated April 2017.

⁷ With regard to paragraphs 47, 49 and 14 of the National Planning Policy Framework.

⁸ This position is specifically referred to in paragraph 7.36 of the SOCG. I would note that appendix 1 to the appellant's viability report considers the practicalities of co-locating sheltered accommodation and affordable housing within the appeal site.

overage clauses sought are solely on the basis of compliance with strategy 34, rather than with reference to the robustness of the appellants' viability evidence.

19. The SPD includes a link to the Council's 'commuted sum calculator', via which off-site affordable housing contributions can be established. With regard to the SPD it is common ground between the main parties that an off-site contribution amounting to 50% of the apartments proposed would be approximately £1,135,656.00 or approximately £360,000.00 if vacant building credit applies ('VBC').⁹ Irrespective of the application of VBC, the affordable housing contribution proposed of £41,208.00 would be a fraction of either figure, representing around 2% or 6% affordable housing provision as opposed to the 50% target.
20. The phrasing of strategy 34 enables overage clauses to be sought, although does not specify what form they should take.¹⁰ As no overage clauses are proposed in the undertaking before me, on the face of it, this resolves the matter in dispute between the main parties as set out in paragraph 8.1 of the SoCG in favour of the Council's position. However, as explained above, the SoCG does not reflect the true extent of the issues in dispute, and I now turn to consider whether or not other material considerations weigh in favour of the proposal.
21. The National Planning Policy Framework (the 'Framework') does not refer to overage clauses. It does not specify whether 'ensuring viability and delivery' should be based on predicted or actual costs of development. Paragraph 173 of the Framework explains, however, that any requirements applied to development should provide 'competitive returns' and 'enable the development to be deliverable'.
22. The Planning Practice Guidance (the 'Guidance') related to viability makes no reference to overage. It sets out that 'planning applications should be considered in today's circumstances'.¹¹ This is an approach echoed in the Council's Viability Guidance Note 2, notwithstanding that this is informal guidance.
23. The Guidance further notes that 'where a scheme requires phased delivery over the medium and longer term, changes in the value of development and changes in costs of delivery may be considered'.¹² The appellants contend that the review clauses proposed in the undertaking are compliant with this approach and, by extension, that the undertaking complies with the requirements of paragraph 204 of the Framework.
24. The appellants have drawn my attention to the Royal Institute of Chartered Surveyors' document Financial Viability in Planning (published 2012, the 'RICS

⁹ With reference to The Planning Practice Guidance Reference ID:23b-021-20160519. Whilst £360,000.00 is referred to within the undertaking, this differs from Vacant Building Credit calculations undertaken by the appellants presented at the hearing (hearing document 9) which instead states that the sum would be £311,084.19.

¹⁰ This is consistent with the finding of the inspector in respect of appeal Ref APP/U1105/W/16/3165906, to which I shall return subsequently.

¹¹ Reference ID: 10-017-20140306.

¹² Ibid.

- report'). As sector-led guidance I accord the RICS report weight, albeit that this weight is limited as it does not represent planning policy or guidance.
25. Paragraph 3.6.4.3 of the RICS report explains that overage clauses based on post-development appraisal are not considered appropriate for three reasons: the risks of development at application stage are inherently uncertain, overage clauses undermine the basis of a competitive return by introducing uncertainty, and overage clauses may make securing development finance difficult or unlikely. With reference to the Framework and the Guidance, these are arguments advanced by the appellants in this appeal.
26. Consistent with the appellants' position in respect of the appeal, the viability report has been undertaken with regard to the risks and uncertainties that applied at that point in time. I accept that the development proposed has a degree of risk, that there are inherent uncertainties in the development process, and that competitive returns must necessarily reflect these factors. Nevertheless, based on the appellants' viability report, which takes account of current risks and uncertainties, the Council have accepted that an affordable housing contribution of £41,208.00 is appropriate now.
27. However, there is a substantial need for affordable housing in East Devon which exists at present. In my view the approach in strategy 34 related to overage is therefore equally grounded in today's circumstances in seeking to respond as fully as possible to current housing needs. This matter is brought into sharp focus by the £41,208.00 affordable housing contribution proposed falling far short of the 50% affordable housing target in strategy 34.
28. Irrespective of their precise wording, I acknowledge that overage clauses introduce an element of uncertainty in relation to profit margins that may be returned post-development and compare 'real-world' returns against predicted viability. However, and again without reference to a particular form of overage clause, I am not satisfied on the basis of the evidence before me that either a competitive return from, or the deliverability of, the development proposed would be compromised by the use of suitably-worded overage clauses.
29. There is nothing in strategy 34, the SPD or Council Guidance Note 3 to indicate that overage clauses would compromise the profit margin of 20% forecast in the appellants' viability report (which forms part of the commercial decision as to whether to proceed with an application and to undertake development). I accept that the sales period for sheltered accommodation is generally longer than for other forms of housing, in particular on account of the impracticality of phased delivery. However, the demographic evidence supporting the Local Plan and the National Strategy for Housing in an Ageing Society published in 2012 point towards the growing importance of this sector of the housing market.¹³
30. The appellants contend that if overage clauses of whatever form applied, the forecast level of profit in the viability report of 20% would need to be increased.¹⁴ However, the application was made on 11 April 2016 following the adoption of the Local Plan on 28 January 2016. There is no adjustment in relation to profit margin made in the viability report related to overage, despite

¹³ With particular reference to Section 8.7 of the former and Chapter 2 of the latter.

¹⁴ Paragraph 6.28 of the appellants' statement of case

the provisions of policy 34 in this regard which applied at the time the application was made.

31. I also note the appellants' contention in their statement of case that re-selling the appeal site with the benefit of permission subject to overage clauses is 'extremely unlikely' as these clauses would be 'developer specific'. However, there is no robust evidence before me in support of this position; it is common for planning permissions to entail obligations which are binding upon all those with an interest in the land. There is, furthermore, no clear evidence to demonstrate development finance would be unavailable were overage clauses to apply.¹⁵
32. Moreover, the adoption of the Local Plan post-dates the publication of the Framework in March 2012, the Guidance related to viability,¹⁶ and the RICS report. The element of strategy 34 related to overage emerged as a main modification (No 81) to the Local Plan, and was therefore consulted upon and examined, including in respect of its consistency with national policy.¹⁷ Whilst there is no specific reference to overage within the examining inspector's report of 15 January 2016, nonetheless the inspector found strategy 34 as a whole to be soundly based on the evidence before him in respect of affordable housing needs and viability.¹⁸ The Framework reiterates that planning should be genuinely plan-led.¹⁹
33. My attention has been drawn to several appeal decisions elsewhere. Three relate to appeals under the provisions of the Town and Country Planning Act 1990 as amended which, alongside associated guidance, are no longer extant.²⁰ In these cases there was no support for overage clauses in the relevant development plan at that time.²¹ In three further cases the sum proposed by the appellant by way of affordable housing contribution met the relevant requirements of the development plan, and there is likewise no reference in those appeal decisions to a development plan policy referring to overage.²²
34. I have referred to appeal Ref APP/U1105/W/16/3165906 in footnote 10 above. The dispute in that case centred on the phasing arrangements of an overage clause rather than the principle thereof. Moreover, in that case the inspector notes that there was specific evidence before her indicating that development finance would have been unavailable were a certain approach to overage taken. Accordingly, none of the cases elsewhere brought to my attention by the appellants are directly comparable with the circumstances in this appeal.
35. Whilst the review clauses in the undertaking have been proposed as such to comply with relevant elements of the Guidance, the undertaking contains no clauses related to overage which are expressly sought via strategy 34 of the Local Plan. The review clauses are such that in the event that the shell and

¹⁵ There is limited evidence before me of financing arrangements in the viability report, notwithstanding the reference to debit and credit rates in appendix 8.

¹⁶ The relevant elements being published originally on 6 March 2014 with certain elements revised on 26 March 2015.

¹⁷ With reference to paragraph 182 of the Framework.

¹⁸ With reference to paragraphs 18, 19, 37 and 38 of that report in particular.

¹⁹ In particular at paragraphs 17 and 196.

²⁰ Former sections 106BA, 106BB and 106BC and associated guidance entitled Section 106 affordable housing requirements, review and appeal dated April 2013.

²¹ Ref APP/Q1255/S/15/3005876, APP/W0340/S/16/3153625 and APP/U1105/S/15/3129438.

²² Ref APP/N0410/A/13/2207771, APP/N0410/A/14/2228247 and APP/W1905/15/3133603.

core of the building proposed are not completed within 18 months of the grant of consent, a new viability appraisal would be undertaken. This would be based on forecast returns, and a revised affordable housing contribution made in certain circumstances. However the review clauses proposed are not, in my view, an appropriate substitute for overage clauses.

36. Whilst I accept that the 18 month marker proposed may encourage progress up to this point, it may equally have the perverse effect of delaying completion: there would be an incentive to make swift initial progress and then to delay completion or sales until market conditions were most favourable. This may delay the benefits of the development proposed, as are considered subsequently.
37. Moreover after 18 months from the grant of consent it is likely that any new viability appraisal undertaken would factor in various costs encountered in implementing development to that stage (such as in respect of foundations, structural works and utility provision). These incurred costs would need to be compared against the predicted returns that would result after completion, the latter inevitably based on forecast rather than actual returns. Therefore the review clauses proposed would not be as robust or transparent a basis for calculating the appropriate affordable housing contribution as overage clauses.
38. Moreover the review clauses proposed may result in costs and uncertainty. A further viability appraisal would necessitate additional technical evidence to be produced, engagement with the Council, and costs associated with those actions. This is in comparison with overage clauses which would be based on actual returns from the scheme as a whole, which would require less interpretation. On the basis of the specific evidence before me in this case, I am therefore not satisfied that suitably-worded overage clauses would necessarily undermine the competitive return that would result from the development proposed or render it undeliverable, having considered the review clauses proposed by the appellants by way of an alternative approach.
39. Moreover, the approach in relevant elements of the Guidance, the RICS report, and the other appeal decisions brought to my attention do not outweigh the harm arising from the conflict with strategy 34 which is specifically justified with regard to the level of affordable housing need that exists at present. By the absence of overage clauses, the undertaking proposed therefore fails to make the development acceptable in planning terms, in conflict with the approach in paragraph 203 of the Framework. I therefore conclude that the development proposed fails to make appropriate provision for affordable housing in conflict with the approach in strategy 34 of the Local Plan and relevant elements of the Framework.

Other matters

40. As established above, it is not disputed that relevant policies of the Local Plan for the supply of housing are up-to-date. As such, the proposal falls to be considered under the development plan unless material considerations indicate otherwise. I accept the proposal would be beneficial in resulting in additional sheltered accommodation in East Devon, in supporting employment during construction, and as future occupants would make use of nearby services and facilities. I have also taken account of the various reports submitted by the

appellants related to housing for older people which highlight the importance of housing provision for an ageing population.²³

41. However, the support accorded in general terms to enabling housing delivery in the Local Plan and Framework is not at the expense of ensuring that all development makes appropriate provision for affordable housing. Moreover, as there is no dispute over whether the Council are presently able to demonstrate a five year housing land supply, the development proposed cannot be said to be necessary to meet housing requirements as they stand in East Devon.
42. I have also considered the concerns raised by nearby residents regarding the development proposed in relation to the living conditions of those nearby including during construction, parking provision, access, landscaping and drainage. Some of these matters are capable of being resolved through suitably-worded conditions were the development otherwise acceptable.
43. On the basis of the evidence before me,²⁴ with regard to the nature of the development proposed, its surrounding context and the previous use of the site, I do not consider that harm would arise in these respects (a position consistent with that of the Council). However, that unacceptable effects would not arise in these respects is neutral in the balance of my consideration of the case. Accordingly neither these matters, nor any others, are sufficient to outweigh or alter my reasoning as set out above.

Conclusion

44. For the above reasons, and having taken all other relevant matters raised into account, the proposal conflicts with the development plan taken as a whole and with the approach in the Framework. I therefore conclude that the appeal should be dismissed.

Thomas Bristow

INSPECTOR

²³ Including publications entitled A better Fit? Creating Housing Choices for an Ageing Population, Housing Market and Independence in Old Age: Expanding the Opportunities, Quality and Choice for Older People's Housing, A Strategic Framework, The Top of the Ladder, and A Better Life: Private Sheltered Housing and Independent Living for Older People.

²⁴ Including the supporting Design and Access Statement, Landscape Strategy Ref 183 LSP 100_A, Arboricultural Assessment Ref 15404-AA2-MW, proposed Construction Environmental Management Plan, Transport Statement, and Drainage Strategy Ref V-R6091/16/DS.

APPEARANCES

FOR THE APPELLANTS:

Mr Neil Cameron QC	Landmark Chambers
Mr Andrew Burgess	Managing Director, Planning Issues Ltd.
Mr Simon Mitchell	Head of affordable housing, Planning Issues Ltd.
Mr Simon Cater	Planning Issues Ltd.
Mr Nigel Jones	Director, Chesters Commercial

FOR THE LOCAL PLANNING AUTHORITY

Mr Darren Roberts	East Devon District Council
Mr Henry Gordon Lennox	East Devon District Council
Ms Rachel Danemann	East Devon District Council

INTERESTED PERSONS

Cllr Marianne Rixson	East Devon District Council
Cllr Gareth Jones	Sidmouth Town Council
Cllr Jeffrey Turner	Sidmouth Town Council
Mr Ian Barlow	Local resident
Mr Nigel Sharp	Local resident

DOCUMENTS

1. List of those individuals appearing on behalf of the appellants.
2. East Devon District Council hearing notice letter, dated 20 May 2017.
3. Unilateral undertaking, dated 5 July 2017, pursuant to section 106 of the Town and Country Planning Act 1990 as amended.
4. Copy of comments made by the Council's Development Monitoring and Enabling Officer in relation to application Ref 16/0867/MFUL.
5. Copy of appendix F to the Council's appeal statement.
6. Copy of appendix G to the Council's appeal statement.
7. Minutes of the Council's Development Management Committee meeting of 1 November 2016.
8. Council Viability Guidance Note 4: Vacant Building Credit.
9. Vacant Building Credit calculations undertaken by the appellant.