



Appeal Decision

Site visit made on 11 November 2020

by Matthew Jones BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 March 2021

Appeal Ref: APP/U1105/W/20/3254780

**South Whimble Farm, Road From Blackhorse Lane To Treasbeare Cottages,
Clyst Honiton EX5 2DY**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (the Act) against a failure to give notice within the prescribed period of a decision on an application for 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 D S Developments (Exeter) Ltd against East Devon District Council.
 - The application is dated 21 November 2019.
 - The application sought planning permission for demolition of agricultural buildings and erection of 19 dwellings, new access and estate road and ancillary works without complying with a condition attached to planning permission Ref 16/1826/MFUL, dated 20 November 2018.
 - The condition in dispute is No 16 which states that: *'The development hereby approved shall be connected to the Decentralised Energy Network in the locality. The buildings shall be constructed so that the internal systems for space and water heating are connected to the decentralised energy network prior to their first occupation for their permitted use'*.
 - The reason given for the condition is: *'In the interests of sustainable development in accordance with Strategy 38 (Sustainable Design and Construction) and Strategy 40 (Decentralised Energy Network) of the adopted East Devon Local Plan 2013-2031'*.
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Decision

1. The appeal is dismissed.

Background and Procedural Matters

2. In 2018 planning permission was granted to redevelop South Whimble Farm for 19 dwellings and associated works under Ref 16/1826/MFUL (the Original Permission). The redevelopment of the site was well underway at the time of my visit. A S106 agreement accompanies the permission which, amongst other things, secures 26% affordable housing (AH) translating to 5 affordable homes.
3. During the appeal the appellant provided the Council's latest Community Infrastructure Levy (CIL) Charging Schedule (2020). As this was of potential relevance and was approved and subsequently came into effect after the lodging of the appeal, I accepted it and had regard to it in my assessment.
4. The Council failed to give notice of its decision within the prescribed period. An assessment of the proposal's merits is now included within the Council's appeal evidence. It contains two notional reasons for refusal which respectively relate to whether or not the scheme should connect to the Decentralised Energy Network (DEN) which serves the adjoining settlement of Cranbrook, and the

suitability of the LPG system alternatively proposed. I have used these reasons for refusal to formulate the first main issue at this appeal.

5. The appellant's statement of case also introduces the intention to provide a different form of, or remove entirely, the AH secured in relation to the Original Permission. During the appeal the appellant submitted a Unilateral Undertaking (the UU) which, amongst other things, would reflect such changes.
6. However, the planning application form directs the reader to a covering letter which explains that the intention of the application is to remove condition no 16 of Ref 16/1826/MFUL, which requires the development to connect to the DEN. What the planning application form, the covering letter and the appeal form do not is make reference to the proposed variations to the AH. This means that it is not immediately apparent to the reader that such changes are in the offing. As such, with regard to the Wheatcroft principles¹, if I were to entertain an assessment of the proposed changes to the AH, other parties may well be prejudiced.
7. Furthermore, S73 of the Act applies to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted. S73(2) requires only consideration of the question of what conditions a grant of planning permission should be subject to. Proposals should not fundamentally alter the original planning proposal for which permission had been granted.
8. Given that it is proposed to fundamentally alter the housing offer of the scheme by changing the level of AH it would provide, and as this relates to part of the Original Permission bound not by a condition but by a planning agreement, this matter falls beyond the scope of S73 in my view. Instead, the established avenue for such changes would be through seeking to vary the legal agreement tied to the Original Permission pursuant to S106A of the Act. For these reasons, I am unable to consider the proposed changes to the AH in my assessment.
9. Nonetheless, although an application made under S73 is commonly referred to as a variation, the effect of granting permission creates a new, standalone planning permission. In such circumstances, it is possible to choose which one to implement, and I must therefore consider the implications of the submitted UU upon the AH secured at the site pursuant to the Original Permission.

Main Issues

10. Consequently, I consider that the main issues are:

- whether or not condition 16 is reasonable or necessary in the interests of sustainable design and climate change; and,
- whether or not the proposal would provide adequate levels of AH.

Reasons

Energy connection

11. Policy 38 of the East Devon Local Plan 2013-2031 (adopted 2016) (EDLP) encourages development to provide for sustainable design and construction solutions including the use of renewable energy technology. To this end, Policy

¹ Bernard Wheatcroft Ltd v Secretary of State for the Environment and Another (1980)

40 of the EDLP requires schemes for ten houses or more to connect to existing or proposed DENs in the locality to bring forward low and zero carbon energy supply and distribution. However, this is only where it is viable to do so, which is an approach consistent with Paragraph 153 of the National Planning Policy Framework (the Framework).

12. It is evident that due to changes in funding, each dwelling within the Original Permission would have a connection charge of £8,193 to the DEN at Cranbrook, which is markedly above that originally envisaged. This combines with the CIL rate that the Original Permission faces, which is significantly higher than the new £nil rate at Cranbrook, which also now applies at South Whimble Farm outwith the Original Permission. Together, these matters indicate that the insistence of a DEN connection would be an unviable imposition in this case, particularly given the marginal viability of the Original Permission, a matter accepted by the Council at the time. Given these constraints, a standalone LPG system, of the cost suggested, would be an appropriate alternative.
13. Consequently, I conclude on this issue that condition no 16 is not reasonable or necessary in the interests of sustainable design and climate change. Without it, the proposal would conform with Policies 38 and 40 of the EDLP.

Affordable Housing

14. The level of AH that Policy 34 of the EDLP seeks to secure can be subject to viability on a case by case basis. The policy would typically require 50% AH at sites such as South Whimble Farm, but viability issues formed the justification for the 26% AH ultimately secured in relation to the Original Permission.
15. The UU which accompanies the appeal would obligate either a different form of AH at the site or none at all, depending on my assessment of the viability of the scheme to provide AH. This does not reflect the situation at hand, where I am unable to be drawn on such an assessment, nor does the UU provide for a situation where the level of AH found to be policy compliant with the Original Permission can be reapplied. For these reasons, I must conclude that there would be conflict with Policy 34 of the EDLP.

Other Matters

16. As I am dismissing the appeal on the second main issue, I have not continued to undertake an Appropriate Assessment as to the potential effects of the proposal on the Exe Estuary and Pebblebed Heaths Special Protection Areas.

Planning Balance

17. I have found that condition no 16 is not reasonable or necessary. However, I cannot consider the sought changes to the AH, and the UU does not provide for a scenario where the Original Permission's AH obligations can be safeguarded. This leads to conflict with Policy 34 of the EDLP. Given the circumstances before me, the conflict with this policy attracts full weight and draws the scheme into conflict with the development plan when read as a whole.
18. Whilst the scheme would boost housing supply in the area, with likely associated economic benefits, I cannot rule out that greater housing benefits would be delivered through the Original Permission. Consequently, there are no other considerations that outweigh the conflict I have identified with the development plan.

Conclusion

19. For the reasons outlined above, and taking all matters raised into account, I conclude that the appeal should be dismissed.

Matthew Jones

INSPECTOR