



Appeal Decision

Hearing Held on 9 November 2021

Site Visit made on 9 November 2021

by S Edwards BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 March 2022

Appeal Ref: APP/B1740/W/21/3277363

Lymington Shores, Bridge Road, Lymington, SO41 9BZ

- 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 Redrow Homes Ltd against the decision of New Forest District Council.
 - The application Ref 20/11163, dated 16 October 2020, was refused by notice dated 6 May 2021.
 - The application sought planning permission for 'Mixed use development comprised: 168 dwellings; restaurant; retail/commercial space (Use Class A1 & A2) boat club; art gallery (Use Class D1); jetty with pontoon; access alterations; pedestrian bridge over railway; riverside walkway; car parking; landscaping; drainage' without complying with a condition attached to planning permission Ref 11/97849, dated 14 June 2012.
 - The condition in dispute is No 19 which states that: *'Written documentary evidence demonstrating that any residential building has met Code Level 3 shall be submitted to the Local Planning Authority and verified in writing prior to the occupation of any residential building, unless an otherwise agreed time frame is agreed in writing by the Local Planning Authority. The evidence shall take the form of a post construction certificate as issued by a qualified Code assessor'*.
 - The reason given for the condition is: *'In the interests of sustainable development, including resource use and energy consumption in accordance with policy CS4 of the Core Strategy for the New Forest District outside the National Park'*.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The revised National Planning Policy Framework (the Framework) published on 20 July 2021 sets out the Government's planning policies for England. Policies within the Framework are material considerations which should be taken into account for the purposes of decision-making from the date of its publication. The parties have had the opportunity to comment on this matter as part of the appeal process, and I have had regard to the updated Framework in determining this appeal.
3. Two signed Unilateral Undertakings (UU) pursuant to Section 106 of the Town and Country Planning Act 1990 (The Act), dated 1 December 2021, were provided after the hearing by the appellants, which I will return to later in this decision.

Background and Main Issue

4. Planning permission was granted in June 2012 for a large mix use development, subject to a number of conditions and the execution of a Section 106 (S106) legal agreement. The S106 notably required a number of residential units to remain unoccupied until a footbridge over the adjoining railway line, and related passenger lift, had been constructed and substantially completed.
5. The development is now largely complete, with the majority of the dwellings being now occupied, but at the time of the hearing, the commercial units had yet to be leased. Furthermore, and in accordance with the terms set out within the second deed of variation to the original planning obligation, only 151 open market dwellings are currently occupied. This means that 17 residential units have to remain vacant, until the footbridge has been constructed.
6. The appellants are seeking consent for the removal of condition 19 of planning permission 11/97849, which requires all residential buildings to meet Level 3 of the Code for Sustainable Homes. There is no dispute between the main parties that this condition no longer meets the relevant tests, as the Code for Sustainable Homes has been withdrawn and replaced through Building Regulations.
7. The effect of removing condition 19 would be to create a new planning permission. However, important material considerations need to be addressed, because of the planning obligation pursuant to Section 106 of the Act, which had been agreed as part of the original application.
8. The main issue is therefore the effects of removing the disputed condition in the context of an appeal made under Section 73 of the Act, with particular regard to the provision of a pedestrian bridge over the railway.

Reasons

9. There is no dispute between the main parties that the footbridge is included within the description of development, and that a section 73 application cannot change the description of development. It was emphasised by the Council that the original planning permission had been granted on the basis that the bridge would be delivered, as an integral part of the development.
10. Furthermore, and as noted above, the obligation to provide the bridge was included within the original S106 Planning Agreement, and was accepted by the parties as being 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. At the hearing, both parties confirmed that the need for the footbridge is accepted.
11. As emphasised by the Courts, there is no assumption in the legislation that any pre-existing planning obligation will apply to a Section 73 permission, or to development carried out under that permission. The legislation does not prevent a Local Planning Authority from considering whether any S106 linked to a previous planning permission should apply to the Section 73 permission or should be varied or discharged.
12. The appellants confirmed at the hearing that they did not detect any specific clause which would have ensured that any S106 obligation linked to the original

planning permission was worded from the outset as to apply to any subsequent Section 73 permission, and none was identified by the Council. Accordingly, it was agreed that a new planning permission would require a new planning obligation. Alternatively, the original planning obligation would need to be varied to also apply to the new planning permission.

13. The UUs submitted by the appellants as part of the appeal seek to modify the terms of the obligation, particularly in respect of the timing for the delivery of the bridge and the trigger mechanism which had been agreed as part of the previous planning obligations. The appellants consider that the current trigger is ineffective, given that the footbridge has not been delivered and prevents the occupation of several residential units in the context of a national housing crisis.
14. The Courts have however confirmed that an application under Section 73 of the Act may only relate to the modification of discharge of conditions on a planning permission. In circumstances where a landowner wishes to make an application for the modification or discharge of a pre-existing Section 106 obligation, he may only do so under Section 106A (or Section 106BA) of the Act and not under Section 73.
15. Furthermore, the legislation is clear that once a planning obligation has been correctly executed, it can only be varied by agreement between the appropriate authority and the person or persons against whom the obligation is enforceable. This means that a UU cannot be used to modify an earlier legal agreement, as the Local Planning Authority would have to be a party to the variation document. Consequently, and given the above, neither of the two UUs submitted by the appellants as part of this appeal constitute appropriate mechanisms to secure the implementation of the footbridge.
16. A major part of the development has been completed for a number of years. However, and whilst this was discussed at the hearing, I have not heard or seen any substantive evidence to justify convincingly why limited progress appears to have been made with regard to the implementation of the footbridge. The footbridge constitutes an integral part of what was originally applied for under the 2012 permission and the appellants therefore accepted a need for this part of the scheme, firstly by including it as part of the description of development and secondly in committing to its construction as part of the accompanying legal agreement, subject to the inclusion of a trigger restricting the occupation of a number of residential properties.
17. Notwithstanding my findings in relation to the removal of condition 19, were I to allow the appeal, the submission of UUs seeking to modify the terms of the planning obligation agreed under the original planning permission fall outside the scope of an application made under Section 73 of the Act. In the absence of a duly executed planning obligation to secure the construction of a pedestrian bridge over the railway in the terms agreed as per the original planning permission, the appeal cannot succeed.

Conclusion

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

S Edwards

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Killian Garvey	Barrister for the appellants
David Hutchison BSc Hons Dip TP MRTPI	Planning Consultant, Pegasus
Rob Phelps	Redrow Homes Ltd, Technical Director
Craige Burden	Redrow Homes Ltd, Head of Planning

FOR THE LOCAL PLANNING AUTHORITY:

David Norris	New Forest District Council, Development Management Service Manager
Warren Simmons	New Forest District Council, Case Officer
Ian Austin	New Forest District Council, Legal Services Manager

INTERESTED PERSONS:

Don Mackenzie	The Lymington Society
Councillor Jacqueline England	District Councillor

DOCUMENTS

- 1 Email correspondence between Councillor J England and John Nicholas (Redrow Homes Ltd)