



Appeal Decision

Inquiry Held on 7 and 8 November 2023

Site visit made on 6 November 2023

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 14 November 2023

Appeal Ref: APP/P0240/Q/23/3320249

Chamberlains Barn Quarry, Heath Road, Leighton Buzzard, LU7 3PZ

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 (TCPA) against a refusal to modify a planning obligation.
 - The appeal is made by Arnold White Estates Limited, Redrow Homes Limited, Mulberry Property Developments Ltd, Close Brothers Limited and Bellway Homes Limited against a refusal that a planning obligation should be modified.
 - The development to which the planning obligation relates is '*mixed development including up to 950 dwellings, a site for a lower school, a local centre comprising retail and community uses, informal open space and country park, incorporating allotments, orchards, new tree and shrub planting and play areas and a link road connecting Heath Road to Vandyke Road.*'
 - The planning obligation (including supplemental agreements), dated 28 August 2015, 10 April 2017, 9 April 2020, 14 June 2021 and 6 May 2022, was made between Central Bedfordshire Council and Arnold White Estates Limited, Redrow Homes Limited, Mulberry Property Developments Ltd, Close Brothers Limited and Bellway Homes Limited.
 - The application Ref CB/22/04278/SECM is dated 30 October 2022 on the Appeal Form and the Local Planning Authority's acknowledgement letter.
 - The application sought to have the planning obligation modified as follows:
'*To enable the installation, ownership, operation and use of a sustainable ground-source ambient heat network under that part of Chamberlains Barn known as the "Shenley Hill Country Park" (shown indicatively coloured green and labelled "Country Park Phase 1" and "Country Park Phase 2" on Plan F to the S. 106 Agreement which can be found at Tab 1L of the Appeal 6 Bundle) as detailed in the table at Tab 1D of the Appeal Bundle and the tracked changes to the S. 106 Agreement set out at Tab 1E of the Appeal Bundle.*'
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Decision

1. The appeal is allowed. The planning obligation (inclusive of supplemental agreements), dated 28 August 2015, 10 April 2017, 9 April 2020, 14 June 2021 and 6 May 2022, made between Arnold White Estates Limited, Redrow Homes Limited, Mulberry Property Developments Ltd, Close Brothers Limited and Bellway Homes Limited and Central Bedfordshire Council shall have effect subject to the modifications as specified in the application.

Procedural Matters

2. A Case Management Conference (CMC) was held on 20 September 2023 relating to an associated appeal (for an ambient Ground Source Heat Pump) under Section 78 of the TCPA (reference 3325744). That appeal is the subject of a separate decision letter.

3. At the CMC I set out clear instructions to the main parties in terms of them submitting 'position statements', an agreed Statement of Common Ground and other related documents. These were submitted in line with a timetable set out, and I have taken these into account in considering the proposal here.
4. It was also agreed at the CMC that the Inquiry would principally take the form of round table discussions led by the Inspector.

Application for costs

5. At the Inquiry an application for costs was made by Arnold White Estates Limited, Redrow homes Limited, Mulberry Property Developments Ltd, Close Brothers Limited and Bellway Homes Limited against Central Bedfordshire Council. This application is the subject of a separate Decision.

Main Issue

6. Put simply, both main parties agreed that the appeal turned on s106A(6)(c) which sets out:

(6) Where an application is made to an authority under subsection (3), the authority may determine—

- (a) that the planning obligation shall continue to have effect without modification;
- (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or
- (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

7. The main issue was set out in the Inquiry Agenda and was reiterated at the opening of the Inquiry. Neither main party raised concerns. The main issue in this case, therefore, is:
 - (i) Whether the obligation continues to serve a useful purpose, and would serve that purpose equally well if it had effect subject to the modifications specified in the application.
8. Within the Council's position statement¹, and at the Inquiry, the Council also raised the matter of s106A(5). This was further explained in Central Bedfordshire Council's Closing Submissions.² This forms an element of the Council's case, and therefore needs to be considered. Lastly, the Council also raise the matter as to whether the existing s106 permits the installation of a GSHP network beneath the Country Park. I have therefore considered this within the reasons section of this decision.

Reasons

Background

9. The background to the case is set out extensively in the evidence of the main parties (including their respective position statements. Therefore, I have not sought to replicate here in any detail.
10. The heating network is proposed for the benefit of future housing development, including Phase 4 of Chamberlains Barn which is consented under the Outline

¹ See Paragraph 11

² See Paragraphs 23 and 24

Planning Permission (shown coloured green on the Phasing Plan at Tab 1K of the Appeal Bundle) and on land known as "Northern Chamberlains Barn" (being land within the Chamberlains Barn site and situated north of Phase 4 and which is allocated for residential development in the Central Bedfordshire Local Plan and is currently the subject of an application for permission for residential development ref: CB/17/05971/OUT). In addition, it is proposed that ambient heat from the heating network could be supplied to the school site at Chamberlains Barn when developed by CBC and which is also consented under the Outline Planning Permission.

Does the existing s106 permit the installation of a GSHP beneath the Country Park?

11. In its closings, the Council drew my attention to its view that the existing s106 does not oblige the Council to agree a scheme and accept a transfer with a ground-source ambient heat network installed under the Country Park³. At the same time, the Council accepts that services may include thermal transfer fluid. There is also disagreement as to whether service media includes or does not include a GSHP network. Lastly, the Council considers that the GSHP network would be an encumbrance, and Part 4, Schedule 4 of the agreement provides that the transfer of the freehold interest in the Country Park should be free from encumbrances save for reserved rights.
12. It is not entirely clear as to the relevance of this point, given that it is s106A(c) that is the main area of contention between the parties. Furthermore, since the Closings were made planning permission has been granted for a GSHP under appeal ref 3325744. That decision was accompanied by a legal agreement whereby the Appellant (AWGeothermal Ltd) is bound to provide for the repair and maintenance of the GSHP network and making good any damages to the Country Park – at both the installation and the ongoing management of the GSHP network.
13. I acknowledge the point made by the Council that there is the risk of the Council being burdened with the GSHP network if the operator was to cease trading. However, it would be odd, given the investment of time and money in such a system, and the benefits to the local community, that were this situation to arise there would be no interest from other operators to purchase and manage the network. In any case, there is no indication that this situation would occur in the first instance.
14. An encumbrance placed upon the Council through the transfer of the 'above ground land' in order to form a Country Park, which is necessary in order to serve the nearby residential and other developments and secure ecological and social benefits, is unlikely to occur given the points above.
15. Accordingly, I do not find that this point indicates that the appeal should fail.

s106A(c) - Continues to serve a useful purpose, and equally well?

16. The Council accepts that the physical delivery of the Country Park would not be compromised as a result of the modification sought. The proposed modifications would oblige the Council to accept the transfer of the Country Park with the GSHP network underneath it.

³ LPA Closing Submissions, page 6, Paragraph 12

17. I note the concerns raised by the Council over the potential for leaks. On their face, these can pose serious risks to human and environmental health. However, the fluids to be used are non-toxic and biodegradable. Furthermore, the government body responsible for some natural environment matters, the Environment Agency, was only able to indicate one occurrence where a leak had occurred – albeit no indication of the location, the age, the type of installation, the type of fluid, the scale of the leakage nor the environmental impact of it. On the basis of the evidence before me, I conclude that the risk from leaks – which would be the responsibility of the operator to make good through the legal agreement under ref 3325744 – is minimal.
18. I note the point made that the Country Park would not be available during installation, non-routine repair, maintenance and decommissioning. However, given the investment made into such networks, there is an imperative for the operator to complete installation as soon as possible in order to recoup the investment costs. Should there be a need to make repairs, under the terms of the unilateral undertaking in relation to the s78 scheme, whilst I acknowledge that there may be some disruption to the users of the Country Park, this is highly likely to be limited in duration.
19. The modification sought would continue to enable the provision of a Country Park. This would provide multiple social and environmental benefits for the local community on the nearby newly built residential developments and further afield. It would also enable the GSHP, for which there are no planning grounds to resist (see appeal ref 3325744), to provide sustainable low carbon heating for the development. In doing so, I find that the modifications sought to the planning obligation (inclusive of supplemental agreements), dated 28 August 2015, 10 April 2017, 9 April 2020, 14 June 2021 and 6 May 2022, would continue to serve a useful purpose and that this purpose would be served, at the very least, equally as well subject to the modifications sought.

s106A(5) – modification imposing obligations on any other persons

20. As indicated in the main issues section, the Council raised the matter of s106(5) of the TCPA (albeit briefly) in its position statement. Further explanation was given in their Closing Submissions. Put simply, the Local Planning Authority argues that as it is a 'covenanter' within the agreement, and the covenants include acceptance of the transfer, and the covenants are enforceable by the owner against the Council (see 9.1 of the agreement), and the proposed modification seeks to impose an obligation on the Council (against its will, with consequences for control of specification and for retained rights), the Council submit that it is entitled to rely on s106A(5)⁴.

21. s106A(5) sets out:

(5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.

22. The Appellants set out in their Closing Submissions⁵ that the Council is already subject to obligations to take a transfer and it cannot fall within s106A(5) since they are not modified. In the Appellants view, the Council's concerns in this

⁴ LPA Closing Submissions, pages 8 and 9, Paragraphs 23 and 24

⁵ See Appellants Closing Submissions, page 5, Paragraph 11

matter turn on the future risk if covenanting parties cease to trade and/or a risk arising from pollution should the system fail.

23. In terms of the pollution risks, this matter is dealt with in associated decision ref 3325744. With regard to the imposition of an obligation against whom the obligation is enforceable, on plain reading the modifications sought would not impose an obligation on the Council outside that which has already been willingly entered into by the Council in the s106 agreement at the time of the appeal (that is the 2015 version and its supplemental parts).
24. Further avenues for the Council to explore on this matter may or may not exist, and such exploration would be at the discretion of the Courts to determine were that a final destination for such matters. That is beyond the scope of my remit here.
25. My role is to carefully consider the evidence put before me and draw rational and logical conclusions. In doing so, on this matter, I am inclined to favour the submission put forward by the Appellants, given that the modifications sought would not, in my view on the basis of the evidence before me, impose an obligation on the Council against whom it is enforceable.
26. Accordingly, I do not find that this point indicates that the appeal should fail.

Conclusion

27. I therefore conclude that the obligation would continue to serve a useful purpose, and would serve that purpose equally well if it had effect subject to the modifications specified in the application.
28. For the reasons given above, I conclude that the appeal should be allowed.

C Parker

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Ed Grant
of Cornerstone Barristers

Instructed by Pathfinder Legal Services Ltd

He/She called

Benjamin Tracy, BSc(Hons) MA
Thomas Mead, BSc(Hons) MA
MRTPI

Principal Planning Officer
Senior Planning Officer

Peter Cook, BSc MRICS
Carol Newell, BA(Hons) DipLA
CMLI

Commercial Estates Manager (Assets)
Landscape Officer

Jethro Punter, HND MSc MCIHT

Team Leader Highways Development
Management

FOR THE APPELLANT:

Mr David Elvin KC
Of Landmark Chambers

Instructed by the Appellants

He/She called

Mr Bob Williams
Mrs Kate Groves
Mr Adam Krol
Mr Chris Groves
Mr Mark Schull
Mrs Jo Unsworth
Mr Tom Ryan
Mr Paul Gibbs

AW Group Ltd
AW Group Ltd
AWGeothermal Ltd
Gunnercooke LLP
Arrow Planning
Savills Planning
Savills Planning
David Jarvis Associates

DOCUMENTS

- 1 List of appearances for Central Bedfordshire Council
- 2 Opening Statement on behalf of Central Bedfordshire Council
- 3 Email from the Environment Agency dated 7 November 2023 at 14:34 confirming position on suggested conditions
- 4 Consolidated list of suggested conditions
- 5 Late email from local resident
- 6 Drawing 3917-4-6-DJA2-S5-P1
- 7 Highways Representation 3 November 2023
- 8 Environment Agency 3 November 2023
- 9 Natural England 6 November 2023