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# Appeal Decision

Site visit made on 16 July 2024

**by Nick Davies BSc(Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 25 July 2024**

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**Appeal Ref: APP/W1145/W/24/3340332**

**Land at The Pines, Westward Ho!, Bideford, Devon EX39 1JG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (as amended) for the development of land without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by Mr Mark Jarvis (Clearsky Developments Ltd) against the decision of Torridge District Council.
  - The application Ref is 1/1027/2023/FUL.
  - The application sought planning permission for proposed flats and associated parking without complying with a condition attached to planning permission Ref 1/0618/2019/FUL, dated 5 August 2020.
  - The condition in dispute is No 2 which states that:  
*The development hereby permitted shall be carried out in accordance with the approved plans listed in the Plans Schedule.*
  - The reason given for the condition is:  
*To ensure the development is carried out in accordance with the approved plans.*
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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. Planning permission Ref 1/0618/2019/FUL (the Existing Permission), which gives rise to the disputed condition, allowed the construction of a block of nine flats over four floors, with basement parking below. It is not contested that the development was lawfully commenced in accordance with Condition 1 of the planning permission. Condition 2 requires development to be carried out in accordance with the approved plans. The application proposed varying the condition to allow the substitution of the approved plans with a new set of plans showing, amongst other things, an increase in the floor area of the flats on the first, second and third floors, and more extensive excavations to allow for a glazed stairwell and additional windows at the rear of the proposed building.

## Main Issues

3. The main issues are the effect that varying the condition would have on:
  - a) the character and appearance of the area;
  - b) the living conditions of the occupants of the neighbouring dwelling with regard to outlook; and
  - c) the planning obligations secured as part of the Existing Permission.

## Reasons

### *Character and appearance*

4. The appeal site is a vacant plot on the southern side of the busy B3236, in a residential part of the built-up area of Westward Ho!. The northern side of the road comprises a row of traditionally designed detached bungalows, set back on a consistent building line, behind enclosed front gardens that are generally given over to car-parking. To the south, the buildings are set well above road level, and there is a greater diversity in their design. However, those to the west of the appeal site show a degree of coherence in their two-storey scale, their set back from the road, and their overall ridge height. Most of them are traditional in design, with front-facing gables and some period architectural detailing.
5. The Pines, to the east, also has period architectural detailing, but it is a much larger building, and is separated from the rest of the row by the appeal site. Unlike the others, it is three storeys in height, so has a much higher ridge level. The Existing Permission provides for a building with an “art deco” inspired design that would contrast, to some extent, with the more traditional façades to either side. It would, however, be consistent with the setback of the other buildings, and would have an overall roof height at an intermediate level between the ridges to either side, providing a visual transition between the two.
6. The proposed increase in the width of the upper storeys would, on an inspection of the elevational details alone, give the building a bulkier and more top-heavy appearance, with a greater horizontal emphasis than the original design. However, the multi-faceted nature of the building would effectively break up the front façade into separate modules on different planes. As a result, the increase in volume would not be readily apparent. The overall design approach of the building would be little changed, comprising a robust stone base, giving rise to three diminishing storeys of masonry, with curved wall and glazing details, and surmounted by a lightweight top storey behind a parapet. The amended design would not, therefore, significantly alter the impact of the development in the street scene.
7. The overall height of the building would remain the same as under the Existing Permission, so there would still be a graduation in roof levels from 74 Atlantic Way (No 74) to the west, up to The Pines on the opposite side. Furthermore, the increased width of the upper storeys would largely be on the parts of the building that would be set back from the side-facing gable of No 74. Consequently, there would still be a stepped relationship between this gable and the adjacent storeys of the proposed building that rise away from the boundary to its ultimate roof height. The visual transition between the two buildings would not, therefore, appear unduly abrupt, and would not be significantly different to what has already been approved.
8. The more extensive excavations to the rear of the site would allow light and air to reach the lower floors of the building, thus improving living conditions for future occupants. They would, though, also result in a moderate increase in the height of the retaining wall compared with the Existing Permission. The enlarged structure would, however, be largely hidden by the frontage buildings in views up and down the road, so its visual impact would be limited to the

road directly in front, where it would be seen to either side of the proposed building.

9. Although higher than previously approved, it would also be set further back on the site, so its presence in the street scene would not be markedly different. It would be seen in the context of the large buildings in the foreground, with rising land and trees behind, so it would not be an overly dominant feature. Furthermore, its impact could be reduced through a judicious landscaping scheme employing trailing plants on the higher land beyond. Overall, it would not have a significantly different impact on the character and appearance of the area than the permitted scheme.
10. The evidence indicates that the revisions to the permitted scheme are sought to improve viability. I am mindful that Paragraph 140 of the National Planning Policy Framework (the Framework) seeks to ensure that the quality of approved development is not materially diminished between permission and completion, as a result of changes being made to the permitted scheme. In this case, however, the proposed changes would be achieved without a noticeable reduction in the design quality of the permitted scheme, which represents an appropriate response to the characteristics of the site and its wider context.
11. I therefore conclude on this issue that the variation of the condition as proposed would not result in harm to the character and appearance of the area. The proposal would, therefore, comply with Policies ST04 and DM04 of the North Devon and Torridge Local Plan 2011-2031 (Adopted October 2018) (the Local Plan), which seek to ensure that all new development is of high-quality design. The proposal would also accord with the Framework's aim to achieve well-designed and beautiful places.

#### *Living conditions*

12. No 74 lies to the west of the site and is built into the steep slope of the land. Its rear elevation faces a steep embankment at close quarters, such that there is little outlook from any windows facing this way. There are no windows in the side gable that faces the appeal site. Consequently, occupants of the house are reliant on the large windows in the front elevation for their main outlook. These windows have open views over the bungalows opposite to the coast beyond. Similarly, the main outdoor amenity space for occupants is the level garden to the front of the house, with a seating area over the garage, which has an open outlook over the road.
13. The amended scheme would involve parts of the upper floors of the proposed building being closer to the boundary with No 74. However, the enlarged parts of the building would be set back behind the ridge line of the side-facing gable of No 74. Consequently, there would be no impact on outlook from the windows in the front elevation, and little effect on the openness of the main outdoor amenity area of the property.
14. The retaining wall would be higher than previously permitted, but it would be considerably further back on the site, so would be more distant from the windows and gardens of No 74. It would also be largely hidden behind the proposed building. Consequently, it would not be visible in views out of the main windows of No 74, and would have very little visual impact from any parts of the garden, particularly the main amenity area to the front. The

amendments would not, therefore, result in any loss of outlook or overbearing impacts for the occupants of the adjacent dwelling.

15. I therefore conclude on this issue that the variation of the condition as proposed would not result in harm to the living conditions of the occupants of No 74. The proposal would, therefore, comply with Policy DM04 of the Local Plan, which seeks to ensure that the amenities of existing and future neighbouring occupiers are safeguarded. The proposal would also accord with the Framework's aim to create places with a high standard of amenity for existing and future users.

#### *Planning obligations*

16. The evidence indicates that the Existing Permission was subject to planning obligations secured by an Agreement under section 106 of the Town and Country Planning Act 1990 (TCPA 1990). These related to financial contributions towards education and off-site public open space provision. No evidence has been provided by either party of the scale of the financial contributions, how the sums were calculated, or how they would be spent.
17. If I were to allow this appeal, a new permission would be created. I have no evidence to indicate that a new permission would be bound by the terms of the previous Agreement. Indeed, both parties refer to the need to pursue a Deed of Variation to ensure that the obligations apply to any new permission that is granted, which indicates to me that they would not be secured by the original Agreement. From the statements of the main parties, there is no dispute that it is appropriate to secure the obligations in relation to the appeal proposal.
18. A Unilateral Undertaking made under Section 106 of the TCPA 1990, and dated 22 July 2024 (the UU), was submitted by the appellant outside the timetable for the appeal. Consequently, the Council has not had the opportunity to make comments on it. Under the terms of the UU the owner covenants to pay financial contributions to the Council of £41,824 towards Offside (*sic*) Public Open Space; £2,250 towards Early Years Education; and £36,000 towards Primary Education.
19. The obligations are conditional upon me being satisfied that they meet the three tests set out at Regulation 122(2) of the Community Infrastructure Levy Regulations 2010. In this regard, whilst it is common ground between the parties that financial contributions are appropriate, I have no evidence to demonstrate that the actual sums included in the UU are fairly or reasonably related in scale. Furthermore, as the Council and the County Council are not signatories to the UU, I have no indication of how the contributions would be spent in order for me to judge whether they would be directly related to the development. I am, therefore, unable to safely conclude that the UU would meet the tests.
20. Even if I had been satisfied on this issue, the UU is flawed. There is no trigger point within the covenant to identify when the financial contributions should be paid. Furthermore, the UU omits details of the Land Registry title number in paragraph 1.1. Consequently, I cannot be sure that the obligation is legally sound, or that the contributions would be paid in a timely manner.
21. On the evidence before me, there is an undisputed need for education and open space contributions to make the development acceptable in planning

terms. However, I have insufficient evidence to satisfy myself that the particular contributions identified in the UU would be fairly and reasonably related in scale and kind to the development, or that they would be spent in a way that would be directly related to the development. Consequently, the obligations in the UU would fall away, due to the conditionality clause at 3.5, notwithstanding the other flaws that I have identified. The proposal would, therefore, fail to secure appropriate financial contributions towards infrastructure that would otherwise make the proposal acceptable.

22. This is not a matter that could be rectified by the imposition of a condition. The Planning Practice Guidance advises that it is only exceptionally that a planning condition might be used to limit development that can take place until a planning obligation has been entered into, indicating that this applies to complex and strategically important development where there is clear evidence that the delivery of the development would otherwise be at serious risk. It further states that ensuring that any planning obligation is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties. I have not seen evidence to suggest that exceptional circumstances apply in this case.
23. In the light of these considerations, if I were to allow the appeal, the obligations necessary to make the development acceptable in planning terms would not be appropriately secured.

### **Conclusion**

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

*Nick Davies*

INSPECTOR