The Planning Inspectorate

Appeal Decision

by Ben Linscott BSc MRTPI

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

Decision date: 29 July 2015

Appeal Ref: APP/D0840/S/15/3013861
Land off St Cyriac, Luxulyan, Cornwall, PL30 5EF.

- The appeal is made under section 78 and S106BC of the Town and Country Planning Act 1990 against a refusal to vary a Planning Obligation dated 23 November 2009, made under S106 of the Act in support of Planning Permission 08/01791.
- The appeal is made by Quay Developments Luxulyan Ltd against the decision of Cornwall Council as set out by letter dated 17 March 2015.
- The application Ref PA15/01267 was dated 5 March 2015.
- The application details (taken from the summary on the appeal form) were: "With respect to the S106 Agreement dated 23 November 2009 and Cornwall Council consent 08/01791 which permitted the development of 13 affordable houses and 6 speculative houses. It is proposed that the number of affordable houses be reduced from 13 to 10, and the number of open market houses be increased from 6 to 9, by allowing plot numbers 14, 15 and 16 to be delivered as open market housing (rather than affordable housing). The detail of the proposed changes to the existing S106 Agreement are *(sic)* set out in the Schedule to the S106BA Application dated 5 March 2015."

Decision

1. The appeal is invalid and I am therefore not in a position to be able to consider any of the viability or other considerations cited by the appellant. I have, however, carefully reviewed all of the correspondence and documentation in reaching my conclusion.

Reasons

2. Planning permission was originally granted for the development of the site as a departure from the development plan. That required the Government Office for the South West, on behalf of the Secretary of State, not to intervene in the knowledge of the Council's intention to grant permission, which decision was confirmed by letter dated 16 March 2009. An understanding of the context in which the Council arrived at that resolution informs my finding.

3. The original application for planning permission was described by the Applicant (then Quay Developments (SW) Ltd) as "Proposed residential development of 13 affordable and 6 speculative houses." In a particularly detailed and lengthy officer's report to the Council's Development Control Committee, the site was described as being a field on the western side of the village and outside the Luxulyan development boundary. It records that provision was made in the Restormel Local Plan for the development of exceptions sites (Policy 75), requiring that such sites must be outside but adjoining the settlement's envelope. To be approved such schemes must also meet a local need. The report noted that Local Plan policy R29 was specific to Luxulyan and provided

for 15 affordable homes to be built there by 2011. At the time of the report, none had been built.

4. Elsewhere in the Local Plan there was a description of the type of facilities etc which would be expected of a village to which policy 75 would apply and the Council's adopted Supplementary Planning Document explained that a need would have to have been established for planning permission to be granted (and reasserted the types of services expected in a qualifying settlement.) Luxulyan was found to meet those requirements. Much of the Officer's report was then taken up with explaining the identified need, drawing on the Council's own information but also, importantly, drawing on research and a survey carried out by the then Applicant itself. The latter's final finding included detailed viability considerations (though some detail was not disclosed on the basis that it was considered to be commercially confidential). However, overall the applicant's assessment provided a respectable and well-founded basis on which to conclude that there was a level of local need for affordable houses in Luxulyan and that a split of 32% to 68% (open market : affordable houses) was viable, which ratio is essentially what it promoted in the application for planning permission and which was consolidated in the permission and Agreement.

5. The officer report also recorded the then Agent's advocacy of the scheme by noting his detailed analysis of the Restormel affordable housing need position. Especially notable is the Agent's reported observation that there had been a "deplorable lack of achievement" over past years, inasmuch as the Luxulyan target of 15 such houses had been set in 2001 and yet none had been delivered 7 years later. He advocated strongly that the scheme would provide 13 of the 15 and should be approved.

6. The circumstances outlined above plainly presented the Council with a dilemma in policy terms, because it is quite clear to me from its wording that policy 75 is one that is directed specifically and only at allowing exceptions to be made to normal policy where the permitted development would be entirely affordable houses. It contains no words or inferences which would permit a mixed scheme or a cross-subsidy to grant permission under its provisions: the proposal was incontrovertibly contrary to the wording of that policy. That seems to me to have been understood by all parties at the time. The Council was nevertheless attracted to and persuaded by the then Applicant's offer and research, and plainly did not wish to lose the opportunity to provide a significant proportion of the affordable housing needed and committed to in policy R29 at Luxulyan. That attraction was sufficient to outweigh the "cost" of having to permit some market housing outside the settlement boundary, which its policies would otherwise forbid. It was on this basis that it resolved to grant planning permission, to seek a S106 Agreement and to promote a departure from the development plan.

7. Whilst, as I note above, the proposal was not consistent with policy 75, it is evident from what I have read that the Council would clearly never have contemplated approving a fully open market housing scheme. Judging by the approach it took and evidence it gathered and relied upon at the time, the applicant equally plainly understood that it could only expect to obtain any sort of planning permission for residential development of the land if the scheme contained a sizable affordable housing element. In short, therefore, what was

approved was an exception to the "exceptions" policy as expressed in policy 75, but crucially recognising, and acting upon, the opportunity to provide 13 affordable houses. Nevertheless it was a permission relating to the delivery of principally affordable housing and represents what can only reasonably be described as an exception to policy: it is therefore an "exceptions site" in any reasonable interpretation of the term. Admittedly Policy 75 was not identified by the Council as a reason for granting planning permission. However, I conclude that permission would not have been granted had it not been for the existence of policy 75; the development was thus clearly approved partly on the basis of a policy for the provision of housing on rural exception sites.

8. Moreover, the planning permission was explicitly stated to be granted in accordance with policy R29 (which relates in part to the provision of affordable housing on exceptions sites) thus providing further reason to support the conclusion that planning permission was granted wholly or partly on the basis of a policy for the provision of housing on rural exception sites, as required by S106BA(12).

9. The above findings are important because the question of whether this appeal can be entertained is in dispute. For its part, the Council (in its letter dated 17 March 2015) explains that it did not validate the application because the original approval was based upon it being regarded as an exceptions site, with approval by the Council and support by the Parish Council being predicated on that basis. The appellant, however, regards the site as a stalled site which it says comes within the ambit of the S106BA and BC provisions, the market housing having been built but three affordable housing plots being yet to be built out, despite unsuccessful attempts to deliver them.

10. Whatever the merits or otherwise of the appellant's case, it is clear to me that my finding above concerning the "exceptions site" standing of the original permission governs whether the application under S106BA was valid, and thus whether an appeal can in turn be validated. In my judgment S106BA(12) is very clear since it explains that a request to vary an affordable housing obligation cannot be entertained "if the planning permission for the development was granted wholly *or partly* on the basis of a policy for the provision of housing on rural exception sites" (my emphasis.) Moreover, the Glossary to the National Planning Policy Framework (albeit that the application pre-dated the NPPF) explains that exceptions sites can, at the Council's discretion, contain small numbers of market homes, if it would assist delivery. Plainly that supports, albeit retrospectively, my finding (which does not incidentally rely upon the NPPF) and the approach of the Council that its original judgment that the site, albeit not consistent with Local Plan policy 75, was nevertheless justifiable as an exceptions site and was granted permission only on that basis.

11. I therefore conclude on the evidence put to me, that S106BA(12) means that there was no basis to validate the application made to the Council on 5 March 2015 to vary the S106 Agreement. Accordingly, there is no provision for an appeal under S106BC and I shall take no further action.

Ben Linscott

INSPECTOR