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## Appeal Decision

Hearing held on 29 November 2022

Site visit made on 30 November 2022

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

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

**Decision date: 12<sup>th</sup> December 2022**

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### **Appeal Ref: APP/D0840/W/22/3295839**

### **Bridge View Nurseries, Church Lane, Calstock PL18 9QJ**

- 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 Mr M Wight (Construction Partners) against the decision of Cornwall Council.
  - The application Ref PA21/09422, dated 17 September 2021, was refused by notice dated 7 January 2022.
  - The application sought planning permission for proposed development of 33 dwellings without complying with a condition attached to planning permission Ref PA17/09575, dated 20 December 2018.
  - The condition in dispute is No 2 which states that:  
*The development hereby permitted shall be carried out in accordance with the plans listed below under the heading "Plans Referred to in Consideration of this Application".*
  - The reason given for the condition is:  
*For the avoidance of doubt and in the interests of proper planning.*
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### **Decision**

1. The appeal is dismissed.

### **Application for costs**

2. On the day of the Hearing an application for costs was made by Mr M Wight (Construction Partners) against Cornwall Council. This application is the subject of a separate Decision.

### **Preliminary Matter**

3. During the appeal Hearing, the appellant submitted a Unilateral Undertaking dated 29 November 2022 (the UU), made in pursuance of section 106 of the Town and Country Planning Act 1990. It contains obligations that would secure, amongst other things, financial contributions towards education facilities, off-site public open space, and mitigation of the impact of the development on European designated wildlife sites. It also includes an obligation securing a financial contribution to off-site affordable housing, subject to review of viability at a late stage of the development.

### **Background and Main Issues**

4. The appeal site comprises an area of approximately 1.75 Hectares on the north-western edge of Calstock. It was formerly a nursery, but is now an active

construction site, following the grant of planning permission for 33 dwellings on 20 December 2018, under reference PA17/09575 (the Original Permission). A section 106 agreement (the s106) was completed in association with the Original Permission, which requires the developer to provide, amongst other things, 15 affordable dwellings (just over 45% of the total).

5. The application sought to vary Condition 2 of the Original Permission, which requires the development to be carried out in accordance with a list of approved plans. It is proposed that a different set of plans should be substituted, incorporating changes to the design and siting of some of the dwellings, including photovoltaic (PV) panels to Plots 1-10 and 21-33; attached garages to plots 4,5,6,7 and 10; utility rooms to Plots 23, 29 and 31; and enlargement of the first floor of Plot 3. The development has commenced, and some of these changes have already been implemented. I am therefore considering these elements of the appeal retrospectively.
6. Development began in breach of an obligation in the s106 to submit an Affordable Housing Scheme, and have it approved, prior to commencement. This remained the case at the time of the Hearing. Furthermore, I saw that 10 of the dwellings have been built above ground floor slab level, in breach of the requirement of the s106 to enter a binding contract for the construction and sale of the affordable dwellings to a Registered Provider, prior to this stage of construction. In the absence of an approved Affordable Housing Scheme and a contract with a Registered Provider, the Council was concerned that the garages and PV panels may add to the value and maintenance costs of the affected dwellings, jeopardising their delivery as affordable housing. This was the only reason for refusal.
7. The appellant's appeal statement identified that there were two elements to the appeal, firstly, the design changes to the various plots; and secondly, revisions to the s106 obligations. A Financial Viability Appraisal (the FVA) was submitted with the appeal, which sought to demonstrate that no affordable housing could viably be delivered. The appeal statement indicated that a new Unilateral Undertaking would be provided to secure payment of an affordable housing contribution. The Council contends that the second element of the proposal, and the FVA, should not be considered in this appeal, as they did not form part of the application.
8. Consequently, the main issues in this appeal are:
  - a) The effect that varying the condition would have on the affordability and deliverability of some of the affordable dwellings to be provided on site;
  - b) Whether the viability evidence that has been submitted with the appeal can reasonably be considered as part of the appeal; and, if so,
  - c) Whether it is justified, on viability grounds, for the development to proceed without the provision of affordable housing.

## **Reasons**

### *Effect of design changes on affordability and deliverability of affordable housing*

9. Although an Affordable Housing Scheme has not been submitted in accordance with the s106, the evidence indicates that, at the time of the Original Permission, it was intended that Plots 6-20 would comprise the 15 affordable

units. Consequently, the modifications proposed under the section 73 application that would affect the affordable dwellings are the addition of attached garages to Plots 6, 7 and 10, and the provision of PV panels on Plots 6-10. It was confirmed at the Hearing that the driver behind these changes was to make the houses more attractive for purchase on the open market, and to improve the value of the overall development, as it was becoming clear that delivery of 15 affordable dwellings would not be viable. However, the application that the Council was being asked to consider did not include any reference to a reduction in affordable housing.

10. It was also confirmed at the Hearing that the alterations to the design of Plots 6–10 were not discussed with any Registered Providers, to gauge whether they would affect their affordability and deliverability as affordable dwellings. In the absence of an Affordable Housing Scheme, or any engagement with a Registered Provider, it was not unreasonable for the Council to take a precautionary approach, particularly as development was progressing in breach of the s106 in these regards.
11. No evidence was submitted with the application to demonstrate that there would be no harm to the prospect of the affected units being delivered as affordable housing as a result of the proposed changes. Conversely, at the Hearing, the Council was unable to provide any evidence that there would be a harmful impact. It was, however, argued that this was because there was no Registered Provider involved in the development to advise on the matter. In the absence of any assurance from a Registered Provider that they would be able to manage the extra maintenance of the buildings, and still rent them at an affordable housing level, I again consider that it was not unreasonable for the Council to take a precautionary approach. This is particularly so when the evidence indicates that an offer had been made by a Registered Provider for all 15 dwellings on the basis of the Original Permission.
12. At the Hearing, it was contended by the appellant that the additional garages would not be taken into account in the amount of rent that would be charged by a Registered Provider. However, it was conceded that the garages would increase the value of the houses. Consequently, if these units were to be shared ownership dwellings there would be an additional cost to the purchaser. It was suggested by the appellant that the increase in value may be in the region of £10,000, so the increased purchase price for somebody buying on a 50% shared ownership basis would be £5,000. Whilst it was argued that this was a relatively small amount, for a local person striving to access the housing market it could be a crucial factor in whether or not they are able to afford a home in the village.
13. There is little evidence regarding the potential impact of the inclusion of PV panels on the maintenance costs for a Registered Provider, and subsequently the charges to occupants of the affordable dwellings. However, any increased costs in this respect would be balanced, at least to some extent, by reduced energy bills for residents. It is therefore unlikely that this aspect of the proposals would significantly reduce the affordability of the houses for local people in need of a home.
14. To summarise on this issue, there is an absence of an approved Affordable Housing Scheme setting out which of the dwellings will comprise the 15 affordable houses required by the s106, and which of those will be rented or

shared ownership. Furthermore, there is no contract with a Registered Provider for the purchase of the affordable dwellings. The appellant does not contest that the inclusion of garages would increase the value of some of the houses which were identified as affordable dwellings on the plans that formed part of the Original Permission. In the absence of clarity on the mix of the affordable housing, and evidence that a Registered Provider would be able to purchase and let the dwellings at affordable levels, I cannot safely conclude that the proposed alterations would not be harmful to the affordability and deliverability of the affordable housing.

15. Consequently, the proposal would be contrary to Policy 6 of the Cornwall Local Plan Strategic Policies 2010-2030 (the Local Plan) and Policy HP5 of the Calstock Parish Neighbourhood Development Plan 2021-2030. These policies seek to ensure that new housing developments include an appropriate mix of house size, type, price, and tenure to address identified needs.

*Whether the viability evidence can reasonably be considered*

16. It is common ground that when the application was initially submitted, it referred to a reduction in the level of affordable housing to a policy compliant 30%. However, when the Council advised that such a change was not permissible under section 73, this aspect of the proposal was removed from the application prior to validation. In resubmitting the application for validation, the email from the appellant's agent at the time confirmed the removal of "*any reference of changing the affordable housing percentage from that currently agreed under the S106 Agreement so this no longer forms part of this application*". Consequently, the application that was the subject of public consultation did not include any overt proposals to alter the affordable housing provision.
17. It is acknowledged in the Statement of Common Ground that the appellant, via a new agent, wrote to the Council on 16 November 2021 indicating an intention to submit a viability report, and requesting that the level of affordable housing be considered as part of the application. However, no viability report was submitted before the application was refused on 7 January 2022. The evidence given at the Hearing indicated that the letter was not published on the Council's website until after the application had been determined. Even if it had been added at the time, it would have been after interested parties had viewed the application and made their comments. Consequently, it was not evident to the public, during the course of the application, that there was any proposal to vary the quantum or mix of affordable housing that had been approved as part of the Original Permission. Furthermore, the Council's decision was based on the application as submitted, with the only reason for refusal relating to the physical changes proposed to Units 6-10.
18. The FVA was not submitted until the appeal was lodged. Furthermore, the appellant's appeal statement was the first time that the proposal was widened, from a relatively modest alteration to the physical design of some of the dwellings, to a wholesale reduction in the affordable housing provision from 45% to 0. This substantial change to the proposal is contrary to paragraph M.2.1 of the Procedural Guide: Planning appeals – England, which says that "*the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by*

*the local planning authority, and on which interested people's views were sought".*

19. Whilst some of those who commented on the application raised the issue of affordable housing, this was only in the context of the physical changes proposed to some of the houses, and the wording in the Planning Statement, which could have been interpreted as inferring a reduction from 15 to 11 units. The representations were made before receipt of the appellant's agent's letter of 16 November 2021, and there is no evidence to suggest that interested parties envisaged that the application entailed a proposal that could result in no on-site affordable housing.
20. It is argued that the appeal process itself provided adequate publicity of the proposal, such that no parties would be prejudiced by my consideration of the FVA, and, consequently, the proposed omission of affordable housing. However, the description of the appeal proposal on the letters of notification was exactly the same as it was for the planning application – *"Proposed development of 33 dwellings with variation of 2 (approved plans) of decision PA17/09575 dated 20/12/18"*. It would not, therefore, have been apparent to recipients that the appeal proposed a radical change to the affordable housing provision that was absent from the planning application documents. Indeed, I note that many of the representations received as a result of that notification refer to the impacts of the garages and PV units, and the potential reduction in affordable housing. The evidence does not indicate that recipients understood that the appeal proposal now explicitly proposed no on-site provision, based on a previously unseen FVA.
21. My attention has been drawn to case law<sup>1</sup> which clarifies that if a section 73 permission is granted, there is no assumption in the legislation that any pre-existing planning obligation will apply to that permission. This is not disputed by the Council. Consequently, if I were to allow the appeal, a new, standalone permission would be created, which could be implemented instead of the Original Permission, and would not be bound by the s106. It is, therefore, not a matter of dispute that if permission were to be granted for the physical changes to the development under section 73, a new planning obligation would be necessary to secure the affordable housing and other mitigation that was to be delivered through the s106 under the Original Permission. It does not, however, follow that an application under section 73 opens the door for radical changes to obligations agreed under the previous permission without proper public scrutiny.
22. Section 73(2) of the Act requires only consideration of the question of what conditions a grant of planning permission should be subject to. The Planning Practice Guidance (the PPG) advises that permission granted under section 73 takes effect as a new, independent permission to carry out the same development as previously permitted subject to new or amended conditions<sup>2</sup>. Furthermore, the PPG advises that this type of application should result in a development which is not substantially different in nature from the one which has been approved<sup>3</sup>.

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<sup>1</sup> North Norfolk Homes v North Norfolk DC [2020] EWHC 2265 (QB)

<sup>2</sup> Paragraph: 015 Reference ID: 17a-015-20140306

<sup>3</sup> Paragraph: 017 Reference ID: 17a-017-20140306

23. If I were to allow the appeal, and the new permission was implemented, the UU would become effective, and no affordable housing would be secured on the site. This would result in a development that was substantially different in nature to that permitted under the Original Permission, which would deliver 15 affordable houses through the associated s106. The evidence indicates that, although not included in the description of the development, the original application was explicit in its proposals for affordable housing, and that this was a benefit that weighed heavily in favour of the decision to grant approval. The UU was submitted at the end of the Hearing. As a result, there has been no opportunity for parties outside the Hearing to comment on the obligations therein, which would result in a significantly different development than was sought under the planning application on which interested people's views were sought.
24. To summarise, the appeal introduced a proposal to omit on-site affordable housing provision from the development, which was not explicit in the application. The justification for its omission was based on viability evidence that was not included as part of the application. I am mindful that section 79 of the Act allows me to deal with the application as if it had been made to me in the first instance. However, having regard to the Wheatcroft principles<sup>4</sup>, I consider that to do so would deprive those who should have been consulted on the substantial changes to the development, the opportunity of such consultation. I have therefore determined the appeal on the basis of the application that was considered by the Council, and on which interested people's views were sought.

*Whether it is justified, on viability grounds, for the development to proceed without the provision of affordable housing*

25. Policy 10 of the Local Plan recognises that it is not always possible to deliver the full quota of affordable housing because of site specific constraints. Where appropriate evidence is submitted, demonstrating that a scheme cannot viably proceed, a range of approaches is set out to assist in securing the maximum achievable contribution to affordable housing.
26. It is evident that there are considerable site-specific costs involved in delivering the approved development. The site is on two levels, requiring a retaining structure of a significant height, and approximately 330 metres long. I saw that substantial engineering operations have already taken place to install deep and extensive surface water drainage systems. The approved levels of the houses require significant excavations and retaining structures, together with large volumes of material to be removed from the site. Furthermore, the layout entails the construction of two roads of considerable length, each of which only serves development on one side. Although the original application explicitly proposed an above policy proportion of affordable housing, I have not been made aware of any evidence that demonstrated this would have been viable, at the time, on such a challenging site.
27. In view of the abnormal costs associated with the development, which were evident from my site visit, I have considerable doubts that the approved level of affordable housing will prove deliverable. Therefore, without co-operative discussions between the parties, there is a significant risk that the development will stall. I am mindful that the appellants signalled an intention to renegotiate

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<sup>4</sup> Bernard Wheatcroft Ltd v SSE [JPL 1982 P37]

the level of affordable housing, and indicated that a viability appraisal would be submitted. However, no viability evidence was included with the application, and the FVA was not received until the appeal was lodged. Consequently, viability discussions to date have been held in the combative arena of an appeal, where the parties are inclined to maintain a position, rather than to adopt a collaborative approach.

28. I have concluded above that my consideration of the appeal should be based, essentially, on what was considered by the Council, and on which interested people's views were sought. On this basis, I have no robust evidence to conclude that it is justified, on viability grounds, for the development to proceed without the provision of any affordable housing. Consequently, the proposal would be contrary to Policies 6, 8 and 10 of the Local Plan, which seek to secure affordable housing to meet local need on all residential developments of more than 10 dwellings.

### **Conclusion**

29. There are no material considerations that indicate the decision should be made other than in accordance with the development plan. Therefore, for the reasons given, I conclude that the appeal should be dismissed.

*Nick Davies*

INSPECTOR

### **APPEARANCES**

#### **FOR THE APPELLANT:**

Simon Bell (Clerksroom) – Counsel  
Mr Mike Wight (Construction Partners) – Appellant  
Adele Fulner (Construction Partners)  
Robin Furby – (S106 Management) - Agent  
Tom Furby - (S106 Management) – Agent  
Helen Wagstaffe – (Countrywide)  
Charlie Staines – (Countrywide)

#### **FOR THE LOCAL PLANNING AUTHORITY:**

Jim Lee – Appeals Officer, Cornwall Council  
Patrick James BSc Arch, MA, MRTPI – Case Officer, Cornwall Council  
Richard Hawkey – Affordable Housing Officer, Cornwall Council  
Sally Henthorn - Affordable Housing Officer, Cornwall Council

#### **INTERESTED PARTIES:**

Cllr Dorothy Kirk – Cornwall Councillor for Calstock  
Cllr Alastair Tinto – Calstock Parish Council  
Sarah Pitt – Tamar Valley Times

Linda Bunyan – Local Resident  
Dania Weatherhead - Local Resident  
Juliet Hilary - Local Resident  
Chris Little - Local Resident  
Terry Lyons - Local Resident  
Martin Smith - Local Resident  
Tony Jope - Local Resident  
Tish Valva - Local Resident  
Phil Hurley - Local Resident  
Emma Hodgson - Local Resident  
Colin Scoble - Local Resident  
Tom Scoble - Local Resident

### **DOCUMENTS SUBMITTED AT THE HEARING**

1. Timeline of validation of application PA21/09422, Bridge View submitted by Cornwall Council.
2. Appeal decisions APP/K3605/W/21/3275803 and APP/K3605/Y/21/3275807 submitted by Cornwall Council.
3. Bundle of documents labelled Appendix 1–6 in response to Appellant's late evidence, submitted by Cornwall Council.