



## Appeal Decision

Site visit made on 9 May 2024

by H Nicholls FdA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 October 2024

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Appeal Ref: APP/Q1153/W/23/3327985

Land off Radford Way, Okehampton, EX20 1UP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
  - The appeal is made by Leander Developments Ltd against West Devon Borough Council.
  - The application Ref is 4440/22/OPA.
  - The development proposed is outline planning permission with some matters reserved (access) for a mix of around 60 1 to 4 bedroom residential dwellings & associated infrastructure.
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### Decision

1. The appeal is dismissed.

### Application for costs

2. An application for costs was made by the appellant against the Council. This application will be the subject of a separate decision.

### Preliminary Matters

3. The application was made in outline form with all matters save for access reserved for future consideration. I have therefore treated all matters detailing the layout, scale, landscaping and appearance of the scheme as indicative in nature.
4. The appeal was submitted against the failure of the Council to determine the application within the prescribed period. Since the appeal was lodged, the Council has indicated that, had it been in a position to determine the application, it would have refused it for three reasons. The first and second reasons relate to the absence of a legal obligation to secure appropriate affordable housing and community infrastructure. The third reason relates to the absence of clarity that a necessary pedestrian and highway link could be provided by the development through *Kellands Lane*. These have formed the main issues in the appeal.
5. A unilateral undertaking (UU) made as a deed under S106 of the Town and Country Planning Act 1990 was submitted and is dated 3 April 2024. A supplemental UU dated 7 May 2024 and a further supplemental UU dated 26 July 2024 were also submitted. I address these further below.

## Main Issues

6. The main issues for this appeal are:

- whether the development would make appropriate provision of affordable housing;
- whether the development would make appropriate financial contributions towards education and 'open space, sport and recreational infrastructure' (OSSR); and
- whether the development would provide satisfactory connectivity for pedestrians and vehicles.

## Context

7. The site currently comprises agricultural land, surrounded by hedges and trees on most sides, with a slope across the land that runs from the south-west down to the north-east. The site is enclosed by modern residential estates on all four sides. The surrounding dwellings are a mixture of single and two storeys.
8. The site links with Radford Way on its southern boundary and the north-eastern corner links to Kellands Lane. Kellands Lane is currently obstructed so no vehicular traffic can pass through it, though at the time of my visit, it was possible to walk through a gap in the barrier.
9. The outline proposal seeks permission for c. 60 dwellings with associated infrastructure. The detailed access point is shown as linking to Radford Way.
10. In terms of site history, with a previous permission granted for a school having lapsed, permission was secured for a residential development of 43 dwellings in outline in 2012<sup>1</sup> and reserved matters in 2015<sup>2</sup>. This scheme is extant, having been confirmed by letter<sup>3</sup> as having lawfully commenced and therefore constitutes a fallback option.
11. The development plan for the area currently includes the Plymouth and South West Devon Joint Local Plan (adopted 2019) (JLP), with accompanying Plymouth and South West Devon Joint Local Plan Supplementary Planning Document (2020) (JLP SPD). The JLP SPD also links to a relevant companion document: *Developer Contributions Evidence Base*, dated June 2020 (DCEB).

## Reasons

### *Affordable Housing (AH)*

12. Policy DEV8 of the JLP seeks to deliver a wide choice of high quality homes and create inclusive and mixed communities by securing a minimum of at least 30% on-site affordable housing from all schemes of 11 or more dwellings. It states that off-site provision or commuted payments in lieu of on-site provision will only be allowable where robustly justified. Whilst the Policy does not refer to any other concessions from the expectation of 30% AH, the preamble to the Policy states that where viability is identified as a constraint on the delivery of the policies, this will be considered in the context of JLP Policy DEL1.

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<sup>1</sup> Reference 02420/2012

<sup>2</sup> Reference 00108/2015

<sup>3</sup> Reference 1661/17/ARC

13. Policy DEL1 indicates that robust viability evidence will be required where a developer contends that planning obligations sought, including for affordable housing, would make a proposal economically unviable. It summarises by saying that the Councils will have regard to the overall economic, social and environmental benefits to determine whether, on balance, some relaxation of planning obligations is justified.
14. Policy DEV9 sets out a range of provisions for the delivery of a range and mix of housing, including seeking affordable housing, such as social and affordable rent, shared ownership, and innovative housing models that meet the local demand/need.
15. Paragraphs 4.79 – 4.80 of the JLP SPD sets out that the Council's preference is that the affordable housing tenure mix should be split between social rented homes (65%) and affordable home ownership tenures (35%), in line with housing needs evidence, other than where viability considerations dictate that some of the rented units should be converted to affordable rent. Paragraph 4.81 goes on to state that the form of affordable home ownership tenure comprising the 35% will be considered on a site by site basis. The JLP SPD essentially advocates an early discussion with the Council on any affordable housing tenure mix to ensure that the proposal best meets the local housing need.
16. The affordable housing offer from the appellant and discussions between the main parties have consistently referred to affordable housing as a percentage of the overall development. This is helpful given the outline nature of the application which does not fix the layout or scale of the development, and allows for some degree of flexibility for the number of dwellings to vary from the 'around/c/up to' 60 dwellings detailed in the submitted evidence.
17. The completed UU and subsequent UUs fix the percentage of affordable housing at 10% with a mechanism for me to increase the percentage should I see fit to do so. The 10% contribution of affordable housing is not compliant with Policies DEV8 or DEV9 of the JLP. Under the UUs, the tenure of the affordable housing would be limited to either affordable rent or discounted market units.
18. As detailed in the evidence, the Council's preference is to prioritise the social rent (SR) tenure over affordable rent (AR) and other intermediate affordable products. The request is that 65% of the total number of affordable dwellings are provided as SR tenure. Whilst these words are not explicitly detailed in the development plan Policies DEV8 and DEV9, it is clear from the JLP SPD that the SR tenure is the priority and that negotiations are to be held early and on a site-by-site basis to ensure that the affordable housing provision from a scheme best aligns with the affordable housing need for the area.
19. Whilst the UU may indicate that the percentage of affordable housing may be changed by me, as the Inspector appointed to determine the appeal, it does not specify that I have the power to alter the tenures offered. As the SR tenure is prioritised by the Council given its importance to providing meaningful opportunities for affordable housing, I am of the view that social rented housing is an important under-represented component of the scheme.
20. I have reviewed the extensive evidence on both sides, including the various draft and completed UUs and supplementals, and comments in association

therewith, and the appellant's *Economic Viability Appraisal* (EVA) and the Council's *Brief Review* of the same. I accept that the 65% SR and 35% intermediate affordable units would likely be too much for the development to bear in full at 30% of the overall number of units. However, my view is that the SR tenure should form at least a reasonable part of the mix offered from the scheme, rather than omitted entirely and that the affordable housing component should be the priority above the other contributions.

21. For the above reasons, the scheme does not accord with policies DEV8 or DEV9 of the JLP and nor would it adhere to the expectations of the JLP SPD.

#### *Education Infrastructure*

22. Policy DEV30 of the JLP indicates that the development of new homes should contribute to the delivery of sustainable communities with an appropriate range of community infrastructure, such as schools, primary health care infrastructure, sports and community facilities. It goes on to state that major housing developments will be considered in the context of the sufficiency (or otherwise) of the community infrastructure to meet the demands and that financial contributions to appropriate projects will be sought to mitigate the effects of any capacity issues generated by the development.
23. The responses from Devon County Council as education authority set out the justification and calculations for the various education contributions requested, with reference to other guidance documents such as '*Department for Education's Securing Developer Contributions for Education guidance*' (August 2023) and '*Education Approach for Developer Contributions – Devon County Council*' (December 2021). The response sets out the requested contributions towards early years, primary school land and primary education infrastructure, the calculation formula and the rationale for requesting the contributions.
24. The way in which this particular contribution has been sought and subject of negotiations has been based on the assumption that the 60 dwelling scheme is fixed and that of those 60 dwellings, 6 units would be 1 bed apartments which would not be considered qualifying dwellings for the purposes of calculating the yield of new pupils from the development. However, the scheme is an up to 60 unit outline scheme which may vary at any future reserved matters stage in terms of overall unit numbers and composition. However, assuming that the total contributions based on 54 dwellings is correct when divided down on a 'per dwelling' basis, the education land and early years contributions appear reasonable and fairly related in scale and kind to the development. The primary education infrastructure costs at around £5076.25 per dwelling seem relatively high and despite the explanation of 13.5 pupil places each costing £20,305.00, little evidence exists that these costs have been passed on in full elsewhere without incurring deliverability challenges.
25. Were an option available to reduce the primary education infrastructure costs whilst preserving the others at the current requested levels, that would have been my inclination. However, this is not an option before me and, rather, the education contributions have been fixed assuming a scheme of 60 dwellings (54 qualifying dwellings) and the effect of the supplemental deed allows for a top up contribution should the number of qualifying dwellings exceed 54. The Supplemental UU does not allow for the contribution to be reduced if fewer than 54 qualifying dwellings are ultimately proposed, and whilst unlikely, there

is a residual concern for me that I cannot be sure that the contribution is directly related in scale to the development proposed.

26. In terms of the overall findings against Policy, the proposal would actually provide sufficient contributions towards education across the UU, DoV and Further supplemental UU, although it may provide contributions exceeding the scale necessary. Whilst it may do so at the expense of a better balanced outcome, I can only find that the proposal would comply with Policy DEV30 of the JLP in relation to education contributions.

*Open Space, Sport and Recreational Infrastructure (OSSR)*

27. Policy DEV27 indicates that the quality and quantity of accessible green space and play space should be improved in line with local targets and standards either by on-site provision or financial contributions to off-site provision where appropriate. Policy DEV3 relates to sport and recreation and indicates that the Council will support opportunities for sport, physical activity and active leisure and that it will require the development of new and enhanced facilities to meet the needs of new and existing communities. Policy DEV4 concerns playing pitches and indicates that development and growth in the plan area will be matched by an appropriate level of provision for playing pitch facilities. Policy DEV30, outlined above, seeks the necessary community infrastructure to create sustainable communities.
28. I have noted that the Council's OSSR request provided an illustration of capital and maintenance costs based on a 60 dwelling scheme but also indicated that the actual contributions should be based on a per person formula based on dwelling sizes when specified at the reserved matters stage. Whilst I note the appellant raised concerns about shifting goalposts, I do not consider that this was what happened here even if the use of two different approaches within the same response can be blamed for a degree of confusion. Using the per person formula is, however, more likely to have the effect of increasing the total contributions which the development is unlikely to support in any event.
29. From the evidence, my understanding is that the scheme is assumed to have a fixed provision of around 1,500 sqm of natural greenspace, which when taken in combination with nearby areas of open space (Meldon Park and Long Barton), was considered, on balance, to be adequate. Again, despite not being a fixed entity within an illustrative outline application, I note the appellant's intentions to secure the open space and related sustainable urban drainage system (SUDS) and associated management company through the UU. Therefore, I accept the Council's position that the natural greenspace requirements could be met through a combination of on-site and existing offsite spaces.
30. The Council also requested contributions towards other forms of open space, such as equipped areas of play and formal sports provision. I also understand that the request towards the provision of allotments has subsequently been retracted.
31. My view is that the collection of the contributions towards the specifically identified locations and enhancement projects is acceptable in the context of the Community Infrastructure Levy Regulations 2010 (as amended) (Regulation 122). Despite the ownership and management responsibilities



- being questioned, I have no evidence to suggest that the Council could not validly use contributions collected for such purposes in the manner intended.
32. Whilst I also accept that there is a formula for the calculation of these contributions separated into capital and maintenance costs per person, the totality of the costs sought seems high, particularly when contributions are only being sought towards improvements to two typologies of open space and the respective ongoing maintenance.
33. Considered overall, whilst I note that there are identifiable projects that contributions would be directed towards, there do not appear to be any significant deficiencies that suggest that the provision of OSSR contributions should be prioritised over affordable housing or education. On this basis, I can understand the rationale for the earlier draft UU omitting the OSSR contributions to facilitate the greater provision of affordable housing and education contributions.
34. Nonetheless, the current UU, DOV and supplemental UU make provision for OSSR contributions at a per dwelling amount. That amount does not tally precisely with the full requested amounts but on the basis that it is only marginally rather than materially lower, I consider that this particular aspect would nonetheless comply with JLP Policies DEV3, DEV4, DEV27 and DEV30. However, the policy compliance with this aspect is detracting from the ability of the scheme to comply with other development plan policies.

#### *Connectivity*

35. Policy DEV29 seeks to ensure that development contributes positively to the achievement of a high quality, effective and safe transport system in the Plan Area. It will promote sustainable transport choices and facilitate sustainable growth that respects the natural and historic environment. DEV29 seeks to facilitate safe and satisfactory traffic movement and vehicular access and to locate new homes in locations that can enable safe, secure walking, cycling and public transport access to local services and amenities.
36. The barrier across Kellands Lane currently necessitates significant diversions by vehicles and pedestrians for both trips within the estate and trips linking Exeter Road to the south with Crediton Road to the north. The proposal could open up Kellands Lane to provide good pedestrian and cycling connectivity from the site to existing developed areas and nearby greenspaces as well as St James primary school, thus providing compliance with JLP Policy DEV10 in this regard.
37. The link through Kellands Lane is required for pedestrians and cyclists as part of the appeal scheme, not for vehicular traffic. However, it is proposed to ensure that the link is provided to allow free passage of vehicles as it is an important piece of road network to promote connectivity and minimise journey length and congestion in the surrounding area.
38. The earlier evidence of the appellant talked about offering the link through Kellands Lane as part of the development for no consideration and it was not highlighted as an abnormal cost to the scheme within the EVA (despite the allocation for abnormal costs of around £700,000). More recent communication suggests that the cost of this connection and works to lay it out for vehicles and pedestrians at over £100,000 should be reflected in the overall package of contributions.

39. I consider that the Kellands Lane link upgrade specifically to facilitate vehicular usage instead of only for pedestrian and cycle movements would go beyond that strictly necessary to make the development acceptable in planning terms but would nonetheless be a worthwhile benefit that should be secured by the development. The value attributed to this land as a 'ransom strip' have not been agreed, and the costs of the works to get it to an adoptable standard have not been provided in full. However, I accept that it is reasonable to attach a cost to this piece of infrastructure that could be delivered by the scheme, even if that would further undermine the ability to secure other aforementioned mitigation and planning benefits.
40. The UU and supplemental UUs provide for the provision of the link, thus complying with Policies DEV10 and DEV29 of the JLP.

#### *Viability analysis*

41. The Council's Brief Review informed by the *Costs Report* indicates some savings on costs that may be able to be made, through means such as using lower quartile build costs, shortening the construction timeframe and reducing the contingency allowances. However, I am persuaded by the appellant's evidence that these cost saving measures would be difficult to achieve in combination and would undermine the achievement of other objectives (such as the carbon reduction measures). Therefore, I am of the view that the Brief Review makes suggestions that are overly optimistic about the range of cost saving measures that could help to push the scheme closer towards full policy compliance.
42. However, I take issue with the high cost allocation for abnormals without adequate explanation and the omission of the Kellands Lane link cost as a clear cost item.

#### *Other Matters*

43. I note that there are numerous areas where the scheme is considered acceptable and policy compliant, either subject to conditions, or through details that could be secured at reserved matters stage. I have no reason to reach alternative conclusions in any of these regards.

#### *Planning balance and conclusion*

44. Overall, I am of the view that the appellant's EVA, whilst likely to be more reliable on the scheme's viability challenges, should better reflect the true costs, including the Kellands Lane link. As a result, I do not have sufficient evidence on which to assume that the limited provision of affordable housing is the maximum deliverable from the scheme and I am unable to conclude that the scheme would still be deliverable if I were to arbitrarily increase the percentage of affordable housing to whatever I deem reasonable without any adjustment to the other contributions. Furthermore, the inability to secure any social rent tenure of housing is also a clear conflict of the scheme with the development plan.
45. Whilst the scheme complies with the development plan in respect of the education and OSSR contributions and the Kellands Lane link, it does not fully accord with the development plan when taken as a whole.

46. Even taking into account the totality of public benefits that would be secured by the scheme over and above the extant scheme, including the additional houses, affordable dwellings, link through Kellands Lane and greater efficiency of land use, there are no considerations of such materiality that indicate that a decision should be taken other than in accordance therewith.

47. For the reasons outlined above, the appeal is dismissed.

*H Nicholls*

INSPECTOR

Richborough