APPEAL REF: APP/C1570/W/22/3296426

Outline planning application for the erection of up to 233 residential dwellings including affordable housing, with public open space, landscaping, sustainable drainage system (SuDS) and associated works, with vehicular access point from Radwinter Road. All matters reserved except for means of access

Land south of Radwinter Road (East of Griffin Place)

Rule 6 Party comments on planning obligations and conditions

Final draft section 106 planning obligations

General / drafting points

1. Although Rosconn Strategic Land Limited joins in the agreement (defined as “the Promoter”), the Promoter then (1) gives no substantive covenants which are planning obligations, and (2) has no obligations at all save to pay the costs of the councils (clause 14, which is otiose since it is to be paid on or before “execution” – ***not*** “completion”) and acknowledging that the agreement is entered by the Owners with its consent (clause 15, which is otiose by reason of clause 8.8.1).

Schedule 3: Obligations entered into with UDC

Affordable Housing (Part 1 of Schedule 3)

2. The Rule 6 Party agrees that these are planning obligations which are compliant with regulation 122 of the CIL Regs.

3. However, the Affordable Housing Units are defined as comprising “***up to 40% of the total of all Dwellings***” (paragraph 1 of Part 1 of Schedule 3), rather than “***not less than 40%***”. As drafted, therefore, this would allow less than 40% of the dwellings to be affordable, and this impacts on the weight that can be attached to this planning obligation.

4. The mortgagee-in-possession clause (paragraph 9.8 of Part 1 of Schedule 3) does not accord with the standard mortgagee protection clause produced by the Property Finance Working Group of the National Housing Federation in 2016 (which was designed to achieve *Market Value Subject to Tenancy* funding value against borrowings); as drafted, it would potentially allow a mortgagee-in-possession to sell free of all affordable housing obligations after a period of only three months. Likewise, with First Homes (paragraphs 9.11 et seq of Part 1 of Schedule 3).

Public Open Space (Part 2 of Schedule 3)

5. The Rule 6 Party agrees that these are planning obligations which are compliant with regulation 122 of the CIL Regs.

6. However, the timings set out in Part 2 simply do not work.

7. "***Public Open Space Transfer Notice***" is defined as a written notice provided by the Owners to the Parish Council offering to transfer the Public Open Space to the Parish Council, and "***Public Open Space Transfer Notice Period***" is defined as a period of 3 months from the service of the Public Open Space Transfer Notice (unless otherwise agreed). By virtue of paragraph 4 of Part 2, ***first Occupation of more than 70% of the Dwellings is not permitted unless and until all of the Public Open Space has been provided***; however, by virtue of paragraph 8 in the event that a binding agreement with the Parish Council is not entered into then the obligation is to establish a Management Company ***prior to the Occupation of any of the Dwellings***. Similar drafting has led to situations where (1) it is possible for units to have been sold before the Public Open Space is ready for transfer, (2) the Transfer Notice Period expires, and (3) there is a legacy of an unviable Public Open Space.

Health Contribution, Custom Build Housing, Car Club Contribution (Parts 3, 4 and 5 of Schedule 3)

8. The Rule 6 Party agrees that these are planning obligations which are compliant with regulation 122 of the CIL Regs, and has no comments on them.

<u>**Schedule 4: Obligations entered into with ECC (*note typo in heading*)**</u>

Education Contribution and Library Contribution (Parts 1 and 2 of Schedule 4)

9. The Rule 6 Party agrees that these are planning obligations which are compliant with regulation 122 of the CIL Regs, and has no comments on them.

Highways and Transport (Part 3 of Schedule 4)

10. The Rule 6 Party agrees that these are planning obligations which are compliant with regulation 122 of the CIL Regs, and concurs with the evidence of the Appellant's highway witness that the Appeal Proposal cannot be allowed without them. The Rule 6 Party has no comments on the Bus Services Contribution, the Sustainable Travel Voucher and the Travel Plan Monitoring Fee.

11. However, with regard to the "Highway Works" (as defined in Part 3 of Schedule 4):

    a. Paragraph 9 of Part 3 provides that in the event that a suitable scheme for the Radwinter Road/Tesco Access Works (to the satisfaction of ECC) cannot be delivered within the adopted public highway then there shall be no obligation to carry out those works and the relevant paragraphs shall

cease to have effect. This would mean that the Appeal Proposal could be carried out without providing these Highway Works, which (in order to be compliant with regulation 122(2)(a)) are "***necessary to make the development acceptable in planning terms***".

The corollary would be that the development could not be "acceptable in planning terms".

This would simply be addressed by making the obligation Grampian-style in its wording; if the Appellant is confident of its position, that would solve the issue completely, and if it is not confident then there is unacceptable uncertainty about delivery.

b. Similarly, with regard to the Pedestrian/Cycle Link Extension, paragraph 10 of Part 3 only requires reasonable "*but commercially prudent*" endeavours to (i) secure the rights and necessary consents (including any planning permission required) to provide and construct it and (ii) enter into a Highways Works Agreement for it, with a proviso that if having used such reasonable but commercially prudent endeavours they have been unable to secure such rights and necessary consents and enter into such Highway Works Agreement "***within 12 (twelve) months of the Implementation of Development***" then this obligation will no longer be enforceable and shall be of no further effect.

Again, the corollary of this happening would be that the development could not be "acceptable in planning terms".

Again, this would simply be addressed by making the obligation Grampian-style in its wording; again, if the Appellant is confident of its position, that would solve the issue completely, and if it is not confident then there is unacceptable uncertainty about delivery.

Safeguarded Land Part 4 of Schedule 4)

12. The Rule 6 Party agrees that this is a planning obligation which is compliant with regulation 122 of the CIL Regs, and has no comments on it.

Generally

13. If the finalised section 106 planning obligations document does not address the deficiencies set out above, then there is no suggestion of prima facie unlawfulness; however, those deficiencies go to the ***weight*** that can be attached thereto.

Final draft conditions

14. The Rule 6 Party has observations on the drafting of conditions, but none are fundamental and can be dealt with in the round table session.

Philip Kratz

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7 September 2022