

P/2010/0289/MOA

Blatchcombe Ward

Land Off Brixham Road, Rear Of Torbay Garden Centre Incorporating Yannons Farm, Adjacent To Little Preston, Short Preston And Woodlands, Paignton

Mixed use development to form approx 220 dwellings, approx 5,600 SQM gross of employment (B1) floorspace, local centre and public open space with roads and car parking (In Outline) THIS IS A DEPARTURE FROM THE TORBAY LOCAL PLAN

Site Details

The application site is land at Yannons Farm off the main Brixham Road (A3022) in Paignton. The site as a whole rises towards the south west with land beyond the ridge to the west being designated as an Area of Great Landscape Value (AGLV). To the north of the site is the existing Sainsbury's superstore on Brixham Road, and to the south of the site lies South Devon College and the former Nortel employment site. To the east, the site adjoins Parkbay Garden Centre and the former Holly Gruit campsite.

The application site itself is part of a wider employment land allocation (E1.16c) within the Saved Adopted Torbay Local Plan (1995-2011).

Relevant Planning History

P/2007/1421 Junction Improvements And Formation Of New Access To Facilitate Access To Land To The West (Resubmission Of P/2006/0678). Approved. 14.11.2008

Relevant history on adjacent site (Parkbay Garden Centre / Holly Gruit):

- P/1998/1919 Erection Of Buildings And Associated Works For Class B1 And B8 Use. Application For Approval Of Details In Part Pursuant To Condition 1; Details Of Access Road Off Brixham Road. Approved. 07.06.2000
- P/2001/0923 Erection Of 66,500 Sq Ft Non Food Retail Park A1 Use And 5000 Sq Ft Restaurant A1/A3 Use With Vehicular And Pedestrian Access (In Outline) This Is A Departure From The Local Plan. Refused. 08.01.2003
- P/2003/0059 Erection Of 61,800 Sq Ft Non Food Retail Park A1 Use And 5,000 Sq Ft Restaurant A1/A3 Use With Vehicle And Pedestrian Access (In Outline) This Is A Departure From The Local Plan. Refused. 28.08.2005. Appeal Withdrawn
- P/2005/0601 Change Of Use To Industrial Land (Class B1 & B8) (Renewal Of Application 98.1919.PA). Refused. 10.06.2005
- P/2005/1055 Certificate Of Lawfulness For The Implementation Of Planning Permission 1998/1919/PA dated 7 June 2000 And Demolition Of A Building Located In The Approximate Position Marked "X" On The Application Site Plan And More Particularly Delineated And Coloured Yellow On Drawing Number 05.05.14901 Rev A. Certificate Granted. 06.10.2005
- P/2009/0297 Retail development (bulky goods) with vehicle/pedestrian access. THIS IS A DEPARTURE FROM TORBAY LOCAL PLAN. Pending.
- P/2009/1287 Residential development to form approx 95 dwellings with associated vehicle/pedestrian access, roads; footpaths (In Outline) (THIS IS A DEPARTURE FROM THE ADOPTED DEVELOPMENT PLAN). Approved by members at the committee meeting of 19 April, subject to conditions and the signing of a s106 legal agreement.

Relevant Policies

National Planning Policy Statements

PPS1 Delivering sustainable development

PPS3 Housing

PPS4 Planning for sustainable economic growth
PPS25 Development and flood risk

Saved Adopted Torbay Local Plan (1995-2011)

ES Employment strategy
E1 New employment on identified sites
E1.16c Yalberton Road, Paignton
E6 Retention of employment land
HS Housing strategy
H2 New housing on unidentified sites
H6 Affordable housing on unidentified sites
H9 Layout, design and community aspects
H10 Housing densities
H11 Open space requirements for new housing
CF6 Community infrastructure contributions
CF7 Education contributions
BES Built Environment Strategy
BE1 Design of New Development
BE2 Landscaping and design
T1 Development accessibility
T2 Transport hierarchy
T25 Car parking in new development
T26 Access from development onto the highway
L8 Protection of hedgerows, woodlands and other natural landscape features
L9 Planting and retention of trees
L10 Major development and landscaping
EPS Environmental protection strategy
EP1 Energy efficient design

Adjacent land designations

L2 Area of Great Landscape Value (AGLV)
L4 Countryside Zone

Proposals

The proposal is an outline application for approximately 220 dwellings, approximately 5,600 sqm gross of employment (Class B1) floorspace, a local centre (0.29 ha) to include Class B1, A1, A2, C2 and D1 uses, a hill top park (1.2ha) and other ancillary areas of public open space and associated vehicular/pedestrian access. The access to the new housing development is proposed to be via the approved junction on Brixham Road (Ref: P/2007/1421).

This application was tabled at the committee meeting of 6 September 2010, where members resolved to approve the proposed development subject to the following:

- 1) The receipt of further information in respect of bat surveys and confirmation that Natural England no longer objects to the scheme on grounds of the potential impact on bats;
- 2) Subject to the signing of a Section 106 Legal Agreement in terms acceptable to the Executive Head of Spatial Planning including those set out in the submitted schedule and those terms agreed at the meeting held prior to the Committee meeting;
- 3) Referral to GOSW as a Departure from the Local Plan.

This application is being referred back to members in order to ensure that the terms of the draft s106 as negotiated are acceptable and in order to provide an update as to the progress made on the matters listed 1-3 above.

Consultations

The only consultation response of relevance to the consideration of the outstanding matters following the decision of the members on 6 September 2010 is that from Natural England. The statutory body still retain a holding objection at the present time on the grounds of the potential impact on the conservation status of the South Hams Special Area of Conservation (SAC) through a potential impact on habitat of value to the Greater Horseshoe Bats, whose habitat the SAC is designated to protect. It is hoped that a further update will be provided by Natural England ahead of the committee meeting.

Representations

All letters of representation that have been received in relation to this application have been reproduced for this committee meeting. The new representations that have come in following the committee meeting on 6th September 2010 assert that,

- a. at the 6 September 2010 meeting of the Development Management Committee, Members failed to take into account relevant considerations and/or took into account irrelevant considerations/mistakes of fact when reaching their decision on this matter,
- b. the s.106 as drafted does not accord with the committee resolution of 6 September 2010
- c. the effects and legality of the draft s106 legal agreement are potentially unlawful.

The primary concerns in relation to the drafted s106 agreement are:

1. The potential for the applicant, by virtue of the provisions of the s.106, to be able to prevent development of adjoining land, also within the E1.16c.policy area, regardless of the proposed use of that land.
2. The apparent lack of opportunity for third party land owners to make representation to the independent expert as part of the assessment of enabling infrastructure contributions and enhancement projects.
3. Contentions that the s106 as drafted will be contrary to Regulation 122 of the CIL (Community Infrastructure Levy) Regulations.
4. Concerns that the agreement would amount to indirect state aid.
5. Concerns that the agreement would fall foul of competition law.

It is clear from the representations made on behalf of the adjoining land owners that they may seek leave for Judicial Review of the decision of the Authority in this case, if their concerns are not resolved. As such it is important that the Council's decision is clear and that members consider all the facts before coming to a decision on the terms of the s106 agreement.

In addition to the representations setting out in detail the concerns of adjacent land owners, further representations from the applicants have also been received in respect of the ongoing negotiations on the s106 agreement.

All representations have been reproduced and placed in the Members Room.

Key Issues/Material Considerations

This proposed outline planning application was considered in full and in detail at the development management committee of 6th September 2010. As such officers are bringing back to the committee members only those matters that were not fully resolved at that committee meeting.

Referral to the Government office (formerly the Government Office for the South West (GOSW) now the National Planning Casework Unit (NPCU)

Following the meeting of 6th September 2010 it has been confirmed that, notwithstanding the fact that this application is a departure from the adopted Torbay Local Plan, in that the proposed development departs from the policy allocation for employment land only, there is no need to refer this application to the NPCU. This is due to the fact that the development does not meet the criteria for referral to the NPCU as set out within The Town and Country Planning (Consultation) (England) Direction 2009 (Circular 02/09). Accordingly, the Council has no further obligations to fulfil in this respect.

Impact on South Hams SAC / Greater Horseshoe Bat habitat

In the intervening period following the decision of members on 6th September 2010, the Council has instructed a consultant to carry out a Habitats Regulations Assessment of the likely impact of the development on the South Hams Special Area of Conservation (SAC). The consultant ecologist has resolved that, following changes to the scheme in the provision of a dark bat corridor and other appropriate mitigation, the scheme will not have a likely significant impact on the conservation status of the South Hams SAC.

Written confirmation has been sought from Natural England, now that it is understood that they concur with the findings of the Council's ecological consultant in respect of the scheme and it is envisaged that this confirmation will be provided at or before the committee meeting. In any event, officers are now confident that the scheme will not have a likely significant effect on the SAC. This is provided that appropriately worded conditions are added to the draft Decision Notice to secure the mitigation, as set out within the draft HRA screening opinion, a copy of which will be provided for members prior to the committee meeting.

Confirmation of heads of terms of s106

Members will be provided with a copy of the latest draft s106 agreement prior to the committee meeting, officers intend to ensure that this reflects the tenet and spirit of the agreed heads of terms set out in the document titled 'Yannons farm, Paignton (P/2010/0289): Summary of S.106 Terms – SUBJECT TO CONTRACT' and dated 6 September 2010. This is the document referred to in the committee minutes of 6 September 2010. Those heads of terms have been reproduced and placed in the Members Room.

It is contended by the third party adjacent land owners that the previous committee report misled members in respect of the effect of the suggested s106 heads of terms on the deliverability of the employment land allocation (E1.16c). As such, notwithstanding officers' views to the contrary, it is important that members are accurately and correctly advised of the circumstances of this case.

Specifically, what effect will the drafted s106 have in relation to the delivery of employment and what is the view of legal advisors within the Authority in respect of the legality of the proposed s106 clauses?

The s106 agreement, as currently drafted, includes the provision of the access / spine road through the site to within 30m of the boundary within 30 months of the commencement of the development. This ensures the provision of a substantial portion of the infrastructure required to support the provision of employment uses both on the application site and on neighbouring land. Without the provision of this infrastructure it will not be possible for an employment development to come forward on the remaining land within the employment policy area (E1.16c).

In addition to this, the s106 agreement provides a formula under which the ransom paid by neighbouring land owners for access to their land for employment and associated enabling uses is regulated. Ransom for non-employment/enabling uses would be ransomed on normal commercial terms. The s106 as drafted currently provides for the applicant to have a form of control over the opportunity for the neighbouring land owner to bring forward development and will have control in the future over the uses to which that land may be put.

In actuality, the effect of the s.106 will be to restrict a ransom situation that would otherwise have been unrestricted in this case. Because of the unusual infrastructure costs that the applicant is incurring in building the new junction with Brixham Road your officers consider that it would not be reasonable to demand that the applicant build the distributor road up to the boundary of the rest of the allocation area and allow unfettered access through its site to the adjoining land (if for no other reason that if such a demand were made, it is unlikely that the applicant would proceed with its project and none of the E1.16c allocation area would be developed). The s.106 should ensure that the applicant is not unfairly burdened with infrastructure costs that others then benefit from while at the same time ensuring that the applicant is not able to stifle delivery of the remainder of the allocation area by refusing to allow access to neighbouring land,.

In order to ensure that the s.106 meets the Council's aims the Council's solicitors are liaising with the applicant's solicitors and considering the wording of the draft s106 agreement further in respect to the ransom situation. An update on the appropriateness of the relevant provisions of the s.106 will be reported verbally at the committee meeting.

Legality of the decision

Legal advice has also been sought in relation to the contentions of the third party adjoining land owner that the s106 agreement will be contrary to Regulation 122 of the CIL (Community Infrastructure Levy) Regulations, and that the agreement would amount to indirect state aid, and that the agreement would fall foul of competition law.

The legal advice on these matters will be provided for members at the committee meeting. It will be important for members to consider the issue of the terms of the s106 afresh and on its merits having regard to the legal advice at the forthcoming committee meeting.

Social economic impacts

As was confirmed at the committee meeting on 6th September, the proposed development will provide for 5,600sqm of serviced employment land, will deliver at least 600sqm of completed modern purpose-built employment space. The scheme will open up the E1.16c allocation area and provide infrastructure necessary to service further employment land across the allocation area. The development will also deliver over 200 family homes, of which 15% will be affordable along with a hill top park, green spaces, mitigation and enhancement for wildlife habitat and a local centre.

This scheme is a vital part of the delivery of the E1.16c land and the necessary infrastructure to support and service the wider land allocation.

Conclusions

The proposal is an outline application for approximately 220 dwellings, approximately 5,600 sqm gross of employment floorspace, a local centre, a hill top park (1.2ha) and other ancillary areas of public open space and associated vehicular/pedestrian access. The scheme represents a form of enabling development to facilitate the delivery of employment land both on the site and within the remainder of the E1.16c policy area.

The proposed s106 legal agreement provides for a restricted ransom situation and will enable the delivery of the key parts of the development in a timely manner so as to open up the allocated land and drive forward its future development.

Recommendation: Subject to the further views of the Council's legal services; that the Council sign the s106 legal agreement and issue the decision.