
Planning Appeal Reference APP/G4620/W/24/3341688

Land to the north of Wilderness Lane, Great Barr

Note on s106 obligation relating to Countryside Park

1 Introduction

1.1 Mills & Reeve LLP were instructed by Wain Estates (Land) Limited (“the Appellant”) to prepare and negotiate a s106 agreement with The Borough Council of Sandwell (“the Council”) in connection with an appeal against the Council’s decision to refuse the Appellant’s application for planning permission to redevelop land to the north of Wilderness Lane, Great Barr.

1.2 An initial draft of the s106 agreement was submitted to the appeal on 11 June 2024 (“Initial Draft s106”) following negotiation with the Council. The Initial Draft s106 included, amongst other things, an obligation at paragraph 3.4 of Part 3 of Schedule 1, to retain a Countryside Part (as defined therein) in accordance with an approved management plan, “*in perpetuity*”:

3.4 Following completion of the Countryside Park, the Countryside Park shall be managed in accordance with the Countryside Park Management and Maintenance Plan and retained as a Countryside Park in perpetuity.

1.3 Following submission of the Initial Draft s106, the Council’s solicitor raised a concern that inclusion of an obligation requiring compliance “*in perpetuity*” would run contrary to the common law rule against perpetuities.

1.4 The Appellant disagreed with this proposition and there was an exchange of emails in this regard prior to the opening of the inquiry. The Appellant’s position is summarised below.

2 Common law rule against perpetuities

2.1 The common law rule against perpetuities was developed by the courts at the end of the seventeenth century. The rule restricts the time period within which future interests in property must vest. The perpetuity period being the length of a life or lives in being, plus 21 years (with a “life in being” being a life in being at the time of the disposition). The purpose of the rule was to prevent people from using legal documents to exert control over the ownership of private property (‘tie it up’) for a time long beyond the lives of the people living at the time the document is entered into.

2.2 The Appellant's position is that the inclusion of an obligation to retain the Countryside Park "in perpetuity" does not run contrary to the common law rule against perpetuities. This is because s106 obligations are local land charges which bind and run with the land and persons who have interests in the land from time to time. They do not prevent the disposition of interests in the land.

2.3 Notwithstanding the Appellant's position on the point, at the Council solicitor's request, the Appellant agreed to amend the obligation in paragraph 3.4 of Part 3 of Schedule 1 of the Initial Draft s106 to require the Countryside Park to be retained as such *for a period of 80 years from its completion*. The amended drafting was included in the final draft s106 submitted for the 23 June 2024 deadline ("Final Draft s106"):

3.4 Following completion of the Countryside Park, the Countryside Park shall be managed in accordance with the Countryside Park Management and Maintenance Plan and retained as a Countryside Park for a period of 80 (eighty) years from the date of its completion in accordance with the approved Countryside Park Design and Delivery Plan .

2.4 We understand that during the inquiry, the appeal Inspector queried why the drafting of the obligation at paragraph 3.4 of Part 3 of Schedule 1 of the Initial Draft s106 had been changed.

2.5 This note has been prepared to inform the Inspector as to the provenance of the drafting within the Final Draft s106 and explain the reason for the drafting changes.

3 Confirmation of Appellant's position on paragraph 3.4 of Part 3 of Schedule 1

3.1 The Appellant remains firmly of the view that the inclusion of an obligation requiring compliance "in perpetuity" would not run contrary to the common law rule against perpetuities and the "in perpetuity" wording included in the Initial Draft s106 should be re-instated. In short, the rule against perpetuity is not offended given planning permission runs with the land and is not specific to any individual.

Mills & Reeve LLP

17 July 2024