The Planning Inspectorate

Appeal Decision

Hearing held on 19 January 2016
Site visit made on 19 January 2016

by Phillip J G Ware BSc DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 1 March 2016

Appeal Ref: APP/V3120/S/15/3133745
Fernham Fields, Faringdon SN7 7EZ

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by SGR (Faringdon) Ltd against the decision of Vale of White Horse District Council.
- The development to which the planning obligation relates is the erection of up to 200 dwellings.
- The Planning Obligation, dated 9 January 2014, was made between the Vale of White Horse District Council and Argent Projects No 4 Limited and SGR (Faringdon) Limited.
- The application Ref P15/V1323/MPO, dated 26 May 2015, was refused by notice dated 14 August 2015.
- The application sought to have the planning obligation modified by the removal of the affordable housing element.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision the planning obligation, dated 9 January 2014, made between the Vale of White Horse District Council and Argent Projects No 4 Limited and SGR (Faringdon) Limited, shall have effect subject to the modifications as set out below.

Main issue

2. Where an application is made for the modification or discharge of an affordable housing requirement in a planning obligation, section 106BA (3) of the 1990 Act provides that, if the requirement means that the development is not economically viable, the application must be dealt with so that it becomes viable. In any other case, the affordable housing requirement must continue to have effect without modification or replacement. Section 106BC(6) provides that the same provisions apply in respect of an appeal.

3. It follows from the above that the issues in the present appeal are:

   - whether the proposed development is economically viable, if it remains subject to the affordable housing element of the Planning Obligation as it currently exists; and
   - if not, what degree of modification to the Planning Obligation is needed for the development to be made viable.

Reasons

Background

4. The appeal relates to a large triangular area of agricultural land adjacent to the built-up area of Faringdon. Outline planning permission was granted in January 2015 for up to 200 dwellings, public open space, associated infrastructure and new access. There are outstanding details to be approved and there has been no work on the site. The scheme includes a package of contributions towards local infrastructure and the provision of 40% affordable housing. This latter is based on policy H17 of the Vale of White Horse Local Plan (2011), emerging policy (to which limited weight can be attached), and an Affordable Housing SPG (2006).

5. The Statement of Common Ground confirms that a number of matters are agreed between the parties, and I have no reason to take a different position. These matters are:

    - Sales values
    - Build costs
    - Professional and legal fees
    - Sales and marketing fees
    - Construction contingency
    - Finance arrangement fee and interest rate

6. Since the production of the Statement of Common Ground, the indexed s106 costs have been agreed between the parties[1], and this has been included in the parties' viability calculations. The remaining significant differences relate to the developer's profit and to the Benchmark Land Value (BLV).

Has the development stalled?

7. The question as to whether the development has stalled did not form part of the Council's reason for refusal or appeal statement, but the concern was raised by the authority at the Hearing.

8. S106BA/BC of the 1990 Act do not require that the development must have stalled in order for the provisions to come into effect. However, even leaving aside national guidance (to which I return below) it must add weight to a proposal if it is possible to demonstrate that a scheme is stalled and producing no economic benefit. The Act deals with situations where a development is not economically viable due to the affordable housing requirement, and provides that an application must be dealt with so that the development becomes economically viable. Self-evidently, the purpose of the relevant sections of the Act is to ensure that once planning permission has been granted, developments are able to proceed to completion.

9. The approach to applications under s106B is clearly set out in the DCLG document '*Section 106 affordable housing requirements. Review and appeal*.' (The Guidance) (2013). Both parties agreed that this document should be

[1] Council's figure 5,287,519, appellant's £5,418,639

accorded significant weight. The approach in the Guidance is to review agreements which relate to 'stalled' schemes, where economically unviable affordable housing requirements result in no development, no regeneration and no community benefit.

10. In this case the appellant clearly set out at the Hearing that there were a number of uncontested factors which have increased uncertainty and costs, and which have led to an absence of progress on the scheme – even leaving aside the viability issue. These were primarily the costs of the provision of access, ground conditions and the consequences of flood risk.

11. There was a suggestion by the Council that the need to clarify the position adopted by Thames Water was delaying the development and that, under those circumstances, the scheme had not stalled. However it was clearly explained by the appellant that Thames Water were progressing the need for infrastructure, and that a resolution was expected early next year. This is well before any potential occupation of dwellings on the appeal site, and is clearly not a reason for the lack of progress.

12. The various factors summarised above, allied to viability considerations, persuasively demonstrate that the scheme has stalled and falls within the type of development considered by the Guidance.

Whether the development is viable with the existing obligation

13. The first significant element which is at issue between the parties is developer's profit. National policy in this regard is found in the National Planning Policy Framework, which provides that the costs of any requirements should still provide competitive returns to a willing landowner and a willing developer.

14. Determining what constitutes a competitive return inevitably involves making a judgement based on the evidence. What is regarded as the 'industry standard' is stated to be around 20%. However, as noted in the Guidance, developers' return varies significantly between projects to reflect the size and risk profile of the developer and the risks related to the development project. On risky sites and those with high and partly unknown infrastructure costs it can be reasonably expected that profit expectations would be higher, and vice versa.

15. In this case, the Council asserted that Faringdon is a popular location with a strong demand for housing (although no significant evidence to support this position was submitted) so a developer profit of around 17% would be more realistic. However it was clearly explained by the appellant at the Hearing that there have been attempts to sell this site for some two years and that, contrary to the Council's position, there is limited developer confidence around Faringdon.

16. This is not a simple greenfield site with no significant abnormal development costs, and the appellant detailed the high costs as mentioned above, which were not contested. From the evidence before me the scheme's infrastructure contributions appear to be significantly in excess of other similar sites.

17. Taking these matters together, I am persuaded that a developers' profit of 20% is justified. Without this there would be insufficient incentive to achieve the delivery of the site for housing development, and I find that the appellant's conclusions on developer profit are to be preferred.

18. The other main issue is the BLV, where there is a significant difference in the figures produced by the parties. The Guidance provides that (as there is no original appraisal) the market value at the date of the original permission should be used, disregarding any significant overbid. With that background the provisions of s106BC are clearly designed to unlock stalled developments, not to underpin developers' decisions to overbid for sites.

19. The Guidance states that the purchase price should be benchmarked against market values and sale prices of comparable sites in the locality. The market value should have regard to the development plan and all other material considerations, whilst providing competitive returns to a willing landowner and developer to enable the scheme to be deliverable.

20. The Council's approach used an indicative land value of £700,000 in their viability calculation. However this appears not to be the site purchase price being paid by the appellant, rather it was the price paid for an agricultural field (albeit with hope value) in 2010, long before the date of the planning permission – which is the relevant date as advised by the Guidance.

21. The appellant applied an 'uplift split' to establish a competitive return to the landowner as against the reasonable expectations of the Council in relation to contributions[2]. This is a methodology which has been convincingly demonstrated by the appellant to have been applied elsewhere.

22. The appellant has followed the approach advocated in the Guidance and submitted largely uncontested evidence of 18 local transactions over a recent two year period. This evidence supports the appellant's approach to the BLV. The Council has pointed out that the appellant has not provided evidence that these comparable transactions did not represent overbids, but it seems highly unlikely that this applies to many/all of these transactions.

23. The Council has drawn particular attention to two nearby greenfield sites, apparently sold without planning permission, which indicate much lower land values. One of these, Steeds Farm, is opposite the appeal site and the authority places considerable reliance on this case. However there is a danger of not comparing like with like, as the appellant's comparable transactions relate to residential sites with planning permission (reflecting development plan policy and all s106 contributions) whereas I understand that the two examples referenced by the Council are sourced from the promotion agreements for sites, without the benefit of planning permission, and which have not been marketed as residential sites. From the evidence before me, I am not persuaded that these are good comparables to the appeal site.

24. Overall there is nothing which leads me to the conclusion that there was any "significant overbid" (to use the language of the Guidance) which should be disregarded. For these reasons, I can come to no other conclusion than that, as long as it remains subject to the present affordable housing requirement, the proposed development cannot realistically be considered viable. I now turn to the modification which might be needed to remedy this situation.

Modification needed to make the development viable

25. The Guidance notes that, when dealing with this type of appeal, a viable affordable housing provision should be proposed, which should deliver the

[2] The so-called 'Shinfield' approach, from a 2013 decision in Shinfield (APP/X0360/A/12/2179141)

maximum level of affordable housing consistent with viability and the optimum mix of provision.

26. The appellant's viability appraisal (IIIc) including 40% affordable housing, based on the appellant's assessment of BLV and developer's profit, indicates a negative viability of -£7,695,802. Even if the affordable housing contribution is removed (appraisal IIIb) the development is not viable as matters stand.

27. There is no persuasive evidence to indicate that, at any other level of affordable housing contribution, the development would become viable. The Council has put forward a number of suggested affordable housing levels – most recently 25% - at which percentage it is stated that the scheme could be viable. However this is founded on an assessment of the scheme's viability based on matters I have discussed and discounted above, and I am not persuaded that this suggestion would take the development into viability.

28. According to the appellant the Council's position in relation to this scheme can be characterised as a 'take it or leave it' approach. The appellant had sought information on the Council's approach to The Steeds development, which was referred to in the Council's statement, and this was discussed at the Hearing. The Council accepted that the authority had adopted a different and more proactive approach to that development, and requested an adjournment of the Hearing to discuss matters with the appellant on a different basis. However I declined that request because the appeal process was too far advanced to commence discussions and, in any event, there was no indication that positive progress towards viability could be made even given a different stance by the authority.

29. Based on the appellants' appraisals, the removal of the affordable housing obligation would result in the proposal moving significantly towards viability and would be reasonably likely to enable the development to proceed. There is no convincing evidence that any lesser change to the affordable housing requirement would achieve a similar result.

Conclusion

30. There is an acknowledged need to boost housing delivery and, despite the grant of planning permission, there has been no progress at the appeal site or on paper, and no market or affordable housing has been produced. There are a number of differences between the parties as to the viability calculations, and the balance of the evidence favours the appellant's position. Overall, it has been demonstrated on the available evidence that a viable scheme does not exist and that the development will not provide the affordable housing element.

31. There is provision to enable me to impose a lower affordable housing percentage. However there is nothing before me to convincingly demonstrate that this would result in the development progressing and provide any affordable housing.

32. The appeal is allowed and the Planning Obligation is modified as set out below for a period of three years from the date of this decision.

P. J. G. Ware
Inspector

APPEARANCES

FOR THE APPELLANT:	
Mr A Kerrison BA(Hons) MRTPI	Principal AMK Planning
Mr R M Boulton	Director SGR Faringdon Ltd
Mr G J Taylor	Director SGR Faringdon Ltd
Mr M Green MRICS	Partner, Green and Co
Mr S Tillman	SGR
Mr N Madeden	Green and Co

FOR THE LOCAL PLANNING AUTHORITY:	
Andrew Jones BSc (Hons) MRICS	BPS Surveyors – Director
Kyle Gellatly MSc	MRICS – BPS Surveyors - Associate Director
Laura Hudson BA (Hons) Dip TP MRTPI	Team Leader (Applications)
Jacqui Evans BA(Hons) DipHsg MCIH	Housing and Regeneration Manager
Brett Leahy BSc (Hons) DipTP UD MRTPI UDG	Development Manager (Vale)

DOCUMENTS

Doc 1	List of persons present at the Hearing
Doc 2	Committee report (14 August 2015) relating to the appeal site
Doc 3	Schedule of proposed modifications to the Planning Obligation, jointly submitted by the parties

Schedule of Modifications to the Planning Obligation

dated 9 January 2014[3]

1. Clause 1.1 of the Section 106 Agreement shall be amended by the deletion of the following definitions:

   a. Affordable Housing;
   b. Affordable Housing Land;
   c. Affordable Housing Units;
   d. Affordable Rent;
   e. Affordable Rented Units;
   f. Agreed Percentage;
   g. Contract;
   h. HCA;
   i. Housing Allocations Policy;
   j. Initial Rent;
   k. Initial Share;
   l. Lifetime Homes Standards;
   m. Local Market Rent;
   n. Open Market Value;
   o. Practical Completion;
   p. Registered Provider;
   q. Shared Ownership Lease;
   r. Shared Ownership Unit;
   s. Open Market Value; and
   t. Practical Completion.

2. Within Clause 1.1 of the Agreement the following definitions shall be amended:

   a. Definition of 'Dwelling' shall be amended by the deletion of the words "and includes flats or dwellings built as Affordable Housing Units".
   b. The definition of 'General Market Housing' shall be amended by the deletion of the words "excluding the Dwellings which shall comprise Affordable Housing".

3. In the Second Schedule of the Section 106 Agreement the entirety of paragraphs 1.1 to 1.9 shall be deleted.

[3] The parties have, at my request and without prejudice, commented on the amendments which would be needed to the existing Obligation.