The Planning Inspectorate

Appeal Decision

Hearing held on 14 September 2016

Site visit made on 14 September 2016

by Christina Downes BSc DipTP MRTPI

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

Decision date: 10 October 2016

Appeal Ref: APP/V3120/S/16/3154198
Land west of Nursery, Steventon Road, East Hanney, Oxfordshire

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 (as amended) against a refusal to modify a Planning Obligation.
- The appeal is made by Lagan Homes Limited against the decision of Vale of White Horse District Council.
- The development to which the Planning Obligation relates is the residential development of 39 dwellings.
- The Planning Obligation by Agreement (Section 106 Agreement), dated 26 April 2016, was made between Vale of White Horse District Council, Martin Ramon Savile de Bertodano and Edward Douglas Simons, Greenland Henley Limited, Wyndhead Estates Limited and Lagan Homes Limited.
- The application Ref P16/V1084/MPO, dated 27 April 2016, was refused by notice dated 22 June 2016.
- The application sought to have the Section 106 Agreement modified by the removal of the requirement to provide 40% affordable housing.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision, the Section 106 Agreement, dated 26 April 2016, made between Vale of White Horse District Council, Martin Ramon Savile de Bertodano and Edward Douglas Simons, Greenland Henley Limited, Wyndhead Estates Limited and Lagan Homes Limited, shall have effect subject to the modifications as set out in the Schedule at the end of this decision.

Procedural matters

2. Where an application is made to modify an affordable housing requirement Section 106BA of the 1990 Act (as amended) provides that, if it means that the development is not viable, the application should be dealt with so that it becomes viable. Section 106BC applies the same provisions to an appeal.

3. The appeal was made by one party to the Section 106 Agreement. It was confirmed that notice had been given in writing to the other signatories. Whilst the Parish Council was represented at the Hearing, the Department of Communities and Local Government (DCLG) document: *Section 106 affordable housing requirements – review and appeal* (the Guidance) makes it clear that, other than in exceptional circumstances, it is only the signatories to the Deed that will be involved with the appeal process. This is because only the matter of viability can be considered and there is no opportunity for the decision

maker to re-consider the overall acceptability of the development proposal. This was explained at the Hearing.

4. Whilst the provisions under Section 106BC of the 1990 Act (as amended) have now been repealed, the application under Section 106BA was made to the Council prior to the due date of 30 April 2016. In such circumstances the appeal can proceed.

5. Following the Council's S106BA decision, the Examining Inspector submitted his interim findings in respect of the Vale of White Horse Local Plan 2031. Core Policy 24 (as proposed to be modified) relates to affordable housing and its provisions were not mentioned by the Inspector as being at issue in terms of soundness. In the circumstances, the Council is now only seeking 35% affordable housing rather than the 40% required by Policy H17 of the adopted Local Plan. The Council's professional advisers, BNP Paribas Real Estate (BNP Paribas), had not submitted any appraisal based on this lower level of requirement. In addition, at the Hearing the Appellant agreed to reconsider its appraisal based on whether it considered that 4 shared ownership units could viably be provided. The parties were given a short amount of time after the close of the Hearing to complete this work.

Main Issue

6. Whether the affordable housing requirement in the Section 106 Agreement would result in the development being economically unviable and, if so, how it could be modified so that the development becomes viable.

Reasons

7. The Guidance makes clear that the Government is keen to encourage development to come forward to meet the growing need for housing and stimulate economic growth. Stalled schemes that have unviable affordable housing requirements result in no development and no community benefit. In this case the developer, Lagan Homes Limited, has made the decision to start building the market housing. It is therefore clear that at the present time the development has not stalled.

8. The trigger for the provision of the affordable housing in the Section 106 Agreement is the occupation of 21 of the market dwellings. It was made clear at the Hearing that the developer would not build the affordable element until he was legally obliged to do so. If the delivery of the requisite number of affordable units is unviable then the development would stall unless the developer is prepared to accept the loss. It would not be reasonable to assume that the latter scenario would necessarily happen. Indeed, the whole purpose of the statutory provisions is to ensure that development is carried out in a viable manner in order that the economic benefits are realised.

9. Viability has been a long running issue with this particular housing scheme. I note that there are other sites nearby where the policy level of affordable housing is being delivered. However, in each case the circumstances are different and thus will not necessarily be comparable. The Appellant has done several viability appraisals. These have been reviewed by BNP Paribas who dispute a number of the assumptions. However, by the close of the Hearing there was agreement on a number of matters. These include market housing

sales values and build costs; professional fees; developer's profit on market housing; legal fees; Section 106 contributions; sales and marketing fees.

10. The Council's final position is that 35% affordable housing would be viable with a tenure split of 7x2 bedroom affordable rented units and 6x3 bedroom shared ownership units. The Appellant's final position is that 7.7% affordable housing would be viable with a tenure split of 1x2 bedroom affordable rented unit and 2x3 bedroom shared ownership units. However, following discussion at the Hearing the Appellant put forward a further proposal for 10% affordable housing with all shared ownership units. I turn now to consider the main issues remaining in dispute.

Benchmark land value (BLV)

11. Paragraph 173 of the National Planning Policy Framework makes clear that the costs of a development, including requirements such as affordable housing and infrastructure contributions, should allow a competitive return to a willing land owner and a willing developer to enable a deliverable development. It is generally accepted that the existing use value would be insufficient incentive and that an uplift would be required in order for the land to be released for development. There is no standard formula or percentage for what this uplift would be and this would be a decision for each respective landowner. Furthermore, any price paid for the land is not necessarily definitive because the developer may well have overpaid. The Guidance indicates that any purchase price should be benchmarked against market value and comparable transactions nearby and that significant over payments should be ignored. I was told that this 2.35 hectare greenfield site had been purchased for £1.1m.

12. The parties had very different approaches to determining market value. The Council's advisers have relied on a research document entitled *Cumulative impacts of regulations on house builders and landowners*. This was published in 2011 but appears to rely on research undertaken at an earlier date. The text indicates that it was produced when the economic downturn was causing falling land values. Its findings indicated that a typical price threshold for greenfield land was in the region of £100,000-150,000 per gross acre. Due to the extent of the abnormal costs in this case, the Council considers that £100,000 per gross acre would be reasonable, which would result in a market value of about £580,450 for the site. This works out at an uplift of about 10% of the existing use value for this former agricultural site.

13. I have several concerns about the Council's approach. The first is that it uses a figure within a research paper that was commissioned at a time when land values were falling as a result of the downturn in the national economy. The document also identifies significant local and regional variations and so a figure that applies to the UK as a whole would not necessarily be transferrable to this part of Oxfordshire. It is also made clear at the start of the document that, whilst commissioned by the Government of the time, the views and analysis in the research paper were not necessarily endorsed by DCLG. Whilst I was told that both South Oxfordshire District Council and the Vale of White Horse District Council have used this approach in their background work to the Community Infrastructure Levy (CIL), I have seen no specific evidence to confirm this. In any event, the viability work needed to support a district-wide CIL charging regime is rather different from the bespoke assessment required in connection with a specific development project. For all these reasons I am

not convinced that the use of the approach applied by BNP Paribas is an appropriate way to assess market value in this case.

14. The Appellant's approach to BLV is to run a residual valuation that omits the costs of affordable housing provision and Section 106 contributions. The residual sum is then split so that 50% would go to the landowner and 50% to fund the contributions and affordable housing. It is acknowledged that there is no policy support for this approach but its advantage is that it would provide the landowner and the community with equal shares in the uplift in the land value. The approach was accepted by an Inspector in a Section 106BC appeal in Shinfield[1]. As the Council pointed out though, in that case my colleague was faced with only two alternatives, the second being no uplift above existing use value at all. Nevertheless, the so-called "Shinfield approach" has been accepted by Inspectors in other cases, most recently in an appeal for housing development in Faringdon[2], which is also in the Vale of White Horse District.

15. The Appellant submitted a schedule of what were considered to be comparable land transactions. This seems to be the same work that was submitted at the Farringdon appeal and I note that the Council did not challenge this evidence or produce anything itself to counter it. The schedule includes a considerable variety of schemes and most, but not all, included 40% affordable housing. The average value from the 18 examples is about £90,000 per plot. This though obscures a considerable variation between about £46,000 and £130,000 per plot. On the Appellant's approach the land value would be about £20,500 per plot whereas on the Council's approach it would be about £15,000.

16. One of the reasons for the lower land value on the appeal site is the substantial abnormal costs, which amount to about £26,000 per plot compared to the comparable sites where they average about £3,000 per plot. The Council considers that this was not taken into account by the Appellant in the price paid for the land and that a lower residual value is now being sought to make good a commercial error. However, the actual price paid for the appeal site is equivalent to about £28,000 per plot and this is still well below the average plot value of comparable sites, even if equivalent abnormal costs were to be added. Anyway, the Appellant's appraisal does not use the price paid for the land. When questioned, BNP Paribas was unable to provide any example of a land transaction in the District with a value as low as £15,000 per plot.

17. It is appreciated that if unreasonably high expectations of land value are supported much needed affordable housing, which is mainly provided through private developments, will not be realised. However, it is also necessary to adopt a realistic position and if the BLV is too low land will not come forward for development at all. Each case is different but it does not seem to me that in the present instance the Appellant's BLV is unduly inflated. In the circumstances I prefer the Appellant's estimate to that of the Council.

Developer's profit

18. The profit required by the developer reflects the risk in bringing the development forward. It is generally accepted that with the affordable housing

[1] APP/X0360/A/12/2179141: Section 78 appeal concerning the residential development of up to 126 dwellings on land at The Manor, Shinfield, Reading (8 January 2013).
[2] APP/V3120/S/15/3133745: Section 106BC appeal concerning the erection of up to 200 dwellings at Fernham Fields, Farringdon (1 March 2016).

element the risk is lower because once a Registered Provider is on board the sale of the units is not subject to the vagaries of the market. I consider that there is insufficient evidence to justify a 10% profit on the affordable element rather than the more usual 6% adopted by BNP Paribas. I accept though that this risk would relate to the costs of construction as the sales risk would be borne by the Registered Provider. I note that in the Appellant's appraisal of 4 shared ownership units, a 6% profit on build costs has been adopted.

Finance costs

19. Finance costs of 7% were agreed by the parties. However, these will also be affected by the length of time that the site takes to build out. The Council has adopted a sales rate of around 2.4 dwellings a month and the Appellant preferred 2 dwellings a month. Whilst the Council's professional advisers have experience of undertaking valuations in the locality they do not have sales experience. The Appellant confirmed that a sales rate of about 2 dwellings a month was achieved on Phase 1 of his development on adjoining land. The Agent involved in marketing the site, as well as developments by other house builders in the locality, made the point that East Hanney is an attractive village but has no secondary school, significant shopping facilities or employment. I was told that there is also considerable competition from other sites within the locality and that larger houses take longer to sell. In the circumstances, a sales rate of 2 units a month seems to me reasonable.

20. The Appellant was also critical of the cashflow assumptions made by BNP Paribas. I agree that it is unrealistic for all of the affordable housing receipts to be provided at the start of the development period. This was accepted by the Council's advisers who submitted a revised analysis based on regular affordable housing payments each month. However, these payments started close to the start of construction whereas the developer indicated that as many market houses as possible would be built before the affordable element was started. He added that all the affordable units would then be constructed together. This does not seem an unreasonable scenario especially as the highest values and profit will be in the sale of the market homes. There is no obligation for the developer to provide affordable homes upfront and it is reasonable for the cashflow to have regard to the requirements of the Section 106 Agreement. In the circumstances the cashflow put forward by the Appellant is more realistic, in my opinion.

Fees for abnormal costs

21. The Council did not dispute the abnormal costs following receipt of itemised evidence from the Appellant. As has already been mentioned, the abnormals in this case contribute to a substantial element of the site development costs. They include sewer work required by Thames Water and offsite upgrades to the gas and electricity networks. The Appellant argued that the 5% contingency allowance for construction costs and the 10% allowance for professional fees should also be applied to the abnormals. The Council's advisers though considered that they would be absorbed by the provider as part of the fixed quote.

22. The Appellant contended that apart from the water, gas and electricity works, the costings were based on the experience of the developer and could not be treated as definitive. I note that in BNP Paribas's appraisal relating to 35%

affordable housing, a 5% contingency and 5% professional fee allowance has been applied to abnormals other than those relating to the statutory providers.

23. The abnormal costs have significantly increased since the Appellant's appraisal with the planning application, which indicates they are far from certain. I can appreciate that a fixed price quote from a statutory provider does give some certainty but only for the period of the quote. Furthermore, there are often contingency clauses involved and this can result in unexpected additional costs. It is not necessarily the same professional advisers involved in the work on the abnormals and, in any event, there would be extra work that would involve a cost. From the available evidence the contingency and fee allowance put forward by the Appellant do not seem to me unreasonable in this case.

Sales values of market houses

24. The Appellant's sales values have been based on the approved housing mix, which includes a variety of 3, 4 and 5 bedroom market units. The appraisal by BNP Paribas does not seem to have taken the specification of the units fully into account and it is not unreasonable to surmise that sales values would be affected by the availability of different types of parking facility. It is appreciated that it is difficult to value market property with precision. However, I was told by the Appellant's marketing Agent that each of the new dwellings had been considered relative to its scale and that the valuation was based on local evidence. The difference between the parties on this point is relatively small but the targeted approach in the Appellant's appraisal seems to me preferable.

Construction costs on affordable housing

25. The BNP Paribas appraisals adopt a lower cost on the basis that it considers that specifications are generally lower. Marble worktops were given as an example. The Appellant explained that the smaller market units would not include such a finish either. Moreover, the Appellant's marketing Agent, who has experience of working on mixed use schemes, indicated that specifications can be more costly in terms of such matters as security, thermal insulation and the like, required by Registered Providers. Although the development would be "tenure blind" the developer pointed out that the affordable element would be distinguishable due to the requirement for features such as water butts and garden sheds. The Council did not dispute this or provide any convincing evidence as to why the affordable build costs should be reduced.

Statutory fees and professional warranties

26. BNP Paribas's appraisal assumes that these costs would be included in the 10% allowance for professional fees and that if a separate allowance were to be made the professional fees should be 1.1% lower. I would tend to agree with the Council on this point. Although statutory fees and professional warranties are clearly over and above the fees allowed for in professional services, the Appellant's evidence that an 8.9% allowance for the latter would be unreasonably low was not substantiated.

Conclusions

27. Having considered the disputed matters between the parties I consider that the Appellant's viability analysis is generally to be preferred in all matters but the developer's profit on affordable housing and the cost of statutory fees and

professional warranties. However, even taking that into account, it is quite clear from the evidence that the provision of 35% affordable housing would not be viable.

28. Further viability work by the Appellant indicated that 8% affordable housing could be supported on the basis of 2 shared ownership and one affordable rented unit. This showed a small surplus of about £4,000 but was based on 10% developer's profit on the affordable units. At my request a further assessment was done on the basis of 6% developer's profit and this revealed that 10% affordable housing on the basis of 4 shared ownership dwellings would result in a small loss. However, taking account of my conclusions on statutory fees and professional warranties it seems to me that this negative would turn positive. I am therefore satisfied that this level of affordable housing would be a viable proposition.

29. In the circumstances it is concluded that the affordable housing requirement in the Section 106 Agreement is unviable. However, there is no justification for removing the affordable housing provision altogether. The available evidence shows that the development would become viable with a modified affordable housing requirement of 10% and an adjusted tenure mix to provide all shared ownership units. On this basis the appeal is allowed and the modifications, which shall remain effective for 3 years from the date of this decision, are as set out in the Schedule below.

Christina Downes

INSPECTOR

SCHEDULE OF MODIFICATIONS
TO THE PLANNING OBLIGATION BY AGREEMENT DATED 26 APRIL 2016

Within Clause 1 of the First Schedule the following definitions shall be amended:

"Affordable Housing" by the deletion of the deletion of the words "rent or".

"Affordable Housing Unit" by the deletion of the words "an Affordable Rented Unit or"

"Affordable Rented Units" by the deletion of the whole definition.

Clause 2.1 to the First Schedule shall be amended as follows:

By the deletion of the table and replacement with the following table:

Unit Type	Unit Size	No of Affordable Rented Units	No of Shared Ownership Units
2 bed house	71 sq metres GIA	0	4

The Plan (reference 15021-01E) shall be amended as follows:

By the deletion of the references to affordable rented units and shared ownership units and the replacement with a reference to 4 x 2 bed shared ownership units.

End (three modifications)

APPEARANCES

FOR THE APPELLANT:

Mr A Kerrison BA(Hons) MRTPI	AMK Planning
Mr J Lagan MRICS	Lagan Homes Limited
Mr C Sanders MRICS	Arcadis
Mr M Green	Green & Co

FOR THE LOCAL PLANNING AUTHORITY:

Mr P Brampton	Major Applications Officer, South Oxfordshire and Vale of White Horse District Councils
Ms K Langford	Principal Appeals Officer, South Oxfordshire and Vale of White Horse District Councils
Mr N Pell MRICS	BNP Paribas Real Estate
Mr A Lee MRICS MRTPI	BNP Paribas Real Estate

DOCUMENTS PROVIDED AT THE HEARING AND FOLLOWING ITS CLOSE

1 Copy of Appellant's viability appraisal (August 2015)

2 BNP Paribas viability appraisal (13 September 2016)

3 Section 106 contributions schedule

4 Appellant's list of comparable sites (A3 format)

5 Correspondence following the close of the Hearing. This includes an updated viability appraisal by BNP Paribas showing 35% affordable housing (15 September 2016) and by the Appellant showing 4 shared ownership units