The Planning Inspectorate

Appeal Decision

Hearing held on 1 November 2016

by P W Clark MA MRTPI MCMI

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

Decision date: 21 November 2016

Appeal Ref: APP/D0840/S/16/3151605
Land East of Trevemper Road, Newquay, Cornwall TR8 4QD

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by R J Walker (Newquay) Ltd against the decision of Cornwall Council.
- The development to which the planning obligation relates is demolition of existing structures and site development to provide up to 330 residential units, restaurant/public house, hotel, open space, play space, new routing for the A392 to Trevemper Road, associated infrastructure (including retaining structures and works to the public highway), access, parking, servicing and landscaping.
- The planning obligation, dated 27 July 2015, was made between Cornwall Council and R J Walker (Newquay) Limited, Brian Avery Killingback and Rita Lucie Killingback and A J L Limited
- The application Ref PA16/03304, dated 1 April 2016, was refused by notice dated 9 May 2016.
- The application sought to have the second schedule of the planning obligation modified to amend "31.8%" to "20%" in the definitions of "Affordable Housing Mix" and "Default Affordable Housing Mix"

Decision

1. The appeal is dismissed.

Procedural matter

1. The appeal is made under section 106BC of the Town and Country Planning Act. Subsection (6) of s106BC applies subsections (4) and (5) of s106BA to this appeal. In the light of that provision, it appears that the Council does not have the power to refuse the application for parts of the reason given in its refusal letter (departure from Development Plan policy, continuing to serve a useful planning purpose and alternative procedure available). This decision therefore focuses on other parts of the reason given (no detailed scheme approved).

Main Issues

2. The main issues derive from the provisions of the Town and Country Planning Act which govern this type of appeal. They are whether the affordable housing requirement means that the development is not economically viable and, if so, how the appeal should be dealt with so that the development becomes economically viable.

Reasons

Prematurity

3. The obligation to which this appeal relates is connected to an outline planning permission so it is correct for the Council to state that there is no detailed scheme approved. The permission was given on appeal following agreements reached between the parties on two putative reasons for refusal, one of which concerned the absence of a mechanism to secure affordable housing amongst other matters.

4. Instead of reaching agreement on a condition to require a scheme of affordable housing, which could then have been the subject of a planning obligation when a detailed scheme was subsequently approved, a unilateral undertaking was made which, as noted in the appeal decision (APP/D0940/W/15/3012830), the Council advised met its requirements. It is that undertaking which is now in question. In the same way that the Council was then able to satisfy itself that the Unilateral Undertaking met its requirements despite there being no detailed scheme approved, so now this Decision must consider whether the development is economically viable despite there being no detailed scheme approved.

5. It is tempting to adopt the view expressed in appeal decision APP/D0840/Q/13/2206580 that assessment is premature in advance of a detailed scheme coming forward and to conclude, as the Council argues, that the obligation should not be modified because it is premature to revisit viability so soon after outline permission was given and when no detailed scheme has yet been worked up. However

    - The application of the legislation is not restricted to schemes with full detailed consent
    - Although permission was given in an appeal decision dated 17 December 2015, the viability appraisal was much earlier, in April 2015 and the Planning Obligation was dated July 2015
    - Notwithstanding the view expressed in appeal decision 2206580, that Inspector went on to conclude, in the light of what he regarded as a "blank canvas" in that case, that it was not possible to conclude that that scheme would necessarily be unviable. It is necessary to consider whether there is an equally "blank canvas" in the current appeal and, if so, whether the blankness of the canvas would allow for a viable scheme to be contrived without changing the obligation.
    - At the time decision 2206580 was made in December 2013, there was still time for a detailed scheme to be approved and for a further application to review the planning obligation to be made before the legislation expired on 30 April 2016. That is not the case in the current appeal so it would be unfair in the present case to dismiss the appeal as premature.

    For all the above reasons, I have continued to examine the appeal as made despite the absence of a detailed approved scheme.

Viability

6. Although there was no detailed scheme approved at the time, the Council accepted that the Unilateral Undertaking met its requirements, so there was clearly a scheme on which the Undertaking was based. At the Hearing the Council confirmed that it had negotiated with the developer the detailed dwelling mix of that scheme so as to increase the percentage of affordable housing from the 30% originally offered by the developer to the 31.8% enshrined in the Unilateral Undertaking, nearer to the 35% sought by development plan policy.

7. The case presented by the appellant is clouded somewhat because the appellant has himself changed the scheme between the original appraisal supporting a 31.8% affordable housing contribution and that now produced to justify a reduction to a 20% contribution. The number of three-bedroomed houses has been increased, the number of four-bedroomed houses has been decreased and a number of five-bedroomed houses has been introduced. These changes have generally tended to improve the viability of the scheme. Unit sizes have all been changed, in most cases tending to decrease the viability of the scheme. But it is clear that the two appraisals are evaluating two different schemes and so are not comparable for the purposes of this appeal. In order to consider whether the affordable housing requirement means that the development is not economically viable, it is necessary first to revert to the scheme as originally appraised before considering what changes might need to be made.

8. Essentially the appellant claims that construction costs have increased in the period since the earlier appraisal, that sales costs have also increased but by a lesser percentage and that values for affordable housing have reduced as a result of the impact of social rent changes announced by the government in the Summer Budget on 8 July 2015. Although these changes were announced shortly before the Unilateral Undertaking was signed, their effects on the funding of affordable housing through planning obligations did not emerge until later, as is recognised in a letter dated 9 November 2015 from the Minister of State for Housing and Planning to Local authorities in England.

9. The construction costs now put forward by the appellant are said to be based on recent experience by Linden Homes, although application of BCIS data is said to show a higher increase and it is claimed that an opinion from a Quantity Surveyor substantiates a higher increase. However, neither the BCIS data, nor the Quantity Surveyor's opinion was submitted to the Hearing. The Council accepts that the costs figures actually submitted are reasonable and so I have based my decision on those submitted.

10. Applying these to the scheme appraised for the 31.8% affordable housing included in the planning obligation shows that the calculated figure for construction costs would have risen from £21,211.008 in the earlier appraisal to £23,393, 594 now, an increase of £2,182,586. Various fees calculated on construction costs would add a further increase of £447,428 and there would also be additional finance charges on the increases. A rounded figure of about £2.65m seems not unreasonable.

11. The sales values put forward by the developer are said to be derived from various comparable sites around Newquay. The Council accepted them as reasonable and so I base my decision on them. Applying these to the scheme

on which the planning obligation was based adds £987,850 to GDV but would also incur additional marketing fees of £34,574. A rounded figure of £0.95m seems not unreasonable.

12. The impact of the announcement of social rent changes on the delivery of affordable housing is recognised by government. The appellant claims this results in a capital value for the affordable rented units reduced from £129 per sq ft to £124 per sq ft. The council also recognises the effects, as it acknowledged during the Hearing. Applying this to the scheme envisaged in the Unilateral Undertaking results in a GDV for the affordable rented units reduced by £346,855. A rounded figure of £350,000 seems not unreasonable.

13. The Council suggests that a factor contributing to the potential unviability of the development is the price paid for the land. Paragraph 98 of its appeal statement suggests that it has evidence that the land value that has been used within the viability appraisal is at the very highest end compared to what has been considered to be acceptable to land owners on other strategic sites in the Newquay area. No such evidence was submitted to the appeal Hearing. Furthermore, I observe that the land value used in the appraisals has not changed since the original appraisal, the costs and values of which are described as reasonable and evidence based in paragraph 35 of the Council's appeal statement. A value at the very highest end of the range accepted by other landowners within the Newquay area is still within the range, so I have no reason to base my decision on any other land value than that used in all the submitted appraisals.

14. In summary, circumstantial changes which have occurred since April 2015 have added about £2.65m in costs to the scheme which was envisaged at that time, have reduced the revenue from affordable housing by about £0.35m and only increased the GDV of the open market housing by about £0.95m. The overall change is about £2.05m adverse to the viability of the scheme. (At the Hearing, the developer's representatives estimated £2.2m without a detailed breakdown). The effect on the developer's profit would be to reduce it from about 16.67% of GDV to about 13.6%, somewhat below the range which is normally regarded as acceptable to incentivise a developer to proceed. I therefore conclude that the affordable housing requirement means that the development as envisaged at the time of signing the Unilateral Undertaking is not economically viable.

How the appeal should be dealt with

15. The legislation under which this appeal is made provides only for the modification or otherwise of a planning obligation. There is no provision to revisit the original permission. Yet, when, as here, the original permission is in outline which implies a degree of flexibility, a consideration of the degree to which the scheme can be refined to increase its viability within the terms of the permission, is a necessary part of considering the appeal.

16. To an extent, the developer has already indicated the potential for this flexibility in that the mix of the scheme has already been revised in the appraisal produced to justify a reduction of the affordable housing to 20%. As the Council points out, within the terms of an outline consent, further adjustments can be made.

17. The figures for present-day construction costs and sales values which the developer has provided show that each change from a 2-bedroom flat to a 2-bedroomed house gains GDV of £26,275. Each change from a 2-bed house to a three-bed house gains £33,100 in value. Each change from a 3-bed house to a four-bed house gains £24,807 in value and each change from a four-bed house to a 5-bed house gains £36,458 in value.

18. The developer points out there would be practical difficulties in substituting two-bed houses for two-bed flats because of the greater land-take of the former. It is also argued that the potential for such change in the mix of houses is limited by the ability of the market to absorb larger properties. Nevertheless the developer agrees that three-bedroomed houses are the easiest to sell and that there is little difference in footprint between a two-bed and a three-bed house. Four five-bed houses are included in the developer's scheme appraised for 20% affordable housing.

19. Within these limitations, there is still flexibility. For example, an open market mix of 20 two-bed flats (as originally envisaged), 126 three-bed houses, 75 four-bed houses and 4 five-bed houses would seem feasible within the parameters discussed. This would give a GDV increased by £907,060 in a scheme retaining 31.8% affordable housing, or, in round terms, about £0.9m. I do not prescribe such a mix; this is purely an example of the scope which exists for improving the viability of the development within the terms of the outline permission.

20. There is also, as the Council points out, some scope to adjust the floorspace of each dwelling type to maximise the difference between construction costs and sales values, although the example worked through at the Hearing produced relatively marginal results.

21. Moreover, as the Council points out, the tenure mix within the affordable housing can change and still remain within the scope of the outline permission. This is the response to the impact of social rent changes on the delivery of affordable housing which is canvassed in the Minister's letter of 9 November 2015, previously mentioned. Paragraphs 93 and 94 of the Council's appeal statement point out that the Unilateral Obligation contains a mechanism for the intermediate affordable units to be sold either as shared ownership or as discounted sale at 60% of market value. The appraisal undertaken at the time of the Unilateral Undertaking is based on shared ownership.

22. At the Hearing, the appellant's representatives questioned the deliverability of discounted sales in place of shared ownership but did not dispute the Council's suggestion that it would add about £1.8m to the GDV of the scheme. Notwithstanding the appellant's reservations, I accept the Council's assurances that a reasonably wide range of potential house builders and mortgage lenders exists to ensure the deliverability of discounted sales and therefore conclude that there is scope for this method to add about £1.8m of value to the development within the existing terms of the unilateral undertaking and outline permission.

23. In combination, the scope for adjusting the mix of market housing within the terms of the outline consent (up to about £0.9m) together with the scope for adjusting the tenure mix of the affordable housing within the terms of the Unilateral Undertaking and the outline permission (up to about £1.8m) amount to a total of about £2.7m additional value which could be found without altering

either the terms of the outline planning permission or the terms of the planning obligation. This would more than outweigh the effects of circumstantial changes which have occurred since the development was appraised on the basis of 31.8% affordable housing in April 2015.

24. I therefore conclude that the affordable housing requirement does not mean that the development is not economically viable and so there is no need to interfere with the terms of the planning obligation. The appeal is therefore dismissed.

P. W. Clark

Inspector

APPEARANCES

FOR THE APPELLANT:

Jonathan Pascoe BA	R J Walker (Newquay) Ltd
Mark Scoot MRTPI MRICS	R J Walker (Newquay) Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Chris Rose MSc MRTPI	Principal Development Officer, Cornwall Council
Richard Hawkey BA	Senior Development Officer, Cornwall Council