The Planning Inspectorate

Appeal Decision

Hearing held on 15 November 2016

by Brendan Lyons BArch MA MRTPI IHBC

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

Decision date: 13 December 2016

Appeal Ref: APP/N3020/S/16/3154302
Cornwater Fields, Longdale Lane, Ravenshead, Nottinghamshire NG15 9AD

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be modified.
- The appeal is made by Philip Lane, Peter Lane, Michael Lane, Nigel Cutts, Chris Cutts, James Cutts and Jeremy Cutts against Gedling Borough Council.
- The development to which the planning obligation relates is described as residential development of up to 70 dwellings including access, equipped play area and open space.
- The planning obligation, dated 13 October 2014, was made between Gedling Borough Council and Nottinghamshire County Council and John Jeremy Cutts, George Nigel Cutts, Christopher Robert Cutts, James Timothy Cutts, and Michael Lane, Peter Lane, Philip Lane.
- The application Ref 2013/0836 is dated 22 February 2016.
- The application sought to have the planning obligation modified by the removal of the affordable housing requirements.

Decision

1. The appeal is allowed. For a period of three years from the date of this Decision, the planning obligation dated 13 October 2014, made between Gedling Borough Council and Nottinghamshire County Council and John Jeremy Cutts, George Nigel Cutts, Christopher Robert Cutts, James Timothy Cutts, and Michael Lane, Peter Lane, Philip Lane, shall have effect subject to the modifications set out in the Schedule appended to this Decision.

Procedural matters

2. Section 106BA of the Town and Country Planning Act 1990 (as amended) provided that, where an application is made to modify an affordable housing requirement contained in a planning obligation, if the requirement means the development is not viable, the application should be dealt with so that it becomes viable. Section 106BC applied the same provisions to an appeal. These sections have now been repealed, but in this case the application under Section 106BA was made to the Council prior to the date of effect of the repeal, so that the appeal can proceed in accordance with the former provisions.

3. The appeal was made by two parties to the Section 106 Agreement, who are identified as the 'First Owner' and 'Second Owner' of the site. Notice of the application and of the appeal was given in writing to the other signatory, Nottinghamshire County Council, which confirmed that it did not wish to take

part in the Hearing as the obligations in respect of education and highways would not be affected.

4. The appeal was made against the Council's failure to issue a decision on the application within the prescribed period. The Council has subsequently formally considered the application and has confirmed the reasons for which it would have refused to modify the obligation.

5. In submissions prior to the Hearing, the Council raised concern that evidence provided on behalf of the appellants appeared to conflict with viability advice to the Council provided by the same consultant in order to inform Local Plan preparation. The consultant explained at the Hearing that that exercise had involved a range of sites, working to set criteria, and did not include any detailed analysis of the appeal site. After consideration of the Local Plan material at the Hearing, the Council accepted that the prescribed parameters under which the advice was prepared could explain any apparent difference in the conclusions reached in respect of the appeal site. The Council accepted that there was no conflict of interest.

Main Issue

6. The main issue is whether the development would be economically unviable while subject to the affordable housing requirements in the Section 106 Agreement and, if so, how the requirements could be modified so that the development would become viable.

Reasons

7. The appeal relates to a site of 2.3 hectares of agricultural land at the southern edge of the settlement of Ravenshead. An adjoining field, of some 1.36 hectares in area, is in the same ownership, and is seen as a potential later phase of development. The land adjoins suburban housing to the north and east, and playing fields and countryside to the west and south.

8. Outline planning permission was granted in October 2014 for the erection of up to 70 dwellings, including the provision of access, an equipped play area and open space. The application had been amended during its consideration by the Council to specify a housing mix of 21 bungalows and 49 houses.

9. The permission was granted on completion of a Section 106 Agreement between the landowners and the Borough and County Councils. As well as the payment of financial contributions for education provision and off-site highway works, the Agreement commits to the provision of on-site open space and of affordable housing. The affordable housing element is to comprise the provision of 9 on-site affordable rented retirement bungalows and a payment for off-site provision or improvement equivalent to the value of 12 further units. The Agreement also restricts occupation of all bungalows, which are to be built to Lifetime Homes standard, to persons aged 55 or over.

10. The planning application was not supported by any viability evidence, and viability does not appear to have been a major concern at that time. However, by February 2016, the landowners had concluded that delivery of the affordable housing commitments would render the scheme unviable. An application was submitted to the Council seeking removal of the affordable housing obligations.

11. The application was supported by a Viability Appraisal ('VA') report, dated January 2016, which included three separate VA calculations. The first, aimed at establishing a residual value for the site, showed development value of £15.995m, with no affordable housing provision, and development costs of £15.199m, resulting in a residual land value of £796,185; the second, used the same development value and construction costs, with no affordable housing, but land costs of £420,842, based on existing use value plus an uplift, and Section 106 contributions of £501,190, resulting in total costs of £16.202m and a negative outcome of £207,061; the third included 30% affordable housing in a mix of intermediate ownership and affordable rent forms, to bring the total development value down to £13.740m, and the same land and construction costs but with lower fees and profits, resulting in a negative outcome of £1.675m.

12. A review of the VA report by the District Valuer Services ('DVS')[1] commissioned by the Council but funded by the landowners in accordance with Council policy, disagreed with these figures. The review concluded that the development could viably provide the full 30% affordable housing required by the Council's Aligned Core Strategy, comprising the 9 on-site bungalows and a contribution of £964,000 equivalent to 12 off-site units, while still generating a surplus of £616,709.

13. Following further negotiations, the Council commissioned a second review at its own expense[2], which also concluded that the scheme should be viable. However, the Council accepts that assumptions used in that report do not assist comparison and does not rely on it in contesting the appeal.

14. The appeal was submitted on 7 July 2016 against the Council's failure to reach a decision on the Section 106BA application.

Scheme viability

15. Guidance on the assessment of viability and the application of Section 106BC is set out in the Government document *Section 106 affordable housing requirements: Review and appeal*, April 2013 ('the Guidance'). This explains the concern that unrealistic Section 106 agreements can be an obstacle to house building, which the government is keen to encourage. Stalled schemes result in no development, no regeneration and no community benefit. The review of unrealistic agreements will result in more housing and more affordable housing being provided.

16. In this case, the Council argue that the scheme has not in fact stalled, as the development remains at an early stage and there is no evidence of any marketing of the site to developers. The agent for the landowners confirmed at the Hearing that informal approaches to sound out developer interest had been made but had not borne fruit. No detailed site investigations had been done and no formal marketing had been carried out. Subject to the outcome of this appeal, it was expected that full open marketing would be undertaken at national level.

17. The purpose of the legislation is to avoid housing developments being prevented from going ahead, but there is no requirement for formal proof that a development has stalled. The Council recognise this but consider that greater

[1] Report dated 20 April 2016
[2] Review by consultants Andrew Golland Associates, dated June 2016.

weight could be given to the appellants' case if there were evidence of a poor response to marketing. I agree that such evidence would be helpful, but I also accept that third parties might be unwilling to allow release of their response to an informal approach. In a case such as this, it is not unreasonable for landowners to be unwilling to commit to the cost of a full marketing exercise, when their professional advice is that the development would not be viable and hence unlikely to attract developer interest. The indications are that the scheme will not proceed until the dispute over the requirements of the Section 106 Agreement can be resolved. In the absence of a clear way forward, the development can be taken as effectively stalled for the purposes of the Guidance.

18. In preparation for the appeal, the parties have concluded a Statement of Common Ground ('SoCG'), which sets out a number of agreed elements of viability assessment. These include: benchmark land value of £926,625; market housing sales values of £15,945,000; abnormal costs of £420,000; Section 106 infrastructure contributions of £501,000; sales and marketing fees for market housing at 3%. I have found no reason to take a different position on any of these matters.

19. The appellants' final position in advance of the Hearing was based on two updated VAs, the first showing that at the agreed land costs and sales values, with no affordable housing, and at developer's profit of 20% of gross development value ('GDV'), the scheme would show negative viability of £638,823. At a reduced profit level of 17.5%, the negative outcome would reduce to £240,198.

20. In response, the Council continue to rely on the DVS report and its accompanying VA. They further suggest that since the appellants' own VAs show negative viability even without any affordable housing and that removal of the obligation would not render the scheme viable, it should not be allowed under Section 106BC. However, the appellants confirmed at the Hearing that the scheme could be brought back into viability by reducing the level of developer's profit to around 16% of GDV, and that there were realistic prospects of a developer committing to the scheme on that basis, perhaps with the hope of reducing margins as the development proceeded. Even without the submission of a formal VA showing the scheme in viability, as recommended by the Guidance, the figures are sufficiently clear that this reduced profit level would alter the balance, subject to the other assumptions. As the reduced level would still be within what is generally regarded as a normal range of profit margin, I consider the appellants' response to be reasonable and see no obstacle in principle to the application of Section 106BC to this case.

21. I now turn to the elements of viability still in dispute, including the question of the correct level of profit to apply.

Affordable housing values

22. The Council disputes the appellants' attribution of a value for the on-site affordable bungalows at 37.5% of market value, which was based on the assumption that likely occupiers would be at least 70 years of age and on social rent terms, as their eligibility for social housing would preclude access to mortgage finance for any share of an intermediate housing unit. The DVS VA had assumed intermediate ownership of the bungalows at 67% of market value.

23. In my view, this debate is almost entirely academic. The Section 106 Agreement is clear that the 9 on-site affordable bungalows are to be for affordable rented occupation. There is no allowance for intermediate ownership of these units. The Agreement includes the need to estimate the value of the site with 21 affordable units (30% of the total 70), in order to calculate the off-site affordable housing contribution. For the purposes of that calculation the notional affordable housing is to be apportioned as 15 (70% of the 21) affordable for rent and 6 (30% of the 21) for shared ownership.

24. The Council takes exception to the description of the bungalows as 'retirement' bungalows, suggesting that many people over the age of 55 might have no intention or ability to retire for the foreseeable future. However the term 'Affordable Retirement Bungalow' is actually defined and used in the Section 106 Agreement. I agree with the appellants that 55 years is very often taken as the minimum age for people opting to take up what is generally perceived and marketed as a 'retirement' product.

25. The Council's concern should be seen as part of a wider issue about the nature of the housing offered and the degree to which it is special in nature. The appellants may be correct that many occupiers would be well over 55 by the time of moving in to the scheme. However, that should not in my view preclude the possibility of a number of purchases by people aged between 55 and 70.

26. The appellants see the retirement bungalows as a premium product, needing to offer buyers a level of facilities similar to those they will have seen advertised by major specialist providers. This would enhance the scheme's sales value but would also incur additional costs, which are considered further below. The suggestion that development of the retirement bungalows would only be taken on by a specialist developer has not been backed by sufficient strong evidence. However, it seems clear that the project would not be of interest to a major national or regional general housebuilder, due both to its scale but also to the high proportion of age-restricted housing.

27. In terms of viability, the schedule of sales values is common ground between the parties, including the value of the retirement bungalows at £225,000 each. The value of the 9 on-site affordable units is linked by the agreed percentage rate. A supplementary schedule submitted by the appellants at the Hearing shows that the provision of the 9 units would adversely affect viability to the extent of some £432,000.

Build costs

28. The Guidance advises that in appraising viability, cost estimates and known tender price evidence in the baseline appraisal should be updated. Site specific evidence based on reported cost estimates or invoices should be provided by the appellants and assessed against comparable market evidence. Where comparability is at issue, figures can be benchmarked against Building Costs Information Service ('BCIS') indices or other appropriate data sets or verified by independent cost consultants.

29. The appellants' latest figure for construction costs of £8,685,430 is based on the BCIS index, taking the median costs for the Gedling area at April 2016, together with the agreed allowance of 15% for external works. The DVS employs a blended rate of £1000 per sq m derived from analysis of actual tenders submitted to the Homes and Communities Agency ('HCA') for sites in

the north of England and of VAs submitted for other projects, as well as the BCIS data, to arrive at a total with external works of £7,808,500.

30. The Guidance has a clear preference that actual site-specific information should inform any reappraisal of viability of a stalled scheme. BCIS and other data sets are recommended as a benchmarking source where site-specific information needs to be assessed against comparable evidence. In this case there is no site-specific information based on cost estimates or invoices, so that reliance must be placed on more generic information.

31. I do not underestimate the value of the actual tender data that has fed into the DVS rate, although there is some lack of transparency about the process of doing so. However, the evidence suggests that these tenders were predominantly by volume housebuilders and major developers interested in larger sites. The applicability of these results to a smaller site such as Cornwater Fields is called into question.

32. One aspect of the BCIS data is said to be its lack of input by major developers, and a majority of evidence supplied by local and regional builders. Because of the scale of the current site, this type of data would be most appropriate, particularly if, as suggested by the appellants, the scheme ended up being delivered by two developers, with a specialist firm taking on the 'retirement' bungalows. The BCIS data also has the benefit of being related to Gedling, even if the sample size is not very large.

33. For these reasons, I consider that the BCIS information, as employed by the appellants in their VAs, represents a more suitable data set for the purpose of apportioning build costs. The Council's suggestion that the lower quartile figure for each building type should be used in preference to the median is not clearly justified, and is disputed by the appellants' cost consultant. I agree that the median figure should be adopted in this instance.

34. Both parties agree that bungalows tend to incur additional costs per sq m than two-storey houses, and this is confirmed by the BCIS data. The April 2016 BCIS Gedling tables do not include a rate for detached bungalows, but it could be expected to be somewhat higher than the rate for a semi-detached bungalow of £1133 per sq m. The single-storey sheltered housing rate of £1286 per sq m adopted by the appellants would be somewhat higher again. However, the Section 106 Agreement specifies that all bungalows are to be built to Lifetime Homes standards. I accept the appellants' proposition that the additional requirements of these standards, in terms of accessibility, services and some structural support, would impose extra costs. I also acknowledge that some other features, such as the facility to have a built in care alarm system, would be expected by potential buyers of advancing years. I accept that these are the sort of extras that inform the higher BCIS sheltered housing rates, rather than those such as warden accommodation suggested by the Council. Specialist cost evidence at the Hearing estimated these features to add c£100 per sq m. On balance, I consider it was reasonable of the appellants to adopt a higher rate for the bungalows and that, despite the Council's strong reservations, the sheltered housing rate provides the most suitable choice.

35. A supplementary VA submitted by the appellants at the Hearing showed that even if the bungalows were assessed at the same rate as detached houses (£1242 per sq m, including external works), the scheme would still show negative viability of some £415,000, without affordable housing.

36. In summary, I accept the appellants' estimate of costs using BCIS data for Gedling at the base date of April 2016, to arrive at a total construction cost of £8,685,430.

Construction Contingency

37. The appellants had allowed a contingency of 5% of construction costs, which was said to be the industry standard for schemes at this stage, with many cost factors still unknown. The DVS regarded 5% as relevant to previously developed sites, and had included 3% in their VA. However, the DVS acknowledged at the Hearing that rates could vary between 2-5%. A recent appeal decision[3] submitted by the Council does not provide a compelling precedent as a figure of about 3% was not contested.

38. In the present case, specialist cost consultancy evidence on behalf of the appellants was very clear that 5% was the minimum that would be recommended to a client at this stage of a project, with the level to decrease as greater certainty emerged. Such advice may be tempered by a degree of caution, and I note that some of the appellants' own appraisals during negotiations employed a rate of 4%. Nevertheless, I give greater weight to the specialist evidence and accept the figure of 5%.

Developer's profit

39. The National Planning Policy Framework ('NPPF') provides that, to achieve viability, the costs of any policy requirements such as affordable housing should allow competitive returns to a willing landowner and a willing developer. The level of developer's profit that would ensure a 'competitive return' is not defined. The Guidance acknowledges that profit levels vary significantly between projects to reflect the size and risk profile of the developer and the risks related to the project.

40. The appellants have adopted a profit level of 20% of GDV and argue that this rate is universally acknowledged in viability work as the base level necessary to secure a competitive return, in accordance with the NPPF, and to meet the requirements of lenders. Reference is made to a number of appeal decisions where this rate has been endorsed[4] and to training material delivered by the DVS which incorporates the rate.

41. The appellants contend that 17.5% profit is the appropriate rate for market housing and a lesser rate of 5% for affordable housing. This split is intended to reflect the much lower risk involved in disposing of the affordable housing in a single sale to a registered provider, compared to the uncertainty of the open market, and is endorsed in HCA schemes.

42. I do not place great weight on the evidence of DVS training material, which could have used any rate as an illustration. However, there is considerable support for the figure of 20% as the 'industry standard' of a competitive return. The appeal decision[5] referred to by the DVS does not establish endorsement of the 17.5% rate. The evidence of northern developers' tenders to the HCA is predominantly by volume housebuilders interested in larger sites, and even

[3] Appeal Ref APP/R2520/S/16/3150756 Land off Poplar Close, Ruskington, Lincolnshire NG34 9TL
[4] E.g. Appeal Ref APP/V3120/S/15/3133745 Fernham Fields, Faringdon SN7 7EZ
[5] Appeal Ref APP/J3015/S/15/3019494 Hempshill Hall, Low Wood Road, Nuthall, Nottingham NG6 7AB

they have shown a recent increase in required profit level to 19.2% of GDV for market housing and 7.9% of cost for affordable housing.

43. I support the appellants' view that, as well as being of smaller scale than the HCA sites, the appeal site has extra complexity and risk added by the high proportion of retirement bungalows. It appears unlikely that a regional or local-scale developer would have greater confidence in proceeding at a lesser profit level than a major firm able to avail of economies of scale.

44. As outlined earlier, if the appellants' assumptions are borne out, the scheme would not proceed without a developer being prepared for a potentially reduced return. But for the purposes of determining a competitive return to attract a willing developer, I accept that 20% is the appropriate rate to employ in the VA.

Finance costs

45. The appellants' latest position is based on a cashflow forecast that adopts the interest rate of 6.5% specified in the DVS VA, to produce a total finance cost of £987,285, over a build period of 18 months and a sales period of 24 months. This is considerably greater than the figure of £263,898, plus fees of £30,000, allowed in the DVS VA.

46. Some difference could be expected because of the different allowance for construction costs and other related costs, but the gap here is significant. However, direct comparison was not possible as the workings supporting the DVS figure, which was derived from a bespoke model, were not available to the appellants or produced for the Hearing.

47. The DVS accepted that the appellants' predicted sales rate of 3 units per month was reasonable but was critical of some of other assumptions made, in particular the time lapse of 12 months from start of construction before sales income was realised. However, I accept the appellants' view that a site of this scale would not be phased and that all the costs of infrastructure and opening up would be incurred early on in the development. Allowing time for the earliest units to become fully available, a lapse of 12 months before sales revenue was received does not appear unreasonable.

48. I agree with the appellants that the DVS figure appears low for a scheme of this overall cost. In the absence of detailed evidence to support a lower amount, I accept the appellants' figure.

Professional fees

49. In response to negotiations, the appellants had reduced their allowance for professional fees from 10% of construction costs to 8%, covering a range of disciplines, and this was the position in the latest updated VAs. The DVS had adopted a figure of 6% as standard for greenfield sites in the North of England, but agreed at the Hearing that this could be increased by £75,000 (or almost 1% of the DVS allowance for construction costs).

50. I accept that the figure of 12% quoted from DVS training material should not be regarded as directly applicable to the present case. I note that the rate may well include statutory fees in addition to professional fees, which the DVS

suggested should apply in this case. However, the two other appeal decisions[6] referred to by the DVS do not provide conclusive reasoned support for a combined rate of around 7%. The evidence of the appellants' cost consultant was that 10-15% should normally be allowed for fees at this stage, with housing projects tending to the lower end, but that 8% might not cover all the necessary inputs. In the light of all the evidence, I accept that an allowance of 8% can be taken as reasonable.

Statutory fees and warranties

51. The appellants allowed a separate line for statutory fees and warranties at 1.1% of construction costs, amounting to £95,540. It was explained that was to include planning and building regulation approval fees, likely to come to more that £60,000, as well as NHBC-type warranties. The appellants' cost specialist confirmed that these would probably cost more than £1000 per house, depending on the developer's experience and track record, and had a recent example of a rate of £1250 per house. The DVS considered this to be excessive, but did not offer detailed evidence to support the rate of £300 per house included in the DVS VA. I accept that the rate of 1.1% is reasonable in this instance.

Legal fees

52. The parties had assessed legal fees differently, with the DVS setting out a separate element for land acquisition, and the appellants including all legal work for sales and acquisition in a combined rate of 0.5% of GDV, equating to £1130 per dwelling. I acknowledge that there would be a degree of repetition in the conveyancing of completed dwellings, but each sale would require an individual transaction with the prospective purchaser. In the light of other professional fees on the project, an overall allowance of 0.5% is not unreasonable.

Conclusions

53. For the reasons set out above, I have concluded on the basis of the evidence before me that the appellants have made a convincing case to support their assumptions in each of the areas of dispute with the Council. This leads inevitably to the conclusion that the development is economically unviable while subject to the affordable housing requirements in the Section 106 Agreement. Full removal of the affordable housing requirements would be necessary for it to become viable, which, as earlier outlined, would also require a willing developer to proceed on the basis of reduced profit.

54. The Council is concerned that, if the appellants' case is accepted, the result would be that a greenfield site with limited need for abnormal construction costs, in a desirable part of the borough, would not be able to deliver the policy requirement for affordable housing. However, this is to overlook the significance of the additional requirement for 30% of the development to be made up of bungalows subject to age-restricted occupancy. As a result of this constraint, the housing scheme is not a typical development and different assumptions of costs and values come into play.

[6] Appeal Ref APP/J3015/S/15/3019494 Hempshill Hall, Low Wood Road, Nuthall, Nottingham NG6 7AB; Appeal Ref APP/R2520/S/16/3150756 Land off Poplar Close, Ruskington, Lincolnshire NG34 9TL

55. The extent of modifications to the Section 106 Agreement necessary to make the development viable was discussed at the Hearing and provisionally agreed. I consider that the changes outlined are all reasonable and necessary, and I shall therefore modify the Agreement in that way. The modifications, which are set out in the attached Schedule, will endure for a period of three years from the date of this decision.

Brendan Lyons

INSPECTOR

Appeal Ref: APP/N3020/S/16/3154302
Cornwater Fields, Longdale Lane, Ravenshead, Nottinghamshire NG15 9AD

Schedule of Modifications to the Planning Obligation dated 13 October2014

1. Section 2: *Definitions* shall be amended by the deletion of the following definitions:

   2.2 Affordable Housing
   2.3 Affordable Housing for Rent
   2.4 The Affordable Housing Guidance
   2.5 Affordable Housing Scheme
   2.6 Affordable Housing Bungalows
   2.16 Off-Site Affordable Housing Contribution
   2.19 Open Market Dwelling
   2.34 Shared Ownership

2. Within Section 2: *Definitions* the following definition shall be amended:

   2.9 Bungalows: delete "…and which may include Affordable Retirement Bungalows".

3. Section 4: *Liability* shall be amended by the deletion of the following clauses:

   4.2
   4.3

4. Within Section 4: *Liability* the following clause shall be amended:

   4.1 Delete "…Open Market…"

5. Section 5: *Monitoring* shall be amended by the deletion of the following clauses:

   5.1.3
   5.1.5

6. Schedule Two: *Affordable Housing* shall be deleted in its entirety.

APPEARANCES

FOR THE APPELLANT:

Adrian Kerrison MRTPI	Principal, AMK Planning
Philip Wright CQS MRICS	Director, Gleeds Cost Management Ltd
Richard Bowden	Director, Bowden Consultants

FOR THE LOCAL PLANNING AUTHORITY Gedling Borough Council

Alison Bennett	Service Manager- Housing
John Sheil	Housing Strategy Officer
Nick Morley MRTPI	Principal Planning Officer
David Newham MRICS	Principal Surveyor, District Valuer Services

DOCUMENTS SUBMITTED AT THE HEARING

Appellants' documents:

1. Cornwater Fields: alternative approach to retirement bungalow costs & values
2. Viability Appraisal – reduced values and build costs
3. Viability Appraisal – 9 intermediate units and unchanged build costs
4. Cornwater Fields: alternative approach to retirement bungalow costs & value (2)
5. Viability Appraisal – unchanged values and reduced build costs

Council's documents:

6. BCIS £/m^2 study, 29 October 2016, rebased to Gedling
7. Appeal Decision, dated 25 October 2016, Ref APP/R2520/S/16/3150756: Land off Poplar Close, Ruskington, Lincolnshire NG34 9TL
8. Local Plan Viability study: Longdale Lane C, Ravenshead – Years 0-5
9. Local Plan Viability study: Longdale Lane C, Ravenshead – Years 6-10