The Planning Inspectorate

Appeal Decision

Site visit made on 2 November 2016

by J S Nixon BSc(Hons) DipTE CEng MICE MRTPI MCIHT

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

Decision date: 20 December 2016

Appeal Ref: APP/N5090/S/16/3155115
Site at 1060A-1072 High Road, Whetstone, London, N20 0QP.

- The appeal is made under section 106BC of the Town and Country Planning Act 1990 (the Act) against the refusal to modify a planning obligation.
- The appeal is made by Dorchester (Whetstone) Ltd, (the Appellants) against the decision of the Council of the London Borough of Barnet (the Council).
- The planning obligation, dated 10 November 2015, was made between the Mayor and Burgesses of the Council and by Dorchester (Whetstone) Ltd.
- The development to which the planning obligation relates is for the demolition of existing buildings and the redevelopment of the site to provide 46 No. self-contained flats (Use Class C3), 10 No. self-contained houses (Use Class C3) and 483 sq m of office (Use Class B1a) floorspace, in buildings ranging between five and four storeys in height (with an additional basement level) and the provision of associated car parking (76 spaces), cycle parking, refuse and recycling facilities, landscaping and amenity space, which includes residents' fitness facility (Application Ref. No: B/06116/13).
- The application to modify the planning obligation is Ref. No. 15/07822/MDL, was dated 18 December 2015 and refused by notice dated 25 January 2016.
- The application subject of this appeal sought to have the planning obligation modified as follows: retaining the number of affordable units agreed within the affordable housing obligations in the section 106 dated 10 November 2015, but providing them all as shared ownership units. The existing obligation is to provide 9 affordable housing units (6 social rented and 3 shared ownership). The appeal application seeks to change this to 9 shared ownership housing units, submitting that this is the maximum level of affordable housing that the development could viably support.

Decision

1. The appeal is allowed and from the date of this decision, the planning obligation, dated 10 November 2015 and made between the Mayor and Burgesses of the Council and by Dorchester (Whetstone) Ltd, shall have effect subject to the modifications set out in the attached schedule.

Background and clarification

2. In this particular case, the original planning permission has not been implemented. A further application was submitted for development of the appeal site, entailing the demolition of the existing buildings and redevelopment of the site to provide 61 no. self-contained residential flats (Use Class C3), 10 no. self-contained houses (Use Class C3) and 612 square metres of office (Use Class B1) floorspace, in buildings ranging between six and four

storeys in height (with an additional basement level) and the provision of associated car parking (82 spaces), cycle parking (70 spaces) refuse and recycling facilities, landscaping and amenity space, which includes a residents' fitness facility. This was refused planning permission 27 November 2015 for six reasons, including the lack of an acceptable contribution to or provision of affordable housing, despite the scheme having been found financially viable for the development proposed to make such a contribution. Having not been made privy to the Economic Viability Assessment for this scheme, I have been unable to draw any comparators to assist in deciding the appeal before me.

3. Following reading the submissions and conducting the site visit, I wrote to the parties posing four questions and inviting comment or submission. These were first, details of the draft changes to the s.106 should the appeal be successful. Secondly, asking for details of the profit levels sought for the affordable housing and commercial elements of the scheme. Thirdly, I pointed out that no mention had been made in the submissions about the fall in the value of sterling and the effect this might have on the attractiveness of UK property for the overseas investor. Finally, I asked for clarification about the Council's submission, which says that it disagrees with the Appellants' argument on house price growth, its position on construction costs and the value of the affordable housing element, but nevertheless agrees that the changes to the affordable housing provision applied for should be accepted.

Main issue

4. From the evidence and representations made and my visit to the site and surroundings, it follows that the main issue to be decided in this appeal is whether the level and mix of affordable housing contained in the s.106 Planning Obligation would render the development unviable and, if so, would the level proposed be reasonable and be delivered to maintain scheme viability.

Policy overview

5. Section 106A of the Act (as amended) recognises the need for flexibility and provides the facility for applications to modify or discharge obligations. The key parameters for decision makers include whether the obligation continues to serve a useful purpose (if not, the obligation must be discharged) or whether that purpose would be served equally well if it had effect subject to the modifications proposed in the application. Accordingly, it is necessary to examine whether the obligation meets the relevant tests for planning obligations in that they are necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind (Paragraph 204, National Planning Policy Framework).

6. National guidance on Development Viability in Decision Taking is set out in the Planning Practice Guidance (PPG), with specific guidance on s.106B applications and appeals contained in the Government document Section 106 Affordable Housing Review and Appeal (April 2013). This says that assessments should be based on clear, up-to-date and appropriate evidence, with the starting point a review of the original viability assessment. Reviews should apply a similar methodology, with any changes explained and justified.

7. The intention of the modifications to s.106 (BA, BB and BC) is to permit variation to the level of affordable housing required under an extant permission, but which was negotiated under different economic conditions. The

key aim has been to unlock stalled developments, while affording the landowner a reasonable return when selling the site and the developer a reasonable level of profit. This provision within the Act has now been withdrawn. Further advice was given in a Ministerial letter dated 9 November 2015 designed to clarify certain points following a perception that s.106B appeals were not being processed and decided as expeditiously as intended, still leading to stalled developments.

8. This letter has particular relevance for this appeal, where the intention would not be to reduce the number of affordable units, but to change the tenure proposed for some units to help retain viability of the scheme overall. The Minister calls upon Councils to respond constructively, rapidly and positively to requests for renegotiations of planning obligations. The letter goes on to say that, where the application is simply for a change in tenure mix, and not to vary the amount of affordable housing, it is unlikely to be necessary to reopen discussions on viability assessment.

9. In terms of the development plan (DP), no information is given about the specific requirement in Barnet, though experience shows that this is likely to be at or above 30%. The London Plan looks for a high target level of affordable housing, 50%, but this is tempered by it requiring each scheme to provide the maximum reasonable amount of affordable housing commensurate with scheme viability.

10. In support of the cases, a number of supplementary planning policy and professional documents inform parties of appropriate process to the desired outcome. These include The Department of Communities and Local Government's publication "Section 106 Affordable Housing Requirements, Review and Appeal" and the Development Control Toolkit, upon which the Appellants' Economic Viability Assessment is based. In addition, though not cited specifically, in the professional world are the RICS Financial Viability in Planning and RICS Valuation Paper No.3, which evince process and methodology for various scenarios. A key point to draw out is that there are few hard and fast rules, with the decision maker left to view viability assessments in the specific context of the site and development under review.

Reasoning

Overview

11. Looking at the original s.106 Obligation, this would deliver 16% affordable housing within the development, which falls well shy of the target figure of usual levels and certainly the target of 50% in the London Plan. Even then, the Appellants submit that even achieving this figure was the result of hard fought negotiations between them and the Council. However, at the time the Obligation was drafted and signed, there were clearly reasons why the 16% figure agreed was judged acceptable in planning terms, deliverable, directly related to the development and fairly and reasonably related in scale and kind. The contribution to the affordable housing provision would, therefore, go some way to meeting the Council's needs in terms of affordable units and the tenure and is necessary to make the development acceptable. However, in the circumstances where the make-up of the 16% figure is now challenged, we have to look at the Economic Viability Assessments prepared originally by the Applicants, the update and the Council's response.

12. No Statement of Common Ground was agreed and, consequently, I am faced with examining the economic background, nationally and possibly locally and, in the absence of any agreement on several key factors, each and every parameter contained in the assessments.

13. In the national context, the s.106B procedure was introduced to reassess proposals caught up in a changing, and by implication a worsening, economic climate. However, this proposal followed the economic turmoil between 2008 and 2012 and was submitted, when the financial regime was well on the way to recovery, with property values increasing at a higher level than costs. Thus, at that juncture there would not seem to be any convincing reason to justify a change.

14. In the more recent assessment, there are a number of agreed parameters, but six variables where there are said to be material changes that will prejudice the commencement of development. These are the Budget reduction to social housing rents; the 3% additional stamp duty for overseas and second home buyers; the closure of property funds; the reduction in the bank rate to the property sector; the drop in construction activity since the Brexit vote; and, the increase in build costs associated with the drop in the value of sterling pound. In addition, it is claimed that since the Brexit vote reports show that there is a marked slowdown in demand, a predicted fall in property prices and prolonged recessionary conditions.

15. From the Council's perspective, it does not accept the fall in house prices, the build cost inflation figure and the value of the social housing used in the matrix. I have looked at these in turn.

16. As for the Budget reduction to social housing rents, the reluctance of five out of six registered providers to submit a quote and the relatively low figure proffered by the one that did tender seems to confirm that this represents a sea change in the position regarding social renting. The 3% additional stamp duty for overseas and second home buyers is far less clear cut. The overseas buyers would seem to be adequately compensated by the marked devaluation of sterling, making investment much more attractive. In some locations the 3% might be material in dissuading purchase of holiday homes and in others it might lessen the attractiveness of the buy to let market. However, there is no objective evidence supplied as to the effects and so I have accorded this little weight. I am mindful, also, that the Appellants say that the target market for this development is local buyers and this is not challenged by the Council.

17. The closure of property funds and the reduction in the bank rate to the property sector are both negative factors that the Council has not sought to rebut. In the absence of any evidence to the contrary, I have afforded these arguments weight. That there has been an increase in build costs associated with the drop in the value of sterling is not a matter of dispute. It is merely the magnitude of the increase that the Council seeks to challenge. Again there is no information that allows me to reach a firm conclusion and so I give this some weight. Moving to the consequences of Brexit, it would be difficult to suggest that it has not had some negative effects on the housing market. However, there is no guarantee to say this is anything more than a short term reaction and certainly the information is not sufficiently robust to deduce any meaningful future trend analysis.

18. Turning to house prices, the evidence would suggest that there had been increases in house prices until the Brexit vote, after which the market has reflected on the outcome and the clear suggestion prices have stagnated or fallen. However, the increase before Brexit will have largely offset any decrease following the Referendum. Consequently, I would not consider it appropriate to decrease the Gross Development Value. As for the value of the affordable housing, I am more inclined to the Council's view. In the latest EVA a value has been included for the social rented element, but nothing for the shared equity element.

19. Incidentally, I found it difficult to understand why there was a substantial figure of £1.358m included in the building costs for exceptional development costs. As far as I can see, sums for remediating ground contamination and the standard amount for contingencies have been included in the priced Bill of Quantities submitted. Finally, the profit element for the B1 use is frequently entered at a figure lower than the 20% used here, and possibly 16% would be more appropriate.

20. To summarise, I do not consider that the situation has deteriorated significantly since the s.106 was signed in November 2015. I accept that there may be some ups and downs in property prices, build costs and financing. Even so, from the information provided, it is not possible to reach a firm conclusion on these factors. It may well be that property sales have dipped and that the pound will have a negative effect on build costs. Even so, I believe that it is too soon after the Brexit vote to produce any robust trend analysis for the variables. In any event, although 20% may be the minimum target profit level, the predicted 16% is not so far short and with the inconsistencies and unknowns I have found in the latest EVA, the level may well be higher.

21. I did invite the Council to justify its position on the three identified areas of disagreement, but its response was not to furnish evidence to support the disagreement, but to adopt the principle that the market was 'failing', implying that, irrespective of the differences, it could support the change in the affordable housing makeup. Even then, it did not conclude that this changed an unacceptable profit margin into an acceptable one. The words used were that "…*it accepts that it would make the development more profitable*..". This is despite loss to the affordable contribution consequent on the changing tenure and, in fact, nothing to support the original tenure split has been submitted. At the end, the Council concludes that even if the Council's preferred figures were adopted, the overall differences identified would not justify sustaining its original position.

22. At this stage, I find the arguments very finely balanced and so I have turned to the content of the Ministerial letter of November 2015 for guidance. It is as well to remember that this letter was written in an entirely different financial and economic climate from when the s.106BC appeals provisions had been introduced. The recession of 2008-2012 had ended and confidence returned to the housing market, especially in London. Crucially, the Minister made clear that he sees very little if any difference between the affordable housing tenures. His overriding principle concern was to deliver numbers.

23. Against this background, unless there is any local policy that clearly seeks one particular form of tenure over another then the numerical delivery should hold sway. In this case the Council did not advance any cogent argument to this

effect and so the Ministerial position attracts substantial weight. In addition, there is the national policy imperative to provide both market and affordable housing, and this adds significant weight to securing an early delivery.

24. Taken together, these factors are what tip the balance in favour of allowing the appeal. There is no doubt that the changes advocated would improve risk, and, as the Council says, make the scheme more profitable, thereby, making it more likely to proceed. Finally, I have taken into account all other matters raised in the evidence and representations, but none carries sufficient weight to alter the balance of my conclusions or decision to allow this appeal.

J S Nixon

Inspector

Schedule of modifications to the planning obligation

1. INTERPRETATION

1.1 For the purposes of this Deed the following words and expressions shall unless the context otherwise requires have the following meanings:-

"the 1990 Act"	means the Town and Country Planning Act 1990
"Affordable Housing"	means housing designed to meet the needs of the eligible households whose incomes are not sufficient to allow them to access decent and appropriate housing on the open market.
"Affordable Housing Grant"	means any financial assistance offered by the GLA towards the costs of providing the Affordable Housing Units
"Affordable Housing Units"	means the nine residential units to be provided by the Owner on the Land as Affordable Housing comprising: 5 x 1 bedroom (2 person), 1 x 2 bedroom (3 person), 2 x 2 bedroom (4 persons) and 1x 3 bedroom (5 person) flats for Shared Ownership and which are to be transferred to a Registered Provider for housing persons in Housing Need on the normal terms for such housing
"Affordable Rent"	definition deleted
"Affordable Rented Units"	definition deleted
"Housing Need"	means the requirement by a person to be granted a Shared Ownership Lease because a person's income is insufficient to enable them to rent or buy housing available locally on the open market determined with regard to local incomes and local house prices
"Shared Ownership Unit"	means one of the Affordable Housing Units which is to be provided on a Shared Ownership basis and "Shared Ownership Units" shall be construed accordingly

SCHEDULE 3

2.1.2 a freehold interest or a 125 year leasehold interest on a full repairing and insuring basis in each of the Affordable Housing Units has been granted to the Registered Provider free from all encumbrances (other than those on the title of the Land at the date of this Deed)

2.3 Subject to paragraph 2.1.2 of this Schedule the Owner shall ensure that the price to be paid by the Registered Provider (or the Council as the case may be) shall be at a level that allows the unit to be sold on an equity basis of not less than 25% of the market value of the said unit