The Planning Inspectorate

Appeal Decision

Hearing held on 10 January 2017

by JP Sargent BA(Hons) MA MRTPI

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

Decision date: 20 February 2017

Appeal Ref: APP/F2605/S/16/3151239
Former RAF Radar Site, Norwich Road, Watton IP25 6UZ

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 as amended against a failure to determine that a planning obligation should be modified.
- The appeal is made by Bennett Homes (also known as Bennett PLC) against Breckland District Council.
- The development to which the planning obligation relates is residential development.
- The planning obligation, dated 22 April 2008, was made between Breckland District Council, Norfolk County Council and Bennett PLC.
- The application Ref 3OB/2016/0003/OB is dated 11 February 2016.
- The application sought to have the planning obligation modified by reducing the number of affordable units from 30% to 22.7%, and by changing the mix from social rented and shared ownership dwellings to affordable rented and shared equity dwellings.

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Decision

1. The appeal is allowed. The planning obligation, dated 22 April 2008, made between Breckland District Council, Norfolk County Council and Bennett PLC shall have effect subject to the modifications in the Modifications Schedule below.

Procedural matters

2. The Appellant questioned whether the Planning Inspectorate still had the powers to modify legal obligations connected with appeals of this nature. It therefore prepared a Deed of Variation. However, in my opinion I still do have those powers and so I have not relied on that submitted Deed.

Main Issue

3. The main issue in this case is whether the requirement for the provision of affordable housing in the obligation of 22 April 2008 (the original obligation) would result in the overall development being unviable.

Reasons

Background

4. In 2008, and after the signing of the original obligation, outline planning permission (the original permission) was granted for a residential development on this site. Following the approval of the subsequent reserved matters 154 units can be built under the original permission. The original obligation said 30% (46) of the units should be affordable as either social rented or for shared ownership, though seemingly that position was unsupported at that time by any evidence to show the amount or mix to be viable. The development has

started and about 25-30 open-market dwellings have been built, some of which are sold and occupied.

5. Both parties are now of the view that the original obligation should be modified. The Council considers the scheme would be viable with 29.2% (45) of the dwellings as affordable, if 30 were for rent and 15 were for shared equity housing. However, the Appellant contends the affordable housing contribution can only be viable on the site if the number of required affordable units is reduced to 22.7% (35), of which 23 units would be for affordable rent and the remainder shared equity. It adds that persisting with the requirement in the original obligation could mean there was *'a danger'* that construction of the scheme may have to stop as the triggers for constructing the affordable units were approached.

6. On the evidence before me I have no reason to consider the introduction of the specified amounts of shared equity housing would not be acceptable on this site. Rather, the differences between the Council and the Appellant are the result of the Benchmark Land Value (BLV) and the sales/marketing costs, each of which will be examined in turn.

Benchmark Land Value

7. The main reason for the differing positions of the parties rests with the BLV. The Council estimates this should be in the region of £494,000 per hectare, while the Appellant considers it should be some £617,500 per hectare. Neither necessarily reflects the market value at the date of the original permission, as the parties were of the view the emphasis of the appeal process was very much on whether the current costs of building the entire site was at a level that would enable the developer to sell all the market units in today's market and make a competitive return to a willing land owner. Despite that though, the Appellant estimates that the BLV for today would be roughly similar to that in 2007/2008 when the original permission was granted.

8. The parties have arrived at these BLV figures based on information from sites they deem to be comparable to the one now before me. The 4 sites on which the Council mainly relies are listed in Appendix C to its statement, and the Appellant did not specifically say these were inappropriate examples. I am mindful too that most brought in a lower price per hectare than that proposed by the Council. However, they were for lower density developments, and I was told that at the RAF site south of Norwich Road in Watton (Ref 3PL/2014/1378/F), on which it relied most heavily, only 7 (8.75%) of its 80 dwellings were affordable. These factors clearly affect the weight I should attach to the suitability of the Council's comparable sites.

9. With regard to the Appellant's position, although the development is now underway its BLV figure has not been calculated in the light of any actual costs or returns so far incurred. Rather, it is taken from a report by Barker Storey Matthews (the BSM Report) that concerns *'open market land values for a hypothetical typical residential site in Watton'*. Despite this I see no reason why, in principle, the findings of the BSM Report should not be credibly applied to the land subject of the appeal, as it is relatively near to the town centre with no major constraints. The BLV in the BSM Report is based on some 21 sites, though many of these are appreciably smaller than that subject of the appeal and so, as comparables, they should be afforded limited weight. Of the remainder, some are in different housing markets or in locations that are more

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financially attractive than Watton and so again their weight in this decision-making process must be reduced. Therefore very few can be treated as closely comparable to the site before me. It is noted though that most brought in a higher price per hectare than the Appellant is now suggesting.

10. Both the Appellant and the Council have relied heavily on what appears to be actual purchase prices of their selected sites. Whilst I accept that is a definite figure that can be relatively easily sourced, it is nonetheless based on developer judgements about returns and has no regard to any discounts that might have been agreed between those involved in the sale. While the Appellant said that its figures made an allowance for discounts, that was not explicitly stated in the BSM Report and so that contention cannot be given significant weight.

11. Finally, the Appellant has referred to the land prices for Breckland found in both '*Land value estimates for policy appraisal*' by the Department for Communities and Local Government (DCLG) and the Council's local plan and affordable housing study. The first of these documents though gives its land prices for a specific purpose with many caveats while I understand that the Council has now moved on from the second document. They have therefore not had an appreciable bearing on my reasoning. The Appellant also said that the other costs in the obligation have worked out at some £477,000 greater than expected, but I see no reason why this should affect my findings.

12. DCLG advice entitled '*Section 106 affordable housing requirements*' places the emphasis on the developer in appeals such as this to demonstrate that the affordable housing obligation as currently agreed makes the scheme unviable in the current market conditions. It says that '*the developer will need to submit clear, up-to-date and appropriate evidence*', so that, if it goes to appeal, the Planning Inspectorate can make a robust and impartial decision on viability.

13. In my opinion when balanced against the Council's case I consider the Appellant has not submitted '*clear … and appropriate evidence*' to demonstrate that the scheme is unviable to the degree it contends. Therefore it has failed to satisfy the requirements in '*Section 106 affordable housing requirements*' and so I cannot find the provision of affordable housing needs to be reduced to the figure sought.

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Sales/marketing costs

14. The Appellant is of the view that, if I accepted the Council's BLV figure, then it could still only provide 43 affordable dwellings (28 for rent and 15 for shared equity) rather than the 45 suggested in the Council's case. The difference for this lay in the projected costs for sales/marketing. The Council contends these should be 1% of Gross Development Value (GDV) plus £600 per unit, and this was based on the costs agreed for the marketing of a Council scheme in Kings Lynn. In contrast the Appellant says the figure should be 2% of GDV plus £600. Although sales/marketing has been underway in connection with this site, the Appellant considers the nature and spread of the costs meant it was difficult to establish a precise amount that had been incurred.

15. The Council's figure is taken from a similar-sized scheme to that subject of this appeal, but it nonetheless concerns only one development and is a figure that was negotiated in circumstances unknown to me. To my mind, the 2% offered by the Appellant is a more realistic figure to attach to this matter. Indeed it

still falls below the 3-5% advised by the Royal Institute of Chartered Surveyors in *Financial Viability in Planning,* and I see no reason why a company of this size should be excluded from that advice. I therefore find that the higher figure for sales/marketing should be used and so there should be 43 affordable dwellings of the mix given by the Appellant.

Conclusions

16. Having regard to the mixes stated, and in the light of the above, I conclude there has not been clear and appropriate evidence to demonstrate that 22.7% (35) of the dwellings need be affordable to render the scheme viable. Rather, on the evidence before me I conclude the original obligation should be modified to require 27.9% (43) of the units to be affordable, and this would comprise 28 for rent and 15 for shared equity.

J P Sargent

INSPECTOR

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Modifications Schedule

1) In ***Clause 1.1*** delete the definitions of "Affordable Dwelling(s)", "Phase 1 Affordable Dwellings", "Phase 2 Affordable Dwellings", "Phase 3 Affordable Dwellings" and "Provider" and replace each with:

   "**Affordable Dwelling(s)**" means 27.9% of the Dwellings (43 Dwellings) to be constructed as part of the Development pursuant to the Planning Permission in accordance with the Affordable Housing Scheme to comprise the following to be provided as Affordable Rented Dwellings:

   a) 6 x 1-bed flats
   b) 8 x 2-bed flats
   c) 3 x 2-bed houses
   d) 9 x 3-bed houses
   e) 1 x 4-bed house
   f) 1 x 3-bed bungalow

   and to comprise the following to be provided as Shared Equity Dwellings

   g) 7 x 2-bed houses
   h) 8 x 3-bed houses

   "**Phase 1 Affordable Dwellings**" means 10 of the Affordable Dwellings

   "**Phase 2 Affordable Dwellings**" means 16 of the Affordable Dwellings

   "**Phase 3 Affordable Dwellings**" means 17 of the Affordable Dwellings

   "**Provider**" means either (i) a registered provider as defined in the *Housing and Regeneration Act 2008*; or (ii) another organisation that owns the Affordable Dwellings and has been approved in writing by the Council.

2) In ***Clause 1.1*** add the following definitions:

   "**Affordable Rented Dwellings**" means Dwellings to be let by a Provider with an appropriate agreement with the HCA for the provision of affordable rents being controls that limit the rent to no more than 80% of local market rents including any service charges or as otherwise agreed with the Council in writing.

   "**HCA**" means the Homes & Communities Agency or its successor body or other appropriate body as the Council may nominate.

   "**Shared Equity Dwellings**" means a Dwelling or Dwellings purchased on a shared equity basis whereby not more than 75% of the equity is sold to the purchaser with power to increase their percentage of ownership up to 100% after 5 years of acquisition of the initial share (but this time restriction shall not bind a mortgagee or charge exercising its staircasing rights) and upon payment to the Council or the Provide (as the case may be) in respect of the remaining equity. No rent or interest is to be paid on the equity which is not sold to the purchaser. Such payment to be based on the actual market value as at the date of acquisition of the additional equity such scheme to be secured by a mechanism and in a form agreed with and approved by the Council (or such other body as the Council may

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elect) such agreement and approval not to be unreasonably withheld or delayed.

3) In ***Clause 1.1*** delete the definition of "Social Rented Housing"

4) Delete ***Clause 5.1(a)*** and replace with:

To submit the Affordable Housing Scheme to the Council for approval and to obtain the Council's written approval to the Affordable Housing Scheme prior to the Commencement of Development PROVIDED THAT this clause does not prevent the Owner submitting and the Council approving a revised Affordable Housing Scheme for all or part of the Phase 2 Affordable Dwellings and/or Phase 3 Affordable Dwellings following Commencement of Development and should such a revised Affordable Housing Scheme(s) be approved by the Council following the Commencement of Development this shall be incorporated into the provisions of this obligation instead of any previous Affordable Housing Scheme(s) approved by the Council.

5) Delete ***Clause 5.1(k)***.

6) Delete ***Clauses 5.1(l)(vi) and (vii)*** and replace with:

vi) any receiver or manager (including any administrative receiver) appointed by such a mortgagee or chargee or any other person appointed by such a mortgagee or chargee for the purpose of realising its security or any housing administrator

vii) a person who has staircased a Shared Equity Dwelling to acquire the freehold or 100% of the leasehold interest or has redeemed a charge securing the Council's or the Provider's equity share (as the case may be) of the said Affordable Dwelling or a mortgagee or chargee of such an Affordable Dwelling;

viii) any persons deriving title from any such person as is mentioned in clauses 5.1(l)(i) to 5.1(l)(vii) above; or

ix) any Dwellings disposed of as Open Market Dwellings pursuant to clause 5.1(j).

7) Delete ***Clause 5.1(n)*** and replace with:

The Shared Equity Dwellings will be sold to households with a total income of less than £80,000 per year whose needs are not met by the local market to be occupied as their sole or principal home.

8) Delete ***Clause 5.1(o)***.

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APPEARANCES

FOR THE APPELLANT:

Mr M Aust	Affordable Housing Consultant
Mr A Bell	Development Director with Bennett Homes
Ms C Houston	Development Surveyor with Bennett Homes

FOR THE LOCAL PLANNING AUTHORITY:

Mr C Hobson	Principal Planner with Breckland District Council
Mr K Patterson	Housing Development Officer with Breckland District Council and the Borough Council of Kings Lynn & West Norfolk
Ms N Patton	Housing Strategy Officer with Breckland District Council and the Borough Council of Kings Lynn & West Norfolk

DOCUMENTS SUBMITTED AT OR AFTER THE HEARING

1. Bundle of emails between the Appellant and the local planning authority.
2. Undated Deed of Variation.
3. Email to the Planning Inspectorate from Ms Houston (dated 12 January 2017) together with agreed changes to the obligation.
4. Email to the Planning Inspectorate from Mr Aust (dated 17 January 2017) together with extracts from *'Financial Viability in Planning'* by the RICS and *'Site Specific Allocations and Policies DPD and Community Infrastructure Levy Viability Study'* by the Borough Council of Kings Lynn & West Norfolk.
5. Email to the Planning Inspectorate from Mr Hobson (dated 23 January 2017).

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