The Planning Inspectorate

Appeal Decision

Hearing held on 5 September 2017

Site visit made on 5 September 2017

by Phillip J G Ware BSc(Hons) DipTP MRTPI

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

Decision date: 14 November 2017

Appeal Ref: APP/N2739/S/17/3168721
Land north of The Laurels, York Road, Barlby, Selby YO8 5JH

- 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 Daniel Garth Homes against the decision of Selby District Council.
- The development to which the Planning Obligation relates is the erection of a residential development (illustrative layout shows 37 dwellings) and the laying out of associated roads and recreational open space.
- The Planning Obligation, dated 2 December 2015, was made between Selby District Council, North Yorkshire County Council, Daniel Garth Homes Limited and Michael Robert Outhwaite/Pauline Margaret Camfield/Carl Emile Wolf.
- The application Ref 2015/0586/OUT, dated 28 April 2016, was refused by notice dated 9 November 2016.
- The application sought to have the planning obligation modified by the reduction of the affordable housing element from 40% to 6%.

Procedural matter

1. At the Hearing the appellant submitted a number of new documents[1]. As agreed at the time I gave the Council the opportunity to respond to these documents in writing and lastly to the appellant to make any final comments[2]. I have taken all these matters into account.

Decision

2. The appeal is allowed. For a period of three years from the date of this decision the Planning Obligation, dated 2 December 2015, made between Selby District Council, North Yorkshire County Council, Daniel Garth Homes Limited and Michael Robert Outhwaite/Pauline Margaret Camfield/Carl Emile Wolf, shall have effect subject to the amendments set out in the Schedule to this decision.

Main issue

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

[1] Document 2
[2] Documents 3 and 4

Reasons

Background and policy context

4. The appeal site is around 1.2 hectares of agricultural land lying to the west of Barlby village. There is residential development on two sides of the site with school playing fields and open space on the other two sides.

5. Following some previous planning history[3], outline planning permission was granted by the Council in December 2015, alongside the Planning Obligation. The Obligation included a number of elements – particularly infrastructure contributions, open space provision and 40% affordable housing. The appellant explained that they (and the landowners) signed the Obligation because a failure to do so could have altered the favourable recommendation from officers.

6. An application to vary the affordable housing element was submitted to the Council in April 2016 accompanied by a Viability Assessment (none had been undertaken in relation to the original application) which concluded that the development could viably provide only 6% affordable housing[4]. The District Valuer Service (DVS), on behalf of the Council reviewed the position and concluded that 40% could be achieved. Following discussions between the parties and the submission of further information, the DVS revised its position and concluded that the development could provide 17% affordable housing. The application was refused on the basis of that reassessment and this decision has resulted in the current appeal.

7. The development plan comprises the Selby District Core Strategy (2013) and the saved policies of the Selby District Local Plan (2005). Policy SP9 of the Core Strategy seeks a maximum of 40% affordable housing. However the policy notes that the actual amount of affordable housing is a matter of negotiation having regard to abnormal costs, economic viability and other requirements.

8. The National Planning Policy Framework provides that matters such as requirements for affordable housing should provide competitive returns to a willing landowner and willing developer to enable the development to be deliverable. The approach in Planning Practice Guidance is that viability assessments should be based on current costs and values.

9. National guidance for applications under s106BA is set out in the DCLG document "Section 106 affordable housing requirements. Review and appeal." (2013) (The Guidance).

Has the development stalled?

10. S106BA/BC of the 1990 Act do not require that the development must have stalled in order for the provisions to come into effect. However, even leaving aside national guidance, it must add weight to a proposal if it is possible to demonstrate that a scheme is stalled and producing no economic benefit. The Act deals with situations where a development is not economically viable due to the affordable housing requirement, and provides that an application must be

[3] Statement of Common Ground 3.1 – 3.2
[4] All parties have based their assessments on a development of 35 dwellings, which I was told at the Hearing is the likely quantum of development

dealt with so that the development becomes economically viable. Self-evidently, the purpose of the relevant sections of the Act is to ensure that once planning permission has been granted, development is able to proceed to completion.

11. The approach in the Guidance is to review agreements which relate to 'stalled' schemes, where economically unviable affordable housing requirements result in no development, no regeneration and no community benefit.

12. In this case the appellant, a local housebuilder who has been promoting this development since the start, clearly set out in writing and at the Hearing that the viability issue resulting from the affordable housing requirement has led to an absence of progress. No other potential reason for the lack of progress has been put before me, and it is clear that the scheme has stalled and falls within the type of development considered by the Guidance.

Issues between the parties

13. Various matters related to the viability of the proposal have been agreed between the parties and are set out in the Statement of Common Ground[5]. In particular the cost of the various infrastructure contributions is agreed, the floorspace and sales value are agreed, as are build costs, abnormals, finance costs, and some professional and all marketing fees. I have no reason to take a different position on any of these matters.

14. This leaves four areas of dispute between the parties:

- Contingency
- Developer profit
- Legal fees
- Benchmark Land Value

15. At the Hearing the parties confirmed my understanding that the last two of these factors were not central to the results of the viability calculations, as they related to comparatively minor differences. I will deal with each of the four matters in turn.

Contingency

16. A contingency allowance is designed to cover items of expenditure which are not known exactly at the time of the viability calculation but are likely to occur. There is no guidance or policy before me as to what should be included in contingency allowances or at what rate. (The only guidance is that where a contingency allowance was included in an original appraisal, the introduction of new provisions at a later stage is discouraged. But as there was no original appraisal this is not relevant in this case.)

17. The Council has not applied contingencies to what it describes as fixed costs. However a significant number of these may vary in reality, as the appellant persuasively explained at the Hearing. Quotations, on which it is reasonable to base viability assessments, are prone to variation nearer to the time when the

[5] Section 5

work is actually carried out, and it is reasonable to take a flexible approach to applying contingencies to a range of costs.

18. As to the percentage to be applied, the DVS has applied 3% to construction costs and abnormals, whilst the appellant has applied 5% to the full range of potential contingencies. As was accepted by the Council at the Hearing, this is a matter of professional judgement. Both parties explained their position with examples but these do not add greatly to the matter. What is of greater note is that the DVS has used a 5% figure in another case.

19. The contingency percentage is generally at its greatest in the early stage of the project, sometimes rising to 15%, when there are the largest number of possible risks. As the project progresses this figure will reduce as fuller details of the project become available and some risks have been overtaken by time or otherwise overcome.

20. Although the proposal has been on the books for some time, and received planning permission almost two years ago, little further progress has been made while the affordable housing issue has been debated. For that reason I prefer the appellant's higher figure for contingencies.

Developer profit

21. The Appellant argues that 20% profit on Gross Development Value (GDV) is a reasonable and acceptable return for both affordable and open market housing. The appellant states that this has become an "industry standard" which has been widely accepted, and that this level is necessary to obtain finance from banks. The latter point was not contradicted by the Council. There are various 'rules of thumb' which are quoted when discussing developer profit and these tend to vary between 15% and 25%. That tends to support a mid range figure in the region of 20%.

22. The Council has used an (amended) profit level of 17.5% GDV on market housing and 7% on affordable housing, leading to a 'blended profit' of 17.05%. This two tier approach was stated to be favoured by the Homes and Communities Agency, although no evidence to substantiate this point was produced, and is intended to differentiate between risks on affordable and market homes.

23. The appellant's position is supported by the appeal decision at Flaxley Road (in the same authority) which was brought to my attention[6]. That decision was made in the light of evidence relating to the particular case and the Inspector was satisfied that a developer profit of 20% was reasonable. The Council confirmed that this is the only appeal decision under s106BC to have been issued in this area, and it is unfortunate that it was not reported to the Committee when considering the current proposal. Other decisions outside the area to which I have been referred resulted in different figures.

24. A telling point is that the Council has, in other instances, instructed the DVS to work on a 20% developer profit when considering different schemes in the area. No convincing reason was given as to this apparent discrepancy.

25. National Guidance states that profit levels vary significantly between projects to reflect the size and risk profile of the developer and the risks associated with

[6] APP/N2739/S/16/3149425

the project. On risky sites it is to be expected that profit expectations would be higher, and vice versa. There will inevitably be a different risk profile if one compares a major national housebuilder and, as in this case, a smaller local developer.

26. Taking these matters in the round and in the light of the differences of professional opinion, the balance of evidence is that a figure of 20%, as used by the Council in other instances and promoted by the potential developer in this case is the most likely to unlock this stalled development.

Legal fees

27. A more minor difference between the parties relates to the inclusion of legal fees in the calculation.

28. The Council had not allowed for these fees in their calculations, which was admitted to be an error. They are clearly part of the costs of the development, which should be included.

29. The appellant has evidenced these fees at £19,551 but the Council has not accepted that figure. Given the evidence put before me, I see no reason to doubt the appellant's figure, and this should be included in the appraisal.

Benchmark Land Value

30. A final difference between the parties is the Benchmark Land Value. The Council's figure is £175,000 per acre, whilst the appellant's figure is £180,000 per acre. This difference leads to the Council's total figure of £515,000 and the appellant's of £535,000.

31. It appears that there was some attempt at reaching a compromise figure, but that these discussions ceased, for reasons which are not entirely clear (both parties have a slightly different version of events). In any event, I do not have sufficient evidence to reach a conclusive position on this matter – which is, in any event, a minor feature in the overall assessment.

Conclusion

32. As set out above, I consider that the appellant has raised persuasive concerns with particular regard to contingencies and developer profit. As a result, I consider that the development with the proportion of affordable housing in the original Obligation would deliver a negative land value and be unviable. There is nothing from any party to suggest that the affordable percentage (40%) was ever viable and deliverable.

33. I therefore have to consider how the requirement could be modified so that the development would become viable, by way of reducing the amount of affordable housing from 40%. I have only the appellant's and the Council's figures before me and do not have evidence to support any other figure.

34. The appellant's appraisal demonstrates that a figure of 6% affordable housing, allowing for the remainder of the requirements of the Obligation, would deliver 35 dwellings and a land value of c.£536,000. For the reasons given above, I conclude that this is the maximum affordable housing provision which could be viably provided at the site, and I shall modify the Obligation to reflect that figure.

35. There is also a suggestion that the split between intermediate and rented units should be changed and only intermediate housing (shared ownership) should be provided on the site. However this suggestion from the appellant was based on the revised appraisals by the DVS and was not part of the application. I have therefore not amended the Obligation in this respect.

36. The extent of the modification, as set out in the attached Schedule, is as sought in the s106BA application and will endure for a period of three years, in line with s106BC.

P. J. G. Ware

Inspector

Schedule of modifications to the Obligation dated 2 December 2015

Page number	Paragraph number	Paragraph title	Amend/remove
4		Affordable Housing Units	Amend to 6%
19	3.1.1		Amend to 6%
20	3.1.8		Amend to 6%

APPEARANCES

FOR THE APPELLANT:	
Ms Bagley BSc(Hons) MRICS	Registered Valuer
Ms Madge	MM Planning
Mr D Garth	Managing Director, Daniel Garth Homes
Mr I Reynolds BSc (Est Man) FRICS	Managing partner, Stephensons. (Agent for the landowner)

FOR THE LOCAL PLANNING AUTHORITY:	
Ms C Reed MRICS	District Valuer Service
Mr C Rowley MA(Hons) MA	Senior planning officer
Ms L Milnes MSc	Principal planning officer

DOCUMENTS

1	List of persons present at the Hearing
2	Bundle of Council documents handed in at the Hearing
3	Council's response to Document 2
4	Appellant's response to Document 3
5	Peter Brett Associates CIL report (2013) (extract)