The Planning Inspectorate

Appeal Decision

Inquiry held on 15 and 16 April 2014

by P W Clark MA MRTPI MCMI

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

Decision date: 29 April 2014

Appeal Ref: APP/J2373/Q/13/2207649
Land at Moss House Road, Marton Moss, Blackpool FY4 5JF

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a failure to determine whether a planning obligation should be modified.
- The appeal is made by Kensington Developments Limited against Blackpool Borough Council.
- The development to which the planning obligation relates is the erection of residential development comprising up to 584 dwellings (2 and 3 storey apartments and houses), with associated parking, village green including water features and shop and formation of vehicular access to Progress Way.
- The planning obligation, dated 19 July 2010 and varied by Deed of Variation dated 21 December 2012, was made between Blackpool Borough Council and Kensington Developments Limited and Malcolm Albert Hawe, Denley Barrow and David Tingle and Kensington Developments (2002) Limited.
- The application Ref 09/0740 is dated 12 July 2013.
- The application sought to have the planning obligation modified by the removal of the First and Second Affordable Housing Contributions.

Decision

1. The appeal is allowed in varied form. For a period of three years from the date of this decision, the planning obligation, dated 19 July 2010 and varied by Deed of Variation dated 21 December 2012, made between Blackpool Borough Council and Kensington Developments Limited and Malcolm Albert Hawe, Denley Barrow and David Tingle and Kensington Developments (2002) Limited, shall have effect subject to the modifications as set out in the Schedule appended to this decision.

Procedural matters

2. An earlier hearing sought to determine this appeal but had to be terminated before it could conclude. The appeal was therefore heard afresh at this event. This event began as a Public Inquiry and the case for the Council was heard in that format before the Inquiry was adjourned at the end of the first day.

3. When the Inquiry resumed both parties jointly announced that they had reached agreement. Because there was no longer a contest between them, and with their agreement, the remainder of the event was conducted in the format of a Hearing in which they jointly presented their agreed way forward and were questioned on it by the Inspector.

Main Issue

4. The issue is defined by reference to s106BA of the Act. It is 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

Background

5. The planning obligation had already been modified under s106A of the Act in December 2012 but the current appeal represents the first application made under s106BA.

6. As varied by the 2012 deed of variation, the affordable housing elements of the planning obligation required the payment of money towards the provision of affordable housing off-site. This accords with Blackpool Council's Local Plan policy HN8 to provide affordable housing directly linked to Blackpool's housing priority neighbourhoods in the inner area of Blackpool, in contrast to its outer edge where the site is located.

7. There was to be a First Affordable Housing Contribution of £1,500,000 payable on commencement of development and a Second Affordable Housing Contribution payable in instalments. The first instalment of £1,000,000 was to be made prior to the occupation of the 200th residential unit. The second instalment of £500,000 was to be made prior to the occupation of the 300th unit. The third instalment of £800,000 was to be made prior to the occupation of the 350th unit. The fourth instalment of £264,000 was to be made prior to the occupation of the 400th unit. The fifth instalment of £620,000 was to be made prior to the occupation of the 450th unit. The final instalment of £2,500,000 was to be paid prior to the occupation of the 500th unit. It can be seen therefore that the payments would be relatively back-loaded onto the later phases of development.

Changed circumstances

8. From the developer's viewpoint, the original viability appraisal showed that the development was already marginally viable, expected to produce a developer's profit of 6.69% on costs. This was because high land costs were incurred and were expected to be incurred in the acquisition of existing dwellings and businesses. Nevertheless, the developer was prepared to go ahead on that basis.

9. The original viability appraisal was based on an outline planning permission with an upper limit to the number of dwellings allowed. The appraisal therefore made presumptions about the size of dwellings and the dwelling mix. In January 2014, approval was given to details submitted in pursuit of that outline permission. These details were for a number of dwellings slightly less than the maximum permitted, a mix of dwellings different from that presumed in the original appraisal and a considerably reduced floorspace.

10. Although not quantified, the Council accepts that these changes, to which it agreed, would have reduced the viability of the development. Regardless of market factors, a revised viability appraisal is justified for this reason.

11. The government's recently issued Planning Practice Guidance advises that estimated land or site value should be informed by comparable, market based evidence wherever possible. Where transacted bids are significantly above the market norm, they should not be used. The government's earlier advice (April 2013) on the Review and appeal of Section 106 affordable housing requirements also advises that any purchase price used in the valuation should be benchmarked against both market values and sales prices of comparable sites in the locality and that any significant overbid should be disregarded. This was the approach taken by the Council.

12. The government's 2013 document also advises that the agreed land value in the original appraisal should be used and that a revised appraisal should be prepared in the same form using a methodology as close as reasonably possible to that provided in the original valuation. In this case, the high land values were used in the original appraisal and the arrangements for reviewing the appraisal which are written in to the s106 agreement specifically refer to land prices actually incurred. This was the approach taken by the appellant.

13. However, even using the Council's benchmarked figures for sales prices, land prices and construction costs (including abnormals), the value of the scheme as now approved in detail would not cover the full costs of the s106 agreement and give the developer a reasonable profit (agreed between the parties at 16.8% on Gross Development Value). The Council accepts that the cost of the affordable housing contribution would have to fall from £9,184,000 to £5,070,000 to render the scheme viable. I agree.

14. Following testing of the Council's evidence during cross-examination, it appears to me that the Council's revised appraisal submitted on the last day of the Inquiry is based on up to date and benchmarked figures for sales revenues, land acquisition costs, construction costs, and marketing and letting costs and fees. It would make an appropriate allowance for a Developer's return and for a finance rate for the expected roll-out period for the development. It is therefore a convincing test of current viability.

15. I therefore conclude that the affordable housing requirement of the existing planning obligation means that the development is not economically viable. I now turn to consider how the appeal should be dealt with so that the development becomes economically viable.

The effect of the application

16. The application was to remove entirely both the First Affordable Housing Contribution and the Second Affordable Housing Contribution from the planning obligation. During the course of the appeal, both parties have come to accept an appraisal which demonstrates that their entire removal is more than is necessary to make the development viable and that a revised obligation reducing the total affordable housing payment to £5,070,000 would be adequate to make the development viable. As noted above, I find that appraisal convincing.

17. Both parties jointly propose to reduce the First Affordable Housing Contribution to £1,070,000 and to reschedule it so as to be due prior to the occupation of the 125th residential unit. The Second Affordable Housing Contribution would be reduced to £4,000,000, payable in four equal instalments prior to the occupation of the 225th, 325th, 425th and 525th residential units respectively.

18. However, in contrast to any modification to the obligation which might be made by the Council on an application under s106BA, a modification made as the result of a successful appeal is limited to a period of three years, following which the obligation reverts to the terms which applied before the appeal was made.

19. Estimates of build-out rates for the development vary from 2 to 9 per month. Because of the backloading of the affordable housing payments onto the later phases of the development, this anticipated build-out rate means that only the changes to the First Affordable Housing Contribution could be guaranteed to have effect.

20. The limited time period of any modified obligation consequent on a successful appeal would incentivise the developer to seek to achieve a fast build-out rate. Even so, there could be no guarantee that liability for the first instalment due under the existing obligation at the 200th dwelling would be excluded, even if the appeal were successful.

21. It follows that, even if this appeal were to be allowed, other than postponing the First Affordable Housing Contribution from commencement to the 125th unit and reducing its value, the reduced Second Affordable Housing Contribution agreed between the parties based on the revised appraisal would, in practice, have little or no effect on the overall viability of the scheme as a whole. Yet both parties now agree that the scheme would be unviable as a whole were it to revert to the current obligation at the end of three years.

22. The purpose of the s106BA application and s106BC appeal process, as described in the government's April 2013 advice document, is to incentivise developers to start building. The size and build-out rate of the appeal scheme and the three-year limitation on any allowed appeal would conspire with the backloaded payments of the original obligation to put this at risk.

23. In response to this concern, the developer submitted a further appraisal of a first phase of the development, comprising 200 dwellings, or the quantity which might be expected to be built before the end of three years. Using pro rata the same updated variables of acquisition costs, construction costs and sale prices as the revised appraisal of the whole scheme, this appraisal of a phase which could be built out within the three-year period of a revised obligation shows a profit to the developer of 4.67% on cost.

24. This would be a little below the 6.69% of the original (2010) appraisal but would still be enough to repay the developer his existing sunk expenditure on land and avoid loss. In these circumstances, the developer would be able to obtain Bank funding to supplement his own resources to commence the development almost immediately and to carry out three years' worth of development. At the end of three years, or before, it would be open to the developer to apply to the Council to modify the agreement if necessary at that time to cover the remaining development period.

25. Because this appraisal of a first phase of development is based upon the same up to date and benchmarked figures for sales revenues, land acquisition costs, construction costs, marketing and letting fees and financing costs as the Council's appraisal of the whole scheme, which I have found convincing, I also find that this appraisal represents a convincing test of the current viability of a first phase of development. It makes provision for the First Affordable Housing

Contribution as renegotiated by the parties and leaves the developer with a profit margin which, although low, would be not far short of that of the original appraisal on which he was prepared to proceed. For this reason, I find it appropriate not to accept the application to remove the First Affordable Housing Contribution entirely but to modify it in the way put forward by the parties.

26. Although it is unlikely that the suggested modifications to the Second Affordable Housing contribution would ever take effect during the three-year lifetime of this appeal decision, there is the possibility that it might do so. I am satisfied that, if it were to come into effect, it would render the later phases of the scheme economically viable as well. For this reason, I do not accept the application to remove the Second Affordable Housing Contribution entirely but I modify it in the way now suggested by the parties.

27. I therefore conclude that the revised proposals put forward by the parties jointly represent the way the appeal should be dealt with so that the development becomes economically viable for its first phase of development.

P. W. Clark

Inspector

Schedule of Modifications to the planning obligation, dated 19 July 2010 and varied by Deed of Variation dated 21 December 2012

Definitions

1. Deletion of the definition of "First Affordable Housing Contribution" and its replacement as follows;

   "the sum of £1,070,000"

2. Deletion of the definition of "Second Affordable Housing Contribution" and its replacement as follows;

   "the sum of £4,000,000"

Schedule 1

3. Deletion of paragraph 5.1 and its replacement as follows;

   "5.1 Prior to the occupation of the 125th Residential Unit to pay to the Council the First Affordable Housing Contribution"

Schedule 3

4. Deletion of Schedule 3 (as substituted by the Deed of Variation) and its replacement as follows;

   "Schedule 3

   Second Affordable Housing Contribution – Schedule of Payment

1. Prior to occupation of the 225th Residential Unit	£1,000,000
2. Prior to occupation of the 325th Residential Unit	£1,000,000
3. Prior to occupation of the 425th Residential Unit	£1,000,000
4. Prior to occupation of the 525th Residential Unit	£1,000,000"

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Ian Ponter, of Counsel	Instructed by Christine Baines (Head of Legal Services, Blackpool Borough Council)
He called	
Bill Swan BSc(Hons) LLM DipProjMan MRICS	Director, Gleeds Advisory Ltd
Ben Glover BSc(Hons) MRICS	Managing Director, Glover Property Consultants
Mark Phillips BSc(Hons) MRICS MRTPI(Assoc)	Principal Planning and Regeneration Consultant, URS Infrastructure and Environment UK Ltd

FOR THE APPELLANT:

Roger Lancaster, of Counsel	Instructed by Anthony McAteer of McAteer Associates Ltd
He called	
A G Massie BSc(Hons) MRICS IRRV MCIArb	Partner, Keppie Massie, Chartered Surveyors and Property Consultants

DOCUMENTS submitted during the Inquiry

1 Rebuttal proof of evidence of Roger Prescott
2 Rebuttal proof of evidence of A G Massie
3 Rebuttal proof of evidence of Anthony McAteer
4 Pages 2 and 3 of original s106 agreement
5 E-mail from Ben Glover to Bill Swan, Ian Ponter and Gary Johnston dated 15 April 2014 @ 22:20
6 E-mail from Jenny Adie to John Barrett dated 26 October 2009 @ 16:55
7 Appellant's draft of agreed variations to s106 agreement
8 Council's corrected draft of agreed variations to s106 agreement
9 Note by Mr Massie headed Moss House Road – Justification for start on site
10 Summary appraisal for phase 1, Moss House Road, Blackpool by Keppie Massie