The Planning Inspectorate

Appeal Decision

Hearing held on 29 April 2014

by P W Clark MA MRTPI MCMI

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

Decision date: 14 May 2014

Appeal Ref: APP/W4223/Q/14/2213720
Tamewater Court, Dobcross, Oldham, Lancashire OL3 5GD

- The appeal is made under Section 106BC 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 Tamewater Developments Limited against Oldham Metropolitan Borough Council.
- The development to which the planning obligation relates is the conversion of Tamewater Mill into 19№ flats, the erection of 25№ dwelling houses and the creation of an area of public open space.
- The planning obligation, dated 17 December 2008, was made between Oldham Borough Council and Tamewater Developments Limited and Co-operative Bank PLC.
- The application Ref PA/051241/06 is dated 19 August 2013.
- The application sought to have the affordable housing requirements of the planning obligation modified to discharge the outstanding three payments totalling £283,525 (payments 2, 3 and 4)

Decision

1. The appeal is allowed. For a period of three years from the date of this decision, the planning obligation, dated 17 December 2008, made between Oldham Borough Council and Tamewater Developments Limited and Co-operative Bank PLC shall have effect subject to the modifications as set out in the Schedule appended to this decision.

Procedural matter

2. Subsection (7) of s106BC of the Act provides that references to the affordable housing requirement or the planning obligation are to the requirement or obligation as it stood immediately before the application under s106AB to which the appeal relates. A previous application, made on 30 May 2012, was refused by notice dated 4 April 2013. This appeal relates to an application reportedly made on 19 August 2013 but there is uncertainty because the Council cannot confirm its receipt. The Council confirms that it received a copy of the application dated 23 September 2013. Both parties agree that, for the purposes of this appeal, the latter should be taken as the relevant date and so the operative date is immediately before that, ie 22 September 2013.

3. The significance is that the requirements of the s106 agreement are that a commuted sum of £383,525 in lieu of the provision of affordable housing on site is to be paid in four instalments. These are triggered by completions, which are defined in the agreement as the actual completion date on which the Developer receives payment from a purchaser of a dwelling. The contributions

and triggers are; £100,000 on Legal Completion of the 5th unit, the same sum on completion of the 15th unit, the same sum on completion of the 25th unit and the final sum of £83,525 on completion of the 30th unit.

4. There is no equivalent provision to subsection (7) of s106BC in s106AB of the Act. The Council was under the impression that, at the time it was due to take its decision, more than 15 units had been completed and that, for that reason, only the two final instalments of the affordable housing payment were within the remit of the application.

5. At the hearing, the appellant produced a schedule of completions, not contradicted by the Council, which showed that, at the operative date for the purposes of this appeal, only 13 dwellings had reached legal completion. It follows that it is the three final instalments of the affordable housing contribution which fall within the remit of this appeal.

Main Issues

6. The issues are defined by reference to s106BA of the Act. They are 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

7. Government advice (Section 106 affordable housing requirements; Review and appeal April 2013 (the DCLG advice)) is that the starting point for reassessing viability will be a review of the original viability appraisal (if any) at the time planning permission was granted. In this case, no original viability appraisal was prepared prior to planning permission being granted. In such cases the DCLG advice is that the developer must clearly demonstrate through evidence why the existing scheme is not viable.

8. The test for viability is that the evidence indicates that the current cost of building out the entire site at today's prices is at a level that would enable the developer to sell all the market units on the site in today's market at a rate of build out evidenced by the developer and make a competitive return to a willing developer and a willing landowner. In the present case, the developer submits a residential viability appraisal said to be based on current costs and today's prices. Even excluding any further affordable housing contributions it results in a residual land value considerably less than that paid for the land.

9. However, the purchase price was agreed in 2005, planning permission was granted in June 2006 and no appraisal agreed at the time is available. DCLG advice is that if there was no original appraisal the market value at the date of the original permission should be used and that any purchase price used should be benchmarked against both market values and sale prices of comparable sites in the locality, with significant overbids disregarded.

10. Both parties agree that benchmarking is difficult because of a lack of comparables for a site which is not entirely greenfield. No specific evidence was submitted at the hearing. The council referred to sites exchanged to provide for a school development which gave a figure nearly 20% less than the appellant's residual but the relevant example was valued by the district valuer on the basis of an existing industrial use plus the hope value of getting a housing permission which would be less than that for a site with planning

permission such as the current case and was in a less favoured part of the Saddleworth area than Dobcross.

11. Eventually, the parties agreed that a figure of £50,000 per plot was a reasonable figure on which to base land values. This would give a figure for the land value of the site considerably in excess of the residual value resulting from the appellant's viability appraisal. It follows that, if the input components to the viability appraisal are accurate, then the development is presently unviable and unable to support any further contribution to affordable housing.

12. The appellant's figures for revenue in his viability appraisal are based partly on sales achieved and partly on projections which are lower than had been previously achieved. The Council took the view that these could be increased and referred, in general terms, to prices which could be achieved in Saddleworth. But, Dobcross, where this development is sited, lacks most services and so is not the most favoured part of Saddleworth. The developer pointed to the very slow sales rate to demonstrate that prices were not too low. The appraisal does not separately account for discounts which are negotiated on an individual basis. Having regard to the arguments put forward I have no sufficient reason or basis for amending the developer's figures for sales revenue.

13. The Council does not dispute the appellant's figures for build costs, professional fees, legal fees, interest, developer's profit nor, after allowing for the fact that the site is partly a brownfield development, contingencies. Direct sales fees seemed high but the appellant explained that this line included marketing, which was not accounted separately. I am satisfied that all these elements and the sales revenue element of the appellant's appraisal are reasonable. It therefore follows that the development is currently economically unviable.

14. However, it is not completely stalled. Build-out of the development has continued. As the DCLG guidance points out, the purpose of reviewing economically unviable affordable housing requirements is to result in more housing and more affordable housing than would otherwise be the case.

15. The developer explains that loan funding from the Homes and Communities Agency under the Get Britain Building scheme has allowed work to progress to complete the shells of the dwellings but no money is available to finish them. Be that as it may, the question whether a development is stalled or not is not a criterion for consideration within the terms of the Act. A developer may have reasons for continuing with an unviable scheme, for example to recoup as much sunk investment as possible so as to reduce a loss. The Act simply refers to the question of whether the scheme is economically viable or not.

16. As noted above, the developer's viability assessment is predicated on his appeal succeeding; i.e. it makes no provision for any of the remaining affordable housing contributions. Even on that basis, the residual land value which results is far less than current value based on the parties' agreed formula, let alone the historic purchase price. It follows that even the removal of all the outstanding affordable housing contributions would not return the scheme to full economic viability. It would however allow the developer to cover his losses and allow the scheme to be fitted out and completed. I note that the development has continued to proceed up to a point but whatever the developer's motivations for doing so when the scheme is clearly unviable, there can clearly be no confidence or expectation that that would continue to be the

case. In any event, a development viability assessment to satisfy the requirements of the Act is based upon the project and not the wider means or motivation of a particular developer.

17. For these reasons and on the basis of the evidence that I have, I conclude that this scheme is not economically viable and that the removal of the remaining contributions to affordable housing provision is necessary to move it towards viability.

P. W. Clark

Inspector

Schedule of Modifications to the planning obligation, dated 17 December 2008

2. DEFINITIONS AND INTERPRETATION

2.1 "Commuted Sum" Delete "Three hundred and eighty three thousand Five hundred and twenty five pounds (£383,525)" and insert "One hundred thousand pounds (£100,000)."

THE THIRD SCHEDULE

The Developer's Covenants

2.2 Delete; "A further £100,000 on Legal Completion of the 15th unit"

2.3 Delete; "A further £100,000 on Legal Completion of the 25th unit"

2.4 Delete; "The final £83,525 on Legal Completion of the 30th unit"

APPEARANCES

FOR THE APPELLANT:

Michael Coulter	Director, Grasscroft Development Solutions
John Kerrison	Tamewater Developments
Robert Schofield	Hiltonlegal

FOR THE LOCAL PLANNING AUTHORITY:

Martyn Leigh	Senior Planning Officer
Mark Prestwich	Development Officer

DOCUMENTS submitted at Hearing

1 Residential Viability Appraisal prepared by Grasscroft Property Solutions August 2013
2 Tamewater Court Sales Analysis/Appeals Timeline
3 Extract from Land Charges register
4 Proof of evidence for Mark Prestwich (further copy)