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## Appeal Decision

Hearing held on 19 June 2014

Unaccompanied site visit undertaken on 18 June 2014

**by Christina Downes BSc DipTP MRTPI**

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

**Decision date: 3 September 2014**

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**Appeal Ref: APP/P1615/Q/14/2215840**

**Land between Lydney Bypass and Highfield Road (known as Lydney A and Lydney B), Lydney, Gloucestershire**

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 (as amended) against a failure to determine whether two Planning Obligations should be modified.
  - The appeal is made by Robert Hitchins Ltd.
  - The developments to which the Planning Obligations relate are:
    - residential development, neighbourhood centre, employment land and school site including infrastructure, ancillary facilities, open space and landscaping (Lydney A);
    - residential development of up to 750 dwellings, reserved site for a school including infrastructure, ancillary facilities, open space, landscaping and construction of a new vehicular access (Lydney B).
  - The Planning Obligations are:
    - Planning Obligation by Unilateral Undertaking dated 10 June 2008 made by Robert Hitchins Ltd (Lydney A);
    - Planning Obligation by Unilateral Undertaking dated 11 May 2010 made by Robert Hitchins Ltd, John Biddle and Emma Louise Kemsley, Nicholas Alan Holt-Martyn, David Henry Martyn and Richard Kenneth Martyn and Mark Singleton Evans, Robert Henry Dickinson, Arthur Nicholas Singleton Cayley Evans and Benjamin Cadoc Herbert (Lydney B).
  - The application Ref P1809/13/PLANOB is dated 6 December 2013.
  - The application sought to have the above Planning Obligations modified by the removal of the requirements relating to affordable housing provision.
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### Decision

1. The appeal is allowed. For a period of three years from the date of this decision the Planning Obligations dated 10 June 2008 and 11 May 2010, made between the above mentioned parties, shall be subject to the modifications as set out in the Schedule at the end of this decision. The modifications as set out in the Schedule shall however cease to apply in relation to any part of the development that has not been commenced before the end of that period.

### Procedural Matters

2. The 2008 and 2010 planning permissions were both in outline form. In 2013 a further outline permission was granted by the Council which effectively renewed the 2008 permission. This included a Supplemental Agreement under Section 106A of the Act. This made sure that the provision of the planning obligations relating to the 2008 permission continued to apply. In terms of affordable housing it did not contain any additional or changed clauses and so for the purposes of this appeal there is nothing that would need to be modified.

3. The Council has indicated that it would have refused to modify the Planning Obligations had it been in a position to do so. The reason is that it did not consider sufficient justification had been given to remove the affordable housing requirements where there are recognised shortfalls, which would place an unacceptable burden on existing local services and infrastructure resulting in an unsustainable development.
4. In light of the discussion at the Hearing I requested that further viability assessments be undertaken by the parties. The Hearing was therefore adjourned on 19 June and closed in writing on 3 July 2014 following receipt of this information. Consequently I asked for further clarification, primarily relating to the application of sales rates by the Appellant. I have taken account of the additional viability assessments and responses in my decision.
5. There was no dispute that for present purposes the development of Lydney A and Lydney B should be considered together, notwithstanding that they benefit from separate planning permissions. This is because the sites will share much of the same infrastructure and much of this will be borne by the smaller of the two developments, Lydney A.

### **Main Issue**

6. Whether the affordable housing requirements in the Planning Obligations would result in the developments being economically unviable and, if so, how they can be modified so that the developments become economically viable.

### **Reasons**

#### **Background**

7. The requirement for Lydney A was that 20% of the total number of residential units should be affordable with a 50% tenure split between shared ownership and social rent. The requirement for Lydney B was that 30% of the housing should be affordable with a tenure split of 35% intermediate and 65% social rent. At the Hearing the Council made clear that there was little demand for intermediate/ shared ownership dwellings in the District and that it would not wish to increase the proportion of such units, even if this improved viability.
8. The main parties initially agreed that the developments would not be economically viable with the level of affordable housing required in the Planning Obligations. However subsequently the County Council, as Education Authority, has indicated that following a review of pupil numbers there would be no requirement for a secondary education contribution in respect of Lydney B if the 2010 planning permission were to be renewed. It is noted that such a contribution was not required in connection with the renewal of the Lydney A planning permission in 2013. In present circumstances the Appellant would have to apply to the Council for a modification of the relevant Planning Obligation. However the Council confirmed at the Hearing that it would be unlikely to object. This would mean that this cost, which amounts to £2.47m with indexation, could be removed from the viability assessment. It does not seem unreasonable to take this into account.

#### **The Viability Assessments**

9. The Planning Practice Guidance confirms that viability assessments in decision-taking should be based on current costs and values. I understand that there

were detailed discussions about viability in relation to both sites at the 2007 and 2010 Inquiries, which resulted in affordable housing requirements that were lower than the policy level and with a tenure mix as referred to in Paragraph 7 above. I was not provided with the original viability appraisals but as these would have been undertaken some years ago it seems reasonable to consider the matter afresh.

10. The Appellant has used the HCA Development Appraisal Tool (DAT) whereas the District Valuer, on behalf of the Council, has used a bespoke excel based toolkit. It was agreed however that the methodologies are very similar and both supply a residual valuation based on cash flow. By the end of the Hearing many of the variables had been agreed. This included a benchmark land value of £7.125m and the blended value of the affordable housing, based on social rent as required by the Planning Obligations, of 55%. Furthermore taking construction costs, fees, contingencies and abnormals together the difference between the two assessments was relatively small being in the region of £11,000 per unit<sup>1</sup>. This is unlikely to make a material difference to the outcome.
11. The main matters that remain in dispute are the number of units on which the assessment should be based, the sales value for the market housing, the sales rate for the market housing and the profit level. These matters are now considered in turn.

#### *Number of units*

12. The Lydney A planning permissions contain a condition limiting the number of dwellings to 320 along with up to 12 more as part of the neighbourhood centre. The Lydney B permission includes a condition for up to 750 dwellings.
13. The outline permissions would result in a maximum overall density of about 44.5 dwellings per hectare. The Appellant considered that this reflected government policy at the time when higher densities were encouraged. However it was contended that in today's market, and in this location, developers want to build traditional lower density schemes with little call for three storey development and flats. Information was produced to show that sites in the vicinity had been granted permission for a range of lower densities and that three developers interested in the appeal sites were proposing an average of 37 dwellings per hectare. Taking this into account the Appellant considered that it would be more realistic in terms of delivery to reduce the number of dwellings to 950, which would result in a density of around 39 dwellings per hectare.
14. The National Planning Policy Framework does not include any indicative national density guidelines but it does require land to be used efficiently. In this case the schemes are in outline with no detailed layout to show how they are to be built out. Whilst the Appellant indicated net: gross ratios of 61% and 67% for Lydney A and B respectively, the exact amount taken by open space, infrastructure and the like cannot be known until the details have been submitted and approved. Furthermore the Council's evidence from the experience of its Planning Officer was that developers often sought to increase

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<sup>1</sup> The Appellant assessed these combined costs as £100,000 per unit whereas the Council's figure was £111,000 per unit.

the numbers of units, especially on a second or subsequent phase of larger developments.

15. There is no objection in principle to seeking to modify affordable housing requirements in relation to an outline scheme. However in this case the site is a relatively large one and, from the available information, the Appellant intends to provide the infrastructure and services and then offer the land for sale. Whilst it is anticipated that two house builders would be involved this cannot be known at this stage. A detailed layout still has to be submitted and agreed and, in its absence, it seems to me impossible to know with any certainty the optimal density or, more importantly, the number of dwellings that would ensue. The recently permitted sites referred to by the Appellant are generally much smaller, the housing mix is not known and it is difficult to judge whether the locations are comparable. Furthermore the number of affordable homes will itself be relevant because these are generally smaller than the market housing. The three house builders have indicated in their correspondence a density of between 34.5 and 39.5 per net developable acre, which in itself indicates a considerable range. However these provide no commitment and, in any event, it may not be these developers who finally construct the scheme.
16. The Appellant has suggested that the Planning Obligations could be varied by imposing a restriction on the number of units to 950 because the Appellant contends that the development would not go ahead on the basis of 1,082 units. However Section 106BC only relates to the affordable housing requirement. It does not allow for other clauses to be added or removed from the legal undertakings. Furthermore this would conflict with the planning permissions themselves on which there are conditions that specifically allow for development of up to 1,082 dwellings.
17. Taking all of the above into account I am not satisfied that there is sufficient certainty to deviate from the amount of housing that could be built out under the two outline planning permissions. For the purposes of the viability assessments at this stage it is necessary, and appropriate, to assume that 1,082 dwellings would be constructed.

#### *Sales value of market housing*

18. As the parties do not agree on the number of dwellings, they have considered the value in terms of £ per square foot (£/ft<sup>2</sup>). Both have relied on comparable information from other sources and have agreed to use an average unit size of 1,050 ft<sup>2</sup>. However it is not possible to know how realistic either figure would be in the absence of any information regarding dwelling mix. Generally speaking the smaller dwellings are proportionately more expensive to build than the larger ones and so the housing mix will be highly relevant.
19. The 2013 Market Report submitted in support of the application indicated an average value of 161 £/ft<sup>2</sup>, although following receipt of further information relating to local values the Appellant settled on a figure of 170 £/ft<sup>2</sup>. The District Valuer has adopted a value of 178 £/ft<sup>2</sup> on the basis of its own comparable evidence. The difference between these two sets of values will have considerable impact on the overall scheme value especially as the value of the affordable housing would be linked to that of the market homes.
20. Although the Appellant criticised the Council for referring to 2010 and 2011 sales values the figures do not suggest that these were materially higher than

those in more recent years. However the District Valuer's evidence relies on a high proportion of smaller units. There is force in the Appellant's argument that smaller units command higher prices in terms of £/ft<sup>2</sup> in comparison with larger units and that the comparable information provided by the District Valuer has inflated the value that has been applied to the agreed dwelling size of 1,050 ft<sup>2</sup>. On the available evidence, including the 2013 Market Report, I consider that a sales value of 178 £/ft<sup>2</sup> is too high and that the Appellant's figure of 170 £/ft<sup>2</sup> is to be preferred.

#### *Sales rates for market housing*

21. The Appellant's original appraisal considered that the development programme would be just over 8 years for Lydney A and 14 years for Lydney B, although both sites would commence together. The sales expectation was for 5 dwellings per month across the two sites reducing to 4.5 on the completion of Lydney A. This would result in an average of 4.7 units per month over the whole construction period. However at the Hearing it was contended that this was too high and that a more realistic assessment would be 3.5 per month across both sites. The Council's estimate, on the basis of two sales points, was that the sites could achieve a total of 6 market sales per month.
22. The Appellant's original assessment of sales rates was based on the Market Report, which was undertaken by a local commercial property agent in July 2013 and compared information from a number of other local agents. Further information was submitted at the Hearing which indicated a lower rate. This was based on 4 developments in Lydney, Cinderford and Mitcheldean, all of which were much smaller than the appeal scheme. It also relied on the responses from 3 developers, which ranged from about 2 to 4 dwellings per month for a single or double sales outlet.
23. Lower sales rates would clearly increase the total development period and the finance charges that would ensue. It is not disputed that the District Valuer and the Appellant's advisers have a good knowledge of the local market but they reach very different conclusions. On the basis of all of the evidence I consider that a sales rate of 6 units a month for this scheme at the present time is likely to be overly optimistic and that 4.7 units a month is more likely. The Appellant's evidence for a lower rate was based on 4 sites and the views of 3 developers, which themselves varied. I do not consider that this provides a sufficiently robust basis to support the reduction in sales rates below the average figure of 4.7 dwellings in the original appraisal.

#### *Developer's profit*

24. The Council considered that due to the improving market a profit level of 17.5% would be reasonable. The Appellant on the other hand considered that 20% would be the minimum on which finance could be obtained. The amount required by a developer to undertake the development is a reflection of the anticipated risk. In this case the evidence indicates that the market is not an easy one within this part of the country. Although the Council considered that work had started on the site with the installation of the pumping station, I am not convinced that this would greatly reduce the risk element of the project. Whilst the greenfield site has an attractive position with enviable views it is not within a prime location on the edge of one of the major towns such as Gloucester or Cheltenham. Furthermore the scheme would be carried out over

a relatively long time period and this would add to uncertainty in terms of future economic conditions.

25. Taking all of the above circumstances into account I consider that it is reasonable to adopt the Appellant's figure of 20% of gross development value as the input for Developer's profit in this case.

### **Conclusions**

26. Both parties have undertaken a number of further scenarios which also reflect various inputs that they agreed during the course of the appeal. These show that on nearly all the tested scenarios some level of affordable housing could be achieved. However my conclusions are clear in respect of the number of dwellings on which the assessment should be based (1,082), Developer's profit (20%) and the exclusion of the secondary education contribution. The Appellant's assessment on the above scenario shows that a contribution of 20% would be viable across the development. The Council's assessment is remarkably similar, being 19.57%, although it assumes a higher sales rate.
27. The Appellant pointed out at the Hearing and in subsequent representations that the HCA DAT only allows a 15 year cash flow to be modelled. The assessments therefore included a higher sales rate in order to deal with the limitations of the model. On the basis of a sales rate of 4.7 units per month the development programme would extend beyond the 15 years in the case of either a 950 unit or a 1,082 unit scheme. The Appellant has explained that for each month that the programme is extended there would be a reduction in the number of affordable units in order to maintain the residual land value which has been agreed by the parties. Further calculations were submitted to take this into account.
28. Whilst I note the Council's concern about the accuracy of the outcome, the Appellant has explained how the discount factor has been arrived at and this does not seem unreasonable. For the scenario that I consider is the appropriate one<sup>2</sup>, the affordable housing component would reduce to 14.1%. As a rough check the Council's assessment on this scenario would result in 19.57% provision as noted above, but this is on the basis of a sales rate of 6 units per month, which I consider too high. Clearly if the sales rate is higher cash flow is likely to improve and a higher contribution could be achieved. Bearing in mind that modelling of this nature is not an exact science it seems to me that the 14.1% figure advanced by the Appellant is robust.
29. The requirement for 20% affordable housing on Lydney A and 30% on Lydney B would not be viable and on this basis I am satisfied that the development will not proceed. However, there is no justification to remove the affordable housing requirement altogether. The available evidence shows that the development would become viable with a modified affordable housing requirement of 14.1% across the two sites. On this basis the Planning Obligations should be modified and the appeal should be allowed.

*Christina Downes*

INSPECTOR

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<sup>2</sup> This is 1082 dwellings, with a sales rate of 4.7 units a month, 20% developer's profit and the secondary education contribution excluded.

**SCHEDULE**

**MODIFICATIONS TO THE PLANNING OBLIGATION BY UNILATERAL UNDERTAKING DATED 10 JUNE 2008**

Deletion of 20% from the definition of "Affordable Housing Units" in Paragraph 1.4 of the Unilateral Undertaking and its replacement with 14.1%.

**MODIFICATIONS TO THE PLANNING OBLIGATION BY UNILATERAL UNDERTAKING DATED 11 MAY 2010**

Deletion of 30% from the definition of "Affordable Housing Units" in Paragraph 1.4 of the Unilateral Undertaking and its replacement with 14.1%.

Deletion of 30% from Paragraph 1 of Schedule 1 of the Unilateral Undertaking and its replacement with 14.1%.

*End (three modifications).*

Richborough Estates

## **APPEARANCES**

### FOR THE APPELLANT:

Mrs J Connor BSc(Hons)	Development Director with Pioneer Property Services Ltd
Mr R Anthony MRICS	Associate with the Land Development Team of Bruton Knowles

### FOR THE LOCAL PLANNING AUTHORITY:

Mr M Hillier DipTP MRTPI MCMI CMS	Principal Planning Officer with Forest of Dean District Council
Mr K Chaplin BSc MCIH	Housing Strategy and Enabling Officer with Forest of Dean District Council
Mr T Williams BSc MRICS	Development Team Leader with DVS
Ms V Rodrigues BSc(Hons) MRICS	DVS

## **DOCUMENTS**

- 1 Note prepared by Bruton Knowles about typical densities
- 2 Information about densities, housing mix, sales rates and developer's profit
- 3 Note by Bruton Knowles about sales values and rated in the Lydney area
- 4 Correspondence with the Education Authority
- 5 Note prepared by Bruton Knowles about developer's profit
- 6 Note and further viability assessments by the Appellant
- 7 Note and further viability assessments by the Council
- 8 Inspector's questions following the close of the Hearing
- 9 Appellant's response to the Inspector's questions (10/7/14)
- 10 Council's response to the Inspector's questions (23/7/14)
- 11 Inspector's further questions following the close of the Hearing
- 12 Appellant's response to the Inspector's further questions (14/8/14)
- 13 Council's response to the Inspector's further questions (15/8/14)
- 14 Appellant's final comments on the Council's responses (22/8/14)