The Planning Inspectorate

Appeal Decision

Hearing held on 18 December 2014

Site visit made on 17 December 2014

by P W Clark MA MRTPI MCMI

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

Decision date: 7 January 2015

Appeal Ref: APP/D1590/Q/14/2228061
53 Pavilion Drive, Leigh-on-Sea, Essex SS9 3JS

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to modify the requirements of a planning obligation.
- The appeal is made by Sandhurst Newhomes Limited against the decision of Southend-on-Sea Borough Council.
- The development to which the planning obligation relates is to demolish a building and erect one 3 storey block of 11 flats and one 3 storey block of 5 flats, lay out parking, amenity area, refuse stores and landscaping, enlarge existing vehicular access onto Pavilion Drive and form new vehicular access onto Kathleen Drive.
- The planning obligation, dated 30 June 2008, was made by Sandhurst Newhomes Limited and the Royal Bank of Scotland in favour of Southend–on-Sea Borough Council
- The application Ref 14/01178/S106BA, dated 23 July 2014, was refused by notice dated 22 August 2014.
- The application sought to have the planning obligation modified as follows: to remove the affordable housing obligations.

Decision

1. The appeal is dismissed.

Procedural matters

2. This appeal is one of three heard at a shared Hearing in which material submitted was common to all three appeals. Nevertheless, separate decisions are made because each case concerns a separate address and different, although related, appellants.

3. An informal, unaccompanied site visit was made on the day before the Hearing.

4. In the case of this appeal, the requirement of the planning obligation to provide the affordable housing had been triggered by events which took place on or before 27 September 2013 yet had not been enforced for over a year. It was argued, on behalf of the appellant, that the requirements of the obligation could not be fulfilled. Nevertheless, confirmation was given at the Hearing that this is an appeal under s106BC of the Act against a decision in respect of an application made under s106BA of the Act (viability) and not an appeal under s106B against a decision in respect of an application made under s106A of the Act (no useful purpose) and so I have dealt with it accordingly.

Applications for costs

5. Prior to the Hearing applications for costs were made by Sandhurst Newhomes Limited against Southend-on-Sea Borough Council and by Southend-on-Sea Borough Council against Sandhurst Newhomes Limited. Both these applications were withdrawn in writing at the Hearing.

Main Issues

6. The main issues derive from the provisions of the Town and Country Planning Act which govern this type of appeal. 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. The parties agree that the only difference between them in this case is whether the provisions of the Act could apply to a scheme which has been built out, sold and tenanted.

8. There are arguments between the parties concerning the appellant's ability to fulfil the requirements of the obligation and the attempts to do so but these are arguments which touch on the obligation's ability to serve a useful purpose; they do not affect its viability. As noted above, this appeal does not result from an application concerning the ability of the obligation to serve a useful purpose; it is concerned only with viability.

9. There are also arguments between the parties about the intentions of the legislative in preparing this legislation and whether the development is stalled or not. What is clear to me is that the requirements of the obligation form a part of the development which has been permitted. The requirement to provide affordable housing is subject to a trigger which has been passed and so, has come into effect. But, for whatever reason, it has not been acted upon (and so, is stalled) but is still capable of enforcement. It is not spent. So, at the operative date for this appeal (immediately before the date on which the application was made), there is an affordable housing provision in the planning obligation, which could be acted upon or be enforced. I therefore conclude that it is open to me to consider whether this 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.

10. Both parties agree that the scheme is not viable within current market conditions but I am not convinced, for the following reasons. The paragraph dated 19 June 2014 added to Mr Dedman's Red Book Report and Valuation dated 27 June gives figures for the development, based on the outturn of sales and costs, discounting the two affordable flats, as a net loss of £109,000. But the two affordable units are being rented, which could be capitalised and, if transferred to a Registered Social Landlord, in the way envisaged by the planning obligation, would generate a capital receipt. In response to my question at the Hearing, Mr Dedman offered the view that if that were taken into account, there would be a profit of £81,000, representing 0.25%.

11. The Council demurs, accepting that the outturn figures should be used for sales and for costs, but not the actual land purchase price of £723,466. A valuation of the site on the date of planning permission, some three or four months later,

by which time values would have fallen to £560,000 is put forward. On this basis there would be a profit of £316,000, representing 11.4%.

12. The Council's approach is more in line with the advice on Land Value in Table A of Annex A of the DCLG publication *Section 106 Affordable Housing requirements Review and Appeal*, so I would prefer it, if there was the benchmarking evidence to corroborate it. But, in any event, both parties' outcomes are positive; 0.25% in the case of the appellant; 11.4% in the case of the Council.

13. The reason why both parties agree that the scheme would not be viable is explained in paragraph 3.10 of Mr Murphy's viability assessment dated February 2014; although this paragraph was commenting on an earlier Red Book Report and Valuation by Mr Dedman, the explanation still applies. It is that "this would not be considered viable as it falls short of a reasonable risk reward return of between 20-25% profit on cost."

14. There is no definition of viability within the Act. The DCLG publication advises that the test for viability is that the current cost of building out the entire site is at a level that would enable the developer to sell all the market units on the site at a rate of build out evidenced by the developer and make a competitive return to a willing developer and a willing landowner. Both the National Planning Policy Framework and the National Planning Practice Guidance (NPP Guidance) make reference to competitive returns to a willing landowner and willing developer to enable the development to be deliverable.

15. Both parties pointed me to RICS Professional Guidance; Financial Viability in Planning for advice on setting the parameters of a valuation exercise. This advises (para 2.1.1) that viability can be defined as an objective financial viability test of the ability of a development project to meet its costs including the costs of planning obligations, while ensuring an appropriate Site Value for the landowner and a market risk adjusted return to the developer in delivering that project. I take particular note of the reference to a "risk adjusted" market return to the developer.

16. This reference to risk adjustment is repeated in paragraph 3.3.1 which advises that a scheme should be considered viable as long as the cost implications of planning obligations are not set at a level at which the developer's return falls below that which is acceptable in the market for the risk in undertaking the development scheme. Paragraph 3.3.2 goes on to advise that the return will include the risks attached to the specific scheme. The level of profit required will vary from scheme to scheme given different risk profiles. Both parties accepted, in response to my question, that the level of profit should reflect the risk of the scheme.

17. However, in this case, although there was undoubtedly a risk before the development started, which would have justified building in a reasonable expectation of 20% profit on GDV, there is now no longer any noticeable risk; most matters are now certain because the development has been completed, the market units sold and the affordable units rented, albeit not to a social landlord. Moreover, there is no longer any need to enable the development to be "deliverable" (in the terms referred to in the NPP Guidance); because it has been delivered in all respects except the transfer of two flats to a social landlord. I am therefore not convinced that a reasonable risk reward return of between 20 and 25% is now required to make this scheme viable.

18. There is no information to indicate what risk, if any, the parties consider is now involved in bringing this development to a close. None requiring a greater return than has been achieved in either party's calculation is apparent to me and so, I take the view that, at this stage of the undertaking, the scheme is viable as it has not actually made a loss. I therefore conclude that the affordable housing requirement does not mean that the development is not economically viable and so the planning obligation needs no modification.

Other matters

19. I was referred by the parties to a number of other appeal decisions. I have taken note of these in so far as they shed light on the matters before me. But each case is unique and decided in relation to its own circumstances. None of the other cases referred to have bound me in considering the case the subject of this appeal, which has been determined on its own merits.

P. W. Clark

Inspector

APPEARANCES

FOR THE APPELLANT:

Kevin Leigh, of Counsel	
David Dedman FRICS	
Michael Calder BSc(Hons) DipTP MRTPI	Associate, Phase 2 Planning and Development Ltd
Sean Callaghan	Partner, BTMK LLP
Brian Strickland	Director, Sandhurst New Homes and Venture Capital Associates

FOR THE LOCAL PLANNING AUTHORITY:

John Pugh-Smith, of Counsel	
Phillip McIntosh BRTP(Hons)	Team Leader, Planning Enforcement and Appeals, Southend Borough Council
Andrew Murphy BSc(Hons) MRICS	Lambert Smith Hampton
Amanda Rogers	S106 and CIL Officer, Southend Borough Council

DOCUMENTS submitted at Hearing

1 Statement of Common Ground
2 Appeal decision APP/X0360/A/12/2179141
3 Residual valuations at dates of planning permission for appeals 2228062 and 2228065
4 Extract from 39 Essex Street newsletter