The Planning Inspectorate

Appeal Decision

Hearing held on 28 April 2015

by Mr JP Sargent BA(Hons) MA MRTPI

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

Decision date: 29 May 2015

Appeal Ref: APP/Q1255/S/15/3005876
Land to the rear of 14-24 Langley Road, Poole BH14 9AD

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 (the Act) against a refusal to modify a planning obligation.
- The appeal is made by Hoyle and Co (Bournemouth) Limited against the decision of the Borough of Poole (the Council).
- The development to which the planning obligation relates is the demolition of existing buildings and the erection of 15 houses as follows: 2 1-bed houses, 7 2-bed houses and 6 3-bed houses with associated parking.
- The planning obligation dated 3 July 2013 was made between the Council of the Borough and County of the Town of Poole and Hoyle & Co (Bournemouth) Limited.
- The application dated 9 November 2013 was refused by letter dated 3 November 2014.
- The application sought to have the planning obligation modified by deleting any requirement for on-site provision, and reducing the financial contribution for off-site provision from £26,940 to £25,519.

Decision

1. The appeal is allowed. The planning obligation, dated 3 July 2013, made between the Council of the Borough and County of the Town of Poole and Hoyle & Co (Bournemouth) Limited shall have effect subject to the following modifications:

   a) *Section 1 Definitions - Affordable Housing Contribution*: Delete 'twenty six thousand nine hundred and forty pounds (£26,940.00)' and replace with 'twenty five thousand, five hundred and nineteen pounds (£25,519.00)';

   b) *Section 1 Definitions – Affordable Housing Contribution*: Delete '£250.00' and replace with '£500.00';

   c) *Section 1 Definitions – Affordable Housing Contribution*: Delete 'and the provision of onsite Affordable Housing comprising one one-bedroom property as Shared Ownership Housing and one one-bedroom and one two-bedroom properties as Affordable Rented Property in accordance with the provisions of PCS06 of the Core Strategy'.

   d) *Section 1 Definitions:* Insert '"**The relevant period"** means the period of 3 years beginning with the date when the Appellant is notified of the determination of the appeal referenced APP/Q1255/S/3005876';

   e) *Section 5 Covenants paragraph 5.1 & paragraph 5.2*: Delete 'Schedules' and replace with 'Schedule';

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f) *Insert Section 12 as follows:*

12. Reversion of the obligation on or after the relevant period

12.1 If the development has not been completed before the end of the relevant period the obligation is treated as containing the affordable housing requirements the obligation contained immediately before the application dated 9 November 2013 was made under section 106BA;

g) *First Schedule - Affordable Housing*: Delete in its entirety;

h) *Second Schedule – Contributions Section 1 Owner's Covenant paragraph 1*: Delete 'twenty six thousand nine hundred and forty pounds (£26,940.00)' and replace with 'twenty five thousand, five hundred and nineteen pounds (£25,519.00)';

Application for costs

2. At the Hearing an application for costs was made by Hoyle & Co (Bournemouth) Limited against the Council, and that is the subject of a separate decision.

Main Issue

3. The main issue in this case is whether the overage clause required by the Council would unreasonably affect the viability of the scheme.

Background

4. In July 2013 planning permission was granted for the erection of 15 dwellings on land behind 14-24 Langley Road, subject to a planning obligation (the original obligation) that required 3 dwellings on site to be maintained as affordable housing, a further contribution to be made from the developers of £26,940 to go towards off-site provision of affordable housing (the off-site contribution), and a £250 administrative fee. This fell some way short of the policy requirement that 40% of the houses on the scheme should be affordable, but, given the submitted viability information, it was considered reasonable by the Council. That obligation did not include an overage clause.

5. In November 2013 the Appellant submitted the application subject of this appeal, with supporting viability information, and initially it was seeking to discharge the original obligation totally and obtain a nil provision towards affordable housing. However, after an assessment from the District Valuer's Office (DVO) the Appellant and the Council agreed there should be no on-site provision and the off-site contribution should be reduced to £25,519 plus a £500 administrative fee. This was to be secured through a Deed of Variation.

6. The Council though also sought to include in this Deed of Variation an overage clause that broadly required the owner to undertake a further viability appraisal (the FVA) not more than 4 months after the 'trigger point' of the first occupation of the first dwelling, and if this FVA produced a surplus the owner should then pay to the Council 50% of the surplus. It is because of this overage clause that the Appellant is now appealing.

7. At the Hearing the Council confirmed the reference to 50% was an error, and the clause should only require it to be paid 25% of the surplus. This correction though did not change the Appellant's position in relation to the appeal.

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Reasons

8. Government guidance on viability assessments in *Section 106 affordable housing requirements: Review and appeal* (the Guidance) states

> *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 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.* (paragraph 10)

9. In this case, the Council acknowledged that, in the light of the viability information submitted in November 2013, it was extremely unlikely there was any justification for any affordable housing provision at that time over and above the agreed off-site contribution of £25,519. Therefore, no further money would be necessary to make the scheme acceptable in planning terms.

10. However, the Council's *Affordable Housing* Supplementary Planning Document (the SPD) says an overage clause can be imposed where an affordable housing obligation is required, and it appears the reason for this is to address cases where the developer secures consent then waits for the market to rise before completing. On this basis the Council has sought to impose the overage clause subject to this appeal.

11. Paragraph 10 in the Guidance repeatedly emphasises the need for viability evidence to be based on current costs and market values. However, in contrast the overage clause suggested by the Council is introducing a further assessment of viability based on costs and sales returns at a future date. Therefore, in this regard the clause is contrary to the Guidance, and this was accepted by the Council at the Hearing.

12. Moreover, I share the Appellant's view that the clause brings a significant element of uncertainty into the future value of the land and the returns it would provide. This is because the Council would no doubt turn to the DVO again to assess the FVA, and its views on the reasonableness of the Appellant's stated costs and estimated sales values would be unknown beforehand. Indeed, they may well be appreciably at odds with those of the suitably qualified professionals the Appellant had engaged. Moreover, if there is a significant discrepancy in views, the developer has little if any redress. As a result, the uncertainty this would create means the clause could well discourage investors and make funding for the scheme harder or more expensive to secure. Furthermore, if for some reason the Appellant decided not to develop the scheme, this uncertainty could also affect the sale of the land to another potential developer. For these reasons it would therefore challenge the viability of the development.

13. In coming to this view I do not question that clauses of this nature may have a role to play where a development is likely to be delivered in a number of discrete and separate phases over a relatively long timeframe. However, the size and nature of this proposal means it is likely to be brought forward in a single phase with all houses being built more or less together, and to develop it otherwise would be result in a significant increase in costs.

14. I also note the Council's assertion that the clause only applies to the element of profit over-and-above that already established in the viability appraisal. However, that in itself does not justify introducing this uncertainty into the development process and utilising a clause that is contrary to the Guidance. In any event, as the Appellant noted there are expenses incurred in a site such as this that are outside of any appraisal but which it still needs to address. Moreover, while the FVA may

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well show no surplus, the mere presence of the clause could increase costs in the form of greater bank charges for example.

15. It is accepted that land values may increase between making the assessment of affordable provision and the sale of the properties, but such an increase to my mind comprises part of the commercial benefit that encourages the supply of additional housing.

16. I acknowledge too that there would be uncertainty before the development is begun as costs and sales values could change. At that stage though the developer can make a business decision and, if necessary, decide not to commit further investment into the project without too much hardship. In contrast, by the 'trigger point' in this overage clause the developer (and any investor) would not be able to leave the scheme in the same way as some 80-90% of the costs would have been incurred.

17. Finally, whilst I have reservations about the application of the clause in the case before me, I do not share the Appellant's view that it is in direct conflict with the wording of section 106 of the Act. This is because I do not accept that all payments need to be specified upfront and the obligation could well contain a formula for establishing the necessary payments at a future date.

18. Accordingly I conclude the overage clause would unreasonably affect the viability of the scheme. I therefore determine that the planning obligation be modified:

    i) by the deletion of the requirement to provide a 1-bedroom property as Shared Ownership Housing and a 1-bedroom property and a 2-bedroom property as Affordable Rented Property on site, and

    ii) by the deletion of a need for a £26,940 off-site contribution with a £250 administrative fee and its replacement with a £25,519 off-site contribution and a £500 administrative fee.

19. In accordance with section 106BC(11) of the Act as amended the planning obligation, as modified, must also contain the provision that if the development is to continue past a date 3 years from the date when the Appellant is notified of this decision there will be a reversion to the requirements in the original obligation as they were worded before the application subject of this appeal was submitted.

20. Although the modifications to the planning obligation do not remove all references to the affordable housing on–site, as the requirement to provide them has been deleted then those outstanding clauses are to no effect.

J P Sargent

INSPECTOR

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APPEARANCES

FOR THE APPELLANT:

Mr J Buchanan	Solicitor
Mr R Henderson	Agent
Mr J Newman	Surveyor

FOR THE LOCAL PLANNING AUTHORITY:

Mr J Gilfillan	Senior Planning Officer with the Council
Ms K Ruff	Strategic Housing Manager with the Council

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