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## Appeal Decision

Hearing held on 3 June 2015

**by Mike Moore BA(Hons) MRTPI CMILT MCIHT**

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

**Decision date: 1 July 2015**

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**Appeal Ref: APP/H1840/S/15/3006384**

**Land adjoining 49 Main Street, Sedgeberrow, Worcestershire, WR11 7UE**

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
  - The appeal is made by Sedgeberrow (Nominees) Ltd against the decision of Wychavon District Council.
  - The development to which the planning obligation relates is the erection of 20 dwellings.
  - The planning obligation, dated 15 July 2014, was made between Wychavon District Council and Sedgeberrow (Nominees) Ltd and National Westminster Bank PLC and Worcestershire County Council and Daphne Erica Stow and Alan John Stow.
  - The application Ref W/14/01755/PO, dated 1 August 2014, was refused by notice dated 16 September 2014.
  - The application sought to modify the planning obligation in order to remove the affordable housing requirement.
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### Decision

1. The appeal is dismissed.

### Application for costs

2. At the Hearing, an application for costs was made by Wychavon District Council against Sedgeberrow (Nominees) Ltd. That application is the subject of a separate decision.

### Main Issue

3. The main issue is whether the existing planning obligation requirements in relation to affordable housing result in the overall development being unviable, and if so how could the obligation be modified so that the development would become viable.

### Background

4. Outline planning permission for 20 dwellings with all matters reserved except access was granted for the appeal site in July 2014. The permission is subject to conditions and a planning obligation dated 15 July 2014. The obligation includes a requirement for 40% of the dwellings to be provided as affordable housing.
5. The main parties have agreed a Statement of Common Ground (SoCG) dated 7 April 2015. They have agreed gross internal floor areas for the proposed illustrative scheme based on the indicative layout plan and the floor area of

units calculated in accordance with the RICS Code of Measuring Practice. While they do not agree on some of the variables within the viability appraisals it is nevertheless common ground that the illustrative development scheme is not viable.

## **Reasons**

### **General**

#### *Stalled scheme*

6. The Council considers that this cannot reasonably be regarded as a 'stalled scheme' as described by the Guidance<sup>1</sup>. Furthermore, as the appellant Company is proposing that no affordable dwellings should be provided, this would conflict with the aim of the Guidance to ensure that more affordable housing would result than would otherwise be the case.
7. The planning application was submitted to the Council in December 2012. The Planning Committee resolved to approve the application in March 2013, subject to a s106 agreement on affordable housing and other matters. No viability appraisal had been submitted at that point. The s106 agreement was not concluded and signed until July 2014 and the planning permission was then issued. The application to modify the obligation was submitted in August 2014. The appellant Company contends that the s106 agreement was signed in order to secure the planning permission, even though in their view the scheme was not viable.
8. The Guidance aims to bring forward development on stalled schemes but offers no definition other than the cause, which is economically unviable affordable housing. There is no proviso to reject applications which do not relate to a stalled scheme. In this case, it is some 2½ years since the original application was submitted and the appellant has presented evidence that seeks to show that the affordable housing would be unviable. The Guidance aims to achieve not just more affordable housing but also more housing generally. Under the Act an applicant is entitled to seek the removal of an affordable housing requirement from a planning obligation. In these circumstances, the suggestions that the development is not stalled or would conflict with the aims of the Guidance are not a basis for dismissing the appeal.

#### *Prematurity*

9. As the planning permission is in outline, the Council contends that it is too early to undertake a viability assessment as this may not represent the final scheme delivered on site. Accordingly, the application and appeal are premature.
10. There are no restrictions in the Act or the Guidance that indicate that the provisions of s106BA do not apply to an outline permission. As such, there is no in principle reason why affordable housing requirements relating to an outline scheme should not be modified. Nonetheless, the Council has referred to an appeal decision<sup>2</sup> where the Inspector concluded that where all matters were reserved there was no detailed scheme against which to base any

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<sup>1</sup> Section 106 affordable housing requirements – Review and appeal (DCLG, April 2013)

<sup>2</sup> APP/D0840/Q/13/2206580

meaningful judgement. It was therefore not possible to conclude that the scheme would necessarily be unviable and the appeal failed for that reason.

11. On the basis of the information on that proposal available to me, the landscaping and house type details were all reserved. There is no indication that there were any conditions that sought to restrict the approach to reserved matters; for example by tying the development to the illustrative scheme which accompanied the permission. The scheme was not determinative in the reasoning for an Inspector's decision to grant the planning permission on appeal.
12. In the case of this appeal the permission is accompanied by an Indicative Site Layout<sup>3</sup> (ISL). Condition 20 of the planning permission requires that development is in general accordance with this drawing and the Design and Access Statement. The Guidance requires that the development should deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision. There is no reason why different scenarios consistent with an outline permission cannot be tested with this objective in mind. Indeed, the Council has undertaken sensitivity analysis which in its view would support at least 20% affordable units.

#### *Nature of the development permitted*

13. The appellant Company considers that, while the planning permission is in outline, the terms of the conditions limit the scope of the development. In addition to condition 20, condition 27 requires that development should take place in accordance with the ISL. As the conditions cannot be varied as part of a s106BA application, the Company contends that the development to which a viability assessment must be applied is that shown on this drawing and that this is the scheme referred to in the SoCG as unviable. The drawing shows the footprint of the dwellings and in a schedule indicates the dwelling types and whether they would be market or affordable.
14. The conditions on a planning permission must be read together. Conditions 1 and 2 require submission of details of reserved matters, including the layout, scale and external appearance of the buildings. Condition 20 indicates that, subject to other conditions, development should be carried out in general accordance with the ISL, which would give some flexibility. The size, type and location of the affordable housing units should conform to the Council's Affordable Housing Supplementary Planning Guidance (SPG) in accordance with condition 23. The layout shows affordable units that are too large based on the SPG. I note that the provisions of the s106 agreement require the submission of an affordable housing plan showing amongst other things the layout, tenure, mix, specification and size of the affordable units.
15. If a strict interpretation of condition 27 was taken, prescribing the types of units as well as the layout, and the appeal were allowed then it is arguable that the permission could not be implemented as it would not provide the affordable units in the schedule to the drawing. The drawing is described as a layout plan and this should reasonably be regarded therefore as its main purpose. Assumptions have been made in order to interpret the layout in terms of the floor areas of the affordable units. Notwithstanding the details of unit types in the schedule, in the context of condition 23 I consider that there is flexibility in

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<sup>3</sup> Ref. 4897-202 Rev C

the development permitted to allow different details of the affordable units to those shown or implied.

#### Viability Assumptions

16. The Council and the appellant have agreed that a residual method of valuation based on current values and costs should be adopted. The appellant has produced three viability assessments. Assessment A is for the illustrative development scheme based on the ISL as referred to above. Assessments B and C are for 100% market housing with 21 month and 24 month development programmes respectively. The Council has also produced an assessment for the illustrative scheme, but also, as an alternative for sensitivity testing, a scheme where the affordable housing units would be smaller.
17. The SoCG indicates that the viability matters on which the Council and the appellant do not agree are:
- Sensitivity analysis and testing
  - Site value
  - Development Programme
  - Development contingency
  - Some of the comparable sites for the purpose of assessing site value

In addition, from the written submissions there were also differences over section 106 payment dates, historic costs and interest/finance costs.

#### *Sensitivity analysis and testing*

18. The appellant Company has not agreed with the sensitivity analysis undertaken by the Council. This relates to different affordable dwelling sizes and types to those in the agreed SoCG and therefore, in the appellant's view, to that which was permitted. However, I have considered above the position of the ISL and the conditions. The Guidance indicates that a viable affordable housing provision may consider whether adjustments should be made to the affordable housing tenure and mix. In that context, the Council's sensitivity analysis is relevant to my consideration of the appeal.

#### *Site value and comparable evidence*

19. The threshold land value is the principal area of difference between the main parties. I have seen no evidence of an agreed land value associated with any appraisal at the time of the original planning permission. The Council concludes now that at the assessment date the site value was £830,000 whereas the appellant Company considers that this should be £1,120,000.
20. In accordance with the Guidance, three comparable sites in the locality have been agreed in the SoCG for the purposes of benchmarking. A further site at Pinvin has been suggested by the Council as this was a sale completed in February 2015 and in my view is a relevant comparator. The Council has explained how it has made allowances for differences between these sites and the circumstances of the appeal scheme.
21. A site at South Littleton is not agreed by the appellant. It had an agreed sale but the purchaser withdrew. There is uncertainty over submission of reserved matters on its outline planning permission. This limits the value that the site can have as a comparator.

22. Two additional sites are put forward by the appellant, one at Sedgeberrow and another at Childswickham. These are for 2 and 3 plots respectively with no affordable housing or other planning obligations. Small sites of this kind in villages can be sought after by local people and small developers and have a different market. While giving some indication of local demand, they are not suitable comparators for the appeal site and scheme.
23. At the hearing, a further site at Badsey, which had just been sold subject to contract, was referred to by the appellant. This has some comparable features to the appeal site but also some differences. It is not clear how these would balance out in terms of their relevance to the appeal site.
24. I have taken account of more general information on the housing market in the Midlands<sup>4</sup> and press reporting of land price rises<sup>5</sup>. However, these relate to a wide geographic area and can only provide a general background to the local information provided by the benchmarking. In the case of the agreed comparator site at Crowle, the Council has taken account of increases in house prices between the sale date for that land and the viability assessment date for the appeal site.
25. Some of the comparables have not yet completed sales but they provide evidence of the residential land market relevant to this site. It is not a straightforward task to compare the characteristics of different sites and locations. The Council has had regard to the list of hierarchical evidence in the RICS information paper *Comparable evidence in property valuation*<sup>6</sup>. I note the appellant's concern at the relationship between gross development value and site value if the Council's figure is used. However, the conclusions reached by the Council are supported by the local evidence. Taken as a whole, the information from the comparable sites supports the Council's position on site value for the purposes of the viability assessment.

*Development programme and section 106 payment dates*

26. The Council considers that the length of the development programme should be 21 months whereas the Company regards 24 months as appropriate to allow for development risk. The main difference is in the initial lead time, with the appellant concerned that, amongst other things, reserved matters would have to be submitted and approved, conditions discharged and Building Regulations approval obtained. As a consequence, there would be differences in terms of the timing of payments arising from planning obligations that are linked to the commencement date. At the hearing the main parties agreed that the timing of payments would have only a small impact on the appraisals.
27. More generally, the appellant Company accepts that for its 100% market housing scheme appraisals B and C the different time periods are of little significance in the context of overall project costs. The Council points to the BCIS Construction Duration Calculator which indicates that for a residential contract of this size in Wychavon a typical duration would be 12-14½ months. There is a need for an archaeological survey but otherwise there is no evidence of abnormal factors or a particularly complicated scheme. These considerations support a 21 month period for the purposes of assessing viability.

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<sup>4</sup> Midlands Operating Area Housing Market Report (Housing and Communities Agency, August 2014)

<sup>5</sup> Birmingham Post 23 April 2014

<sup>6</sup> 1<sup>st</sup> edition (IP 26/2012)

### *Development contingency*

28. The parties are agreed that there should be a contingency of 3% in relation to construction costs. The appellant considers that a further 3% should be added to allow for all the other cost risks associated with the project at the assessment date, in particular as forecast increases in tender prices could consume the construction costs contingency. However, an increase in construction costs may also be reflected in increased sales values. Generally, such risks are carried by the contractor but if they stay with the client then it would be for the design team to manage costs. There are no particular circumstances here that would suggest that a further contingency is necessary.

### *Historic costs*

29. Although the SoCG indicates that there are no historic costs to be taken into account, the appellant's viability appraisals appear to include some incurred prior to the assessment date. At the hearing, the appellant agreed that these should not have been included. However, they are not significant factors in the overall calculations.

### *Interest/finance costs*

30. In the SoCG debt charges, inclusive of bank arrangement fees and surveyor's monitoring costs, are agreed at 6.5%. The appellant has adopted a different approach in the assessments, making separate assumptions for bank funding fees. However, these assumptions are not critical to the overall outcomes.

### **Conclusion**

31. The appellant Company is seeking the removal of the affordable housing requirement. I find the Council's assumptions about the matters in dispute with the appellant to be the most compelling. Nonetheless, even using those the Council concurs that the illustrative development scheme identified in the SoCG is unviable and there is no evidence that would lead me to disagree. However, I do not agree with the appellant that the terms of the outline planning permission restrict the proposal to that scheme.
32. The Council's sensitivity analysis shows that 20% affordable housing would be viable given a particular mix of housing units and sizes, with a surplus that could potentially achieve more. Possible higher figures were discussed at the hearing but I have seen no viability assessments associated with them. The Guidance requires that a viable affordable housing provision should be proposed, delivering the maximum level of affordable housing consistent with viability and the optimum mix of provision. On the evidence before me, 20% would not be a maximum. Indeed it has not been demonstrated to my satisfaction that 40% would be unviable with the appropriate types and sizes of affordable units. As such, I conclude that the case for removing the requirement has not been made.
33. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be dismissed.

*M J Moore*

INSPECTOR

## **APPEARANCES**

### **FOR THE APPELLANT:**

Jeremy Edge BSc FRICS MRTPI  
Peter Clifford  
Nick Ellison

Edge Planning & Development LLP  
Sedgeberrow (Nominees) Ltd  
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### **FOR THE LOCAL PLANNING AUTHORITY:**

Nina Pindham of Counsel  
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Principal Planning Officer, Wychavon District  
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Projects and Development Officer,  
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Heather Peachey BA(Hons)

## **DOCUMENTS SUBMITTED AT THE HEARING**

- 1 Details relating to land at Bretforton Road, Badsey, Worcestershire
- 2 Comments on Council's sensitivity analysis submitted by Mr Edge

Richborough Estates