



Appeal Decision

Hearing held on 7 July 2015

by Karen L Baker DipTP MA DipMP MRTPI

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

Decision date: 17 August 2015

Appeal Ref: APP/J3015/S/15/3019494

Hemphill Hall, Low Wood Road, Nuthall, Nottingham NG6 7AB

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to discharge or modify a planning obligation.
 - The appeal is made by Langham Park Developments Limited against the decision of Broxtowe Borough Council.
 - The development to which the planning obligation relates is the construction of 116 dwellings, including details of access, appearance, layout and scale with landscaping reserved for future consideration (revised scheme).
 - The planning obligation, dated 29 November 2013, was made between Broxtowe Borough Council and Mary Holmes and Philip Michael Wrigley and Mark Finley Mitchell and Langham Park Developments Limited and Nottinghamshire County Council and Clydesdale Bank PLC trading as Yorkshire Bank.
 - The application Ref. 14/00744/OBLIGA, dated 1 December 2014, was refused by notice dated 13 January 2015.
 - The application sought to have the planning obligation modified as follows: to remove the affordable housing requirement.
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Decision

1. The appeal is allowed in varied form. For a period of 3 years from the date of this Decision, the planning obligation, dated 29 November 2013, made between Broxtowe Borough Council and Mary Holmes and Philip Michael Wrigley and Mark Finley Mitchell and Langham Park Developments Limited and Nottinghamshire County Council and Clydesdale Bank PLC trading as Yorkshire Bank shall have effect subject to the modifications as set out in the Schedule appended to this Decision.

Procedural Matters

2. The appellants confirmed at the Hearing that the Clydesdale Bank PLC, trading as Yorkshire Bank, is no longer a party to the Section 106 Agreement. In accordance with the advice given in the Department for Communities and Local Government publication 'Section 106 affordable housing requirements: Review and appeal', published in April 2013, the appellants have provided evidence that all signatories to the Section 106 Agreement were notified of the application to the Council and this subsequent appeal. With the exception of the Council, no representations were received in response to these notification letters from other signatories to the Section 106 Agreement.

3. Following the close of the Hearing the Council provided further information to support its position in respect of Build Costs¹ and Sales Values² within the local area. The appellants were also given the opportunity to respond to this³. Furthermore, given the changes in positions which occurred as a result of the discussions at the Hearing, the Council and the appellants prepared a synopsis of scenarios⁴ which shows the impact of changes made to the variables within the Homes and Communities Agency (HCA) Development Appraisal Toolkit (DAT) on the viability of the development.

Main Issue

4. The issue is defined by reference to Section 106BA of the Act. It is 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

5. Certain matters are no longer in dispute and were either agreed in advance of, or at, the Hearing. These are: Base Land Value (£1,149,184); the housing mix; allowance for all fees, including warranties (7%); Section 106 and Section 278 financial contributions (£826,660); Sales/Letting Fees (3%); Legal Fees (£500 per open market unit, and £200 per intermediate unit); Arrangement Fee (£50,000); Miscellaneous Fees (surveyors etc) (£2,000); Agents Fees (£11,492); Legal Fees (£5,746); Stamp Duty (£45,967); the Development Timetable⁵; interest rate (6.25%); and the Developers' Return (17.5% on open market housing and 6% on affordable housing).
6. Matters which remain in dispute, albeit that the respective positions in relation to these matters may have been revised, either at, or following the close of, the Hearing are: Build Costs (the Council considers that a rate of £909 per square metre (psqm), plus an 18% allowance, should be used, compared to the appellants' rate of £1,008psqm, plus an 18% allowance); Building Contingencies (the Council considers that 2% would be sufficient, compared to the appellants' figure of 5%); Abnormal Costs (the Council includes £1,210,560 compared to the appellants' figure of £1,230,535); and Sales Values. I consider each of these in turn below.

Build Costs

7. The appellants included total build costs of £1,008psqm in their 'Affordable Housing Viability Report', dated 27 November 2014. This was based upon the Royal Institution of Chartered Surveyors, Building Cost Information Service (BCIS) median cost over a 5 year period for 2 storey new build estate housing of £854psqm, dated 20 September 2014, rebased to Broxtowe, plus an allowance of 15% for external works and infrastructure, with a further 3%, given the significant length of estate road which would be widened to facilitate a tram route on the site. In its statement, the District Valuer Services (DVS) Leeds, confirmed, on behalf of the Council, that it had had regard to the data from the BCIS, which it stated is widely used in appraisal work, and had

¹ Document 9

² Document 10

³ Document 24

⁴ Documents 13 – 23 and 28 – 30

⁵ Document 8

adopted the median build cost, ensuring that the costs are appropriate for the Broxtowe area for the past 5 years. The Council's build costs, which include for preliminaries, but exclude a contingency, equated to £874psqm. For external works, the DVS also adopted a figure of 18% of build costs, which is consistent with that applied by the appellants. This gave an overall build cost of £1,031psqm. The uplift of 18% was agreed by the main parties at the Hearing. However, at the Hearing, the appellants submitted further updated evidence in respect of the BCIS, which showed that the median build cost over a 5 year period for 2 storey new build estate housing was £1,010psqm, dated 27 June 2015, rebased to Broxtowe⁶.

8. At the Hearing the Council expressed concern about the significant increase in build costs and submitted further BCIS information rebased to the third quarter of 2014⁷ and to the second quarter of 2015⁸ and Broxtowe, which showed the median build costs over a 5 year period for 2 storey new build estate housing to be £949psqm and £999psqm respectively. At the Hearing, the appellants stated that they would accept the figure of £999psqm and the DVS indicated that it would be willing to accept a build cost of £949psqm. However, having considered its position, following the Hearing, the Council submitted additional information on build costs⁹, in which the DVS concluded that, based on other information, including 'live' tender information from the Homes and Communities Agency (HCA); viability appraisals received by the DVS from applicants; and a Quantity Surveyor Report submitted as supporting evidence for an area wide viability study, its revised position on build costs would be £909psqm. This would equate to a total build cost of £1,073psqm (£909 + £164 (18%)).
9. The appellants submitted 2 responses¹⁰ to the additional information on build costs provided by the Council, prepared by Anderson Bourne and the Rund Partnership Limited. The former concludes that the BCIS current median rate for 2 storey new build estate housing, dated 11 July 2015, rebased to Broxtowe, of £1,008psqm¹¹ is a reasonable rate and should be used in this case. This would equate to a total build cost of £1,189psqm (£1,008 + £181 (18%)). The latter suggests that a slightly lower build cost of around £1,000psqm should be applied. This would equate to a total build cost of £1,181psqm (£1,000 + £181 (18%)).
10. The Council is concerned that the BCIS data is based on schemes of 50 dwellings or less and that it does not, therefore, include information from 'volume' house builders, who are able to develop schemes at reduced costs. Given that the site the subject of this appeal would be developed for 116 dwellings, the Council considers that it would be reasonable to assume that a regional/national volume house builder would be the most likely type of developer to implement the scheme. I note, however, the appellants' statement that the proposed development in this case, given its relatively small scale, would be more likely to be picked up by a large local or regional developer and not a national volume house builder.

⁶ Document 1 (Document 3)

⁷ Document 7

⁸ Document 6

⁹ Document 9

¹⁰ Document 24

¹¹ Document 25

11. When examining the HCA tender framework, known as the Delivery Partner Panel 2 (DPP2), the schemes considered by the DVS had a mean of 244 units. The DVS has applied the weighting of 105 given to Broxtowe to the mean build cost of £866psqm ascertained from the 65 tender bids across 20 sites to give a build cost of £909psqm. However, when an inflation, as well as a location, adjustment is applied to this figure, given that this data relates to bids received from early in 2014, the appellants consider that the mean build cost would be £934psqm.
12. The viability appraisals assessed by the DVS included schemes of between 100 and 900 dwellings. The average build cost from these schemes equated to £802psqm. The appellants consider that only 2 of the schemes considered by the DVS are comparable to that proposed in this case and that the average adjusted build cost of these 2 would be £865.50psqm when time and location adjusted. Furthermore, the appellants give 4 examples that show a range of schemes and BCIS equivalent base build costs for houses, which have been time and location adjusted. The average build cost of the 4 schemes gives an adjusted rate of £1,075.75psqm. The appellants state that individual examples can be produced that prove costs both lower and higher than BCIS median rates and that it is therefore reasonable to adopt BCIS as a reasonable average rate.
13. The DVS refers to a report¹² by Gardiner and Theobald, prepared on behalf of DTZ, in the context of an area wide Community Infrastructure Levy study being undertaken by DTZ on behalf of Wakefield Council. The report concludes that a reasonable build cost would be £862.22psqm in Quarter 4 of 2014, which includes external costs. When time and location adjusted, the appellants say that the build costs would actually be £1,033.65psqm.
14. From the evidence before me, it is apparent that the median cost over a 5 year period for 2 storey new build estate housing of £854psqm, dated 20 September 2014, rebased to Broxtowe, relied upon by the appellants in their original assessment was substantially underestimated, given that the median cost over a 5 year period for 2 storey new build estate housing rebased to the third quarter of 2014 and Broxtowe, dated 27 June 2015, was £949psqm. I also note that the location weighting attached to Broxtowe, which was 95 prior to March 2015, is now 105. Indeed, the appellants state that this change in weighting alone accounts for 10.53% of the change in median build costs between September 2014 and July 2015. The appellants also refer to the average index for Nottinghamshire as being 104, with no other Borough in the County having an index lower than 100.
15. Although the Council considers that the BCIS figures are typically on the high side, I also note the appellants' view, expressed at the Hearing, that they find the BCIS figures quite low and time lagged. Indeed, they stated that the current market is rising quite steeply and that this is now reflected in the latest BCIS figures. I acknowledge the reference¹³, made by the Rund Partnership Limited, on behalf of the appellants, to the Spons Architects and Builders Price Book 140th Edition to check published building prices per square metre. Reference has been made to the average build cost for affordable housing, adjusted to Outer London and for time to the third quarter of 2015, along with a regional variance of -10% for the East Midlands, which gives an average build

¹² Document 9 Appendix 2

¹³ Document 24

cost of £951.48psqm. The Rund Partnership considers, therefore, that given that the majority of the proposed development would be built to the standard of private housing and around 40% would be detached dwellings, a build cost of around £1,000psqm should be applied.

16. From the evidence before me, given the size of the scheme proposed, I am not satisfied that this development would only be attractive to a large regional or national volume house builder. Furthermore, having regard to the examples put forward by the DVS, I consider that the proposed development would not be of a similar scale to the majority of those schemes. In this case, I consider that the proposed development would be more akin to those developments included within the BCIS figures. BCIS is an industry wide recognised benchmark for assessing build cost information, with the data collected from a broad range of schemes and sources. Although I acknowledge that there has been a significant increase in the BCIS median cost for 2 storey new build estate housing over a 5 year period between September 2014 and July 2015, given the changes to the location weighting of Broxtowe and the changes in the current market, I consider that a build cost of around £1,000psqm would not be unreasonable on this site. I have, therefore, adopted the figure of £999psqm as the build cost in my calculations. This reflects the BCIS information rebased to the second quarter of 2015 and Broxtowe, which showed the median build costs over a 5 year period for 2 storey new build estate housing to be £999psqm and was accepted by the appellants at the Hearing.

Building Contingencies

17. The Council considers that a figure of 2% for building contingencies would be reasonable in this case. However, the appellants consider that a figure of 5% would be more appropriate given that the ground conditions are unknown, the requirements of the planning conditions in relation to the estate spine road and the provision of a bridge over a brook. In my opinion, these costs should be included within the abnormal costs and, although I concur that a building contingency figure should be included, I am satisfied that 2% would be sufficient in this case.

Abnormal Costs

18. At the Hearing most of the abnormal costs were agreed. The costs associated with the road widening for the NET reserve were agreed as £282,713 as were the costs of £477,459 for extra foundation, slabs and drainage and £90,000 for the playground and balancing pond maintenance. The majority of the costs associated with the noise and ecology measures were also agreed, with the only remaining areas of disagreement being the costs of providing the acoustic fence and the provision of habitat areas. The appellants consider that the costs of these elements would be £145,759 and £8,225 respectively, whereas the Council's opinion is that the cost of the acoustic fence would be £134,009, with no allowance made for the habitat areas. As such, the Council and the appellants confirmed at the Hearing that their costs for the noise and ecology measures would be £360,388 and £380,363 respectively, which would mean that their total abnormal costs associated with the proposed development would be £1,210,560 and £1,230,535 respectively.
19. It was agreed at the Hearing that the total length of acoustic fencing required would be 540m, with the cost agreed at £160 per metre, plus preliminaries at

17.5%, which would give a total of £101,520 (540 x 160 + 15,120 (17.5%)). In addition, it was agreed at the Hearing that, in accordance with the noise mitigation scheme required by Condition 10¹⁴, for any plots positioned at right angles to the tram route such that private garden areas used for amenity purposes have an angle of view to the tram route, garden boundaries alongside the tram route should have a 2m high close boarded timber fence to minimise noise contributions from the tram operations. Furthermore, it was agreed, that an acoustic fence would not be required to be provided to garden boundaries facing the A610.

20. The main areas of dispute between the parties relate to general ground clearance and preparation for the acoustic fence, the formation of an embankment along the acoustic fence line, planting along the embankment, fencing around the play area and traffic management, all of which were included within the Budget Estimate of Abnormal Costs, prepared by the Rund Partnership, on behalf of the appellants.
21. At the Hearing the Council stated that the general ground clearance and preparation, along with any traffic management required during the installation of the acoustic fence would be included within the preliminaries. I concur with this approach, given the inclusion of 17.5% for preliminaries. The Council also confirmed that while there is no requirement for another embankment, the existing embankment is densely planted, but a condition would require further planting along this line. As such, I do not consider that the cost of providing another embankment would be necessary, but I am satisfied that an allowance for planting should be included. Furthermore, the Council stated that the fencing around the play area would be included within the external works allowance. Given the nature of this fencing, I concur with the Council's view that this would not be an abnormal cost and would be included within the external works allowance. I have, therefore, included the Council's estimate of abnormal costs, relating to the acoustic fence, in my calculations.
22. The appellants consider that the provision of the habitat areas would be over and above the normal landscape allowance. They referred at the Hearing to the cost of providing 700sqm of species rich wildflower area, as recommended by the FCPR Report, as £7,000 plus preliminaries at 17.5% (£8,225). The Council stated at the Hearing however that Condition 5 on the outline planning permission related to the Toad Mitigation Strategy which requires a grassland habitat to be retained. This is the only ecological requirement of the planning approval and, as such, it does not consider that the cost of providing wildflower planting to create a habitat is required. I am satisfied, therefore, that the provision of a species rich wildflower area is not a requirement of the outline planning permission and should not therefore be included as an abnormal cost.
23. For the reasons given above, I have used the abnormal costs put forward by the Council of £1,210,560 in my calculations.

Sales Values

24. In terms of the sales values of the proposed dwellings, the Council and the appellants agree in most cases, with the exception of the Tilton 2 bedroom terraced house (3 units), the Tilton 2 bedroom semidetached house (4 units), the Croft 4 bedroom + house (11 units) and the Orton 4 bedroom + house (3

¹⁴ Document 5

- units). The appellants consider the sales values to be £117,000, £120,000, £240,000 and £240,000 respectively, compared with the Council's sales values of £124,500, £127,000, £250,000 and £250,000 respectively.
25. The appellants carried out an internet based market research exercise, which was updated and presented at the Hearing¹⁵, looking at comparable values within a one mile radius of the site and identified a range of comparables ranging from £85,000 - £110,000 for 2 bedroom houses, £125,000 - £130,000 for 3 bedroom houses and £135,000 - £200,000 for 4 bedroom houses. However, the appellants acknowledge that a good quality new build development of this scale with good kerb appeal would attract premium pricing and, having liaised with local agents consider that an average of £1,850psqm would be achievable in this location. Following the updated market research appraisal, the appellants stated at the Hearing that, if a 10% new build premium is added, the average second hand value of 2 bedroom houses in a half mile locality is £1,542psqm. With regards to the 4 bedroom detached houses, the appellants say that the highest local comparable is £230,000, which they consider to be a local ceiling value, but, to reflect a new premium, they have priced the Croft and Orton house types at £240,000.
26. In considering the Gross Development Value (GDV) the DVS ascribed different market values for each of the house types. For the detached houses, the DVS used a market value of between £1,943 and £2,107psqm depending on unit size, and noted that, as a general rule, the larger the house, the lower the value per square metre. For the semidetached houses the market value used ranges from £1,727 to £2,143psqm. Finally, for the terraced houses the market value ascribed by the DVS was between £1,996 and £2,101psqm. The overall average value of the market dwellings was considered to be £1,928psqm. These values were arrived at by examining the sales evidence for transactions effected since January 2012 within the NG15, NG16 and NG6 postcode areas, with a focus on sales of new build properties only. Furthermore, as the DVS is part of Her Majesty's Revenue and Customs (HMRC) and the Valuation Office Agency (VOA) it has access to stamp duty land tax returns for all property sales throughout Britain and the floor area measurements for all houses, given the responsibility of the VOA for setting Council Tax valuations. The DVS has used this information to collate sales data on various sites in the local area for comparison purposes. Following the close of the Hearing, the Council submitted further sales evidence of 4 bedroom detached houses built since 2000 in postcode area NG16, close to the site, that have achieved in excess of £250,000¹⁶.
27. From the evidence before me, I am satisfied that the sales values put forward by the DVS on behalf of the Council would be more appropriate in this case, given that they are based on recent sales evidence of transactions of new build properties within the local area. I have, therefore, used the Council's sales values in my calculations.

Conclusions

28. Of the various scenarios submitted by the appellants and the Council following the close of the Hearing, the one which most accurately reflects the conclusions

¹⁵ Document 1 (Document 2)

¹⁶ Document 10

that I have reached in respect of the above disputed matters is Scenario 3¹⁷. This includes the build costs of £999psqm, along with the sales values put forward by the Council. In addition it includes residential building contingencies of 2% and the abnormal costs of £1,210,560. This scenario indicates that with these figures, with no affordable housing provision, there would be a deficit of £733,081. As such, on the available evidence, I conclude that the scheme would be unviable with the inclusion of any affordable housing.

29. Removal of the affordable housing component in its entirety is sought. There is provision to enable me to impose a lower affordable housing element. However, there is no evidence to suggest that this would result in the development progressing and providing affordable housing.
30. The parties have, at my request and without prejudice, commented on the amendments which would be needed to the existing obligations. The Council has submitted wording for amended planning obligation scenarios¹⁸ and has submitted an unsigned amended version¹⁹ of the Section 106 Agreement with all references to the provision of on-site affordable housing omitted but an overage clause and relevant definitions included. As I have found that the scheme would be unviable at present with the inclusion of any affordable housing, I propose to amend the planning obligation as sought. However, I consider that the inclusion of an overage clause would be reasonable in this case to enable the funding of affordable housing should market conditions change in the intervening period.
31. The appeal is allowed and the planning obligation, dated 29 November 2013, made between Broxtowe Borough Council and Mary Holmes and Philip Michael Wrigley and Mark Finley Mitchell and Langham Park Developments and Nottinghamshire County Council and Clydesdale Bank PLC trading as Yorkshire Bank is modified as set out in the Schedule of Modifications below for a period of 3 years from the date of this Decision.

Karen L Baker

INSPECTOR

¹⁷ Document 15

¹⁸ Document 12

¹⁹ Document 11

APPEARANCES

FOR THE APPELLANTS:

Mr Simon Corp BSc(Hons)	Director, S106 Affordable Housing Limited
Mr Tim Woodman BA(Hons) PGDipSURV	Surveyor, Rund Partnership Limited
Mr Fin Mitchell BSc(Hons) MRICS	Langham Park Developments Limited

FOR THE LOCAL PLANNING AUTHORITY:

Mrs Emma Palmer-Barnes BA MA MRTPI	Senior Planning Officer, Development Control
Mr David Newham MRICS Registered Valuer	Sector Leader, Liability Team for the North of England and the East Midlands, District Valuer Services (DVS)
Mr Colin Fayers BSc MRICS	Leader for National Specialist Unit, Quantity Surveying Team, DVS

DOCUMENTS SUBMITTED AT THE HEARING

- 1 Response Notes to LA Proof of Evidence, submitted by the appellants
- 2 Policy 8 of the Broxtowe Borough Aligned Core Strategy Part 1 Local Plan, adopted in September 2014, submitted by the Council
- 3 Policy H5 of the Broxtowe Local Plan 2004, adopted in September 2004, submitted by the Council
- 4 Responses to Comments in the DVS Report relating to Abnormal Costs, submitted by the appellants
- 5 Extract from the Noise Mitigation Scheme to Discharge Condition 10, prepared by Acoustic Air Limited, submitted by the Council
- 6 BCIS rate per sqm gross internal floor area for the building cost including preliminaries, last updated on 27 June 2015 at 12:20, rebased to 2Q 2015 and Broxtowe, submitted by the Council
- 7 BCIS rate per sqm gross internal floor area for the building cost including preliminaries, last updated on 27 June 2015 at 12:20, rebased to 3Q 2014 and Broxtowe, submitted by the Council
- 8 Pre-Start and First Occupation Programme, submitted by the appellants

PLAN SUBMITTED AT THE HEARING

- A1/1 Site Layout (Drawing No. 28015-APP-01 Rev. M), submitted by the appellants

DOCUMENTS SUBMITTED FOLLOWING THE CLOSE OF THE HEARING

- 9 Additional Information on Build Costs, prepared by the DVS, dated 9 July 2015, submitted by the Council
- 10 Sales evidence of 4 bedroom detached houses built since 2000 in postcode area NG16 that have achieved in excess of £250,000, submitted by the Council

- 11 Amended Planning Obligation – Zero Affordable Housing, submitted by the Council
- 12 Wording for Amended Planning Obligation Scenarios, submitted by the Council
- 13 Scenario 1 HCA DAT, (Build Costs £909psqm, DVS' Sales Values, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the Council
- 14 Scenario 2 HCA DAT, (Build Costs £909psqm, appellants' Sales Values for Croft and Orton House Types, DVS' Sales Values for Tilton House Types, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the Council
- 15 Scenario 3 HCA DAT, (Build Costs £999psqm, DVS' Sales Values, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the Council
- 16 Scenario 4 HCA DAT, (Build Costs £874psqm, DVS' Sales Values, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the Council
- 17 Scenario 5 HCA DAT, (Build Costs £874psqm, appellants' Sales Values for Croft and Orton House Types, DVS' Sales Values for Tilton House Types, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the Council
- 18 Scenario 6 HCA DAT, (Build Costs £999psqm, appellants' Sales Values for the Tilton House Types, DVS' Sales Values for the Croft and Orton House Types, 5% Building Contingencies and £1,230,535 Abnormal Costs), dated 15 July 2015, submitted by the Council
- 19 Updated Scenario 2 HCA DAT, (Build Costs £909psqm, appellants' Sales Values for Croft and Orton House Types, DVS' Sales Values for Tilton House Types, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the appellants
- 20 Updated Scenario 3 HCA DAT, (Build Costs £999psqm, appellants' Sales Values, 5% Building Contingencies and £1,230,535 Abnormal Costs), dated 15 July 2015, submitted by the appellants
- 21 Updated Scenario 5 HCA DAT, (Build Costs £874psqm, appellants' Sales Values for Croft and Orton House Types, DVS' Sales Values for Tilton House Types, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 15 July 2015, submitted by the appellants
- 22 Scenario 6 HCA DAT, (Build Costs £1,008psqm, appellants' Sales Values, 5% Building Contingencies and £1,230,535 Abnormal Costs), dated 15 July 2015, submitted by the appellants
- 23 Scenario 7 HCA DAT, (Build Costs £1,008psqm, , DVS' Sales Values, 2% Building Contingencies and £1,210,535 Abnormal Costs), dated 15 July 2015, submitted by the appellants
- 24 Responses to Additional Information on Build Costs, prepared by Anderson Bourne and Rund Partnership Limited, submitted by the appellants
- 25 BCIS rate per sqm gross internal floor area for the building cost including preliminaries, last updated 11 July 2015 at 12:20, rebased to Broxtowe, submitted by the appellants
- 26 Costs Application, submitted by the Council
- 27 Response to the Costs Application, submitted by the appellants
- 28 Corrected Scenario 2 HCA DAT, (Build Costs £909psqm, appellants' Sales Values, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 21 July 2015, submitted by the Council
- 29 Corrected Scenario 3 HCA DAT, (Build Costs £999psqm, DVS' Sales

- 30 Values, 5% Building Contingencies and £1,230,535 Abnormal Costs), dated 21 July 2015, submitted by the Council
- Corrected Scenario 5 HCA DAT, (Build Costs £874psqm, appellants' Sales Values, 2% Building Contingencies and £1,210,560 Abnormal Costs), dated 21 July 2015, submitted by the Council

Richborough Estates

Schedule of Modifications to the planning obligation dated 29 November 2013

INTERPRETATION

Delete definitions of:

Affordable Housing Units

Open Market Dwellings

Protected Tenant

Social Rented Units

Amend definitions to read as follows of:

Affordable Housing: has the meaning given to it in Annex 2 of the "National Planning Policy Framework March 2012" published by the Department for Communities and Local Government or any amendment or supplemental guidance issued in respect thereof but shall be restricted to Shared Ownership Units and/or Affordable Rented Housing provided to eligible households whose needs are not met by the market.

Dwellings: Any residential unit or residential units (as the context requires) constructed on the Property in accordance with the Planning Permission and "Dwelling" shall be construed accordingly.

Occupy: the beneficial occupation of the Dwellings permitted by the Planning Permission but not including occupation by personnel engaged in construction fitting out or decoration or occupation for marketing or display or occupation in relation to security operations and "Occupation" shall be construed accordingly.

Insert the definitions of:

Deferred Affordable Housing Contribution: 25% of any increase in the net profit in accordance with the Viability Review to be used by the Borough Council towards the construction provision or delivery of new Affordable Housing in the Borough of up to a maximum value of £1,305,000.

Force Majeure: An event beyond the reasonable control of the Developer (including its sub-contractors/contractors and agents) which is unrelated to its default or negligence including acts of God, war, terrorist activity, rebellion, local or national emergency, riots, fire or flood and which adversely affects its ability to Practically Complete the Development within the timescales provided but which Force Majeure events will not otherwise exempt the Developer from complying with the terms of this Deed.

Viability Review: means a Homes and Community Agency Development Appraisal Tool (or similar to be first agreed with the Borough Council) financial appraisal to be undertaken by the Developer and submitted to the Borough Council pursuant to Schedule 1 paragraph 6 assessing the viability of the Development to deliver an Affordable Housing Contribution.

Schedule 1 Covenants to the Borough Council

Paragraph 3 Affordable Housing

Delete the whole paragraph (sub paragraphs 3.1 to 3.3 inclusive)

Paragraph 6 Viability Review

Insert a new Paragraph 6 Viability Review (sub paragraphs 6.1 to 6.5 inclusive) as follows:

- 6.1 The Developer shall submit to the Council a Viability Review following practical completion of the 50th dwelling and the Developer shall not further commence or cause further commencement of the Development as the case may be until a Viability Review has been submitted and the Council has confirmed receipt of the Viability Review in writing and the outcome of the Viability Review is agreed by the Parties or determined by the Specialist.
- 6.2 Subject to Force Majeure the Viability Review in respect of the Development shall expire after a period of 12 months from the date of approval of the Viability Review by the Borough Council.
- 6.3 If a Viability Review expires pursuant to paragraph 6.2 above then unless agreed otherwise by the Borough Council in writing the Developers shall within one (1) calendar month and/or prior to commencement or recommencement of any Development submit to the Borough Council an up to date Viability Review in respect of the Development, whereupon the provisions and covenants on behalf of the Developer and the Borough Council in this paragraph 6 and Schedule 1 shall apply to any subsequent Viability Reviews.
- 6.4 In the event that the Viability Review is determined by the parties or in the absence of an agreement between the parties by the Specialist and results in the Deferred Affordable Housing Contribution falling due the Developer shall on or prior to commencement or recommencement of the Development pay the Deferred Affordable Housing Contribution.
- 6.5 For the purposes of disputes under Schedule 3 (paragraphs d to f) only the Specialist shall be:
 - 6.5.1 an independent chartered surveyor agreed by the parties or in the absence of agreement appointed by the President of RICS, and
 - 6.5.2 who is qualified to act as an expert in relation to the dispute having not less than ten years' professional experience in relation to the viability testing of developments including the HCA DAT appraisal software programme and similar financial appraisal models in developments similar in nature to the Development, shall be appointed and act in accordance with the provisions of Schedule 3 of this Deed.

Schedule 3 Covenants by the Borough Council

Insert new paragraphs (d) to (g) inclusive as follows:

- (d) Within 20 Working Days of receipt of the Viability Review in accordance with paragraph 6 of Schedule 1 use reasonable endeavours to either

approve the submitted Viability Review, not agree the Viability Review or make a request for further information; and

- (e) Within 10 Working Days of receipt of any further information received in accordance with paragraph 6.1 of Schedule 1 in respect of the submitted Viability Review, either accept the further information and approve the Viability Review or reject the Viability Review.
- (f) In the event that the Borough Council does not approve the Viability Review by the date that is 40 Working Days from the initial receipt of the Viability Review or if the Borough Council rejects the Viability Review in accordance with the provisions of paragraph (e) above, either party may refer the matter to be determined by the Specialist pursuant to paragraph 6.
- (g) The Borough Council shall be entitled to instruct a surveyor at the Developer's expense to act on behalf of the Borough Council to review, assess, negotiate and advise in relation to any Viability Review submitted.

Richborough Estates