The Planning Inspectorate

Appeal Decision

Hearing held on 21 October 2015
Site visit made on 20 October 2015

by R P E Mellor BSc DipTRP DipDesBEnv DMS MRICS MRTPI

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

Decision date: 21 December 2015

Appeal Ref: APP/U1105/S/15/3129438
Land at Dukes Way, Axminster, Devon EX13 5FN

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be modified.
- The appeal is made by Betterment Properties (Weymouth) Ltd against East Devon District Council.
- The development to which the planning obligation relates is a partially completed 3 phase development totalling 122 dwellings.
- The planning obligations, dated 17 July 2009 and 9 March 2011 (with variations on 17 November 2009, 20 October 2011 and 1 August 2012) were made between East Devon District Council and Betterment Properties (Weymouth) Ltd.
- The application Ref 14/2304/V106 was registered by the Council on 19 September 2014.
- The application sought to have the planning obligation modified to reduce the overall requirement for 48 affordable dwellings (40%) to the 20 dwellings that have already been provided (16%).

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 9 March 2011, made between Betterment Properties (Weymouth) Ltd and East Devon District Council, shall have effect subject to the following modifications:

   a) Clause 1.4 shall be deleted and replaced with: *'The owner has agreed to provide affordable housing as part of the development'.*

   b) The definition of affordable dwelling shall be amended so that reference to *'Twenty Eight'* in the first line shall be replaced with *'Six'*.

   c) Clause 4.1.1 shall be amended so that:

      (i) In the first line *'twenty eight'* shall be replaced with the word *'the'*

      (ii) In the third line *'seventeen'* shall be replaced with *'five'*.

Procedural Matters

2. Phases 1 and 3 of the development have already been completed to include the provision of 11 affordable dwellings on Phase 3 and 9 affordable dwellings on Phase 1. Phase 2 is under construction.

3. The Council and the Appellant agreed at the hearing that the appropriate number of affordable dwellings on the whole development should be 26 of which 20 have already been provided. Consequently it would only be necessary to vary the primary S106 agreement dated 9 March 2011 by reducing the number of affordable dwellings in the final Phase (Phase 2) from 28 to 6 and by making consequential changes to the number of dwellings in the defined tenure mix. Whilst recent Government policy changes could affect the tenure mix, changes have not been sought in the subject application and would need a further application should the Appellant wish to pursue them.

4. The Council did issue a decision notice on the application on 27 October 2014. That was after the expiry of the 28 day period for a decision and that decision did not describe what variation to the number of affordable dwellings was agreed. Neither did it refer to the overage clause which the Council seeks to make a condition of the variation and to which the Appellant does not agree. The appeal is therefore being determined on the basis that there was a failure to determine the application.

5. It became apparent at the hearing that the freehold of part of the uncompleted site remains in the ownership of the Homes and Communities Agency (HCA) which was not a party to any of the S106 agreements and variations thereto. However, this is not an issue which I am able to address, as s106BA(6)(c) precludes me from imposing obligations on parties other than the appellant.

Main Issue

6. The main issues are considered to be:

   (a) whether the variation in the number of affordable dwellings is necessary to make the development viable;

   (b) whether the reduction in affordable housing below the target levels in the adopted or emerging development plan, and uncertainty as to actual development costs and values, justifies the inclusion of an overage clause in the agreement to recover to the Council part of any excess profit which would then be spent on off-site provision of affordable housing; and

   (c) whether such an overage clause would be effective in the circumstances of this development.

Policy Context

7. The relevant adopted development plan comprises the saved policies of the East Devon Local Plan 1995-2011 (2006). Policy H4 seeks 40% affordable housing provision as provided for in the original S106 planning obligations including the previous variations.

8. The emerging East Devon Local Plan is at an advanced stage of the Examination and is an important material consideration. At the date of the hearing the Inspector's Report was expected in December 2015. Strategy 34 of that emerging plan was last amended in March 2015. The amendments were subject to public consultation and were considered at an examination hearing in July 2015. The further proposed modifications to the Plan are currently the subject of public consultation and do not include any changes to Strategy 34. It is therefore likely to be included in the final plan without

further amendment of the March 2015 wording. The relevant provisions are that it seeks a target of only 25% affordable housing provision in Axminster. However it also provides that, where provision below that target is agreed on viability grounds, an overage clause will be sought in respect of future profits and affordable housing provision.

9. The Government has produced guidance entitled: *'Section 106 affordable housing requirements. Review and appeal'*. Amongst other things, it provides that viability evidence should be submitted to support applications and appeals and that the local planning authority may also submit evidence. Paragraph 10 provides that: *'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 all 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'.*

10. Annex A provides guidance on potentially relevant key variables when assessing viability. In relation to Land Value, it provides that: *'The agreed land value in the original appraisal should be used, unless the site has been acquired since and evidence is provided of purchase price. If there was not an original appraisal the market value at the date of the original permission should be used'*. It continues that any purchase price used should be benchmarked against market values and sale prices of comparable sites, disregarding any significant overbid and having regard to development plan policies and other material considerations whilst providing competitive returns to a willing landowner and developer.

11. The National Planning Policy Framework and the supporting Planning Practice Guidance are also material.

Reasons

Viability

12. In this case there was no original viability appraisal. Neither has any specific evidence been provided of market values and sale prices of comparable sites. All assessments of land value by the advisors to the Appellant and the Council have been calculated on a residual land value basis. That has produced a variety of different results which are not agreed between the parties.

13. In support of the S106BA application the Appellant submitted a viability report by Humberts Commercial (Yeovil) Ltd dated 11 April 2014. It sought to demonstrate that the development would not be viable unless affordable housing provision were to be limited to the 20 dwellings that had already been provided on phases 1 and 3.

14. Notable components of this report were that 48 affordable dwellings would have resulted in a developer's profit of 17.25% of Gross Development Value (for the market and affordable dwellings). That percentage profit was a 'blend' of a higher level of profit for the market housing and a lower level for the affordable housing. The report concluded that there would be a negative residual land value of -£84,332. A second appraisal found that, were the affordable housing provision reduced to 20 dwellings (as first requested) with the same percentage developer's profit, the return to the developer would have risen by about £0.3m. There would have been a positive residual land value of

£1,121,548. With stamp duty and fees the total land acquisition costs would have been £1,183,233.

15. The Council has been advised by the District Valuer Service (DVS) who also prepared 2 viability appraisals. In the first appraisal with 48 affordable dwellings, the DVS calculated a developer's profit of 17% of the GDV of the market dwellings and 6% of the GDV of the affordable dwellings. The outcome was a figure for the developer's profit about £0.5m lower than the Appellant's figure for the same scheme. There would be a higher and positive land value of +£55,271. The DVS agreed that this would not be a competitive return to the landowner and that it would not be a viable development.

16. The DVS also prepared a second appraisal with 26 affordable dwellings which they recommended was the maximum provision that the development could support and be viable. That would result in a developer's profit on the same (17% & 6%) basis. It would approximate to that in the Appellant's 48 dwelling appraisal but would be less than the figure in the Appellant's 20 dwelling scheme. The DVS assessed the residual land value at £717,713; about £0.4m less than in the Appellant's 20 dwelling scheme. The DVS considers that would be a competitive return.

17. The Appellant company does not agree with the individual components of the DVS appraisals. In particular they do not agree the residual land value. However in this case the developer has already acquired an interest in all of the land. The HCA has retained the freehold of much of the remaining site of Phase 2 but the Appellant advises that no more money is due to be paid to the HCA unless sale values rise far above the anticipated levels in which case an overage clause applies. That is considered to be unlikely. As the Appellant company already controls the site and can only realise the developer's profit by carrying out the development they can be regarded as a willing landowner.

18. Consideration was given at the hearing as to whether the original price paid for the land by the Appellant would assist in establishing its value as advised in the Government guidance. However the site has been acquired over several years during changing market conditions. The Appellant estimates that the overall cost has been some £2m, in which case it significantly exceeds the residual land value based on 2014 values in any of the 4 submitted appraisals. That is of little assistance in establishing a competitive return and no appraisals have been carried out on this basis.

19. Whilst the Appellant company does not agree the components of the DVS appraisals, the Appellant has submitted a draft Statement of Common Ground in which they agree to a requirement to provide 26 affordable dwellings. That includes the 20 dwellings already provided. Only 6 more affordable dwellings would be needed within the final Phase (Phase 2). The Council confirmed that it also agrees this figure.

20. At the hearing the Appellant explained that this agreement was made on the grounds of expediency and that the reduced gross development value by comparison with its preferred 20 affordable dwelling scheme would result in a lower developer's profit and/or land value. That is nevertheless acceptable to the Appellant. As the Appellant accepts a requirement of 26 affordable dwellings I consider that they can be regarded as a willing landowner and a willing developer, subject to the resolution of the overage requirement issue.

21. Were an overage clause to be required, the Appellant accepted at the hearing that, for expediency, the DVS figures for land value and developer's profit would be an acceptable base level when considering whether any additional profit had been created.

Overage Clause Justification

22. The evidence supporting the emerging Local Plan has reportedly demonstrated that, for reasons of viability, the percentage of affordable housing in Axminster should be reduced from 40% in the adopted Local Plan to a 25% target in the emerging Local Plan. That lower 25% level is already being sought in new housing developments. It would most likely be sought on the appeal site were a new application to be made. 25% of all dwellings on the appeal site would amount to 30.5 dwellings (rounded up to 31). That remains above the agreed figure of 26 dwellings. The likely main reason why the site could not support the full 25% provision is that it is a steeply sloping site which has required considerable cut and fill to create level development platforms, resulting in a high level of abnormal costs. Nevertheless, in the circumstances where affordable provision is below the 25% target, Strategy 34 in the emerging Plan provides that the Council would seek an overage clause.

23. My attention has been drawn to an appeal decision at Poole dated 28 April 2015[1] where the Inspector commented at paragraph 11 that an overage clause would be contrary to Government guidance. That guidance emphasises the need for viability evidence to be based on current costs and values. The viability appraisals in this case are based on current costs. However there are some circumstances in which Government guidance also allows for consideration of values at different dates. One example above relates to land values. The Planning Practice Guidance also allows for future reviews of viability in phased developments. But that does not apply directly here as the overage clause would not be linked to a future phase.

24. Government policy in the Framework merits greater weight than guidance. Paragraph 205 of the Framework provides amongst other things that where planning obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time. Also with specific relevance to affordable housing, paragraph 50 provides amongst other things that affordable housing policies should be set to meet the identified need and should be sufficiently flexible to take account of changing market conditions over time.

25. It would not be appropriate to seek to forecast future changes in development costs or development values when assessing viability. But an overage clause would be a flexible mechanism that would allow for changing market conditions. It also seems likely that provision for such clauses will soon be included in the adopted development plan when its provisions would attract considerable weight. The Framework provides at paragraph 216 that such emerging plans attract increasing weight as they progress towards adoption and if they are consistent with policy in the Framework. By contrast the Poole decision does not record that there was any similar provision in the relevant development plan. The only support for an overage clause at Poole was in a supplementary planning document that merits less weight than the development plan.

[1] APP/Q1255/S/15/3005876

26. In the present case the Council is seeking an overage clause whereby any excess profit would be shared 50-50 between the developer and the Council. Its draft S106 agreement suggested that this sum would be capped at £3m. That would represent the estimated costs of providing another 22 affordable dwellings if the full 40% affordable housing requirement set out in the original agreement were to be met. However that would be unreasonable given that the emerging plan would only require 5 extra dwellings to achieve the emerging policy requirement of 25% provision (31 dwellings in total). The Council therefore agreed at the hearing that the overage contribution should be capped at £675,000. Given the 50-50 split, that maximum would only be achieved if the developer's profit exceeded the figure in the DVS appraisal by at least £1.35m.

27. At the hearing the Council accepted that it would be necessary for the modified S106 agreement to specify that the funds would be spent on the provision of affordable housing off-site in Axminster and that it should also provide for the repayment of any unspent funds after 5 years.

28. Firstly the Appellant objects to the overage clause in principle on the basis that it would increase the burden above that in the original agreement, contrary to Government guidance. However the original agreement required 40% affordable provision on–site. The requested overage clause would cap provision at 25% (partly off-site). Thus the burden would not be increased above the original requirement.

29. Secondly the Appellant objects that an overage clause would impede the financing of the remaining development. In that regard the Appellant has drawn attention to professional guidance from the Royal Institution of Chartered Surveyors that an overage clause may make funding a scheme difficult or unlikely. However here the Appellant has previously agreed an overage clause with the landowner. In any event the clause would not prevent the developer from retaining at least half of the excess profit. It would be capped at a level equivalent to only about one fifth of the forecast profit. It would only be payable once that level of profit had been realised. Construction of the final phase has in any event already commenced. In the circumstances it has not been demonstrated that the clause would prevent the development from being financed and proceeding.

30. It is concluded on this issue that an overage clause would accord with the emerging development plan and in particular with its objectives to achieve a target of 25% affordable housing on developments in Axminster to address identified local needs. It has not been demonstrated that this would make the development unviable.

Overage Clause Effectiveness

31. The Act provides that in the circumstances of this appeal, the variation of the original S106 agreement to reduce affordable provision would only endure for 3 years from the date of decision. At that date the variation would cease to have effect and the obligation would revert to that in the original agreement. As discussed at the hearing the same time limit would apply to the overage clause.

32. The requested overage clause would only come into operation when the last dwelling had been sold. At that time actual figures would be available for all

sales and all the development costs. The use of such figures would then provide the most accurate profit figures. At the hearing there was concern about how any disputes as to the accuracy of the figures would be resolved. However the Council pointed to the dispute resolution mechanism that was written into the original S106 agreement and which would still apply. The Appellant also expressed some concern about the practical difficulties of retrieving all detailed records of expenditure over the long period that this development has been in progress and when it was not anticipated that such records would be needed. However it is likely that reasonably accurate estimates could be used to fill in any gaps in the records.

33. A more difficult practical problem is that in this case the development of the remaining 70 or so dwellings could take up to 3 years to complete given the relatively slow pace of sales. If it appeared that profits were on track to exceed the DVS appraisal estimate there would then be every incentive for the Appellant to slow the pace of development, or at least to delay the sale or long lease of the last dwelling, as the overage clause would cease to have effect after 3 years and could not then be enforced. That would not apply in the case of conventional permanent S106 agreements that are not normally time limited.

34. The Council has drawn my attention to an appeal decision concerning Broxtowe dated 17 August 2015[2]. At paragraph 30 the Inspector did support the inclusion of what was described as an overage clause when allowing the variation of a S106 agreement to remove the affordable housing requirement. In the schedule that is described as a viability review. It would have been required to take place after the practical completion of 50 out of 116 dwellings. But that is not what is proposed by the Council in this case and is not what is sought by the emerging Local Plan. I therefore do not consider the circumstances to be comparable.

35. The Appellant has provided examples of other appeal decisions. In one case in South Buckinghamshire[3] (12 February 2015) the Inspector concluded that a requested overage clause was not supported by the development plan and did not refer to any support in an emerging plan. That does not apply here. The Inspector also concluded that the provision would have contravened Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). However the Council points out that that regulation does not apply to the current appeal proposal.

36. The older Greenwich appeal[4] dated 8 January 2014 concerned a future review mechanism rather than an overage clause. The circumstances were different in that the development was unviable with or without affordable housing provision. Those circumstances also do not apply here.

37. The Charnwood appeal decision dated 18 December 2014[5] included a review mechanism late in the development which the Inspector concluded would have little effect in returning the development to viability, which was its apparent intention. That also differs from the circumstances of this appeal.

[2] APP/J3015/S/15/3019494
[3] APP/N0410/A/14/2228247
[4] APP/E5330/Q/13/2207402
[5] APP/X2410/Q/14/2225175

38. For the above reasons I consider the circumstances of the above appeals to be materially different.

39. Nevertheless whilst an overage clause may be suitable in some circumstances, in the particular circumstances of this appeal it is concluded that the overage clause would be ineffective in achieving its aims because it could be easily avoided by delaying the completion and sale of the housing. It therefore should not be imposed.

Conclusion

40. For the above reasons it is concluded in the interests of viability that the requirement in the S106 agreement of 9 March 2011 to provide 28 affordable dwellings in Phase 2 (as part of the overall original requirement for 48 affordable dwellings) should be modified to a requirement to provide only 6 affordable dwellings in Phase 2, as agreed between the parties, with associated amendments to the number of dwellings in each tenure type as also agreed.

41. The requested addition of an overage clause is not supported as it would not be effective in achieving additional affordable housing. It would be likely to slow the completion of the development contrary to Government aims to boost the supply of housing.

R P E Mellor

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr N L Jones BSc FRICS ACIArb	Valuer – Chesters Commercial
Mr J Loosemore FCCA	Betterment Properties (Weymouth) Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Mr C McCullough BA(Hons) MRTPI	Senior Planning Officer, East Devon District Council
Ms S Shaw Llb (Hons)	Planning Barrister, Legal Team, East Devon District Council

DOCUMENTS SUBMITTED AT THE HEARING

1. Poole Appeal Decision
2. East Devon Local Plan 1995-2011 Policy H4
3. Emerging East Devon Local Plan Strategy 34 (March 2015)
4. Minutes of Development Management Committee 16 July 2013
5. Extract from RICS Professional Guidance – *Financial Viability in Planning 2012*