The Planning Inspectorate

Appeal Decision

Hearing held on 26 November 2015 and 13 January 2016
Site visit made on 26 November 2015

by Phillip J G Ware BSc DipTP MRTPI

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

Decision date: 23 February 2016

Appeal Ref: APP/X5210/S/15/3133785
22 Tower Street. London WC2H 9TW

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine an application to modify a planning obligation.
- The appeal is made by English Rose Estates (Tower Street) Limited against the Council of the London Borough of Camden.
- The development to which the Planning Obligation relates is the change of use of and conversion of the building from offices to 22 residential units, with alterations and a new two storey structure.
- The Planning Obligation, dated 26 November 2014, was made between the Mayor and Burgesses of the London Borough of Camden and English Rose Estates (Tower Street) Limited and Lasalle Investment Limited.
- The application Ref 2015/3425/P is dated 24 April 2015.
- The application sought to have the Planning Obligation modified by a payment of £250,000 in lieu towards off-site affordable housing in place of the provision in the Obligation of four on-site units of affordable housing.

Decision

1. The appeal is dismissed. The Planning Obligation, dated 26 November 2014, made between the Mayor and Burgesses of the London Borough of Camden and English Rose Estates (Tower Street) Limited and Lasalle Investment Limited shall continue to have effect.

Procedural matter

2. During the afternoon before the first session of the Hearing, the appellants provided additional information (Doc 2 below). This related to a number of detailed matters including the treatment of purchaser's costs, residential sales growth, and cost inflation. I received this electronically on the evening before the Hearing. After a short discussion at the start of the Hearing, I stated that insufficient time had been provided to the Council (and myself) to assimilate this evidence, and the Hearing was adjourned.

Application for costs

3. At the Hearing an application for partial costs on two separate grounds was made by the Council of the London Borough of Camden against English Rose Estates (Tower Street) Limited. This application is the subject of a separate Decision.

Main issue

4. Where an application is made for the modification or discharge of an affordable housing requirement in a planning obligation, section 106BA (3) of the 1990 Act provides that, if the requirement means that the development is not economically viable, the application must be dealt with so that it becomes viable. In any other case, the affordable housing requirement must continue to have effect without modification or replacement. Section 106BC(6) provides that the same provisions are to apply in respect of an appeal.

5. It follows from the above that the issues in the present appeal are:

   - whether the proposed development is economically viable, if it remains subject to the affordable housing element of the Planning Obligation as it currently exists; and
   - if not, what degree of modification to the Planning Obligation is needed for the development to be made viable.

Reasons

Background

6. The appeal site is located within the Seven Dials Conservation Area and is occupied by a Grade II Listed Building. The building has undergone significant internal changes over the years, particularly in relation to its most recent use as offices.

7. Planning permission and Listed Building consent were granted in November 2014 for the conversion of the property to 22 residential units, along with internal and external alterations. The associated Planning Obligation included, amongst other matters, the provision of 4 affordable housing units within the development. This is the Obligation which is the subject of this appeal.

8. More recently planning and Listed Building applications have been submitted to vary the mix of units within the scheme. This application has yet to be determined by the Council. The only relevance of this later proposal is that the appellant's viability assessment (April 2015) was based on an appraisal of this revised scheme rather than the currently approved development. However the Statement of Common Ground notes that the difference in viability terms is negligible and I have no reason to disagree.

9. The current appeal proposes to revise the Obligation to provide a Payment In Lieu (PIL) of £250,000 in place of the four on-site units. The Council's position is that, if a PIL were to be accepted, the scheme could provide £1,415,320.

10. The policy context is largely found in the *Core Strategy and Development Policies* (CS) (2010). Policy CS6 provides that the Council will seek to negotiate affordable housing contributions based on the maximum reasonable amount of affordable housing in the specific circumstances of the site. More detail is given by policy DP3, which states that it is expected that the affordable housing contribution will be made on-site, but where this cannot be practically achieved, off-site affordable housing may be accepted or, exceptionally, a PIL might be acceptable. These policies echo the approach in

the London Plan, which provides that negotiations on sites should take account of individual circumstances, including viability.

11. The justification for policy DP3 gives more detail of this 'cascade' approach to the provision of affordable housing – explaining the preference for on-site provision, then off-site provision, or exceptionally a PIL. This is a matter which I return to below, after considering whether the development has stalled and considering the evidence as to the viability of the scheme as it stands.

Has the development stalled?

12. The appellant has emphasised that S106BA/BC of the 1990 Act do not require that the development must have stalled in order for the provisions to come into effect. This is supported by Counsel's opinion. That position is correct, as there is no specific provision in the Act to that effect. However, even leaving aside the Guidance (to which I return below) it must add weight to a proposal if it is possible to demonstrate that a scheme is stalled and producing no economic benefit.

13. The Act deals with situations where a development is not economically viable due to the affordable housing requirement, and provides that an application must be dealt with so that the development becomes economically viable. Self-evidently, the purpose of the relevant sections of the Act is to ensure that once planning permission has been granted, developments are able to proceed to completion.

14. The approach to applications under S106B is clearly set out in the DCLG document '*Section 106 affordable housing requirements. Review and appeal*.' (The Guidance) (2013). Both parties agreed that this document should be accorded significant weight. The approach in the Guidance is to review agreements which relate to 'stalled' schemes, where economically unviable affordable housing requirements result in no development, no regeneration and no community benefit.

15. In this case planning permission was granted and the Obligation was signed in November 2014. The application for the variation of the Obligation was submitted in April 2015. The Council has stated that this short time period was insufficient for the appellant to have thoroughly explored the position, and noted that even before the Obligation was signed, the applicant was aware of the position regarding the difficulties of on-site provision.

16. Although I can appreciate the Council's concerns, I have to deal with the position at the present time. The appellant has explained a number of issues affecting on-site provision related to the design of the scheme and the lack of interest from Registered Providers (RP). The design matters include difficulty with shared access and management arrangements but, even if these could be partly addressed by layout changes, the lack of interest from RPs is a clear reason why the development has not moved ahead. Regardless of the stage at which this became apparent to the appellant, in the absence of a Council list of suggested RPs or any positive suggestions from the authority as to how the approved scheme might progress, it is clear that the development has very little chance of moving forward, and has therefore stalled. This is even in the absence of any viability considerations, to which I now turn.

Whether the development is viable with the existing obligation

17. The Guidance provides that (as there is no original appraisal) the market value at the date of the original permission should be used, disregarding any significant overbid. The purchase price should be benchmarked against market values and sale prices of comparable sites in the locality. The market value should have regard to the development plan and all other material considerations, whilst providing competitive returns to a willing landowner and developer to enable the scheme to be deliverable.

18. The provisions of S106BC are clearly designed to unlock stalled developments, not to underpin developers' decisions to overbid for sites. In this case, the Statement of Common Ground identifies that, although there are some other relatively minor differences between the parties, the main area of disagreement is the Benchmark Land Value. The appellant has started their analysis with the purchase price (£19m) and considered this against other transactions to test whether there was any overbid. The Council's position is that a reasonable purchaser would not have paid that amount and states that comparable market evidence values the site at £14.6m – the Council's position is that the purchase price was an overbid.

19. The Guidance sets out the way in which the viability of a development should be assessed, and the appellant's evidence (largely set out in their April 2015 assessment) closely follows this approach. The Council's evidence, though carefully calculated, relies more on Land Registry values, which tend to have a built-in delay due to registration, and takes a more generalised approach supported by market transactions.

20. There is a considerable difference between the parties as to the relevance of the comparables put forward by the appellant, and certainly some of these have obvious differences from the approved scheme. It is almost inevitable that comparables, as put forward by both parties, will not match the characteristics of the approved development. This is especially the case in an inner urban location involving a complex development of a Listed Building. However the comparison method can be a useful check and there is nothing before me which leads to the conclusion that there is any "significant overbid" (to use the language of the Guidance) which should be disregarded.

21. For these reasons, I can come to no other conclusion than that, as long as it remains subject to the present requirement for four on-site affordable dwellings, the proposed development cannot realistically be considered viable. I now turn to the modification which might be needed to remedy this situation.

Modification needed to make the development viable

22. The Guidance notes that, when dealing with this type of appeal, a viable affordable housing provision should be proposed, which should deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision. The level of off-site affordable housing contributions may also be considered, as may any other aspect of the affordable housing requirement.

23. This accords with the policy in the National Planning Policy Framework which provides that where affordable housing is needed (which is not contested in

this case) policies should meet this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified. In this case CS policy DP3 (which was accepted by both parties as being relevant) sets out what I have described above as a 'cascade approach'. By this I mean that the affordable contribution is expected to be met on site and, where this cannot be practically be achieved, the next consideration is off-site affordable housing. Only where exceptional circumstances are demonstrated will a PIL be accepted.

24. I have accepted above that on-site provision in not appropriate in this case, for reasons which closely align with the justification for CS policy DP3. Turning to the possibility of off-site provision, the appellant's position is that this is an area of high residential value which cannot meet the demands of RPs. It was also noted that the appellant does not own any suitable residential properties in the area which could be used for affordable housing.

25. The reasoned justification to policy DP3 gives examples of situations where a PIL may exceptionally be accepted. These are where no suitable affordable housing sites are likely to come forward in the short or medium term or where the appropriate affordable housing contribution is too small to form a stand-alone development and there are no other opportunities to link it to an alternative development nearby.

26. It is clear that the adopted development plan requires a robust investigation of the provision of off-site affordable housing, which could have different viability implications depending on the nature of the site or the development being considered. The appellant's position, set out almost in full above, falls considerably short of being a robust appraisal of the possibility of off-site provision. Amongst other deficiencies, it appears that no contact was made with the Council's planning or affordable housing officers to explore the potential of providing off-site units elsewhere in the area.

27. As indicated above, I prefer the appellant's evidence related to the viability appraisal. Therefore, were a PIL to represent the appropriate solution to the viability issue, I consider that the appellant's calculation of the maximum PIL which the scheme could support is more robust – although I am conscious that the return on cost is well below the target benchmark. However, in accordance with development plan policy, the PIL stage has not been reached. The evidence fails to demonstrate that the maximum level of affordable housing consistent with viability has been offered, and the exceptional circumstances where, in policy terms, a PIL would be accepted have not been demonstrated.

28. In the absence of any other evidence, I come to the conclusion that the appellant's proposed solution of offering a PIL in place of the agreed on-site provision is not necessarily the one most likely to succeed in producing a commercially viable development and deliver the maximum level of affordable housing consistent with viability. Nor does it accord with the policies in national and local policy.

Other matters

29. Councillor Vincent gave some background to the grant of permission for the development – which was apparently a finely balanced decision – and stated that she felt badly let down by the appellant's decision to seek to amend the

Obligation so soon after its completion. However there is nothing in legislation, policy or guidance which prevents this approach, and I cannot take this argument into account. She also explained the need for affordable housing in the area.

30. Before the second session of the Hearing I drew attention to the letter, dated 9 November 2015, from the Minister of State for Housing and Planning regarding the impact of social rent changes on the delivery of affordable housing. This was in the light of the changes in the level of social rent announced in the July 2015 Budget. The appellant was of the view that this added no new considerations, but rather that it reinforced existing policy, whilst the Council noted that the letter stressed the need for constructive engagement between the parties. I have taken this letter into account in the planning balance.

Conclusion

31. For the reasons given above I conclude that the appeal should be dismissed.

P. J. G. Ware

Inspector

APPEARANCES

FOR THE APPELLANT:

Ms H Emmerson	Of Counsel, instructed by English Rose Estates
Mr R Fourt	Gerald Eve
Mr A Crow	Gerald Eve
Mr J Gunning	CBRE
Mr O Van Den Berg	The appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr J McClue	Planning officer
Mr Jones	BPS Chartered Surveyors
Mr N Cleary	Affordable housing officer
Mr W Bartlett	Council's solicitor

INTERESTED PERSONS:

Councillor S Vincent

DOCUMENTS

1	List of persons present at the Hearing
2	Appellant's Briefing Note 25 November 2015
3	Council's response (11 December 2015) to Doc 2
4	Draft amendments to S106 obligation and the parties comments thereon
5	Statement of Common Ground
6	BPS Development Appraisal (12 January 2016)