The Planning Inspectorate

Appeal Decision

Inquiry held on 9-12 November 2021

Site visits made on 10 September and 8 November 2021

by Tom Gilbert-Wooldridge MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 7th January 2022

Appeal Ref: APP/X5210/Q/21/3276844
100 Avenue Road, London NW3 3HF

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by Essential Living (Swiss Cottage) Ltd against the decision of the London Borough of Camden.
- The development to which the planning obligation relates is the demolition of the existing building and redevelopment with a 24 storey building and a part 7 part 5 storey building comprising a total of 184 residential units (class C3) and up to 1,041sqm of flexible retail/financial or professional or café/restaurant floorspace (classes A1/A2/A3) inclusive of part sui generis floorspace or potential new London Underground station access fronting Avenue Road and up to 1,350sqm for community use (Class D1) with associated works including enlargement of the existing basement level to contain disabled car parking spaces and cycle parking, landscaping and access improvements.
- The planning obligation, dated 24 August 2015, was made between the London Borough of Camden, Essential Living (Swiss Cottage) Ltd, and Mount Street Loan Solutions LLP.
- The application Ref 2021/0025/P, dated 4 January 2021, was refused by notice dated 23 March 2021.
- The application sought to have the planning obligation modified as follows: amend clause 3.2 (and associated definitions) to remove the requirement to provide 28 Affordable Rent units, 8 Intermediate Housing units and 18 Discounted Market Rent units (for a minimum of 15 years post completion), to be replaced with 18 Discounted Market Rent units in perpetuity.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. My pre-inquiry site visits were unaccompanied and allowed familiarisation with the site and its surroundings. As a result of these visits, and due to the nature of the appeal, it was agreed by the main parties that there was no need for me to return to the site during or after the inquiry.

3. A completed and executed deed of variation (DoV) was finalised by the appellant and the London Borough of Camden (the Council) on 24 November 2021. The DoV seeks to amend the extant Section 106 (S106) agreement. It contains Part A and Part B modifications. Those in Part A are disputed by the main parties and form the basis of this appeal. They would only take effect if the appeal is allowed. Those in Part B are not disputed and would allow for certain amendments to be made to the S106 agreement that would take effect from the date of this decision regardless of the outcome. In summary, these amendments would rationalise the provisions relating to the Disposal Viability

Assessment regarding the effect of any market sales and the Post Completion Viability Review for any deferred affordable housing contributions.

4. There was some debate about whether the proposed modifications that are subject to this appeal should have been sought via an application to vary the original planning permission under Section 73 of the Town and Country Planning Act 1990 (the 1990 Act), or via an entirely new planning application, rather than via a S106A application of the 1990 Act. It was also suggested that modifications to affordable housing obligations on viability grounds was only possible under the now-repealed S106BA-C of the 1990 Act. However, the Council validated and determined the S106A application and it has not been argued that this appeal is invalid under S106B of the 1990 Act. Therefore, I have assessed the appeal against the relevant provisions in S106A and S106B.

5. Following the close of the inquiry, I accepted late correspondence from an interested party who had been unable to participate fully due to technical difficulties in accessing the event remotely. The main parties were afforded the opportunity to comment on this correspondence.

Background and Main Issues

6. The appeal site is located at the junction of Avenue Road and Finchley Road next to Swiss Cottage underground station. Belsize Conservation Area is situated to the east behind Swiss Cottage Open Space. The site previously contained a building used for offices and retail/café.

7. Planning permission was granted at appeal by the Secretary of State (SoS) on 18 February 2016 for the development described in the third bullet point above. The permission is accompanied by the extant S106 agreement dated 24 August 2015 which contains a number of planning obligations. This includes clause 3.2 which relates to the provision of affordable housing in the form of 28 Affordable Rent units, 8 Intermediate Housing units, and 18 Discounted Market Rent (DMR) units (for a minimum of 15 years post completion).

8. The permission has been subject to various non-material amendments and the Council has discharged a number of conditions. The permission has commenced as substantial demolition works and the construction of subterranean elements took place in 2019 and 2020. On-site works have not progressed since mid-2020. In early 2021, the appellant applied to modify clause 3.2 (and associated definitions) of the S106 agreement to remove the above units and replace them with 18 DMR units in perpetuity. The DoV seeks to achieve this modification.

9. S106A(1) states that a planning obligation may not be modified except by agreement between the appropriate authority (in this case the local planning authority) and the person against whom the obligation is enforceable, or in accordance with S106A and S106B.

10. S106A(6) sets out that the authority may determine:

    (a) that the planning obligation shall continue to have effect without modification;

    (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it has effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

11. The Council refused the application on the basis that the original obligation in clause 3.2 serves a useful purpose which would deliver the consented amount and tenures of affordable housing, and that the modification would not serve that purpose equally well because there would be a significant reduction in the amount of affordable housing and a loss of a range of tenures that are considered to be genuinely affordable.

12. Based on the above, the main issues[1] are as follows

(i) whether the planning obligation relating to affordable housing continues to serve a useful purpose;

(ii) if the obligation serves a useful purpose, whether it would serve that purpose equally well if it was modified as proposed; and

(iii) whether the obligation should continue to have effect without modification.

Reasons

Whether the obligation continues to serve a useful purpose

13. The 1990 Act does not provide a definition of the phrase 'useful purpose' in relation to S106A(6). Court judgments[2] have established that useful purpose does not need to be a useful planning purpose or have to be related to the development with which the S106 agreement was entered into. The useful purpose can be a different one from that which led to the S106 agreement in the first place. What matters is whether the obligation continues to serve a useful purpose.

14. The provision of affordable housing was a policy requirement at the time of the SoS decision. The SoS concluded that the obligation in clause 3.2 of the S106 agreement was necessary and fairly and reasonably related to the development having regard to the policy framework and the borough's housing needs.

15. Although the Camden Local Plan 2017 (CLP) and the London Plan 2021 (LP21) have been adopted since the SoS decision was made, the overarching policy requirement remains. CLP Policy H4 seeks 50% affordable housing for developments with 25 dwellings or more. The policy states that the Council will seek to negotiate the maximum reasonable amount of affordable housing taking into account various aspects.

16. LP21 Policy H4 has a strategic target of 50% of all new homes across London to be genuinely affordable with an annual need for circa 43,500 affordable homes across the capital each year. LP21 Policy H5 sets out the threshold approach to major development proposals including the need to ascertain the maximum level of affordable housing.

17. Camden's Strategic Housing Market Assessment identifies the need for 10,200 affordable homes between 2016 and 2031. The CLP target for this period is the

[1] These issues are unchanged from the case management conference but the ordering has been revised following the presentation of evidence at the inquiry
[2] Provided as part of Inquiry Document 6 (ID06)

delivery of 5,300 affordable homes equivalent to 353 homes per year. However, the annual delivery of affordable homes has consistently fallen below this target since at least 2012/13. The median house price in Camden far exceeds the median annual income. There are several thousand people waiting for affordable housing. Current waiting times for social rented housing range from 2 to 9 years depending on house size. There was little dispute between the main parties that Camden has a significant affordable housing need.

18. Therefore, given the policy and local housing context, the planning obligation relating to affordable housing in clause 3.2 of the S106 agreement continues to serve a useful purpose. The main parties are in broad agreement on this position. However, they differ in terms of how that useful purpose is defined.

19. The appellant states that the purpose was, and remains, to deliver policy compliant (i.e. maximum reasonable) affordable housing in line with the relevant policies. The Council in contrast contends that the useful purpose is to deliver the consented amount and tenure mix of affordable housing. The Belsize Society argues that the useful purpose goes beyond the provision of affordable housing and relates to the overall package of planning benefits to mitigate and outweigh the harm that would be caused by the development (including the harm to Belsize Conservation Area).

20. Starting with the appellant's definition, the policy context, both in 2016 and now, seeks to secure as much affordable housing as possible. At the time of the 2016 decision, there was agreement between the Council and appellant that the affordable housing provision was policy compliant having regard to viability matters. This is noted by the SoS in paragraph 43 of his decision and the Inspector in paragraph 373 of his report. It is common ground between the Council and the appellant now that the provision went beyond what was financially viable and that the consented development is in deficit. However, there appears to have been little doubt at the time that the development was deliverable (i.e. capable of being achieved) based on the specified provision.

21. Whether or not the 2016 provision represented the maximum reasonable amount of affordable housing is unclear. Neither the SoS nor the Inspector expressed an explicit view on this position. However, given the policy context, it is plausible to contend that the useful purpose of the obligation was to secure the maximum reasonable amount of affordable housing in compliance with policy requirements. CLP Policy H4 sets out various non-viability factors that will be taken into account when assessing the provision of affordable housing, but the main aim of the policy is to maximise the supply of such housing.

22. It is accepted by the Council and the appellant that the S106 agreement cannot require the actual delivery of the development. However, it would compel the owner to provide a specific form of affordable housing once built. The number and mix of affordable housing in the extant agreement would provide 56 units across three types of tenure. Nevertheless, to take a strict definition of the useful purpose as providing a specific amount and type of housing would mean that it would be very difficult under Section 106A to ever reduce that amount as it would clearly not serve the purpose equally well in quantitative or qualitative terms. Therefore, it would not be reasonable to apply the Council's definition of the useful purpose.

23. The main parties concur that my decision cannot revisit the various harms and benefits that were assessed as part of the 2016 decision. The provision of

affordable housing formed part of the planning balance carried out by the SoS and was identified as a considerable social benefit alongside the general provision of housing. The SoS concluded the affordable housing provision was necessary.

24. However, it is impossible to know what conclusions the SoS and Inspector would have reached if the affordable housing provision was as proposed now. The SoS found that the benefits as a whole considerably outweighed the harms in 2016 and this could still have been the case even with less affordable housing. Furthermore, the provision of affordable housing was and still is to ensure compliance with the requirements of policy where appropriate. It is not mitigation in the way that a scheme of highways works might be for example. Therefore, I cannot agree with the Belsize Society that the useful purpose of the existing affordable housing obligation is to justify the 2016 planning permission that would not otherwise have been granted.

25. Concluding on this first main issue, the planning obligation relating to affordable housing continues to serve a useful purpose. Defining the useful purpose as securing the maximum reasonable amount of affordable housing is the most convincing of the three propositions put before me at the inquiry. However, it is necessary to go on and consider whether the obligation in clause 3.2 would serve that purpose equally well if it had effect subject to the modifications specified in the application. In other words, whether the modified provision would represent the maximum reasonable amount of affordable housing and thus be policy compliant.

Would the obligation serve the useful purpose equally well if modified as proposed?

26. It is clear from the appellant's Financial Viability Assessment Report dated December 2020 which accompanied the S106A application that the provision of 18 DMR units in perpetuity would not be viable in financial or commercial terms. This is not disputed by the main parties. However, just because 18 DMR units are being offered by the appellant does not automatically make it the maximum reasonable amount of affordable housing. It is also necessary to consider whether or not the provision would be deliverable.

27. The appellant and the Council agree that the consented development has a residual deficit of over £70 million based on a conventional residual appraisal of costs versus revenue. The modified obligation would reduce the residual deficit by around £14 million. There would also be an increase in market rent by over £900,000 per year. Both sets of figures represent considerable sums of money. However, the rent increase has already been factored into the revised residual deficit and the deficit would remain at over £56 million even with the modified obligation. These figures alone do not point towards deliverability.

28. The appellant's letter of 19 October 2021 provides an overview of Essential Living (EL) as a Build to Rent (BtR) developer, investor and operator, with its focus on delivering residential units in London. It is not disputed that BtR developers like the appellant have a longer-term stake in a development rather than simply selling off units shortly after their completion.

29. The letter notes that to support the development, EL is funded through a long-term capital commitment from a US state pension fund that has a long-term investment horizon. The letter contends that this financial position would allow EL to deliver the development via the proposed modified obligation by reducing

the payback period to breakeven within an acceptable timeframe. Alternative options are considered and discounted by the letter on financial grounds. The letter states that EL cannot sell the site or deliver the consented development as is, and so must focus on mitigating losses.

30. While there is no suggestion that the letter is unrealistic or wrong, there is little supporting information on EL's overall funding or how the payback period would operate to deliver this development. There is no disagreement that the gross development value and profit would increase by around £28 million and £4 million respectively as a result of the modified obligation, or that market rent would increase. Nevertheless, it remains unclear how or why the changed financial position would enable the development to be delivered in comparison to the existing position. The letter does not contain the standardised inputs that paragraph 58 of the National Planning Policy Framework requires for viability assessments. The assumptions in the letter also lack transparency as required by the Planning Practice Guidance[3]. Therefore, I can only afford the letter limited weight in my decision.

31. There have been a number of unforeseen circumstances since the 2016 decision was made, including legal challenges, Brexit, Covid, and the increasing cost of building materials. This has inevitably affected the appellant's finances. The appellant has to date incurred costs of over £30 million in implementing the consented development and could only make a profit if those costs were written off, something that the appellant accepts is only a theoretical exercise. It is unlikely that another BtR developer would take on the site and the consented development due to the extent of the residual deficit. Converting the residential units to market sale is not part of EL's business model, and in any case, the DoV would effectively eliminate this option from the date of this decision.

32. As a consequence, the appellant claims to be stuck between not being able to sell the site or deliver the development as consented with its various planning benefits. However, I have not been persuaded that the financial position of the appellant means that the only option is the proposed modification to the S106 agreement. Moreover, while a realistic alternative use value for the site may be lacking, this does not undermine the prospect that another residential-led scheme could be delivered on this site, particularly given the site's urban location next to a London underground station.

33. The S106A process allows developers to seek modifications to obligations once 5 or more years have elapsed since the S106 was executed, as is the case here. However, the evidence before me is insufficient to show that the proposed modification to the affordable housing obligation would result in the delivery of the consented development. Therefore, it is not possible to say that the modification would provide for the maximum reasonable amount of affordable housing in compliance with development plan policies. It follows that the modified obligation would not serve the useful purpose equally well and so would not accord with the provisions of S106A(6)(c).

Whether the obligation should continue to have effect without modification

34. On the basis that the proposed modification would not serve the useful purpose equally well, I consider that the existing obligation in clause 3.2 of the S106

[3] Reference ID: 10-008-20190509 and 10-010-20180724

agreement should continue to have effect without modification in accordance with S106A(6)(a). As a consequence of this appeal being dismissed, the modifications set out in Part A of the DoV would not take effect.

35. The modifications set out in Part B of the DoV take effect from the date of this decision. However, they involve matters that are not in dispute between the parties and would provide greater clarity regarding the disposal of any private rented unit and any post construction viability review. Therefore, while I am not required to sanction the Part B modifications, I have no concerns regarding their effect.

Conclusion

36. For the above reasons, and having had regard to all other matters raised, I conclude that the appeal should be dismissed.

Tom Gilbert-Wooldridge

INSPECTOR

APPEARANCES

FOR THE APPELLANT

Rupert Warren QC, instructed by Wesley Fongenie of Brecher.

He called:

Gareth Turner
Director, Savills (UK) Ltd

David Whittington BA (Hons) DipTP MRTPI
Director, Savills (UK) Ltd

FOR THE COUNCIL

Morag Ellis QC, instructed by William Bartlett of the London Borough of Camden.

She called:

Andrew Jones BSc MRICS
Director, BPS

Jonathan McClue BPlan (Hons)
Deputy Team Leader, London Borough of Camden

FOR THE BELSIZE SOCIETY

Tom Symes The Belsize Society

INQUIRY DOCUMENTS

ID01 Legal opinion from Brecher to the Council dated 2 December 2020

ID02 Email from appellant dated 8 November 2021 responding to the Inspector's questions on the draft deed of variation

ID03 Unmarked version of the draft deed of variation

ID04 Copy of an earlier deed of variation dated 4 August 2020

ID05 Appellant's opening statement

ID06 Council's opening statement including the following court judgments:

(a) *R (The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin)

(b) *R (oao Batchelor Enterprises Ltd) v North Dorset District Council* [2003] EWHC 3006 (Admin)

(c) *R (oao Renaissance Habitat Ltd) v West Berkshire District Council* [2011] EWHC 242 (Admin)

(d) *R (oao Millgate Development Ltd) v Wokingham Borough Council* [2011] EWCA Civ 1062

(e) *R (oao Mansfield District Council) v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 1794 (Admin)

ID07 The Belsize Society's opening statement

ID08 Updated version of the draft deed of variation

ID09 The Belsize Society's closing submissions

ID10 Council's closing submissions

ID11 Appellant's closing submissions

DOCUMENTS SUBMITTED AFTER THE INQUIRY CLOSED

1. Completed and executed deed of variation dated 24 November 2021

2. Letter from Mr Terence Ewing dated 25 November 2021

3. Email from the appellant dated 1 December 2021 responding to Mr Ewing's letter

4. Comments from the Belsize Society received on 2 December 2021 responding to Mr Ewing's letter