The Planning Inspectorate

Appeal Decision

Hearing held on 19 June 2014
Site visit made on 19 June 2014

by Phillip J G Ware **BSc DipTP MRTPI**

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

Decision date: 25 July 2014

Appeal Ref: APP/H1033/Q/14/2217720
Land off Marsh Lane, New Mills, Derbyshire SK22 4PN

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine an application seeking to discharge a planning obligation.
- The appeal is made by J W Swindells Ltd against High Peak Borough Council.
- The development to which the planning obligation relates is residential development, associated access and landscaping works.
- The planning obligation, dated 11 September 2013, was made between High Peak Borough Council and John W Swindells Ltd[1].
- The application Ref HPK/2013/0315 is dated 19 March 2014.
- The application sought to have the planning obligation modified by the removal of the affordable housing contribution.

Decision

1. The appeal is dismissed.

Main issue

2. The issue is defined with reference to s106BA of the Act. That 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 viable.

Reasons

Background

3. The site is a former quarry and landfill site to the rear of residential properties. It has not been in use for some years and is relatively overgrown.

4. Outline planning permission was granted in 1994 for 28 dwellings on the site. This permission was renewed in 1997 and again in 2002. Permission was then refused in 2012 due to the lack of an affordable housing contribution.

[1] And Jonathan Anthony Swindells, Helen Christine Swindells and National Westminster Bank PLC

5. Outline planning permission was granted for the residential development of the site in September 2013. A Planning Obligation (the subject of this appeal) was completed dealing with the provision of 30% affordable housing. The Obligation also dealt with public open space, a play space contribution and permitted development rights – these matters are not the subject of this appeal.

6. The affordable housing provision was based on saved policy 44 of the High Peak Local Plan (2005). There is no dispute between the parties as to the relevance of this policy. The National Planning Policy Framework provides that Local Plans should meet the full objectively assessed needs for market and affordable housing in the housing market area. It also states that, to ensure viability, the cost of matters such as affordable housing, taking account of the normal cost of development and mitigation, should provide competitive returns to a willing landowner and a willing developer to enable the development to be deliverable.

Overall viability and developer profit

7. National advice '*Section 106 affordable housing requirements, review and appeal*' (April 2013) (the CLG Guidance) is that the starting point for reassessing viability will be a review of the original viability appraisal (if any) at the time planning permission was granted. In this case, the appellant confirmed that there was no original viability appraisal, so no open book review of the original appraisal was possible. In such cases, the CLG Guidance is that the developer must clearly demonstrate through evidence why the existing scheme is not viable.

8. The test for viability is whether the evidence indicates that the current cost of building out the development at today's prices is at a level that would enable the developer to sell the market units at a rate of build out such that a competitive return would be provided to a willing landowner and a willing developer.

9. In the current case the appellant submitted a viability appraisal with the current application/appeal which demonstrated that the development could not support the affordable housing element. The CLG Guidance makes reference to the possibility of general evidence of changes in costs and values since permission was granted, although there is a caveat that developers must consider if this approach will provide sufficient evidence to make a robust, impartial decision on viability. In this case, no differing economic conditions or changed site circumstances were set out in comparison with the position when the Obligation was concluded some 5 months earlier.

10. The appellant set out three development scenarios[2] - a scheme comprising entirely of market dwellings (Scheme A), another with 30% affordable provision (Scheme B) and another with 10% affordable provision (Scheme C).

11. The appellant concluded that Schemes B and C showed an actual (margin) loss of £284,297 and £6,282 respectively. Scheme A, with no affordable

[2] Report 26 February 2014 by S J Design

element, which equates to the development if the current appeal is allowed, shows an actual (margin) profit of £122,032. This was calculated by the Council (and not contested) as being a return of 2.85% on cost and 2.77% on Gross Development Value (GDV). I will return below to the implications of the appellant's profit figure in relation to Scheme A.

12. There are significant areas of dispute between the parties as to the viability of the proposal. These areas of disagreement stem from a comparison of the appellant's three scheme viability study, the Council's viability report (May 2014), and subsequent material. The main areas of dispute are set out below.

The nature of the development

13. The planning permission granted in 2013 was in outline, albeit supported by extensive illustrative plans and a Masterplan. It appears that the appellant's appraisal (all Schemes) assumes that the development would go ahead on that basis. This is not a requirement of the permission, and it is argued by the Council that there may be a more profitable way to develop the site. However nothing to support this contention has been put forward and, at its highest, this point only serves to cast a very limited doubt on the appellant's approach.

Sales values

14. Of more consequence is the differing approach taken by the parties towards the assessment of the sale value of the proposed dwellings. The CLG Guidance is that viability appraisals should be supported by scheme specific evidence from comparable developments, taking account of the type of property, location and delivery. Such comparables should be prices actually achieved rather than asking prices, and should exclude marketing incentives. Where comparability is an issue, these can be benchmarked against published sources.

15. The Council's appraisal followed the CLG Guidance and addressed six new developments within a six mile radius of the appeal site, along with second hand sales within New Mills as a sense check. Whether another development can reasonably be regarded as being comparable to a proposed scheme can often be contentious, and in this case the appellant maintains that there have been no new developments of a similar type to the appeal scheme in the immediate postcode area over the last 12 months. The appellant's position is that the Council's approach is flawed in that it has included areas with significantly higher house values. The appellant, faced with what was perceived to be a lack of comparable data, sought the opinion of established local estate agents and incorporated these into the appraisal.

16. I visited all the developments identified by the Council as comparables. Whilst I fully recognise that each development and its immediate setting will vary, I am not persuaded by the evidence that the circumstances of these cases is so different that they cannot be used as comparables in the normal way, as recommended in the CLG Guidance.

17. The uplift in the revenue arising from the Council's figures (including the 30% affordable housing) is £823,337[3]. This increase in the potential revenue weighs substantially in favour of the Council's position, namely that the development, including the affordable housing element, could be viable.

Construction costs

18. There are two significant differences between the parties in relation to construction costs. In both cases I prefer the clear and detailed report prepared for the Council by WYG Quantity Surveyors, which contains an assessment of the various elements of the scheme in line with the CLG Guidance.

19. In relation to the build cost per unit, the persuasive evidence is that there is nothing particularly exceptional known at this stage about this site or the approved development. The difference in the cost per unit results in a total new build dwelling cost (on the Council's figures) at £335,689 lower than the appellant's less detailed assessment.

20. There is also a difference between the parties of £153,044 in relation to the site remediation costs and the need for piling or abnormal foundations. The site was formerly a quarry and there has been landfill on part of the area – probably including the dumping of asbestos. Both parties agreed that remediation would be necessary, and that this would be a significant cost. However the appellant relies on a quotation for the remediation work which could not be broken down into its constituent elements and which was itself based on a ten year old study. The WYG report for the Council gave a much more detailed breakdown of the likely abnormal costs.

21. Whilst, given the presence of asbestos on the landfilled part of the site, some handpicking would be necessary, the extent of this which is assumed by the appellant is not fully justified. Of more consequence is the decision by the appellant to opt for a two metre clean fill depth across the entire site. As the Council persuasively explained, this would be unusual and more costly than would normally be the case. The appellant explained that this was a commercial decision and not one based on known or likely contamination. The appellant's position on this matter was further weakened as there has been no discussion with the Council's environmental health officer in order to ascertain what the position of the authority would be. Overall, the appellant's construction costs are in excess of that justified by the balance of the evidence.

Contingencies and professional fees

22. The Council's WYG report included contingencies at 5%, which is a typical level for a development at this stage of design. However the appellant has included a higher figure at 7.5% on construction costs. No convincing justification for the higher figure has been put forward and, on the basis of the WYG report, the contingency figure is £77,878 below the appellant's assessment.

[3] All figures taken from agreed summary table of Common Ground Doc 2

23. The appellant has also included fees for a full external management team, separate from any developer. This would be appropriate if the scheme were to be built out by a party who was not a typical developer of open market housing, but there is no persuasive reason to assume that this would be the case. Whilst it is true that the scale of the development is unlikely to attract a volume house builder, other developers of more bespoke sites have some in-house expertise. On that basis, the WYG report, which shows a figure of £136,360 below the appellant's assessment, is more likely to be realistic.

Conclusion related to the differences in the appraisals

24. There are other areas where the two parties differ, as shown on the table which represents the agreed position[4]. Some of these more minor factors involve higher costs as assessed by the Council. However there are also further factors, such as the length of the void period following the completion of the development and the finance rate, which add to the Council's assessment that the development could be viable. Overall there are substantial areas where the Council's evidence, presented in accordance with the CLG Guidance, demonstrates that the scheme, including the affordable housing element, has the potential to be viable. This leads to the conclusion that the appeal should be dismissed.

Developer profit – on the appellant's assessment

25. There is a separate consideration, as noted above, regarding the appellant's assessment of Scheme A (i.e. the development if the appeal is allowed). This shows a return, on the appellant's figures, of only 2.85% on cost and 2.77 on GDV.

26. The appellant's report concluded that this modest profit is below what a developer would expect in the current financial climate but stated that it made the scheme financially viable. There are various 'rules of thumb' which are quoted when discussing developer profit, tending to vary between 15 and 25%. In reality, different circumstances and developer aspirations will enable development to go ahead at a range of potential profit margins.

27. However, in the absence of any evidence addressing this point, it is hard to accept that the development would go ahead at such a very low profit expectation. Nothing has been put forward by the appellant to demonstrate a willing developer at that margin.

28. The CLG Guidance explains that the objective of the process is to deliver more housing and incentivise developers to start building. In this case there is nothing to suggest that allowing the appeal would secure this objective. On that basis, adopting the appellant's assessment, there is no justification in principle for allowing the appeal as it would not bring the scheme to a level of viability such as to enable the development to go ahead.

Conclusion

29. There is an acknowledged need to boost housing delivery and, despite the grant of planning permissions over the years, nothing has happened on this site.

[4] Doc 2

30. There does not appear to have been a change in knowledge or any other relevant factor since the application was submitted and the Obligation completed. It has not been adequately demonstrated on the available evidence that a viable scheme would not proceed in accordance with the planning permission, including the affordable housing element. This is broadly the Council's position, and the appellant has failed to clearly demonstrate through evidence why the existing scheme is not viable.

31. As a secondary matter, even if one accepted the appellant's position uncritically, this does not show a rate of return sufficient to incentivise development if the affordable housing element were removed.

32. In neither case is there justification for modification to the Obligation. I conclude that the appeal should be dismissed.

P. J. G. Ware

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr S Jones BSc(Hons) MRICS	Surveyor
Mr J Rose BA(Hons) TecP MRTPI	J R Consulting
Mr J Swindells	The appellant
Mr T Johnson	Colleague of the appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mrs E Pleasant BSc(Hons) DipTP MRTPI	Planning officer
Mr A G Massie BSc(Hons) MRICS IRRV	Keppie Massie
Ms J Adie BSc(Hons) MRICS	Keppie Massie
Mr R Prescott	White Young Green

DOCUMENTS

Document 1	List of persons present at the Hearing
Document 2	Table showing summary of Statement of Common Ground
Document 3	Planning permission dated 10 September 2013
Document 4	Council's position statement
Document 5	Appeal documents submitted by J R Consulting (Appendices 1 – 9, Chandos estimate, screening volumes)
Document 6	Response to Additional Sales Information submitted by Keppie Massie
Document 7	Email (dated 13 June 2014) from Mr Jones to Keppie Massie