Appeal Decision

Hearing held on 21 September 2016

Site visit made on 21 September 2016

by Christina Downes BSc DipTP MRTPI

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

Decision date: 28 October 2016

Appeal Ref: APP/Q1445/S/16/3154858
Lansdowne Place Hotel, Lansdowne Place, Hove BN3 1HQ

- 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 Lansdowne Investments Limited (in Administration) against the decision of Brighton & Hove City Council.
- The development to which the Planning Obligation relates is the part demolition, change of use and alteration and extensions, including the creation of a penthouse floor to provide 45 residential units, car parking, cycle parking, landscaping and associated works.
- The Planning Obligation by Agreement (Section 106 Agreement), dated 23 March 2016, was made between Brighton & Hove City Council and Lansdowne Investments Limited (in Administration) and The Administrators and Alliance & Leicester Commercial Bank PLC and Hove & Brighton Limited.
- The application Ref BH2015/04196 is dated 28 April 2016.
- The application sought to have the planning obligation modified by the removal of the requirement to provide 40% affordable housing.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision, the Section 106 Agreement, dated 23 March 2016, made between Brighton & Hove City Council and Lansdowne Investments Limited (in Administration) and The Administrators and Alliance & Leicester Commercial Bank PLC and Hove & Brighton Limited, shall have effect subject to the modifications as set out in the Schedule at the end of this decision.

Procedural matters

2. Where an application is made to modify an affordable housing requirement, Section 106BA of the 1990 Act (as amended) provides that if it means that the development is not viable the application should be dealt with so that it becomes viable. Section 106BC applies the same provisions to an appeal.

3. The Section 106BA application and the appeal were made by Lansdowne Investments Limited (in Administration), the owners of the site and Hove & Brighton Limited, the prospective developers. However, the latter company withdrew prior to the hearing and I was told that it is no longer involved with the proposed development. The Administrators have decided to proceed with the appeal as they require to sell the property in order to obtain the best value for the creditors of the hotel, which went into administration in 2013. It was confirmed that notice had been given in writing to the other signatories to the Deed.

Main Issue

4. Whether the affordable housing requirement in the Section 106 Agreement would result in the development being economically unviable and, if so, how it could be modified so that the development becomes viable.

Reasons

5. The Government is keen to encourage development to come forward to meet the growing need for housing and stimulate economic growth. There is no doubt that the Council has a very great need for affordable housing, especially one and two bedroom units. This is explained in the *Objectively Assessed Need for Housing: Brighton & Hove*, which is part of the evidence base to Policy CP20 in the *Brighton & Hove City Plan Part One*, adopted in March 2016. For the appeal scheme the policy requires 40% affordable housing provision and there is no reason why it should not provide it, subject to considerations of viability.

6. Stalled schemes with unviable affordable housing requirements result in no development and no community benefit. In this case the property is currently vacant and boarded up. The Section 106 Agreement does not require that the affordable element is provided until 50% of the market units have been sold or occupied. However, as it would be within the same converted building, it seems unlikely that work would get underway until the issue of viability has been resolved. It can thus be concluded that the development has stalled.

7. There are many matters on which the parties agree. These include the various fees, finance costs, developer's profit on the affordable housing units and a benchmark land value of £3m. The Section 106 Agreement requires a tenure mix of 7 affordable rent and 11 shared ownership units. The Council has been advised by the District Valuer Service (DVS) that this provision would be unviable. However, the DVS has concluded that a viable scheme could be provided with 14 mixed tenure flats (31%) or 18 shared ownership flats (40%). The appellant remains of the view that no affordable housing would be viable. I turn now to consider the main issues remaining in dispute.

Sales values of market housing

8. The appeal site is within an attractive road of 19th century town houses in the Brunswick Town Conservation Area that leads directly onto the seafront. It is occupied by an imposing 5 storey building with various more recent extensions to the rear. This was built in the 1850's as a residential terrace of houses before being converted into a hotel. Whilst many of its original architectural features remain, a grand central entrance now punctuates the front elevation onto Lansdowne Place. There are many listed buildings in the immediate vicinity but the appeal property is not listed itself.

9. Both parties have considered their valuations on an apartment by apartment basis, taking account of aspect, position within the building, size of unit and the like. However, apart from the two penthouse apartments, the DVS considered that the value overall would be about 5% higher than the appellant. Although values will go up and down over time, the Land Registry has recorded a rise in values of over 14% in Brighton & Hove between July 2015 and July 2016. I was told that the local housing market is relatively buoyant and has not so far been affected unduly by the uncertainties surrounding the UK's exit from the European Union.

10. At the hearing the appellant referred to several available one and two bedroom apartments in converted houses in Lansdowne Place. The asking prices varied between £205,000 and £425,000 but the actual sales prices are not known. These appear generally to be smaller units than the appeal scheme with no balconies, outdoor space or lift access. They have limited comparative value.

11. Innings House, Palmeira Avenue comprises a new development of 9 flats. The rear faces towards the cricket ground and the property is close to the railway station. There is secure on-site parking and the flats have balconies. The most recent transactions in March and May 2016 show that the 2 bedroom apartments sold for £560,000 and £550,000 respectively. Whilst the building is within a pleasant tree-lined street there is a mix of development locally, including some rather large and uncompromising blocks of flats. One Hove Park, Old Shoreham Road is a development of 71 flats that overlooks Hove Park, has on-site parking and is fairly close to the station. However, it is also on a relatively busy main road of mixed character. The information from the DVS is the most up to date regarding actual transactions with average sales prices for one bedroom flats of £300,000 and 2 bedroom flats of £430,000.

12. The above developments and the other examples given by the parties provide a useful starting point. However, the permitted scheme would have the advantage of providing new apartments within a converted building with a unique character and located in perhaps one of the most attractive and desirable streets in Hove. Many units would have a sea view. They would also be within reasonable walking distance of the railway station and I observed that there are shops and cafés in the immediate vicinity. Unlike the new build examples above, most occupiers would not have access to on-site parking. However, a survey at application stage showed that there is less parking stress in this part of Hove than in other parts of the town. It seems that the Council did not require restrictions on parking permits for new occupiers.

13. Valuation is not a definitive exercise and will be based on experience and knowledge. However, for all of the above reasons it seems to me that the appellant has underestimated the sales value of the market units. In my opinion the DVS has applied a more realistic assessment of this matter.

Sales values of affordable housing

14. The main dispute relates to the sales values of the shared ownership units. The appellant has proffered a sales price of £165,000 for the one bedroom units and £200,000 for the 2 bedroom units. However, within this scheme the unit size varies regardless of the number of bedrooms. As an occupier will own a proportion of the apartment, it is not unreasonable to surmise that a higher price would be paid for a larger unit. Following discussion at the hearing it was made clear that the affordable units would be required to pay similar service charges to the market units for the upkeep of the building and external areas. These charges would fall on the occupiers in the case of the shared ownership flats. The DVS therefore felt it appropriate to reduce the value of the shared ownership units from £325 per ft^2 to £300 per ft^2 to take this into account.

15. Considering the market values attributed by the appellant in the appraisal with no affordable housing, it seems to me that the value of the same flats as shared ownership units in the appraisal of the permitted scheme is too low. As I have supported the DVS valuation of the market units it follows that a higher valuation of the shared ownership units would be reasonable.

Construction costs

16. At the hearing an updated costs estimate was provided by the appellant. This indicated that the total project costs had increased, taking account of inflation and essential repairs. However, the appellant considered that these additional costs would be reflected in the market value of the property and its costs estimate was therefore not changed.

17. The difference between the parties in terms of the build costs of the scheme before including VAT and a 5% construction contingency were about £885,000[1]. The costs estimates of both parties were prepared by their respective professional advisors. The DVS explained that its Quantity Surveyor had provided an independent report but had not been able to gain access to the appeal site. It is clearly up to each party to decide who should be present in order to present the respective cases to best advantage. In this case, neither the Council nor the appellant was accompanied by a person qualified to address the details of the costs work. Reliance therefore has had to be placed on the written evidence.

18. The costs estimate prepared on behalf of the DVS used Building Costs Information Service (BCIS) data, which is commonly employed in viability appraisals. To reflect the challenges that the conversion of a building such as this are likely to involve, the upper quartile figures have been used, which seems to me appropriate. A number of items were classed as abnormals in the DVS costs report. The appellant's costs on these items were generally accepted, save in a few instances. However, the differences are relatively small and unlikely to be significant. The main difference lies in the various costs to which the BCIS upper quartile rates have been applied.

19. The appellant's cost estimate was bespoke to this scheme and based on the approved drawings. I do not dispute that it was a report that was properly prepared by suitably qualified professionals. Nevertheless, as it was based on bespoke information it is important to be clear how the various costs had been derived and verified. This was not clear from the costs report itself and there was no-one to question on the matter at the hearing. The DVS made the point that costs estimates are often conservative in order to avoid going over budget. Although the appellant contended that this was why the construction contingency was not 10%, in my experience a 5% construction contingency is not unusually low. Taking all of these matters into account, and on the available evidence, I consider that the DVS estimate of costs is to be preferred.

20. From the information before me it is clear that a reduced rate of 5% VAT is chargeable on conversion costs. However, it is also apparent that this can be reclaimed in the case of a developer who sells on the residential units. Where this would not be recoverable is if the purchaser were an investor, for example, as the units would be retained. In this case it was agreed that the development is unlikely to be attractive to buy-to-let investors because of the high values involved. In the circumstances I do not consider that the inclusion of a 5% VAT charge is justified as a cost of the development.

[1] The £10,950,000 construction cost in the appellant's appraisal includes a 5% construction contingency whereas the £9,517,000 in the DVS appraisal does not and adds it separately.

Developer's profit and contingency

21. The profit required by the developer reflects the risk in bringing the development forward. It is accepted that with the affordable housing element the risk is lower because once a Registered Provider is on board the sale of the units is not subject to the vagaries of the market. A 6% profit has been agreed by both parties.

22. On the market units, the appellant considers that a 20% profit is required and in my experience this is usually accepted as reasonable. The DVS considers that in this case a lower profit of 18.5% would be sufficient. This is on the basis that the local housing market is strong and values are rising. As has already been indicated, the scheme would offer a unique opportunity to purchase a new apartment in a very attractive period building. The DVS considers it likely that a high proportion of units would be sold off-plan.

23. It is acknowledged that financial institutions take a conservative approach to lending money. It is not unusual for a higher return to be required in order to ensure sufficient profit to cushion any fall in values. It is clear that at present the local housing market is flourishing but, even so, I do not consider that a 20% profit for the market element is unreasonable. This would result in an overall blended profit for the scheme of about 17.29%.

24. The appellant also considers that a 5% developer's contingency should be included. I was told that conversions are more risky than new build projects and that it would cover unforeseen circumstances that occurred during the construction phase. However, there is an agreed 5% construction contingency in the appraisals and it seems to me that this further addition, which would add a not insignificant sum to the costs, is unwarranted.

Conclusions

25. On the basis of the reduced values for shared ownership units, the DVS appraisals show a blended profit on GDV of 19.05% in the mixed tenure scheme of 9 shared ownership and 5 affordable rented units and 18.35% in the scheme with 18 shared ownership units. On the basis that I have concluded that a blended profit of 17.29% would be required, a development with either of these affordable housing requirements would be viable.

26. I have also considered the particular circumstances of this development and whether the provision of affordable housing on-site would be a practical or realistic proposition. There is no dispute that there is an acute local affordable housing need. National and local planning policy seek to provide mixed and balanced communities, which means that affordable housing should be fully integrated with market housing. However, in this case there was no dispute that the service charges for the management and maintenance of the property would be relatively high. The evidence suggests that Registered Providers would not be prepared to absorb such charges in the provision of affordable rented units. I was also told that Registered Providers do not favour rented units pepper-potted through a converted building with a shared core, not least because this makes management difficult.

27. Policy CP20 does not make provision for commuted payments on larger sites such as this. However, the supporting text does allow for exceptional circumstances when this can happen. The Council would prefer to see on-site

provision but, bearing in mind the service charge issue, it seems to me that the mixed tenure option would be unlikely to proceed.

28. The Council did also indicate that a financial payment could be an acceptable alternative in this case. On the basis of the DVS costs and values, the development would result in a profit of £6,975,165 on the basis of 45 market units and a developer's profit of 30.54% on GDV. Allowing for a 20% profit on GDV there would be a surplus of some £2,407,000 that could be provided as a commuted sum for affordable housing elsewhere. I was told that the Council operates a programme with a development partner whereby 100% affordable housing schemes are built on Council owned land. It also purchases units within development schemes and acts as a Registered Provider itself. In the circumstances it is clear that a payment in lieu of on-site provision would help to address affordable housing need in the City in accordance with local and national planning policy.

29. The affordable housing requirement in the Section 106 Agreement is unviable as it stands. However, there is no justification for removing it altogether. The available evidence shows that the development could become viable by changing the tenure mix or by providing a commuted payment. In this case, due to the particular circumstances, the provision of 18 shared ownership units would be the most likely on-site option to be achieved. However, the service charges may prove to be an unaffordable barrier for prospective purchasers. It is therefore considered that the most pragmatic way to ensure that this stalled development will proceed is to modify the Section 106 Agreement by making provision for on-site or off-site provision in the alternative. This would give the developer flexibility whilst still ensuring that much needed affordable housing is provided.

30. The appeal is therefore allowed and the modifications, which shall remain effective for 3 years from the date of this decision, are as set out in the Schedule below.

Christina Downes

INSPECTOR

SCHEDULE OF MODIFICATIONS
TO THE PLANNING OBLIGATION BY AGREEMENT DATED 23 MARCH 2016

1. **Within Paragraph 1: INTERPRETATION the following definitions shall be amended:**

   "Affordable Housing" means Intermediate Affordable Housing provided to Eligible Households whose needs are not met by the market and should meet the needs of those Eligible Households including availability at a cost low enough for them to afford, determined with regard to local incomes and local house prices and also include provision for the home to remain at an affordable price for future Eligible Households or if these restrictions are lifted for the subsidy to be recycled for alternative affordable housing provision.

2. **Within Paragraph 1: INTERPRETATION the following definitions shall be deleted:**

   "Affordable Rented Housing"
   "Social Rented Housing".

3. **Within Paragraph 1: INTERPRETATION the following definition shall be added:**

   "Affordable Housing Commuted Payment" means a sum of £2,407,000 (two million four hundred and seven thousand pounds), which sum shall be adjusted in line with the movement in the published Retail Prices Index – X (All Items) from the month in which the date of this Agreement falls to the month in which the date of payment falls.

4. **Schedule 5 (Affordable Housing) shall be deleted and replaced with the following Schedule 5 (Affordable Housing):**

   The Owner covenants with the Council to make the Affordable Housing Commuted Payment or to provide the Affordable Housing as follows:

   EITHER:

   1. Not more than 50% of the Residential Accommodation shall be sold or Occupied until the Affordable Housing Commuted Payment has been paid to the Council.

   OR:

   2. Not more than 50% of the Residential Accommodation (but excluding the Affordable Housing Units) shall be sold or Occupied until the Affordable Housing Units have been built and are ready for Occupation, and the Affordable Housing Land has been Transferred to or is in the ownership of a Registered Provider on a freehold basis or long lease for a term of no less than 125 years at a peppercorn rent.

3. Subject to the provisions of Clause 3 of this Deed, the Affordable Housing Units shall not be used other than as Affordable Housing.

4. At least 10% of the Affordable Housing Units shall be built to be Wheelchair Accessible in accordance with the requirements of the Wheelchair Housing Design Guide 2nd Edition.

5. Development shall not commence until a scheme for the provision of the Affordable Housing on the Property has been submitted to and approved in writing by the Director and the scheme shall include:

    i) The type and location within the Property of the Affordable Housing, which shall consist of 18 Shared Ownership units.
    ii) The timing of the provision of the Affordable Housing in relation to the occupancy of the market housing.
    iii) The arrangements for the transfer of the Affordable Housing Units to a Registered Provider if required, or for the management of the Affordable Housing Units (if no Registered Provider is used).
    iv) The arrangements to ensure that such provision is affordable for both first and all subsequent occupiers of the Affordable Housing and the occupancy criteria to be used for determining the identity of occupiers of the Affordable Housing and the means by which such occupancy criteria shall be enforced.

6. The Affordable Housing shall be provided in accordance with the scheme approved under 5 above.

5. Within Schedule 6 (Council's covenants) the following changes shall be made:

1. Delete Paragraph 4 and replace it with:

    Upon receipt of a written request the Council will pay to the Developer such amount of the Education Contribution, Local Employment Scheme Contribution, Recreation Contribution and Affordable Housing Commuted Payment paid to the Council under this Agreement, which has not been expended or committed for expenditure in accordance with this Agreement within 7 years of the date of receipt by the Council of such payment.

2. Add a new Paragraph 5:

    To use the Affordable Housing Commuted Payment, if it is paid, to fund affordable housing within the City for the purpose of meeting the housing needs of those who cannot afford market housing.

(*End of the five modifications*)

APPEARANCES

FOR THE APPELLANT:

Mr L Carter MRTPI	Lewis & Co Planning
Mr L Pavlou MRICS	Bilfinger GVA
Mr J Bernstein MRICS	Bilfinger GVA
Mr R Blyth MRICS	KPMG Real Estate

FOR THE LOCAL PLANNING AUTHORITY:

M G Giles MRTPI	Principal Planning Officer, Brighton & Hove Coty Council
Mr S de Whalley MRICS	District Valuer's Service (DVS)

DOCUMENTS SUBMITTED AT THE HEARING AND AFTER ITS CLOSE:

1 Viability Assessment, including summary appraisals, prepared by the DVS for the Council

2 Budget estimate of the costs of the development prepared by RLF for the appellant (April 2016)

3 Planning permission and approved drawings for the development at Lansdowne Place Hotel

4 Quantity Surveyor's costs estimate prepared for the DVS

5 Map of the location of other comparable developments submitted by Mr de Whalley

6 Correspondence following the close of the hearing from the Council, including a revised appraisal by the DVS showing 14 mixed tenure affordable units and 18 shared ownership affordable units

7 Correspondence following the close of the hearing from the appellant, including a revised appraisal using the values of the DVS

8 Correspondence following the close of the hearing from the appellant and DVS, including revised appraisals without a 5% VAT deduction