
Appeal Decision

Hearing held and site visit made on 5 October 2016

by Brendan Lyons BArch MA MRTPI IHBC

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

Decision date: 2 November 2016

Appeal Ref: APP/N2739/S/16/3149425

Land off Flaxley Road, Selby YO8 4BW

- 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 Hallam Land Management Limited against the decision of Selby District Council.
 - The development to which the planning obligation relates is the erection of circa 200 dwellings and the conversion of agricultural buildings to form 2 further dwellings.
 - The planning obligation by agreement, dated 3 December 2015, was made between Selby District Council and North Yorkshire County Council and Mary Cook and Hallam Land Management Limited.
 - The application Ref 2016/0161/MLA, dated 11 February 2016, was refused by notice dated 11 April 2016.
 - The application sought to have the planning obligation modified by a reduction in the level of affordable housing from 40% provision to 22% provision.
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Decision

1. The appeal is allowed in varied form. For a period of three years from the date of this Decision, the planning obligation dated 3 December 2015, made between Selby District Council and North Yorkshire County Council and Mary Cook and Hallam Land Management Limited, shall have effect subject to the modifications set out in the Schedule appended to this Decision.

Procedural matters

2. Section 106BA of the Town and Country Planning Act 1990 (as amended) provided that, where an application is made to modify an affordable housing requirement contained in a planning obligation, if the requirement means the development is not viable, the application should be dealt with so that it becomes viable. Section 106BC applied the same provisions to an appeal. These sections have now been repealed, but in this case the application under Section 106BA was made to the Council and the subsequent appeal submitted prior to the date of effect of the repeal, so that the appeal can proceed in accordance with the former provisions.
 3. The appeal was made by one party to the Section 106 Agreement, who is the promoter of the development of the site. Notice of the appeal was given in writing to the other signatories, including the existing landowner, who did not take part in the Hearing.
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Main Issue

4. The main issue is whether the development would be economically unviable while subject to the affordable housing requirement in the Section 106 Agreement and, if so, how the requirement could be modified so that the development would become viable.

Reasons

5. The appeal relates to 8.38 hectares of agricultural land at the north-western edge of Selby, surrounded on three sides by open countryside. To the east, the land adjoins suburban housing, which varies from older bungalows and houses close to the Flaxley Road frontage, to more recent estates further north.
6. A hybrid planning permission was granted in December 2015, comprising outline planning permission for the erection of circa 200 dwellings and infrastructure, and detailed permission for the conversion of listed agricultural buildings to form 2 additional dwellings.
7. The permission was granted on completion of a Section 106 Agreement between the applicant/promoter, the landowner and the District and County Councils. As well as the payment of financial contributions for education, highway infrastructure and waste and recycling facilities, the Agreement commits to the provision of on-site open space and affordable housing. The affordable housing is to comprise 40% of the total number of dwellings and to be provided in a proportion of 30-50% intermediate /shared ownership units and 50-70% affordable rented units.
8. The appeal is accompanied by a signed Statement of Common Ground ('SoCG') that sets out some of the background to the application and appeal. This explains that the planning application had been accompanied by a Viability Appraisal ('VA') dated 2 April 2015, prepared by consultants Johnson Brook¹, which had concluded that the proposed development could only viably provide 17% affordable housing (34 units, with the full provision of 200 dwellings), based on an equal split² of tenures between intermediate housing and rented. A review of the VA on behalf of the Council by the District Valuer Services ('DVS')³ disagreed, and concluded that the development could viably provide the full 40% required as normal provision for large sites by Policy SP9 of the Selby District Core Strategy, adopted October 2013, and the Affordable Housing Supplementary Planning Document of February 2014. However, before this difference could be resolved, and in order to pre-empt altered consideration of the proposal due to pending revision of the Council's land supply position, the appellant allowed the application to go forward and concluded the Agreement, as outlined above, so that planning permission could be granted.
9. The Section 106BA application submitted in February 2016 was accompanied by a revised VA, which concluded that the development could viably support only 22% affordable housing. A review by the DVS⁴ again concluded that the full 40% could be provided. Following negotiation, further information was submitted, including an updated VA dated 1 April 2016, shortly before the

¹ Now Johnson Mowat, who represented the appellant at the Hearing

² The SoCG refers to a 30:70 split, but the actual VA indicates a 50:50 split

³ Report dated 5 October 2015

⁴ Report dated 1 March 2016

application was refused. This VA continues to form the basis of the appellant's case in the appeal. It envisages 22% affordable housing provision (44 dwellings), with a tenure split of 30:70 intermediate : rented (13 intermediate units, 31 rented).

10. The appellant also commissioned an independent review of the parties' positions by consultants Cushman & Wakefield ('CW')⁵, whose report dated April 2016 includes their own VA. This report considers that up to 24% affordable housing could be provided, based on the parties' assumptions, but that CW's own assessment of values would result in a viable provision of only 14.5%. The report therefore concludes that the appellant's proposed reduction is to be favoured as a reasonable provision.

Scheme viability

11. Guidance on the assessment of viability and the application of Section 106BC is set out in the Government document *Section 106 affordable housing requirements: Review and appeal*, April 2013 ('the Guidance'). This explains the concern that unrealistic Section 106 agreements can be an obstacle to house building, which the government is keen to encourage. Stalled schemes result in no development, no regeneration and no community benefit. The review of unrealistic agreements will result in more housing and more affordable housing being provided.
12. In this case, the development remains at an early stage of the process, being taken forward by the promoter with no housebuilder yet actively involved and no tender data. The indications are that the scheme will not proceed until the dispute over the terms of the Section 106 Agreement can be resolved. The development can be classed as 'stalled' for the purposes of the Guidance.
13. The SoCG sets out a number of elements of viability assessment where the parties are in agreement. These include: abnormal costs of some £1.3m; (other) Section 106 contributions; finance costs at 6.5%; professional fees at 6%; marketing fees at 3%; transfer values to a social housing provider of £65 per sq ft for shared ownership units and £70 per sq ft for rented units; construction costs of garages; costs of conversion of the agricultural buildings to provide 2 dwellings. I have found no reason to take a different position on any of these matters.
14. The appeal submissions focus on four key areas of dispute, and I now consider each of these in turn.

Sales values

15. The best indication of future sales values is likely to come from sales achieved at comparable new-build developments already on the market. The SoCG identifies the Holme Meadows development closer to the centre of Selby as the most suitable comparable scheme, and this is endorsed by the CW review. I agree that the development offers a good comparison in terms of scale and likely quality of residential environment, although the Holme Meadows site has a more urban context.

⁵ Although their report has been written as an independent review, CW confirmed at the Hearing that they appeared in support of the appellant.

16. The second most direct comparison would be the very large development at Staynor Hall, to the south of the town. Again, the quality of the residential environment would be similar to that expected at the appeal site, but the scale of this development is very large, effectively an urban extension with its own school and community facilities, and the location is conveniently close to the southern by-pass road.
17. A third potential comparison is offered by new development in the village of Thorpe Willoughby to the west of Selby. It is generally accepted by all parties that the village is somewhat different from the appeal site in the quality and accessibility of the location, but they differ in the weight to give to comparison sales evidence.
18. The appellant also argues that the evidence of CIL charge zones is significant, as these were based on valuation research. Thorpe Willoughby and Staynor Hall have been placed in the moderate value zone, and the appeal site and the Holme Meadows development in the low value zone.
19. Both main parties have drawn on sales evidence over several years, and their interpretation of the data and its applicability to the appeal site has tended to fluctuate as each new slant on the figures has come to light.
20. By the time of the Hearing, the position of the DVS on behalf of the Council was that sales values at the appeal site should be assessed at £197.50 per sq ft,⁶ which represented an increase from the figure of £195 per sq ft used in the DVS's March 2016 VA. In brief, the DVS believes that the appeal site should attract higher values than Holme Meadows because of its semi-rural position. The high proportion of 3 storey development at Holme Meadows should be factored out by focusing on values achieved by 2 storey units, which had been running at £183 per sq ft and in 2016 had increased slightly to £185 per sq ft. The proposed figure of £197.50 per sq ft would represent a premium of some 6.75% over the £185 rate.
21. The appellant's April 2015 VA had incorporated sales values averaging at £180 per sq ft, based on achieved sales values in the area, including reference to Holme Meadows and Staynor Hall. The February 2016 VA increased predicted values to £190 per sq ft apparently by direct comparison with Staynor Hall sales, and by a greater amount than recorded sales at Holme Meadows. For the appeal, the April 2016 VA reverted predicted sales returns to £185 per sq ft, by reference to a more selective choice of achieved values at Holme Meadows and to nearby second-hand sales.
22. The CW report assessed sales returns in some detail, and concluded an average net value for the appeal site of £175 per sq ft, compared with £171 for Holme Meadows and £174 for Staynor Hall. A later note on values by CW, submitted just before the Hearing⁷, argued that the starting point for comparison should be the average value achieved at Holme Meadows of £174 per sq ft, which with a 6% uplift as employed by the DVS would result in a figure for the appeal site of £185 per sq ft.
23. Based on the evidence before me, and my own inspection of the sites, I find that the appeal site would be seen as a more attractive location than Holme Meadows, because of its more rural character and surrounding residential

⁶ Supplementary Information relating to Sales Values, dated 16 June 2016, and VA of same date

⁷ Letter to Hallam Land Management Limited, dated 3 October 2016

environment, albeit not all of the highest quality. Its accessibility would be very similar. Therefore I consider it reasonable that values achieved at the appeal site would be higher than those at Holme Meadows. I find that the appeal site would be seen as a less attractive location than Staynor Hall, which is large enough to function as a self-contained new-build environment, less dependent on context and with its own facilities, and also with much better access to the main road network. Values at the appeal site would be likely to be lower than those at Staynor Hall. I give limited weight to the comparison evidence from Thorpe Willoughby, because of its village character and enhanced accessibility.

24. The values achieved at Holme Meadows provide the best starting point. I accept that the most appropriate figure to provide a baseline would be the average value achieved. It was confirmed at the Hearing that this was £174 per sq ft, net of incentives. I prefer this figure because it reflects the mix of 2 storey, 3 storey and 2½ storey unit sales. Based on experience of typical new-build residential development in urban fringe locations, I consider it highly likely that the eventual development of the appeal site will include a significant proportion of 2½ storey and perhaps 3 storey units. The evidence is that the indicative layout submitted with the planning application allowed for some 25% (50 units) as 2½ storey types. The final layout may well be based on that starting point. Allowing for an uplift of some 6%, which is similar to that applied by the DVS, would result in an average value for the appeal site of £185 per sq ft, which is the figure adopted by the appellant.
25. The DVS's use of only the 2 storey values from Holme Meadows would give a somewhat distorted result. The proposed figure of £195 per sq ft would be well in excess of the Holme Meadows average. Crucially it would also exceed the average of £192 per sq ft identified for Staynor Hall in the March 2016 VA.⁸ An argument for a return from the appeal site higher than Staynor Hall cannot realistically be sustained, in my view. By contrast, the average figure of £185 per sq ft would sit well between the Holme Meadows and Staynor Hall averages, but somewhat closer to the latter.
26. The more recent increased values quoted for 2016 are for less than half a year (to mid-June) and might not be reflected over the full year. But if they were, the differential rate of increase between the two reference sites would not be highly significant. The updated proposed figure of £197.50 per sq ft would not be any more justifiable than the earlier.
27. I do not give significant weight to the evidence of second-hand sales, because of the difficulty in identifying the correct premium that would need to be added in each particular case. The small estate near the appeal site identified by the CW note might well be the best comparable location, but the small sample size and the variety of figures obtained make any conclusion difficult to justify.
28. For these reasons, I favour the appellant's position on sales values.

Build costs

29. The Guidance advises that in reappraising viability, cost estimates and known tender price evidence in the baseline appraisal should be updated. Site specific evidence based on reported cost estimates or invoices should be provided by the appellant and assessed against comparable market evidence. Where

⁸ The more recent Supplementary Note records average sales achieved of £202 per sq ft, but does not make the corresponding reduction for incentives.

comparability is at issue, figures can be benchmarked against Building Costs Information Service ('BCIS') indices or other appropriate data sets or verified by independent cost consultants.

30. In this case the pre-approval VAs were not informed by detailed estimates or tender price evidence, and such evidence is still not available. The parties continue to rely on relatively generic evidence of costs to inform their latest viability work on the new housing.
31. The appellant's 2015 VA was based on a BCIS figure for mixed housing developments with additions for external works to give a building cost of £82.50 per sq ft. The February 2016 VA increased this figure to £86.78 per sq ft, recognising that this increase was below that of the BCIS index over the same period. The appellant's position for the appeal, as set out in the April 2016 VA, is based on a build cost of £89.17 per sq ft, which is founded on a BCIS lower quartile figure for estate housing (£79.18 per sq ft), with the addition of 10% for externals and 5% contingency, and a deduction of 2.5% for a large site.
32. The DVS 2015 VA was also founded on BCIS figures, but the DVS now has considerable reservations about the applicability of BCIS to large housing developments, owing to rapid fluctuations and perceived weaknesses of the source data, particularly in relation to the small size of projects and the absence of input from major housebuilders. The DVS now seeks to place greater reliance on other data available to the service, including bids obtained from developers seeking to secure Homes and Communities Agency ('HCA') land. The DVS's position on behalf of the Council in the appeal⁹ was to allow a build cost of £83.01 per sq ft, which included a reduction in the costs of external works to 10% to match the appellant's figure.
33. The Guidance has a clear preference that actual site-specific information should inform the viability reappraisal. BCIS is referenced as a benchmarking source rather than as the foundation of a cost estimate, and other data sets can be used. In the absence of site-specific data in this case, I consider that the information quoted by the DVS provides the next best available source. This is because, as set out in the DVS March and April 2016 reports, it is mainly derived from actual tenders for large residential projects in the north of England, comprising 81 tender bids across more than 20 sites. The resulting basic cost figure adjusted for Selby of £75.36 per sq ft therefore merits considerable weight. Furthermore, the DVS has been able to validate the figure against the content of over 60 individual appraisals for housing developments of more than 50 units in the north of England over the past 2 years. I accept that the full details of these figures remain confidential, but despite the appellant's concern over transparency, I have no reason to doubt the professional evidence.
34. The BCIS data may be more robust in other instances, with a larger or more relevant sample size. In this case, the appellant does not specifically challenge the shortcomings identified by the DVS, but considers it inconsistent for the Council to adopt a CIL using BCIS data and then to depart from it in this instance. However, the task of preparing a CIL is of a different nature and scale to the matter now at issue, and the consultants employed by the Council would not have had access to the data now brought forward.

⁹ Supplementary Information relating to Build Costs, dated 16 June 2016, and VA of same date

35. The appellant also raises concern that the DVS figure of £85.32 per sq ft¹⁰ for combined build costs would be the lowest among a number of estimates for the appeal site and several other sites, including some where a VA was prepared by the DVS. A chart tabled at the Hearing shows the range from that low figure up to £90.85 per sq ft. Leaving aside one site that was too small to be included, the DVS response acknowledged that cases will vary, depending on the design and materials to be used, and the form and density of development. I share some of the appellant's surprise that the basic build cost figure did not re-appear in other VAs, but that does not in itself discredit use of the figure in the present appeal. I note that the CW check considered both parties' figures to be within an acceptable range of £80-100 per sq ft.
36. For these reasons, I favour the DVS calculation of cost of the new-build housing at £85.54 per sq ft including 10% externals and 3% contingency, giving a total cost of £17,531,423.

Developer profit

37. The National Planning Policy Framework ('NPPF') provides that, to achieve viability, the costs of any policy requirements such as affordable housing should allow competitive returns to a willing landowner and a willing developer. The level of developer's profit that would ensure a 'competitive return' is not defined. The Guidance acknowledges that profit levels vary significantly between projects to reflect the size and risk profile of the developer and the risks related to the project.
38. The appellant has adopted a profit level of 20% of GDV throughout the process. The appellant's case is that this level is effectively an industry standard, which is endorsed by the Home Builders Federation, and which has been accepted in other appeal decisions and by the Council in two recent developments. The view that profit at this level is seen as a necessity to obtain bank finance was endorsed by CW in their report and at the Hearing.
39. The DVS has maintained the view that a profit of 17.5% of GDV for the market housing would be reasonable, with a lesser return of 5% of costs for the affordable housing. This split is intended to reflect the much lower risk involved in disposing of the affordable housing in a single sale to a registered provider, compared to the uncertainty of the open market, and is endorsed in HCA schemes. The DVS also cites appeal decisions where the principle of a split or reduced 'blended' return has been upheld, and has quoted examples of VAs from north of England sites with a varied range of profit levels.
40. Given evidence of almost diametrically opposed professional experience of the need for a 20% profit margin, in my view the decision on the correct level should err towards the option most likely to prevent development from stalling. Therefore I favour the appellant's submission that an overall profit level of 20% on GDV is required.
41. I take support for this from the DVS update of HCA returns, which indicate that recent housebuilder VAs allowed a mean profit level of 19.2% of GDV of market housing, and 7.9% of costs of affordable housing. These would well exceed the levels promoted by the DVS in this appeal and would be very close to an overall return of 20%.

¹⁰ £85.54 per sq ft in the April and June 2016 VAs

42. Some further support is offered by the Council's previous acceptance of this level of profit. I agree with the appellant that this should not be linked to the issue of the Council's five-year land supply.
43. Since the appeal was submitted, the Council has resolved a 'fall-back' position, which is not endorsed by the DVS, of 20% profit on GDV¹¹ with a reduced expectation of 35% affordable housing provision. In the light of my preference for the appellant's submission, this would not have effect as a fall-back option, and the level of affordable housing will be determined by other variables.

Land value

44. National policy does not expand on the concept of a competitive return to a willing landowner. The guidance advises that any purchase price should be benchmarked against both market values and sales prices of comparable sites in the locality.
45. The appellant has argued that a benchmark land value of £200,000 per acre would represent a reasonable return for a landowner. However, the February 2016 VA accompanying the Section 106BA application included a residual land value of £3.66m or £176,768 per acre, which was seen as 'not unviable'. The figure of £176,768 per acre was adopted by the DVS for subsequent VAs, following analysis of a broad range of VAs for north of England sites, and comparison with the value achieved at Thorpe Willoughby.
46. The CW report endorsed an anticipated agreed figure of £3.7m, or £179,000 per acre, as an appropriate benchmark value that would incentivise the owner to release the land for development, although at the lower end of market expectations.
47. The appellant's most recent VA includes a site value of £3.8m, or £183,000 per acre. The difference of £100,000 from the earlier figure would have a very small effect on the potential provision of affordable housing.
48. The appellant has referred to published sources, including a Government document¹² that sets out post-planning permission residential land values, for use only in policy appraisal, with a figure for Selby District £271,000 per acre. I do not give weight to that figure as it is expressly based on nil affordable housing and, as noted in the document, therefore unlikely to be realised in an actual live situation.
49. I acknowledge that arrival at a fair benchmark figure through a process of residual valuation is not an exact science. The difference between the parties is not highly significant. Nevertheless, the Guidance is clear that a benchmark figure should have regard to development plan policies, including affordable housing obligations. Therefore, I consider that the inflation in value from the previous figure of £176,768 per acre, then accepted by the appellant as viable, should be discounted and the funds diverted to the provision of affordable housing.

¹¹ Clarified by the Council at the Hearing as 20% profit on GDV of market housing, plus 8% on costs of affordable housing, as previously applied to development in Thorpe Willoughby. The Committee resolution approving the 'fall-back' position was not clear on this point.

¹² *Land value estimates for policy appraisal*, December 2015

Conclusions

50. As set out above, I have found that the appellant has raised valid concerns with regard to the effect of sales values and developer's profit on the assumptions needed to sustain the previously agreed proportion of affordable housing, but not with regard to build costs and land value. As a result, I consider that the development would be unviable under the affordable housing requirement of the existing Section 106 Agreement.
51. In order to make the development viable, the proportion of affordable housing will need to be reduced from 40%. The appellant's VA incorporating sales values at the preferred level would deliver 22% affordable housing. It was agreed at the Hearing that the effect of build costs would account for 4% of the affordable housing provision and the effect of the land value difference some 1%. From this I conclude that the maximum affordable housing provision that could viably be provided by the site would be 27% (54 units if the permitted 200 are finally developed). I shall therefore modify the Agreement to incorporate that figure. The split between intermediate and rented units set out in the Agreement does not require amendment.
52. The extent of the modification, which is set out in the attached Schedule, is as sought in the Section 106BA application, and will endure for a period of three years, in accordance with Section 106BC.

Brendan Lyons

INSPECTOR

Schedule of Modifications to the Planning Obligation dated 3 December 2015

In Clause 1.1, in the definition of Affordable Housing Units, deletion of '40%' and replacement with '27%';

In Clause 1.2.1 of Schedule 1, deletion of '40%' and replacement with '27%'.

APPEARANCES

FOR THE APPELLANT:

Mark Johnson MRICS MRTPI	Partner, Johnson Mowat
Phil Roebuck FRICS	Director, Cushman & Wakefield
Rebecca Wasse	Hallam Land Management Limited

FOR THE LOCAL PLANNING AUTHORITY

David Newham MRICS	Principal Surveyor, District Valuer Services
Yvonne Naylor	Principal Planning Officer, Selby District Council

DOCUMENTS SUBMITTED AT THE HEARING

1. Selby BCIS £s per sqm Study
2. Comparison of Build costs (2016)
3. Selby District Council Community Infrastructure Levy: Revised Draft Charging Schedule Report, Peter Brett Associates, November 2014
4. Copies of Appeal Decisions Ref:
APP/N1160/A/12/2169472/NWF;
APP/P1615/Q/14/2215840;
APP/V3120/S/15/3133745;
APP/V5570/A/14/2214889