Appeal Decision

Hearing held on 18 October 2016

Site visit made on 19 October 2016

by J S Nixon BSc(Hons) DipTE CEng MICE MRTPI MCIHT

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

Decision date: 23 November 2016

Appeal Ref: APP/V5570/S/16/3155272
Site at 640-650 Holloway Road, London, N19 3NU.

- The appeal is made under section 106BC of the Town and Country Planning Act 1990 (the Act) against the refusal to modify a planning obligation.
- The appeal is made by Mr Nick Cockburn, on behalf of Opticrealm Ltd, (the Appellants) against the decision of the Council of the London Borough of Islington (the Council).
- The planning obligation, dated 20 October 2015, was made between the Council, Junction Road Property LLP and National Westminster Bank PLC.
- The development to which the planning obligation relates is for the demolition of existing buildings and the erection of a five storey building (plus basement) fronting Holloway Road (Block 1) comprising retail space (Class A1) at ground floor, gym (Class D2) at basement level, 20 residential units (Class C3) on the upper floors; a four storey building to the rear of 652-660 Holloway Road (Block 2) comprising 11 residential units (Class C3); a four storey building to the rear of 634-636 Holloway Road (Block 3) comprising 9 residential units (Class C3); and associated landscaping and play space (Application Ref. No: 2014/3494/FUL).
- The application to modify the planning obligation is Ref. No. P2016/1579/S106BA, was dated 15 April 2016 and refused by notice dated 13 May 2016.
- The application subject of this appeal sought to have the planning obligation modified as follows: reduction in the provision of affordable housing obligations in the section 106 dated 20 October 2015. The existing obligation is to provide 11 affordable housing units (8 social rented and 3 shared ownership). The appeal application seeks to reduce the provision to 6 affordable housing units (4 general needs and 2 social rented) as the maximum level of affordable housing that the development could viably support.

Decision

1. For the reasons given below, this appeal is dismissed.

Background and clarification

2. In this particular case, the original planning permission was granted to the then landowner Mr O'Sullivan of Junction Road Property LLP. The land and permission were then sold on to the present Appellants, Opticrealm Ltd. Subsequent to the purchase, Opticrealm Ltd's review of the viability of the approved scheme led to a conclusion that it was not viable and that to rectify

this position there needed to be a reduction in the affordable housing units. It is submitted that the original owner Mr O'Sullivan was faced with financial and personal pressures to accept the 11 affordable housing units to expedite and secure the planning permission, which he felt had been dragging on. Thus, it is not a material change in economic circumstances that has led to the application to modify the s.106, but claimed to be an inappropriate viability assessment at the outset, which the application seeks to rectify.

3. In terms of the s.106, as the land was sold by Junction Road Property LLP to the present owners Opticrealm Ltd without implementing the planning permission it did so with 'clean hands' and can no longer attract any liability as per Clause 4 of the s.106. As for the National Westminster Bank PLC, who were signatories to the s.106, the appeal site has been refinanced and, therefore the charge in favour of the Bank has been appropriately discharged. Accordingly, I agree with the Appellants that it was unnecessary to inform Junction Road Property LLP and/or National Westminster Bank PLC of this appeal. As such, Mr O'Sullivan of Junction Road Property LLP appeared at this hearing in a private capacity.

Main issue

4. From the evidence and representations made at the hearing and my visit to the site and surroundings, it follows that the main issue to be decided in this appeal is whether the level and mix of affordable housing contained in the s.106 Planning Obligation would render the development unviable and, if so, what level could be delivered to maintain scheme viability and how would this best be achieved.

Policy overview

5. Section 106A of the Act (as amended) recognises the need for flexibility and provides the facility for applications to modify or discharge obligations. The key parameters for decision makers include whether the obligation continues to serve a useful purpose (if not, the obligation must be discharged) or whether that purpose would be served equally well if it had effect subject to the modifications proposed in the application. Accordingly, it is necessary to examine whether the obligation meets the relevant tests for planning obligations in that they are necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind (Paragraph 204, National Planning Policy Framework).

6. National guidance on Development Viability in Decision Taking is set out in the Planning Practice Guidance (PPG), with specific guidance on s.106B applications and appeals contained in the Government document Section 106 Affordable Housing Review and Appeal (April 2013). This says that assessments should be based on clear, up-to-date and appropriate evidence, with the starting point a review of the original viability assessment. Reviews should apply a similar methodology, with any changes explained and justified. The intention of the modifications to s.106 (BA, BB and BC) was to permit variation to the level of affordable housing required under an extant permission, but which was negotiated under different economic conditions. The key aim was to unlock stalled developments, while affording the landowner a reasonable return when selling the site and the developer a reasonable level of profit.

7. In terms of the development plan (DP), both the London Plan and the Islington Core Strategy 2011 (CS) look for a high level of affordable housing, with the CS requiring a Borough wide target of 50%, with a tenure split of 70% social housing and 30% intermediate housing. These targets are tempered by the London Plan requiring each scheme to provide the maximum reasonable amount of affordable housing commensurate with scheme viability.

8. In support of these DP edicts, there is a number of supplementary planning and professional documents informing parties of appropriate process to the desired outcome. These include Mayor's Housing SPG 2016; GLA Development Appraisal Toolkit – Guidance Notes 2015; Islington Development Management Policies 2013; Islington CIL Viability Study 2013; Islington Development Viability SPD 2016; RICS Financial Viability in Planning; and RICS Valuation Paper No.3, which evince process and methodology for various scenarios. A key point to draw out is that there are few hard and fast rules with the decision maker left to view viability assessments in the specific context of the site and development under review.

Reasoning

9. Looking at the original s.106 Obligation, this would deliver 28% affordable housing within the development, which falls well shy of the target figure of 50%. However, this is a site with an existing use that is judged to have a relatively high value. As such, at the time the Obligation was drafted, there were reasons why the 28% figure agreed was judged acceptable in planning terms, deliverable, directly related to the development and fairly and reasonably related in scale and kind. The contribution to the affordable housing provision therefore goes some way to meeting the Council's needs and is necessary to make the development acceptable. However, in the circumstances where the 28% figure is now challenged, we have to look at the Economic Viability Assessments prepared by the original Applicants, the Council and the current Appellants.

10. No Statement of Common Ground was agreed and, consequently, the hearing was faced with examining each and every parameter contained in the assessments. However, after discussion, and although there were some disagreements about an increase in property prices and a decrease in build costs countered by the increase in imports costs and the effect of Brexit, these were largely resolved with an agreed position being taken.

11. For my part, I accept that there may be some ups and downs in property prices, build costs and financing. Even so, from the information provided added to that deduced at the hearing, it is not possible to reach a firm conclusion on these factors. It may well be that property sales have dipped and that the pound will have a negative effect on build costs. Even so, I believe that it is too soon after the Brexit vote to produce any robust trend analysis for the variables. In any event, even in the absence of any sensitivity testing of inputs, it is clear that minor fluctuations in many parameters would have little material effect on the key outturn figure of the Economic Viability Assessment.

12. This left the two sizeable features of the seller's premium to encourage landowners to sell land on for development and the developer's profit. It was agreed that the viability of the scheme and the amount of affordable housing that could reasonably be supported largely turned on the outcome of these

factors. As it transpired, the Appellants conceded on their argument that there should be an across the board profit figure of 20%, accepting that the figures of 20% on market housing, 6% on the affordable element and 15% on the commercial uses were appropriate.

13. Thus, we were left with discussing the need for and reasonable level of the seller's premium. It was submitted by the Appellants that figures for the seller's premium falling within the range 10-30% were normal, and that the figure of 20% proposed by the Appellants in this case was appropriate, proportionate and would enable the delivery of six affordable units, albeit with the potential for reduced profits.

14. The Council, on the other hand, pointed to what it saw as two flaws in the Appellants' arguments. First, is the lack of need for a seller's premium in this particular case, because the land had been sold by the original user to the current owner/ developer. Under these circumstances there is no further need to input any retrospective incentive to sell. The second point is that the land had been bought on an open tender basis and the fact the Appellants had paid over the odds for the land did not invite or provide any legitimate grounds for reviewing the Economic Viability Assessment.

15. Having reviewed the arguments and the submissions, I am very much inclined to the Council's view. The only caveat to this is a thought that the inflated purchase price might have included an implicit element of the seller's premium. However, in all the assessments submitted there is no suggestion that this was the case. As the previous owner stated, his company was under some pressure to secure a planning consent for redevelopment and to sell the site to support other business interests. While one can have every sympathy for the fact Mr O'Sullivan's wife was seriously ill at the time and subsequently passed away, this is not a personal circumstance that now affects the planning merits of the current viability arguments.

16. The simple fact is that the planning permission can be translated into a value for the appeal site. That value has to have taken into account the obligations and conditions incumbent on the successful Applicant. The Applicant would then have weighed this value against the value of the land as it stood without the new permission. If there was a disparity, such that the existing land value was higher than the value of the land with the benefit of the permission for a changed, but more desirable end use, then it would have been within the Applicant's gift to appeal under s.106B to have the s.106 Obligation discharged or modified to reflect the values and include at this stage an incentive factor for the seller. Whether the then owner accepted that there was no premium needed or that there was an overriding business urgency to sell the land it was placed on the market for open tender, without any seller's premium being secured.

17. The next stage in the process was the open tender for the land with the benefit of the planning permission. There was no dispute that the Appellants tendered at a price in excess of the valuation for the land provided by the expert in such matters, Mr Hunter. Mr Hunter's valuation did make some attempt to deliver a realistic figure for the land value, though it was clear this was somewhat difficult with a business selling fuel at some 25-30p a litre above the general market price. On this basis, I accept the figure and in the absence of any business accounts to show anything different cannot see my way to reviewing

this aspect of the Assessments at this stage. I have to be mindful that it was only after completion of the land purchase by the Appellants that concern about viability was voiced, which is essentially after the key event i.e. the land sale.

18. Equally as important, to allow the appeal would bring the entire tendering process into question. If it was seen that a high price could be paid for land and then that price be effectively reduced through the planning system, this would lead to inflated land values and/or reduced affordable housing contributions, neither of which are remotely in the public interest. It is at the tender stage that a prospective purchaser would be expected to exercise due diligence before submitting a tender price. It is not acceptable to outbid competitors in the expectation that the price could be 'reduced' subsequently by invoking s.106B. This is not the function of the planning regime. It is, of course, very possible that a bidder that did exercise due diligence and tendered a lower price for the land would have been in a position to fulfil the terms of the Obligation.

19. It is also worth remembering that the scheme was refinanced after the land purchase. It would be reasonable to expect at this stage that the viability of the scheme would have been investigated before agreement was reached.

20. To summarise, I am clear that there is no justification at this stage of the process to require inclusion of a seller's premium in the Economic Viability Assessment for development of this site. Neither have I found any reason to offset the overbid on the site, by allowing a reduction in the affordable housing contribution. All the other inputs to the Economic Viability Assessment are accepted as there or there about and would not have any material effect on the viability. In the immediate post Brexit landscape, I see no reason to disagree. Finally, I have taken into account all other matters raised in the evidence and representations, but none carries sufficient weight to alter the balance of my conclusions or decision to dismiss this appeal.

J S Nixon

Inspector

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY

Mr J Wacher	-	S.106 Officer for the Council
Mr A Jones	-	BPS surveyors
Ms P Parkinson	-	Planning Lawyer with the Council
Mr R Ching	-	Planning Officer with the Council
Mr S Greenwood	-	Planning Officer with the Council
Ms R Doraisamy	-	BPS surveyors

FOR THE APPELLANTS

Mr N Cockburn	-	Opticrealm Ltd
Dr D Birt	-	Douglas Birt Consulting
Mr D Hunter BSc FRICS ACIArb MEI, Chartered Surveyor	-	David Hunter Property
Mr S Tewis-Allen LLB Hons	-	Solicitor with Gowling WLG
Mr J O'Sullivan	-	Former owner of the site

DOCUMENTS HANDED IN DURING THE HEARING

Document 1	-	Attendance List (not included)
Document 2	-	Council's final submission in response to the Appellant's submission
Document 3	-	Hearing agenda
Document 4	-	Planning decision Ref: APP/V5570/A/14/2227656
Document 5	-	Planning decision Ref: APP/L5240/W/16/3143978 (copy not handed in, but referred to in evidence)
Document 6	-	Plans of scheme
Document 7	-	Extract from AMR 2014
Document 8	-	S.106 Obligation with draft amendments
Document 9	-	S.106 Obligation with agreed amendments