
Appeal Decision

Hearing held on 10 November 2016

Unaccompanied site visit made on 9 November 2016

by Karen L Ridge LLB (Hons) MTPL

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

Decision date: 29 November 2016

Appeal Ref: APP/D0840/S/16/3151466

**Land adjoining Wych Hazel Way and Elm Close, Newquay, Cornwall
TR7 2LL**

- 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 AJL Limited against the decision of Cornwall Council.
- The development to which the planning obligation relates is an outline planning permission for residential development for up to 88 dwellings.
- The planning obligation, dated 23 December 2011, was made between The Cornwall Council and AJL Limited and Elizabeth Ann Shrivell.
- The application Ref. PA16/03305, dated 5 April 2016, was refused by notice dated 9 May 2016.
- The application sought to have the planning obligation modified as follows: a reduction in the level of affordable housing from 40% provision to 25% provision.

Summary of Decision: The appeal is allowed and the obligation is modified to provide 33% provision of affordable housing.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision the planning obligation dated 23 December 2011 made between The Cornwall Council and AJL Limited and Elizabeth Ann Shrivell shall have effect subject to the modifications as set out in the schedule at the end of this decision.

Main Issue

2. The main issue is whether or not the affordable housing provision means that the development is not economically viable and if so, whether (and to what extent) the planning obligation should be modified.

Reasons

Background

3. The appeal site is an undeveloped parcel of land to the south of Wych Hazel Way. On the 29 December 2011 outline planning permission was granted for the erection of up to 88 dwellings. Approval of reserved matters was subsequently granted on 10 September 2013 for 82 dwellings. The outline planning permission was issued following completion of a planning obligation on 23 December 2011 which secured, amongst other things, the provision and
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construction of 40% of the total housing on site as affordable housing, with 70% of those affordable units to be intermediate dwellings and 30% of the affordable units to be rented affordable dwellings. Following the grant of reserved matters consent construction commenced on site and a contract has since been negotiated for the sale of 11 affordable units. Three open market value houses have also been sold and one is being marketed.

4. The Appellants now seek a modification of the obligation to revise the amount of affordable housing down to 25% of the total housing on site. There are no modifications sought to the terms or tenure split on which the affordable housing is to be provided. The Council refused the request for modification on the basis that the Appellants had not provided sufficient evidence to support their contention that the provision of 40% affordable housing renders the scheme economically unviable.
5. The policy position in relation to the provision of affordable housing remains unchanged. The Council's Supplementary Guidance Document for Affordable Housing from 2008 sets out targets of 40% affordable housing provision in Newquay in the form of 30% rented units and 70% intermediate units. The Council's emerging policy in relation to affordable housing provision requires 35% provision with a different tenure split; namely 70% rental provision and 30% intermediate provision.
6. National guidance is found in 'Section 106 affordable housing requirements Review and Appeal' dated April 2013 (the Guidance) which provides 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 Appellants confirm that there was no original full viability appraisal and therefore an open book review of the original appraisal is not possible. In such cases, the Guidance advises that the developer must clearly demonstrate through evidence why the existing scheme is not viable.
7. The test for viability is whether the evidence indicates that the current cost of building out the development (including the affordable housing provision) at today's prices is at a level which would enable the developer to sell the market units at such a rate that a competitive return would be provided to a willing landowner and a willing developer.

The appraisals

8. The Appellants submitted a viability appraisal with their application based upon revised construction costs and sales figures and a firm offer in relation to the affordable housing element of the development. The viability appraisal was based upon the provision of 21 affordable housing units or 25% of the total housing on site. The offer from an affordable housing provider, Coastline, was received in relation to 11 affordable housing units comprising 4 shared ownership units and 7 affordable rented homes. This was used to calculate the total revenue from the affordable homes element of the development. A quotation from a local estate agent was obtained in relation to the value of the open market value properties.
9. The Council responded to the Appellants' appraisal by the production of two of its own appraisals. The first of these was based upon its own revised construction costs and other assumptions in relation to construction variables as well as the revised value for the affordable housing units. This appraisal

indicated that 40% affordable housing provision was still achievable. The second appraisal adopted the same assumptions as the first but increased construction costs. This appraisal indicated that at 33% provision the scheme would remain viable.

10. At the Hearing the Council confirmed that the sales figure in relation to both the affordable housing element and the open market housing was agreed. This effectively meant that the gross development value was fixed. Differences between the parties related to construction costs and other infrastructure costs, as well as the land value and developer's return. All of these matters were fully ventilated and after the luncheon adjournment the parties indicated that agreement had been reached in relation to all matters. Both parties advocated a modification of the agreement to result in 33% affordable housing provision with 27 units.
11. I now turn to consider the three areas upon which the parties had a dispute and upon which now they have come to agreement.
12. Costs: the Appellants applied build costs of £80psf across the development but also included separate elements for preliminaries and an allowance for part L compliance. In its first appraisal the Council had used a build cost of £84psf being the BCIS lower quartile figure for this type of development. It had deducted preliminaries and the part L allowance on the basis that these were included in the BCIS figures. The second Council appraisal applied a higher build cost of £94psf on the same basis.
13. Whilst construction has commenced on site there is no actual data before me in terms of actual costs incurred to date. The Appellants rely upon estimates from 2009 in relation to the scheme for 88 dwellings. However the Appellants point out that the lower quartile BCIS figures should not be used because they are not a volume house-builder and their costs are higher. The second Council appraisal uses a build cost of £94psf which is just below the BCIS mean figure for such schemes. It is this figure that the parties have agreed on the basis that the allowances for preliminaries and part L compliance are removed. Having regard to the size of the scheme and its location I am satisfied that this represents a realistic estimate of build costs in the absence of evidence to the contrary.
14. Infrastructure Works: the Appellants rely upon the 2009 estimate in relation to the 88 house scheme. This is somewhat out of date and for a larger scheme, although I accept that the internal access roads are largely the same. In its appraisals the Council has removed allowances for access roads etc, parking courts, fencing & hedges, landscaping & gardens, street furniture & signs, play space & equipment and drainage/soakaways. It has replaced these individual estimates with a global figure for such elements calculated as £15psf for externals which is a standard approach across the industry. In the absence of specific information supported by documentary evidence I agree that the Council's approach is to be preferred. This was also agreed by the Appellants.
15. Finally the Council's appraisal used the same land value as the Appellants but applied a blended profit of 13% of Gross Development Value. This blended rate was calculated assuming a 15% profit rate for the open market housing and 6% profit on the affordable housing. These assumptions are within the range of profit figures generally accepted. The 6% profit on the affordable housing is reasonable given that there is limited risk associated with such

development and in this case the Appellants have already agreed a deal with a social housing provider.

Overall Conclusions

16. At my request the parties modelled various scenarios prior to the Hearing to illustrate the effect of adopting different permutations of the main variables in dispute. At the outset of my conclusions I note that the Appellants' stated baseline position was that they wished to reduce the affordable housing element down to 25% provision which essentially equates to some 21 affordable units. Provision at the rate of 40% specified in the obligation would result in 33 units.
17. The agreements reached by the parties in relation to the disputed variables are reasonable. They most closely resemble the scenario modelled by the Council which resulted in a scheme being viable with provision of affordable housing at a level of 33%. This would result in a reduction of the number of affordable units from 33 to 27. The parties agreed that the number of intermediate dwellings should be reduced from 23 to 17 and the social rented dwellings remain unchanged at 10. This effectively preserves the contract already agreed by the Appellants and it secures the same level of provision of rented dwellings which is in short supply. Finally the parties agreed that the 6 intermediate dwellings which should be removed should be the 4 bedroom houses. I am content that these modifications are necessary to reflect the agreement between the parties and to render the scheme viable. I shall modify the obligation accordingly.

Karen L Ridge

INSPECTOR

SCHEDULE OF MODIFICATIONS TO THE PLANNING OBLIGATION DATED 23RD DECEMBER 2011

1.1 Definitions

'Affordable Housing Scheme' definition- replace figure 33 with 27

'Intermediate Dwellings' definition- replace figure 23 with 17

Third Schedule

Delete the requirement for 6 x 4 bedroom houses- intermediate dwelling

Revise percentage figures for 2 bedroom intermediate dwellings and 3 bedroom intermediate dwellings to 62% and 62% each.

For the avoidance of doubt the Third Schedule should read as follows:

THIRD SCHEDULE

Number of units	Type of unit	Tenure	Terms	Percentage (%) of OMV
10	2 bed houses (min 68m ²)	Social rented dwelling	Transfer to an Affordable Housing Provider and let an Affordable rent	-
15	2 bed houses (min 68m ²)	Intermediate dwelling	Let at an intermediate rent or sold at a % of open market value	62%
2	3 bed houses (min 90m ²)	Intermediate dwelling	Let at an intermediate rent or sold at a % of open market value	62%

END OF MODIFICATIONS

APPEARANCES

FOR THE APPELLANT:

Mr Pascoe	Consultant
Mr Andrew Luxon	Director, AJL Limited

FOR THE LOCAL PLANNING AUTHORITY:

Mr Christopher Rose	Development Officer, Cornwall Council
Mr Richard Hawkey	Senior Development Officer, Cornwall Council.

DOCUMENTS SUBMITTED AT THE HEARING

- 1 Revised toolkit appraisal based upon 40% provision, submitted by the Council.
- 2 Revised toolkit appraisal based upon 33% provision, submitted by the Council.