The Planning Inspectorate

Appeal Decisions

Hearing held on 30 November 2016

Unaccompanied site visit made on 29 November 2016

by Mike Moore BA(Hons) MRTPI CMILT MCIHT

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

Decision date: 22 December 2016

Appeal A: APP/D0840/S/16/3150473
Fistral Blue, Headland Road, Newquay, Cornwall, TR7 1FX

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by Bluer Homes Limited against the decision of Cornwall Council.
- The development to which the planning obligation relates is the demolition of an existing two-storey house to be developed with 18 two, three and four-bed luxury apartments with 18 parking spaces.
- The planning obligation, dated 9 March 2007, was made between the Council of the Borough of Restormel, Cornwall County Council, Stephen Christopher Bluer and Barclays Bank Plc with a supplemental agreement, dated 21 October 2010, between Bluer Homes Limited, Cornwall Council and National Westminster Bank PLC.
- The application Ref PA16/02764, dated 16 March 2016, was refused by notice dated 13 April 2016.
- The application sought to have the planning obligation modified to remove the affordable housing contribution.

Appeal B: APP/D0840/Q/16/3155225
Fistral Blue, Headland Road, Newquay, Cornwall, TR7 1FX

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a refusal to discharge a planning obligation.
- The appeal is made by Bluer Homes Limited against the decision of Cornwall Council.
- The development to which the planning obligation relates is the demolition of an existing two-storey house to be developed with 18 two, three and four-bed luxury apartments with 18 parking spaces.
- The planning obligation, dated 9 March 2007, was made between the Council of the Borough of Restormel, Cornwall County Council, Stephen Christopher Bluer and Barclays Bank Plc with a supplemental agreement, dated 21 October 2010, between Bluer Homes Limited, Cornwall Council and National Westminster Bank PLC.
- The application Ref PA15/09220, dated 1 October 2015, was refused by notice dated 18 January 2016.
- The application sought to have the planning obligation discharged.

Decisions

1. Appeal A is dismissed.
2. Appeal B is dismissed.

Preliminary Matters

3. An unaccompanied site visit was made on the day before the hearing. At the hearing the main parties agreed that a formal accompanied site inspection would not be necessary given the issues in these appeals.

4. Both appeals concern the same site, development and planning obligation. The development to which the obligation relates was first permitted in 2007. A new permission that extended the time limit for the development but otherwise left the scheme unchanged was issued in 2010. The original planning obligation was entered into in March 2007. A supplemental agreement of October 2010 relates to changes to the ownership of the property and to Cornwall Council being the statutory successor to the former County Council and Council of the Borough of Restormel. The parties to the supplemental agreement are bound in an identical manner to the development permitted as in the original obligation. I have considered the appeals in that context.

5. The main parties agreed that the development of the site had been completed with all 18 properties sold and occupied.

Main Issues

6. For Appeal A the main issue is whether the planning obligation requirements in relation to affordable housing result in the overall development being unviable, and, if so, how the obligation could be modified so that the development would become viable.

7. For Appeal B the main issue is whether the planning obligation still serves a useful purpose.

Reasons

Appeal A

8. The statutory tests for applications of this kind and subsequent appeals involve only the consideration of the viability of the affordable housing requirements. While the Council referred to the obligation continuing to serve a useful purpose in its reasons for refusal, that is not a consideration in appeals made under s106BC.

9. The appellant is seeking the removal from the obligation of an affordable housing contribution of £370,170 plus administrative costs and a retail price index percentage increase, payable upon the completion of the sale of the 12th dwelling. As all the properties have been sold, this trigger point has passed.

10. In the first instance the principal difference between the parties is the extent to which the provisions of the Act apply to the circumstances where the scheme has been built out and sold. The Council is of the view that the purpose of the legislation was to address stalled schemes where requirements under Section 106 of the Act (s106) are preventing a development taking place. It should not be applied to schemes that are completed, where the trigger point has passed.

11. The Government's 'Section 106 affordable housing requirements – review and appeal' guidance ('the Guidance'), April 2013, indicates that unrealistic s106 agreements negotiated in differing economic conditions can be an obstacle to house building. Stalled schemes due to economically unviable affordable housing requirements result in no development, no regeneration and no community benefit. The Guidance goes on to state that reviewing such agreements will result in more housing and more affordable housing than would otherwise be the case.

12. Developments may be built out even though a developer makes a loss as that may be a more acceptable alternative financially than abandoning the scheme. The appellant has referred to an appeal decision[1] at another site where the development had been built out, sold and tenanted. In that case the Inspector concluded that the requirements of the obligation were part of the development permitted. As in this case, the trigger point for the provision of affordable housing had passed. The obligation could therefore be acted upon or enforced. Accordingly, he concluded that it was open to him to consider whether the affordable housing requirement meant that the development was not economically viable and, if so, how the appeal should be dealt with so that the development became viable.

13. From the details provided of that decision, the circumstances of the earlier appeal are different to that here. In that case some of the built units were being rented and could be capitalised. If transferred to a registered social landlord therefore, the affordable provision would be on site as part of the scheme. The parties had agreed that the scheme was not viable but the Inspector on testing the evidence was not convinced and found that it was viable and dismissed the appeal.

14. In this case, the parties disagree over viability. The Guidance establishes the test for viability as being that the evidence indicates that the current cost of building out the entire site (at today's prices) is at a level that would enable the developer to sell all the market units on the site (in today's market) at a rate of build out evidenced by the developer and make a competitive return to a willing developer and a willing landowner.

15. There was no viability appraisal prepared relating to the original planning permission in 2007, nor for the new permission in 2010. In those circumstances the developer must clearly demonstrate through evidence why the existing scheme is not viable. A proposal to bring the scheme into viability should be submitted. In this instance, where the built development is completed, the appellant has submitted a summary of the construction costs incurred and actual revenue from sales. It shows a loss of over £160,000 excluding the s106 costs. The loss rises to over £750,000 when these are taken into account.

16. The Council's hearing statement indicates that its main concerns relate to the land value and an unrealistic target profit margin. At the hearing it confirmed that, apart from the land value, it otherwise accepted the costs set out in the appellant's calculation.

17. The Guidance indicates that if there was no original appraisal the market value at the date of the original permission should be used. The appellant's evidence has had regard to a valuation report produced in 2011 for the appellant company's bank, after the 2010 planning permission. It has taken account of comparable transactions information, changes in property prices between 2010 and 2011 and other evidence to establish an estimated land value at the time of the planning permission. The Council has not produced persuasive evidence that would lead me to a different view. As such, I favour the appellant's conclusion that the development is not economically viable even with no affordable housing. However, this outcome would not result in more housing

[1] APP/D1590/Q/14/2228061

or more affordable housing than would otherwise be the case as the Guidance intends.

18. The Act is silent on the need for schemes to be stalled and there is no legal definition of what that means. However, ss106BA(8) of the Act requires that a determination by an authority must have regard to guidance issued by the Secretary of State. The intentions behind s106BA in the published Guidance are unequivocal. The market housing with planning permission proposed in this case has been completed and without the obligation no further affordable housing would be provided. By any measure it cannot be considered to have stalled.

19. Reference has been made to other appeal decisions but the circumstances in those cases are different to those here. They do not add materially to my understanding of the issues in this appeal or affect my conclusions.

20. As I have concluded that the development is not a stalled scheme there is no need for me to consider further the viability of the affordable housing requirements. I conclude therefore that Appeal A should be dismissed.

Appeal B

21. The Appeal B proposal is for the discharge of the planning obligation in its entirety. In addition to the affordable housing provisions considered under Appeal A, the agreement includes financial contributions to education facilities £1,370 per dwelling) and public open space (£3,068 per dwelling) (with allowance for retail price index changes).

22. Under the Act, applications for the discharge of a planning obligation are determined solely on the basis of whether or not it continues to serve a useful purpose.

23. The development is in a very prominent headland location facing the sea. The appellant considers this to be a high quality development which is described as an iconic building. It has assisted in the regeneration of this part of Newquay with a number of nearby redevelopments providing good quality apartment accommodation. It is contended that these benefits should outweigh the need to provide further funding and amount to sustainable development without the contributions to other facilities.

24. The National Planning Policy Framework ('the Framework') was adopted in 2012, after the obligation was agreed. It sets out the Government's view of what sustainable development means, identifying economic, social and environmental dimensions which should be sought jointly and simultaneously through the planning system. The recently adopted Cornwall Local Plan Strategic Policies carry forward this approach.

25. There is clear evidence of a significant need for affordable housing in Newquay and this was not contested by the appellant.

26. The Framework gives great weight to the need to create, expand or alter schools. It recognises the important contribution that high quality open spaces can make to the health and well being of communities. The evidence indicates that the contributions here were fairly and reasonably related in scale and kind to the development at the time of the agreement. In principle, such

contributions are necessary for the development to be sustainable having regard to all three dimensions.

27. Whereas I was informed that many of the units are occupied as second homes, they are not restricted by condition or obligation to use as holiday accommodation. Potentially there could be children of school age. The education authority indicates that schools in Newquay are close to capacity and that the funding would be used to create additional teaching space in a school where the pooling limit under Community Infrastructure Levy Regulation 122 has not been reached.

28. The occupants are reasonably likely to be users of local open spaces, particularly as the provision of on-site private open spaces is mainly limited to balconies. The Council's Open Space Strategy for Larger Towns in Cornwall, July 2014, provides a basis for the provision of new or improved open spaces and identifies deficiencies in Newquay. The pooling limit for contributions has not been reached.

29. At and subsequent to the hearing the parties agreed various modifications to the obligation, including to the public open space contribution, to reflect changing circumstances. However, these are not matters that I can take forward. The Act includes no provision for either the local planning authority or an Inspector on appeal to modify a planning obligation when the application is to discharge it. S106B(4) when read with s106A(6) only allows consideration of modifications specified in the application and there were none in this case. It is open to the parties to renegotiate the obligation as appropriate.

30. Reference has been made to other appeal decisions but, as for Appeal A, the circumstances in those cases are different to those here. They do not add materially to my understanding of the issues in this appeal or affect my conclusions.

31. The provision of affordable housing, education facilities and public open space in or around Newquay are all useful planning purposes. There is no requirement in the Act that those purposes should relate to the impact of the development concerned. In these circumstances I conclude that the planning obligation continues to serve a useful purpose. The appeal should therefore be dismissed.

M J Moore

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

John Pugh-Smith of Counsel	
Hollie Nicholls MSc MRTPI	Planning Manager, Laurence Associates
Andrew Murphy BSc (Hons) MRICS	Director, Lambert Smith Hampton
Stephen Bluer	Bluer Homes Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Chris Rose MSc MRTPI	Principal Development Officer, Cornwall Council
Richard Hawkey	Senior Development Officer, Cornwall Council
Stephen Kirby BA (Hons) DIPTP DIPUD MRTPI	Principal Development Officer, Cornwall Council

DOCUMENTS SUBMITTED AT OR AFTER THE HEARING

1 Appeal decision Ref. APP/D0840/S/16/3151466
2 Statement of Common Ground dated 29 November 2016 (appellant's latest draft, not signed by the Council)
3 Chronology of events concerning Statement of Common Ground and requests to discuss costs evidence with Cornwall Council submitted by the appellant
4 Email trail submitted by the appellant
5 Appeal decisions Ref. APP/D0840/A/13/2203549 & APP/D0840/Q/13/2200972
6 Land registry entry for the site 5 October 1994
7 Daily Telegraph article 15 March 2008
8 Financial appraisals showing alternatives land values submitted by the Council
9 Emails setting out the basis on which the Council assesses the need for the open space and education contributions
10 Council's evidence on calculation of effect of Retail Price Index
11 Modifications to the s106 agreement agreed by the parties
12 Calculation for adding retail price index
13 Series of emails between the appellant's planning agent and the Council concerning modifications to the s106 agreement