Appeal Decision

Hearing held on 25 January 2017

by P W Clark MA MRTPI MCMI

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

Decision date: 20 February 2017

Appeal Ref: APP/H5960/S/16/3151517
266 Balham High Road, London SW17 7AN

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to modify the affordable housing requirements of a planning obligation.
- The appeal is made by indigoScott against the decision of the Council of the London Borough of Wandsworth.
- The development to which the planning obligation relates is demolition of the existing petrol station and redevelopment of the site including the erection of a 4-7 storey building to provide 71 self-contained residential units with associated cycle parking and landscaping.
- The planning obligation, dated 4 January 2016, was made between the Mayor and Burgesses of the London Borough of Wandsworth and 260-266 Balham High Road LLP and Lendinvest Private Finance General Partners Limited and varied by a Deed of Variation dated 21 December 2016 between the Mayor and Burgesses of the London Borough of Wandsworth and 260-266 Balham High Road LLP and Lendinvest Private Finance General Partners Limited and Lendinvest Trading Partners LLP and Grass Lake Investments UK Limited.
- The application Ref 2016/1862, dated 1 April 2016, was refused by notice dated 28 April 2016.
- The application sought to have the planning obligation modified to reduce the on-site provision of affordable housing units to 5 and to provide an affordable housing commuted sum of £210,000.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision, the planning obligation dated 4 January 2016, made between the Mayor and Burgesses of the London Borough of Wandsworth and 260-266 Balham High Road LLP and Lendinvest Private Finance General Partners Limited and varied by a Deed of Variation dated 21 December 2016 between the Mayor and Burgesses of the London Borough of Wandsworth and 260-266 Balham High Road LLP and Lendinvest Private Finance General Partners Limited and Lendinvest Trading Partners LLP and Grass Lake Investments UK Limited shall have effect in the event that the development proceeds in accordance with the 71 unit scheme subject to the modifications as set out in the Schedule appended to this decision.

Procedural matters

2. Between the date of the refusal of the application to vary the planning obligation and the hearing of this appeal, the development was the subject of an application (reference 2016/3412) under s73 of the Act to vary condition 10 of the planning permission 2015/3470 for the development so as to reduce the

number of units proposed in the development from 71 to 69. Planning Practice Guidance ID 21a-031-20140306 advises that the original permission continues to exist whatever the outcome of the application under section 73, so the effect of approving the application to vary condition 10 is that there are two permissions existing side by side, one for a development of 71 units and one for the development of 69.

3. At the same time, an application (reference 2016/3617) was made to vary the affordable housing obligations of the original (71 unit) scheme. The Council resolved to enter into a Deed of Variation to vary the affordable housing requirement of planning permission 2015/3470 (the 71 unit scheme) to reduce the affordable housing provision from 25 units and a commuted sum of £138,688 to 15 units and a scheme of calculating a development surplus to be paid to the Council in the event that the development achieves higher sales values than a threshold value.

4. However, the Deed of Variation which was subsequently executed by the parties appears to have done something slightly different. Clause 4.2 of the Deed of Variation provides that the Deed applies in the event of the site being developed pursuant to the section 73 permission (i.e the 69 unit scheme). There is nothing expressly provided for in the Deed of Variation to indicate that it should apply in the event of the site being developed pursuant to the original permission (i.e the 71 unit scheme). Rather, clause 4.3 makes it clear that "save as expressly provided for by this Deed of Variation, nothing in this Deed of Variation shall be construed as amending in any way the provisions of the Original Agreement…." (i.e. that applying to the 71 unit scheme).

5. At the Hearing the Council made it clear that this interpretation of the Deed of Variation was not its intention but, after careful consideration of its construction, I am convinced that although its correct interpretation may not be what the Council intended, that is the way the Deed of Variation should be understood. The appellant made it clear that despite the approval of a revised scheme of 69 units and the Deed of Variation which applies a revised affordable housing requirement to that scheme, the current appeal was being pursued in relation to the original permission for 71 units and the scheme of affordable housing agreed at that time. In any event, subsection (7) of s106BC of the Act requires that references to the affordable housing requirement of the planning obligation are to the requirement or obligation as it stood immediately before the application under section 106BA to which the appeal relates. I have dealt with this appeal on that basis and so my decision is limited to the 71-unit scheme.

Main Issues

6. The main issues derive from the provisions of the Town and Country Planning Act which govern this type of appeal. They are whether the affordable housing requirement means that the development is not economically viable and, if so, how the appeal should be dealt with so that the development becomes economically viable. The points which the appellant claims make the scheme unviable concern land value, construction costs and sales values.

Reasons

Land value

7. Land Registry records show that the site was sold in June 2015 for £1.5m but that was not the figure used in the original viability appraisal which underpinned the affordable housing obligation. The reason given is that the sale occurred as part of a package transaction which involved exchanges of land as well as monetary considerations and so only an arbitrary apportionment of the portfolio sale price was ascribed to this particular site.

8. The land value actually used in the original viability appraisal was £2,520,000 based on an estimate of existing use value plus a landowner's premium. The original viability appraisal was undertaken in June 2015, based on a benchmark valuation carried out in May 2015. It was appraised by the Council in August 2015. Resolution to grant planning permission, subject to a s106 agreement, occurred on 16 September 2015 but the agreement itself was not executed until 4 January 2016. Meanwhile, Land Registry evidence shows that the site was sold on 24 September 2015 for £6,975,000 plus £1,395,000 VAT.

9. Advice in Annex A of the DCLG's April 2013 publication *Section 106 affordable housing requirements Review and appeal* (DCLG advice) is that the agreed land value in the original appraisal should be used when considering requests to modify affordable housing obligations, unless the site has been acquired since and evidence is provided of the purchase price. In this case, the site has been acquired since the original appraisal and evidence is provided of the purchase price. But, the advice continues that any purchase price used should be benchmarked against both market values and sale prices of comparable sites in the locality, that any significant overbid on the appeal site should be disregarded and that market value should have regard to planning policies and obligations.

10. Although this transaction occurred before the obligation was executed, it was clearly done at a time when the likely requirements associated with the development were known. Equally, the obligation was entered into on a date where the price paid for the land was known to be far in excess of the land value on which the viability of the scheme with its obligation was based. Such action might be regarded as amounting to poor behaviour but is not a reason to turn away this appeal.

11. The submitted evidence intended to persuade me that I should not disregard the price paid as a significant overbid includes an appraisal by Montagu Evans in April 2016 and two benchmarking extracts from the Molior London database.

12. The Montagu Evans appraisal is based on an assumed permitted alternative use value of £6,250,000 as a care home. (Applied to the appeal scheme that would equate to a land price per unit of £88,028). This appraisal was prepared in accordance with national Guidance, paragraph: 024 Reference ID: 10-024-20140306 which advises that options (for establishing a land value providing a competitive return to developers and landowners) may include the current use value of the land or its value for a realistic alternative use that complies with planning policy.

13. There is an encouraging response from the Council, dated 24 February 2016, to a pre-application request made in January 2016 for an opinion on a proposal

for a Care Home. This gives reason to believe that a Care Home development would be an alternative use complying with planning policy. But, as the Council's representative at the hearing pointed out, an encouraging response to a request for pre-application advice does not give the same certainty as would a planning permission and so, some discount to the land value to reflect that risk would be appropriate. Moreover, the only evidence produced to substantiate the appellant's assertions that it would be a realistic alternative is an e-mail which does not refer to a care home proposal but is from a party which describes itself as a leading retirement housebuilder.

14. Both parties accept that comparable land transactions in the local area are few, so no inference should be drawn from the fact that only two comparables were submitted as benchmarks. The Council did not submit any additional candidates for benchmarking comparables. One of the comparables, at 215 Balham High Road, is almost opposite the site, so is a very good comparable. The data suggests that the price paid in March 2016 equated to a land price per residential unit of £125,000. The other benchmarking transaction was some distance away, in Streatham High Road. Data for that suggests a land price per residential unit in February 2015 of £90,425. Neither of these comparables suggests that either the Montagu Evans valuation of the appeal site or the actual purchase price is an overpayment.

15. DCLG advice is that the market value at the date of the original permission should be used. The two comparables, at February 2015 and March 2016 lie almost equidistant in time either side of the date of the Council's resolution to grant the original permission and so represent a good guide to the market value of the site at that time.

16. Notwithstanding the plausibility of the observations in principle on the Montagu Evans valuation, the substantive evidence of actual transactions indicates that no discount should be applied to it. I therefore conclude that a land value for the site of at least £6.25m is appropriate for any review of the affordable housing obligation.

Construction costs

17. The original appraisal was based on a build cost of £224 per sq ft (£15,674,000). A Feasibility Cost Estimate by Oander dated March 2016 identifies a build cost of £237 at that time (£16,630,419). The Council's consultants reckoned that this could be reduced to £15,959,512 but the differences between the parties were not resolved at the time because discussion was cut short by the appellant's offer of a varied affordable housing obligation in relation to the revised scheme, which the Council decided to accept.

18. At the hearing, no further information was submitted in support of the Council's view of the matter and Oander did not modify its judgement. However, both parties agreed that costs had increased again in the period since the March 2016 estimate by an annual national rate of 4.3%. This would increase Oander's estimate to £247-59 per sq ft (£17,250,000). There is no substantive evidence which would cause me to come to a different conclusion. This suggests that the viability of the scheme now is even less than at the time the appeal was made.

Sales values

19. The original appraisal used sales values of £700 per sq ft (a compromise between Jones Lang LaSalles's £660 and Savills' £750). Montagu Evans revised appraisal of April 2016 simply applied six months' Land Registry House Price Index data for Wandsworth and one month's Rightmove House Price index for Wandsworth to arrive at a figure of £745.64 for March 2016. Further application of the indexation approach was said to lead to a figure of £727.86 per sq ft for Wandsworth in November 2016. By reference to a number of comparables, particularly two developments known as Aura House and Balham Walk, G.L Hearn for the Council now advise £775.

20. Aura House is to the north of Balham and could well be described as Clapham, a more prestigious area. Its nearest Underground station is Clapham South, in both zones 2 and 3 of the Transport for London fare system, so offering cheaper travel costs to central London. By contrast, the appeal site is well to the south of Balham, almost into Tooting, a less prestigious area and is served by zone 3 stations. Both Aura House and Balham Walk have SW12 postcodes whereas the appeal site has a less desirable Tooting postcode, SW17. These local connotations are likely to suppress the sales values for the appeal site relative to these two comparables. In addition, a proportion of properties at Balham Walk were sold with parking spaces, each worth about £30,000, so average prices for that development, relative to the appeal site, would be greater in any event.

21. Both parties are agreed that the sales values for the affordable housing should remain unchanged. Because of the imponderable effects of differences between the appeal scheme and the two comparables suggested by the Council, I prefer to rely on the submitted UK House Price Index for Wandsworth. This shows that the average price for a flat or maisonette property in September 2015 (the date of the resolution to grant planning permission) was £505,835. By November 2016 (the most recent date for which data is submitted) the average price for a flat or maisonette had risen to £525,954. That represents an increase of £20,119 which is a little under 4% of the earlier figure. Applied to the original sales value of £700, this produces a figure for November 2016 of £727.84, confirming the appellant's figure given at the hearing.

22. Although this suggests that the appellant's viability assessment submitted in support of the appeal produced too high a value and that, as a consequence, the viability of the proposal is even less than claimed, the figure is highly susceptible to variation depending on the base date used for the calculation. Although I have taken September 2015 (the date of the resolution to grant permission) as the base date, it must be remembered that the original appraisals were carried out earlier; in June 2015 by Jones Lang LaSalle for the appellant and in August 2015 by Savills for the Council. Repeating the calculation using these two months as the base date produces figures for November 2016 of £770-50 and £735-61 respectively, the first of these rather vindicating the Council's view.

23. It is clear from this index that prices in Wandsworth have been highly volatile over the period in question. That is consistent with the Chancellor's comments on turbulence in the markets at the present time. In consequence, it would be unsafe to alight on a precise figure for the current value of the development.

Nevertheless the range of plausible figures centres around the figure used in the appellant's revised viability appraisal and so I accept that it represents a basis for the review of the affordable housing obligation.

Conclusion on viability

24. There are three major points of disagreement between the parties. In terms of land values, I have found that the figure of £6.25m used in the appellant's revised appraisal by Montagu Evans submitted in support of the appeal is appropriate for any review of the affordable housing obligation. In terms of construction costs, there is no substantive evidence to show that the costs now would not be even greater than at the time the appeal was made. In terms of sales values, the published land registry index suggests great volatility but that the appellant's revised viability appraisal represents a basis for the review of the affordable housing provision of this scheme. I therefore conclude that the appellant's revised viability appraisal correctly demonstrates that the affordable housing requirement means that the development is not economically viable.

How the appeal should be dealt with

25. In a letter dated 9 November 2015 from the Minister of State for Housing and Planning, sent to local authorities in England, commenting on the impact of social rent changes on the delivery of affordable housing, the minister canvassed the potential of adjusting tenure mix (e.g discounted sales in place of shared ownership) so as to retain overall numbers of affordable housing. That also seems to be the preferred approach of the Mayor of London and the Council as set out in their respective supplementary planning documents[1].

26. However, neither party has provided any information about the possible effects of such adjustments. In response to a direct question, the Council's representatives indicated that the Council would not be happy to modify the mix of affordable housing so as to maintain the overall numbers of affordable housing. On the other hand, notwithstanding the potential for the viability of the scheme to have worsened still further subsequent to the revised appraisal of March 2016, the appellant indicated that the variations to the affordable housing requirement proposed in their viability appraisal of that date would still be sufficient for the development to become economically viable. In the absence of any other information, that is the course which I adopt.

P. W. Clark

Inspector

[1] Wandsworth Local Plan SPD Planning Obligations, paragraphs 5.42, 5.50 and 5.52-5.59. Mayor of London Housing Supplementary Planning Guidance March 2016, paragraph 4.4.2

Schedule of Modifications to the planning obligation dated 4 January 2016 applicable to the 71 unit scheme

1) Amend the following Definitions in Clause 1 of the Agreement as follows;

   Affordability Criteria (a) (i) to read; "the one bedroom Intermediate Housing Unit is affordable to applicants with gross annual household incomes of £45,000 (fortyfive thousand pounds) or less and"

   Affordability Criteria (a) (ii) to read; "the two bedroom Intermediate Housing Unit is affordable to applicants with gross annual household incomes of £55,000 (fiftyfive thousand pounds) or less"

   Affordability Criteria (a) (iii) to be deleted

   Affordable Housing Commuted Sum to delete "£138,688 (one hundred and thirty eight thousand six hundred and eighty eight pounds)" and insert "£210,000 (two hundred and ten thousand pounds)"

   Affordable Housing Mix to read; "means the on-Site provision of 5 (five) Affordable Housing Units equating to 7% (seven percent) of the Residential Units and comprising:-

   (a) 3 (three) Affordable Rented Units (1 x 3 bed unit and 2 x 2 bed units)
   (b) 2 (two) Intermediate Housing Units (1 x 2 bed unit and 1 x 1 bed unit)

   Or such alternative Affordable Housing Mix as may be approved in writing and in advance by the Council PROVIDED ALWAYS THAT the total number of Affordable Housing Units to be provided on the Site shall be not less than 5"

   Affordable Housing Plans to read "means Plans B1 and B2 showing the location of the Affordable Rented Units plots 00.01 00.03 and 00.04 and the Intermediate Housing Units plots 00.02 and 00.05"

   Affordable Rented Units to delete "15 (fifteen)" and insert "3 (three)" and delete the first bullet point and amend the second bullet point to delete "7" and insert "2" and amend the third bullet point to delete "3" and insert "1"

   Intermediate Housing Units to delete "10 (ten)" and insert "2 (two)"

2) Amend Schedule 2 to delete plans B3 to B6

3) Amend Schedule 3 Part 1 clause 1.2 to delete "(the 23rd)" and insert "(the 34th)" and to delete "10% (ten per cent)" and insert "40% (forty per cent)" and to delete "2" and insert "1"

4) Amend Schedule 3 Part 1 clause 1.3 to delete "23" and insert "34"

5) Amend Schedule 4 clause 1.2 to delete the second occurrence of “10% (ten per cent)” and insert “40% (forty per cent)”

End of Schedule

APPEARANCES

FOR THE APPELLANT:

Jo Fone	Montagu Evans
Will Seamer	Montagu Evans
Jon Davis	indigoScott
Christine Hereward	Pemberton Greenish, solicitors
Jeremy Scott	indigoScott
Neil Jones	Rapleys
Ben Davies	Oander

FOR THE LOCAL PLANNING AUTHORITY:

Guy Ingham	G L Hearn
Andrew Vaughan	L B Wandsworth
Ian Ruegg	L B Wandsworth

Additional **DOCUMENTS** submitted at the Hearing

1
   - A) Copy of e-mail 24.1.17 from Neil Jones to PINS
   - B) Land Registry Copy of Register of Title 23.11.16
   - C) Planning Timeline
   - D) Response to Inspector's queries

2 E-mail 14.9.15 from Scott Pluthero of McCarthy and Stone

3 Copy of permission 2016/3412

4 Extracts from Molior London database
   - A) Relating to Ipsus 10 (Bedford House)
   - B) Relating to Streatham Police Station

5 Details of sales prices at Aura House, Balham Hill

6 UK House Price Index Wandsworth from January 2015 to January 2017

7 Aerial photograph illustrating location of appeal site, Aura House and Balham Walk