The Planning Inspectorate

Appeal Decision

Hearing held on 5 April 2017

Site visit made on 5 April 2017

by Christina Downes BSc DipTP MRTPI

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

Decision date: 16 May 2017

Appeal Ref: APP/H1840/S/16/3158916
Land adj Sims Metals UK (South West) Limited, Long Marston, Pebworth

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 (as amended) against a refusal to modify a planning obligation.
- The appeal is made by Codex Land Promotions Ltd against the decision of Wychavon District Council.
- The development to which the planning obligation relates is a mixed use development, comprising up to 380 dwellings, employment and community uses along with public open space, landscaping and infrastructure.
- The Planning Obligation by Agreement, dated 12 November 2013, was made between Wychavon District Council, Worcestershire County Council, Risborough Developments Limited, Anthony Patrick Michael Bird, the Bird Group of Companies Limited, Santander UK PLC and Barclays Bank PLC.
- The application Ref W/16/01128/PO, dated 28 April 2016, was refused by notice dated 30 August 2016.
- The application sought to have the planning obligation modified by reducing the affordable housing provision from 35% to 20%.

Decision

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

Procedural matters

2. Where an application is made to modify an affordable housing requirement Section 106BA of the 1990 Act (as amended) provides that, if it means that the development is not viable, the application should be dealt with so that it becomes viable. Section 106BC applies the same provisions to an appeal.

3. The appeal was made by Codex Land Promotions Ltd. It was confirmed that this is the legal agent of those parties against whom the affordable housing requirement is enforceable. I am therefore satisfied that the appeal has been validly made under the provisions of Section 106BC of the Act. It was also confirmed that notice was given in writing to the other signatories of the Deed.

4. Whilst the provisions under Section 106BC of the Act have now been repealed, the application under Section 106BA was made to the council prior to the due date of 30 April 2016. In such circumstances the appeal can proceed.

5. The hearing was closed in writing on 2 May 2017 for the reasons explained in paragraph 7 below.

Background

6. Outline planning permission for the development was granted by the Secretary of State in July 2014. Condition 9 required a connectivity scheme to be agreed by the council before development could commence in order to provide linkages with the adjacent development by St Modwen. This is a large mixed use scheme that is currently being constructed and will provide retail, leisure and commercial facilities as well as housing. The Secretary of State made clear that the connections between the two were essential to make the appeal development sustainable. The subsequent details of the proposed connectivity scheme were considered inadequate by the council and the related appeal was dismissed in December 2016. The main reason was that a cross-boundary connection had not been included and this was considered necessary in order to provide a satisfactory link for new residents to the shops and facilities on the adjoining site.

7. It is clear that there have been protracted discussions with the adjoining landowner about the connectivity requirement. The appellant indicated at the hearing that a £5m payment had been agreed and this was to be subject to a legal agreement that was almost, but not quite, agreed. The council objected to any further time being given on the basis that the matter had been discussed at the original inquiry in 2013. However, the appellant contended that resolution was now very close and, in the circumstances, I allowed the appellant a further 14 days, which it agreed should be sufficient. Just before the expiration of that time period a further extension of time was requested to allow all of the signatories to execute the Deed. This was agreed but it was made clear that no further extensions of time would be granted. The executed Deed has not been submitted and no explanation has been forthcoming.

Main issue

8. Whether the affordable housing requirement in the Planning Obligation by Agreement (S106 Agreement) would result in the development being economically unviable and, if so, how it could be modified so that the development would become viable.

Reasons

9. The Department of Communities and Local Government document: *Section 106 affordable housing requirements – review and appeal* (the Guidance) makes clear that the Government is keen to encourage development to come forward to meet the growing need for housing and stimulate economic growth. Stalled schemes that have unviable affordable housing requirements result in no development and no community benefit. No viability work was submitted with the original planning application or appeal, which was determined by the Secretary of State in July 2014. However, a viability assessment was submitted in support of the application to modify the S106 Agreement and this was reviewed by the District Valuer's Service (DVS) in July 2016. Prior to the hearing I requested some further viability work to be undertaken to test several other scenarios with changed inputs relating to developer's profit and land value.

10. The appellant's viability assessment did not include the costs or values relating to the commercial element of the scheme. The reason given was that this would be provided separately from the residential development. There is no

planning condition requiring it to be delivered at any particular time apart from a general phasing condition for the development as a whole. In any event it was contended that the cost of a serviced commercial site was likely to be higher than the return. There was little evidence on the matter to reach a conclusion but the DVS considered that the commercial element was likely to break even at best and so it would have little impact on overall viability. In the circumstances it seems reasonable to omit the commercial land from the viability appraisal.

11. The site area used in the appellant's viability assessment includes 12.35 acres of ecological land. The S106 Agreement requires this land to be retained and managed in accordance with a management plan from the commencement of development. This means that it would be integral to the overall housing provision. In the circumstances it is reasonable to include this land as part of the site area in the viability assessment. My consideration is therefore on the basis of a site area of 68.35 acres.

Benchmark land value

12. Most of the inputs to the viability assessment are agreed between the main parties. The major dispute relates to whether the connectivity payment to St Modwen should be considered as a land cost or a development cost. From the evidence I am satisfied that there is a high probability that £5m will be the sum of money required in order to achieve the connectivity required in order to discharge condition 9. As explained above, the legal agreement between the appellant and the adjoining landowner has not yet been executed. However the evidence indicates that this will happen, even though it is taking rather a long time to achieve. In any event, if it were to founder, the planning permission could not be implemented and this was a risk foreseen by the Secretary of State when he made his decision on the appeal in 2014. In the circumstances I am satisfied that £5m is a reasonable figure to take into account for the purposes of this appeal.

13. The parties agreed that a reasonable market value for the site is £15m or about £219,000 per acre. The dispute lies with whether this value should be reduced to take account of the £5m connectivity charge. If that is the case, the land value would fall to £10m or about £146,000 per acre. The Planning Practice Guide indicates that land value should be informed by comparable, market-based evidence wherever possible. However, in this case I was not given any example of a valuation for a site with a comparable constraint.

14. The Planning Policy Framework (the Framework) establishes the basic principle that in order to ensure viability and deliverability it is necessary to ensure a competitive return to a willing developer and a willing landowner. It is thus necessary to consider the threshold land value, which is the value at which a willing landowner would be prepared to release the land for development. *The Harman Report: Viability Testing Local Plans (2012)* provides some useful guidance in this regard and suggests different approaches to establishing the threshold land value. The exercise starts with existing use value and then considers what premium or uplift would be required. Comparison with other sites in the locality is not helpful in this case for the reason given above.

15. The site is mainly derelict land and most of it has little agricultural value. The only estimate of existing use value was from the DVS who put forward a figure of £5,000-10,000 per acre. The appellant did not seem able to engage with the

concept. In view of the existing condition and position of the land, the upper value suggested by the DVS does not seem unreasonable. This would result in an existing use value of about £684,000.

16. The appellant's valuation expert indicated that an unconditional sum of about £100,000 per acre would be reasonable. However, it is important to understand that this is not the same thing as existing use value. On the contrary, it would rely on an assessment of the mid-long term prospects for the land as well as the risks presented by the planning process. In other words it would be inflated to include a good dose of hope value on the basis that some transactions would result in a viable development materialising and others would not. This would result in a value of about £6.8m.

17. The advice on land value in the Guidance is that the market value at the time of the original planning permission should be used. That would be likely to be lower than the unconditional figure referred to above because once permission has been granted the various costs of development will become clearer. In this case not only were there various S106 costs but also the requirement for connectivity with the adjoining site. Whilst the sum required had not been negotiated at this time, it seems to me untenable that any developer would have worked on the basis that St Modwen would provide the vital connections at nil charge. The connectivity scheme was described in the Secretary of State's decision as "*absolutely crucial*" and without it he made clear that the development must fail. In the circumstances it is difficult to see how anyone could have expected that the implementation of this linkage would involve other than a substantial sum of money.

18. The residual valuations demonstrate that when all of the necessary costs are taken into account, including 35% affordable housing, other planning obligation costs and the £5m connectivity payment, the residual land value would be just over £10m. This is clearly considerably higher than the £6.8m referred to above and would result in an uplift of about 14.6 times existing use value. If the small surplus shown in the parties' appraisals[1] is also taken into account, the 15 times multiplier advanced by the DVS as being the minimum uplift that would be expected to bring a site forward for development would be achieved. The Codex representative indicated that £250,000 per acre was the minimum that the land would be sold for. However, no evidence was given to support this figure and it did not seem to accord with the appellant's expert valuation evidence or that of the DVS, both of which indicated that a benchmark land value of £150,000 per acre would be reasonable.

Developer's profit

19. This matter is of little consequence in view of my conclusion regarding land value. There is no dispute that 6% profit on the value of the affordable element would be appropriate to reflect the lower risk involved with affordable housing provision. However, I do not agree with either party on the profit level for the market housing. In my experience a 20% profit on the value of market housing is usually accepted, although a lower or higher figure can be justified in some circumstances. Here there are some risks. There is an objection from the Health and Safety Executive in relation to the proportion of the housing that would be acceptable within a certain distance of the pipeline that crosses the

[1] See Document 1: Appraisal No 6 by Atwell Martin Ltd and Document 2: Appraisal No 2 by the DVS.

site. However, neither the Inspector nor the Secretary of State considered this to be an overriding concern and, indeed found the objection difficult to understand. Brexit may affect the housebuilding industry but in what way is currently unknown. Whilst the maximum number of dwellings may not be built, there is no evidence that a lesser number is likely to transpire. This is a greenfield site with seemingly few encumbrances and limited risks. On the evidence the DVS figure of 17.5% seems too low but the appellant's figure of 22% seems too high. The normally accepted figure of 20% would be most appropriate in this case.

Overall conclusions

20. For all of the above reasons it is concluded that the land value adopted in the appellant's viability assessment is too high and should be reduced to reflect the connectivity charge of £5m required to implement the planning permission. I asked the appellant to rework the appraisal with all inputs the same, including the affordable housing requirement, but with a land value of £10m and a developer's profit of 20% on the value of the market housing and 6% on the value of the affordable housing. This showed a small profit surplus of £477,117. Taking this into account, there would be an uplift of about 15 times existing use value.

21. On the evidence this seems to me sufficient to be confident that the current cost of building out the site would enable the developer to sell the market units on the site and make a competitive return to a willing developer and a willing landowner. The affordable housing obligation of 35% does not therefore make the scheme unviable in current market conditions. For this reason the planning obligation will not be modified and the appeal does not succeed.

Christina Downes

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Charles Banner	Of Counsel, instructed by Foxley Tagg Planning Ltd
Mr S Usher	Codex Land Promotions Ltd
Mr S Taylor BSc MRICS	Director of Atwell Martin Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Ms Sarah Clover	Of Counsel, instructed by the Head of Legal Services, Wychavon District Council
Ms H Peachey	Deputy Legal Services Manager, Wychavon District Council
Mr J Edwards BSc(Hons) DipTP MRTPI CLMS	Development Manager (Planning), Wychavon District Council
Mr T Williams MRICS	Head of Viability (Technical), District Valuer's Service

DOCUMENTS SUBMITTED AT THE HEARING AND PRIOR TO ITS CLOSE

1 Further viability appraisals undertaken by Atwell Martin Ltd

2 Further viability appraisals undertaken by the council

3 Post hearing correspondence concerning an extension of time to submit the legal agreement

4 Letters from the Planning Inspectorate closing the hearing in writing (2 May 2017)