



Appeal Decision

Hearing Held on 18 May 2021

Site Visit made on 19 May 2021

by Sarah Housden BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 July 2021.

Appeal Ref: APP/A0665/Q/21/3267532

12 Chedworth House, The Square, Seller Street, CHESTER, CH1 3AR

- 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 Mr Alexander Rowson against Cheshire West and Chester Council.
 - The development to which the planning obligation relates is 'modification of S106 planning obligation of planning permission 01/00740 to remove the affordable housing restrictions relating to no12 Chedworth House.
 - The planning obligation, dated 31 July 2002, was made between the Council of the City of Chester, David Wilson Homes Ltd, CP Witter Ltd and Derbyseek Ltd.
 - The application Ref 18/02773/106 is dated 16 July 2018.
 - The application sought to have the planning obligation attached to planning permission number 01/00740/FUL modified to exclude the appeal property.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application form indicates that the appellant sought the discharge of the planning obligation (PO) attached to planning permission no 01/00740/FUL in its entirety in so far as it relates to 12 Chedworth House (No 12). However, the Council determined the application on the basis that the proposal was to modify the PO and that is confirmed in the decision notice. The PO covers 'The Square' development as a whole and includes provision for other matters, such as management of parking. At the hearing, the appellant confirmed that he proposes the modification of the PO's affordable housing provisions in Section 11 in so far as they relate to No 12, so that he would be able to dispose of the property on the open market and to a person not meeting the qualifying criteria.
3. Under the terms of Section 106A(3)(a) and 6(c) of the Town and Country Planning Act 1990, where the modification (as opposed to discharge) of a planning obligation is sought, the proposed modifications must be specified in the application. No such modifications were submitted to the Council nor are they within the appeal documents. I therefore gave the appellant additional time after the hearing to submit a revised version of the s106 PO showing clearly the proposed modifications, together with a plan identifying the land to which the obligation relates.
4. A deed of variation signed by the appellant was submitted before the hearing was formally closed in writing on 12 July 2021. This includes a modification to

Section 11 of the PO which would remove the requirement for the appeal property to remain as an affordable dwelling. I have had regard to this deed of variation in my determination of the appeal and I have made further comments about the execution of the document below.

5. The Council's notification of the date and time of the appeal were sent less than two weeks before the date of the hearing which does not accord with the prescribed timescale set out in the Procedure Rules¹. However, the Council confirmed at the hearing that the only people notified were the ward Councillors. I concluded that the interests of third parties would not be prejudiced by continuing with the hearing and determining the appeal.
6. A previous appeal for the modification of the PO was dismissed on 20 September 2017². I have had regard to that decision in so far as it is relevant to my consideration of the appeal, but I have come to my decision based on the evidence before me, the discussions at the hearing and my observations at the site visit.

Main Issue

7. The main issue in this case is whether or not the planning obligation continues to serve a useful purpose in ensuring that the appeal property contributes to the supply of affordable housing and if so, whether it would serve that purpose equally well if it had effect subject to the modifications proposed.

Reasons

8. Chedworth House is one of seven apartment blocks within 'The Square' development and contains thirty-one apartments, comprising thirteen one bedroom units for social rent, fifteen low cost studio units (including No 12) and three open market units. It occupies a central location immediately to the north of the St Oswald's Way inner ring road and in proximity to the Shropshire Union canal, within walking distance of the services and facilities in Chester city centre. Section 11.1 of the PO defines the low cost units as affordable dwellings.
9. Policy SOC-1 of the Cheshire West and Chester Council Local Plan (Part One) Strategic Policies 2015 (LP) seeks to maximise the provision of affordable housing within developments of 10 dwellings or more, up to a target of 30%. This is subject to a number of criteria, including that there is provision for affordable dwellings to remain at an affordable price for future households. The supporting text makes reference to the definition of affordable housing as set out in the National Planning Policy Framework (the Framework). Consistent with the Framework's definition of discounted market sales dwellings as affordable housing, the PO provides for low cost units as affordable housing.
10. The Council's Strategic Housing Market Assessment (2015) (SHMA) which informed LP Policy SOC-1 confirmed a high level of affordable housing need in the District, including for one bedroom intermediate affordable home ownership dwellings. More recent evidence points to a continuing need for affordable housing, albeit that the highest levels of need are for affordable rent. There were 82 applications for discounted market sale properties in Chester from April 2017 to July 2020, 67 of which were for one bedroom units. Whilst the

¹ Town and Country Planning (Hearings Procedure) (England) Rules 2000.

² Appeal Reference APP/AO665/Q/17/3175930

delivery of intermediate affordable units is expected to improve with the development of sites at Wrexham Road and Northgate, there has been a shortfall in delivery against the annual target of 155 dwellings per year. In short, the evidence demonstrates that there is an ongoing and significant level of affordable housing need for one bedroom and studio units in the city centre.

11. The PO requires that No 12 must be sold to buyers in a particular order of priority – Nominated Purchasers, Qualifying Purchasers and then others as defined in the PO's Second Schedule. A Nominated Purchaser is defined as 'a person or persons nominated by the Council as a person registered on the housing waiting list and whose income is considered by the Council in its absolute discretion to be within the lowest quartile of incomes of all persons within the Chester District'.
12. In the event of no Nominated purchaser, Qualifying purchaser or a purchaser meeting the Second Schedule locational requirements coming forward, Section 11.4.7.5 of the PO would allow for the property to be sold to someone not fulfilling those criteria. However, this would always be at the affordable price and on condition that for any subsequent sale, the priority order outlined above would apply.
13. At the hearing, the Council confirmed that although it no longer nominates purchasers from the housing waiting list, it does highlight the availability of affordable dwellings to those on the list, when such properties are advertised as being available. Although the lower quartile income thresholds referred to in the PO are no longer used to define eligibility for an affordable dwelling, an assessment of housing need and affordability based on income is made by the Council's housing team on a case by case basis.
14. The Chedworth House affordable dwellings including No 12 are the only supply of affordable studios in the city. Those on an income of around £15,000 would be able to afford one of the studio apartments, whereas the one bedroom apartments would require an income of around £21,000. The affordable units in the block continue to provide a potential source of supply to meet the needs of those on the lowest incomes for smaller intermediate affordable units, as identified in the SHMA.
15. Section 11 of the PO includes provisions to ensure that the low cost units in Chedworth House are sold at an 'affordable price', defined as a sum not greater than 30% less than the open market value or, if greater (on any disposal of a low cost unit after the first disposal of such unit), the price at which the discounted sale unit was acquired by the owner. Whilst the age of the PO (2002) pre-dates the current adopted LP, this provision is in accordance with, and will help to deliver, the requirements of LP Policy SOC-1.
16. Based on an average of three valuations obtained by the appellant, No 12 was first marketed for sale in 2015 for £77,000. The Council subsequently commissioned its own valuation in 2017 as part of the determination of a previous application for the modification of the PO³ which produced a figure of £63,000 with the 30% discount in place. No 16 Chedworth House, an identical studio unit to No 12 sold for £70,000 in 2015. The picture is therefore mixed, but there is nothing in the evidence which updates or confirms the valuation of No 12 as a low cost unit, taking into account the 30% discount required by the

³ Application Reference 17/05429/106

PO. Furthermore, the property is not being actively marketed at present and the holding of details by estate agents to signpost to potential purchasers who may express an interest in this type of property does not represent a robust and proactive marketing strategy. Overall, there is insufficient evidence before me to demonstrate with reasonable certainty that No 12 is no longer required as a low cost unit to contribute to the supply of affordable housing in Chester. An active marketing strategy at an up to date price is required before it can be concluded that the property is no longer required to meet an affordable housing need.

17. The appellant contends that the PO contains a number of flaws which render it ineffective in so far as it seeks to secure the provision of No 12 as an affordable dwelling, including in particular the discrepancy between the PO and the terms of the lease in relation to service charges which has become apparent since the outcome of the last appeal.
18. Section 11.6 of the PO requires that any service charges for No 12 should be calculated as a proportion of the overall charges for the block, at a rate equivalent to its floorspace as a percentage of the floorspace of the block as a whole and for that arrangement to be replicated in any lease. That approach does not form part of the appellant's lease agreement with the management company, under which the appellant pays a higher rate, based on the property as a proportion of the numbers of properties within Chedworth House and The Square development as a whole.
19. The service charge issue is compounded because the PO has no mechanism to 'cap' increases in the service charge. Based on the appellant's statement of case, the charge has risen from £8 per week in 2005 when the appellant purchased the property, to £24 per week or approximately £1250 per year at present. At the hearing, the Council confirmed that the POs for more recently developed schemes do contain provisions to cap the service charge or set alternative time periods for payment in order to assist with budgeting. The risk that service charges could continue to rise could deter some potential purchasers, but this would be likely to be reflected in the level of any offer for the property.
20. Whilst I acknowledge the appellant's frustration in this regard, the provisions of the PO are clear and the discrepancy is not attributable to any defect in the PO. Even if the PO were to be modified in the manner sought by the appellant, the service charge would continue to be charged at the higher rate under the terms of the lease and could continue to rise. Whilst the sale of the property on the open market to a wider range of purchasers would resolve the appellant's immediate situation, the redress to the drafting error should not be at the expense of harming the supply of affordable housing in Chester District. The correct redress for this situation is a matter for the appellant, the Council and the management company and is outwith the scope of this appeal which must be determined based on the planning issues in this case.
21. The number of lenders willing to provide a mortgage on the low cost units at Chedworth House is more restricted due to the lack of a 'mortgagee in possession' (MIP) clause in the PO. This would enable the property to be sold free of the occupancy restrictions and the open market discount, in the event that possession of the property reverted back to the mortgage lender. Nevertheless, some of the Chedworth House low cost units have been

purchased with mortgage finance without a MIP clause in place. In addition, the Council has indicated that it would support the modification of the PO to incorporate a MIP clause. I therefore consider that the absence of a MIP clause does not render the PO ineffective and even if this were to be the case, there may be an alternative solution to the modification of the PO in the manner sought by the appellant.

22. Clearly some of the provisions of the PO have been overtaken by changes in policy and procedure since it was completed in 2002, but drawing matters together, I conclude it is still effective in its function to secure No 12 as an affordable dwelling for future households, as sought under LP Policy SOC-1. The modifications to the PO proposed as part of this appeal would remove No 12 from the available supply and would harm the supply of affordable housing, in conflict with Policy SOC-1 and the aim of the Framework to address the needs of groups with specific housing requirements.
23. The deed of variation to the PO was not signed by the Council, but given my conclusion on the main issue in this case, I have not sought a completed version of the document. However, I am satisfied that had I concluded that the removal of No 12 from the supply of affordable housing would not be harmful, the deed of variation would have provided a satisfactory mechanism to modify the PO as sought by the appellant.

Other Matters

24. The appellant argues that other owners in Chedworth House have sub-let their properties at market rents and that the conditions set by the Council which would enable the appellant to do the same with his property are too onerous. Based on this, it is argued that the Council is treating the appellant differently in contravention of his Human Rights having regard to Article 8 – everyone has the right to respect for his private and family life, his home and his possessions.
25. The officer report indicates that the Council has continued to pursue the investigation of sub-letting and potential breaches of occupancy of other affordable dwellings in Chedworth House since the date of the last appeal decision. At the hearing, the Council confirmed that these investigations have required more sensitive handling during the Covid 19 pandemic because of the potential for the final outcome to be homelessness. However, the Council confirmed that it is continuing to pursue such breaches and take enforcement action where it is expedient to do so and I see no reason to dispute that position.
26. The PO does not allow for sub-letting. However, at the hearing, the Council confirmed that a bespoke arrangement could be agreed with the appellant whereby the provisions of the PO would not be enforced for a temporary period to enable the property to be sub-let at an affordable rent to a qualifying person to respond to changes in the owner's circumstances. The fact that the lease does allow for sub-letting does not undermine the provisions of the PO and is not a matter on which I can comment as part of this appeal. The conditions required in the Council's letter of 23 November 2016 to enable No 12 to be sub-let do not appear to be unduly onerous or unusual. Overall, I find nothing in the evidence to suggest that the appellant has been treated unfairly or that his Human Rights have been breached.

27. The appellant's point that No 12 was overvalued and overpriced by the developer at the initial point of sale is a private matter and does not fall within the scope of the planning issues in this case.

Planning Balance and Conclusion

28. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that planning applications are determined in accordance with the development plan, unless material considerations indicate otherwise.
29. I have found that the PO continues to serve a useful purpose and that the proposed modifications would harm the supply of affordable housing in the District, in conflict with LP Policy SOC-1 and the Framework.
30. There are no material considerations in this case of sufficient weight to outweigh that harm and the conflict with the development plan, read as a whole. Accordingly, there is nothing to justify a decision other than one in accordance with the development plan.
31. For the reasons outlined above, and having had regard to all other matters raised and representations in this case, the appeal should be dismissed.

Sarah Housden

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Leslie Rowson on behalf of the appellant Mr Alexander Rowson

FOR THE LOCAL PLANNING AUTHORITY:

Mr Brian Leonard	Senior Planning Officer
Mr Steve Lewis	Senior Planning Officer
Miss Rachel Rens	Housing Policy Officer

DOCUMENTS SUBMITTED AFTER THE HEARING

Deed of Variation under Sections 106A and 106B of the Town and Country Planning Act 1990 relating to amenity provision, affordable housing, archaeological and highway matters and a car park management plan – Flat 12 Chedworth House