The Planning Inspectorate

# Appeal Decision

Site Visit made on 1 June 2021

**by Sarah Manchester BSc MSc PhD MIEnvSc**

**an Inspector appointed by the Secretary of State**

**Decision date: 9th December 2021**

**Appeal Ref: APP/M0933/W/21/3269341**
**Land south of Haggs Lane, Haggs Lane, Cartmel, Cumbria LA11 6PH**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission
- The appeal is made by Ms Rachel Bagshaw of Holbeck Homes (Cartmel) Ltd against South Lakeland District Council.
- The application Ref SL/2017/0732, is dated 15 August 2017.
- The development proposed is residential development.

## Decision

1. The appeal is dismissed.

## Applications for costs

2. An application for an award of costs was made by Holbeck Homes (Cartmel) Ltd against South Lakeland District Council. That application is the subject of a separate Decision.

## Background and Preliminary Matters

3. The appeal is against the failure of the Council to determine the application within the prescribed time period. Consequently, there is no decision notice. However, the Council has stated that if it had been in a position to determine the application, it would have refused it on grounds relating to lack of affordable housing (AH) for the lifetime of the development.

4. The application was considered by the Council at its planning committee on 30 November 2017, at which time it resolved to approve the scheme for 39 dwellings subject to a Section 106 (s106) agreement relating to, among other things, the provision of AH. The AH requirement, in accordance with Policy CS6.3 of the South Lakeland Core Strategy Adopted October 2010 (the CS), equates to 14 dwellings.

5. The scheme was subsequently amended to reduce the AH provision from 14 to 8 units. The Council accepted that the provision of a greater number of AH units was not financially viable. The revised application was considered by the Council at its planning committee on 31 October 2019, when it again resolved to grant permission subject to completion of a s106 relating to the AH provision. However, the parties failed to agree the terms of the s106.

6. In September 2020, before the appeal was made, the appellant converted the draft s106 to a draft Unilateral Undertaking (the UU). A revised UU, which has been signed and dated, has been submitted with the appeal. Consequently, I have taken it into account in my determination of the appeal.

7. The revised National Planning Policy Framework (the Framework) was published in July 2021. The parties were provided with the opportunity to comment on the implications of the revisions to their cases. I have taken account of the revised Framework, and the comments, in my determination.

## Main Issue

8. Therefore, the main issue is whether or not the proposal would make adequate provision for affordable housing for the lifetime of the development.

## Reasons

9. The appeal site, which is within the settlement boundary of Cartmel, is identified for housing development in the South Lakeland District Council Local Plan Development Management Policies Adopted March 2019 (the LP). Consequently, subject to meeting the requirements of relevant development plan policies, the principle of residential development is acceptable.

10. The Council considers that the design and layout are acceptable, the proposal would not harm the setting or the significance of the Cartmel Conservation Area and, moreover, the proposal is acceptable in respect of all matters except affordable housing provision. On the basis of the evidence before me, I see no reason to disagree.

11. The popularity of South Lakeland as a location for second home ownership and for retirement has resulted in a significant imbalance in the housing market with an acute shortage of AH to address the needs of local people. To redress the imbalance, CS Policy CS6.3 requires housing developments to provide AH at no less than 35% of the total number of dwellings. Exceptionally, as is the case here, reduced provision will be accepted where there is clear evidence that the development would be otherwise unviable. CS Policy CS6.3 also sets out that the planning permission will be subject to appropriate conditions and/ or planning obligations to secure the affordable provision in perpetuity.

12. The completed UU identifies the land to which the obligations would relate, the planning application and the planning appeal, and it relates to the delivery of not less than 8 AH units. It makes provision for the AH to be either rented affordable (ARHU) or intermediate housing units (IHU). It includes specific trigger points for delivery. It defines the qualifying persons. It does not include an obligation that would ensure the AH units are retained as affordable for an unlimited duration, in this case the lifetime of the properties or in perpetuity.

13. Schedule 1 paragraph 2.4(b) of the UU sets out arrangements in the event that the ownership of the AH units transfers from the Registered Provider (the RP) to a mortgagee (the Mortgagee in Possession, MiP, clause). MiP clauses are increasingly included in obligations where lenders and Homes England make support for schemes conditional on an MiP clause or offer less favourable terms for development finance.

14. Therefore, in cases where support or funding for AH is conditional on an MiP clause, the absence of the clause could compromise the delivery of AH. Conversely, the inclusion of an MiP clause, without adequate justification or safeguards, could similarly compromise the delivery of AH and result in development that conflicts with the development plan. Consequently, the Council's approach is to consider each case on its own merits.

15. In this case, the Council requested substantive financial justification and evidence to demonstrate that the proposal would not be delivered in the absence of an MiP clause. The justification[1] submitted with the appeal indicates that, following a marketing exercise, each of the RPs that expressed an interest would require a form of MiP clause in the legal obligation. However, no details of the marketing exercise or the RP responses have been provided. The evidence does not robustly demonstrate the need for an MiP clause.

16. Where the need for an MiP clause has been demonstrated, because the scheme would otherwise be at risk, it nevertheless seems reasonable for safeguards to be in place to secure the AH. The inclusion of a 3 month moratorium period, during which time the MiP must make reasonable endeavours to dispose of the AH units to an alternate provider before disposing of them on the open market, therefore seems an entirely reasonable approach.

17. I accept that a large national RP, such as might acquire the AH units, would be unlikely to default on its funding arrangements. Moreover, the worst case scenario would be the loss of only 8 AH units, which is a relatively small number. Even so, it would be a significant loss in the context of the acute shortage of affordable housing in the area. Therefore, it seems reasonable to mitigate the risk, however small, by making provision for the AH to remain affordable through the inclusion of the moratorium period in the MiP clause.

18. In this regard, my attention has been drawn to recent decisions[2], where the RP and the Council have entered into s106 agreements that include a 3 month moratorium period in the MiP clause. While those schemes might not be directly comparable to the appeal proposal, there is little compelling evidence as to why a MiP in this case should not similarly take steps to deliver the AH.

19. Schedule 1 paragraphs 2.3 and 3.1.7 (the cascade clauses) of the UU make provision for the owner to dispose of the AH units on the open market if they have been unable to dispose of them to a RP within specified timescales. The parties had previously agreed a limited cascade mechanism to allow the ARHU to be disposed of as shared ownership housing if they could not be disposed of to a RP as rental properties. A limited cascade clause would ensure that the proposal continued to provide affordable housing. However, the cascade clauses in the completed UU would allow for all tenures of AH to be disposed of on the open market, in which case the proposal would fail to deliver AH in perpetuity in conflict with the development plan.

20. The proposed cascade clauses would be a more certain mechanism for the appellant to deal with disposal than the deed of variation route, in the unlikely event that no RP was forthcoming. However, the evidence indicates there would be significant demand for the AH units and there are already RPs actively acquiring AH in this area. Therefore, while a mechanism for the ARHU to cascade to shared ownership would allow some commercial flexibility, there is little compelling evidence to justify the loss of all AH to the open market.

21. Moreover, in the apparently unlikely event that the AH did need to be disposed of on the open market, there would be no mechanism to ensure that the proposal would contribute towards meeting the identified AH need by alternate means. The appellant considers there is no policy basis to require mitigation,

[1] letter dated 3 February 2021 from Pioneer Housing and Development Consultants
[2] Planning applications refs SL/2018/0364 and SL/2019/0880

such as subsidy for alternative AH provision, if open market disposal takes place. Nevertheless, the definitions of AH in the Framework include that it should remain affordable for future eligible households, or the subsidy recycled for alternative AH provision. The proposed full cascade clauses do not demonstrate that the proposal would meet the requirements of the development plan or the Framework.

22. Irrespective, the cascade clauses do not include adequate controls or transparency at each stage. Paragraph 3.1.7 requires that, before the IHU are disposed of on the open market, the owner provides evidence to the Council that it has not been possible to secure the transfer of the IHU to the RP. There is no such provision in Paragraph 2.3 in relation to the ARHU, only that the owner should use reasonable endeavours to dispose of the ARHU to an RP before disposing of them on the open market. Neither paragraph indicates that the reasonable endeavours should be demonstrated to the Council.

23. Section N.8 of Annex N of The Procedural Guide: Planning appeals – England (29 March 2021) sets out the matters that need to be satisfactorily addressed in relation to planning obligations that provide for AH. These include, if the planning obligation includes a cascade arrangement, that there are adequate time periods at each stage, especially before triggering any "fall-back" clause which would enable the AH to revert to the developer for sale on the open market. However, Annex N.8 also refers to the need for such planning obligations to include adequate controls to ensure that AH is retained as affordable for an unlimited duration. The guidance does not appear to infer the acceptability of a cascade clause that would result in open market disposal with consequent loss of AH.

24. Therefore, the proposal would not make adequate provision for AH for the life of the property and in perpetuity. The UU does not meet the tests in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010, in relation to necessary to make the development acceptable in planning terms, directly related to the development, or fairly and reasonably related in scale and kind. The proposal would conflict with CS Policy CS6.3. It would conflict with the Framework in relation to affordable housing.

25. Clause 3.2 of the UU includes a mechanism which provides that for any obligation that the Inspector finds does not pass the statutory tests, such obligation shall have no effect and shall be void for the purposes of the deed. I have considered whether the UU could be satisfactorily amended in this way. It would be possible to void the MiP clause. Schedule 1 paragraph 3.17, which cascades the shared ownership housing to the open market, and Schedule 1 paragraph 2.3, which cascades the ARHU to shared ownership, could be similarly rendered void.

26. However, there is compelling evidence that some form of limited cascade clause, such as was previously agreed, should reasonably be included in the UU or a mechanism for alternative provision in the event of full open market disposal. Moreover, even if were possible to remove only the part of paragraph 2.3 that relates to disposal of the ARHU to the open market, the remaining part would allow for the disposal of the ARHU to shared ownership without having evidenced reasonable endeavours to the Council. Therefore, I am not satisfied that, if I was to void part or all of the cascade clauses, the remaining UU provisions would meet the tests for obligations.

## Conclusion

27. For the reasons set out above, the proposal would conflict with the development plan and there are no material considerations that would outweigh that conflict.

28. Therefore, I conclude that the appeal should be dismissed.

*Sarah Manchester*

INSPECTOR