The Planning Inspectorate

Appeal Decision

Site visit made on 20 November 2023

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 1 December 2023

Appeal Ref: APP/K3605/Q/23/3315907
Land South of 17 to 19 Church Street, Weybridge, Surrey KT13 8DE

- 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 Ashwood Investment and Development Ltd against the decision of Elmbridge Borough Council.
- The development to which the planning obligation relates is dated 19 September 2016 and modified by a deed dated 31 May 2022. The 31 May 2022 deed relates to changing the specific parts of the proposed development to be used as affordable housing.
- The planning obligation, dated 19 September 2016 (and subsequent modification dated 31 May 2022), was made between Elmbridge Borough Council and Ashwood Investment and Development Limited.
- The application Ref 2022/2254, dated 24 February 2022 (as per Section 10 Certificate of compliance with the Notification Requirements in Regulation 4 of the application form) and 18 July 2022 (as per the Appeal Form and Covering Letter), was refused by notice dated 30 November 2022.
- The application sought to have the planning obligation modified as follows: *'The obligation to be modified so that the on-site provision for affordable housing is delivered, instead, as a financial contribution towards off-site affordable housing'*

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Ashwood Investment and Development Ltd against Elmbridge Borough Council. This application is the subject of a separate Decision.

Main Issue

3. In general terms, s106A of the *Town and Country Planning Act 1990*, as amended, (TCPA) sets out that a planning obligation may not be modified except by agreement between the enforcing body (that is the Council in this case) and the persons who the obligation is enforceable against (the Appellant) or in accordance with s106A and s106B. Section 106A (6) sets out:

(6) Where an application is made to an authority under subsection (3), the authority may determine—

(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

4. Appeals, in relation to applications under s106A are dealt with under s106B of the TCPA. This includes considerations under s106A (6) as shown above. The Appellant does not seek the discharge of the obligation in this case. The main issue in this case, therefore, is:

   (i) Whether the obligation continues to serve a useful purpose, and would serve that purpose equally well if it had effect subject to the modifications specified in the application.

Reasons

Background

5. The background to the case is set out extensively in the evidence of the main parties (including their respective position statements. Therefore, I have not sought to replicate here in any detail.

6. Put simply, planning permission was granted in 2016 for a building housing seven residential units. There was a unilateral undertaking which secured two units for affordable housing. In 2022, the obligation was modified so that the specific units were changed, albeit with the same quantum. The Appellant asserts that they have not been able to find a Registered Provider (RP) to manage the two affordable housing units. To support this, they have submitted some email correspondence where very little interest from local RPs has been indicated.

7. This is unsurprising considered in light of the Council's Officer Report, which states that most RPs '*are not interested in less than 5 units'.* To that end, they have suggested the services of a company called Landspeed Homes, who specialise in Shared Equity Products.[1] However, at the time of the application and appeal there remains no formal agreement between the main parties as to how some form of affordable housing can be secured – whether on site or through the provision of monies as an off-site contribution for affordable housing.

8. This matter is slightly complicated by the fact that the amount the Appellant suggest would comprise the affordable housing contribution has changed on a few occasions.

9. Firstly, the Appellant's viability report considered a contribution of 20% in its calculation whereas Policy CS21 requires a figure of 30% of the gross number of dwellings on site. The viability report suggests that a 20% provision has been calculated at £243,432.

10. Secondly, a draft Deed of variation (dated 23 August 2023, but not completed or appearing to have been entered into by the Appellant and the Local Planning Authority) has been submitted at the appeal stage which sets out an affordable housing contribution of one hundred and sixty seven thousand, seven hundred and twenty three pounds (£167,723).

11. Given the disparity between these figures, and what effect, if any, the difference between 20% and 30% may have, I sought clarity from the Appellant. Their response was that:

[1] See Officer Report, pages 4 and 5 of 7

12. *'The report was prepared on a 20% provision, however a 30% requirement would be £365,148 (this would alter the figure within 7.1 of the report), this is an increase of £121,716. The viability shows a surplus at £110,714 (with a contribution of £242,432) , therefore the maximum viable contribution would be* ***£354,146*** *and the conclusion remains that the development can deliver a suitable off site contribution.'*

13. I have, therefore, proceeded on the basis that the maximum viable contribution to affordable housing in this case is £354,146. This is amount is not, however, reflected in the draft deed of variation nor in any subsequent amendment to it.

s106A (6) (c) - Continues to serve a useful purpose, and equally well?

14. The modification sought would, in essence, remove two built affordable housing units to be removed from that part of the housing supply and move into the non-affordable housing category. People waiting for affordable housing accommodation will have to wait until the alternative financial contribution towards affordable housing is spent and units delivered. It is unclear as to when such affordable housing through the contribution would be provided.

15. Alternatively, if the obligation in its current form remains un-modified, then two units could be provided in the near future. The 'blockage' here is down to the unwillingness of RPs locally to take on two units in a seven unit scheme. There is, however, a third party in the form of Landspeed Homes, for which there is reasonably likelihood, subject to finalising details, that the on-site affordable housing provision could continue to be provided. This is on-site affordable housing which the Appellant's own viability report accepts can be delivered either on-site or through an off-site financial contribution.

16. I note the Appellant's points about the status of Landspeed Homes compared to a typical RP, with the former operating as a private company. Moreover, they point out that the wording of the obligation does not provide scope for a company such as Landspeed Homes to take ownership of the affordable housing units as they are not a RP. Whilst I acknowledge this, it is within the scope of the s106A application process, and in drafting of planning obligations (including deeds) more generally, to provide various ways in which to achieve the desired outcome.

17. For example, an application under s106A could set out a schedule or obligation whereby if no RP came forward, and no other provider was available or willing to take on the affordable housing units, and therefore all reasonable steps had been taken to provide an on-site provision, then the affordable housing could be provided by means of a financial contribution to off site provision. This is something that is not only possible, but within the scope of the Appellant to arrange. However, that is not the application before me, which put simply seeks to swop on-site delivery of affordable housing units in the near future, to a commuted financial contribution to off-site provision of affordable housing at some indetermined point in the future.

18. I therefore find that the original obligation provided on-site affordable housing in a way that was compliant with local planning policy, which itself has been subject to public examination at the Local Plan preparation and adoption stage. However, the modification sought in the application itself fails to reflect the required amount derived from the application of Policy CS21. Moreover, the provision of a financial contribution in lieu of an on-site provision when such a

provision is possible as set out in the viability report as indicated by the Council, would mean that the families and individuals seeking affordable housing at this time would continue to wait until the monies are spent, the 'when' which is a significant unknown. Furthermore, there is a provider who could provide a realistic alternative to RPs, and achieving this would be reasonably straightforward for the aforesaid reasons.

19. Taking all factors into account, I find that the modifications sought to the planning obligation would continue to serve a useful purpose, but that this purpose would not be served equally as well subject to the modifications sought.

Conclusion

20. For the reasons given above, I conclude that the appeal should be dismissed.

C Parker

INSPECTOR