



Appeal Decision

by David Smith BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 January 2024

Appeal Ref: APP/Z0923/Q/22/3311413

Land at Tarn Bank, Braystones, Beckermeth, Cumbria, CA21 2YL

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be modified.
 - The appeal is made by Mr Peter Lockhart (Lockhart Leisure) against Copeland Borough Council.
 - The development to which the planning obligation relates is the erection of five affordable dwellings with two open market dwellings, site access and amended access arrangements (Ref 4/14/2242/OF1).
 - The planning obligation, dated 14 April 2015, was made between Copeland Borough Council and Peter Lockhart.
 - The application Ref 4/22/2241/DOC is dated 20 May 2022.
 - The application sought to have the planning obligation modified to remove reference to affordable housing with the exception of a single residential unit.
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Decision

1. The appeal is allowed. The planning obligation, dated 14 April 2015, made between Copeland Borough Council and Peter Lockhart shall continue to have effect subject to the following modifications:

The Definitions within section 1 of the obligation shall be amended to:

"Affordable Housing Unit" that part of the Development comprising one of the seven residential units shown on drawing number 2014.622.01 annexed to this Deed and "Affordable Housing Unit" shall be construed accordingly.

"Development" development of the Site with seven dwellings (one to be an affordable unit).

Preliminary Matter

2. Copeland Borough Council ceased to exist on 1 April 2023 and was replaced by Cumberland Council. However, the appeal proceeds in the name of Copeland Borough Council as the planning authority to whom the application was made.

Background and main issue

3. As it is over five years old and by virtue of section 106A of the Act, application can be made for the obligation to be modified. It is proposed to amend it by changing the number of affordable housing units from five to one. The Act sets out the tests for determining such applications which also relate to this appeal.
4. Therefore, the main issue is whether the obligation continues to serve a useful purpose and whether, as proposed to be modified, it would serve that purpose equally well.

Reasons

5. The appeal site is at Braystones and is outside the settlement boundary of Beckermeth. At the front of the site, three of the permitted units have been constructed to a weather tight shell form. None of the internal fittings and finishes have been undertaken or services installed.
6. The development was accepted on the basis that it would comprise a rural exception site on land regarded as open countryside for planning policy purposes. The provision of only one affordable unit would have a significantly reduced impact in terms of meeting local housing needs. It would make the scheme predominantly an open market housing development contrary to the Council's original intentions. This would be at odds with policies in the adopted Copeland Local Plan and in its emerging successor.
7. In applications to modify or discharge planning obligations there is no statutory requirement to have regard to the development plan as there would be when dealing with an application for planning permission. However, Local Plan policies are a material consideration. Consultation on main modifications to the emerging Plan is due to take place. As none of them amend the settlement hierarchy, settlement boundaries or housing policies, the broad approach to new rural housing development is unlikely to change markedly in the future. The proposed adjustment to the amount of affordable housing would therefore not sit well with the strategy for development in this part of Cumbria.
8. The Appraisal of Financial Viability (AFV) nonetheless concludes that providing five units of affordable housing would incur a financial loss. If a single unit were delivered as proposed then a modest profit of 5.63% of gross development value would be achieved. None of the values used in the assessment have been disputed by the Council.
9. The AFV considers an application with a 2018 reference. However, this was a subsequent variation of the original 2015 permission. It was dealt with as a plan substitution by the Council rather than a new planning permission. The only change was to swap the layout around and it involved no alteration to the quantum or mix of housing. As such, the AFV is soundly based.
10. The AFV was undertaken in 2022. However, a recent review has been undertaken by the original valuer and this takes account of changes to market sales values and principal construction costs. It concludes that the scheme is not able to support an affordable allocation. This finding is not challenged by the Council.
11. The Council does question the fact that work started on three of the dwellings that were intended to be affordable. The circumstances behind the decisions taken in this respect are not known but this does not alter the economics of proceeding further. As those houses are not habitable, they cannot provide a stream of income.
12. The upshot is that if the obligation continued to have effect, then the development would not proceed as the developer would be out of pocket. In that way, none of the permitted housing at the site would be delivered, including the single unit of affordable housing now proposed. The three houses would remain unfinished which would be a waste of resources. That outcome

would appear to be the worst of all possible worlds. It is also notable that the provisions in the obligation relating to local connections would remain.

13. The Council refers to the policies regarding viability at paragraph 58 of the National Planning Policy Framework. However, this is not a case where up-to-date policies have set out the contributions expected from development. The Local Plan dates from 2013 and the obligation is not directly concerned with financial payments. This part of national policy therefore does not count decisively against the proposed adjustment to the terms of the obligation.
14. In summary, to insist that the 2015 planning obligation remained unaltered would not serve a useful purpose as the evidence is that this would stymie any development of the site. Adjusting it as proposed would allow for a single affordable unit to be provided for local people in line with relevant policies. Whilst this would be a modest benefit, it would nonetheless constitute a useful purpose and would be better than the alternative. This would result in the site being mothballed. There is no indication or argument that the viability of the development is likely to change in the foreseeable future.

Conclusion

15. The obligation, as proposed to be modified, would continue to serve a useful purpose in that it would secure a unit of affordable housing. Given the reality of the original scheme's viability, the obligation would secure that purpose equally well if it had effect subject to the proposed modification. As such, for the reasons given, the appeal should succeed.
16. The simplest way to amend the obligation is to alter the relevant definitions to refer to one affordable dwelling. The other definitions, provisions and schedules therefore remain unchanged.

David Smith

INSPECTOR