Planning Inspectorate

Appeal Decision

Site visit made on 5 December 2024

by S Dean MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10th December 2024

Appeal Ref: APP/R1010/Q/24/3350501
Land rear of 16-124, south west of 124 and between Brickyard Farm & Barlborough Links, Chesterfield Road, Barlborough S43 4ZD

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 (as amended) against a refusal to modify a planning obligation.
- The appeal is made by Ground Group Ltd against the decision of Bolsover District Council.
- The development to which the planning obligation relates is for "Residential and commercial development (business, industrial and warehousing, Class B1, B2 and B8) including new roundabout and associated roads".
- The original planning obligation, dated 7 March 2011 was made between Bolsover District Council, Derbyshire County Council, William Hiscock and Buy Me Ltd. A Deed of Modification dated 13 December 2016 was made between Bolsover District Council, Derbyshire County Council, Arba Ground Trading Company Limited and Cambridge & Counties Bank Limited. A further Deed of Variation dated 29 January 2020 was made between Bolsover District Council, Derbyshire County Council, Arba Ground Trading Company Limited, William Arthur Hiscock and Financial Funding Limited.
- The application Ref 23/00367/OTHER, dated 16 October 2023, was refused by notice dated 22 February 2024.
- The application sought to have the planning obligations modified by way of an additional Deed of Variation in order to remove the obligation to provide any affordable housing and reduce the contributions required in respect of education contributions, off-site sports provision and highways contributions.

Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the planning obligations would continue to serve a useful purpose if modified as proposed.

Reasons

3. In combination, the current planning obligation, subsequent modification and variation require that 10% of the development is delivered as affordable housing and contributions towards on-site public open space, education, off-site sports provision and highways contributions. The detail of these obligations, including triggers, indexation and the mechanism for the return of any unused funds is set out in the obligations.

4. The purpose which the obligations fulfil is to ensure that the development delivers policy compliant affordable housing, on-site equipped play space for the benefit of the occupiers, contributions towards education infrastructure, contributions towards off-site sports provision and contributions towards highway works required in connection with the effects of the development.

5. This purpose is clearly a useful one. At the time planning permission was granted, the initial obligation entered into, and then subsequent changes made, the obligations were necessary to ensure that the development complied with the development plan and mitigating any impacts it had, benefiting local communities and supporting the provision of local infrastructure. Clear policy requirements and evidence supported these at the time and now.

6. The utility of the obligations is reinforced by the third-party objections to this application to modify it, with many contributors noting both the social and economic value of the obligations to them and the community.

7. The appeal is based largely around the viability of the residential development, and in particular, the effect of the obligations on that viability. The evidence of the appellant shows that if they were to pay the contributions as currently required, then they would still realise a profit.

8. During the course of the application and appeal the profit level with the current obligations has improved from £1.708m (representing 5.34% of GDV) in October 2023 to £2.03m (representing 6.36% of GDV) in July 2024. This profit, the appellant notes, has been achieved against the background of challenging market conditions.

9. If the obligations were to be modified as proposed, then this profit level would increase to £4.148m (representing 12.58% of GDV). However, it would do so at a cost to the occupiers of the site, local residents, Bolsover District Council and Derbyshire County Council. The cost to them, essentially, the public, would be in the complete failure to provide any affordable housing, insufficient provision of contributions towards on- and off-site play and sports facilities and equipment, and insufficient contributions towards education and highways infrastructure.

10. Challenging market conditions, and indeed, challenging conditions as set out in the appeal have affected the country as a whole, not just the appellant, and there is no compelling evidence in the appeal which leads me to conclude that the public should, in effect, suffer those twice. Once directly, and once indirectly in order to protect the return to the developer on their capital employed in delivering the development.

11. Development carries risks. These risks are acknowledged in national planning policy and guidance, which sets out illustrative profit levels to be considered at plan-making stage in acknowledgement of that commercial risk and to allow site promoters and developers to understand likely costs, to be able to make informed commercial decisions. Guidance is clear that the level of profit modelled at plan-making stage is not guaranteed for the lifetime of the project and it is not appropriate to seek to amend obligations in order to protect returns. It is also plainly not the purpose of the planning system or planning obligations to remove any and all financial risk from development.

12. That this development has, unfortunately fallen foul of particularly challenging market conditions is unfortunate. The evidence does not demonstrate that the overall approach, using illustrative profit levels in plan-making viability testing in order to make an informed decision on commercial risk at delivery is flawed. Nor does it show or otherwise require that the system should be used to guarantee such a return, removing the risk from the developer and placing it wholly with the Councils, and in effect, the public.

13. I note that the proposed modifications to the obligations would still not deliver a level of profit within the range preferred by the appellant, which matches that used at the plan-making stage. In terms of viability, I accept that if the development had been forecast to deliver the current profit level at plan-making stage, then it may not have been pursued. However, that is the risk inherent in development.

14. Specifically regarding the education contribution, the appellant has offered, instead of the evidence-based requirement in the current obligations, a much lower amount per-dwelling. No evidence has been provided to support this amount. In contrast, Derbyshire County Council did produce evidence, albeit now of some age, to support the current figure. Whilst the appellant has sought to challenge the need for any education contribution at all, I do not find their evidence on the point compelling. The evidence on school capacity is described by its author as a "brief review" and is just that. By way of example, it appears to pay no regard to the likely effects of other development in the area, which is likely to have an impact on school capacity. The complexity of the education infrastructure and planning process made plain in the evidence of Derbyshire County Council is not reflected in that brief review.

15. I also note that the obligations currently include a mechanism whereby any unspent contributions which have been paid could be returned to the appellant should they prove unnecessary or remain unspent after a specified time period. It also includes a specific clause relating to the education contribution which could be reduced subject to certain conditions.

16. The modification would result in the development delivering no affordable housing. That would clearly conflict with local and national planning policy. It would also result in the delivery of either no, or improperly funded on-site equipped play-space, deliver insufficient funding to meet policy-compliant requirements for off-site sports facilities and make an insufficient contribution towards required highway works and education infrastructure. In all of these respects, the development would not therefore deliver policy aspirations or comply with the development plan.

17. Both the appellant and the Council have addressed their cases to the development plan and the CIL Regulations. I do not consider that this is strictly necessary in light of the wording of the relevant legislation, or indeed, the conclusions of the relevant caselaw[1]. However, in light of those cases, I find that the existing obligations are evidence-based and justified, with appropriate policy support, and therefore continue to meet the relevant tests.

18. Overall, the obligations would not serve their useful purpose equally well if they had effect subject to the modification.

[1] Following *R (oao) Mansfield DC v SSHCLG & Mr J A Clark* [2018] EWHC 1794 (Admin)

Other Matters

19. I acknowledge the implications of not modifying the obligations set out by the appellant. However, on the basis of my observations on site, I do not give great weight to their suggestion that the road infrastructure would not be completed. Indeed, at the time of my site visit contractors were actively engaged in new surfacing works to the carriageway and footway, and other highway defects had been marked, apparently for rectification. Adoption would be a separate matter.

20. The failure to provide the full number of planned new homes would be unfortunate, but I note the evidence of the appellant that the vast majority, some 126 of the 135 proposed, have already been completed (and the vast majority of contributions are therefore due). The completed phases are distinct from the final phase such that the site does not obviously appear incomplete, but for the failure so far to provide the equipped play space.

21. Further, there is a strongly expressed and very clear desire from residents of both the development (essentially the appellants' customers who, on their evidence, had expectations about the product they were buying) and the surrounding area that the contributions be paid and the obligations, particularly in relation to play space, highways and education infrastructure, be met.

Conclusion

22. The appellant has demonstrated that the obligations without modification would still deliver a profit, albeit not one as large as projected or desired, given the challenging market conditions. That is unfortunate but the evidence shows that the development is still viable. The contributions within the obligations all continue to meet the relevant policy and legal tests.

23. For the reasons given, I find that the obligations continue to serve a useful purpose and would not serve their useful purpose equally well if they had effect subject to the modification.

24. The appeal should therefore be dismissed, and the obligations shall continue to have effect without modification.

S Dean

INSPECTOR