The Planning Inspectorate

Appeal Decision

Site visit made on 25 October 2016

by Phillip J G Ware BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 25 November 2016

Appeal Ref: APP/W0340/S/16/3153625
Crookham House, Crookham Common, Thatcham, Berkshire RG19 8DQ

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine an application proposing that a planning obligation should be modified.
- The appeal is made by Bridgewood plc against West Berkshire Council.
- The development to which the planning obligation relates is the change of use and redevelopment to provide a mixed use scheme.
- The planning obligation, dated 25 March 2015, was made between West Berkshire District Council, Philip Dobree and James Dobree, and Bridgewood plc.
- The application Ref 16/01074 is dated 26 April 2016.
- The application sought to have the planning obligation modified by the removal of the affordable housing requirements.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision the planning obligation, dated 25 March 2015, made between West Berkshire District Council, Philip Dobree and James Dobree, and Bridgewood PLC, shall have effect subject to:

   The deletion of Clause 8 'Affordable Housing Contribution' of the Schedule to the Obligation.

Application for costs

2. An application for costs was made by Bridgewood plc against West Berkshire Council. This application is the subject of a separate Decision.

Procedural matter

3. As set out above, this appeal relates to an obligation dating from March 2015. Subsequently, on 1 August 2016, the parties entered into what is described as a Supplemental Agreement. The appellant initially suggested that I also consider this latter document but, following correspondence with the Planning Inspectorate, the parties have accepted that I am not able to make changes to this document. I have dealt with the appeal on that basis.

Main issue

4. Where an application is made for the modification or discharge of an affordable housing requirement in a planning obligation, section 106BA (3) of the 1990 Act provides that, if the requirement means that the development is not economically viable, the application must be dealt with so that it becomes

viable. In any other case, the affordable housing requirement must continue to have effect without modification or replacement. Section 106BC(6) provides that the same provisions apply in respect of an appeal.

5. It follows from the above, and from the extent of the common ground between the parties (which I discuss below), that the issues in the present appeal are:

   - whether the proposed development is economically viable, if it remains subject to the affordable housing element of the Planning Obligation as it currently exists; and
   - if not, whether the deletion of the affordable housing element in the Obligation and the inclusion of an overage clause would enable development to be made viable.

Reasons

6. There is no dispute between the parties as to the policy background which led the Council to seek an affordable housing contribution from the scheme. In particular Policy CS6 of the West Berkshire Core Strategy (2012) seeks affordable housing provision at a level of 30%. The need for affordable housing, as demonstrated by the Berkshire Strategic Housing Market Assessment (2016), illustrates the level of need for affordable housing.

7. Planning permission was granted for the development in March 2015, subject to the completion of the obligation, which dealt with infrastructure and affordable housing matters. The obligation provided for the payment of an affordable housing contribution (£120,000) to the Council, prior to the commencement of the development.

8. The application which led to this appeal was submitted in April 2016, and sought the removal of the affordable housing element on viability grounds. The appellant produced evidence to demonstrate that the development was not viable with affordable housing or infrastructure contributions. Council officers took independent financial advice and recommended that the affordable housing requirement should be removed. The question of the inclusion of an overage clause was raised by Council officers prior to making the recommendation but the applicant did not agree to this on the basis that it had not been included in the original obligation and could be more onerous. This clause was not recommended by officers.

9. The Council considered the officer's report and decided to remove the affordable housing requirement, but subject to the inclusion of an overage clause. The Council did not set out any mechanism or timetable for this clause.

10. The appellant has stated that the works to restore the original building on the site, which is part of the approved development, are more costly than originally thought. A review of build costs and sales values has demonstrated that the scheme remains unviable. They state that the obligation was only completed by the appellants "under sufferance to obtain a planning permission after years of negotiation with the Council and financial investment into the scheme".

11. In the light of the appellant's evidence the Council accepts that the development is unviable whilst the affordable housing element of the obligation remains. Nothing has been put before me to suggest a different view, and the

issue to be considered is whether the Council's requirement for an overage clause is reasonable or would result in the development remaining unviable.

12. I will deal first with policy and guidance regarding overage clauses. There is no development plan policy or local guidance to support the principle of such a clause.

13. The National Planning Policy Framework provides that matters such as requirements for affordable housing, should provide competitive returns to a willing landowner and willing developer to enable the development to be deliverable.

14. The approach in Planning Policy Guidance (PPG) is that "Viability assessment in decision-taking should be based on current costs and values. Planning applications should be considered in today's circumstances. However, where a scheme requires phased delivery over the medium and longer term, changes in value of development and changes in costs of delivery may be considered".

15. The specific national approach to applications under s106B is set out in the DCLG document "Section 106 affordable housing requirements. Review and appeal." (2013). This Guidance does not refer to overage clauses.

16. The only potential policy or guidance to this type of provision is therefore the reference in PPG. However, despite the Council's general reference to phasing, there is nothing before me to suggest that the approved scheme, which is not a large development, would be phased. The appellant's position is that this is not a phased development, but simply one which will follow a clear sequence - there is nothing to contradict that position. I therefore conclude that there is nothing in PPG or any other policy or guidance which supports the Council's approach.

17. This absence of policy support is perhaps unsurprising as, given the overall approach of the Guidance to unlock stalled developments, the introduction of overage arrangements could undermine the basis of a competitive return as envisaged by the Framework by introducing uncertainty at a late stage in the process. This could make funding the scheme difficult.

18. This position is worsened by the uncertainty about the Council's detailed position. Nothing has been set out in the Council's appeal statement to explain the details of the proposed clause, which adds to the element of uncertainty. I fully appreciate that the Council wishes there to be an overage clause, but in the absence of any details, the authority is effectively asking me to sign a 'blank cheque' by dismissing the appeal. If I were to do so, there would inevitably follow a period of negotiation between the parties - which would add to delay and uncertainty.

19. Both parties have made reference in the most general terms to Vacant Building Credit. However these comments do not add to my considerations in this case.

20. The Council has included representations from a local Councillor, which provides some comment on the timing and threshold for the proposed overage clause. However this falls substantially short of a detailed proposal. In any event, it is far from clear if this represents the formal view of the authority – from the correspondence, it appears that this is not the case.

21. There is provision to enable me to impose a different affordable housing level. However there is nothing before me to demonstrate that this would result in the development progressing and providing an affordable housing contribution.

22. It is common ground that the approved development is not viable if the current obligation remains unaltered. Overall, there is no development plan, national policy or guidance which supports the introduction of an overage clause. The absence of any details as to how such a clause would function adds to the uncertainty which it would create, and it is even possible that it would be more onerous than the provisions of the original obligation.

23. For these reasons the appeal is allowed and the Planning Obligation is modified as set out above for a period of three years from the date of this decision.

P. J. G. Ware

Inspector