The Planning Inspectorate

Appeal Decision

Hearing held on 27 October 2015
Site visit made on 26 October 2015

by John Felgate BA(Hons) MA MRTPI

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

Decision date: 24 November 2015

Appeal Ref: APP/A5840/S/15/3121484
Land at 2-2A Crystal Palace Road, East Dulwich, London SE22 9HB

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by Crystal Palace Road Limited against the decision of the Council of the London Borough of Southwark.
- The development to which the planning obligation relates is *"The demolition of the existing building, and the erection of a part 3, part 4-storey building, comprising 22 residential units, together with basement car parking, landscaping and works incidental to the development"*.
- The planning obligation is contained within an agreement dated 13 February 2015, between the Mayor and Burgesses of the London Borough of Southwark, and Crystal Palace Road Limited.
- The application Ref 15/AP/1251, dated 18 March 2015, was refused by notice dated 6 May 2015.
- The application sought to have the planning obligation modified by the removal of the requirement to provide affordable housing.

Decision

1. The appeal is allowed. For a period of three years from the date of this decision, the planning agreement identified above shall have effect subject to the modifications set out in the Schedule appended to this decision.

Costs applications

2. Applications for costs have been made by both the Appellants and the Council, against each other. Those applications are the subject of a separate decision.

Procedural matters

3. Prior to the hearing, I prepared a Pre-Hearing Note (PHN), which was sent to the Council and Appellants on 2 October, seeking clarification and further information on various matters, including full disclosure of all written communications between the parties during the original application stage. The parties helpfully responded with the information requested. This documentation has informed my decisions on the appeal and costs applications.

4. As part of their response to the PHN, the Appellants also submitted an updated version of their Affordable Housing Viability Statement, dated October 2015, including an updated 'Argus' appraisal, dated 8 October 2015. The Council objected to the submission of this additional evidence. At the hearing, the Appellants agreed not to contest the point. I have therefore disregarded the October 2015 statement and appraisal.

5. Prior to the hearing, the Council requested that the appeal be dealt with by way of a public inquiry. That request was refused by the Planning Inspectorate in an email dated 25 August 2015. Subsequently the Council made a further written request for an inquiry. At the opening of the hearing, I sought further comments on the choice of procedure. The Council stated that it was now content to continue with the hearing procedure, albeit with some reluctance. I acknowledge the Council's misgivings. However, having read all of the evidence, and having heard the submissions made at the hearing, I am satisfied that I now have all that I need to be able to determine the appeal.

The legal basis relating to S.106BC appeals

6. The legal basis for determining the appeal is set out in the Act[1]. Section 106BA(3) states that if the requirement for affordable housing (AH) means that the development is not economically viable, the application must be dealt with so that it becomes viable. In any other case, the AH requirement must continue to have effect. Section 106BC(6) provides that the same provisions apply in respect of an appeal.

7. Section 106BA(8) also states that in making any determination of such an application, regard must be had to guidance issued by the Secretary of State. Again, the same applies to appeals.

Government guidance

8. The current guidance for S.106BC appeals is dated April 2013[2]. By way of context, the guidance states (at paragraph 2) that unrealistic S.106 agreements are seen as an obstacle to house building; the Government is said to be keen to encourage development to come forward, both to provide more homes, and to promote construction and economic growth.

9. The test of viability is whether the cost of building out the whole development would enable the developer to sell the open market units and make a competitive return to both the developer and landowner (paragraph 10). The burden of proof for showing the lack of viability is placed on the applicant (11). Alternative proposals should be brought forward, to deliver the maximum viable level of AH (12).

10. The developer should submit clear, up-to-date and appropriate evidence. This should be in the form of an open-book review of the original viability appraisal (13), which should be the starting point for reassessing the development's viability (16). A revised appraisal should be prepared in the same form and using the same methodology, based on current market conditions (17/18).

Main issues

11. In the light of the above, and all the matters raised by the parties, I consider that the main issues in the appeal are as follows:

    i) Whether the proposed development, with the AH requirement as it currently stands, has been shown to be not economically viable;

    ii) Whether the evidence produced by the Appellants for the purposes of the appeal is consistent with their submissions made during the application process, and accounts for any differences;

[1] The Town & Country Planning Act 1990
[2] '*Section 106 affordable housing requirements: review and appeal'*, DCLG April 2013

Reasoning

(i) Whether the proposed development has been shown to be non- viable

Background

12. The original planning application, submitted on 23 June 2014, was put forward by the Appellants (or the applicants, as they then were) on the basis that no AH should be required, for reasons of viability. The Appellants' case was set out in an AH Viability Statement, by BNP Paribas (BNPP), dated June 2014. Appended to the statement was an 'Argus' spreadsheet-based financial appraisal, plus a list of sales prices for comparable residential properties, and a quantity surveyors' cost estimate report by Bruce Shaw Partnership (BSP). In response to queries raised by the Council, further supporting evidence was submitted by the Appellants during July – October 2014, which included additional evidence on residential selling prices, ground rent yields, professional fees, developer profit levels, industrial rental levels and industrial yields. This evidence was intended to support the Appellants' original argument for nil AH provision.

13. On 8 October 2014, the applicants changed their position, by stating that, although their view was still that the development could not afford any AH, they were now minded to make a 'without prejudice offer' of 35 per cent on-site AH provision. At the Council's request, some further information was submitted, including two further Argus appraisals dated 5 and 28 November, but no further Viability Statement. Planning permission was then granted, and the S.106 agreement entered into, on the basis of 35% provision.

14. The application to modify the agreement was accompanied by an updated AH Viability Statement by BNPP, dated March 2015. The statement also included a new Argus appraisal dated 13 March 2015, and updated evidence on residential sales values, industrial rents and yields, an updated building costs report, and a spreadsheet-based site valuation based on the existing industrial use.

15. The March 2015 Viability Statement follows the same format and methodology as the original June 2014 version, and thus allows a ready comparison between the two. In a number of cases, where figures have changed from that original version, the differences are explained and accounted for. The March 2015 statement therefore incorporates a review of the original, as well as forming a revised appraisal in its own right. To my mind, the evidence contained in it is clear, up-to-date, and appropriate, as required by the relevant guidance. In the circumstances, it seems to me that the March 2015 report should be the main focus of my consideration in this appeal.

General methodology

16. The methodology of the viability statement involves establishing a 'Benchmark Value' (BV), which is based on the site's existing use value, plus a landowner's premium. It then compares this to the 'Residualised Price' (RP), which is effectively the residual land value. The RP is derived from the proposed development's 'Net Realisation' value, less all relevant development costs. The latter include construction costs, fees, and the developer's target profit.

17. The method suffers from some disadvantages in terms of clarity. In particular, the Argus spreadsheet makes the Residualised Price appear as an input, rather than as the end product, which is what is required for planning purposes. And the calculation of the Benchmark Value is carried out separately, so that there

is no facility for comparing the RP and BV directly within the Argus appraisal. But the method is not objected to by the Council. And despite the drawbacks of the Argus spreadsheet, the end result is made sufficiently clear in the Viability Statement.

Benchmark Value

18. The Appellants' valuation of the existing industrial building is based on a floorspace of 12,394 sq ft (1,151 sq m). The Council disputes this. Both parties' figures are said to be based on actual measurements taken on site. However it is agreed that the Appellants' figure accords with that used by the District Valuer for rating purposes. I see no reason to depart from this.

19. The Appellants assume a rental value of £11.00 per sq ft. This is supported by a schedule of the rental levels said to have been achieved in 12 other industrial lettings in the area. None of the units cited is identical to the appeal site, but that could hardly be expected. The examples appear to span a reasonable range of sizes, types and quality of building, and different types of location. All the sites are within the general area of inner south-east London. And all the transactions were concluded within the 12-month period immediately prior to the date when the evidence was submitted. I see no reason to doubt the accuracy of any of this information, but in any event if the Council had any doubts on that score, they have had ample time to undertake any necessary checks. There is an absence of any more detailed information, such as the length of leases and other detailed terms, but to my mind requiring that kind of information would be disproportionate.

20. Consequently, in my view, the information provided by the appellants is sufficient to provide a general overview of industrial rents in the area, and serves as a reasonable basis for assessing the value of the appeal site. This evidence shows an overall range of rental levels from just over £6 to well over £20 per sq ft, with the majority clustered in a narrower central band of around £11 - £13 per sq ft. The appeal site is not in a prime location. It has residential properties for neighbours on two sides, and its access is from a residential street. I agree these will all have some effect. I also note that the Council suggested one additional comparator building, which was said to have been let at £9.22 per sq ft. But nevertheless, in the context of all the evidence as a whole, I consider that the Appellants' assumption of £11 is reasonable.

21. The Appellants suggest that this rent should be capitalised based on a yield of 8 per cent. A schedule is produced showing the yields derived from five recent industrial investment purchases. These range from 2.5% to 8.25%. The level suggested for the appeal building is towards the upper end of this range, and is thus a relatively cautious assumption in terms of its effect on the capitalised value. The Council questions the Appellants' assumption, but has not produced any counter-evidence. I accept that the Appellants' examples are net initial yields, which exclude the effect of future rent reviews, but to my mind this does not invalidate them. I therefore find no reason to disagree with the Appellants' proposed yield figure of 8%.

22. Based on the above inputs, the Appellants calculate that the existing site value, net of fees and stamp duty, is £1,381,000. The mathematics of this calculation are not disputed, and I see no reason to disagree.

23. The Appellants then add a 'landowner's premium' of 20%. This is disputed by the Council, but the DCLG guidance notes the importance of allowing for a

competitive return to the landowner as well as the developer. In this context, it seems to me that the principle of a landowner's premium is reasonable, because without some element of financial return to the owner, over and above the existing use value, there would be little or no incentive to make the site available for development. I also note that the RICS Guidance[3], which was referred to by both parties at the hearing, acknowledges the possible need for such an incentive. The evidence before me does not show whether such a premium was in fact included in the price paid by the present appellants; but that is not relevant, because the viability exercise is essentially a theoretical one, which is independent of the particular circumstances of the parties currently involved. In the light of all the evidence before me, the proposed level of 20% for the landowner's premium seems to me to be reasonable.

24. Based on all of the above, the Appellants propose that the BV should be taken to be £1,657,200. Again, the mathematics are not in dispute. Having found all of the above inputs to be acceptable, I see no reason to disagree with this benchmark figure.

Residual land value

25. On the 'Revenue' side of the appellants' appraisal, the March 2015 Viability Statement shows a total sales value of £12,699,320. This is based on all 22 units being for open market sale, and is therefore effectively a 'best case' scenario. The Council disputes the sales values, and suggests alternative values on a per sq ft basis, which are some 7-8% above those adopted by the appellants.

26. However, the appellants' case is supported by a schedule listing the asking prices of 24 comparable residential units within the local area. Those prices show an overall range equating to around £370 - £710 per sq ft. The figures adopted by the appellants for the appeal development, at £630 - £690 per sq ft, are close to the top of this range. As such, I see no basis on which the appellants' assumptions can be said to be unduly pessimistic.

27. I appreciate that these comparables cited by the appellants are all second-hand properties, and a new development such as that now proposed would be expected to achieve slightly higher values, on a like-for-like basis. But the Council has not identified any other relevant new developments in the area. And in any event, to my mind, the price differential is taken into account, by projecting sales values above the middle of the range. I accept that actual selling prices may differ from the asking price, but this merely reinforces my view that the appellants' assumptions appear reasonable.

28. The Council refers to research undertaken by Lambert Smith Hampton (LSH), but this has not been produced, and no details have been made available. Little weight can be given to unsupported assertions. Some property details from the 'Zoopla' website were referred to at the hearing, but the appellants had not had an opportunity to examine these previously, and I have therefore given little weight to this evidence.

29. I therefore find that the appellants' assessment of the total sales value has been adequately substantiated. The question as to ground rent yields is no longer contested, nor are any other elements of the gross or net development

[3] 'Financial Viability in Planning ': Royal Institution of Chartered Surveyors, 2012

value. On this basis therefore, I find no reason to disagree with their Net Realisation figure of £12,825,714.

30. On the 'Outlay' side of the appraisal, the appellants' building costs are based on the cost estimates report by BSP. The Council disputes the need for a 'design development' allowance in addition to the sum for contingencies, and I agree that there may be some overlap between these two items, which are both geared towards unforeseen eventualities. However, even when they are combined on a cumulative basis, they equate to only about 8% of the building cost. To my mind that is not unusually large, especially here, given the evidence regarding the need to build over the Effra sewer. I accept that ultimately it is quite possible that neither of these sums might need to be spent, but that is not the point; the issue is whether it is reasonable for a developer to make an allowance on this scale, to cover the uncertainties of construction. In my view, the design development and contingency sums in the March 2015 appraisal are self-evidently reasonable in the context of the development proposed at the appeal site.

31. The Council questions the sum budgeted for professional fees. However, the Viability Statement gives a detailed breakdown of the various professional fees, totalling around 12% of the building cost, and this evidence has not been seriously challenged. I find no reason to doubt the appellants' figures on this item.

32. Finally, the Council also queries the developer's target profit, which the appellants treat as a cost input, at a rate of 20% of the gross development value. The appellants support this figure on the basis that this is the rate usually required by lenders; whereas the Council contends that other developments have gone ahead at around 17%. Neither of these arguments is supported by any hard evidence. However, I am mindful of the fact that the Guidance seeks to ensure a competitive return, and in that light, it seems to me that the question is what rate of return is likely to be necessary, to encourage a prudent developer to go ahead with the development. In the present case, it is significant that most of the proposed 22 residential units would be comprised in a single block, limiting any opportunities for phased completions to assist cash-flow. In those circumstances, it seems to me that a return of less than 20% might well be perceived as insufficient to justify the risks of undertaking the scheme. I therefore find the appellants' target profit figure preferable to the Council's

33. None of the other cost inputs are disputed, nor are the mathematics. On this basis, it follows that the residualised land price, or RP, is £383,157 as shown in the March 2015 appraisal.

Overall viability

34. Based on the above figures, the residual value falls well short of the Benchmark Value, indicating that the proposed development is not economically viable. I conclude that the appellants have satisfactorily demonstrated a lack of viability.

(ii) Whether the evidence is consistent with the submissions made during the application process

35. Unsurprisingly, the figures contained in the appellants' updated Viability Statement and appraisal dated March 2015 differ from those in the original June 2014 version, including some which have gone down, as well as others that have increased. For the most part, these changes are within the range of variation that might be expected over the intervening period of 8 or 9 months, and where the differences are significant, they are accounted for within the Statement. Overall, the updating between these two versions does not alter the outcome of the exercise. In the present appeal therefore, nothing turns on any comparisons with the June 2014 Statement, and the Council does not suggest otherwise.

36. Instead, the Council's argument is that the figures in the March 2015 version differ from those in the Argus spreadsheet submitted on 28 November 2014, and in subsequent emails between then and the Planning Committee meeting on 3 February 2015. In essence, the Council argues that this evidence demonstrates that the development would be viable with 35% AH. I appreciate the Council's strength of feeling on this point. However, having reviewed the extensive correspondence that passed between the parties during the period in question, and all of the submissions before me, my view is that the Council's interpretation is not supported by the evidence.

37. The original June 2014 Viability Statement presented the appellants' case as to why the inclusion of any AH would not be financially viable. The early exchanges between the parties contained nothing to contradict that position. When the appellants changed their position on 8 October 2014, their letter and covering email of that date both stated that the proposal for 35 % AH was made on a without prejudice basis, in return for ensuring an early committee date. The letter also confirmed the appellants' continuing view that the development could not afford any AH.

38. At that point however, it appears that the Council's position also changed: from previously maintaining that the development must provide AH, to now seeking evidence that such provision could be made viable. On more than 20 occasions between 8 October and 19 December 2014, and at two meetings during this period, the Council sought further detailed financial information to 'justify' the 35% AH offer. On a similar number of occasions, the appellants provided the requested information, which was then on some occasions disputed by the Council. Given that 35% was in line with the maximum that the Council had sought, and was agreed to be policy-compliant, this was an extraordinary turn of events. Accordingly, it seems to me that the ensuing exchanges between the parties can only be viewed in this context.

39. On 28 November, after several such exchanges, the appellants' agents, DP9, submitted an Argus spreadsheet appraisal, with various input figures changed, and an RP of just over £1.07m. However, there was no accompanying viability statement, and no indication as to the level of the BV, which would have been needed in order to establish viability. Furthermore, the appellants' covering email stated that, based on this appraisal, the 35% AH offer would need to be conditional upon the Registered Social Landlord supporting certain minimum values, but this point does not seem to have been explored further by either party. As far as I can see, nothing in the 28 November appraisal, or the

covering email, sought in any way to represent that the development with 35% AH included would be financially viable.

40. The exchanges of correspondence continued over the next few weeks, and again in none of this correspondence does it seem to have been suggested by the appellants that the scheme, with the AH included, was viable. Indeed the tone of the correspondence makes it fairly clear that this was not the appellants' view. On 12 December, in an email copied to the Council, BNPP set out the revised assumptions incorporated in the 28 November appraisal. The writer commented that, although the appellants had attempted to achieve a compromise position, some of these changes were *"not currently acceptable to the market"*. To my mind this email made it evident that the appellants were not representing the 28 November appraisal as evidence that the scheme was viable, still less were they seeking to persuade the Council of any such proposition.

41. On 17 December, the Council raised further points of dispute regarding various matters arising from the 28 November appraisal. Their email then said: *"However, notwithstanding this, if you could simply confirm that you are now adopting a benchmark value of £1m… we can proceed on this basis,… given that the scheme would then be viable at a RLV of £1.072m"*. In reply, the appellants acknowledged that they would adopt a lower benchmark figure than previously, but they declined to comment on the specific figure of £1m, or on the question of whether the scheme would then become viable. When pressed again by the Council on the same point, on 19 December, the appellants conceded a BV of £1m, but commented that this could only be justified by assuming a rental level lower than the comparable evidence. The Council's contention that the 28 November appraisal showed the 35% AH scheme to be viable, and that the appellants sought to persuade the Council of that fact, hangs on this one email. In the light of the above sequence of events, that contention does not bear scrutiny.

42. For completeness, I note that the other appraisal submitted by the appellants during this process, on 5 November 2014, is not relied on by either of the parties, and indeed both have agreed that I should disregard it. I have therefore done so, except to note that the covering email on 5 November again stated that the appraisal was without prejudice.

43. Having regard to this correspondence as a whole, I find nothing to support the Council's central contention that the appellants have changed their position on the underlying issue of whether the inclusion of AH in the scheme is viable. The 28 November 2014 appraisal and subsequent correspondence did introduce some different figures and assumptions from those contained in either of the June 2014 or March 2015 versions. However, it is clear that those changes were made only because of the Council's insistence that the scheme should still be justified in viability terms, even after it had been amended to be policy compliant. This put the appellants in the impossible position of being required to provide evidence for a proposition that they had already rejected, and which they continued to reject. As such, it seems to me that little weight can be attached to either the 28 November appraisal or any of the correspondence that followed from it.

44. I appreciate that the DCLG Guidance refers in paragraph 13 to the 'original appraisal' as the one that was most recently agreed by the authority and the

developer. However, due to the circumstances detailed above, the 28 November appraisal does not seem to me to fit that category.

45. I conclude on this issue that the Viability Statement and related Argus appraisal prepared for the S.106BA application in March 2015 are broadly consistent with the earlier submitted versions, and account adequately for the differences since the application was submitted. This reinforces my view that the March 2015 statement comprises an appropriate basis for determining the appeal, and that it demonstrates that the proposed development is not economically viable.

Other matters

46. I have considered whether there is any prospect that the proposed development could be made viable by deleting only part of the AH requirement, rather than the whole. But the evidence appears to show that the scheme has negative viability even without any AH.

47. In the light of that point, the Council draws attention to the requirement in S.106BA(3)(a), that the appeal must be dealt with so that the development becomes economically viable. Based on the present evidence, it appears that allowing the appeal would not be sufficient to produce that result at present. However, the appellants contend that, over the 3-year period allowed by S.106BC(13), there is a prospect that the development, without the AH, could achieve viability, due to the upward trend in house prices. Having regard to the underlying purpose of these provisions, of helping to increase the early delivery of housing and stimulate the construction industry, it is clear that these aims would not be advanced by dismissing the appeal. Even if there is no certainty that the scheme will become fully viable within 3 years, it must have a better chance of being started without the AH requirement than with it.

48. I accept that the few weeks between the grant of planning permission and the submission of the S.106BA application was not a long enough period on its own to show that the development had stalled, and nor was it long enough for changes in the housing market to have been a compelling factor. But the case advanced here does not rely on any such considerations. Rather, the question is whether the scheme was sufficiently profitable to bear any AH in the first place. The evidence suggests that it was not. Consequently, as long as it remains encumbered by the AH requirement, there is every reason to expect that the development would be stalled in the future.

49. The Council observes that on other sites in the area, the land values anticipated in viability assessments have subsequently been exceeded in actual transactions. However, I can only decide the appeal on the basis of the evidence relating to this site and this scheme.

50. I note the Council's contention that, without the AH, planning permission for the proposed development might have been refused for other reasons. However, I can find no basis for that argument. The officers' report to the Committee meeting on 3 February 2015 makes it clear that there were no planning grounds for objecting to the scheme. Whilst the density was said to exceed the Core Strategy guidelines, the report shows that this was not seen as a valid reason for refusal. No harmful impacts were identified in relation to the effects on neighbours or the street scene, and the design was considered to

be of a high standard. Consequently, if the AH had not been required, there would have been no reason why permission should have been refused.

Conclusion

51. In the light of all the above, and having considered all the other matters raised, I conclude that the existing planning obligation should now be modified, by deleting the requirement for affordable housing. The appeal is therefore allowed, in the terms set out below.

John Felgate

INSPECTOR

SCHEDULE OF MODIFICATIONS TO THE EXISTING S.106 AGREEMENT, BETWEEN CRYSTAL PALACE ROAD LIMITED AND THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF SOUTHWARK, DATED 13 FEBRUARYY 2015

Clause 1.1 (Definitions)

Delete**:** "Affordable Housing", "Affordable Housing Units", "Approved Affordable Housing Mix", **"**Habitable Rooms", "Registered Provider", "Registered Provider Mortgagee's Duty", "Remaining Units", "Shared Ownership Housing", "Shared Ownership Terms", "Shared Ownership Units", "Social Rented Housing", "Social Rented Units", "South East London Partnership", "South East London Housing Partnership Boroughs", and "South East London Shared Ownership Priorities", and their definitions, in their entirety.

Amend**:** "Wheelchair Accessible Affordable Housing Units" shall become "Wheelchair Accessible Housing Units"; and in the related definition, the word "Affordable" shall be deleted wherever it occurs.

Clause 7

Delete**:** Sub-clauses 7.1.1, 7.1.2, 7.1.4, 7.1.5 and 7.1.6 in their entirety.

Schedule 2

Delete**:** Delete Paragraph 1.1 and Paragraph 1.2 (headed Affordable Housing) in their entirety

Amend: In Paragraph 2.1 (Wheelchair Accessible Housing Units), the word "Affordable" shall be deleted.

Schedule 6 (Approved Affordable Housing Mix)

Delete: Delete Schedule 6 in its entirety

Schedule 7 (Approved List of Registered Providers)

Delete: Delete Schedule 7 in its entirety

Schedule 8 (The Registered Provider's Mortgagee's Duty)

Delete: Delete Schedule 8 in its entirety

APPEARANCES

FOR THE APPELLANT:

Mr Chris Goddard, MRICS MRTPI	DP9 Planning Consultants
Mr Anthony Lee, MRICS MRTPI	BNP Paribas Real Estate
Mr Andrew Gillick	Crystal Palace Road Ltd
Ms Christine Hereward	Howard Kennedy Solicitors
Mr Patrick D'Arcy, BSc MRICS	Bruce Shaw Partnership

FOR THE LOCAL PLANNING AUTHORITY:

Mr Rob Bristow, MRTPI MCMI	Group Manager, Major Applications
Mr Peter Barter, MRICS	Principal Surveyor, Corporate Property Team
Mr Stephen Ashworth	Dentons Solicitors
Ms Michele Vas	Dentons Solicitors
Ms Wing Lau, BA(Hons) MA MRTPI	Senior Planner
Mr Toby Sowter	Corporate Property Team
Ms Alison Squires, BA MA MRTPI	Planning Officer
Mr John Gorst, LLB	Solicitor, Legal Services

OTHER INTERESTED PERSONS:

Mr Mark Treasure	Local resident