The Planning Inspectorate

Appeal Decision

Site visit made on 8 August 2018

by Grahame Gould BA MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4th September 2018

Appeal Ref: APP/Q1445/W/18/3194293
Windhaven, 107 Marine Drive, Rottingdean, Brighton BN2 7GE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr Carlo Schifano of the Morgan Carn Partnership against the decision of Brighton and Hove City Council.
- The application Ref BH2016/05906, dated 31 October 2016, was refused by notice dated 21 November 2017.
- The application sought planning permission for Demolition of existing dwelling and outbuildings and erection of a three storey building with additional lower ground floor entrance to provide 7 no flats and erection of 2 no semi-detached houses accessed from Chailey Avenue with associated landscaping, parking, cycle and bin storage without complying with conditions attached to planning permission Ref BH2015/01745, dated 22 July 2016.
- The conditions in dispute are Nos 2, 13, 14, 15, 16 and 17 which state that:
  2) The development hereby permitted shall be carried out in accordance with the approved drawings listed below (ie the list of drawings set out in the table embedded within this condition).
  13) Prior to first occupation of the development hereby permitted, details of appropriate levels of lighting to ensure a safe segregated footway in the car park area at all times shall be submitted to and approved in writing by the Local Planning Authority. The works shall be completed prior to the occupation of the development hereby permitted and shall thereafter be retained.
- 14) Prior to first occupation of the development hereby permitted, details of the proposed entrance gates and details (including sample) of the split face stone tiled wall hereby approved shall be submitted to and approved in writing by the Local Planning Authority. The works shall be completed prior to the occupation of the development hereby permitted and shall thereafter be retained.
  15) Prior to first occupation of the development hereby permitted, details of appropriate signage to the access, to ensure vehicles entering the site have priority shall have been submitted to and approved in writing by the Local Planning Authority. The approved facilities shall be fully implemented and made available for use prior to the first occupation of the development and shall thereafter be retained for use at all times.
  16) Prior to first occupation of the development hereby permitted a scheme for the storage of refuse and recycling shall have been submitted to and approved in writing by the Local Planning Authority. The scheme shall be carried out in full as approved prior to first occupation of the development and the refuse and recycling storage facilities shall thereafter be retained for use at all times.
  17) Prior to first occupation of the development hereby permitted, details of secure cycle parking facilities for the occupants of, and visitors to, the development shall have been submitted to and approved in writing by the Local Planning Authority. The approved facilities shall be fully implemented and made available for use prior to the first occupation of the development and shall thereafter be retained for use at all times.

- The reasons given for the conditions are:
  2) For the avoidance of doubt and in the interests of proper planning.
  13) In the interest of highway safety and to comply with policy TR7 of the Brighton and Hove Local Plan and CP9 of the Brighton & Hove City Plan Part One.
  14) To ensure a satisfactory appearance to the development and to comply with policy CP12 of the Brighton and Hove City Plan Part One.
  15) To improve visibility and awareness of vehicles and other users entering and exiting the site via the access, and to comply with policy TR7 or the Brighton and Hove Local Plan.
  16) To ensure the provision of satisfactory facilities for the storage of refuse and to comply with policy QD27 of the Brighton and Hove Local Plan.
  17) To ensure that satisfactory facilities for the parking of cycles are provided and to encourage travel by means other than private motor vehicles and to comply with policy TR14 of the Brighton and Hove Local Plan.

Decision

1. The appeal is dismissed.

Background and Procedural Matters

2. The applicant and the appellant are an architectural practice. However, the viability reports submitted with the appealed application and the appeal refer to PVJ Developments Limited being the applicant. At my request the appellant has confirmed that it has been instructed to act on behalf for PVJ Developments Limited, the landowner and developer[1] for the application site. For the sake of clarity hereafter I shall refer to the developer rather than appellant and in so doing I consider no prejudice will be caused to any party.

3. Planning permission was granted by the Council on 22 July 2016 under reference BH2015/01745 (the permission) for the demolition of 107 Marine Drive, a bungalow, and the construction of two semi-detached houses and a block of seven flats (the development). In association with the granting of the permission the developer entered into planning obligations to secure the payment of an affordable housing contribution of £329,000 and a sustainable transport contribution of £6,750.

4. Following the development's commencement on 1 May 2016[2] (predating the permission) an application (BH2016/05906 – the appealed application), made under Section 73 of the Act, was submitted on 31 October 2016. That application sought to 'vary' six of the conditions, 2 and 13 to 17 inclusive, imposed on the permission. Condition 2 is a standard plans condition and requires the development to be carried out in accordance with the numerous plans listed in the condition.

5. Conditions 13 to 17 respectively require details relating to: external lighting; the front boundary treatment (gates and a wall); directional signage; refuse and recyclate storage; and bicycle parking to have been approved (discharged) prior to the first occupation of the development. Thereafter the works subject conditions 13 to 17 should be implemented in accordance with the approved details prior to the first occupation of the development.

[1] PVJ Developments Limited being defined as the developer for the site within the Supplementary Planning Obligation executed on 20 July 2016 and appended to the Oakley Financial Viability Assessment of June 2017
[2] Date taken from the application form for the appealed application

6. Conditions 13 to 17 inclusive all require quite minor details to be discharged. It is therefore unclear to me why it is necessary for those conditions to be varied under Section 73, given the discharge procedure that is governed by legislation. It therefore appears to me that it is only condition 2 of the permission that might conceivably need to be varied under Section 73. That is because some of the drawings listed in condition 2 might become superseded and need to be updated and/or the list might need to be expanded as part of the process of discharging the requirements of conditions 13 to 17.

7. The purpose of the plans condition is to ensure that the new development is implemented in accordance with plans that are subject to express planning permissions. It is common for conditions to be imposed on permissions requiring the subsequent approval of detailed matters. Given that I am unaware of there being any particular issue with the discharge procedure for conditions creating conflicts with plans conditions, so as to render the latter inoperative, as might be inferred from the developer's reliance on Section 73 in this instance. Be that as it may the Council has determined the appealed application and I am required to determine the appeal on the same basis.

8. As the development subject to the permission has in part been occupied prior to conditions 13 to 17 being discharged a breach of that permission has arisen. However, as the appealed application was submitted prior to the breach of conditions 13 to 17 occurring I have determined this appeal having regard to the provisions of Section 73 rather than Section 73A of the Act.

9. The details for which approval has been sought are of an uncontroversial nature, with the Council considering them to be unobjectionable. I similarly consider the submitted details to be acceptable and I consider there to be no need for me to assess them in my reasoning below.

10. The disagreement between the appellant and the Council revolves around the need or otherwise for the making of an affordable housing contribution. In that regard the granting of an approval to vary conditions under Section 73 would create a new express permission. The Council contends that a new permission should not be granted without there being an executed planning obligation (or a deed of variation) to secure the payment of the affordable housing contribution. However, for reasons concerning scheme viability, which I will address in my reasoning below, the developer is unwilling to enter into a new planning obligation or a deed of variation.

11. The developer in submitting its final comments has provided additional viability evidence[3] and the Council has objected to my consideration of that evidence without it first being given the opportunity to comment on it. I consider that the additional viability evidence simply serves to reinforce the appellant's view that the development will become more unprofitable once all of the dwellings in it have been sold. I therefore consider that I can take account of the additional viability evidence without either needing the Council to comment on it or prejudicing the parties' cases.

12. Further to the parties submitting their cases the Government published the revised National Planning Policy Framework on 24 July 2018 (the revised Framework). At the same time some revisions were made to the Planning

[3] The Oakley Financial Viability Assessment of July 2018

Practice Guidance (the PPG), with a replacement viability section being published. Given the references made by the appellant and the Council to the previous versions of the Framework and the PPG in their cases, they have been given the opportunity to comment on the revised Framework and PPG. I have taken account of the comments that have been submitted.

Main Issue

13. The main issue is whether the appeal development would make adequate provision for affordable housing.

Reasons

14. Policy CP20 of the Brighton and Hove City Plan Part One of March 2016 (the City Plan) addresses the provision of affordable housing. Policy CP20 states that affordable housing will be sought on all sites of five or more dwellings (net) and for schemes of between five and nine dwellings the requirement is for 20% affordable housing to be provided in the form of an equivalent financial contribution. The wording of Policy CP20 makes it clear that there is scope for affordable housing contributions to be negotiated with the Council when development viability may be an issue.

15. Paragraph 63 of the revised Framework states that affordable housing should not be sought in connection with non-major residential developments, ie developments of less than ten dwellings. Hereafter I shall refer to the national policy requirement as the ten unit threshold or threshold. The threshold originates from the Written Ministerial Statement (WMS) made on 28 November 2014 and part of the PPG was revised to take account of the WMS. The WMS was subsequently subject to a legal challenge, however, the Court of Appeal found in the Government's favour on 11 May 2016[4], reversing the earlier judgement of the High Court. Thereafter the WMS and the guidance in the PPG were reinstated. The City Plan was adopted a little before the Court of Appeal handed down its judgement, nevertheless Policy CP20 is an extant development plan policy.

16. The revised Framework's ten unit threshold is a material consideration that might warrant a departure being made from Policy CP20. However, the Court of Appeal's judgement relating to the WMS has clearly established that its policy measures should not automatically be applied without regard being paid to the full circumstances of any given case, including the provisions of development plan policies. I consider the same principle is equally applicable to paragraph 63 of the Framework.

17. For the purposes of considering viability as part of decision making Paragraphs 008 and 009 of the extant version of the PPG's section on viability[5] state:

'…The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including … any change in site circumstances since the plan was brought into force …'
[Paragraph 008]

[4] Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council [2016] EWCA Civ 441
[5] Reference IDs: 10-008-20180724 and 10-009-20180724

'…As the potential risk to developers is already accounted for in the assumptions for developer return in viability assessment, realisation of risk does not in itself necessitate further viability assessment or trigger a review mechanism. Review mechanisms are not a tool to protect a return to the developer, but to strengthen local authorities' ability to seek compliance with relevant policies over the lifetime of the project.' [Paragraph 009]

18. Planning law requires that planning applications must be determined in accordance with the development plan, unless material considerations indicate otherwise[6] and Policy CP20 of the City Plan is therefore the starting point for the determination of this appeal. However, I consider that the Government's policy relating to the circumstances when affordable housing contributions should or should not be sought, as stated most particularly in the revised Framework, is a material consideration of great weight that I must also have regard to.

19. While there is inconsistency between the provisions of Policy CP20 and national policy there appear to be good local reasons for why that is the case. The Council has identified those reasons as being: a significant need for affordable housing for the life of the City Plan, ie until 2030, with there being an affordability issue given the average house price in the area; a constrained housing supply given the physical constraints arising from the proximity of the sea and the South Downs National Park; and the significance of small sites as contributors to the overall housing land supply, with sites of fewer than ten units yielding over 50% of new homes in the area. The Council's evidence[7] shows that the delivery of affordable housing between 2010 and 2017 lagged behind the target level. Given that context I consider Policy CP20 to be consistent with the parts of the revised Framework that promote the provision of affordable housing, most particularly paragraphs 59, 61 and 62.

20. There is disagreement as to whether the development will or will not ultimately be viable, were the affordable housing contribution to be paid and once all of the dwellings have been sold. However, I consider whether the development will or will not ultimately be viable is somewhat academic. That is because it cannot be said that the existence of the affordable housing obligation has resulted in the development being stalled. In that regard the development was completed in January 2018[8] and has thus been delivered, with one of the flats having now been sold and occupied.

21. The development subject to the appealed application is fundamentally the same as that benefitting from the permission. Having regard to that I consider the appealed application has all the hallmarks of being a vehicle to secure a favourable review of the requirement to make the affordable housing contribution, akin to the interim review procedure that was available under Sections 106BA to 106BC of the Act (as amended) up until 30 April 2016.

22. The appellant contends that the development has become unviable because firstly unanticipated ground conditions were encountered increasing the build costs and secondly there has been a decline in house prices. The decline in house prices being attributed to the withdrawal from the European Union

[6] Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990
[7] Ie the table included on page 4 of the Council's final comments on the revised Framework and PPG
[8] Paragraph 1.2 of the Oakley Financial Viability Assessment of July 2018

(EU). However, any slowing down of the property market attributable to withdrawing from the EU would potentially have been foreseeable at or around the time that the developer, apparently willingly[9], entered into the affordable housing obligation, given the Referendum's result predated the obligation's execution on 20 July 2016. I am therefore not persuaded that any significant weight should be attached to the developer's case relating to any decline in the housing market.

23. It is contended that I should attach greater weight to the ten unit threshold stated in paragraph 63 of the revised Framework, because it is a material consideration and Policy CP20 is inconsistent with that national policy. However, at the time the affordable housing obligation was entered into the national policy and guidance relating to the ten unit threshold was extant, with it having been reinstated following the Court of Appeal handing down its WMS judgement. I consider that had the developer been concerned about making an affordable contribution, either as a matter of principle and/or because of its potential to affect the development's viability, then it had the options of either not entering into the obligation or seeking to negotiate a reduced contribution, as allowed for by Policy CP20.

24. Instead the obligation was entered into and the development was allowed to progress to an advanced stage, prior to any concerns with viability being raised with the Council as a significant issue[10]. The developer appears to have been prepared to bear the cost of the affordable housing contribution until it sensed that there was a threat to the development's viability. I consider the developer's approach to this matter to be one of seeking to find a way of avoiding paying the affordable housing contribution after there had been some realisation of financial risk.

25. I consider the developer's attitude to this issue to be contrary to the extant guidance contained in paragraph 009 of the PPG. The PPG states that viability reviews should not be used as '… a tool to protect a return to the developer …'. It is contended that the PPG's guidance should not be relied upon because this development will not yield a return on the investment that has been made. However, I consider the developer's interpretation of 'return' to be too literal and thus narrow.

26. The development may ultimately be unviable and that would mean that there would be no return for the developer. However, I consider what the developer is seeking to do is protect its financial position by minimising the loss that it is now forecasting will arise. Not making an affordable housing contribution would reduce the costs of this development and that would undoubtedly be financially beneficial for the developer. I therefore consider reducing the magnitude of any loss would constitute a form of protection for the developer's finances and I cannot accept that paragraph 009 of the PPG should not be applied in this instance.

27. For the record I also consider that the developer's approach to this matter did not accord with what is now superseded guidance in the PPG, namely that stated in former paragraphs 016 and 017[11]. That is because the deliverability of the development appeared not to have been compromised at the point

[9] As stated by the Council in its appeal statement
[10] Ie the submission of the Oakley Financial Viability Assessment report dated June 2017
[11] Reference ID: 10-016-20140306 and Reference ID: 10-017-20140306

viability evidence was first made available to the Council and the development was not a phased one.

28. It has been submitted that further to an appeal concerning land at Ovingdean Road being allowed, following a public inquiry[12], I should consider the appeal before me on the basis of the Council being currently unable to demonstrate a five year supply of deliverable housing sites (HLS). A consequence of that would be for me to treat Policy CP20 as being out of date.

29. However, I consider the current HLS position is of no particular bearing for the determination of the appeal before me. That is because the permission has been implemented and the dwellings subject to it have been occupied or are available to be occupied. Accordingly irrespective of the outcome of this appeal the HLS position would be unaffected. In any event in the absence of an HLS and evidence of there being a continuing need for affordable housing, I am not persuaded that 'minimum weight' should be attached to Policy CP20 of the City Plan. That is because that would be likely to further compound the shortfall in the provision of affordable housing in the Council's area.

30. For the reasons I have outlined above, most particularly the appeal scheme's similarity with that subject to the permission and the development not being stalled, I conclude that the appeal development would make inadequate provision for affordable housing. In that regard the appeal development would be contrary to Policy CP20 of the City Plan and would be inconsistent with paragraphs 59, 61 and 62 of the revised Framework. I also consider that there would be some conflict with Policy CP7 of the City Plan, an umbrella type policy relating to developer contributions, because no Section 106 agreement or deed of variation has been submitted. For the reasons given above I find that paragraphs 008 and 009 of the PPG do not provide support for the appeal development.

31. There is an inconsistency between Policy CP20 and paragraph 63 of the revised Framework. However, having regard to the case specific circumstances I have referred to above and the local need for affordable housing, I consider that, in this instance, substantial weight should be attached to the conflict with Policy CP20.

Conclusion

32. For the reasons given above I consider that the appeal should be determined in accordance with the development plan, with there being no material considerations indicating to me that I should do otherwise. There would be unacceptable conflict with Policy CP20 of the City Plan and I therefore conclude that the appeal should be dismissed.

Grahame Gould

INSPECTOR

[12] APP/Q1445/W/17/3177606