

REPORT BY THE HEAD OF PLANNING, REGENERATION AND REGULATORY SERVICES

OUTCOME OF PLANNING APPEAL

MODIFICATION OF SECTION 106 OBLIGATION RELATING TO THE PROVISION OF AFFORDABLE HOUSING, INVOLVING PAYMENT OF A COMMUTED SUM TOTAL OF £115,400

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APPLICATION 44/2011/0508/OB

1 PURPOSE OF REPORT

- 1.1 This report relates to the outcome of a planning appeal which was decided at an Informal Hearing on 6 March 2012. The appeal was dismissed and the claim for costs made by the appellant was also dismissed.
- 1.2 This report provides Members with the feedback on the decision taken on the appeal, along with comments on the primary issues raised by the case.

2 BACKGROUND

- 2.1 The appeal arose from the decision taken by the Planning Committee in September 2011 to refuse the application which sought to modify an existing Section 106 Agreement by the replacement of the agreed affordable housing provision of 10 on-site apartments with a commuted sum payment of £115,400. The Section 106 Agreement relates to a planning permission for 38 dwellings which was granted by the Council in January 2006 and required the provision of 10 affordable units in the form of apartments within a single block. Although the development was commenced in February 2006, only 17 of the 38 dwellings (45%) have been constructed. The trigger point within the Section 106 Agreement for the provision of the affordable units is when 70% of units have been constructed.
- 2.2 The application sought to change the approach to the provision of affordable housing in connection with the development from the construction of 10 units on-site to a financial contribution to the Council of £115,400 to facilitate off-site provision. Negotiations were held with

the applicants and the figure of £115,400 referred to in the description of development was calculated by a sum of £28,850 for 4 off-site affordable units.

- 2.3 As Members may recall, the application was first presented to the Planning Committee in July 2011 recommended to be granted by Officers, but was deferred from this committee to allow for further analysis. The application was then debated by the September 2011 Planning Committee with the Officer recommendation remaining to grant and endorsed by a Counsel opinion which had been obtained, but was refused for the following reason:

'In the opinion of the Local Planning Authority, the modification sought would be contrary to the aims of the Council's Affordable Housing Policy guidelines in its Unitary Development Plan (HSG 10) and its Supplementary Planning Guidance Note 22 – Affordable Housing in New Developments, which seek the provision of affordable housing units within a development site unless there is evidence to justify an alternative approach. In this case the Council do not consider the case is made to either justify the option of payment of a commuted sum in lieu of on site provision, or to the sum forming the subject of the modification based on a level of provision below the 10 units originally proposed as part of the development.'

3 PLANNING POLICIES AND GUIDANCE

- 3.1 In respect of local planning policies, the key UDP policy referred to by the Council during the appeal was Policy HSG 10 along with SPG 22, and Members will be aware that Paragraph 5.1 of SPG 22 states that unless there is evidence to the contrary a 30% on-site provision will normally be sought. In the case of the appeal proposal, a total of 10 units out of the 38 granted equates to a 26% provision which was marginally below the 30% target figure due to the manner in which the provision was proposed i.e. within a single block of 10 apartments.
- 3.2 Paragraph 5.5 of SPG 22 allows for alternative off-site provision where it can be shown that: on-site provision is unfeasible; off-site provision would be better to meet the overall local housing needs; or when planning, housing or regeneration objectives would be better served by off-site provision. Paragraph 5.6 of SPG 22 sets out factors to consider where and when off-site provision may be acceptable, one of which is where it has been demonstrated that the application site has serious problems regarding its economic viability without affordable housing and that with affordable housing the development is economically unviable. It was this aspect that the appellants sought to focus on during the discussions with officers during the determination of the application, and also placed great emphasis on during the appeal hearing.
- 3.3 In terms of national guidance published by the Assembly, the appellants utilised the WAG Practice Guidance (2008) and Guidance Update (2009) on the subject of delivering affordable housing using Section 106 Agreements. In particular, Section 4 of the 2009 guidance update relates to

circumstances in which adverse viability is an issue and was therefore of the most relevance to the issue given that the appellants were basing their case on the changes in market conditions since the original Section 106 Agreement in 2006. The Council's case at the hearing when upholding the reason for refusal was that whilst the Council had taken full account of the 2008 and 2009 guidance, it did not believe that the scheme is unviable with the original on-site provision of 10 units out of the 38 dwellings allowed.

4 PRINCIPAL ISSUES FOR THE APPEAL HEARING

4.1 In essence, the appellants based their case on the changes to market and economic conditions since the original 2006 consent which they believed meant that the valuation figure for the sales of apartments had declined significantly and that the demand of apartments had also fallen with the focus shifting to providing houses. The appellants provided evidence via their appointed valuation consultant that the original expected figure of £120,000 per apartment sale had fallen to between £95,000 and £100,000. This meant that the overall developer's profit would fall from the expected 20% level down to 13% and as such the development of the remainder of the site in the form granted was no longer economically viable and the sum of £115,400 towards off-site provision was the only way in which the development could be completed. (NB: It should also be noted that the appellants sought to reduce this figure down to £75,400 on the basis of falling sales values but this was not accepted by the Inspector as it was not stated in the description of the proposed development.)

4.2 The crux of the Council's case was that the market value of apartments put forward by the appellants was too low and evidence was presented by the valuation consultant appointed by the Council to show that recent purchases of comparable apartments in the locality had taken place at values of between £118,000 and £135,000, the highest of which was achieved at the adjacent flat development of Abbey Court in Rhuddlan. The Council also suggested that the developer's profit figure of 20% sought by the appellants was too high for the current market conditions and that the 13% figure which was put forward in the appellant's own evidence demonstrated that the scheme remained viable irrespective of their 'desired' figure of 20%. It was also argued that the recent sales of apartments demonstrated that a market for this form of accommodation still existed. The Council also argued that the potential for an alternative form of on-site provision had not been explored.

5 THE INSPECTOR'S DECISION

5.1 The Inspector adjudged that the main issue for the case was whether the original Section 106 Agreement continued to serve a useful purpose and, if so, whether that purpose would still be served by the proposed modification sought by the appellants.

- 5.2 The Inspector assessed that on the basis of the evidence put forward that if the scheme was completed as originally granted permission then the development as a whole would yield a profit of between 13% (£583,822) as put forward by the appellants and 20% (£783,822) as put forward by the Council based on their respective valuations of the sales values for the apartments. Accordingly, the Inspector concluded that such a profit would still be comparable with, or indeed better than, the level of profitability enjoyed by some sectors of the economy and therefore the development remained economically viable with the 10 affordable units being delivered on-site as originally required by the Section 106 Agreement.
- 5.3 The Inspector also commented that the provision of affordable housing should be subsidised from the profit resulting from the whole development and not just a part of it. This was a reflection of the manner in which the appellants had sought to argue the case relating solely to the viability of the apartments, rather than paying sufficient regard to the values of the property sales across the site which included their own figures showing house sales of up to £475,000 for the larger detached houses. The Council stated in the hearing that such values were at the peak of the property market before the decline but must be included in the calculations for the overall site viability and the Inspector paid due regard to this in his decision.
- 5.4 In respect of the form of affordable units, i.e. as apartments, the Inspector noted that there may be limited open market demand for this type of accommodation and this may lead to the need to seek a modification of the planning permission in respect of the revision of the apartments to another form of accommodation, but he noted that the appellants had not even considered this possibility. Even if the form of provision were to change, the Inspector concluded that he saw no reason why this could not still include an element of affordable housing as required.
- 5.5 The appellants suggested during the hearing that if the appeal were dismissed then they would abandon the remainder of the development. The Inspector's response in his decision to this was that such a stated intent did not outweigh the strong policy presumption in favour of on-site provision given his previous conclusion that the development remained economically viable with the provision as originally required by the Section 106 Agreement.
- 5.6 The Inspector also noted the reference made by the appellants that the dismissal of the appeal could result in the development of The Orchards site being postponed as a knock-on effect, but adjudged that the development of this other site in Rhuddlan had no bearing on the subject appeal as the two sites were not linked in any way.
- 5.7 On one further point, the Inspector noted the appellants' reference to the Counsel's opinion on the matter which had been obtained by the Council between the July 2011 and September 2011 Planning Committees that suggested that a refusal of consent could not be upheld at an appeal. However, the Inspector correctly stated that this opinion was provided at a time when there was a lack of proper professional evidence to support the reason for refusal and that had the evidence

produced by the appointed consultants at the hearing been available to Counsel then the advice could well have been quite different.

5.8 As an overall conclusion, the Inspector was not convinced of the need for affordable housing in the form of apartments in Rhuddlan but adjudged that the Section 106 Agreement continued to serve a useful purpose in terms of requiring the appellants to provide affordable housing at the site. The Inspector dismissed the proposition that the commuted sum offered as an alternative could serve the purpose of providing affordable housing equally well as the required on-site provision.

5.9 On the matter of costs, at the hearing the appellants submitted an application for their costs to be awarded based on the unreasonable behaviour of the Council in the form of the Planning Committee whose Members were perceived as disregarding their own officer's recommendation to grant consent and the Counsel opinion obtained which endorsed this recommendation. In assessing this claim, the Inspector acknowledged the points raised by the appellants but stated that for costs to be awarded it must be shown that the Council have not presented evidence to substantiate the reason for refusal in the appeal proceedings. Given that the Council was able to produce relevant and compelling evidence to support the case, the Inspector concluded that the application for costs was dismissed as no unreasonable behaviour had occurred at the appeal.

6 ISSUES ARISING FROM THE APPEAL

6.1 It is considered that the following primary issues are worthy of note and consideration for future such proposals as this, given that the appeal decision was seen as something of a landmark case which could have opened up a number of long-standing Section 106 Agreements for debate if the appeal had been allowed.

Form of On-Site Provision

6.2 Overall, the Inspector decided that whilst the provision of 10 affordable apartments at the site was perhaps not ideal in respect of the form of accommodation given the current market demand and the identified need for more houses, he concluded that the substitution of such on-site provision in the form of a commuted sum was not the way forward. Indeed, he noted very clearly that the appellants had not sought to review any alternative form of on-site provision in place of the approved apartments.

6.3 For example, based upon the appellant's own build cost figures as put forward for the appeal, a two-bedroom town house would be cheaper to build than a two-bedroom apartment and these would have a market value at least equal to that of apartments if not better. It is therefore considered that the lack of such exploration of an alternative solution such as smaller houses either in terraced or semi-detached form was a matter which should have been fully analysed by

the appellants before proceeding to an appeal given that a solution may have been found which was agreeable to both the developer and the Council.

Off-Site Commuted Sum

6.4 Planning policies at both a local level and at national level allow for the use of a commuted sum payment towards off-site provision in place of on-site provision only where extenuating circumstances can be proven to exist, and indeed the officer recommendation to grant permission for the subject application was based on this premise. However, the Inspector concluded for this case that on-site provision remained entirely achievable, albeit perhaps in an alternative form, and as such the acceptability of an off-site commuted sum must be seen as the last possible course of action once all alternatives for on-site provision have been exhausted.

6.5 It is therefore too simplistic for the appellants to have suggested that the drastic reduction in the level of provision down from 10 units to only 4 units and the provision of this via an off-site commuted sum was the only way forward as not all possibilities had been explored to evaluate whether on-site provision can be achieved in a different form of accommodation, if indeed it can be shown that the market dictates that apartments are not suitable.

Level of Developer's Profit

6.6 Developer's profit reflects the risk inherent in any development scheme and it is not the role of the Council to grant or amend a planning permission on the basis that the permission seeks to improve or maximise the developer's profit. If, as in the appeal case, the market should move during a development period it also does not fall upon the Council to override the policy and guidance with the sole aim of maintaining a certain level of profit for the developer. The Inspector was very clear on this point that the level of profit for the scheme was substantial and better than many other market sectors at the current time irrespective of whether a figure of 20% or 13% was achieved. The assessment of the matter of developer's profit is therefore not a matter in which the Council should become embroiled, with the more important issue being whether a scheme remains economically viable with the affordable housing provision on the site.

Piecemeal Consideration

6.7 In this case the appellants sought to establish that because of a downturn in the market and property values that this development was no longer viable. In particular, the appellants suggested that the affordable housing element of the development made the scheme unviable but much of their evidence was based on the cost of the land for the apartments along with the cost of building the apartment blocks and their end sales values. The principle for affordable housing provision is set out very clearly in both the relevant policy and the SPG that the policy applies to the whole site rather than any piecemeal part of it and as such the provision of the affordable housing should be subsidised from the profit from the whole scheme, i.e. both houses and apartments, when judging the viability of the site. Given the substantial sums received for the

detached houses, the profit from the whole site clearly shows that the provision of affordable units on-site remains economically viable as stated by the Inspector.

Market Values

- 6.8 The Inspector accepted in his decision that he could not categorically conclude whether the values of comparable apartment units put forward by the appellant at around £95,000 or by the Council at around £125,000 was correct. However, he could reasonably conclude that the true value was somewhere within this range and at either end of the range the development remained economically viable be it with a developer's profit of 20% or at 13% or somewhere in between. As such, it is considered that the Council need not become engaged in any elongated debate about specific valuations of comparable properties but should rather focus on the overall economic viability of a scheme which includes affordable provision. For this case, the Inspector was more than satisfied that the development of the site was economically viable irrespective of the final end values of the units.

Abandonment

- 6.9 The appellant's warning that the remainder of the site would not be developed if the appeal were dismissed, as made repeatedly during the appeal hearing, was rebutted by the Inspector in his decision as a matter which did not carry sufficient weight given the failure of the appellants to adequately investigate any alternative forms of on-site provision. Accordingly, such a suggestion should be given little credence for any future site considerations.

7 CONCLUSION

- 7.1 There were a number of factors for consideration relating to what was a complex appeal hearing including issues relating to valuation, piecemeal development, alternative forms of provision, level of profit, abandonment, current economic conditions, and planning policies. However, what became very clear throughout the process and as concluded by the Inspector was that the manner in which the supporting information was presented by the appellants was somewhat selective as it sought to focus on the worst possible scenario for property values and lack of demand for apartments as well as reviewing the development of the apartments via a piecemeal approach which failed to take full account of the level of profit made by the scheme as a whole. It is therefore perhaps not surprising that the original recommendation for the application and the Counsel opinion suggested that the proposed amendment to the Section 106 Agreement was acceptable given the circumstances put forward by the appellants.

- 7.2 However, once the case presented by the appellants was scrutinised in-depth by the independent valuation and planning consultants it was evident that the matter was far from clear and that a compelling argument could be made that the Section 106 Agreement should remain unmodified and that the affordable housing requirement on-site remained economically viable. This is borne

out by the decision to dismiss the appeal and the conclusions set out in the decision letter by the Inspector.

- 7.3 In terms of a way forward for scrutinising any further such proposals it is suggested that the Council may wish to investigate the potential of utilising an independent specialised consultant to provide a view on any financial evidence put forward, perhaps on a similar basis to that offered by ACAS for worker's dwellings proposals for a fixed fee payable by the applicant. One other possibility may be to review the potential for an officer with a valuation/planning background to be responsible for dealing with new and/or proposals to vary Section 106 Agreements given that such legal agreements are becoming ever more common for a variety of matters. The use of a specialised officer may prove very worthwhile as such expertise would potentially avoid appeals. It may also be feasible for such an officer to create a template for a detailed financial appraisal to include the areas which need to be covered in order to avoid any ambiguity in future cases.