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## Appeal Decision

Hearing held on 17 December 2014

**by Philip Major BA (Hons) DipTP MRTPI**

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

**Decision date: 14 January 2015**

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**Appeal Ref: APP/D2510/Q/14/2228037**

**Land adjacent to 52 South Road, Chapel St Leonards, Skegness, Lincolnshire.**

- The appeal is made under Section 106BC of the Town and Country Planning Act 1990 against a refusal to remove one element of a planning obligation.
  - The appeal is made by Langridge Homes Ltd against the decision of East Lindsey District Council.
  - The development to which the planning obligation relates is the erection of 111 dwellings.
  - The planning obligation, dated 17 February 2014 was made between East Lindsey District Council and Langridge Homes Ltd and The Forest Property Partnership.
  - The application Ref: N/031/01837/14, received by the Council on 15 September 2014, was refused by notice dated 10 October 2014.
  - The application sought to have the planning obligation modified by the removal of the affordable housing element.
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### Preliminary Matters

1. The appeal relates to a site which has an extant planning permission for 78 dwellings dating from the 1970s. That development has been started in a small way but never built out. The scheme the subject of this appeal was submitted in 2011 and finally approved in 2014 following the signing of the S106 obligation the subject of this appeal. The development permitted now has 111 dwellings, the 'extra' 33 being, by coincidence, the affordable housing requirement of 30%. There has not, until the lead up to this appeal, been any detailed viability assessment of which any party is aware.
2. It has been suggested by the Council that this cannot reasonably be regarded as a stalled scheme as described in the relevant guidance<sup>1</sup>. It is argued that the Appellant has produced appraisals which show that the scheme is unviable with or without affordable housing and that S106 BA can only apply to schemes which are rendered unviable by the affordable housing requirement and are not unviable anyway. However, the Appellant has indicated (as I deal with below) that the scheme can go ahead as the landowner is prepared to set aside land value to a large extent. Bearing that in mind, and that the primary purpose of the S106BA process is to encourage development and provide more homes, I do not agree with the Council that this scheme should be excluded from consideration under the S106BC appeal process.

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<sup>1</sup> Section 106 affordable housing requirements – Review and appeal (DCLG, April 2013)

### **Applications for costs**

3. At the hearing an application for costs was made by Langridge Homes Ltd against East Lindsey District Council. This application is the subject of a separate decision. A later application for costs, pursuant to the Appellant's submission of information after the close of the hearing, was made in writing by the Council. This will be subject of a separate decision following receipt of the response from the Appellant.

### **Decision**

4. The appeal is allowed as set out in the formal decision below.

### **Main Issue**

5. The only issue in this case is whether the affordable housing requirement in the extant obligation means that the development is not economically viable and, if that is the case, what action in relation to the affordable housing requirement would be necessary in order that the development becomes viable.

### **Reasons**

#### ***Areas of Dispute***

6. There are a number of areas on which the Appellant and the Council do not agree. These are:
  - Sales values for the permitted scheme.
  - Build cost rates/construction costs
  - Statutory Fees
  - Contingency
  - Developer's profit margin
  - Land value assessment

There was formerly a disagreement about finance costs but that is now agreed and dealt with on the same basis in the latest assessments provided by each party. I will consider each of the disputed areas in turn.

#### ***Sales Values***

7. The development is made up of a number of different house types and clearly their aggregate value adds up to the gross development value of the scheme. The area of comparable values has been agreed and each party has drawn on its own expertise to assess the likely sales value of each house type. There are some areas of general agreement in relation to values for some of the houses, with differences in assessed values being quite small. Equally, there are significant differences, such as in the smaller footprint semi-detached and detached house types. The total difference in values of an entirely open market development is approaching £0.9m. This is a significant sum in relation to an overall value of between £14.7m and £15.6m. Clearly the total value of a scheme including 30% affordable housing would be less.
8. In order to further assess likely sales values the Appellant has examined value per square metre of dwelling. I accept the point made by the Council that there is not a simple arithmetic relationship between the size of a house and its value, but more importantly I agree with the Appellant that a larger house of the same type is likely to attract a better price (all other things being equal).

For that reason I prefer the evidence of the Appellant in relation to likely realisable sales values on this site. That is not to say that the Council's figures are entirely wrong, but the evidence of the Appellant is more convincing. A wholly open market development value of £14.7m is therefore realistic in my judgement.

### ***Build Cost Rates/Construction Costs***

9. At the heart of the Council's concerns here are that the Appellant has not provided enough information to justify the build costs submitted with the application, and that the alternative use of BCIS<sup>2</sup> rates is not acceptable as more specific and localised data ought to be used.
10. The total costs shown in the application were just over £9m, as assessed by the developer. That is similar to, but notably a few percentage points lower, than the latest BCIS derived Appellant figures of about £9.8m. The Council has also referred to BCIS rates and reached a figure of over £9m. However, the Council has acknowledged a mistake in its calculations relating to detached housing. This would add something like £0.5m to its figures, bringing costs on the Council's BCIS assessment close to that of the Appellant.
11. The important question here is whether there is any justification for expecting more localised costs to be used. This proposed development has not started, so there are no subcontracts for any trades, and no quotations for any works on site. In these circumstances it is difficult to justify a requirement to rely on 'localised' data. It is well known that house building has enjoyed something of a renaissance lately, but that has also resulted in materials shortages (as mentioned by the Appellant at the hearing) which tends to push up costs. Regular updates to BCIS information can take these into account, and I have no reason to suppose that the area of the appeal site is in any way immune to changing trends. I am therefore satisfied that the use of BCIS data is appropriate, and indeed the guidance of April 2013 indicates as much when there are no estimates or tender prices capable of being updated, as is the case here.
12. In passing I note that the Council and Appellant prefer different data from BCIS – the Council preferring median figures and the Appellant the mean figures. In this case not much turns on that since they happen to be very similar at present. I therefore do not need to express a preference in this case.

### ***Statutory Fees***

13. The Council's position here is that this should be included within the 'professional fees' bracket of the assessment, and that in any case the allowance of 8% for professional fees is at the high end of the scale. The DCLG guidance on this type of cost is not definitive, but cites agent's fees, legal fees site promotion and other costs and fees, where appropriate. The Appellant also reasonably cites such matters as ecological reports and flood risk assessments. The guidance does not definitively indicate that, for example, planning application fees should be treated differently. However I note that the Council is content that legal fees should be specifically included and assessed separately at 1%, and sales and marketing at 2%. I cannot agree with the Council that planning application fees should not be accounted for somewhere

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<sup>2</sup> Building Costs Information Service

just because that is money which has already been spent – clearly it is a cost associated with the specific scheme.

14. The Appellant, in the latest viability appraisal (AMK Rebuttal 21) assesses statutory fees at 1.1% of gross development value, or £108,218. The total of professional fees and statutory fees would therefore be 9.1%. Hence the overall increase in costs associated with a separate statutory fees item is some 1% of total costs. That seems to me to be relatively minor in a scheme of this size. This is a matter which is (based on the evidence I heard) dealt with differently from development to development. There is probably no right or wrong approach, but in this case the final outcome is not likely to be materially altered by either approach. Given the uncertainties which inevitably surround projections for both values and costs it seems to me that it cannot reasonably be a determinative matter in this appeal.

### ***Contingency***

15. In my experience every scheme includes a contingency figure. But in this case the Council believe that the developer already knows the site well enough to minimise risk such that a contingency should not be required. If not needed the Council's position is that the contingency sum would simply become an increase in profit.
16. I do not agree with the Council's position on this. Although it was fairly conceded that some risk would remain, the Council indicated that site investigations should have reduced this to a minimum and a reduction to 2.5% would be more reasonable. That seems to me to be somewhat unrealistic. The contingency applied by the Appellant, of 5%, is an industry standard for relatively 'easy' sites, and would be expected to be higher to cater for increased risks on difficult sites. I heard that the Appellant has not carried out intrusive site investigations, and would not have been in a position to do so until planning permission was granted in 2014. That is entirely understandable. Familiarity of the developer with the general area cannot be translated into certainty of conditions on a particular site.
17. Of course contingency sums can be too small as well as too big, so that if the Appellant finds unexpected difficulties during the development, the lack of adequate contingency can reduce profit. Whilst there is no evidence either way in this case, it is right that contingency reflects risk, and in the circumstances I accept that 5% is an appropriate figure in this instance.

### ***Developer's Profit Margin***

18. To some extent it can also be argued that profit expectation reflects risk. As pointed out at the hearing a developer in a property 'hotspot' may well be prepared to accept a modest paper profit forecast because of the certainty of being able to sell and the likelihood of rising values. However, it is common ground that this case does not reflect such a scenario.
19. The figure of 20% on gross development value of market housing is often quoted as an industry standard starting point on 'standard' sites. I accept the Appellant's evidence that developers would be most unlikely to accept a predicted profit margin of 12.5%, the position suggested by the Council. Whilst the Council produced a table showing that margins between about 12% and 17% have been accepted on other local sites, there was no other

information on the circumstances of those cases, and hence it is impossible to know what factors led to those rates being deemed acceptable.

20. The Three Dragons Coastal Lincolnshire Economic Viability Assessment of January 2013 is a study which seeks to "...provide well reasoned justification for proposed thresholds and affordable housing targets...". Key assumptions of the study include 17% developer profit on market housing and 5% overheads, a total of 22% (it should be noted that there is no equivalent overheads figure in the assessments relating to this case). I therefore find no justification for the Council's initial stance that 12.5% should be acceptable.
21. The Council also indicated that the cases it had been involved with showed that a nil profit was expected on affordable housing. That is something I find very surprising. It is generally accepted that a lower profit would be acceptable because of the low risk attached to affordable housing provision, but low does not equate to nil. I consider that a return on affordable housing in the region of 5% or 6% is reasonable. The Three Dragons report referred to above assumes a return on affordable housing of 5%, and the Homes and Communities Agency assumes 6% as the 'norm'.
22. The Council suggested that this is a location where developers 'on the ground' are taking lower profits because that is what the location can bear. Indeed, it may be that eventual outturn on investment is lower than anticipated because this is, as described at the hearing, a 'marginal area' for development. But that does not justify starting out by seeking a low profit. To do so would risk no development at all, and that would conflict with the impetus behind S106 BA applications, which is to get houses built. Taking this topic in the round I concur with the Appellant that a 20% starting point on market housing is reasonable, and that a 6% return on affordable housing is similarly reasonable.

### ***Land Value Assessment***

23. This is something of an academic exercise in this case. There is no agreed value in an original appraisal because no such appraisal exists. Market value at the time of the planning permission has been assessed by the Council at about £1.25m, but the Appellant points out that such a valuation would make the development unworkable, and that is shown in the Appellant's assessment.
24. The land is in the hands of the developer who is prepared to virtually write off land costs if a reasonable return can be made on the development itself. In that sense there is a willing developer and willing landowner (itself). The residual land value as assessed by the Appellant is some £0.2m even without the input of affordable housing, and supports a conclusion that the development would be incapable of providing any affordable housing.
25. The Council has itself carried out a residual land valuation exercise, which results in value of about £0.7m including the provision of affordable housing. However, that must be treated with caution in light of the acknowledged mistake in costs noted above, and my judgements on other areas of disagreement.

### **Other Matters**

26. This is an unusual case in that the site lies within flood zone 3 where residential development would not normally be permitted. However, there is an extant permission for 78 houses in any event. I am informed that the current

permission for 111 dwellings was only granted because of the affordable housing element, and that without it permission would have been refused. I understand that the Council has an agreement with the Environment Agency that affordable housing can be built in flood zone 3 so long as occupants are relocated from flood zone 3 elsewhere. However, none of those matters are before me in this case, which can only make a determination on the viability of the scheme with or without affordable housing. Although a determination in favour of the Appellant would result in 33 more dwellings being permitted in flood zone 3 that would be an inevitable consequence of the narrow determination I am required to make. To dismiss the appeal on the basis that there would be more dwellings in flood zone 3 would exceed the remit open to me, and to be fair, the Council has not suggested that is something which I should consider.

## **Conclusion**

27. Drawing together the threads of the above matters it is clear that my findings are as follows:

- The Appellant's assessment of sales values is to be preferred to that of the Council;
- The Appellant's assessment of build costs is to be preferred;
- Statutory fees are not of such magnitude that they would be determinative in this case;
- It is reasonable to apply a 5% contingency;
- A developer's profit margin of 20% on market housing and 6% on affordable housing is reasonable;
- Land value in this case, if assessed in accordance with guidance and realistic figures for costs and sales, would rule out affordable housing in any event. In this instance land value is of academic interest in the circumstances of the case.

28. When these findings are applied to the assessments made by the Appellant, notably AMK Rebuttal 21 (though using a lower 17.5% profit on market housing) it becomes apparent that the development is not viable if it includes any affordable housing element at all. It follows that the appeal must succeed if development is to proceed in the short term on this site.

## **Formal Decision**

29. The appeal is allowed. The planning obligation, dated 17 February 2014 made between East Lindsey District Council and Langridge Homes and The Forest Property Partnership, is modified as set out below for a period of three years from the date of this decision.

### **Schedule of Modifications to the planning obligation dated 17 February 2014**

#### **1. DEFINITIONS AND INTERPRETATION**

Delete:

Affordable Housing Unit  
Affordable Housing

Affordable Rented Housing  
Chargee  
Choice Based Letting Provider  
Choice Based Lettings Scheme  
Eligible Tenant  
Protected Tenant  
Rented Housing  
Registered Provider  
Shared Ownership Housing  
Social Rented Housing

2. Paragraph 4.1.14 amended to read

'This deed shall not be enforceable against individual purchasers of any unit of market housing'

3. Paragraph 6.1.1 is deleted

4. Paragraph 7.2 is deleted

5. Schedule 3 is deleted in its entirety

*Philip Major*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT:

Mr A Kerrison	AMK Planning
Mr R Maxey	HEB Surveyors, Chartered Surveyor and Valuer
Mr A Davidson	Chartered Quantity Surveyor
Mr N Paterson	Estate Agents Lincolnshire

### FOR THE LOCAL PLANNING AUTHORITY:

Mrs M Walker	East Lindsey District Council Planning
Mrs H Wright	East Lindsey District Council
Mr G Sargeant	Chartered Surveyor, East Lindsey District Council

## **DOCUMENTS**

Doc 1	Email from David Newham in relation to BCIS use
Doc 2	Extract from Viability Appraisal Assumptions
Doc 3	Rightmove sales data
Doc 4	Bundle of house type information, sizes and sales values
Doc 5	Written costs application
Doc 6	Written costs response