The Planning Inspectorate

Appeal Decision

Hearing held on 24 September 2014

by Gyllian D Grindey MSc MRTPI Tech. Cert. Arb.

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

Decision date: 14 October 2014

Appeal Ref: APP/A2335/Q/14/2211913
Middleton Towers, Morecambe, LA3 3LJ.

- The appeal is made under section 106B of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be modified.
- The appeal is made by Moorfields Corporate Recovery LLP against the decision of Lancaster City Council.
- The development to which the application relates is a continuing care retirement village.
- The planning obligation dated 17 October 2001 was made between Lancaster City Council and The Glory Hole Ltd (and varied by Deed dated 6 September 2005)
- The application, Ref 13/00805/VLA, was dated 1 August 2013.
- The application sought to have the planning obligation modified as follows: [in summary – see later text for details] remove the effect of the obligation from a part of the site; to remove the age restriction regarding the property occupants; to delete the requirement concerning restricted use of the leisure facilities; to delete the requirement for a mini-bus service; to amend Green Transport Plan details and those regarding affordable housing provision.

Decision

1. The appeal is allowed and the S106 agreement between (1) Lancaster City Council and (2) The Glory Hole Ltd dated 17 October 2001 and adjusted by a Deed of Variation dated 6 September 2005 shall be further varied in the terms of the document attached as appendix 1 to the Statement of Common Ground (SCG) dated 23 September 2014 [document 5]. For the avoidance of doubt all these documents must be read together.

Preliminary Matters

2. The applicant and the Council continued dialogue prior to the hearing. At the commencement of the hearing, I was handed a SCG which, broadly, stated that the Council and the applicant had reached agreement on all outstanding matters. The SCG is well known to all interested parties: I need not detail the points contained therein here [document 5].

Main Issue

3. From my inspection of the site and surroundings and the representations made at the hearing and in writing I find that the decision in this appeal turns on a single main issue. This is whether the obligation, in its current form, serves a useful planning purpose.

4. I am aware that a number of the conditions attached to the original planning permission would have a tension between them and the amendments to the S106 which the Appellant company seek. They are, though, separate matters, and an examination of the practical planning issues would be better suited to either an application under S73 of the Act (I understand one has been made) or further planning applications.

Background

5. Outline planning permission for a largely self-contained "retirement village", was granted by the Secretary of State (SofS) in September 2002. This permission was subject to a number of conditions including no. (xxi) "the development hereby permitted relates to a continuing care retirement village and no other form of residential development". The 23ha site would have had 650 dwellings together with on-site sports/recreation/library/guest facilities, a care-home, reception, administration and retail buildings all set within landscaped gardens.

6. It is clear from the Inspector's report and the SofS decision that the scheme was regarded as "unique" (paragraphs 9 of SofS decision and 11.15 of the Inspector's report) type of proposal, modelled on specialist USA style developments and new to the UK market. It is also clear from the decision that, in highway terms, great weight was placed on the self-contained nature of the development. It was envisaged that the overall numbers of car-journeys likely to be generated by the residents would not strain the capacity of Carr Lane, the only access. Reliance was placed on the proposed age-restriction that "in particular, the provision relating to the age of the heads of households should ensure that the proposed dwellings will continue to be occupied by the elderly for the lifetime of the development" (para 15 of SofS decision).

7. The Inspector's report talks of "an average age of 76; 20% of the units would be let or sold as being car-free; ie without garages or car-spaces; the age profile of residents would virtually eliminate any need to travel to work, school or college from the site, and most of the daily and weekly needs for shopping, recreation, health, personal care, social activities and dining facilities would be provided on the site".

8. The development was severed into 2 parcels, phases 1 and 2. This appeal concerns phase 1 land only. Phase 1 has foundered twice, with developers going into administration. Only 55 units have been built and 36 sold; the Council describes the remainder of the site as follows: "the condition of the site for the existing residents is not particularly appealing….areas of undeveloped land and large hoardings……." I have evidence from Land Registry that 1 unit which sold for £230,000 in July 2010 has recently re-sold at auction for £34,500 – a telling reflection perhaps of the uncertainties of the present dismal situation.

9. Currently, the appellant is working for the Bank which funded the last developer. The Bank seeks only to dispose of the land as a business; it is not a health-care provider or a developer who could build and/or sell the individual units. Mr Hinds, for the appellant, stated that the Bank would make a loss whatever the outcome of the appeal in any event, it was only a question of whether a smaller loss could be achieved.

10. The Appellants submitted compelling evidence that the development, as originally envisaged, will not be completed. Mr Jeffery, for the Council, concurred and spoke at the hearing of the various locational and market reasons why the site was not an appropriate one for this novel type of scheme. Mr Francis, for the owners of phase 2, the remainder of the land, (GHL) stated that the scheme which currently has permission "will not come forward." Indeed, GHL explained that they are in discussion with the Council concerning an alternative mixed use scheme for their phase 2 land: light industrial/housing on the land (document 3). Thus it is a shared opinion by all interested land owners that the development, as originally envisaged, will not be completed.

11. So this is where we are today; I am acutely aware of the unusual circumstances of this site and its planning history. This has led to the present residents living on a partially completed development site in worrying circumstances. They believed they were buying a property within a 'continuing care retirement village', with an outstanding array of facilities at their disposal, which have not materialised. The situation must be very stressful – indeed the many letters from the residents say that it is – while the outcome continues to evolve. I can only hope that matters are pushed along quickly, for all concerned.

12. The appellant submitted a viability study at the hearing. This demonstrates that the restricted scheme would not be viable and would not, in all likelihood, deliver either the scheme with permission or any affordable housing. There was sufficient evidence to suggest that, with the removal of the age restriction, the scheme would produce a land-value. While some of the residents questioned the accuracy of some of the Appellants' statements, I have no alternative evidence on viability at all. I find the Appellants' evidence convincing and this must be my starting point.

13. Indeed, the facts seem to rather speak for themselves in that 2 developers have gone into administration and the present land owners are adamant that they will not proceed with the present scheme. Even without the current restrictions it is the Appellants' stated view that "the site is a highly marginal location for residential development in any event".

14. While the Council is now in agreement with the proposed alterations to the obligation I must still assess the 'Amendments to the Section 106 Agreement' appended to the SCG (document 5) numbers 1- 8. I use the same numbers, for ease of reference.

Amendment no. 1

15. Bearing in mind that only the land shown on the drawing AIB/MT-001 (appended to the SCG) is involved (Phase 1), paragraph 1 of the schedule to the S106 Agreement would need to be changed if the appeal is successful. The original planning permission repeats the *total* overall number in any event at condition no (iv) & thus provides a measure of control; I need not deal with this further. This is also the paragraph that specifies that "not less than 20% of the total number of units shall be of 'car-free' design." Unfortunately the S106 does not prohibit any residents *owning* vehicles and leaving them parked on the internal private roads (they are not adopted). As such, the clause is unsuccessful in achieving its objective.

16. 'Car-free design' is too loose; any property with no garage or parking area would comply, but could nonetheless be occupied by a resident with a car who could park it on the road. There is also no requirement for any of the 'car-free' units to be provided on Phase 1 (the Bank's land) – so they would be unlikely to have been delivered until the later phase anyway. I understand and have sympathy with the Highway Authority's submissions regarding the unsustainable location of this site and, indeed, there was agreement that this is the case, but nothing in the present S106 limits car-ownership on the site today anyway.

17. Mr Coombe and Mr Smith, for the Highway Authority, made it clear that, with a scheme of unrestricted housing in the normal course of events, the internal roads would, most likely, be adopted. While I agree, we have to start from where we are and modification of this element in the S106 would not worsen the existing situation. I think it most likely that this whole subject (of traffic generation) will have to be re-examined either through a S73 application (for the development of land without complying with conditions subject to which a previous planning permission was granted) or through a new application for a revised scheme. This existing element of the S106 serves no useful planning purpose in its current form however.

Amendment no. 2

18. The Council accepts that, due to poor drafting of the existing S106, there would be "nothing preventing the developer from constructing 90% of the units (187 units) before a single affordable unit is required based on the wording of the existing agreement" (Council's statement para 6.31). I agree that there is no earlier trigger point for when the affordable housing must be delivered. Given present circumstances and the unlikelihood of further dwellings ever being constructed under the present permission, I find it doubtful that this scheme will *ever* deliver any affordable housing. The appellant and the Council agree that facilitating non-restricted properties on the site is the most likely method of generating some affordable housing on the site and accepts that this element of the S106 still serves a planning purpose. The additional clause would require the outstanding phase 1 dwellings to be built to yield 10% affordable units. I find this amendment to be the best in these unsatisfactory circumstances.

Amendment no. 3

19. Paragraph 3 of the Schedule is concerned with the ages of occupants. Originally the S106 agreement stated that occupiers of the dwellings and the care home "shall not be occupied by households whose head of household is less than 60 years old". This was changed by a Deed of Variation to 55 years old in September 2005. The care-home would lie outside the phase 1 land (the Bank's) and so need not concern me further. The S106 does not appear to me to restrict occupants of the scheme to retired households competently. I am certain that most persons are likely to be working at 55 and generating the sort of vehicle movements associated with going to/from employment.

20. Only 1 person within a household would have to be 55 or older to meet the terms, in any event, while the remainder of the household could be younger. So, for example, a household made up of a young, working couple in their twenties with a baby but also living with a grandparent of 55 years plus, would comply. Mixed-generation households are not unusual.

21. Typically persons are having children later in life and so 55 year old residents could well still have children at home who may be going out to school/college/work daily too. So, while it is clear that the original permission was granted on the basis of an average age of 76 and that the age profile of residents would virtually eliminate any need to travel to work, school or college from the site, this has most definitely not been achieved by the terms of the S106.

22. The Highway Authority is, understandably concerned about un-restricted housing here. They underlined at the hearing that no objection was made formerly because of the self-contained nature of the proposal. I share their concern but have to bear in mind that, with a zero possibility of the development ever being completed as 'self-contained', existing residents will have to travel off-site to meet some of their needs anyway and they may well be still in employment too. In normal circumstances some mechanism for ensuring that age-restricted retired households live in a "continuing care retirement village" would serve a useful planning purpose. However, in the particular circumstances of this case it does not.

Amendment no. 4

23. This element covers a minor re-wording to reflect amendment no 2 concerning affordable units and the remaining un-built dwellings to yield 10% affordable units for the phases.

Amendment no. 5

24. This paragraph concerns the on-site leisure facilities. It is clear that the leisure facilities and club are not viable with the small numbers of eligible patrons. Figures given to the Council show running costs of £115,000 per year and income from users of £45,521; these are not disputed. Calculations demonstrated that a total number of 474 residential members would be needed to make a viable concern with a modest profit, but NOT allowing for running costs to increase if user numbers increase, which seems to me inevitable.

25. The break-even user figure is greater than the numbers of residents that would be on-site if the whole of the phase 1 land were to be developed. But, given that the scheme is not viable in its current format, it is clear that there is no prospect of the necessary population living on site in any event. I understand from the Council's comments at the hearing that they have not taken any enforcement action regarding the current use of the facilities by a wider population. I agree with the parties that there is no realistic alternative but to permit a wider user-base in order for the facilities to remain open. The clause in its present form would, in the normal course of events, serve a useful planning purpose but, given the particular circumstances on site it does not.

Amendment no. 6

26. This clause required a minibus service, subject to various criteria such as times, routes and destinations, but only for a period of 5 years from the occupation of the first dwelling unit, rather than the lifetime of the scheme as might be expected. 5 years have elapsed. While I understand that, at present, the management company currently continues to operate the minibus the terms of the obligation have been met & this clause no longer serves any useful purpose and should be deleted.

Amendments nos. 7 and 8

27. The existing clause requires the submission of a Green Transport Plan (GTP) prior to the occupation of the first dwelling. This was intended to 'encourage the use of sustainable modes of transport to and from the development'. One has never been submitted and the Council has not pursued enforcement action. The amended clause requires the submission of a GTP, (a draft of which has already been prepared) and requires the owner to implement all aspects of the GTP. Such a substitution would, therefore, improve upon the present somewhat unsatisfactory situation.

Conclusions

28. Pulling all these threads together, I find that the present scheme will not be built out – the 2 land-owners, in particular, are certain about that. Elements of the S106 did not succeed in achieving that they set out to do either, which would result in a less than satisfactory scheme even if it did proceed.

29. In addition, I note that the Council, at the hearing, acknowledged that it does not have a 5 year housing land supply (3.2 years only). It is already moving forward with a site specific land allocation policy for the site in the emerging Development Management DPD which it an advanced stage of preparation where some weight can be accorded to it. Policy HEY4 states that the Council will "support proposals for residential, employment and/or tourism led regeneration" with "priority for the implementation of the existing planning consent for the delivery of a specialist retirement village. Only where this is shown not to be viable will the Council consider alternative proposals for the site with wider residential development, employment and/or tourism development to be considered". While this policy is more pertinent to consideration of any S73 applications or alternative applications for planning permission it is indicative of the Council's direction of travel. Nothing in the suggested alterations to the S106 would conflict that that emerging policy.

30. While the owners of phase 2 land (GHL) objected to the appellants' application to amend the S106 (which would also apply to their land) they appeared at the hearing, which was helpful to me. Their initial position was that the appeal proposal would have the effect of imposing an additional burden on them as owners of the remainder of the site because they would be left with more onerous obligations. However, it seems to me that the terms of the S106 were such that much of the onerous elements could have been deferred to the later stages of the development whatever the position on phase 1.

31. In any event GHL submitted evidence at the hearing that they were in discussion with the Council about an alternative scheme and confirmed that they would not be proceeding with the extant permission on their land. In answer to my question they stated that the amendments discussed were a "perceptual burden" only and did not offer any compelling evidence that they would be disadvantaged.

32. I conclude that, for all the reasons above, the elements of the planning obligation discussed serve no useful planning purpose. It follows that the relevant clauses should be amended and/or deleted in the manner set out in the document attached to the SCG. I am very aware that this will be a disappointment to the occupiers who wish to live in a 'continuing care retirement village'. Even with an altered S106 there will be no guarantee that

matters will be resolved quickly but it is to be hoped that it is a step towards resolution.

Gyllian D Grindey

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr J Hinds	Planning Consultant, Savills
Mr T Adey	Planning Consultant, Savills

FOR THE LOCAL PLANNING AUTHORITY:

Mr D Jeffery MRTPI	Planning Officer, Lancaster City Council (LCC)
Ms J Rehman MSc Env Planning	Planning Officer LCC
Ms A Parkinson	Solicitor LCC

FOR LANCASHIRE COUNTY COUNCIL:

Mr C Smith	Highway Engineer, Lancashire County Council
Mr A Coombe	Highway Engineer, Lancashire County Council

FOR OTHER LAND OWNER: GLORY HOLE LTD (GHL):

Mr J Francis	Of DPP, Manchester
Ms T Mee	Of GHL
Ms C Wild	Of GHL

INTERESTED PERSONS:

J & F Doran	Middleton Towers Residents
R Stevens	Middleton Towers Resident
P Lord	Middleton Towers Resident
A Speakman	Middleton Towers Resident
J Wilson	Middleton Towers Resident
M & P Little	Middleton Towers Residents

DOCUMENTS

1 Attendance list x 3 pages
2 Notification of hearing & circulation list
3 Middleton Tower Redevelopment 'Vision' Document put in by Mr Francis on behalf of GHL
4 Early Middleton Towers Retirement Village information/advertisement folder, put in by Mr Hinds
5 Statement of Common Ground submitted at the start of the hearing

6 Sales details of 2 Lavender Way Middle put in at hearing
7 Decision letter of 14 May 2014 on duplicate application to vary planning obligation put in at hearing
8 Decision letter of 22 September 2014 regarding LCC's Development Management Plan & Morecambe Area Action Plan: Final Report