The Planning Inspectorate

Appeal Decision

Hearing held on 27 February 2018

by Julia Gregory BSc (Hons), BTP, MRTPI, MCMI

an Inspector appointed by the Secretary of State

Decision date: 22 March 2018

Appeal Ref: APP/P1940/Q/17/3181213
Leavesden Aerodrome, Aerodrome Way, Leavesden, Hertfordshire WD25 7NL

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by Hightown Housing Association Ltd against the decision of Three Rivers District Council.
- The development to which the planning obligation relates is mixed development including up to 425 dwellings at Leavesden Aerodrome, Leavesden, the subject of outline planning permission reference 10/2230/OUT.
- The planning obligation, dated 7 December 2011, was made between Three Rivers District Council and Hertfordshire County Council and MEPC Leavesden Park No.1 Limited and MEPC Leavesden Park No 1 Limited (2) (the owners).
- The application Ref 17/0456/FUL, dated 24 February 2017, was refused by notice dated 7 June 2017.
- The application sought to have the planning obligation modified as follows in respect of certain plots. Paragraph 9a of the principal deed would be amended in the following respects:

  a. cease to apply any part of the Affordable Housing Units where such part is transferred leased, pursuant to any event of default, by any mortgagee or chargee of the Affordable Housing Provider or any receiver or manager (including an administrative receiver) appointed pursuant to the Law of Property Act 1925 or pursuant to any security documentation PROVIDED THAT:

  (iii) such mortgagee, charge, receiver or manager has given the Council 3 (three) months prior notice in writing of its intention to exercise any power of sale in respect of any Affordable Housing Units and provided the Council the opportunity to make arrangements for the transfer of the affected Affordable Housing Units in question for a consideration not less than the amount due and outstanding to the mortgagee or chargee under the terms of the mortgage or charge in order to ensure they continue to be used for the purposes of Affordable Housing; and

  (iv) if the council is unable to secure the transfer of the affected Affordable Housing Units within the said period of three months in accordance with Sub Paragraph (i) above then the mortgagee, chargee, receiver or manager shall be entitled to dispose of the affected Affordable Housing Units on the open market free of the restrictions set out in Schedule 3 and such restrictions will cease to apply to the affected Affordable Housing Units and not bind the mortgagee, chargee, receiver, manager or any successors in title to such parties.

Preliminary matters

1. The modification relates to the Principal Deed rather than subsequent Deeds of Variation, of which there have been several. These would be unaffected by the modification.

2. The modification sought would only relate to the parcels of land indicated on submitted plan 2657-SK113 Revision P1. These dwellings have all been completed. The properties comprise plots 277-291, (21-49 (odds) Braham Close); 246-259 (9-22 Ivy Close); 346-358 (27-51 (odds) Cunningham Way); 390-397 (64-78 (evens) Cunningham Way); and 407-425 (26-62 (evens) Cunningham Way); a total of 69 affordable dwelling units.

3. There are further affordable dwelling units within the wider estate covered by the Principal Deed which are not within the control of the appellant and which would not be affected by the alteration proposed in the modification.

4. The modification proposed would reduce the notice period to be given to the Council from 6 months to 3 months.

5. At the Hearing the main parties agreed that there would be nothing to be gained by making a site visit. Nonetheless, I confirmed that I had familiarised myself with the location of the appeal properties on 26 February 2018 when I had driven through the estate.

Decision

6. The appeal is dismissed.

Main Issue

7. The main issue is whether the obligation serves a useful purpose that would be equally well served if it were to be modified as proposed.

Reasons

8. There is no dispute between the main parties that there is a need for affordable housing within the District. Core Strategy (CS) policy CP4 seeks to increase the provision of affordable homes locally. Provision of around 45% of all new housing is required to be affordable housing with a mix of tenures. It is not argued that the policy is out of date. The affordable housing has been provided and is within the control of a Registered Provider, the appellant.

9. The Council's Affordable Housing Supplementary Planning Document (SPD) provides some advice on S106 requirements. This includes in paragraph 4.8 advice on mortgagee in possession clauses such as that the subject of the modification proposed. It says that such clauses may be included in a section 106 agreement forming part of a planning permission to facilitate lending from financial institutions to registered providers. This is by protecting the value of the lender's investment, because the clause would release the lender from the affordable housing occupancy conditions, and the properties could then be sold on the open market. Neither the CS policy nor the SPD specify what notice period should be given to the Council.

10. The Housing Association has been able to secure finance on these properties but this is at existing use value with tenants in possession. I was advised at the Hearing that funding is subject to periodic reviews.

11. What the Housing Association is seeking is to increase the amount of money that can be raised on these properties by increasing their value to market value subject to tenancies. This would be less than without tenancies but would be

more than the existing use value for social housing. The Housing Association would then use that money to fund the provision of affordable housing elsewhere. There is also some evidence that interest rates are lower for loans on less restricted properties and that there are more potential lenders for less restricted properties. The money that could be raised by re-financing could be substantial. The appellant specifies that it could amount to an additional £3m which could contribute to the costs of providing an additional 50 new affordable homes.

12. The Council argues that the lack of a specified period in the CS and SPD allows flexibility for negotiation on a site by site basis depending on the circumstances. There is some evidence that less than six months has been accepted elsewhere locally. I was provided with some details of a site at Millers Court, Abbots Langley[1] where it appears that there is a four-month notice period. However the example given by the appellant's where the Council allowed a three month period, albeit this was by a planning condition rather than by an agreement, the Council says was an error on their part.[2]

13. The Council is concerned that three months would be too short to ensure that another Registered Provider could be found to transfer the properties. The Council would need to prepare the particulars of sale in terms of size, type, rental figures, tenancy details and individual equity of dwellings. A reasonable period would be required to submit bids and the Council would expect bidders to have in principle funding. The Council would then need to evaluate bids and recommend a preferred bidder. There would also be time taken to complete contracts and exchange. Even if there was no adverse committee cycle or that this could be done under delegated powers, in all the Council considers that 5 to 6 months would be required. Three months would be too short and would not serve the obligations' purpose equally well.

14. Furthermore, the money due to lenders would have been increased and would be higher than the existing use value for social housing. This could result in no registered providers being interested in purchasing the properties at the higher value.

15. For the appellant, it is argued that the three months period is becoming an industry standard. Detailed examples have been provided of four Councils that adopt this time period. The Chartered Institute of Housing and Homes and Communities Agency document entitled *Promoting mortgage access for affordable housing* identifies concerns expressed by retail mortgage lenders. They identify that in order to be accepted by a lender, any time limit set will need to be three months or less. Annexe 1 to the document identifies that a nine month time period would be too long and therefore would be rejected by a retail mortgage lender. It also identifies that many local authorities allow these clauses to be activated immediately, recognising that repossessions are extremely rare. Again it identifies that in order to be accepted by a lender any time limit will need to be set to 3 months or less.

16. The appellant has also provided *Securing mortgage access for affordable housing: the good practice note for planning and Housing practitioners*. This

[1] Submitted document 2
[2] Planning permission reference 15/1026/FUL and discharge of condition reference 16/0507/DIS

was prepared by the Welsh Local Government Association, the Welsh Government and others. The guidance says that it draws heavily upon the guidance prepared by the Chartered Institute for Housing and the Homes and Communities Agency. It recommends that the time limit for mortgagee in possession clauses should be three months or less. This does not relate to England but nonetheless it has relevance in as much as lenders in England may take a similar approach and because of its reference to the Homes and Communities Agency guidance. Nonetheless, neither document is planning policy. Mortgagee in possession clause length of notice period is not subject to any advice in the National Planning Policy Framework or Planning Practice Guidance. Paragraph 50 of the Framework does refer to policies being sufficiently flexible to take account of changing market conditions over time, but as there is no reference in the Council policy to a fixed time period this does not take the argument much further.

17. Essentially the mortgagee exclusion clause has at its heart the protection of mortgage lenders so that they are able to sell be property at open market value to achieve the best price for the property. Also the shorter the period of resale, the greater the help it is to those in financial difficulty because the mortgagee can sell it quickly, thereby avoiding additional interest payments for the Housing Association. This is if the Registered Provider is not subject to a rescue package by Homes England. The likelihood of the Housing Association going into receivership is remote. Such examples are rare and there is legislative provision under the Housing and Regeneration Act 2008. Registered Providers are currently regulated by Homes England with the remit to protect social housing assets and to ensure that Registered Providers are well managed and financially secure. The thrust of the national advice is that the support of retail lenders is essential to finance affordable housing with reduced government funding.

18. However, on these appeal plots finance has already been provided and the Housing Association is seeking to release additional funding to provide capital for development elsewhere, the details of which are not provided. That is not a purpose which is relevant to the obligation. Furthermore, there are other Housing Associations that have provided affordable housing on the estate. The clause has not been demonstrated to be an impediment to the continued provision of this affordable housing or the other affordable housing provision locally.

19. I find the Council's concerns about their responsibility in respect of the obligation and how long it could take to find another provider persuasive. The time period of 3 months does not serve the purpose equally well in terms of allowing sufficient time for the process to take place without lenders selling the properties on the open market, albeit with existing tenancies.

20. In addition, the consequence of the reduction in the time period would effectively change the valuation to open market with existing tenancies, as the Housing Association agrees. This would allow mortgages to be increased. Raising the amount of debt on the properties would reduce the likelihood of another Registered Provider being interested in taking on the properties if the Housing Association were to get into financial difficulties, whether these would be sought by the Council or by Homes England.

21. I have no reason to doubt that the Housing Association has the best ratings possible with G1 governance rating and V1 viability rating but the affordable

housing is intended to be provided over the long term and future circumstances and control of the units cannot be readily predicted. I am not satisfied that the useful purpose of providing this affordable housing would be equally well served if the clause were to be modified as proposed.

Conclusion

22.For the reasons given above I conclude that the appeal should be dismissed.

Julia Gregory

Inspector

APPEARANCES

FOR THE APPELLANT:

Paul Semple	Bidwells
Charlotte D'Avola	Penningtons Manches LLP
Alison Firth	Hightown Housing Association
Penny Metcalf	Hightown Housing Association

FOR THE LOCAL PLANNING AUTHORITY:

Claire Westwood	Development Management Planner
Mathew Barnes	Planning Solicitor

DOCUMENTS SUBMITTED AT THE HEARING

1 Notification of Hearing documents
2 Delegated report and decision for Millers Court, Broomfield Rise, Abbots Langley - Council reference 17/1152/FUL