The Planning Inspectorate

Appeal Decision

Site visit made on 9 January 2023

by Tom Bristow BA MSc MRTPI AssocRICS

an Inspector appointed by the Secretary of State

Decision date: 21 February 2023

Appeal Ref: APP/L3245/Q/22/3298512
Inglish Court, Croeswylan Lane, Oswestry SY10 9PT

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 as amended against a refusal to discharge a planning obligation.
- The appeal is made by Mr Ben Power against the decision of Shropshire Council.
- The development to which the planning obligation relates is the erection of a two storey dwelling (permitted via decision notice dated 17 September 2015, ref. 13/02031/FUL).
- The planning obligation, dated 16 September 2015, was made Gary Davin Power and Shropshire Council.
- The application ref. 21/00014/DSA106, dated 14 December 2020, was refused by notice dated 10 November 2021.
- The application sought to have the planning obligation discharged.

Decision

1. The appeal is dismissed.

Context

2. Section 106 of the Town and Country Planning Act 1990 as amended (the '1990 Act') makes provision for obligations. An obligation, by way of a planning agreement dated 16 September 2015 (the 'S106'), was entered into in respect of planning permission ref. 13/02031/FUL (the '2015 permission'). The 2015 permission was for a new dwelling, now named Inglish Court.[1] I am told there is a Building Regulations completion certificate of 28 May 2021 in respect of it.

3. The S106 contains an obligation that a contribution of £9,000 is made in connection with the development to fund affordable housing provision elsewhere. That figure appears fixed, rather than the S106 making provision for changes over time (by virtue of inflation or indexation). The S106 further requires that the contribution be made 'within 2 years of the commencement of a material operation of the development'.[2] I understand the trigger for that timeframe occurred around 22 June 2018.[3]

4. Paragraph 55 of the latest iteration of the National Planning Policy Framework (published 20 July 2021, the 'NPPF2021') explains how consideration should be given to whether 'otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations'. NPPF2021 paragraph 57 further explains that planning obligations must only be sought

[1] I understand that permission was granted at the juncture the S106 was correctly executed.
[2] With reference to section 56(4) of the 1990 Act.
[3] With reference to the Community Infrastructure Levy commencement notice and paragraph 3.9 of the Council's statement of case; the Council's correspondence to the appellants of 6 August 2020 referring to the need to make the payment by 22 June 2020.

where they meet three tests,[4] to which elements of the Planning Practice Guidance relate ('PPG'). Those three tests are the same as applied in 2015.[5]

5. The appellant argues principally that the S106 should be discharged, or waived.[6] In the event that I do not agree, the appellant has suggested that it be modified such that the affordable housing contribution 'is to be repaid upon sale of the property.' Section 106A(6)(b) of the 1990 Act sets out that 'if the obligation no longer serves a useful purpose' it shall be discharged. Section 106A(6)(c) alternatively sets out that if the obligation continues to serve a useful purpose, but would 'equally well' serve that purpose subject to proposed modifications, then it shall have effect subject to those modifications.

Main issue

6. Against the context above, the main issue is whether the affordable housing obligation continues to serve a useful purpose. If it does, I will then consider whether it would serve that useful purpose equally well subject to the modification proposed by the appellant.

Reasons

7. Policy CS11 of the Shropshire Core Strategy (adopted February 2011), the policy context in which the S106 was established, preceded the initial version of the NPPF (published on 27 March 2012, the 'NPPF2012'). Its adoption also preceded the Written Ministerial Statement of 28 November 2014 ('WMS2014') in which the Government set out that for sites of 10 units or less, affordable housing contributions should not be sought.[7] The WMS2014 has since morphed into NPPF2021 paragraph 64, which sets out that 'provision of affordable housing should not be sought for residential developments that are not major developments, other than in designated rural areas (where policies may set a lower threshold of 5 units or fewer).'

8. The S106 was, inevitably, created in the economic context at that time. The pandemic, inflation and interest rate changes have all since unforeseeably occurred. Via guidance published in April 2013,[8] the Government set out how 'unrealistic' section 106 agreements related to affordable housing provision 'negotiated in differing economic conditions can be an obstacle to house building.' The 1990 Act was amended to make specific provision in that respect, albeit that those provisions lapsed on 1 May 2016.[9]

9. The NPPF2021, legislation, and potential forthcoming changes to Government policy all support, in principle or prospectively, self and custom build housing.[10] I empathise with the circumstances the appellant is in. I am told that the construction of Inglish Court proved to be higher than expected on account of unforeseen circumstances. That, along with court proceedings dealing with the

[4] Replicated in regulation 122 of the Community Infrastructure Levy Regulations 2010 as amended.
[5] That an obligation must be a) necessary to make the development acceptable in planning terms; b) directly related to the development; and c) fairly and reasonably related in scale and kind to the development.
[6] As set out in the appeal form, to which the provisions of section 106A(3)(b) of the 1990 Act relates.
[7] HCWS50.
[8] 'Section 106 affordable housing requirements: Review and appeal'.
[9] Section 106BA, 106BB and 106BC introduced, and repealed by, the Growth and Infrastructure Act 2013.
[10] Including NPPF2021 paragraph 62, the Self-build and Custom Housebuilding Act 2015, the NPPF prospectus published on 22 December 2022 and the Levelling-up and Regeneration Bill before Parliament. Self-build may also be exempt from Community Infrastructure Levy (PPG reference ID: 25-082-20190901).

legal implications of the S106, has understandably been a significant stressor. That has clearly adversely affected the appellant and the appellant's family.

10. It may be, however, that many agreements agreed at earlier dates seem out of step with current circumstances; it would be well-nigh impossible to ensure all obligations are perpetually in step. At 16 September 2015, the date on which the S106 was executed, there had been a successful challenge to the WMS2014.[11] That position was only reversed via judgement handed down on 11 May 2016.[12] Therefore, chronologically, planning permission was granted at a juncture when there was nothing preventing securing affordable housing contributions from sites of 10 or fewer dwellings.

11. The disputed obligation was formulated to achieve compliance with Core Strategy policy CS11, in the context of the same tests on the use of obligations as now apply, and was agreed by the appellant. The application to which this appeal relates, ref. 21/00014/DSA106, was made on 14 December 2020.[13] Therefore the dispute has only apparently arisen several years after the appellant's CIL compliance statement dated 22 June 2018. In itself that post-dates the judgement of 11 May 2016 referenced above by quite some time. Accordingly current Government policy, even though it has been moved on, does not justify undoing a legitimately established agreement retrospectively.

12. The pandemic, inflation and interest rate changes will all have affected the costs involved in construction, financing and the labour and housing market. However those effects are complex and multifaceted, arguably more so than the 2007-2008 financial crisis (which, at its core, related to credit, global markets and housing). In part amendments to the 1990 Act referenced above were responses to the legacy of the financial crisis, to address 'stalled schemed due to economic unviable affordable housing requirements…'.[14] Those amendments had sunset clauses, reinforcing my reasoning in paragraph 10 of this decision.

13. I empathise that the appellant is in financial difficulty. However, noting that the onus is principally on an applicant to substantiate their case,[15] there is no robust evidence before me in terms of viability (for example in terms of accounts, budgets relative to anticipated costs of the build process, valuation information, or in relation to the nature of the local housing market). The 2013 guidance referenced in paragraph 8 of this decision focusses on viability, in respect of which there is extensive guidance in the PPG.

14. Planning and construction are often challenging and stressful, including as uncertainties and risks are borne by those undertaking development. As with circumstances since 2015, however, mental wellbeing is multifaceted. Although Government policy is supportive of self-build housing, that is not unqualified; planning serves many objectives. Those objectives include seeking to provide homes for different groups, including those who require affordable

[11] West Berkshire District Council Reading Borough Council v Department for Communities And Local Government [2015] EWHC 2222 (Admin), judgement handed down on 31 July 2015.
[12] Secretary of State for Communities and Local Government v West Berkshire District Council & Anor [2016] EWCA Civ 441.
[13] There is also correspondence of 26 August from the appellant to the Council indicating that the 'contribution could/ should be waivered under the circumstances'.
[14] Paragraph 2 of the 2013 guidance referred to in paragraph 8 of this decision.
[15] Section 62(3) of the 1990 Act.

housing (NPPF paragraph 62). In absolute terms the affordable housing contribution of £9,000 is small. Nevertheless its intended purpose is to support provision of accommodation for those unable to access accommodation on the open market, the lack of such provision in all likelihood entailing stresses for those unable to find suitable accommodation.

15. In that context the Council sets out, undisputedly and uncontroversially, that there are pressing needs for affordable housing nationally and within Shropshire. I am told that in December 2022 there were 465 eligible households recorded in the Oswestry Urban area as in need of affordable housing. The disputed obligation would contribute towards addressing those needs. Fundamentally, therefore, the disputed obligation still serves a useful purpose.

16. That useful purpose would not be equally well served subject to the modification proposed by the appellant, namely that the affordable housing contribution should be 'repaid upon sale of the property'. Affordable housing needs exist now, and there is nothing to indicate that those needs have reduced since the juncture at which the S106 was signed. That suggested modification is also not time-specific, in that there is no indication as to when the property would be sold.

17. Furthermore inflation and interest rates have risen since 2015 such that the 'value' of £9,000 now is less than it would have been in 2020. Whilst that may not always be the case, for example in a deflationary environment, the relative value of the contribution in terms of practically securing affordable housing provision is already lower than had it been made in line with the S106 provisions and timing. Therefore the housing obligation would not continue to serve the foregoing useful purpose equally well subject to the modification proposed by the appellant.

Conclusion

18. For the above reasons I conclude that the appeal should be dismissed. I appreciate this decision may have implications for the appellant and their family. However in the foregoing context, any interference with their human rights would nonetheless be justified, necessary and proportionate.[16]

Tom Bristow
INSPECTOR

[16] With reference to the European Convention on Human rights incorporated into domestic legislation via the Human Rights Act 1998 as amended.