The Planning Inspectorate

Appeal Decision

Site visit made on 11 October 2017

by Lesley Coffey BA Hons BTP MRTPI

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

Decision date: 29th November 2017

Appeal Ref: APP/B9506/Q/17/3176653
Rear of Forest Glen, Pikes Hill, Lyndhurst SO43 7AY

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a refusal to discharge a planning obligation.
- The appeal is made by Mr Phillip A Bartram & Mrs Diane R Bartram against the decision of New Forest National Park Authority.
- The development to which the planning obligation relates is the erection of a new dwelling and garage.
- The planning obligation, dated 11 June 2010, was made between New Forest National Park Authority and Phillip Andrew Bartram and Diane Roberta Bartram.
- The application Ref 17/00142, dated 15 February 2017, was refused by notice dated 13 April 2017.
- The application sought to have the planning obligation discharged.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. Planning permission was refused in 2007 for a new dwelling and attached double garage. A subsequent appeal was dismissed.[1] The Inspector identified the provision of affordable housing as a main issue. The development plan at the time included the New Forest District Local Plan. Policy AH-2 sought an element of affordable housing on all suitable sites, or where the proposal was for a single dwelling, as in this case, an equivalent financial contribution. The Inspector found that in the absence of a financial contribution the development would have unacceptable consequences for the provision of affordable housing and would be contrary to policy AH-2.

3. A further planning application was submitted to the Council and approved in June 2010[2]. The application was accompanied by a planning obligation which covenanted to make a financial contribution towards affordable housing prior to the occupation of the dwelling.

4. The planning permission has been implemented and the dwelling is occupied. An application to discharge the planning obligation was refused by the Council and is the subject of this appeal.

[1] APP/B9506/08/2074817
[2] RLPA Ref: 09/94481

Main Issue

5. I therefore consider the main issue to be whether the planning obligation continues to serve a useful purpose.

Reasons

6. A planning obligation is a legal covenant. Once it comes into effect its terms are binding on the person(s) against whom it is enforceable. Planning obligations can only be modified or discharged by agreement between the Applicant and the local planning authority, or following an application to the local planning authority five years after the obligation has been entered into.

7. Where an application is made for modification or discharge the local planning authority may determine under the Town and Country Planning Act 1990 Part III s106A(6) - (a) that the planning obligation shall continue to have effect without modification; (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications. Section106B provides for an appeal against the local planning authority's decision.

8. The financial contribution required by the planning obligation was due to be paid once the dwelling was first occupied. Therefore the dwelling and garage are in breach of the planning obligation. The appellant submits that changes in national and local planning policy mean that a contribution would not be required for a similar development at the present time and therefore the planning obligation should be discharged.

9. At the time the planning application was determined the requirement for a planning contribution towards the provision of affordable housing was consistent with policy AH-2 of the New Forest District Local Plan. This was confirmed by the previous appeal decision where the sole reason for the dismissal of the appeal was the absence of a planning obligation in relation to affordable housing.

10. Policy CP11 of the New Forest Core Strategy and Development Management DPD (adopted December 2010) replaced policy AH-2, but has a similar intent. It states that within the four defined villages (which include Lyndhurst) at least 50% of the residential development on all sites should be affordable housing, with the remainder being open market housing. Proposals for single dwellings within the defined villages are required to make an affordable housing contribution to be used in the local area, rather than on site provision.

11. Following the Court of Appeal judgement in the case of *West Berkshire District Council & Reading Borough Council v Secretary of State for Communities and Local Government* in May 2016 the Council resolved that contributions would only be sought on schemes of 5 dwellings or more. On the basis of this change in policy the appeal scheme would not be liable to make a contribution towards affordable housing if it were to be submitted today. Self- build projects were also excluded from the need to contribute to Community Infrastructure Levy (CIL). However, this consideration has little relevance in the context of this appeal since affordable housing contributions are not chargeable development for the purposes of CIL.

12. Since the s106 was completed in June 2010 there has been a change in policy both nationally and locally. At the time the agreement was entered into there was a need for affordable housing and therefore the contribution was necessary to make the development acceptable. This is confirmed by the dismissal of the previous planning appeal.

13. In the judgement in respect of *R (Renaissance Habitat Ltd) v West Berkshire District Council [2011] EWHC 242 (Admin*) , the Court held that it was not unreasonable to enforce an agreement as made even where circumstances had subsequently changed. Similar considerations apply in relation to this appeal.

14. The changes in planning policy since the planning obligation was entered into do not make it unlawful. There remains a need for affordable housing within the District, including within Lyndhurst and other villages within the National Park. Evidence submitted by the Council indicates that there was a need for 33 affordable dwellings within Lyndhurst from those within the highest band at October 2016 and the overall need is considerably greater. Therefore the planning obligation which undertakes to make a financial contribution towards affordable housing would continue to serve a useful purpose.

15. The statutory tests under regulations 122 of the CIL regulations are not applicable to the appeal scheme since affordable housing is not chargeable development, whilst those in the NPPF post-date the planning obligation.

Other Matters

16. The appellant has raised a number of other matters. These generally refer to whether the planning obligation was justified and the manner in which the Council has used other contributions received. S106A(6) of the Act clearly sets out the alternative determinations in relation to applications for the modification for a s106. These do not include an assessment of the merits of the s106.

17. The appellant's family has worked in the National Park area for over 28 years and lived in Lyndhurst for nearly 11 years. The dwelling is occupied by the appellant's daughter who also works in Lyndhurst. The appellant provided an extract from New Forest District Council Housing Scheme Policy. This outlines the criteria used to assess which housing allocation band a household would fall into. For this reason the appellant considers that the site is providing more than the percentage of affordable housing required by policies AH2 and CP11. It would seem that the appellant and his family may come within the highest band due to the length of time they have lived and worked in the New Forest, however, these criterion appear to be a means of prioritising those on the housing register, and there is no information before me to indicate that the appellant or his family would be eligible to join the housing register, or would satisfy any other criteria that may be applicable. Whilst I appreciate that the family may have long standing connection with the National Park, this does not represent evidence that the dwelling is an affordable dwelling, or indeed would remain so in the future. Consequently it does not justify the discharge of the obligation.

18. The appellant refers to the tests within the Community Infrastructure Regulations 2010. These tests relate to development that is capable of being charged CIL, and since affordable housing is not chargeable development for the purposes of CIL it falls to be assessed under the tests at paragraph 204 of

the NPPF. For the same reason the restriction on pooling contributions within the CIL regulations is not applicable to the appeal scheme.

19. Paragraph 204 of the NPPF requires that planning obligations should be necessary to make the development acceptable, directly related to the development, and fairly and reasonably related in kind. The necessity of a contribution for affordable housing was clearly established by the original appeal decision, where the absence of a planning obligation in relation to affordable housing led to the dismissal of the appeal. There is no evidence before me to indicate that the Obligation would not comply with these tests. Notwithstanding this, the NPPF was published in 2012 and was not intended to be applied retrospectively.

20. The appellant suggests that in order to be directly related to the development the contribution should be used within Lyndhurst, I disagree. Policy CP11 states that the contribution will be used in the local area I consider that this could include other villages within the National Park. Moreover, there is no evidence to suggest that the contribution will not be used in the local area. Indeed, the Council states that affordable housing contributions have been used to provide two affordable homes within the National Park. Furthermore the manner in which the contributions are used is a separate matter from the consideration as to whether the obligation continues to serve a useful purpose.

21. There is no evidence to suggest that affordable housing contributions are being pooled by the Council and used for general infrastructure. Indeed, the obligation includes a mechanism for the repayment of the money to the owners within five years of receipt if it has not been used for the intended purpose.

Conclusion

22. For the reasons given above, and having had regard to all other matters raised, I conclude that the obligation continues to serve a useful purpose. The appeal is therefore dismissed and the application to discharge the obligation is refused.

Lesley Coffey

INSPECTOR