The Planning Inspectorate

Appeal Decision

Hearing held on 21 March 2017

Site visit made on 21 March 2017

by Grahame Gould BA MPhil MRTPI

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

Decision date: 27th April 2017

Appeal Ref: APP/N1920/W/16/3162337
Patchetts Equestrian Centre, Hilfield Lane, Aldenham, Watford WD25 8PE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Simon Warner of Heronslea Group against the decision of Hertsmere Borough Council.
- The application Ref 16/1188/FUL, dated 13 June 2016, was refused by notice dated 15 September 2016.
- The development proposed is Demolition of equestrian facility, removal of hard standing, buildings and structures and the redevelopment of the site to provide 46 new dwellings (with 4 affordable units), parking, gardens and village green. The redevelopment will include the conversion of Urn's Barn into a residential unit and the retention of the barn, Little Patchetts and The Coach House as residential units, Existing access from Hilfield Lane to be retained with new access from Hilfield Lane. (Variation of Affordable housing from 15/1433/FUL).

Decision

1. The appeal is dismissed.

Procedural and Preliminary Matters

2. Prior to the Hearing the appellant submitted an unexecuted Unilateral Undertaking (UU) to be entered under Section 106 of the Act. The UU would obligate the appellant to have: constructed and then transferred four on-site affordable homes to the Council or a registered provider at a defined trigger point; completed the works to the listed buildings at the site at a defined trigger point; and installed working fire hydrants prior to the first occupation of any home within the development.

3. At the Hearing I was advised that while the UU had been signed it had not been dated and thus fully executed. The Council confirmed that the wording of the UU was acceptable to it and on that basis I indicated that I was prepared to accept the receipt of a copy of the signed and dated UU after the Hearing had been closed. A copy of the fully executed UU was submitted to the Planning Inspectorate, via the Council, on 7 April 2017. Wording agreed between the appellant and the Council for suggested condition 26 (obscured glazing) was also submitted on 7 April 2017.

4. With respect to the application plans I explained at the Hearing that the third revision version of a drawing entitled 'Heights Plan'[1] had not been submitted

[1] A2609 S105 R3

as part of the appeal, despite it being referred to as an application drawing by the Council in its first statement of case. It was confirmed that I should have regard to the previously mentioned drawing and a copy of it was given to me at the Hearing. I am content that I can take account of this drawing without prejudice being caused to any party because it is a drawing that has formed the basis of an amendment to the planning permission granted by the Council for a very similar development under file reference 15/1433/FUL (the first application). At the Hearing I was provided with a copy of proposed access plan (Appendix E of the Transport Assessment report of August 2015).

5. At the start of the Hearing leading counsel for the appellant indicated that he wished to put before me a supplementary statement with appended emails[2] prepared by the appellant, together with submissions that he and his junior had prepared[3]. I was informed that those documents had already been shared with the Council. Counsel for the Council advised that written responses[4] to the appellant's additional documents had been prepared and that the appellant had been provided with those documents prior to the Hearing. As the additional documents were comparatively short and it was possible for them to be read out in full and/or summarised at the Hearing, I accepted their submission because prejudice would not be caused to anyone present at the Hearing.

Background and Main Issue

6. The development (the scheme) would involve the construction of 46 new build houses, with other listed buildings to be converted to provide four further dwellings. The scheme would include the provision of four on-site affordable homes. Works associated with the implementation of the permission have been commenced, with some buildings having been demolished and piled foundations having been formed for a number of the houses.

7. The scheme is identical to the development subject to the extant permission, except for the number of affordable homes to be provided, with twenty affordable homes to be provided under the extant permission. With respect to the appealed application the only matter in dispute concerns the amount of affordable housing to be provided. Given the extant permission the Council has raised no concerns with respect to the scheme's implications for a range of matters, such as the Green Belt, the works to the listed buildings and the effect on their settings, the Patchetts Green and Delrow Conservation Area and the operation of the public highway.

8. The existence of the extant permission and its on-going implementation is a material consideration that I attach great weight to. That is because regardless of the outcome of this appeal a development, with the same physical attributes as the appeal scheme, could be completed. Given the scrutiny the first application was subjected to by the Council, prior to it granting planning permission, I consider it unnecessary for me to consider any matters concerning the scheme, other than the amount of affordable housing to be provided.

[2] Supplementary statement of Mr James Craig
[3] Entitled 'Appellant's Submissions'
[4] Respectively entitled 'Response to Supplementary Statement of by James Craig' and 'Response to the submissions of Anthony Crean QC and Killian Garvey'

9. The main issue is therefore whether the development would make adequate provision for affordable housing.

Reasons

Local and National planning policy

10. Policy CS4 of the Hertsmere Core Strategy of 2013 (the Core Strategy) addresses the provision of affordable housing and it identifies a target of 1,140 affordable homes to be provided between 2012 and 2027. The site is in a location where Policy CS4 requires 40% of new dwellings to be affordable homes. The wording of Policy CS4 makes it clear that the affordable housing provision should be in line with the requirements of this policy, although lower levels of provision may be acceptable. For the scheme to be fully compliant with Policy CS4 twenty affordable homes would be required.

11. I consider Policy CS4 is consistent with the National Planning Policy Framework (the Framework), most particularly paragraphs 7, 17 (the third core planning principle), 47, 50 (the third bullet point) and 173. That is because paragraphs 7, 17, 47 and 50 of the Framework, amongst other things, address the provision of affordable housing, as part of boosting the supply of housing, while paragraph 173 requires policies with cost implications, such as Policy CS4, to be formulated to take account of viability. Importantly Policy CS4 indicates that a scheme's affordable housing level can be reviewed if viability is an issue.

12. In a Written Ministerial Statement (WMS) of 28 November 2014 the Government introduced the vacant building credit (VBC), which when applied, allows locally derived levels of affordable housing to be reduced. The VBC was introduced with the intention of incentivising the redevelopment of vacant buildings and was introduced by the Government '… to tackle the disproportionate burden of developer contributions on small-scale developers, custom and self-builders'. The WMS states that the VBC is 'A financial credit, equivalent to the existing gross floorspace of any vacant buildings brought back into any lawful use or demolished for re-development, should be deducted from the calculation of any affordable housing contributions sought from redevelopment schemes. This will not however apply to vacant buildings which have been abandoned'. Guidance relating to the VBC is included in the Planning Practice Guidance (the PPG).

13. The WMS and the PPG were subsequently subject to legal challenge and, following proceedings in the High Court[5], the policy and guidance concerning the VBC was withdrawn on 31 July 2015. However, the Court of Appeal on 11 May 2016[6] allowed an appeal by the Government and the policy and guidance concerning the VBC was reinstated. The PPG provides guidance on the VBC at paragraphs 021, 022, and 023[7]. Paragraph 021 explains what VBC is and paragraph 022 indicates how it should be calculated. Paragraph 023 identifies the circumstances when VBC might not be applied.

[5] West Berkshire District Council and Reading Borough Council v Secretary of State for Communities and Local Government [2015] EWHC 2222 (Admin)
[6] Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council [2016] EWCA Civ 441
[7] Paragraphs: 021 Reference ID: 23b-021-20160519; 022 Reference ID: 23b-022-20160519; and 023 Reference ID: 23b-023-20160519

14. Paragraph 023 of the PPG makes it clear that the credit cannot be applied to buildings that have been abandoned. In considering how the VBC should be applied paragraph 023 advises that '… local planning authorities should have regard to the intention of national policy' and in so doing it may be appropriate for authorities, to consider 'whether the building has been made vacant for the sole purposes of re-development' (the first bullet point) and 'whether the building is covered by an extant or recently expired planning permission for the same or substantially the same development' (the second bullet point).

15. If a residential development would result in a reduction or no increase in floorspace then no affordable housing contribution should be sought when the VBC is applied. Using the methodology for determining the VBC, as set out in the PPG, the parties agree that the scheme would result in around a 20% increase in floorspace. Accordingly if the VBC was to be applied to the scheme that would reduce the number of affordable homes to four.

Whether an appropriate level of affordable housing provision

16. Planning law requires planning applications to be determined in accordance with the development plan, unless material considerations indicate otherwise and Policy CS4 is therefore the starting point for the determination of this appeal. It is common ground that if the scheme only provided four affordable homes there would be conflict with Policy CS4.

17. Appendix 4a to the Council's statement of case explains that the South West Hertfordshire Strategic Housing Market Assessment of 2016 (the SHMA)[8] has identified an on-going need for affordable housing to be provided through to 2036, with the gap between the cost of housing (buying and renting) and occupier earnings accounting for the continued need. The SHMA suggests that 434 affordable homes will be needed per annum in the future, while the current rate of delivery is 266 homes per annum. I was informed that the bulk of new affordable housing is being built in Borehamwood and Bushey. The Council stated that it is struggling to meet the level of affordable housing envisaged by Policy CS4, which is resulting in an '… acute level of affordable housing need …' (paragraph 13 of Appendix 4a). The appellant accepts that there is an unmet affordable housing need, which is not being addressed by the existing supply[9].

18. I consider the provision of twenty affordable homes would make a useful contribution to the delivery of affordable housing in Hertsmere. As this site is outside one of the locations where the bulk of affordable housing is currently being delivered, providing twenty extra affordable homes would have the added advantage of widening the distribution of such housing in the Council's area. The delivery of four affordable homes, by contrast, would make a much more modest contribution to addressing the need for this form of housing.

19. Given the acute need for new affordable homes, for a non-Policy CS4 compliant scheme to be viewed as being acceptable there would need to be a material consideration of great weight to justify a departure from Policy CS4 being made. The application of the VBC is a material consideration that might

[8] Jointly commissioned by the Council and neighbouring Councils
[9] Note prepared by Counsel for the appellant and the Council setting out of matters agreement

warrant such a departure. However, the VBC originates from national policy and the Court of Appeal's judgement relating to the WMS has clearly established that the VBC, along with the other policy measures set out in the WMS, should not automatically be applied without regard being paid to the full circumstances of any given case, including the provisions of development plan policies.

20. Notwithstanding the wording of the reason for refusal and the contents of the Statement of Common Ground, the parties accepted at the Hearing that this is a development that is eligible for VBC, with the issue being whether it should be applied. The intention of the VBC is to 'incentivise brownfield development' and coupled with that the WMS refers to reducing the disproportionate burden of developer contributions. I take the reference to reducing the burden of contributions to mean reducing the financial costs associated with new development, with such costs often having a bearing on scheme viability. In order to be able to reach a conclusion on the main issue I have identified, and having regard to the conflict with Policy CS4 and the cases made by the parties, it is necessary to consider whether the VBC's application would be the only means of incentivising this site's redevelopment.

21. Opposing submissions have been made about the relevance of this scheme's viability to the application of the VBC. In that regard the appellant contends that the VBC should treated as a standalone policy that should not be confused with any viability review that might be pursued under Policy CS4. The appellant argues that to treat the VBC otherwise would mean that this national policy would needlessly repeat local policy (the duplication point).

22. Having regard to the wording of the WMS and paragraph 022 of the PPG, of itself viability is irrelevant to the calculation of the VBC because it is determined solely by reference to changes in floorspace. However, with respect to the duplication point, there may be cases when brownfield sites have little in the way of vacant buildings on them, for example scrap yards and railway sidings. For those cases applying the VBC would do little to incentivise a site's redevelopment, because the amount of credit that could be applied might be negligible and a reduction in affordable housing secured via a viability review would act as more of an incentive.

23. Equally there may be instances when, as well as an affordable housing contribution being required, infrastructure contributions (highway works, providing community infrastructure etc) would be needed. For such cases the infrastructure costs might be of such a magnitude that applying the VBC alone would do little to address a scheme's overall viability and thus incentivise a site's redevelopment. The VBC might therefore need to be applied as part of a much wider review of viability, in line with the PPG's guidance on brownfield site viability[10].

24. I am therefore not persuaded that a viability review under a policy, such as Policy CS4, duplicates the intention of the VBC to incentivise brownfield development. I therefore consider that in deciding whether or not the affordable housing requirement should be reduced in this instance, a detailed assessment of viability should not simply be cast aside in favour of the straight application of the VBC.

[10] Paragraph 026 Reference ID: 10-026-20140306

25. There is also significant disagreement between the parties as to what degree applying the VBC would incentivise the appeal site's redevelopment. Part of that disagreement arises from the fact that the implementation of the extant permission has been commenced without the VBC having been applied.

26. Mr Craig for the appellant company explained that the VBC's existence had been influential in determining purchase price offered by the appellant, with the site's acquisition proceeding on an unconditional basis, after competitive bidding involving other parties. I consider agreeing a purchase price reliant on the VBC's application carried a significant degree of risk, which the appellant appears not to have recognised at the time. That is because it was assumed that the VBC would automatically be applied without appreciating the VBC's application would be discretionary, given its other material consideration status as policy rather than legislation.

27. I believe it is clear why the appellant made no mention of the VBC to the Council during much of the first application's life because it had been withdrawn. Equally I consider it unsurprising why the appellant made no reference to the VBC during the pre-application discussions, because to have done so could have led to a conclusion that the buildings were to be made intentionally vacant for the sole purposes of the site's redevelopment.

28. For the appellant it has been vehemently put that the VBC's existence 'induced' (incentivised) the appellant to acquire the site. While that might be the case, for the reasons I have given above, I consider that the appellant made a misguided presumption that the VBC could automatically been relied on in an area where the need for new affordable housing is outstripping the supply. If providing affordable housing below a level that would be compliant with Policy CS4 was needed to incentivise this site's re-development, then it would have been open to the appellant to make a viability case. Mr Craig in responding to a question I raised stated that had the VBC never existed then a viability case would have been pursued and less would probably have been offered to buy the site.

29. From the exchange of emails between the appellant and the Council prior to the first application's submission, most particularly on 3 July 2015[11], it is clear that the Council would have been prepared to consider a credible viability case. The issue of scheme viability was then touched on in an exchange of emails on 22 and 23 January 2016[12]. Mr Wooldridge in his email to Mr Craig of 23 January commented that viability information should be presented at the next meeting with officers, which suggests the Council was prepared for viability to be explored if necessary. Mr Craig replied to Mr Wooldridge that there were 'abnormal costs' that were '… putting pressure on viability …'. Mr Craig further stated that a viability report had not been produced and that there was no intention of preparing one because of the cost of doing so and there was no need to do so '… as we are policy compliant with affordable housing'.

30. The issue of the possibility of the VBC being applied only arose because of its reinstatement following the Government's WMS appeal being allowed. The application of the VBC became the subject of discussions and email exchanges between the appellant and the Council a few days before the first application

[11] Appendix 2 of Mr Craig's supplementary statement
[12] Appendix S2 of the Council's response to Mr Craig's supplementary statement

was scheduled to be determined[13]. Mr Craig in his email of 23 May 2016 made a formal request for the VBC to be applied. It was put to the Council that if it was unwilling to apply the VBC at that stage then a second application would be submitted, as the means of having the VBC applied to the development. Mr Laban in his email of 24 May stated to Mr Craig '… I suggest progressing with the proposals as is and that you review what you wish to do post-resolution'.

31. Seeking to have the VBC applied at such an advanced stage in the first application's determination, because it had suddenly became available, appears to have been a fortuitous and opportunistic way for the appellant to pursue a reduction in the development's costs. I say that because the email of 23 May made no reference to any cost pressures, while the viability concerns alluded to in January 2016 seem to have been of a magnitude that the appellant did not seem to be overly anxious about, given its reluctance to submit a viability report. I, however, recognise that by May 2016 additional holding costs would have been incurred by the appellant.

32. The appellant has argued that reducing the overall number of dwellings to fifty, with any implications that might have for the scheme's viability, was outside the appellant's control. However, had reducing the number of dwellings to fifty been of such significance to the scheme's viability the appellant could have had the first application determined without amending it, with a viability case possibly being made to justify a higher number of dwellings. Alternatively for a fifty dwelling scheme the appellant could have made a viability case seeking to reduce the affordable housing requirement to a figure less than twenty homes to address any viability concerns it had.

33. There were potentially options available to the appellant to address any viability concerns it had with or without the VBC being available. I therefore consider that reducing the scheme to fifty dwellings, with twenty affordable homes, was something that the appellant did not automatically have to accede to. I am therefore not persuaded that the appellant '… had no power to influence … the demands of the Council to reduce the size of the scheme …'[14].

34. Part of the appellant's case is that the Council has acted unfairly and irrationally in not applying the VBC to the appeal scheme, given the dialogue that took place just prior to the first application's determination, which I have referred to above. The appellant argues that it proceeded on the basis that the VBC would be applied to the scheme subject to the second application, with the VBC's utilisation amounting to a justification for a departure from full compliance with Policy CS4.

35. Mr Laban's email of 24 May 2016 appears to have been interpreted as having a particular meaning, given the propositions it was responding to. However, Mr Laban's email did not commit the Council to determining a second application in any particular way. Instead the Council indicated that it was for the appellant to review what it wanted to do once the first application had been considered by the Council's planning committee.

[13] Appendices 14 and 15 to the Council's initial statement of case
[14] Paragraph 9 of the appellant's submissions made by Counsel

36. At the heart of the appellant's wish for the VBC to be applied to this scheme is an issue with viability, which appears to have become more significant following the exchange of emails in January 2016 that I have referred to above. While seeking the VBC's application was a course of action that was open to the appellant, an alternative route for a second application would have been to base it on a viability review under Policy CS4, an option that the appellant appears to have ignored.

37. While the VBC option was pursued through the second application's submission, nothing in the evidence presented to me suggests that the Council compelled the appellant to pursue that course of action. As I have indicated above the appellant appears to have assumed throughout its involvement with this site that, whenever the VBC has been extant, it should be applied as a matter of course without fully appreciating that it should not automatically be applied to usurp Policy CS4.

38. The second bullet point listed in paragraph 023 of the PPG makes it clear that it may be appropriate to have regard to the existence of any extant permission. I consider that in this instance the existence of the partly implemented extant permission cannot be ignored. While the appellant considers that the history surrounding the second application's submission means that it would be unfair for the extant permission's existence to be used as a reason for not applying the VBC, I find this aspect of the appellant's case not to be persuasive. That is because the available evidence has not demonstrated to me that the appellant was forced by the Council to follow any particular course of action, with the appellant choosing the basis upon which the second application was submitted. I therefore consider that the provisions of paragraph 023's second bullet point weighs against the VBC being applied in this instance.

39. Policy CS4 allows for reductions to affordable housing provision to be made if it can be demonstrated that a scheme's viability would be undermined by being fully policy compliant. Such a review would have the potential to address cost pressures on this scheme. I therefore consider that any such review would be consistent with the underlying intention of the VBC to incentivise brownfield development when necessary and this is a route that the appellant has indicated it would be likely to pursue in the event of this appeal being unsuccessful.

40. I am not persuaded that applying the VBC represents either the only option or the most appropriate way of addressing any issues with this scheme's viability. I therefore conclude on the available evidence that four affordable homes would be an inadequate level of provision for the scheme. That inadequacy would give rise to an unacceptable conflict with Policy CS4 of the Core Strategy by failing to address the acute need for additional affordable housing in Hertsmere.

Conclusion

41. The appeal is dismissed.

Grahame Gould

INSPECTOR

APPEARANCES

FOR THE APPELLANT

James Craig	Director for the Appellant Company
Anthony Crean QC	
Killian Garvey of Counsel	
Matthew Taylor	Aitchison Rafferty

FOR THE LOCAL PLANNING AUTHORITY

Giles Atkinson of Counsel	
Ola Duyile	Development Team Manager
Mark Silverman MRTPI	Planning Officer
June Taylor	Planning Officer
Chileme Hayes	Principal Solicitor
Councillor Linda Silver	Chairman of the Planning Committee

INTERESTED PARTIES

Councillor Farida Turner	Hertsmere Borough Council
Councillor Kashif Merchant	Hertsmere Borough Council
Aminata Kamara	Hertsmere Borough Council
Harry Branch	Hertsmere Borough Council

DOCUMENTS AND PLANS SUBMITTED AT THE HEARING

1. Note prepared by Counsel for the appellant and the Council setting out matters of agreement
2. Supplementary Statement of James Craig
3. Appellant's Submissions prepared by Anthony Crean QC and Killian Garvey
4. Council's response to James Craig's Supplementary Statement
5. Council's response to the Submissions of Anthony Crean QC and Killian Garvey
6. Drawing A2609 S105 R3 – Heights Plan
7. Proposed Access Arrangement – Appendix E to the Transport Assessment of August 2015 prepared by EAS

DOCUMENTS RECEIVED BY AGREEMENT FOLLOWING THE HEARING

1. The appellant's signed and dated Unilateral Undertaking
2. Wording for condition 26 agreed by the appellant and the Council