

**Affordable
Housing Appeal**

DLP BRIEFING NOTE 161

Prepared by
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Introductions

This client briefing has been compiled to discuss the implications of the appeal submitted by Tamewater Developments Limited and Co-operative Bank PLC against Oldham Metropolitan Borough Council (ref: **APP/W4223/Q/14/2213720**). The appeal was made under subsection (7) of Section 106BC of the Growth and Infrastructure Act 2013 against a failure to determine that a planning obligation should be modified in accordance with up to date Government advice. In the case of the appeal, the application sought to discharge outstanding affordable housing payments of £283,525 due to issues of viability.

In addition to the above appeal, it should be noted that Kensington Developments also submitted appeals under this clause arguing that their developments at Marton Moss, Blackpool (ref: APP/J2373/Q/13/2207649) and Runnell Farm, Blackpool (ref: APP/J2373/Q/13/2207621) were unviable due to the affordable housing contributions required by Blackpool Borough Council.

Tamewater Court, Dobcross, Oldham, Lancashire

The original application, approved in June 2006, was for the conversion of Tamewater Mill into 19 no. flats, the erection of 25 no. houses and the creation of an area of public open space (application ref: PA/051241/06). Part of the requirements of the Section 106 agreement was the commuted sum of £383,525 for affordable housing, which would be paid in four instalments in line with housing completions. At the time that that appeal was submitted, the first instalment of £100,000 had been paid under the terms of the obligation. However, since acquiring the site and obtaining planning permission for the development, house prices and therefore land values had fallen. The subsequent argument presented by Tamewater Development Limited essentially stated that paying another £283,525 towards the delivery of affordable housing would ***render the scheme commercially unviable and put completion of the scheme in jeopardy.***

As no viability assessment was conducted prior to the planning application being granted, the Inspector used the market values from the date of the permission, granted in June 2006, and compared these to current property market values. The parties agreed that a benchmarking exercise was agreeable, although some debate took place to establish the methodology considering differences of opinion regarding the validity of potential comparables. In the event, the parties agreed on a figure per plot upon which to base land values. The Inspector agreed with the figures put forward by the developer in respect of sales revenues, whilst the Council did not dispute the appellant's figures for associated development costs, including build costs, legal fees and developers profits.

In the event, the Inspector took into account that the whilst the development had not completely stalled, there may be reasons for continuing with an unviable scheme to a point and determined that the fact that the scheme was still progressing was not, in itself a reason to refuse the appeal. Ultimately he concluded that even with the removal of the affordable housing contributions the scheme would not return to full economic viability but that removing the remaining obligation would allow the developer to cover whatever losses they have incurred and complete the development, which may not otherwise have occurred were the obligation to remain. Accordingly the appeal was allowed.

Kensington Developments

The application for 584 no. dwellings at Marton Moss, Blackpool (application ref: 09/0740) was approved at appeal on 29th April 2014. Kensington Developments used the same clause to challenge the section 106 agreement for £9.1 million off-site affordable housing contributions, successfully arguing that the obligation made the scheme commercially unviable. However, unlike the previous case, a viability appraisal had been previously submitted. Accordingly this made the benchmarking exercise more straight forward, and ultimately identified that scheme would be viable with the removal or a reduction of the affordable housing contribution. ***In this case, the Inspector reduced the affordable housing contributions to £5.1 million to make the development viable.***

Kensington Developments also appealed the obligation which required an affordable housing contribution amounting to £1.6 million at Runnell Farm, Blackpool (planning ref: 11/0260). In this case, the developer sought for the full affordable housing contribution to be removed. In reaching his conclusion, however, the same Inspector (Mr Paul Clerk) determined that the scheme was still viable if a sum of £350,000 was paid as a contribution towards the delivery of affordable housing.

Conclusions

The appeal for Tamewater Court and appeals made by Kensington Development illustrate that there is an increasing opportunity to challenge affordable housing contributions previously secured through Section 106 agreements. Cases where such contributions will render the scheme commercially unviable could be successfully challenged through the Growth and Infrastructure Act 2013 (s106BA). In areas where Local Authority affordable housing charges are high, or Councils have previously secured unviable contributions, developers have the opportunity to challenge these decisions through the appeal system. Momentum has built up through recent policy changes, which supports these actions.

The Government is keen to encourage development to come forward and to continue the house building and development policy changes.

DLP Planning Consultants have considerable knowledge of planning matters. Senior staff within the Practice are well versed with the planning process and policy changes, this allows us to deliver the best result for our clients. We have excellent working relationships with Local Planning Authorities, making the process clearer and smoother for our clients. However, DLP is also experienced with the appeal process and guiding clients through the system. If you require any further advice regarding the above, please do not hesitate to contact one of the offices listed below. Senior staff within the practice would be very happy to assist you with regards to your enquiry.

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