

To: City Executive Board

Date: 18th February 2009

Item No:

Report of: Head of City Development

Title of Report: City Council response to the appeal decision at Canalside, Jericho, specifically relating to the Council's affordable housing policy

Summary and Recommendations

Purpose of report: To confirm the City Council's position when applying the Local Plan affordable housing policies in the light of the appeal decision at Canalside, Jericho

Key decision? No

Executive lead member: Councillor Cook

Report Approved by:

Executive Director: Mel Barrett

Finance: Chris Kaye

Legal: Jeremy Thomas

Environmental Development: John Copley

Policy Framework: More housing, better housing for all

Recommendation(s): That the City Executive Board, having considered and taken account of the officers' views as set out in the report, and Counsel's advice as appended, agree that the adopted Local Plan policies and SPD relating to affordable housing should continue to be applied as required by the Plan.

Background

Adopted planning policy

1. The Oxford Local Plan 2001-2016 (OLP), adopted in November 2005, contains policies (HS.4 and HS.5) requiring the provision of generally a minimum of 50% affordable housing on sites of 10 or more dwellings (or

0.25ha or greater). Paragraph 7.2.6 states that “*This level of provision will be sought on all relevant sites unless the applicant can demonstrate that an alternative provision should be made to make the development viable*”.

2. The Affordable Housing Supplementary Planning Document (AHSPD), adopted in November 2006, provides further detail on these policies. Paragraphs 31-37 of the AHSPD set out the City Council’s approach in dealing with applications for residential development where less than 50% affordable housing is proposed.
3. In summary the AHSPD says:
 - the City Council expects the applicant to provide financial viability evidence to support their application which will be open to public scrutiny and, where necessary, audited by external experts;
 - the City Council expects developers to have considered the financial implications of the affordable housing policy requirements when agreeing the purchase price for the land;
 - if the City Council is satisfied with the viability evidence, it will provide a cascade approach altering the tenure split and then altering the mix and proportion of affordable housing until the development is viable.
4. The OLP and AHSPD have been applied to planning applications by the City Council since their adoption.

The appeal decision at Jericho Canalside

5. The application for the redevelopment of the Canalside Land at Jericho included 54 residential dwellings of which 19 were affordable housing (equating to 35%). The application was refused by the City Council with one of the reasons being that not enough affordable housing was provided. The applicant appealed against the decision with a public inquiry being held in August 2008. The Inspector dismissed the appeal.
6. In her deliberations, the Inspector notes that the 50% affordable housing requirement is a well known and established feature of Oxford’s policy framework and that the onus is on the developer to have considered financial implications of this affordable housing policy when purchasing the site. The Inspector says that the applicant would have known of these requirements.
7. The Inspector then goes on to say that “*Inputting site purchase costs retrospectively in to a viability assessment would not comply with such an approach and would have unacceptable widespread implications for the manner in which the City Council’s affordable housing policies are interpreted.*”
8. Whilst the Inspector dismissed the appeal, and despite her comment in the paragraph above, she then says that the applicants could not deliver the affordable housing requirements because the purchase price was £4m

and so concluded that there was some justification in accepting a lower level of affordable housing.

Officer comment

9. The reasoning behind the Inspector's comments on the level of affordable housing and purchase price is unclear as she appears to contradict herself. Initially she says that purchase costs shouldn't be retrospectively inputted into viability evidence but then says that the applicant could not provide 50% due to the purchase price. Officers have sought advice from Counsel.
10. Land value should be adjusted to take into account the contributions required from development of the site. This is made clear in paragraph 35 of the AHSPD and should be common sense in the construction industry when undertaking site valuations. The Inspector also concluded that policy required developers to "*take on board the consequences of affordable and other policy requirements at the time of purchasing the site*". As such the Inspector was endorsing the advice given in paragraph 35 of the AHSPD.
11. Notwithstanding this, the Inspector held that there were "*a number of factors specific to this particular site*" (including the provision of a bridge and land for a community centre) which led her to conclude, contrary to the City Council's case, that the quantum of affordable housing was acceptable. The Inspector seems to be saying that the other benefits of the proposals outweigh not achieving the full 50% affordable in this case. Although the Inspector found 50% affordable housing was not required in this case, she also indicates that overpayment on purchase of a site is not justification for setting aside affordable housing or other policy requirements.
12. In summary the Inspector says "*I come to this conclusion on the basis of the particular circumstances of this site and the background to the case before me. For those reasons, my decision to depart from the 50% proportion required by Policy HS.5 would not compromise the Council's ability to rigorously apply its affordable housing policies on future developments*" (para. 17). It is Counsel's, and Officers', view that the Inspector's decision concerning quantum of affordable housing does not give rise to any matter of principle applicable in other cases, nor does it provide any basis on which the rigorous application in future of policy HS.5 should be displaced, as indeed, the Inspector recognised.
13. The Inspector was most careful in her decision letter to make plain that the reason for accepting a lesser quantum of affordable housing than Policy HS.5 of the Local Plan generally requires, arose out of the specific circumstances relating to the appeal site and the development under consideration.
14. The Inspector's decision letter may be a material consideration in the determination of the quantum of affordable housing provision in any future

application for planning permission but as a matter of principle it cannot be construed (nor was it intended) in any way to supersede or supplant the operation of the policies of the development plan, including the Local Plan.

15. The City Council is currently considering a report by the Affordable Housing Select Committee regarding the options for the future delivery of affordable housing. Notwithstanding the content of that report and consideration of its recommendations, the principle would always remain that a developer paying too much for a piece of land would not lead to the City Council relaxing the developer's obligation to provide the level and type of affordable housing required at the time. The Head of City Development and Head of Community Housing and Community Development will be presenting a report in the future regarding the Affordable Housing Select Committee Report.

Climate change

16. As this report is confirming the current approach of the Council, it has no differential impact upon climate change.

Equalities

17. As this report is confirming the current approach of the Council, it has no differential impact upon equality issues.

Financial implications

18. As this report is confirming the current approach of the Council, there are no direct financial implications.

Legal implications

19. Applicants of future housing developments may refer to the Canalside appeal decision as part of their evidence in appeals.

Risk analysis

20. If the Council does not continue to apply the Local Plan affordable housing policies, it risks delivering a smaller proportion of affordable housing on qualifying sites than would otherwise have been the case.

Conclusion

21. Whilst the Inspector concluded that less than 50% affordable housing would be acceptable on the Canalside Land at Jericho, she made it clear this was due to the specific circumstances of the site and that it would not compromise the City Council's ability to rigorously apply its affordable housing policies on future developments.

22. It is Officers' opinion that the Local Plan policies on affordable housing and the AHSPD remain intact and should continue to be rigorously applied to all future relevant planning applications.

Recommendation

23. That the City Executive Board, having considered and taken account of the officers' views as set out in the report, and Counsel's advice as

appended, agree that the adopted Local Plan policies and SPD relating to affordable housing should continue to be applied as required by the Plan.

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Background papers: none

Version number: 4

Appendix 1 provides the full transcript of the legal advice obtained from Counsel.

LAND AT JERICHO CANALSIDE, JERICHO, OXFORD.

ADVICE

Introduction

1. I am asked to advise Oxford City Council (“the City Council”) concerning the conclusions of an Inspector expressed in a decision letter of 8 October 2008 by which she dismissed appeals by Spring Residential Limited against decisions of the City Council to refuse planning permission and conservation area consent for development, mainly of a residential nature, of land at Jericho Canalside, Jericho, Oxford.
2. The public inquiry into the above appeals was held over several days during August 2008. I represented the City Council at that inquiry. One of the grounds of objection raised by the City Council concerned the inadequate provision of affordable housing. The Appellant proposed that 19 of the proposed 54 residential units, or 35%, be provided as affordable housing. Policy HS.5 of the Oxford Local Plan 2005 seeks “provision of generally a minimum of 50% of the proposed new dwellings as affordable housing”. The City Council contended that there was no proper justification for accepting less than 50% affordable housing provision.
3. The Inspector’s conclusion was that the level of affordable housing offered was acceptable. I have been asked to advise as to the possibility of challenging this conclusion and, irrespective of that, as to implication of that decision on the future application of the City Council’s policies.
4. I have advised in conference in respect of these matters. I have been asked subsequently to set out the advice which I gave on that occasion in writing.

Legal Challenge

5. A challenge to a decision of an inspector or of the Secretary of State following an appeal under s.78 of the Town and Country Planning Act 1990 may only be made under s.288 of that Act. A claim under that section may only be made by a “person aggrieved”. Where an appeal is determined substantively in favour of a particular party, then, notwithstanding that it may be aggrieved by certain aspects of the decision, it is not a “person aggrieved” and may therefore not bring a claim under s.288 of the 1990 Act (see **R (Redditch BC) v First Secretary of State** [2003] 2 P&CR 338). Although a claim for judicial review may, in principle, be available as an alternative route of challenge, in the same case, the Court held that such claim should only be entertained exceptionally and, for example, where the victory before the Inspector was entirely pyrrhic. There are, in my view, no “exceptional circumstances” which would entitle the City Council to bring such a claim against the recent Inspector’s decision in respect of her conclusions on the affordable housing issue or at all.

6. I do not therefore consider there to be any procedure by which a legal challenge to the Inspector's decision is available to the City Council.

Implications of decision on affordable housing issue

7. The City Council's policy concerning the quantum of affordable housing provision is set out clearly in its Local Plan, and in particular policies HS.4 to HS.6. The guidance on the application of these policies is set out in the City Council's affordable housing SPG, which was adopted in November 2006.
8. In determining any future planning application, pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004, that application is required to be determined in accordance with the development plan unless material considerations indicate otherwise. The policies of the local plan (as part of the development plan) are plain. The Inspector's decision letter may be a material consideration in the determination of the quantum of affordable housing provision in any future application for planning permission but as a matter of principle it cannot be construed (nor was it intended) in any way to supersede or supplant the operation of the policies of the development plan, including the Local Plan.
9. The Inspector was most careful in her decision letter to make plain that her reason for accepting a lesser quantum of affordable housing than policy HS.5 of the Local Plan generally requires arose out of the specific circumstances relating to the appeal site and the development under consideration.
10. At paragraph 12 of her decision letter the Inspector accepted that to input retrospectively a purchase price into a viability assessment in order to justify less than the generally required quantum of affordable housing would have far reaching consequences and would not accord with the approach required by policy, which, as she concluded, required developers to "take on board the consequences of affordable and other policy requirements at the time of purchasing the site"¹. As such the Inspector was endorsing the advice given in paragraph 35 of the City Council's affordable housing SPD.
11. Notwithstanding this the Inspector held that there were "a number of factors specific to this particular site" which led her to conclude, contrary to the City Council's case, that the quantum of affordable housing was acceptable.
12. The Inspector had regard to the decision letter arising from an earlier appeal by Bellway Homes Limited and the British Waterways Board concerning the same site and dated 5 August 2005 (paragraph 14 of decision letter). The Inspector also had regard to the overall package of

¹ In reaching this conclusion the Inspector was adopting the same approach as she herself adopted, and which the Secretary of State accepted, in the Norwich decision (referred to at paragraph 17 of the decision letter) and in other decisions (eg. Appeal APP/H2265/A/08/2079994 – Sovereign House, Sovereign Way, Tonbridge, Kent (dated 14 November 2008)).

infrastructure required by site-specific policy DS.13 together with other Local Plan policies (paragraph 15). The Inspector also had regard to the benefits in securing timely development of the appeal site (paragraph 17). These considerations, individually and collectively, represent particular and site specific considerations which the Inspector was entitled to have regard to and which represent a legitimate application of policy to the appeal site rather than some restatement or refinement of policy which could be readily transposed into the consideration of development proposals elsewhere.

13. In this context the Inspector stated expressly that *“I come to this conclusion on the basis of the particular circumstances of this site and the background to the case before me. For those reasons, my decision to depart from the 50% proportion required by Policy HS.5 would not compromise the Council’s ability to rigorously apply its affordable housing policies to future developments”* (paragraph 17). It is in my view plain that the Inspector’s decision concerning quantum of affordable housing does not give rise to any matter of principle applicable to other applications for planning permission elsewhere nor does it provide any basis on which the rigorous application in future of policy HS.5 should be compromised, as indeed, the Inspector recognised.
14. The Inspector’s decision on the issue of the quantum of affordable will have been disappointing to the City Council. Furthermore, the Inspector’s reasoning is in several respects open to legitimate criticism. For example, having acknowledged that it is not appropriate to input site purchase costs retrospectively into a viability assessment (paragraph 12) and having noted that (as was common ground at the inquiry) the £4 million purchase price paid could not have and cannot now deliver viably more than 19 affordable housing units (paragraph 16), the Inspector nevertheless concluded at paragraph 13 that the purchase price paid was neither excessive nor over inflated. The Inspector appears to place some weight on that conclusion as justifying the level of affordable housing provision offered. Although the Inspector was entitled to conclude that the purchase price paid reflected “market value”, it is not logical nor consistent with her earlier conclusions (especially at paragraph 12) for this to be given weight as a justification for providing less affordable housing than would generally be required by policy.
15. Furthermore, at paragraph 17 of her decision letter the Inspector distinguished the Norwich decision on the basis that *“... the size of the development proposed at Norwich, as well as the scale of the affordable housing shortfall ...”*. The City Council invited the Inspector to follow the her approach, which was accepted by the Secretary of State, in Norwich appeals; there were of course material differences of fact between the two cases. In my view, the Inspector has failed properly to distinguish the Norwich decision either on the basis of the reasons she expressed or at all.
16. Although these two matters may, in other circumstances, have given rise to points of legal challenge, that route, for the reasons which I have

explained, is not available to the City Council. Furthermore, those conclusion neither affect the overall thrust of the Inspector's decision that there were site specific considerations which justified the level of affordable housing provided nor do they give rise to any point of principle which ought to affect the future application of policy.

17. In conclusion on the second issue upon which I am asked to advise, and as the Inspector was careful to point out, I do not consider that the decision letter gives rise to any point principle which will affect the way in which the City Council applies its affordable housing policies to future developments.

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