

IN THE MATTER OF:

LW DEVELOPMENTS LIMITED

and

WELWYN HATFIELD BOROUGH COUNCIL

and

An enabling development appeal concerning Northaw House, Coopers Lane,
Northaw, Potters Bar EN6 4PS

OPINION

Paul Cairnes QC
No5 Chambers

Thrings LLP

Ref: Fred Quatermain

1. Opinion.

In this matter I am instructed on behalf of LW Developments Limited ('the Applicant') in respect of the approach to be adopted when calculating the conservation deficit for the purposes of enabling development. For the reasons set out in detail herein my opinion may be summarised as follows:

- (a) This opinion does not address the planning merits of the appeal scheme and/or whether the reasons for refusal were/are justified but is confined to consideration of the approach to be taken regarding the calculation of the conservation deficit.
- (b) The defining characteristic of enabling development is that it would secure the future conservation of a heritage asset if other reasonable efforts have failed, and the balance articulated in NPPF paragraph 208 is met.
- (c) In practice, this means a decision-maker being satisfied that a scheme of enabling development would securely provide for the future of the heritage asset.
- (d) The amount of enabling development that can be justified will be the minimum amount necessary in order to address the conservation deficit and to secure the long-term future of the asset(s).
- (e) The LPA has previously accepted that the an allowance for the acquisition of the site should be included as a cost (Site Value). This approach is reflective of the relevant guidance.
- (f) Both the BNP Paribas reviews (May 2019 and July 2019) estimated the Site Value at £1.6m based upon its existing office use and from which they reached their assessment(s) of the minimum amount of enabling development required.
- (g) The HE Guidance indicates that the purchase price is relevant because it is necessary to ensure that any 'hope value' is removed from the equation, whereas the purchase price of the asset would be irrelevant for the purposes of a RLV calculation of current value.
- (h) There is support for the Bailey Venning interpretation that an indicative 'price paid' (less any hope value) should be factored into the assessment of the conservation deficit as an input cost.
- (i) Ultimately, the determination of the minimum enabling development required is quintessentially a matter of planning judgment.

- (j) Although it is a matter of agreement that OVU is residential that has not simply removed or otherwise precluded its existing permitted use as offices.
- (k) It is against this use that the enabling development is being justified and ultimately resulted in the 2020 permission. As with all viability assessments the weight they to be accorded is a matter of judgment for the decision maker.
- (l) The existing use value (office) and the OVU (residential) are not necessarily the same. It seems artificial to accept a Site Value input for the purposes of the 2020 permission but to thereafter exclude that input entirely for the purposes of the 2021 application, especially when there has always been an issue over the minimum enabling development required and the conservation purposes of the enabling development have not yet been secured.

2. Background

- 2.1 The Applicant is the registered owner of Northaw House, Coopers Lane, Northaw, EN6 4NG ('the Site'). Northaw House was constructed in 1698 and sits at the centre of its own 10 ha estate. The Main House, West Wing, Ballroom Wing and Conservatory along with the Stable Block are separately listed Grade II buildings. Within the grounds there were several outbuildings, although all that remains now is a gardener's cottage (Oak Cottage), and a walled garden, both of which are curtilage listed.
- 2.2 Between 1972 and 2014 the Site was used as offices for an architectural practice (Architects Co-Partnership). However, this use did not provide the investment needed to maintain the historic buildings in a good condition. Although Northaw House and its associated buildings are rated as offices the Site has remained vacant since 2014. The Stable Block and Oak Cottage are in a very poor condition, having been left without an active use for many years.
- 2.3 On 1 February 2019 the Applicant sought planning permission from Welwyn Hatfield Borough Council ('the LPA') to develop the Site¹. The application was for enabling development designed to secure the future conservation of Northaw House

¹ LPA Ref: 6/2019/0217/MAJ.

and its heritage assets. The LPA did not dispute the principle of enabling development but did take issue with the quantum proposed.

- 2.4 Prior to submitting the 2019 application the Applicant had engaged in extensive pre-application discussions with the LPA about the restoration of Northaw House (commencing in June 2016). The LPA had acknowledged that its restoration (along with the outbuildings) would be feasible only with enabling development. The Applicant provided the LPA with a Financial Viability Assessment ('FVA') prepared by James R Brown & Co. This demonstrated that the restoration of Northaw House and its outbuildings would require 31 proposed dwellings, of which 16 would be new-builds whose construction would be justified as enabling development.
- 2.5 The LPA instructed BNP Paribas to review the pre-application FVA. The first review of the Applicant's FVA by BNP Paribas (May 2019) considered that 12 new builds were the minimum enabling development required. This would have had the effect of reducing the application scheme from 31 units to 27 units. However, BNP Paribas then issued a further report (July 2019) that concluded that the minimum amount of enabling development required was only 10 new build units, not 12. This was a reduction of 6 units from the 16 new builds that the Applicant's FVA had previously indicated was the minimum scale of enabling development. The LPA made it clear that unless 6 new build units were removed the application would be refused. This had the effect of reducing the application scheme from 31 units to 25 units. The units removed were the proposed 4 new-builds in the East Drive and the 2 proposed new-build gate house units.
- 2.6 Due to the commercial situation relating to the purchase of the Site² the Applicant removed the 6 new builds from the application and permission was granted on 7 January 2020 ('the 2020 permission'), as follows:

Conversion of Northaw House to form 11 apartments (including refurbishment of existing single caretaker's flat) and underground parking area, the Ballroom Wing to form 2 dwellings, the Stable Block to form 1 dwelling, refurbishment of existing dwelling at Oak Cottage, 3 dwellings within the Walled Garden, 7 dwellings within the Settlement Area, refurbishment of the Walled Garden,

² The Applicant acquired the Site following the 2020 permission.

refurbishment of access routes and reinstatement of old route, provision of hard and soft landscaping, car parking and supporting infrastructure”.

- 2.7 On 20 January 2021 the Applicant submitted a further application³ for a total of 31 units (‘the 2021 application’), which number it had previously sought to demonstrate through the previous 2019 application FVA included the minimum amount of enabling development necessary (16 new build units). In essence, it was the same application but included the previously removed 4 new-build East Drive and 2 Gate House units. It was duly accompanied by an updated FVA (also prepared by James Brown & Co) which included updated costings and duly appraised the costs associated with the 25, 27 and 31 unit schemes. This updated FVA confirmed that 31 units was the minimum level of enabling development required.
- 2.8 The application was refused by a decision notice dated 26 May 2021. The three reasons for refusal were that the proposed development would (1) comprise inappropriate development in Green Belt (2) material harm to the setting of the heritage assets on the Site, and (3) fail to ensure appropriate mitigation was provided to address the impacts upon infrastructure and services.
- 2.9 The Council also refused the accompanying listed building application for the following reason:
- The proposed development would materially harm the setting and significance of the Grade II Listed Buildings and whilst this is considered to result in less than substantial harm, public benefits to outweigh the identified harm do not exist. As such the proposal is contrary to SADM15 of the Emerging Local Plan 2016; National Planning Policy Framework and the Planning (Listed Buildings and Conservation Areas) Act 1990.
- 2.10 Prior to determination of the 2021 application, the Applicant commenced works on the new build elements permitted pursuant to the 2020 permission. Although the 2020 permission has been implemented it is noted that none of the conversion works to residential use have been commenced in respect of Northaw House or the listed outbuildings. The implementation has only been in respect of the permitted new-builds. Such works that have been undertaken in respect of the listed buildings are principally for preservation and/or repair, including:

³ LPA Ref: 6/2021/0072/MAJ.

- (a) The roof slates have been removed from the main house building. This was the result of lead work having been stolen from the main house leading to significant water ingress. The removal of the roof and installation of a temporary scaffolding roof has allowed the house to dry out.
- (b) A cupola has been removed from the stable block and stored on site. It was removed to prevent it falling in because a significant amount of rot was discovered in the stable block building.
- (c) Some brickwork in the walled garden area (adjacent to the new build element) has been repaired.
- (d) Works for the conversion of Oak Cottage (a separate, but curtilage listed building) have started.
- (e) A curtilage listed outbuilding was damaged in severe storms and so has been removed and partially restored.

Aside from the roof works to Northaw House itself, none of these works affect areas with a previous office use. Moreover, works to the listed building elements cannot lawfully commence as conditions controlling these works have not yet been discharged.

2.11 Meanwhile, the Applicant has now appealed against the refusal of the 2021 application, which appeal is due to be heard in September 2022 by way of a hearing.

2.12 The LPA appointed Aspinall Verdi Limited (AVL) to review the 2020 application FVA prepared by James Brown & Co. The Applicant subsequently instructed Bailey Venning Associates⁴ who have also reviewed the 2020 application FVA. The Bailey Venning review generally agrees with the approach and conclusions of the James Brown application FVA. However, the respective approaches taken by AVL and Bailey Venning are disputed. In particular:

- (a) AVL consider there to be no Conservation Deficit. Specifically, the AVL review considered that the extant and implemented 25-unit scheme generate a positive residual land value (RLV) of c£578,000. Therefore, there is no conservation deficit and no justification for enabling development.
- (b) The Bailey Venning consider viability assessments for enabling development operate differently to the conventional RLV viability assessments. This is

⁴ I am instructed that James Brown is unable to attend the appeal.

because the relevant guidance explicitly references the Site Value as an input cost in the calculation, not the result.

- (c) Furthermore, AVL consider the proposed use of the heritage asset permitted by the 2020 permission (residential) should form the basis of the conservation deficit calculation whereas Bailey Venning consider it should reflect its existing use as offices.

3. Enabling Development.

- 3.1 Chapter 16 of the NPPF addresses conservation and enhancement of the historic environment. This chapter provides a practical approach to the determination of planning applications whilst applying the statutory obligations on decision-makers pursuant to the Planning (Listed Buildings and Conservation Areas) Act 1990. Paragraph 208 of the NPPF indicates the exercise to be undertaken where enabling development is being advanced:

Local planning authorities should assess whether the benefits of a proposal for enabling development, which would otherwise conflict with planning policies but would secure the future conservation of a heritage asset, outweigh the disbenefits of departing from those policies.

- 3.2 The following represents the principal extant guidance on the approach to be taken by decision-makers when considering the question of enabling development:

- Enabling Development & Heritage Assets – Historic England (June 2020)
- Planning Practice Guidance (Viability and Historic Environment)
- Assessing Viability in Planning under the NPPF 2019 for England – RICS (March 2021)

- 3.3 The Historic England (HE) Guidance is the principal relevant guidance. It introduces the concept of a ‘conservation deficit’ and sets out advice on enabling development against the background of the NPPF and the related guidance given in the PPG. The HE Guidance was not extant when the 2020 permission was granted. The defining characteristic of enabling development is that it would secure the future conservation of a heritage asset if other reasonable efforts have failed, and the balance articulated in NPPF paragraph 208 is met, i.e. the future conservation of the asset is secured and the disbenefits of departing from conflicting planning policies are outweighed by the

benefits⁵. In practice, this means a decision-maker being satisfied that a scheme of enabling development would securely provide for the future of the heritage asset⁶. Moreover, the HE Guidance makes clear that the amount of enabling development that can be justified will be the minimum amount necessary in order to address the conservation deficit and to secure the long-term future of the assets⁷.

3.4 The conservation deficit is defined⁸ as:

The amount by which the cost of repair (and conversion to optimum viable use if appropriate) of a heritage asset exceeds its market value on completion of repair and conversion, allowing for all appropriate development costs.

The ‘optimum viable use’ is defined in the Glossary as follows:

Optimum viable use: if there is only one viable use, that use is the optimum viable use. If there is a range of alternative economically viable uses, the optimum viable use is the one likely to cause the least harm to the significance of the asset, not just through necessary initial changes, but also as a result of subsequent wear and tear and likely future changes.

3.5 In the instant matter both the Applicant and the LPA agree that the optimum viable use for Northaw House and its outbuildings is residential. However, I am instructed that there is disagreement over elements of the “appropriate development costs”, specifically whether that should include the Site Value and how it should be assessed. Where the principle of enabling development is agreed, the preference for agreement on the calculation of the conservation deficit and the minimum amount of enabling development required is clearly set out in the HE Guidance⁹:

If the local planning authority decides that a scheme of enabling development is justified in principle, it will need to ensure that long-term conservation of the heritage asset is secured ...thereby avoiding the need to revisit consents with a view to approving further development...

3.6 The approach to identification of the conservation deficit is then set out in the Guidance. It emphasises the importance of accuracy in any relevant financial assessments when identifying the conservation deficit’, at paragraph 46 it notes the following:

⁵ Paragraph 15.

⁶ Paragraph 16.

⁷ Paragraph 14.

⁸ Paragraph 9.

⁹ Paragraph 25.

It is important to ensure that financial assessments underpinning the proposals are accurate and robust. This will help avoid any suggestion that appraisals might be revisited and the level of enabling development subsequently increased as a result. In order to understand how much money the enabling development will be required to raise an applicant will need to assess the market value of the asset in its current state and when completed. If the current value plus the cost of the reasonably required repairs and (if appropriate) conversion to optimum viable use exceeds the value when completed, then there is a conservation deficit. Where this is the case, the existing market value of the property will usually be nominal. The conservation deficit will be the amount the enabling development needs to raise...

- 3.7 The subsequent paragraphs discuss the practical application of the above and provide a number of considerations that could or should not be factored into the assessment. It (unsurprisingly) notes that enabling development is to be tested against the needs of the place and not the owner, that the purchase price having been paid should be disclosed in order to ensure that any ‘hope or anticipation’ element of the price paid is to be disregarded¹⁰.
- 3.8 This resonates with the PPG approach to establishing the Benchmark Land Value (BLV) for the purposes of conventional viability assessments. Once calculated the BLV can then be assessed against reasonable price comparators, which exercise also requires an assessment of the Existing Use Value (EUV) from which any element of hope value is to be disregarded¹¹. This is calculated by assessing the value of the completed development less the development costs (including an element for profit) which produces the Residual Land Value (RLV). If the RLV is less than the BLV then the scheme is unviable and may justify the removal of certain contributions sought, such as affordable housing or other infrastructure costs.
- 3.9 It is also noted that the HE Guidance references the RICS Valuation Guidance in respect of determining ‘market value’ for the purposes of enabling development, namely the current market value of the asset and the market value of the completed scheme¹². The former is expected to provide a justification for the current market value, the definition of which is long established as:

¹⁰ Paragraph 49.

¹¹ PPG paragraph 15.

¹² See paragraphs 57 and 58.

The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

4. Discussion.

- 4.1 In this matter the Appellant has always represented to the LPA through its FVAs (and confirmed in the Bailey Venning review) that the minimum amount of enabling development necessary to secure the long-term future of the assets was a 31-unit scheme with 16 new-build units. I am instructed that the Appellant has never resiled from that position and only agreed a reduction to 25 units for reasons of commercial pragmatism to facilitate the 2020 permission.

- 4.2 For the purposes of the 2020 permission the LPA had accepted the principle of enabling development but disputed the quantum required. When making its assessment of the minimum scale of enabling development required the LPA has also previously accepted that an allowance for the acquisition of the Site should be included as a cost (Site Value). This approach is reflective of all the extant above-mentioned guidance. Both the BNP Paribas reviews (May 2019 and July 2019) estimated the Site Value at £1.6m based upon its existing office use, and from which they reached their assessment(s) of the minimum amount of enabling development required. Although the Applicant disagreed with Site Value figure of £1.6m, the principal area of dispute between the Applicant's FVAs and the BNP Paribas reviews related to the build costs allowances – a common area of dispute in viability assessments generally. However, there has been an element of inconsistency in the previous viability reviews conducted on behalf of the LPA, as the BNP Paribas reviews altered their assessment of the minimum enabling development required from 27 to 25 units.

- 4.3 The 2021 application FVA review undertaken on behalf of the LPA by AVL adopted a different approach to that agreed for the purposes of the 2020 permission. Specifically, the AVL approach was to calculate the RLV on the basis that the Site Value should be assessed not on the EUV of the Site for office use but on its current permitted use for residential purposes because the 2020 permission has been implemented. The direct consequence of this approach is that the nominal value of the site is simply removed, as indicated above BNP Paribas had previously assessed the Site value at £1.6m. The

RLV approach adopted by AVL simply removes this figure as a cost from the conservation deficit calculation. AVL contend that the residual approach to assessing the current market value is “*implied as the most appropriate way of valuing development land within the HE Guidance.*” This is because paragraph 54 indicates that two development appraisals should be conducted, the first to establish whether there is a conservation deficit and the second to demonstrate the minimum amount of enabling development to meet the identified deficit. Further, that the presence of a positive RLV implies that no conservation deficit exists, albeit that “*was not explicitly explained*” within its initial review.

- 4.4 AVL contend that the HE Guidance supports its approach because it refers to the current condition of the heritage asset and its current market value; that enabling development should be tested against the needs of the place not the owner; and therefore any transaction timing and change of ownership is irrelevant when determining market value. Furthermore, AVL question whether the previous use of Northaw House as offices should form any part of the conservation deficit calculation. In particular, such an approach “*could theoretically allow for market values to be based on any previous use which may or may not currently exist depending on the time an applicant purchased the site*”, which would contradict the HE Guidance to the effect that the needs of the owner should be disallowed.
- 4.5 Bailey Venning contend that the HE Guidance is explicit in including the Site value as a cost when calculating the conservation deficit. In particular, viability assessments for enabling development operate differently to conventional viability assessment. This is because the HE Guidance explicitly references Site Value and the price paid (less any hope value) and is predicated on establishing whether or not there is a conservation deficit. That means that the Site Value (or indicative price paid to remove hope value) is an input cost in the calculation, not the result.
- 4.6 Paragraph 49 of the HE Guidance (under the title ‘Site Value: has too much been paid?’) appears clear that the purchase price is relevant because it is necessary to ensure that any ‘hope value’ is removed from the equation. Technically the purchase price of the asset would be irrelevant for the purposes of a RLV calculation of current value, particularly where the guidance indicates that any hope value element of the price paid

should not form part of the assessment. Consequently, there is support for the Bailey Venning interpretation that the Site Value should be factored into the assessment and on a plain reading of paragraph 49 that would necessarily be as an input cost.

- 4.7 The approach to be taken by the decision-maker must be consistent with the statutory obligations pursuant to the P(LBCA) Act 1990 and NPPF paragraph 108. Specifically, that the enabling development sought should secure the future conservation of the heritage asset concerned and outweigh the disbenefits of departing from heritage policies with which it conflicts. That is quintessentially a matter of planning judgment. The HE Guidance is designed to assist the decision-maker but its application is also a matter of judgment. As explained in paragraph 58 of the NPPF which refers to viability assessments:

“...the weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances of the case...All viability assessments...should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.”

- 4.8 The differing approaches to calculating the conservation deficit are largely due to the phraseology used in paragraph 49 of the HE Guidance from which both AVL and Bailey Venning draw support for their competing arguments. However, in my opinion the following matters are material to the determination:

- (a) For the purposes of the 2020 permission the LPA acknowledged that the Site Value was to be included as a cost input when assessing the minimum enabling development required.
- (b) Irrespective of the need for consistency of approach in decision-making (it being recognised that the HE Guidance had not then been published) the identification of a Site Value would appear to be a necessary component in the identification of the minimum scale of enabling development required.
- (c) The HE Guidance expressly references Site Value and price paid in paragraph 49. Unlike the conventional RLV viability assessment the price paid (less hope value) is described as an input not the output.

- 4.9 The other element that needs to be considered is the existing use of Northaw House. Although it is a matter of agreement that OVU is residential that has not simply

removed or otherwise precluded its existing permitted use as offices. As indicated in paragraph 2.10 above, although the 2020 permission has been commenced, the conversion works to the heritage asset(s) require the discharge of pre-commencement conditions which have yet to take place. Consequently, although it is agreed that the OVU for the asset is residential its existing permitted use is office. In practical terms it is against this use that the enabling development is being justified and ultimately resulted in the 2020 permission. Ultimately this is also a matter of judgment for the decision maker, in particular:

- (a) Whether enabling development is justified and the minimum level required is dependent upon the Applicant satisfying the requirements of paragraph 208 of the NPPF.
- (b) This will necessarily involve the decision-maker making an assessment of the different approaches to calculating the conservation deficit, including the issue of the existing use value.
- (c) The existing use value and the OVU are not necessarily the same. It seems artificial to accept a Site Value input for the purposes of the 2020 permission but to thereafter exclude that input entirely for the purposes of the 2021 application, especially when there has always been an issue over the minimum enabling development required and the conservation purposes of the enabling development have not yet been secured.

9 September 2022

**Paul Cairnes KC
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