

**PLANNING COMMITTEE – 7 MARCH 2019****PART 1**

Report of the Head of Planning

**PART 1**

Any other reports to be considered in the public session

1.1 REFERENCE NO - 18/503723/MOD106

APPLICATION PROPOSAL

Modification of Planning Obligation dated 18/05/2010 under reference SW/08/1124 to allow removal of on site affordable housing.

ADDRESS

153 London Road Sittingbourne Kent ME10 1PA

RECOMMENDATION

Grant Modification

SUMMARY OF REASONS FOR RECOMMENDATION

The proposal would provide a commuted sum for off site affordable housing which is considered to be appropriate in these circumstances. The commuted sum has been set at a level which, when considered in the context of the viability evidence, is believed to be compliant with policy DM8 of the adopted Local Plan, despite the advancement of the development.

REASON FOR REFERRAL TO COMMITTEE

Called in by Cllr Mike Baldock

WARD

Borden And Grove Park

PARISH/TOWN COUNCIL

APPLICANT

Clarity Properties Ltd

AGENT

Brachers LLP

DECISION DUE DATE

07/09/18

PUBLICITY EXPIRY DATE

N/A

RELEVANT PLANNING HISTORY (including appeals and relevant history on adjoining sites):

App No	Proposal	Decision	Date
16/507631/LDCEX	Certificate of Lawful development to establish that works commenced under the approved planning permission, SW/13/0568, in the form of demolition of the existing buildings on 23 <sup>rd</sup> May 2016.	Approved	08.12.16
16/508336/NMAMD	Non material amendment to alter the description of application SW/08/1124 to reflect the approved drawings which show 13 one bedroom apartments and 13 two bedroom apartments.	Approved	08.12.16
SW/13/0568	to replace an extant planning permission SW/08/1124 (Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26, parking spaces and cycle store and new vehicular	Approved	08.08.13

	access) in order to extend the time limit for implementation.		
SW/08/1124	Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26 parking spaces and cycle store and new vehicular access.	Approved	18.05.10

## MAIN REPORT

### 1.0 DESCRIPTION OF SITE

- 1.01 The application site is 0.09 hectares in size and rectangular in shape. It is directly adjacent to the Wickes car park and fronts onto London Road (A2). The site lies to the west of Sittingbourne Town Centre and residential properties lie opposite and to the west of the site. A Petrol Filling Station is located on the opposite side of London Road slightly to the east.
- 1.02 Construction of the 26 residential units (granted planning permission as per the history section above) has begun on site and has reached an advanced stage.

### 2.0 PROPOSAL

- 2.01 The current proposal is to modify the Section 106 agreement attached to the original planning permissions (SW/08/1124 & SW/13/0568) to allow the removal of the requirement for on-site affordable housing. Among other things, the requirement of the Section 106 agreement is currently for the provision of 30% affordable housing on site (8 units), although a tenure split was not specified.
- 2.02 In addition, the Section 106 agreement required the following developer contributions:
- i) £227 per dwelling for library improvements;
  - ii) an open space contribution of £17,940;
  - iii) an adult social services contribution of £2362.85;
  - iv) a community learning contribution of £981.05;
  - v) a primary education contribution of £590.24 per dwelling; and
  - vi) a secondary education contribution of £589.95 per dwelling.
- 2.03 Officer's have negotiated with the applicant that prior to the occupation of the 21<sup>st</sup> unit, a commuted sum of £40,000 is to be paid in one instalment for off site affordable housing. The wording of the Section 106 agreement will need to be modified to enable this change, the precise wording of which would be agreed under the instruction of the Head of Legal Services.
- 2.04 It is important at this point to set out the background to this application as Members may recall that a similar proposed modification was reported to Planning Committee on two separate occasions in 2017 for the removal of on site affordable housing - For clarity, there is no reference number for this previous application as it was not submitted separately as a formal modification to the Section 106 agreement, but rather as a proposed modification under the original planning permissions (as referenced above). Therefore I have included the previous committee reports related to this proposal as appendices to this report which I will summarise as follows.

- 2.05 The previous application to modify the Section 106 was initially submitted proposing the removal of on site affordable housing, a viability appraisal upon occupation of the 21<sup>st</sup> unit and a commuted sum of a maximum of £31,000 if the scheme achieved a certain level of profit. This proposal was reported to the Planning Committee of 2<sup>nd</sup> February 2017 with an Officer recommendation of approval. Members resolved:  
*“That the application be deferred to allow officers to advise the developer to either provide affordable housing or more than £31,000 for offsite affordable housing, and that it can not be dependant upon their profit margins.”* As a result of this, the applicant undertook a viability appraisal which was independently assessed and concluded that the scheme would not be viable if affordable housing was provided. I have included this viability report and independent assessment as appendices to this report.
- 2.06 The application was reported back to Members at the 14<sup>th</sup> September 2017 Planning Committee meeting. The proposed modification was again to remove the requirement for on site affordable housing with a viability re-assessment submitted upon the occupation of the 21<sup>st</sup> unit. However, the proposal was altered to propose a commuted sum of a minimum of £31,000 if it was viable to do so, despite the conclusions of the viability appraisal and independent assessment as referred to above. There was again an Officer recommendation for approval. At the meeting, Members resolved that *“That the modification to the Section 106 Agreement for SW/08/1124 & SW/13/0568 be rejected and officers discuss alternative options with the applicant.”*
- 2.07 As set out above, the proposal considered in 2017 had not been submitted as a formal modification under Section 106A of the Town and Country Planning Act. Therefore, there was no requirement to issue a formal decision notice and there was no right of appeal for the applicant.

### **3.0 POLICY AND OTHER CONSIDERATIONS**

#### **3.01 The National Planning Policy Framework (NPPF)**

Para 62: *“Where a need for affordable housing is identified, planning policies should specify the type of affordable housing required, and expect it to be met on-site unless:*

- a) off-site provision or an appropriate financial contribution in lieu can be robustly justified; and*
- b) the agreed approach contributes to the objective of creating mixed and balanced communities.”*

Para 57: *“Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.”*

### 3.02 National Planning Practice Guidance

Within the section entitled 'Planning Obligations, the following is set out:

*“Planning obligations must be fully justified and evidenced. Where affordable housing contributions are being sought, planning obligations should not prevent development from going forward.”*

And

*“Obligations should only be sought where they are necessary to make the development acceptable in planning terms. Where they provide essential site specific items to mitigate the impact of the development, such as a necessary road improvement, there may only be limited opportunity to negotiate. Where local planning authorities are requiring affordable housing obligations or tariff style contributions to infrastructure, they should be flexible in their requirements. Their policy should be clear that such planning obligations will take into account specific site circumstances.”*

The section entitled 'Viability' states the following:

*“Plans should set out the contributions expected from development. This should include setting out the levels and types of affordable housing provision required”*

And

*“Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage.*

*Such circumstances could include, for example where development is proposed on unallocated sites of a wholly different type to those used in viability assessment that informed the plan; where further information on infrastructure or site costs is required; where particular types of development are proposed which may significantly vary from standard models of development for sale (for example build to rent or housing for older people); or where a recession or similar significant economic changes have occurred since the plan was brought into force.”*

And

*“The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and viability evidence underpinning the plan is up to date, any change in site circumstances since the plan was brought into force, and the transparency of assumptions behind evidence submitted as part of the viability assessment.”*

### 3.03 Bearing Fruits 2031: The Swale Borough Local Plan 2017

Policies ST1 (Delivering sustainable development in Swale); ST2 (Development targets for jobs and homes 2014-2031); CP3 (Delivering a wide choice of high quality homes); DM8 (Affordable Housing).

Policy DM8 states that in Sittingbourne, the affordable housing provision sought (on developments of 11 dwellings or more) will be 10%. Furthermore, it states that *“In exceptional circumstances, and in accordance with a supplementary planning document to be prepared by the Borough Council:*

*a. on-site affordable housing provision may be commuted to a financial contribution to be used off-site, singly or in combination with other contributions.”*

The supporting text to policy DM8 at paragraph 7.3.10 states the following:

*“The starting point for any planning application is the on-site provision of affordable housing. In exceptional cases, the Council may consider affordable housing provision to be provided off-site. In such a case, it may be possible to require a commuted sum (or payment in lieu), which is an amount of money, paid by a developer to the Council when the size or scale of a development triggers a requirement for affordable housing, but it is not possible or desirable to provide it on the site. This option may be appropriate, for example, in cases of economic difficulties, where provision on an alternative site could be of higher quality, or where improvements to the quality of the existing housing stock are considered more appropriate.”*

#### 4.0 CONSULTATIONS

4.01 Cllr Mike Baldock has commented that he would *‘like this returned to the Planning Committee.’*

4.02 I have had a number of discussions with the Council’s Strategic Housing and Health Manager regarding this application and I consider the most relevant comments to be as follows:

*“I can confirm that I have recently been advised by Optivo, Moat and Golding Homes that they are not accepting less than 20 - 60 affordable units per site. Therefore, it is likely that the developer would struggle to secure an RP for the three (or eight) affordable flats required on this site. Even if an RP were secured, I would expect the flats to be provided as shared ownership tenure only, although based on recent conversations with RP’s, marketing such a small number would be difficult and not cost effective.*

*The issue of securing an RP for very low numbers of affordable homes came to light recently after a developer of a small site at Swale Way notified us that they could not secure an RP to take on four affordable units. Therefore it was agreed to accept a new provider called ‘Landspeed’ who will deliver these four homes as intermediate housing only e.g. shared ownership or shared equity. Landspeed are not required to register with Homes England, like other ‘traditional’ RP’s, because they only deal with Shared Equity/Shared Ownership, they will not be the landlord of the units and they do not require grant funding to enable delivery.*

*To summarise, I think the likely outcome is that it would difficult to secure an RP here, and outside of agreeing to a commuted sum it is likely that the only other option would be a company such as Landspeed who could look to provide the flats as intermediate low-cost homeownership housing.”*

In addition, the following was stated:

*“It is questionable whether or not a Registered Provider (RP’s) will purchase and take on the management of such a low number of new build affordable flats, particularly as the units will be located within a mixed tenure block that includes open market sales.*

And then finally the Strategic Housing and Health Manager also stated that *“In this particular case I understand that a commuted sum may be necessary mainly due to potential issues in securing an RP, however I should note that a commuted sum is always less preferable to actual affordable housing delivery.”*

## **5.0 BACKGROUND PAPERS AND PLANS**

- 5.01 The application includes a draft Section 106 agreement and a supporting statement.

## **6.0 APPRAISAL**

- 6.01 The application now before Members has been formally submitted pursuant to Section 106A of the Town and Country Planning Act 1990. It was initially submitted on exactly the same basis as the original application described in the ‘Proposal’ section above (as reported to Members at the 2<sup>nd</sup> February 2017 Planning Committee), which for clarity was the removal of on site affordable housing, a viability appraisal upon occupation of the 21<sup>st</sup> unit and a commuted sum of a maximum of £31,000 if the scheme achieved a certain level of profit. However, as a result of negotiation between Officer’s and the applicant, the proposal has now been amended to seek modification of the Section 106 Agreement to remove the requirement for on site affordable housing and the payment of a commuted sum for off site affordable housing of £40,000 in one instalment, prior to the occupation of the 21<sup>st</sup> unit. This payment will not be dependant on a further viability appraisal.
- 6.02 As referred to above, the application considered in 2017 included a viability appraisal which the supporting statement submitted with the current application refers to. Having assessed the independent review of this viability appraisal and the committee reports presented to Members in 2017, the conclusion is clear in that the development would be unviable if the requirement for 30% of the dwellings (8 units) were required to be affordable. I do appreciate that time has passed between the original viability appraisal and now. Therefore, in terms of the weight to be given to this I have researched property prices in the locality of the application site. This shows that in the past 12 months, property prices for flats in the same postcode area as this site in Sittingbourne, have in fact fallen by 1.25% (although this is a limited sample size). However, when I have searched for Sittingbourne as a whole, property prices for flats have fallen by 2.04%. As a result of this I am of the view that the viability assessment which was submitted to support the previous application would still be relevant and still carries weight in the decision making process.
- 6.03 I have also taken into consideration that as set out in policy DM8 of the Local Plan, the affordable housing requirement on sites in Sittingbourne is 10%. This is a reduction from the previous Local Plan’s requirement of 30% which was the level when the previous Section 106 agreement was signed. This also gives a further indication of the viability issues which have impacted upon sites in Sittingbourne and in my view gives some additional weight to the applicant’s viability argument. I also note the Committee’s previous references to profit margins as referred to in paragraph 2.05 above. Through case law and Government guidance, a gross development profit of around 20% would be considered ‘normal’. In this case, as shown by the viability assessment, the developer has sought to demonstrate that they would be making a profit of 0.65%. As such, it appears that the developer is not likely to make any significant profit on this site.
- 6.04 Further to the receipt of the current application I have liaised with the Council’s Strategic Housing and Health Manager. I also note from the previous committee reports that the Strategic Housing and Health Manager was involved at the point that the previous proposals were considered and was supportive of the commuted sum approach. As set out above, the

Strategic Housing and Health Manager in respect of this current proposal has commented that although on site affordable housing is generally preferable, in this case a commuted sum is necessary. As stated above, part of the reason for this is that Registered Providers (RP's) are becoming increasingly unwilling to provide small numbers of affordable units in mixed blocks, therefore in this case the principle of a commuted sum, which would go towards affordable housing being provided elsewhere in the Borough is acceptable in my view. On this basis I am of the view that in these specific circumstances a commuted sum approach would be compliant with part 5.a of policy DM8 as quoted in the policy section above.

- 6.05 In terms of what is considered to be an appropriate amount, I have assessed other applications in Sittingbourne where a commuted sum was received. Firstly, I note the application approved under 14/506623/OUT for 18 dwellings at 109 Staplehurst Road where a commuted sum of £65,000 was agreed after a viability assessment. At the time the Local Plan required 30% of dwellings to be affordable (on developments of over 14 units) which would equate to 5 units in this case. In terms of an application approved at No.4 Canterbury Road, Sittingbourne for 45 one and two bed apartments, after the submission of a viability appraisal, a commuted sum for affordable housing of £62,300 was agreed, although the committee report sets out this would equate to 0.92 affordable units. As such, these figures have been arrived at via a viability report, rather than a set calculation.
- 6.06 Therefore in terms of this current application, based upon the viability report setting out that no affordable housing would be viable, and then considering the previous proposals that have been put forward to modify the Section 106 agreement, I am of the view that a commuted sum of £40,000 is appropriate and would in these very specific circumstances be compliant with policy DM8 of the Local Plan. Furthermore, unlike the previous proposal, the commuted sum will not be reliant on a further viability appraisal and would be paid in one instalment prior to the occupation of the 21<sup>st</sup> unit. On the basis of the viability report which I consider to still carry weight, and as this broadly aligned with the trigger point originally proposed I believe this to be reasonable. Furthermore, as there will not be a requirement for a further viability appraisal as set out above I am of the view that this provides more certainty for the Council if this modification was to be approved than under the terms of the previous proposal.
- 6.07 I do appreciate that Members may, quite reasonably, consider that the argument of a lack of viability carries less weight when the scheme has reached the advanced stage of development as is very clearly the case here. In terms of this, usually, the reason for taking viability into account is the resultant impact that this could have upon the delivery of the development. As the development is nearing completion then the risk that the development does not proceed in the first instance doesn't apply in this case. However, when considering this, I also give weight to the proposal as originally considered in 2017 which set the trigger point of the viability re-assessment upon the occupation of the 21<sup>st</sup> unit. This means that Officer's had previously factored in the expectation that the development would be completed before the viability was re-assessed. Therefore this principle remains the same whereby the payment will be made prior to the occupation of the 21<sup>st</sup> unit (at which point the development would be complete). As such, although I believe that the advancement of the development should weigh against granting this proposed modification, for this reason, I do not believe that this should weigh so heavily against the acceptability of the proposed modification in these circumstances as what might usually be the case.
- 6.08 In addition to the above consideration of the weight to be given to the advancement of the development, I also believe that the comments of the Council's Strategic Housing and Health Manager are of importance. In terms of this, I consider that the obstacles there may be to providing on site affordable housing in these circumstances would be relevant as a factor, whether the development had begun or not. As a result, this further leads me to believe that

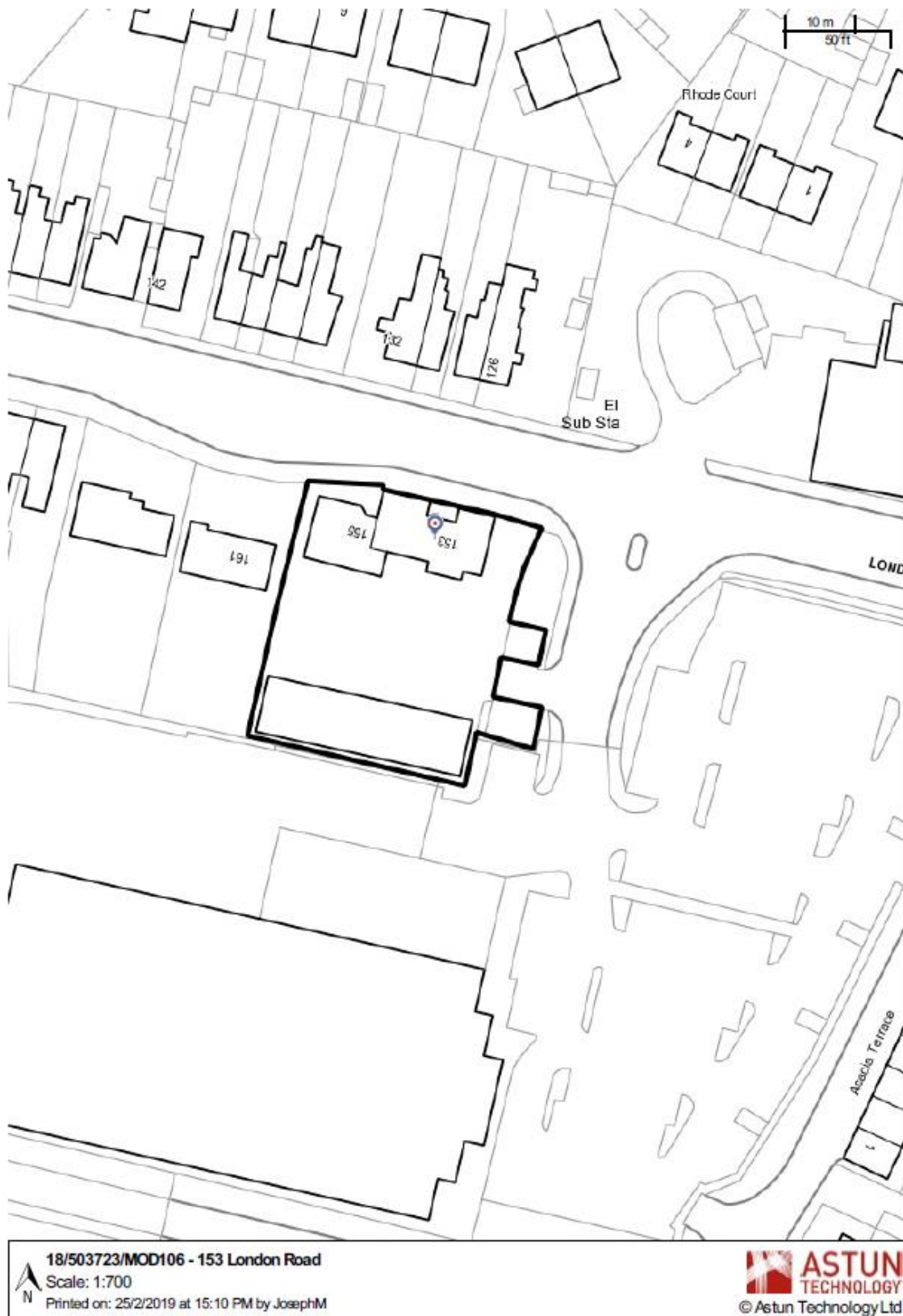
the near completion of the development should not weigh so heavily against the proposed modification in the specific context of this application.

- 6.09 In undertaking the assessment of the final planning balance, I give weight to the viability report (and independent assessment) carried out in 2017 and that the scheme would be providing, what is considered in this specific case, a commuted sum in accordance with the exceptional circumstances as set out in policy DM8. Although the advancement of the scheme without any guarantee that this modification will be accepted weighs somewhat against the proposal, I have factored in that the trigger point at which the further viability report was to be submitted (as per the original application to modify the Section 106 agreement) was set after the completion of the development. As a result, it was taken into consideration and accepted by Officer's previously that the scheme would be delivered before this re-assessment took place. Therefore, as the payment trigger remains subsequent to completion I do not believe that the advancement of the development would in this case outweigh the reasons I have identified for granting the modification. Furthermore, I give weight to the view that RP's could have difficulty in providing on site affordable housing in this case. Due to the above assessment, on balance, I am of the view that the modification is acceptable.

- 7.0 RECOMMENDATION** – GRANT modifications to the existing Section 106 as set out above and delegation to agree the precise wording of the modified planning obligation under the instruction of the Head of Legal Services.

- NB For full details of all papers submitted with this application please refer to the relevant Public Access pages on the council's website.  
The conditions set out in the report may be subject to such reasonable change as is necessary to ensure accuracy and enforceability.





## APPENDIX 1

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<b>2.9 REFERENCE NO - SW/08/1124 &amp; SW/13/0568</b>			
<b>APPLICATION PROPOSAL</b>			
Modification of Section 106 agreement to allow removal of on-site affordable housing with a viability re-assessment submitted upon occupation of the 21 <sup>st</sup> unit and a commuted sum payable at a maximum of £31,000 for off-site affordable housing. Original application - to replace an extant planning permission SW/08/1124 (Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26 parking spaces and cycle store and new vehicular access) in order to extend the time limit for implementation.			
<b>ADDRESS</b> 153 London Road, Sittingbourne, Kent, ME10 1PA			
<b>RECOMMENDATION</b> Grant modification			
<b>SUMMARY OF REASONS FOR RECOMMENDATION</b>			
On-site affordable housing would be difficult to provide. Allowing a viability re-assessment once the development has commenced and upon occupation of the 21 <sup>st</sup> unit, would ensure that a commuted sum is secured for off-site affordable housing, subject to there being a profit above 17%. This modification of the Section 106 agreement responds to the changing financial and property markets in difficult economic times. The modification would allow the development of much needed housing to be provided within an urban and sustainable site. It would also significantly improve the appearance of the site which is an eyesore in a prominent position.			
<b>REASON FOR REFERRAL TO COMMITTEE</b>			
Modification of Section 106 agreement			
<b>WARD</b> Grove Ward		<b>PARISH/TOWN COUNCIL</b> Sittingbourne	<b>APPLICANT</b> Clarity Properties Ltd <b>AGENT</b> Mr Keith Plumb
<b>DECISION DUE DATE</b> 08/08/13		<b>PUBLICITY EXPIRY DATE</b>	<b>OFFICER SITE VISIT DATE</b> 09/01/17
<b>RELEVANT PLANNING HISTORY (including appeals and relevant history on adjoining sites):</b>			
<b>App No</b>	<b>Proposal</b>	<b>Decision</b>	<b>Date</b>
16/507631/LDCEX	Certificate of Lawful development to establish that works commenced under the approved planning permission, SW/13/0568, in the form of demolition of the existing buildings on 23rd May 2016.	Approval	08.12.16
16/508336/NMAMD	Non material amendment to alter the description of application SW/08/1124 to reflect the approved drawings which show 13 one bedroom apartments and 13 two bedroom apartments.	Approval	08.12.16
SW/13/0568	to replace an extant planning permission SW/08/1124 (Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26, parking spaces and cycle store and new vehicular access) in order to extend the time limit for implementation.	Approval	08.08.13

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SW/08/1124	Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26, parking spaces and cycle store and new vehicular access.	Approval	18.05.10
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**MAIN REPORT****1.0 DESCRIPTION OF SITE**

- 1.01 The application site is 0.09ha and is rectangular in shape. It is directly adjacent to the Wickes car park and fronts onto London Road (the A2). On the site is a partially demolished two ½ storey building and a single storey flat roof building to the rear of the site.
- 1.02 The site lies to the west of Sittingbourne Town Centre. Residential properties lie opposite and to the west of the site. There is a Petrol Filling Station on the opposite side of London Road slightly to the east. The site is currently messy and unsightly.

**2.0 PROPOSAL**

- 2.01 Planning permission was originally granted under SW/08/1124 for the demolition of existing buildings and redevelopment of the site to provide 12, two bedroom apartments, 14, one bedroom apartments with amenity space and parking and a new vehicular access. Permission to extend the time limit for implementation of the development was granted under SW/13/0568. Application reference 16/508336/NMAMD later corrected the description to accurately reflect the approved plans which showed 13 one bedroom and 13 two bedroom apartments.
- 2.02 An application for a Lawful Development Certificate (16/507631/LDCEX) was later submitted to establish that the 2008/2013 permissions had been implemented by virtue of development commencing prior to the expiration of the time limit imposed. In this case, the partial demolition of the property constituted the commencement of development. The certificate was issued confirming that the permission was extant. We are currently considering the details submitted pursuant to conditions attached to the 2008/2013 permissions. Upon approval of these details, the approved development can continue.
- 2.03 I understand that the applicant was required to start the demolition process due to the unsafe state of the building fronting onto London Road. This Council served a Stop Notice on the applicant once this demolition was started because the work did not have the benefit of prior approval or planning permission. There has been no work on site since then. The applicant is aware that the conditions details, including contaminated land, will need to be agreed before any further work is carried out on site. I am informed by the planning agent that the required contaminated land surveys are being carried out and will be submitted shortly.
- 2.04 The current proposal is to modify the Section 106 agreement attached to the original permissions (SW/08/1124 & SW/13/0568) to allow removal of the requirement for on-site affordable housing. Among other things, the requirement of the Section 106 agreement is currently for the provision of 30% affordable housing on site (8 units), though a tenure split was not specified.

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2.05 In addition, the Section 106 agreement required the following developer contributions:

- i) £227 per dwelling for library improvements;
- ii) an open space contribution of £17,940;
- iii) an adult social services contribution of £2362.85;
- iv) a community learning contribution of £981.05;
- v) a primary education contribution of £590.24 per dwelling; and
- vi) a secondary education contribution of £589.95 per dwelling.

2.06 We have negotiated with the applicant that a viability re-assessment would be submitted upon the practical completion of the 21<sup>st</sup> unit and a commuted sum payable at a maximum of £31,000 (plus an adjustment for inflation) for off-site affordable housing. This would be paid in three installments: 1<sup>st</sup> – practical completion of 21<sup>st</sup> unit, 2<sup>nd</sup> - practical completion of the whole scheme and 3<sup>rd</sup> – sale of 26<sup>th</sup> unit or 6 months after the 2<sup>nd</sup> instalment, whichever is sooner. The wording of the Section 106 agreement will need to be modified to enable this change, the precise wording of which would be agreed under the instruction of the Head of Legal Services.

### 3.0 POLICY AND OTHER CONSIDERATIONS

3.01 The National Planning Policy Framework (NPPF) – paragraph 173 is quoted below.

3.02 National Planning Practice Guidance (NPPG): Viability & Planning Obligations

3.03 Swale Borough Local Plan 2008: SP1 (sustainable development); SP4 (housing) and; H3 (affordable housing).

3.04 Bearing Fruits 2031 The Swale Borough Local Plan Proposal Main Modifications June 2016: ST1 (sustainable development); ST2 (development targets for jobs and homes); CP3 (delivering a wide choice of high quality homes) and; DM8 (affordable housing).

3.05 Supplementary Planning Documents: Developer Contributions 2009

3.06 Section 106A of the Town and Country Planning Act 1990 allows the modification and discharge of planning obligations.

### 4.0 CONSULTATIONS

4.01 The Head of Housing has been involved in the discussions and negotiations throughout and is in agreement with the commuted sum approach in this case and to the payment being capped at £31000 plus indexation. This is in response to a number of viability assessments that have been submitted - one in 2012, one in 2015 and the most recent in 2016. Each appraisal has shown that the scheme would be unviable if affordable housing were to be provided on site. They have agreed since 2012 that a commuted sum in lieu of on-site affordable housing would be acceptable.

4.02 With regard specifically to the possible availability of grant funding, she comments as follows:

*"The current grant programme (Shared Ownership Affordable Homes Programme 2016-21) is for the delivery of shared ownership product only with limited affordable rent tenure for specialist/supported housing. Therefore our current affordable homes delivery programme is based solely around shared ownership with zero affordable*



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*rent. This also means that our 'new' policy split of 90% affordable rent tenure with 10% shared ownership will be difficult to meet, as has been the case so far."*

**5.0 BACKGROUND PAPERS AND PLANS**

- 5.01 Draft Section 106 agreement & application documents and plans for SW/08/1124 & SW/13/0568.

**6.0 APPRAISAL****Principle of Development**

- 6.01 As noted above, Section 106A of the Town and Country Planning Act 1990 allows the modification and discharge of planning obligations. NPPG – Planning Obligations states:

*"Planning obligations can be renegotiated at any point, where the local planning authority and developer wish to do so. Where there is no agreement to voluntarily renegotiate, and the planning obligation predates April 2010 or is over 5 years old, an application may be made to the local planning authority to change the obligation where it "no longer serves a useful purpose" or would continue to serve a useful purpose in a modified way".*

- 6.02 In this case the planning obligation is over 5 years old, being completed on 18<sup>th</sup> May 2010, and so the developer could have applied formally to the council for this modification. However, all negotiations to date have been successfully undertaken without the need for the formal application.

- 6.03 In April 2013, the Government produced guidance on Section 106 Affordable Housing Requirements. This introduced a new temporary procedure, with the ability to appeal, for the review of planning obligations where it relates to affordable housing under Section 106BA of the Town and Country Planning Act. The guidance notes at paragraph 2 that:

*"Unrealistic Section 106 agreements negotiated in differing economic conditions can be an obstacle to housing building. The Government is keen to encourage development to come forward, to provide more homes to meet a growing population and to promote construction and economic growth. Stalled schemes due to economically unviable affordable housing requirements result in no development, no regeneration and no community benefit. Reviewing such agreements will result in more housing and more affordable housing than would otherwise be the case."*

- 6.04 Although this procedure was repealed in April 2016, the guidance referred to above and the change in legislation sets the tone for negotiations on the loosening of requirements to provide affordable housing on schemes that were approved at a time of economic difficulty and for schemes that are proving difficult to get off the ground, such as 153 London Road.

- 6.05 Now that the temporary change in legislation has come to an end, the modification of planning obligations can still take place under Section 106A but, arguably, under a less, streamlined process and without the right to appeal.

- 6.06 NPPG - Viability, notes that viability can be important where planning obligations or other costs are being introduced. In these cases decisions must be underpinned by an understanding of viability, ensuring realistic decisions are made to support

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development and promote economic growth. The guidance states that where the viability of a development is in question, local planning authorities should look to be flexible in applying policy requirements wherever possible. Where an applicant is able to demonstrate to the satisfaction of the local planning authority that the planning obligation would cause the development to be unviable, the local planning authority should be flexible in seeking planning obligations. This is particularly relevant for affordable housing contributions which are often the largest single item sought on housing developments. These contributions should not be sought without regard to individual scheme viability. The financial viability of the individual scheme should be carefully considered in line with the principles in this guidance.

6.07 Paragraph 173 of the NPPF states:

*"...To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable."*

6.08 In the case of 153 London Road, the guidance is clear that we should be flexible in terms of the provision of affordable housing. The applicant has submitted three separate viability assessments, one in 2012, one in 2015 and the most recent in October 2016. All of these assessments demonstrate that the scheme would be unviable with affordable housing provided on site. It is my strong view that the proposed modification would allow the development of the site to come forward much more quickly than it would do if affordable housing was required to be provided on site at 30%. The requirement for a viability re-assessment, which would be independently assessed, will ensure that if the developer makes a profit above 17% (which is considered to be a reasonable % for developer profit and has been similarly applied to other schemes), a contribution of £31,000 (index linked) will be paid to the Council. This would be used towards the provision of affordable housing elsewhere within the Borough. The capping of the contribution at £31,000 gives the developer the certainty that they require in order to secure the necessary funds to develop the site. I consider that this is reasonable in this case.

6.09 The figure of £31,000 has been arrived at following extensive negotiations. The developer had originally offered a much smaller figure of £19,800 based on their calculations of the value of the market value of the 8 affordable units. We queried this figure based on our knowledge of larger commuted sums that had been secured on sites within close proximity to 153 London Road. The developer has agreed to pay this higher figure on the terms set out at paragraph 2.06 above.

6.10 Allowing the planning obligation to be modified in the way proposed will enable the provision of much needed housing and would improve the appearance of the site which I consider is, at present, an eyesore.

## 7.0 CONCLUSION

7.01 The proposal to modify the planning obligation in respect of the affordable housing provision on site would enable the development of much needed housing to come forward and would result in a significant visual improvement of the site. These factors weight significantly in favour of the modification which would see the loss of all on-site affordable housing. However, the scheme would still be subject to a viability re-assessment which would see £31,000 secured towards off-site affordable housing, should the developer make a profit of more than 17%.

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8.0 **RECOMMENDATION** – To Grant modifications to the existing Section 106 as set out above and delegation to agree the precise wording of the modified planning obligation under the instruction of the Head of Legal Services.

NB For full details of all papers submitted with this application please refer to the relevant Public Access pages on the council's website.

The conditions set out in the report may be subject to such reasonable change as is necessary to ensure accuracy and enforceability.

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## REPORT SUMMARY

REFERENCE NO - SW/08/1124 & SW/13/0568			
<b>APPLICATION PROPOSAL</b>			
Modification of Section 106 agreement to allow removal of on-site affordable housing with a viability re-assessment submitted upon occupation of the 21 <sup>st</sup> unit and a commuted sum payable at a <u>minimum</u> of £31,000 for off-site affordable housing. Original application - to replace an extant planning permission SW/08/1124 (Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26 parking spaces and cycle store and new vehicular access) in order to extend the time limit for implementation.			
<b>ADDRESS</b> 153 London Road, Sittingbourne, Kent, ME10 1PA			
<b>RECOMMENDATION</b> Grant modification			
<b>SUMMARY OF REASONS FOR RECOMMENDATION</b>			
On-site affordable housing would not be viable to provide. Allowing a viability re-assessment once the development has commenced and upon occupation of the 21 <sup>st</sup> unit, would ensure that a commuted sum is secured for off-site affordable housing, subject to there being a profit above 20%. This modification of the Section 106 agreement responds to the changing financial and property markets in difficult economic times. The modification would allow the development of much needed housing to be provided within an urban and sustainable site. It would also significantly improve the appearance of the site which is an eyesore in a prominent position.			
<b>REASON FOR REFERRAL TO COMMITTEE</b>			
Modification of Section 106 agreement			
<b>WARD</b> Grove Ward		<b>PARISH/TOWN COUNCIL</b> Sittingbourne	<b>APPLICANT</b> Clarity Properties Ltd <b>AGENT</b> Mr Keith Plumb
<b>DECISION DUE DATE</b> 08/08/13		<b>PUBLICITY EXPIRY DATE</b>	<b>OFFICER SITE VISIT DATE</b> 09/01/17
<b>RELEVANT PLANNING HISTORY</b> (including appeals and relevant history on adjoining sites):			
<b>App No</b>	<b>Proposal</b>	<b>Decision</b>	<b>Date</b>
16/507631/LDCEX	Certificate of Lawful development to establish that works commenced under the approved planning permission, SW/13/0568, in the form of demolition of the existing buildings on 23rd May 2016.	Approval	08.12.16
16/508336/NMAM D	Non material amendment to alter the description of application SW/08/1124 to reflect the approved drawings which show 13 one bedroom apartments and 13 two bedroom apartments.	Approval	08.12.16
SW/13/0568	to replace an extant planning permission SW/08/1124 (Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26, parking spaces and cycle store and new vehicular	Approval	08.08.13



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	access) in order to extend the time limit for implementation.		
SW/08/1124	Demolition of existing buildings and redevelopment of site to provide 12, two bedroom apartments, 14, one bedroom apartments, amenity space, 26 parking spaces and cycle store and new vehicular access.	Approval	18.05.10

## MAIN REPORT

## 1.0 INTRODUCTION

1.01 The proposal to modify the Section 106 agreement as set out above was brought before Members of the Planning Committee on 2<sup>nd</sup> February 2017. The original committee report and the relevant minutes of this meeting are appended.

1.02 Members resolved that the application be deferred to allow officers to advise the developer to either provide affordable housing or more than £31,000 for offsite affordable housing, and that it cannot be dependent upon their profit margins. Members also requested that the viability assessment be made available to them when the proposed modification is reported back to them. The viability assessment is provided under Part 6 of this agenda as the information contained within it is financially sensitive.

1.03 In response to Members' concerns, the developer instructed his financial advisor to provide an up to date viability assessment to enable the Council to review it. Officers have commissioned an independent review of this viability assessment by CBRE. The report on this review is provided under Part 6 of this agenda.

1.04 Members are asked to refer to the original report that is appended in respect of the history of the site, planning policy, consultee responses, background papers and appraisal.

1.05 Since the proposed modification was reported to the February Planning Committee, the Bearing Fruits 2031: Swale Borough Local Plan 2017 (adopted LP) has been adopted. Policy DM8 of the adopted LP in part states:

*"...In exceptional circumstances, and in accordance with a supplementary planning document to be prepared by the Borough Council:*

*a. on-site affordable housing provision may be commuted to a financial contribution to be used off-site, singly or in combination with other contributions. Commuted sums may also be considered in respect of sites at Faversham and the rural areas so as to support the provision of affordable housing in less viable locations; or*

*b. where no Registered Social Landlord is available, the full affordable housing provision requirement will be cascaded to another provider and/or site or via a commuted sum, its calculation having regard to the full amount of market housing that has been achieved on the site; or*

*c. where an applicant can demonstrate that providing the full affordable housing provision would result in the scheme becoming unviable, a reduced requirement may be considered and will be subject to a legal agreement to ensure that full provision of*

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*affordable housing is reconsidered should land values rise prior to the commencement of development or any subsequent phases and/or an adjustment made to the tenure split.*

*If evidence demonstrates that economic conditions, or the proposed characteristics of the development or its location, have positively changed the impact of viability of the provision of affordable housing, the Council will seek a proportion of affordable housing closer to the assessed level of need, or higher if development viability is not compromised."*

1.06 Under Policy DM8, for development in Sittingbourne of 11 or more dwellings, 10% affordable housing is required as opposed to the previous 30% under the old Local Plan 2008.

1.07 Since the February Planning Committee, the building that was on the application site has been demolished, the land cleared and foundations have been laid.

## **2.0 APPRAISAL**

2.01 Members will have read in the original committee report that the principle of modifying a Section 106 agreement in respect of the level of affordable housing is accepted in National Planning Policy, providing that a viability assessment demonstrates that a reduction is justified.

2.02 Policy DM8 of the adopted LP also allows the level of affordable housing to be reviewed under a viability assessment and a reduction allowed:

*"...where an applicant can demonstrate that providing the full affordable housing provision would result in the scheme becoming unviable, a reduced requirement may be considered..."*

2.03 It goes on to seek to ensure that a clause is built into the revised Section 106 to allow a review of the viability at a certain trigger point with the aim of capturing an increase in sale prices, profit for the developer and/or uplift in land value.

2.04 The proposed modification to remove the requirement for affordable housing to be required on the application site would meet the requirements of Policy DM8 in my view. The viability assessment that has been submitted has been independently reviewed by CBRE (see report at part 6 of this agenda) and they conclude that the revised proposal submitted by the applicant is reasonable:

*"In light of the review undertaken and assumptions applied, CBRE's analysis shows that the scheme cannot support the delivery of on-site affordable housing in addition to the £40,000 S106 contribution allowed for. Therefore we consider the applicant's offer of £40,000 S106 contributions and a viability review following the occupation of the 21<sup>st</sup> unit with a minimum additional payment of £31,000 to be reasonable.*

*However as noted in paragraph 5.12 above we would suggest that there is a formal viability review undertaken at the point of occupation of the 21<sup>st</sup> unit utilising an agreed baseline appraisal. We believe this should be a condition of the planning consent. This should test whether a payment above the £31,000 offer be applicable at that point in time."*

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- 2.05 Members may have noted that the developer has agreed to change the terms under which the viability re-assessment would be based, referring to a minimum commuted sum of £31,000 as opposed to a maximum commuted sum of £31,000. It is entirely reasonable, as Members rightly considered at the February planning committee (see minutes as appendix A), that the commuted sum should be based on the amount that the developer can afford to pay at the time, as demonstrated in a viability re-assessment.
- 2.06 As noted at paragraph 2.06 of the original report, we have negotiated with the applicant that a viability re-assessment would be submitted upon the practical completion of the 21<sup>st</sup> unit. Should the viability re-assessment demonstrate that the scheme can afford a commuted sum payment, a minimum of £31,000 (plus an adjustment for inflation) for off-site affordable housing would be made to the Council. This would be paid in three installments: 1<sup>st</sup> – practical completion of 21<sup>st</sup> unit, 2<sup>nd</sup> – practical completion of the whole scheme and 3<sup>rd</sup> – sale of 26<sup>th</sup> unit or 6 months after the 2<sup>nd</sup> instalment, whichever is sooner. The wording of the Section 106 agreement will need to be modified to enable this change, the precise wording of which would be agreed under the instruction of the Head of Legal Services.
- 2.07 In response to Members concerns about the provision of affordable housing being dependant upon the developer's profit, it is entirely reasonable for the developer to make a profit from the development. Indeed, paragraph 173 of the NPPF states:
- "...To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable."*
- 2.07 Delivery of housing in this Borough and across the country is dependent on profit-making developers. It is widely recognised that a reasonable level of profit for a developer is within the range of 17.5-20%. As Members will see from the submitted viability assessment (see part 6), the developer seeks to demonstrate that they would actually be making a profit at 0.65%. Given the significantly reduced profit level for this development, the developer's financial advisor states:
- "In my opinion, this scheme is such a long way off being viable that any Section 106 payments at all simply adds to the costs and will reduce the viability further. However, as previously mentioned the developer is keen to build the scheme and exit the site and is willing to honour the previous commitment to provide a total package of £40,000 in payments, almost double the total projected profit of this scheme."*
- 2.08 CBRE have conducted their viability assessment based on a 18.5% profit and consider this to be reasonable noting that in their experience elsewhere, a higher profit margin has been accepted. Despite the differences on the profit assumptions, CBRE continue to conclude that it would not be viable to provide affordable housing on this site.

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- 2.09 Members should note that the developer has requested that the viability re-assessment should be based on the developer receiving a 20% profit. The developer's financial advisor justifies this as follows:

*"It is widely accepted that, for a scheme to be technically viable in planning terms, an acceptable return for a developer is in the range of 17.5% to 20%. On complex brownfield sites, and particularly post-Brexit, it is widely accepted that returns will be at the upper end of this spectrum going forward, certainly much closer to 20%. As alluded to previously in this Report, the profit margin is crucial for absorbing unexpected shocks in the economy, along with hidden costs on brownfield sites, and is a suitable sum commuted on the risk taken by the developer.....*

*...I believe in this case, a reasonable return to the land owner would be recouping the costs of the 2007 purchase of the site, which stands at £630,000. Additionally, a willing developer would reasonably be expected to make a return in the region of 17.5% to 20%, as supported by the research paper in Appendix B [see part 6 item]. This return insulates the developer from risk and wider economic factors, which is particularly prevalent in this case considering the time of the site purchase."*

- 2.10 As CBRE have based their appraisal on a profit of 18.5%, I would advise Members that this should also be the basis of the re-assessment and not the 20% as suggested by the applicant's financial advisor.
- 2.11 In summary, CBRE and the developer's financial advisor conclude that the scheme would be unviable without the removal of the requirement for affordable housing at this site. The developer is, however, willing to build in a review of the viability upon occupation of the 21<sup>st</sup> dwelling allowing a commuted sum of a minimum of £31,000 to be released if it is viable to do so. This is entirely compliant with Policy DM8 of the adopted LP and the relevant paragraphs of the NPPF. There is no reason why the Section 106 should not be modified in the way that is being requested by the developer.

### 3.0 CONCLUSION

- 3.01 The proposal to modify the planning obligation in respect of the affordable housing provision on site would enable the development of much needed housing to come forward. This factor weighs significantly in favour of the modification which would see the loss of all on-site affordable housing. However, the scheme would still be subject to a viability re-assessment which would see at least £31,000 secured towards off-site affordable housing, should the developer make a profit of more than 20%. The proposed modification would be entirely compliant with the adopted LP and the relevant paragraphs of the NPPF.

- 8.0 **RECOMMENDATION** – To Grant modifications to the existing Section 106 as set out above and delegation to agree the precise wording of the modified planning obligation under the instruction of the Head of Legal Services.

- NB For full details of all papers submitted with this application please refer to the relevant Public Access pages on the council's website.



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The conditions set out in the report may be subject to such reasonable change as is necessary to ensure accuracy and enforceability.