

PLANNING COMMITTEE – 23 JULY 2020**PART 2**

Report of the Head of Planning

PART 2Applications for which **PERMISSION** is recommended

2.1 REFERENCE NO - 20/500938/MOD106		
APPLICATION PROPOSAL Modification of a Planning Obligation under reference SW/08/1124 to remove the requirement for provision of on-site affordable housing and replace it with a requirement to make a financial contribution of £44,000 towards off-site provision.		
ADDRESS 153 London Road Sittingbourne Kent ME10 1PA		
RECOMMENDATION That the modification as proposed is acceptable and that the Council does not defend the appeal.		
SUMMARY OF REASONS FOR RECOMMENDATION An appeal has been submitted against non-determination of this modification and it cannot now be formally determined by the Council. However Members need to determine whether the modification would have been approved if it was still before them, or on what grounds they would have refused the application to modify the Section 106 Agreement. This will then form the basis of the Council's case regarding the proposal for the purposes of the appeal. In my view, based upon relevant planning policies, the supporting letters from registered affordable housing providers, the viability evidence and site history, the commuted sum approach and amount are acceptable.		
REASON FOR REFERRAL TO COMMITTEE Called in by Cllr Mike Baldock and Cllr Nicholas Hampshire		
WARD Borden And Grove Park	PARISH/TOWN COUNCIL	APPLICANT Clarity Propoerties LTD AGENT Brachers LLP
DECISION DUE DATE 20/04/20		PUBLICITY EXPIRY DATE 14/07/20

Planning History

18/503723/MOD106

Modification of Planning Obligation dated 18/05/2010 under reference SW/08/1124 to allow a reduction of on site affordable housing. Approved 30.07.2019

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. Approved 08.12.2016

SW/13/0568

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. Approved 08.08.2013

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 18.05.2010

1. DESCRIPTION OF SITE

- 1.1 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.
- 1.2 Construction of the 26 residential units (granted planning permission as per the history section above) is complete and a number of the units are occupied.

2. PROPOSAL

- 2.1 The current proposal is to modify the Section 106 Agreement to allow the removal of the requirement for on-site affordable housing. Due to a previous modification being granted (as approved under 18/503723/MOD106), the Section 106 Agreement requires 3 units to be provided as shared ownership affordable housing.
- 2.2 In addition, the Section 106 Agreement required / requires the following developer contributions which will be unaffected by this application:

- 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.

(All of these payments have been made, aside from the open space contribution, which is payable within 7 days of practical completion of the development. Due to the completion of the development I am aware that the Council's Section 106 Monitoring Officer is clarifying the details with the developer and as required, requesting payment.)

- 2.3 Further to discussions between Officer's and the applicant, the proposal has been amended, from originally proposing a financial contribution of £40,000, to seek to pay a financial contribution to the Council of £44,000, prior to the occupation of any more than 22 dwellings. This sum would then be able to be used by the Council towards

affordable housing elsewhere in the Borough. 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.

- 2.4 It is of fundamental importance at this point to set out the background to this application. Members may recall that a similarly 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 the application made in 2017 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). However, a summary of the application is provided as follows.
- 2.5 The application submitted in 2017 initially proposed the removal of on site affordable housing, a viability appraisal upon occupation of the 21st 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 2nd February 2017 with an Officer recommendation for 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.
- 2.6 The application was reported back to Members at the 14th 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 21st 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.”*
- 2.7 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. As a result of this, under reference 18/503723/MOD106 a formal application to modify the Section 106 was made.
- 2.8 The application submitted under 18/503723/MOD106 was first reported to the Planning Committee on 7th March 2019. The modification sought an amendment to the Section 106 Agreement to remove the requirement for on site affordable housing and instead to provide a commuted sum of £40,000, prior to the occupation of the 21st unit. The application was deferred following the Head of Planning Services calling in the application *“as the Planning Committee was minded to make a decision that would be contrary to officer recommendation and contrary to planning policy and/or guidance.”*
- 2.9 The application was reported back to the Planning Committee on 4th April 2019 with a revised proposal. In summary, the application sought to modify the Section 106 Agreement to provide for 3 affordable units on site. However, due to potential delivery

issues, a fall-back option was proposed if these units were unable to be provided as on-site provision. This fall back option was a contribution of £40,000 which would be payable before the occupation of 22 open market units. An update to the 2017 viability appraisal was also submitted prior to this committee meeting which set out that *“the latest UK House Price Data values in Swale have flat-lined since June 2017 when the original Viability Report was submitted. During this time, there has been an increase in Primary Building Cost (PBC) of 4.3% as shown in the attached BCIS data. As such, it can be concluded that the viability position is actually even weaker than before and certainly no better.”* At the 4th April 2019 meeting, Members resolved that the application was deferred *“until after the meetings with the Applicant and Registered Providers had taken place.”*

- 2.10 As a result of the above, the proposal was again amended to seek to provide 3 on site affordable units with the fall-back option of the financial contribution removed. This was a result of positive discussions which had taken place between a Registered Provider (RP) of affordable housing and the applicant. This proposed modification was considered acceptable by Members. As a result the S.106 was modified in this manner and the application approved.
- 2.11 The supporting information submitted with the proposed modification now being considered sets out that *“the RP made an offer to acquire the 3 x affordable housing units which was accepted by the applicant. The applicant has made strenuous efforts to conclude the agreement with the RP but these have proven to be unsuccessful. Unfortunately, the RP has now withdrawn from the purchase. The Applicant has also approached other RP’s but without success. It is therefore considered that there is no realistic prospect of securing a further RP willing to deliver the units on site.”*
- 2.12 The result of the above is the proposal which has now been submitted as set out in paragraph 2.3 above.

3. PLANNING CONSTRAINTS

- 3.1 None

4. POLICY AND CONSIDERATIONS

4.1 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.”

4.2 National Planning Practice Guidance

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

“Plans should set out the contributions expected from development towards infrastructure and affordable housing. 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. Planning obligations can provide flexibility in ensuring planning permission responds to site and scheme specific circumstances. Where planning obligations are negotiated on the grounds of viability it is up to the applicant to demonstrate whether particular circumstances justify the need for viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker.”

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

“For the purpose of plan making an assumption of 15-20% of gross development value (GDV) may be considered a suitable return to developers in order to establish the viability of plan policies. Plan makers may choose to apply alternative figures where there is evidence to support this according to the type, scale and risk profile of planned development. A lower figure may be more appropriate in consideration of delivery of affordable housing in circumstances where this guarantees an end sale at a known value and reduces risk. Alternative figures may also be appropriate for different development types.”

4.3 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.”

5. LOCAL REPRESENTATIONS

- 5.1 In accordance with The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992, the application has been advertised via a site notice, which expires on 14th July 2020. If any further comments are received in addition to the one set out below I will report this to Members via a tabled update prior to the meeting.
- 5.2 As referred to above, I have received one comment, stating the following – *“I am instructed on behalf of The Sittingbourne Society to express concern at the proposal contained within the above planning application. It seems wrong to us that at a time when the government is urging local authorities to provide more affordable housing the Council should be asked to reduce the amount of such housing to be provided in the Borough. We hope therefore that the Council will continue to require a proportion of housing provision to be “affordable” and will not permit the developer to wriggle out of his responsibilities in the way he is proposing.”*

6. CONSULTATIONS

- 6.1 Cllr Mike Baldock (Cabinet Member for Planning and Ward Member) commented *“I want this referred to the Planning Committee.”*
- 6.2 Cllr Nicholas Hampshire (Ward Member commented *“It is my wish that this modification be referred to the Planning Committee for decision.”*
- 6.3 Cllr Ben J Martin (Cabinet Member for Housing) has stated *“As I sit on the planning committee I don't want to predetermine myself, however, the commuted sum seems a bit on the low side compared to the cost of providing a unit. Waverley council use this https://www.waverley.gov.uk/downloads/file/2839/commuted_sums_calculator to calculate commuted sums.”*
- 6.4 The Council's Affordable Housing Manager has stated:

“In regard to the £40K commuted sum in lieu of the 1 x 1BF and 2 x 2BF's Sage HA were due to deliver as shared ownership, I have looked at current market sale prices of similar new-build flats in Sittingbourne and have found the following:

- 153 London Rd (Clarity Mews) flats are advertised at offers over £130K for a 1-bedroom and £180K for a 2-bedroom

- 1-bed flats on the Abbey Homes development at Mill & Wharf are available for around £150-£160K

- Cooks Lane 1-bed flats are advertising prices at £162,500
- No5 High Street 1-bed flats are up for sale at £162,500
- 2-bedroom flats have just been launched for sale at Redrow's site Regents Quay advertised at £200K-£215K

Other than the Redrow scheme, these are very similar sale prices to those available at 153 London Rd and also sale prices considered back in 2015 when discussions were taking place about commuted sum values for this site. Furthermore, when we were considering the commuted sum amount in Nov 2016, we took account of commuted sums for two developments in Sittingbourne, both of which have now been paid. The six flats at Staplehurst Rd provided £75K and, four flats at 4 Canterbury Rd provided £69K. If the average commuted sum per flat of these schemes is considered, 153 London Rd's commuted sum could be a little higher at just over £44K. However, this does not of course take account of any expert commuted sum calculation or methodology that may need to be applied.

I would suggest that the wording around how the commuted sum should be spent is left relatively open so that it can be used towards any/all schemes across the borough for all types of affordable housing, including older persons/extra care and general needs on Council owned sites or on RP partnership developments for example.

Taking the above into account, along with Sage's decision to withdraw from the purchase due to it not being financially viable for an RP to own, operate and manage a scheme of just 3 dwellings in this location, Heylo's recent decision to also not take on these three units due to the location, current sales market and price and also reiterating the continuing issue that RP's are not accepting low numbers of affordable homes on development sites, it is my opinion that a sensible approach in this case would be to accept a commuted sum in lieu of affordable housing delivery."

7. SUPPORTING INFORMATION

- 7.1 Along with the comments set out in paragraph 2.11 above, the application is also supported by letters from two RPs. One of these has been submitted by Sage Housing which states *"We have decided to withdraw from the purchase of the 3 affordable housing flats at 153-155 London Road because it is not financially viable for us as a registered provider to own, operate and manage a scheme of just 3 affordable housing units in this location."*
- 7.2 The second letter, provided by Heylo Housing states that *"We are not in a position to offer on the 3 shared ownership flats at 153-155 London Road. Due to the location, price of the flats and current sales climate we have decided Home Reach will not be feasible in this area at this current time."*

8. APPRAISAL

- 8.1 As set out above, there is a complex history to this proposed modification which includes various amended proposals being reported to Members on 5 separate occasions. It is recognised through the history of these applications that Members have been very firm in their requirement that on site affordable housing should be provided in this case.

- 8.2 It is also my view that the delivery of on site affordable housing is, wherever possible the best case scenario. Relevant planning policies set this out, however, they also recognise that due to issues such as viability, or other specific factors this is not always possible. One specific factor is the issue of RPs being unable or unwilling to manage low numbers of affordable dwellings upon sites, which is a recurring theme across the Borough. I note that the Council's Affordable Housing Manager raised this as a very likely scenario when commenting on the previous applications submitted to modify the Section 106 Agreement in this way. I also give weight to the correspondence received from two RPs, as stated above, which reflects this in the application now being considered. As a result of this I am of the view that the principle of a commuted sum approach should be accepted here and would be in accordance with policy DM 8 of the Local Plan, allowing for the sum to be directed towards the delivery of affordable housing elsewhere in the Borough.
- 8.3 As a result of the above, this then leads onto a consideration of what level of financial contribution should be considered appropriate. In terms of this I firstly turn to the Council's Affordable Housing Manager's comments above which have included examples of when commuted sums have been accepted in the past, comparing this to average sales prices and then setting out what would likely be appropriate in this case. As a result of the applicant's agent being provided with the comments of the Council's Affordable Housing Manager, the proposal was amended from initially offering £40,000 as a commuted sum to £44,000 as per the proposal now before Members.
- 8.4 In addition to the above, I secondly turn to the relevant viability issues in this case. I note that a viability assessment was carried out in 2017 which set out that the developer would be making a profit of 0.65%. This is somewhat below the normal expected returns of 15-20%. Further to this, as a result of the time that had elapsed when the applicant submitted the application under 18/503723/MOD106, a viability update was submitted in April 2019 to reflect updated house price trends and building costs. Members may now consider that as a further period of time has elapsed that an update to the viability review should have been undertaken by the applicant. I considered this but believed it appropriate to undertake a review of flat prices in Swale in the intervening to provide an up to date representation. As a result of this I have analysed data of flat prices in Swale in the period from when the last viability review was undertaken in 2019 until the date when the latest data is available. I have analysed the Land Registry data, firstly because this is the source from which the viability update obtained information in 2019 and also because this is information which has been produced directly by Central Government. This shows that, perhaps unsurprisingly, there has been a very recent downward trend in the average flat price in Swale and for the latest month available (March 2020), the average price is lower than at any point in the period since the original viability report was undertaken. For context, the average price in June 2017 (the date when the original viability report was carried out) was £144,990, compared to £136,529 in March 2020. As such, with evidence to suggest that a commuted sum of £31,000 was appropriate in less challenging viability circumstances, I am of the view that on this basis a commuted sum of £44,000 would be acceptable and the request for further viability information would have been unnecessary.
- 8.5 I have considered the comments of the Cabinet Member for Housing and note the reference to a commuted sum calculator from Waverley Borough Council. Firstly, for

clarity, Swale BC does not have a standardised approach to calculating commuted sums. Although I am aware that other Authorities have adopted such an approach, as per the comments referred to, each Authority has a range of different circumstances and specific commuted sum calculators would be supported by background inputs related to that specific area. As such, I do not believe commuted sum calculators from other Authorities can be directly used for an application in Swale.

9. CONCLUSION

9.1 As set out above, the applicant has appealed to the Planning Inspectorate against non-determination of the proposed modification. As a result the Council is unable to formally determine the application and this role will be undertaken by the Planning Inspectorate. Therefore Members must now determine the following –

- i) Whether, if an appeal had not been made, Members would have approved the application to modify the S.106 Agreement (either in accordance with my recommendation or for other reasons), or
- ii) Whether, if an appeal had not been made, Members would have refused the application to modify the Section 106 Agreement, and if so on what grounds.

9.2 It is my firm view based upon the assessment above that the commuted sum approach in these specific circumstances is acceptable. In addition to this I am of the view that the amount, for the particular reasons discussed, is appropriate.

9.3 Therefore my recommendation is that the Council does not defend the appeal. If this was the route that Members wished to take there would still be the opportunity for the Council to agree the proposed variation to the Section 106 Agreement (a commuted sum of £44,000 instead of on site delivery of 3 affordable units) outside of the appeal process. If this was to be the case then the applicant's agent has provided comments in writing to say that they would withdraw the appeal for this to take place. An application for an award of costs against the Council has also been made by the applicant and if the above was the route that Members decided to follow then the application for the award of costs would also be withdrawn.

9.4 Members may of course disagree with my assessment of the case. However, in taking this forward to defend at appeal the reasons for refusal must be set out in clear and detailed terms (with necessary supporting evidence) to justify the decision and minimise the risks of costs being awarded against the Council. Notwithstanding this, when considering the viability evidence, the current economic climate, the supporting evidence supplied with the application, the comments of the Council's Affordable Housing Manager and the history of the site in the context of relevant planning policies, my view is that there is a reasonable prospect that the Council would lose costs.

10. RECOMMENDATION – That the modification as proposed is considered acceptable and that the Council does not defend the appeal.

The Council's approach to the application

In accordance with paragraph 38 of the National Planning Policy Framework (NPPF), February 2019 the Council takes a positive and proactive approach to development

proposals focused on solutions. We work with applicants/agents in a positive and creative way by offering a pre-application advice service, where possible, suggesting solutions to secure a successful outcome and as appropriate, updating applicants / agents of any issues that may arise in the processing of their application.

The application was considered by the Planning Committee where the applicant/agent had the opportunity to speak to the Committee and promote the application.

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.

