

Request to vary a s106 Agreement relating to residential development at 341 Goring Road, Worthing (former Caffyns VW site).

Report by the Director for the Economy

1.0 Summary

- 1.1 This report relates to an application made under section 106BA of the Town and Country Planning Act 1990 (as amended) which permits an application to be made to modify or discharge any affordable housing obligation in connection with a previously approved planning application on viability grounds. The Growth and Infrastructure Act inserted this new section into the Town and Country Planning Act. It was introduced on 25th April 2013 and only applies to agreements signed after 6th April 2010. The provision will be repealed at the end of 30th April 2016 unless the Secretary of State substitutes a later date.
- 1.2 The applicant has applied to remove the affordable housing element from a residential scheme in Goring Road and this report considers the submitted viability case. The report recommends that a compelling case has been made, in accordance with the Act, to lift the requirement for onsite affordable housing subject to revised development contributions.

2.0 Background

- 2.1 This application AWD/1727/14 was presented to the Planning Committee on the 4th March 2015. The proposal was for the demolition of the former Caffyns VW workshop and the erection of 17 residential dwellings including 30% (5 dwellings) as affordable housing with associated parking and landscaping.
- 2.2 The Committee resolved to approve the development subject to:
- a) *Officers considering further viability information from the applicant regarding the open space contribution, to add the informative from Southern Water in respect of connection to the public sewer, amend proposed conditions to ensure boundary treatment is included and to clarify affordable housing tenure mix requirements with the Housing Strategy Manager; and*

- b) *Completion of a s106 Agreement securing development contributions, amounts to be determined by Officers taking into account further viability information for outdoor recreation and equipment, education, fire and rescue, library service, transport, TRO and 5 units of affordable housing, the tenure mix as specified by Officers and subject to a number of conditions.*
- 2.3 Following the Planning Committee, the applicant did submit financial information that identified that there would be significant development costs with the site, particularly in relation to land contamination and he suggested that he would prefer to pay no contribution towards open space, but he did eventually agree to pay just under £9,000 to avoid submitting a viability appraisal. At that stage, however, there was no suggestion that the affordable housing could not be delivered.
- 2.4 Planning permission was granted on 9 June 2015 for the erection of 17 residential dwellings subject to a number of planning conditions and a completed s106 Agreement.
- 2.5 The Agreement requires 30% affordable housing units on site but also financial contributions amounting to £29,755 towards local transport; £6,000 towards the cost of a Traffic Regulation Order; £4,056 towards library facilities; £80,500 towards education; £368 towards fire and rescue and £8,974.36 towards open space. The current application under section 106BA does not permit changes to these other contributions, only affordable housing.
- 2.6 Subsequently, this current application under section 106BA was received on 7 August 2015 on behalf of the applicant, Wilmington Homes. In support of the application, an independent assessment of viability prepared by Turner Morum, Chartered Surveyors, was submitted which seeks to demonstrate that the development as approved is not currently viable. As a result, the application seeks the removal of the affordable housing requirement from the Agreement.
- 2.7 In response to this application, WSCC has revised its consideration of the application and raised its requested level of contributions for the scheme because its previous request for contributions did not include any requirement for the 5 affordable houses. This is on the basis that occupiers of affordable housing are those already living in the town and, therefore, will not increase the burden of the existing services. With the affordable housing removed, WSCC now considers that additional contributions are required for the 5 market houses.
- 2.8 WSCC has, therefore, now recommended WSCC contributions which amount to an increase of £19,458 over the original £44,000 which was sought. This revised set of contributions can now be itemised as follows: £29,755 towards local transport (unchanged); £6,000 towards the TRO (unchanged); £4,686 towards library facilities; £89,541.50 towards education; £3,425 towards fire and rescue.
- 2.9 The Borough Council contributions now being offered by the applicant are £8,974.36 towards open space (unchanged) and a new sum of £45,000 towards affordable housing. This additional contribution of £45,000 towards affordable housing has arisen following negotiations with the applicant.

3.0 Details

3.1 There is no statutory consultation associated with an application of this type as local planning authorities are required solely to assess the viability of the scheme and its ability to meet affordable housing requirements. Whilst, the legislation indicates that such applications should be determined within 28 days of receipt, in this instance an extension of time was considered necessary to seek an independent view on the applicant's viability assessment and, for that reason; the District Valuer (DV) was consulted.

3.2 The District Valuer produced a draft report dated 2 November 2015 which concluded:

The applicant suggests that this scheme cannot comply with policy and cannot provide any contributions.

Our assessment suggests that with the above costs and values, the scheme is unlikely to be able to support the policy level of on-site affordable housing. On the basis of an All Private scheme with no on-site affordable contributions (Appendix 1) the scheme shows a small surplus of £21,912. On this basis we are advised that the application is prepared to make a contribution of £25,000 which we would suggest is given serious consideration taking into account viability.

On the basis that the Council is prepared to consider granting consent with a reduced level of contributions and since we are assessing this scheme in the current market, we would recommend that if the scheme is not delivered within an agreed timescale that an automatic viability review be triggered.

3.3 The Case Officer considered that some of the submitted sums appeared to be on the high side and asked the DV to respond to the following request points. The DV's response follows each point in italics.

1) Development value

a) Are we satisfied that the stated values are correct because our in-house view is that the 2 bed flat could be £180k; the 2 bed house £240-250k; and the 3 bed house £300k?

'We have researched our database and Rightmove and are happy with the stated values.'

2) Development Costs

g) Finance costs - The finance rate of 6.75% seems high and 5% would appear to be more realistic in the current market place

'The finance rate that is normally adopted is 6% to 7%. At the lower rate we would also include arrangement fees, valuation fees and monitoring fees whilst the higher rate would include this. We therefore feel that 6.75% including all fees is reasonable.'

h) Developer's profit - 20% seems high. 15% would appear to be more appropriate

'The range for profit is normally 15% to 20% and is dependent on the risk involved. Whilst housing schemes are less risky than flat schemes, in this case due to the size of the scheme most will need to be completed before any sales can be completed and units occupied and therefore most of the costs will need to be expended before the sales receipts start coming in. We are therefore of the view that 20% profit relates to the risk that the developer is taking in this situation.'

f) Sales and Marketing fees - Following on from my email comment and questions for you this morning, one of my colleagues has just raised a further final question regarding marketing fees which he suggests appear to be rather high in the circumstances when you combine marketing (not explained) and agents' sales fees totalling £141,855.

'We have adopted 2% for agents fees (£81,060), 1.5% for marketing (£60,795) which includes for the marketing suite and the incentives provided to the occupiers and legals of £500 per unit (£8,500). The range of fees normally adopted for sales and marketing excluding legals is 2.5% to 6% depending on the type of scheme and I therefore feel that 3.5% in this case is not unreasonable.'

j) Land value - You say that £500,000 is not an unreasonable value for the site but should this be reduced by £65,000 because of the contamination costs on the basis that the polluter pays? Shouldn't evidence be submitted to substantiate their figures?

Is the point you are making that the developer should not have paid for the existing building on site because it has zero value due to its poor condition? If so how is the price paid for the building calculated and what discount is made?

'We would agree with you that if we were just dealing with a land value abnormal like contamination etc. should be deducted. However we are adopting the principle of a brown field site with an existing use value plus an incentive to sell which is different and can be supported by many appeal decisions.'

4.0 Planning Considerations

4.1 The procedure associated with an application under section 106BA is very clear in that it only involves assessing the viability of affordable housing requirements. It will not reopen any other planning policy considerations or review the merits of the permitted scheme.

- 4.2 It is normal to seek the independent view of the District Valuer in such cases and he is clear in his response that all costs as itemised in the applicant's viability assessment are reasonable and there appears to be no identified areas of concern despite the Case Officer's further exploratory questions.
- 4.3 It is also clear in with Section 106BA applications that they are to be judged on the basis of a simple viability analysis given the normal 28 days that the legislation sets down for determination which will normally give no opportunity for third parties to be consulted or for Planning Committees to get involved in the decision making process (although the applicant can agree an extension of time beyond the 28 days, as in this case).
- 4.4 Section 106BA and the associated guidance makes it clear that for an application of this type, the authority must determine the application in a way that makes the development economically viable. The options available are detailed in section 106BA(5), namely:
- a) It can modify the obligation either in the way the application suggests or in another way if more appropriate;
 - b) It can replace the obligation again in the way suggested by the application or with another obligation if more appropriate; or
 - c) It can remove the obligation altogether.
- 4.5 Any determination under (5) (a), (b) or (c) may not have the effect that the obligation as modified is more onerous in its application to the applicant than in its unmodified form.
- 4.6 The District Valuer's independent assessment of the applicant's viability appraisal accepts that a wholly private market residential scheme based on reasonable development and marketing costs with appropriate profit levels and borrowing costs would show a small surplus of only **£21,912**. As a result the applicant could argue that not only is the scheme unable to meet affordable housing requirements but it could only afford a fraction of the original development contributions set out in the s106 agreement. However, in this instance the applicant has not sought to challenge the level of development contributions and has been willing to increase the contributions to both the County Council by £19,000 and provide a new affordable housing contribution of £45,000 to the Borough Council in lieu of the on-site provision.

- 4.8 Given the viability assessment prepared by the DV the contributions are welcome and there would be no reason not to support the application and lift the requirement for on-site affordable housing. Your Officers have questioned why the applicant's viability position has changed so dramatically since the original resolution to grant planning permission earlier this year and the applicant has identified the significant costs associated with the development of this site. The key issue is that the abnormal development costs have only been identified since permission was granted and during the works to remediate the site and address the ground contamination. The Environment Agency has confirmed that the remediation work undertaken has cleaned the site satisfactorily and development can now proceed.
- 4.7 The DV recommends that, in the current market, an automatic viability review should be triggered if the scheme is not delivered within an agreed timescale. There is a recently reported case in East Sussex where an Inspector noted that although National Planning Practice Guidance suggests that such reviews are appropriate where a scheme is phased over the medium to long term, he took into account the developer's intention to build as one phase over a maximum period of 18 months. He also noted that the appellant owned the site which was vacant and available for development with a full permission and he saw no reason why the scheme would not be built out in the short term.
- 4.8 In this case, the construction phase is also likely to be short. As a brownfield site the site has now been decontaminated and building regulations drawings been prepared. The applicant intends to start building in January 2016 and therefore, in the circumstances it would not seem necessary to require a review of the viability of the scheme.

5.0 Legal

- 5.1 Section 106BA Town and Country Planning Act (as amended) provides that the applicant may apply to the appropriate authority for the affordable housing contribution to be modified, removed or replaced. Section 106BC details the appeal procedure.
- 5.2 Guidance is provided by the Department of Communities and Local Government 'Section 106 Affordable Housing requirements' (April 2013).

6.0 Financial implications

- 6.1 There are no direct monetary implications but this does represent a loss of affordable homes. However, insisting on affordable homes would prevent development proceeding and result in the loss of other development contributions and much needed new homes.

7.0 Conclusion and Recommendation

7.1 As Members will be aware there are a number of Government initiatives designed to increase the number of new homes built and to reduce some of the burdens on the development industry. The ability to challenge s106 agreements where viability is an issue is just one of those measures. In this instance the applicant has undertaken a significant amount of work to prepare the site for development and it is important that this well designed back land residential scheme comes forward for development. Notwithstanding the DV's viability assessment the applicant recognises that the loss of on-site affordable housing is regrettable given the need for affordable housing in the Borough and has offered an additional development contribution which is to be welcomed as well as the original development contributions sought.

7.2 The Planning Committee is recommended to:

- (i) Vary the agreement as proposed with the removal of the requirement to provide 5 affordable dwelling units as approved; and**
- (ii) Enter into a Deed of Variation to secure the additional development contributions of £19,458 for WSCC and £45,000 for off-site affordable housing.**

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Schedule of other matters

1.0 Council Priority

- 1.1 Protecting front line services
- 1.2 Ensuring value for money and low Council Tax.

2.0 Specific Action Plans

- 2.1 **(A)** Provide and develop customer driven cost effective services.
- (B)** Generate financial capital, increase income and seek external funding sources.

3.0 Sustainability Issues

- 3.1 Matter considered and no issues identified.

4.0 Equality Issues

- 4.1 Matter considered and no issues identified.

5.0 Community Safety issues (Section 17)

- 5.1 Matter considered and no issues identified.

6.0 Human Rights Issues

- 6.1 No direct HR implications arising from this report.

7.0 Reputation

- 7.1 None

8.0 Consultations

- 8.1 None

9.0 Risk assessment

- 9.1 None

10.0 Health & Safety Issues

- 10.1 Matter considered and no issues identified

11.0 Procurement Strategy

11.1 Matter considered and no issues identified

12.0 **Partnership working**

12.1 Matter considered and no issues identified

Pre-Application Charging – Neighbouring Context

The below table summaries those neighbouring authorities that currently charge and don't charge for pre-application advice

Charge for Pre-application Advice	Don't currently charge (but may do in near future)
<ul style="list-style-type: none"> ● West Sussex County Council ● Mid-Sussex District Council ● Lewes District Council ● Hastings Borough Council ● Chichester DC ● Arun DC ● Rother DC 	<ul style="list-style-type: none"> ● Horsham District Council ● Adur District Council ● Crawley Borough Council ● Brighton and Hove City Council (due to introduce charging shortly)

The charging models for authorities charging for pre-application advice are listed below:

Neighbouring Authorities Schedule of Fees**Chichester Pre-application Charging – Schedule of Fees**

Planning pre-application advice fees	
Type	Fee
Householder	£90.00
Other e.g. changes of use, variation and removal of conditions.	£180.00
Minor e.g. 1-9 dwellings, commercial (less than 1000m2)	£480.00
Major e.g. 10-99 dwellings, commercial (more than 1000m2)	£1800.00
Large Major e.g. 100+ dwellings, commercial (more than 5000m2)	£4200.00

**Arun Planning Services Pre-Application Enquiry Service
Schedule of Charges**

1 November 2015

CATEGORY	FEE (INCLUSIVE OF V.A.T.)
Householder	
Development within the curtilage of a dwelling house. (Not new residential units within the curtilage)	£30.00 for enquiry (including site visit) and £30.00 for a meeting following a written response.
Minor Residential Developments	
1 - 2 residential units	£204.00 for enquiry(including site visit) and £30.00 for a meeting following a written response
3 – 9 residential units or residential development on sites less than 0.5 hectare.	£380.00 for enquiry (including site visit) and £200.00 for a meeting following a written response.
Smallscale Major Developments-small residential	
10 – 99 residential units, or site area between 0.5 hectare and less than 2 hectare	£700.00 for enquiry (including site visit) and £200.00 for a meeting following a written response.
Smallscale Major Developments- large residential	
100 – 199 residential units, or site area between 2 hectares and less than 4 hectares	£1500.00 for enquiry (including site visit) to include a meeting.
Largescale Major Development-residential	
200 residential units and over, or site area greater than 4 hectares.	Minimum charge of £1500.00 plus £300.00 for every 50 dwellings up to a maximum of £3000 to include a meeting.
Shop Fronts	No charge at present (to be reviewed)
Commercial Schemes (Excluding Food Retailing)	No charge at present (to be reviewed)
Food Retailing Schemes Under 500 sq.m.	No charge at present (to be reviewed)
Food Retail Schemes between 500 and 9999 sq.m.	
Floor space between 500 and 9,999 sq. m. or site area is between 1 hectare and less than 2 hectares	£700.00 for enquiry (including site visit) and £200.00 for a meeting following a written response.
Food Retail Schemes greater than 10,000 sq.m.	
Floor space greater than 10,000 sq.m. or site area greater than 2 hectares	Minimum charge of £1500.00 plus £300.00 for every 1000 sq.m. to a maximum of £3000.00 to include a meeting

All charges are inclusive of V.A.T. @ 20%.

A fee is payable for each proposal, so if you require advice on more than one scenario a fee is payable for each one.

Where a change of use is involved it will be charged on the basis of either the number of residential units created or the amount of floor space involved if it is commercial and or retail.

West Sussex County Council Charging Schedule

Table of Charges

After receiving your request for pre-application advice, we send you an invoice if providing one of our chargeable services. Payment must be made within 30 days.

No. of Dwellings	Commercial and Retail Area	Additional Written Response Only	Single Meeting and Written Response
Up to 10	Up to 100m ²	£100 plus VAT	£125 plus VAT
11 to 24	101m ² to 500m ²	£400 plus VAT	£500 plus VAT
25 to 49	501m ² to 1,000m ²	£600 plus VAT	£800 plus VAT
50 to 79	1,001m ² to 2,000m ²	£1,100 plus VAT	£1,250 plus VAT
80 to 199	2,001m ² to 5,000m ²	£2,000 plus VAT	£2,000 plus VAT
200+	5,001m ² +	£2,200 plus VAT	£2,200 plus VAT

Lewes District Council

Charges are made for major developments only. Minor and household applications are free.
The charge for a pre-application meeting with follow up written advice is £600 +VAT.
Written advice only with no meeting is £450 +VAT.
Subsequent pre-application meetings or advice are charged at hourly rates. Quotations can be provided on request. Hourly rates for officers are currently:
Planning Officer - £30 +VAT
Senior Planning Officer - £40 +VAT
Team Leader (Senior Planning Officer) - £50 +VAT
Department Head - £60 +VAT

Mid Sussex District Council

Categories of proposed development
From the 1st April 2009 the charge for pre-application advice will depend on the nature and scale of the proposed development. A stepped rate will be charged based on the following categories:
'Super Major' - 150 dwellings or more, or 5000 sq m or more of commercial floor space
'Major' - 10 or more dwellings or 1000 sq m or more of commercial floor space
'Minor' - less than 10 dwellings or 1000 sq m of commercial floor space
'Other' - i.e. changes of use, adverts, listed building consents, conservation area consents
'Trees'
The fee rates
The following fees, which are total fees per meeting, will be charged for each category of development:
'Super Major' - £500 per meeting
'Major' - £300 per meeting
'Minor' - £200 per meeting
'Other' - £150 per meeting
Advice by letter only would be charged at 50% the rate for a meeting.
'Trees' - £30 per meeting or letter (In the case of an emergency tree matter, no charge will be levied)