

MC/15/4364

Date Received: 26 November, 2015

Location: St Marys Island, Sectors 10, 11, 13 And 15, Chatham Maritime, Chatham, Kent

Proposal: Application under section 106BA of the Town and Country Planning Act 1990 (as amended) and the Growth and Infrastructure Act 2013 to modify the affordable housing requirement of Planning permission MC/13/2210

Applicant: Savills

Ward River

Recommendation of Officers to the Planning Committee, to be considered and determined by the Planning Committee at a meeting to be held on 9 March 2016.

Recommendation - Approve this application made under Section 106BA of the Town and Country Planning Act 1990 (as amended) by entering into a deed of variation with the applicant to secure the revised affordable housing proposal consisting of the 62 extra care units (based on a 60% affordable rent / 40% Shared Ownership basis) and 18 Shared Ownership dwellings.

Proposal

This application seeks the replacement of the existing affordable housing obligation of 97 affordable housing units (62 of the extra care units and 35 dwellings) by reducing the number of dwellings from 35 to 18. This means that the revised affordable provision would amount to 80 affordable housing units (62 of the extra care units and 18 dwellings). This application seeks to modify the S106 agreement on the grounds of financial non-viability and is made pursuant to Section 106BA, which was enacted in 2013 expressly with the purpose of allowing the viability of affordable housing contributions negotiated in more buoyant economic conditions to be reconsidered.

Relevant Planning History

MC/15/3760 Construction of 54 residential units, change of use of the office floor space (Class B1) to a Nursery (Class D1) and the use of the ground floor of the Basin Head and Marina apartments as residential floor space, together with associated car parking spaces and infrastructure works.
Also on this agenda.

MC/13/2210 Application for approval of reserved matters being access, appearance, landscaping, layout and scale pursuant to GL93/10730

and MC/2004/1207 for the construction of 339 dwellings comprising detached, semi-detached and terraced Houses, flats and 'extra care' sheltered housing building (Class C3) and associated garages; Construction of, office building (Class B1), and cafe/coffee shop (Class A3), lay out parking spaces; Public and private amenity areas, drainage infrastructure, estate roads, footpaths and landscaping, including earth amenity bund, surface water outfall, detention ponds with viewing platform and children's play areas and equipment,
Approved 17 July 2014

MC/04/1207 Variation of condition No. 1(B) of application reference 93/0730GL to extend the time allowed for the submission of reserved matters by a further eight years
Approved 22/12/2005.

MC/02/2072 Application for approval of reserved matters (siting, design external appearance and means of access) (pursuant to planning consent 93/0730GL) for construction of thirty three 2/3 storey 2-4 bedroomed houses and two 2-bedroomed maisonettes with associated roads, garages, parking and landscaping
Approved 14/04/2003.

GL/93/0730 Outline application for the erection of up to 1700 dwellings together with community, educational and commercial areas and associated open spaces, highways and service infrastructure
Approved 03/07/1996.

Background

This application concerns the supplemental agreement completed in relation to the reserved matters planning approval granted under planning reference MC/13/2210 on the 14 July 2014 for "*the construction of 339 dwellings comprising detached, semi detached and terraces houses, flats and an 'extra care' sheltered housing building (Class C3) and associated garages; construction of office building (Class B1), and cafe / coffee shop (Class A3), lay out parking spaces; public and private amenity areas, drainage infrastructure, estate roads, footpaths and landscaping, including an earth amenity bund, surface water outfall, detention ponds with viewing platform and children's play areas and equipment*" at Sectors 10,13 and 11/15 St Mary's Island, Chatham Maritime.

The Supplemental agreement was in addition to the original Section 106 agreement completed pursuant to the outline planning permission granted in July 1996 (LPA Ref. 93/0730/GL) by Gillingham Borough Council for "*the erection of up to 1700 dwellings together with communication, educational and commercial areas and associated open spaces, highway and service infrastructure*".

The Section 106 Agreement attached to the original outline permission set out that 200 of the 1700 approved units had to be provided as affordable. The deed of variation that arose as part of the 2005 permission (MC/04/1207) took into account policy H3 of the Medway Local Plan 2003, which sets out the current requirement for affordable

housing of 25%. This increased the number of units to be provided in the remaining phases of the development to a total of 246 units. MC/13/2210 proposes 97 (29%) affordable units, which was an increase in the percentage above the 25% as set out in policy H3. This increase took into account the need to provide the affordable housing from an earlier Sector on St Mary's Island, where it was agreed to have no affordable housing to make the phase viable and to permit construction and stimulate the housing market on the Island.

The 97 units were made up from: all 62 of the extra care units; and 35 dwellings pepper potted across the site in clusters of no more than 9 units. The tenures for the extra care units would be split 60% affordable rent and 40% shared ownership with the remainder of the affordable housing all being shared ownership equating to 38% affordable rent and 62% shared ownership across the site as a whole.

The supplemental agreement secured the above affordable housing units referred to above and updated the affordable housing section to take account of the changes in legislation and terminology that had occurred since 2005.

The current application has been submitted pursuant to Section 106BA (2) (b) of the Town and Country Planning Act 1990 (as amended on 25 April 2013) and seeks the existing affordable housing requirement, as set out above, to be replaced with a different affordable housing requirement being 80 units in total made up from: all 62 of the extra care units; and 18 dwellings pepper potted across the site in clusters of no more than 9 units. The tenures for the extra care units is unspecified, but the council will be seeking to retain the existing split of 60% affordable rent and 40% shared ownership, with the remainder of the affordable housing all being shared ownership equating to 46.3% affordable rent and 53.7% shared ownership across the site as a whole.

The provision of 80 units of affordable housing would equate to 24% of the number of units approved in the 2013 application. With the increase in units proposed within the associated application MC/15/3760. which would provide for 394 units within these final sectors, the amount of affordable housing provision would be 20.3%.

Legislation and National policy relating to the consideration of applications under Section 106BA of the Act

Section 106BA enables parties bound by affordable housing obligations to apply to have them: modified; replaced by a different affordable housing requirement; removed; or discharged when the obligations that have been entered into relate solely to one or more affordable housing requirements.

In considering the submitted application, subsections 3 and 5 of Section 106BA are of particular significance and state:

- (3) *Where an application is made to an authority under subsection (2) and is the first such application in relation to the planning obligation –*
 - a) *if the affordable housing requirement means that the development is not economically viable, the authority must deal with the application in*

accordance with subsection (5) so that the development becomes economically viable, or

b) if paragraph a) does not apply, the authority must determine that the affordable housing requirement is to continue to have effect without modification or replacement.

(5) The authority may –

- a) determine that the requirement is to have effect subject to modifications,*
- b) determine that the requirement is to be replaced with a different affordable housing requirement,*
- c) determine that the planning obligation is to be modified to remove the requirement, or*
- d) where the planning obligation consists solely of one or more affordable housing requirements, determine that the planning obligation is to be discharged.*

The National Planning Practice Guidance (NPPG) related to Planning Obligations states "*Section 106BA... allows applications to be made to modify the affordable housing requirements of any Section 106 agreement regardless of when it was signed. This review must be based on economic viability and cannot take into account other aspects of the planning consent. It addresses affordable housing requirements only.*" (Paragraph: 009 Reference ID: 23b-009-20140306). Furthermore, Subsection 8 of the Act and the NPPG is clear that further guidance issued by the Secretary of State in relation to this matter has been made available and that regard must be given to that guidance by the Local Planning Authority, when they consider the application. The extant guidance 'Section 106 affordable housing requirements – Review and appeal' was published on 26 April 2013 (the Guidance). Given the context within which this application has been submitted (i.e. prior to the commencement of this phase of the development) the following sections from the guidance are considered to be of particular relevance to the consideration of this application:

- 2 Unrealistic Section 106 agreements negotiated in differing economic conditions can be an obstacle to house 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.
- 10 The test for viability is that the evidence indicates that the current cost of building out the entire site (at today's prices) is at a level that would enable the developer to sell all the market units on the site (in today's market) at a rate of build out evidenced by the developer, and make a competitive return to a willing developer and a willing landowner.
- 11 The developer will need to demonstrate to the planning authority, and to the Planning Inspectorate on appeal, that the affordable housing obligation as

currently agreed makes the scheme unviable in current market conditions.

- 12 A viable affordable housing provision should be proposed. This should deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision. The proposal may consider whether adjustments should be made to the affordable housing tenure and mix and, where relevant, phasing may also be considered. Timing and level of off-site affordable housing contributions may also be considered, as may any other aspect of the affordable housing requirement.
- 13 The developer will need to submit clear, up-to-date and appropriate evidence. Wherever possible, this should take the form of an open book review of the original viability appraisal and should clearly demonstrate, by reference to evidence, that the proposals are not viable in current market conditions. The “original viability appraisal” is that which is the most recently agreed by the local planning authority and developer.
- 22 Revised affordable housing obligations, in line with current market conditions and based on the test of viability in this Guidance, should incentivise developers to start building.
- 23 Section 106BC* ensures that if an Inspector modifies an affordable housing obligation on appeal, that modification is valid for 3 years. If the development is not completed in that time, the original affordable housing obligation will apply to those parts of the scheme which have not been commenced. Developers are therefore incentivised to build out as much of their scheme as possible within 3 years. It will not be sufficient to commence one part of the development to secure the revised affordable housing obligation for the whole scheme.....’ [* Appeal provisions]
- 24 This 3 year period, and the need to secure as much development as possible in that period, should incentivise developers to build out. Local planning authorities may wish to make similar time-limited modifications or conditions when considering an application under Section 106BA.

Planning Appraisal

Having regard to the provisions of Section 106BA and the Guidance the main issue raised by this application is whether the development is unviable due to the existence of the affordable housing obligation secured as part of MC/13/2210.

The applicants have submitted a financial viability assessment, on an open book basis, which demonstrates that the scheme as approved, if built out in the current market conditions, would be unviable. In addition to the above, the financial viability assessment considered four alternative scenarios, as set out below:

1. The development as envisaged in application MC/13/2210 (339 units) with a 10% affordable housing element;
2. The development as envisaged in application MC/13/2210 (339 units) with a 5%

affordable housing element;

3. The development as envisaged in applications MC/13/2210 plus MC/15/3760 (394 units) with a 9% affordable housing element;

4. The development as envisaged in applications MC/13/2210 plus MC/15/3760 (394 units) with a 5% affordable housing element.

The covering letter submitted with the application on the applicant's behalf states Countryside "...remains committed to bringing the final phase of development forward, however, as a result of the level of affordable housing required, it remains, unviable." and that they consider the affordable housing share ownership dwellinghouses, should be reduced from 35 housing units to 18 housing units. As Members would have noted above, the Governments guidance indicates that where an application is made to the local planning authority for a revised affordable housing proposal based on prevailing viability, supporting viability evidence should be submitted.

This application is accompanied by a Viability Study, prepared by Turner Morum, which identifies that the scheme cannot provide the level of affordable housing stipulated in the S106 agreement, and states that this should be reduced to 18 shared ownership units, despite this remaining unviable. Furthermore, all of the scenarios demonstrate that the development would be unviable.

This financial viability assessment has been independently reviewed, on the Councils' behalf, and the Council's advisor has confirmed that based on the information submitted "All the scenarios are financially unviable using conventional analysis techniques. The only reason there is any capacity to make S106 costs in the last scenario is because Countryside have chosen voluntarily to make a reduced profit. The Council's independent advisor also comments that if the "abnormal" costs are valid then this renders any consideration of affordable housing meaningless. The Councils independent advisor concludes that were the applicant to make the affordable housing element of development of the size that would meet the Council's policy requirement, this development would be economically unviable.

Conclusion and Recommendation

Having regard to the advice contained within the Guidance, especially Paragraphs 2, 12, 13, 22 and 24 quoted above, and the advice of the Council's independent advisor on the submitted financial viability appraisal, it is considered that the existing affordable housing obligation make the scheme unviable in the current market conditions and that Members approve this Section 106BA application by entering into a deed of variation with the applicant to secure the revised affordable housing proposal consisting of the 62 of the extra care units (based on a 60%affordable rent / 40% Shared Ownership basis) and 18 Shared Ownership dwellings.

This application has been brought to Planning Committee for determination as the original S106 requirements were approved by Committee.

Background Papers

The relevant background papers relating to the individual applications comprise: the applications and all supporting documentation submitted therewith; and items identified in any Relevant History and Representations section within the report.

Any information referred to is available for inspection in the Planning Offices of Medway Council at Gun Wharf, Dock Road, Chatham ME4 4TR and here <http://publicaccess.medway.gov.uk/online-applications/>