

Application Number 13/6001/S106BA **Agenda Item**
Date Received 9th September 2013 **Officer** Mrs Sarah Dyer
Target Date 7th October 2013
Ward Coleridge
Site Cambridge Water Company 41 Rustat Road
Cambridge Cambridgeshire CB1 3QR
Proposal Application under s106BA to vary the existing s106
Affordable Housing provision from 30% to 0%.
Applicant
Permisson House 19 Commerve Road
Peterborough Business Park Lynch Wood
Peterborough PE2 6LR

SUMMARY	<p>The application is the first of its kind to be submitted to the City Council.</p> <p>If approved the application would result in a variation of the s106 Agreement to reduce the affordable housing provision to zero.</p> <p>If the application is refused, the applicant has a right of appeal to the Secretary of State.</p>
RECOMMENDATION	To be confirmed on Pre-Committee Amendment Sheet

0.0 INTRODUCTION

- 0.1 Members will recall that a confidential report was brought before this Committee in August 2013 (the August report). The report was not published because it related to a potential review of a s106 Agreement and the evidence that had been produced to justify the review included information that was commercially sensitive. An exemption was made by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972.

This information now forms part of the current application and is no longer excluded as commercially sensitive information.

- 0.2 The August report was compiled following a mediation exercise between Persimmon (the owners of the site) and the City Council with mediators provided by DCLG under the Central Government Section 106 Renegotiation Programme which was launched in August 2012. As part of that exercise CBRE were commissioned to provide a Viability Assessment. This appraisal recommended that given the information and assumptions made in the assessment, there is a case for renegotiation of the s106 Agreement to ensure delivery of the proposed residential development.
- 0.3 The Committee resolved to accept the officer recommendation that officers enter into negotiations with the owners of the site to draw up a revised s106 Agreement, involving reduced obligations, which would subsequently be brought before the Committee for approval. The Committee also agreed to encourage officers to enter into discussions with the site owners with the aim of bringing forward a new planning application for the site.
- 0.4 As part of the renegotiation of the s106 Agreement, the Council commissioned DVS to review the viability assessment which had been carried out by CBRE. This review was carried out following the Committee meeting in August. A copy of the review is attached at Appendix A. I will refer to this Review more fully in my assessment of the current application below.
- 0.5 The report made reference to a new section of the Planning Act 1990 which has been introduced by the Growth and Infrastructure Act 2013. The new section allows for the provision of an application and appeal procedure for the review of planning obligations on planning permissions which specifically relate to the provision of affordable housing. Other S106 obligations are not included. At the time of the August meeting an application had not been made under this section of the Act.
- 0.6 The new section enables developers to apply to the Local Planning Authority to modify affordable housing requirements set out in existing S106 agreements where the requirements have made the development economically unviable. The

developer is required to provide a revised affordable housing proposal based on prevailing viability which is to be supported by relevant viability analysis. The developer also needs to demonstrate that the previously agreed provision will make the scheme unviable in current market conditions and suggest a revised proposal which will deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision. The revised proposal can be based on adjustments to the tenure or mix of affordable housing, or the phasing of delivery as well as the overall level of affordable housing

- 0.6 An application under s106BA was registered on 9 September 2013. The Council has 28 days to determine the application under Section 106BA (unless both parties mutually agree to extend the date in writing). If the Council does not agree with the developer's proposal for variation of the s106 Agreement, the Act allows developer's the right to appeal to the Secretary of State. The 28 day period for consideration of this application expires on Monday 7 October 2013.

1.0 SITE DESCRIPTION/AREA CONTEXT

- 1.1 The application site (1.163 ha) lies on the west side of Rustat Road. The buildings which formerly occupied the site - the offices and workshops formerly used by the Cambridge Water Company, and the two semi-detached houses which stood further north - were demolished in 2005.
- 1.2 The north boundary of the site is bounded by a wire and close boarded fence, beyond which is a pedestrian and cycle way which links Rustat Road and Clifton Road. On the northern side of the cycleway is a late 1990's development of 24 residential units on three floors (Regency Square).
- 1.3 To the south of the site is a detached house, 37 Rustat Road. The rear garden of 35 Rustat Road, which is much longer than that of 37 Rustat Road, also directly abuts the application site. To the west of the application site is the Clifton Road industrial estate, with units 18 and 21 hard up to the common boundary with the application site.
- 1.4 The site does not have a specific designation in the Cambridge Local Plan 2006.

- 1.5 The site is not within any conservation area. The site falls outside the controlled parking zone.

2.0 THE PROPOSAL

- 2.1 The application is made under s106BA of the Planning Act 1990 and seeks to vary the s106 Agreement that was entered into as part of the consideration of the Outline planning application (ref. 05/1336/OUT) to reduce the affordable housing provision from 30% to zero.
- 2.2 The application is accompanied by the following supporting information:
1. Planning statement by Persimmon
 2. Copy of the s106 agreed as part of the Outline Planning consent
 3. Copy of relevant Decision Notices (Outline and Reserved Matters)
 4. Approved scheme layout
 5. CBRE Viability Assessment dated July 2013
 6. CBRE Viability Appraisals with 30%, 20%, 10% and 0% affordable housing
 7. Copies of notifications to other parties to the s106 Agreement including Cambridgeshire County Council.
- 2.3 The application is brought before Planning Committee because this type of application is not included in the Scheme of Delegation.

3.0 SITE HISTORY

Reference	Description	Outcome
C/02/0582	Outline consent	A/C
05/1336/OUT	Outline consent	A/C
06/0590/REM	153 dwellings	Refused/Appeal dismissed
07/1223/REM	4 three bed townhouses, 108 two bed maisonettes and 31 one bed flats	A/C
09/0137/REM	Landscaping	A/C

4.0 PUBLICITY

- | | | |
|-----|---|-----|
| 4.1 | Advertisement: | Yes |
| | Adjoining Owners: | No |
| | Site Notice Displayed: | Yes |
| | Public Meeting/Exhibition (meeting of): | No |
| | DC Forum (meeting of): | No |
| 4.2 | The legislation does not prescribe the level or type of publicity that is given to this type of application. Officers consider that the publication of the application online (Public Access), its inclusion on the Weekly List, a Press and Site Notice is an appropriate degree of publicity bearing in mind the determination of the application is a technical as opposed to subjective exercise. | |
| 4.3 | Ward Councillors and the Chair of Rustat Neighbourhood Association have also been advised of the submission of the application. | |

5.0 POLICY

- 5.1 See Appendix 1 for full details of Central Government Guidance, Cambridge Local Plan 2006 policies, Supplementary Planning Documents and Material Considerations.
- 5.2 Relevant Development Plan policies

PLAN	POLICY NUMBER
Cambridge Local Plan 2006	5/5

- ### 5.3 Relevant Central Government Guidance, Supplementary Planning Documents and Material Considerations

Central Government Guidance	National Planning Policy Framework March 2012 Circular 11/95 Community Infrastructure Levy Regulations 2010
-----------------------------	---

Supplementary Planning Documents	Affordable Housing
Material Considerations	<u>Central Government:</u> Letter from Secretary of State for Communities and Local Government (27 May 2010) Written Ministerial Statement: Planning for Growth (23 March 2011)

6.0 CONSULTATIONS

Planning Policy

- 6.1 Comments are awaited. These will be reported on the amendment sheet or verbally at the meeting.

Head of Strategic Housing

- 6.2 Comments are awaited. These will be reported on the amendment sheet or verbally at the meeting.

7.0 REPRESENTATIONS

- 7.1 No representations have been received to date. The expiry date for comments is 27 September 2013. Any comments that are received will be reported on the amendment sheet or verbally at the meeting.

8.0 ASSESSMENT

- 8.1 The determination of this application rests on:
- a) an assessment of the evidence that has been submitted to demonstrate that the affordable housing element of the existing s106 means that the scheme is unviable: and
 - b) consideration of the proposals for provision of affordable housing.

- 8.2 The Procedural Note which accompanies the changes to the Act states that the local planning authority may prepare its own viability evidence or provide commentary on the evidence submitted in support of the application.
- 8.3 The applicants have submitted the report prepared by CBRE as part of the mediation process. They have not submitted their own evidence or any additional viability information. That said the CBRE report is based upon information from the applicants and CBRE's own analysis. The advice previously given to Committee in the August report therefore remains relevant and is as follows:

The report indicates that on the basis of the assumptions made by CBRE, which include profit on gross development value at 20% for market housing and 6% on affordable housing, there is a very significant viability 'gap' on the development. The assessment suggests a residual land value for the site of £1.16m. CBRE consider that the expected RLV for the site would be £4m+. CBRE's report includes an analysis of the Rustat Road site with the 'abnormal' costs removed, which produces an RLV of £4.05m. The CBRE report also models the impact on RLV of various alternative planning obligation commitments. This shows, for example, that were the affordable housing component in the development to be reduced to zero, the RLV would rise to £3.36m.

- 8.4 The viability appraisals themselves which underpin the Viability Appraisal indicate that even with zero affordable housing there is a £540,000 shortfall against reasonable viable 'land value' assessed by CBRE. Notwithstanding this Persimmon indicate, in its Planning Statement, that they are willing to progress development on the site to deliver 143 open market units.

Assessment of Evidence Provided

- 8.5 Prior to the August Committee officers were asked to advise on the merits of the CBRE report and whether the conclusions that had been reached were robust. This resulted in the appointment of DVS to carry out a desktop review of the CBRE viability assessment. It was not possible to bring the results of this review before Members at the August Committee meeting but they would have been used to assist in the mediation

process had that continued. A copy of the DVS review is attached at Appendix A.

8.6 The DVS review can be summarised as follows:

Development Costs – Land Value –that the land value should be assessed on a residual basis disregarding the historic purchase price is accepted. However, accrued interest should be excluded as the site value should be as at the date of assessment taking account of costs and values as at that date.

Development Costs

- a. Land value – CBRE has allowed interest to accrue on the residual land value from 2006 when the site was acquired. This should be disregarded as the site value should be as at the date of assessment taking account of costs and values as at that date.
- b. Finance costs – reasonable.
- c. Development Programme – satisfactory.
- d. Build costs – reasonable
- e. Abnormal costs – reasonable but query why blocks are linked and not standalone.
- f. Contingency – 3% would be reasonable (5% is considered high given that a value engineering exercise has been carried out)
- g. Professional Fees – reasonable
- h. Sustainability Code Level 3 – reasonable.
- i. Survey costs – reasonable
- j. Sales, Marketing and Legal Fees – reasonable.
- k. Other Legal Fees – reasonable
- l. s106 Costs – it is understood that these have been agreed

m. Acquisition fees on Residual Land Value – SDLT should be 4% (not 4.8%)

n. Developers Profit - reasonable

Development Values

a. Private Residential – similar to CBRE's figures.

b. Ground rents – acceptable

c. Affordable Housing – cannot comment on BPHA offer which has been reflected in CBRE's appraisal.

d. Residual Land Value – RLV is below what would be expected for residential development land in close proximity to Cambridge City centre.

Overall Assessment and Recommendations by DVS

8.7 Overall, DVS do not disagree with the vast majority of CBRE's input in their viability assessment.

However, their assessed site value is in DVS's opinion a conservative assessment.

Nevertheless, it is evident that there is a need for Cambridge City Council and the applicant to reach an agreement reflecting a compromise on both sides which although may see the reduction in the level of affordable housing delivered will ensure the site is brought forward for development.

If required DVS are prepared to undertake further modelling to assist any negotiations with the applicant as to the appropriate level of affordable housing for this scheme.

The Council's position in the light of the DVS review

8.8 The review by DVS has demonstrated that there are a number of areas where DVS consider the assumptions and information on which the CBRE report is based are reasonable. However there are also areas where DVS consider that more work could

be done so that the actual viability gap is clearer. These relate to the following matters:

- a. Development Costs – Land value
- b. Development Costs – Abnormal Costs
- c. Development Costs – Contingency
- d. Development Costs – Acquisition fees on Residual Land Value
- e. Development Value – Residual Land Value

8.9 With regard to (a), (c) and (d) above, removal of the allowance for interest and a reduction in the allowance for contingency costs and acquisition fees on residential land value would reduce the development costs which would reduce the 'viability gap'. I have asked the applicant to comment on these two issues. I will provide further advice on this point on the Amendment Sheet or verbally at the Committee meeting.

8.10 (b) and (e) above are more complicated to deal with because they are more reliant upon the design details of the scheme and assumptions about the value of residential development land in Cambridge. The advice from DVS is that these two issues could be subject to further analysis.

Development Costs – Abnormal Costs and Design Issues

8.11 With regard to Abnormal Costs, as demonstrated by the CBRE report, these have a significant effect on the viability of the development. These costs principally relate to the provision of a basement car park and piling. The view from DVS is that while the cost of providing the basement is reasonable the overall cost of the scheme is expensive for the proposed 143 units. This opens up the question as to whether an alternative scheme would be more viable which clearly complicates the determination of the application. Under normal circumstances if planning permission is sought the planning authority can only consider what is before them. Following through this logic the evidence that has been submitted demonstrates that the development, including the basement car park and other

abnormal costs is not viable and therefore there is a case for reducing the affordable housing provision to zero.

- 8.12 The Council could try and make a case for refusal of the application on the basis that the evidence is not taking account of an alternative design which could resolve the viability gap. It is not clear however whether an Inspector would be willing to take this into account but the procedures for an appeal, which I address in more detail below, suggest that he would not be able to. DVS have been asked to comment on this point. I will provide further advice on this point on the Amendment Sheet or verbally at the Committee meeting.

Development Value – Residual Land Value

- 8.13 With regard to Residual Land Value the DVS report states that in their view the CBRE's assessed land value is below what would be expected for residential development land in close proximity of Cambridge City Centre taking into account the current buoyant local market. However DVS have not carried out an independent assessment.
- 8.14 The Council could make a case for refusal of the application on the basis that the case is not proven with regard to the actual level of the viability gap and Residual Land Value and more work is needed to demonstrate that this is reasonable. However officers are not yet in a position to recommend this course of action. Further advice will be provided on the Amendment Sheet or verbally at the Committee meeting.

Process following determination of this application

- 8.15 The Council has 28 days in which to make a determination under s106BA unless both parties agree, in writing, to extend this period. To date officers have not requested an extension of time to deal with the application.
- 8.16 Once a determination is made the Council must set out in writing any variation to the affordable housing obligations and give reasons for its decision. In the event that it is determined that a variation is not agreed, clear reasons need to be given. Because this is a very new type of application there are very few precedents for the reasons for other decisions by local

planning authorities and only one refused application is currently at appeal nationally.

- 8.17 If the application is approved then a deed of variation will be prepared and agreed by the Council and the developer stating that no affordable housing is to be provided in the development. This modification would be valid for a period of 3 years from the date of the agreement (this time period is recommended by s106BA to incentivise the development).
- 8.18 If the application is refused (i.e. the Council does not agree with the developer's revised proposal for affordable housing) or if it is not determined then the developer has the right of appeal to the Secretary of State (under s106BC of the Act).
- 8.19 Interim procedures for appeals under s106BC have been set out by Central Government pending a consultation exercise. These set out the following principles:
1. appeals will only consider the issue of viability; there will be no opportunity for decision-makers (or third parties) to reopen questions around the overall acceptability of development proposals;
 2. there will be an expectation that if parties provided evidence at the application stage, they will not seek to rely on new evidence on appeal;
 3. there will be an expectation that appellants will set out their case fully at the outset of their appeal, and that no further information should need to be requested from them;
 4. only signatories to the existing Section 106 agreement will be involved, except in exceptional circumstances;
 5. all parties will communicate by electronic means wherever possible
- 8.20 My view is that as a result of the first principle set out above it would be difficult to base a case on the proposition that an alternative form of development could produce a more viable outcome.
- 8.21 The expectation is that the majority of s106BC appeals will be determined following the written representations procedure. Where a hearing is deemed appropriate this is likely to take the

form of a simple meeting between the Inspector and the parties and would take place shortly after the appeal is lodged.

- 8.22 After an appeal is lodged the Council and other signatories to the original s106 will be invited to give evidence within 2 weeks of notification and the Planning Inspectorate will have 28 days to issue a decision notice following receipt of all written representations.

9.0 CONCLUSION

- 9.1 This application is the first of its kind and is required to be determined within a very tight timescale. For this reason a report needed to be brought before this Committee. However there are number of issues which need to be addressed before a final confirmed officer recommendation can be made. These will be addressed on the Amendment Sheet or verbally at the Committee meeting.

10.0 RECOMMENDATION

To be confirmed on the Pre-Committee Amendment Sheet.

Appendix A – DVS Report dated 20 August 2013