

Report of the Head of Planning & City Regeneration

Planning Committee – 2 July 2019

Planning Application Ref: 2019/1232/106 and 2018/2671/S73

Construction of 80 no. residential units with associated access and landscaping Former Civic Centre Site, Penllergaer

1.0 Purpose of the Report

- 1.1 To seek authorisation to refuse to modify the Unilateral Undertaking made pursuant to S106 of the Town and Country Planning act 1990 (as amended) for the development at the former Civic Centre, Penllergaer.
- 1.2 The request has been submitted under S106A(1)(a) of the Town and Country Planning Act 1990 (as amended).

2.0 Background

- 2.1 An application for the residential development of the former Civic Centre in Penllergaer was submitted in July 2017, prior to the adoption of the Local Development Plan (Ref: 2017/0986/FUL). At the time of the submission, the Adopted Unitary Development Plan was time expired, but was still the development plan for S38(6) purposes. The application was considered to be a departure to the Adopted UDP as it was located outside of the settlement boundary. The site was proposed as an allocated site in the then Emerging LDP.
- 2.2 The Council's Housing Officer requested 30% affordable housing provision on site in line with the UDP (24 units) as part of the application.
- 2.3 The applicant stated that it was not viable to provide 30% provision on site and an Independent Financial Viability Appraisal was commissioned on behalf of the applicant and Council. This indicated that it was viable to provide 20% affordable housing provision on site with 75% being intermediate units to improve the viability on site. Further to this, the land deal was amended (as the Council owned the land) to ensure that the 20% provision could be provided. Permission was subsequently approved in May 2018 with a Unilateral Undertaking submitted by the applicant to secure the affordable housing provision.
- 2.4 Development subsequently commenced on the site, but additional survey work indicated that the proposed Dormouse mitigation was not required as no dormice were found. The applicant subsequently submitted a S73 application to remove the condition regarding dormice. The application was reported to Committee in March 2019 with a recommendation of approval. As a result of unauthorised tree works, the approved landscaping scheme could not be implemented so a revised landscaping scheme was conditioned and permission was granted subject to a Deed of Variation in May 2019.

- 2.5 At the current time, the site is nearly complete. The majority of the dwellings have been constructed but due to the site only having one access, the dwellings have not been occupied at present for site management purposes. It is envisaged that the first occupation will take place towards the end of July 2019.
- 2.6 The applicant (Enzo Homes) has submitted an application to vary the terms of the Unilateral Undertaking which was amended pursuant to a Deed of Variation. As the original application was reported to Planning Committee, any variation of the legal Agreement also needs to be referred to Planning Committee. The applicant wishes to reduce the contribution of affordable housing down from 20% (16 units) to 15% (12 units) following the adoption of the Swansea Local Development Plan (2010-2025) in February 2019 which seeks a minimum of 15% affordable housing provision in the Greater North West area in which the site is located.
- 2.7 The applicant has not submitted any supporting information to support the application save for an amended site layout plan indicating the location of the 12 units proposed. The amendment is sought purely on the basis that the LDP requirement for affordable housing provision has reduced as result of the adopted of the LDP.
- 2.8 As the Deed of Variation was signed in May 2019, the applicant can only vary the terms of the S106 agreement in agreement with the Council.
- 2.9 It appears that the applicant is in breach of the current Unilateral Undertaking at the current time as negotiation with the RSL's has not progressed. This issue has been raised with the applicant and an update has been requested in this regard.
- 2.10 A copy of the 2017 and 2018 Officer Reports to Planning Committee are attached as Appendix A and Appendix B respectively.

3.0 Consultation

- 3.1 The Local Ward Member and the Housing Officer were consulted on the application.
- 3.2 The Council's Housing Officer has commented as follows:

"I can confirm the request to allow for a reduction in affordable housing provision to 15% is not acceptable.

The most recently published Local Housing Market Assessment 2013 (updated in 2015) identifies an affordable housing requirement of 7,400 dwellings across the County and indicates a tenure split with a higher level of social rented to meet the highest need, with the Greater North West zone having a need for 900 affordable housing units. The need for affordable housing within this zone was reflected in the initial planning consultation for affordable housing which required 30% affordable housing onsite with a higher % of social rented units.

This figure was reduced following an Independent Financial Viability Appraisal which indicated that a minimum of 20% was viable onsite. The tenure split was also amended to ensure the financial viability of the site. Therefore a further reduction in the % of onsite affordable housing provision onsite is unacceptable."

- 3.3 The Local Ward Member has commented as follows:
“I object as this site was granted planning consent on the basis of a 20% affordable housing component well before the decision of the Planning Inspector re the LDP was taken in February 2019 and Enzo Homes entered into the agreement with the Council on those terms. I raised matters around financial viability at the planning stage and that the fact that there was no requirement for a 106 contribution to the local school or community (except for a minuscule amount for a tweak to the crossing on the A483) in order to ensure that 20% affordable housing could be delivered.

In addition, despite the recommendations of the Planning Inspector, the Council indicated a very clear intention to pursue a 20% Affordable Housing Policy wherever possible at the time the LDP was approved.”

4.0 Main Issues

- 4.1 On an application for modification by agreement pursuant to section 106A(1)(a) of the 1990 Act the Courts have considered the matters that a Council must have regard to (see R(Bachelor Enterprises Ltd) v North Dorset District Council [2003] EWHC 3006 and in R(Millgate Development Ltd) v Wokingham DC [2011] EWCA Civ 1062).

The Council has to ask itself:

- a. Does the existing planning obligation still serve a useful planning purpose?;
 - b. If it does and modification is proposed, then the question is whether that planning purpose could be equally served by the proposed modification?
 - c. If it would, then the Council should agree to the modification;
 - d. If it would not then the Council should refuse the application to modify.
- 4.2 Any decision by the Council to agree to a modification of the S106 agreement could be the subject of a challenge via Judicial Review however, the decision cannot be appealed.
- 4.3 Firstly, it is considered that the original obligation still serves a useful planning purpose in that there is an identified need for affordable housing in both the County (7,400 units required) and within the Greater North West Area (900 units required) according to the most recent Local Housing Needs Assessment. As the Housing Officer notes, the local need was reflected in the original request for 30% provision on site that was subsequently reduced as a result of viability. In addition, despite the need for a higher proportion of Social Rented units, the mix was altered to provide scope for more intermediate units which generate additional value to the developer.
- 4.4 The requirement for Affordable Housing is clear in both local and national planning policy. Technical Advice Note 2: Affordable Housing (2006) provides practical guidance on the role of the planning system in delivering such housing. The guidance defines affordable housing for the purposes of the TAN and provides advice to local planning authorities on how to determine affordability.
- 4.5 Secondly, the question is whether that planning purpose could be equally served by the proposed modification. It is not considered that the planning purpose could be equally served by the proposed modification as the proposal would result in a reduction of 4 units on site (5% of the total).

- 4.6 When the applicant originally queried the process for the reduction, he was advised to submit supporting information to justify the proposal. The proposed reduction is on the basis that the LDP has subsequently been adopted and Policy H3 indicates a requirement of 15% in the Greater North West area in which the site is located.
- 4.7 As noted in the background, the application was submitted and considered within a different policy context. The applicant decided to submit the application prior to the adoption of the LDP of his own accord. The application was subsequently considered under the Swansea Unitary Development Plan.
- 4.8 Of note, is that following the Independent Financial Viability Assessment, the Council (acting as landowner) offered to amend the terms of the contract of sale to reflect the increased provision of affordable housing despite the site being indicated as viable without this.
- 4.9 The application was subsequently determined prior to the adoption of the LDP and work commenced on site prior to the adoption of the LDP with significant progress made in the last year as the site is nearing completion and first occupants likely to be on site at the end of July 2019.
- 4.10 In addition, and as noted in the ward member comments, whilst Policy H 3 indicates a percentage of 15% affordable housing for this area, the Council Adoption Report sought to seek to secure, on certain developments, higher percentages of affordable housing than the target figures specified in Policy H3 for the North, East and Greater North West housing zones, where this is justified having regard to the level of constraints, planning obligations and other relevant matters. If contributions are less than £5,000 per unit, a higher percentage of affordable housing would be sought. The contributions on site (excluding affordable housing) equate to less than £5,000 per unit (£4,075) so additional affordable housing would have been sought on this site.
- 4.11 In summary, the amendment is only sought as a result of the Adoption of the LDP. The applicant submitted the application 18 months before the LDP was adopted and it was determined 6 months prior to adoption. The applicant subsequently commenced development. At no point since the original application has viability been raised as an issue and the development has progressed to nearing completion which is unlikely if viability was an issue. The original application was determined under the UDP context and the applicant voluntarily submitted a Unilateral Undertaking to provide 20% affordable housing on site. The applicant could have delayed submission of the application until the LDP was adopted if they required certainty on the percentage prior to the decision. The LDP Adoption Statement indicates that a higher percentage of affordable housing would in any event have been sought on the site. Both the Housing Officer and the Local Councillor object to the proposed alterations.
- 4.12 The planning purpose for the legal agreement was to secure 20% affordable housing on site along with its make up in terms of tenure. The planning purpose would therefore not be served by the proposed modification as it would result in the loss of 4 affordable units when there is still a large demand for affordable units within the County and Greater North West area.

5.0 Recommendation

5.1 It is recommended that:

- i) **Members refuse the modification of the Unilateral Undertaking Deed of Variation (planning obligation).**

BACKGROUND PAPERS

Local Government Act 1972 (Section 100) (As Amended)

The following documents were used in the preparation of this report:
Application file, together with the files and documents referred to in the background information section of the appended Development Management committee report.

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