

Report of the Head of Planning & City Regeneration

Planning Committee – 6 August 2019

Planning Application Ref: 2019/1678/106 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 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 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 subject to a Deed of Variation in May 2019.
- 2.3 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 shortly.
- 2.4 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.
- 2.5 In terms of the Affordable Housing, the Officer Report noted that 20% of the development would be affordable units (reduced from 30% on viability grounds) with a tenure split between social (25%) and intermediate (75%) tenure types also accepted on viability grounds. The Council's Housing Department reviewed the revised site layout plan and confirmed their acceptance of the amended housing offer.

- 2.6 Following recent discussions with Coastal (following the Committee Item Report prepared for July's Planning Committee that was refused to amend overall provision), an issue has arisen in that the intermediate tenure properties are restricted to intermediate rental properties in the definitions contained within the S106 agreement. This would not allow Coastal to provide Low Cost Home Ownership (a Welsh Government approved intermediate product) on site. This appears to have been an error when the S106 agreement was originally drafted and the applicant is seeking to vary the S106 agreement to refer to "intermediate tenure" rather than "intermediate rented tenure".
- 2.7 The applicant has also sought the inclusion of a Mortgagee in Possession Clause on the social rented units as this provides RSL's with greater options to finance developments.
- 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 A copy of the 2017 and 2018 Officer Reports to Planning Committee are available to view via the link below (Page 68 onwards – Item Report 5):
<https://democracy.swansea.gov.uk/documents/g8568/Public%20reports%20pack%20Tuesday%2002-Jul-2019%2014.00%20Planning%20Committee.pdf?T=10&LLL=0>

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 that the Housing Service agrees to the request for the inclusion of the Mortgagee in Possession (MIP) clause on the social rented units being provided on this site.

The Housing Service also agrees to the request to remove the word "rented" from within the Section 106 description of Intermediate Housing to enable Intermediate sale products to be provided on site.

Affordable Housing is defined as housing where there are secure mechanisms in place to ensure that it is accessible to those who cannot afford market housing, both on first occupation and for subsequent occupiers. Affordable Housing may be broken down into two categories; Social Rented Housing and Intermediate Housing.

Intermediate Housing provided by Registered Social Landlords covers housing provision where prices or rents are above those of social rented housing but below market housing prices or rents. The Registered Social Landlords can only use a Welsh Government approved Intermediate Rent or Sale Product, therefore the Housing Service supports this variation to provide Intermediate Sale."

- 3.3 The Local Ward Member has commented as follows:
"I am happy with the arrangements you outlined previously which are that 4 houses will be social rented and 12 are Intermediate units which may or may not be rented."

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 the required affordable housing (16 units on site) would still be provided in the same split between intermediate and social rented housing. This would not change as a result of this application.
- 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. The definition of 'affordable housing' for the purpose of the land use planning system as described in the Technical Advice Note (Para 5.1) is housing where there are secure mechanisms in place to ensure that it is accessible to those who cannot afford market housing, both on first occupation and for subsequent occupiers. However, it is recognised that some schemes may provide for staircasing to full ownership and where this is the case there must be secure arrangements in place to ensure the recycling of capital receipts to provide replacement affordable housing. Affordable Housing includes:
- Social rented housing;
 - Intermediate housing.
- 4.6 Social rented housing is that provided by local authorities and registered social landlords. Intermediate housing is that where prices or rents are above those of social rent but below market housing prices or rents.
- 4.7 As part of the original application, due to viability concerns, it was agreed that the Affordable Housing provision on site would be 20% (16 units); of which 25% would be social rented units and 75% would be intermediate units. This requirement was replicated again in the S73 application approved earlier this year.

- 4.8 The term “intermediate rented housing” was contained within the first S106 agreement and the terminology has followed through into subsequent agreements. It was not the intention of the Housing Officer or Committee in approving the application to further restrict the intermediate offering to intermediate rented only.
- 4.9 The Housing Officer has not objected to the proposals, and has clarified that Pobl would be using an Intermediate sales product approved by the Welsh Government. For clarification, Low Cost Home Ownership is not the same as low cost market housing referred to in TAN 2. The Local Councillor has no objections either.
- 4.10 The planning purpose for the S106 agreement was to secure the percentage and make up of affordable housing. The planning purpose would therefore still be served by the proposed modification as a WG approved intermediate product would still be provided.
- 4.11 In light of what was an apparent error when preparing the S106 agreement in the first instance, the intention of the applicant is the same as was reported to Planning Committee for the original application. 75% of the 16 affordable units would still be “intermediate units” which is considered acceptable. The remainder of the Affordable Housing provision (25%) would be social rented units.
- 4.12 The applicant has also requested that a Mortgagee in Possession (MIP) Clause is inserted into the document for the Social Rented units. These are clauses that allow a (commercial) lender who has repossessed the property to operate free of restrictions which are placed upon individual properties. Essentially, a MIP occurs when a borrower defaults on their repayments and the lender subsequently takes possession of, and sells, the property.
- 4.13 This MIP Clause would only apply to the Social Rented units which would be owned by the Registered Social Landlord (likely to be Coastal). In the first instance, it should be noted that repossessions are a relatively rare event and the RSL would need to become insolvent before this would come into effect.
- 4.14 In addition, the MIP Clause would state that the MIP can only operate freely (and unencumbered by the affordable housing restriction) after a 3 month period. These clauses were previously resisted by Local Planning Authorities as there is a chance, albeit very small, that the affordable housing unit(s) could be lost permanently.
- 4.15 Since the financial crisis, and tighter lending requirements, lenders are increasingly looking at S106 agreements to ensure that there is provision to recoup their money in the event of default. RSL’s have discussed this issue directly with the Welsh Government and they have indicated support for this approach and advised that they are likely to step in in such a situation if an RSL got into difficulties to avoid the loss of affordable housing stock. This 3 month period is considered sufficient time to resolve the issue and is reasonable.
- 4.16 For clarity, these clauses are not accepted on Intermediate tenure units.

5.0 Recommendation

5.1 It is recommended that:

- i) **Members authorise the modification of the S106 agreement (planning obligation) to amend the terminology to omit the term “rented” from the definition of “intermediate housing” and update the remainder of the agreement accordingly so that the applicant can utilise other WG approved intermediate products and provide a MIP clause for Social Rented units only.**

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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