Parish: Dalton Committee Date: 11 January 2018
Ward: Sowerby & Topcliffe Officer dealing: Mr Mark Russell
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17/02464/S106

Request under Section 106A(1) of Town and Country Planning Act 1990 for variation of S106 agreement dated 6 June 2013
For Whitfield Homes Limited

This request is referred to Planning Committee as it seeks to alter the terms of a planning obligation that were set by the Committee.

1.0 SITE DESCRIPTION AND PROPOSAL

1.1 This request relates to a housing site on the northern edge of Dalton, on the site of a former turkey factory.

1.2 The request is to vary the terms of the S106 relating to planning application 12/01346/OUT and 13/02560/REM (called "the first application" or "the first permission" in this report) for 36 dwellings, comprising 22 market units and 14 affordable units. Only nine market units and seven affordable units have been built; the remainder of the site is subject to a later permission (16/00511/FUL, called "the second application" or "the second permission" in this report). Dwellings are under construction pursuant to the second permission and therefore no more dwellings will be built under the first permission.

1.3 The request is made under a provision that does not afford a right of appeal; the formal application process that would provide a right of appeal can only be used once the agreement has been in place for five years.

1.4 The terms of the S106 agreement that this request seeks to vary can be summarised as follows:

- Education Contribution of £54,384.00 - 50% payable prior to the occupation of 7th market housing unit and 50% prior to the occupation of the 14th market housing unit; and
- Off Site Public Open Space, Sport and Recreation Contribution of £140,335.00 - 50% payable prior to the occupation of 7th market housing unit and 50% prior to the occupation of the 14th market housing unit.

1.5 The requested modification to the section 106 agreement put forward by the developer can be summarised as follows:

i. To delete the following definition in the Section 106 Agreement in its entirety: "Education Contribution" means the sum of fifty four thousand three hundred and eighty four pounds (£54,384) to provide additional educational facilities within the Thirsk Hinterland as required as a consequence of the Development;

ii. To delete the definition of "Off-site Public Open Space, Sport and Recreation Contribution" and replace it with the following: "Off Site Public Open Space Sport and Recreation Contribution" - means the sum of thirty three thousand two hundred and fifty seven pounds (£33,357.00) towards the upgrade of public open space sport and recreation facilities within the Dalton Area or if

such upgrade is required in this area, within the Thirsk Hinterland as required as required as a consequence of the Development";

iii. To delete the trigger points for payments of the public open space, sport and recreation contribution, to be replaced with text providing for the sum being offered by the developer to be paid on the completion of the amended Deed; and

iv. To delete the trigger points for payments of the education contribution in their entirety. For the avoidance of doubt, the part of the agreement relating to education contributions would no longer exist.

1.6 The deletion of the education contribution would require the consent of North Yorkshire County Council as a party to the S106 agreement but the variations proposed in respect of the off-site public open space, sport and recreation contribution are to be considered by this Council alone.

2.0 RELEVANT PLANNING AND ENFORCEMENT HISTORY

2.1 12/01346/OUT - Outline application for the construction of 36 dwellings including means of access; Refused 28 November 2012, appeal allowed 4 July 2013.

2.2 13/02560/REM - Reserved matters application for the construction of 36 dwellings including means of access; Granted 20 February 2014.

2.3 16/00511/FUL - Construction of 27 dwellings with associated garaging, car parking and landscaping to existing road layout; Granted 20 September 2016.

2.4 16/01018/S106 - Variation of Section 106 agreement associated with application 12/01346/OUT (affordable housing contribution); Pending consideration.

3.0 RELEVANT PLANNING POLICIES

3.1 The relevant policies are:

Core Strategy Policy CP1 - Sustainable development
Development Policies DP2 - Securing developer contributions
National Planning Policy Framework - published 27 March 2012

4.0 CONSULTATIONS

4.1 Parish Council - Objects on the following grounds:

The original Agreement dated 6 June 2013 stated that "Prior to the occupation of the 7th Market Housing Unit to pay to the District Council 50% of the Off-Site Public Open Space and Recreation contribution" which amounted to £70,167.50. As 7 market value houses were built and sold before the end of February 2016 for full market value, we feel that this met the criteria for the payment of £70,167.50. Because the first half of the project was not fully completed, with this in mind, Dalton Parish Council considers that the £70,167.50 should be recalculated as follows: The original planning permission was for 36 houses. Taking out the 14 affordable houses, this leaves 22 market value properties. The first building phase had completed 9 market value houses which is 2 short of half of the 22. Therefore, we consider the following formula for working out the S106 contribution to be fair: £70,167.50 divided by 11 = £6,378.86 times 9 = £57,409.74.

We would also like to point out that, in the Application for Variation document, reference is being made to S106 and CIL monies as applying to both planning

applications but the two planning applications are quite separate issues. The S106 monies were due prior to any mention of the second planning application which invoked the CIL payments.

4.2 Public comments - None received.

4.3 North Yorkshire County Council – No comments as yet.

5.0 OBSERVATIONS

5.1 The key issue to be considered by this Council is whether the proposed changes to the public open space, sport and recreation contribution would deliver an appropriate public benefit. The "first permission" to which the S106 agreement relates was determined with regard to development plan policies that require proposals for new housing to make adequate provision for the increase in demand on local infrastructure and services they will create.

5.2 As part of the assessment it is necessary to consider (i) whether viability evidence should be given weight at this stage of the development process; and (ii) whether the contribution that was due prior to the occupation of the 7th market unit is proportionate to the nine market units that have been built.

5.3 The nature of the request, which is not in a form that affords a right of appeal, is effectively asking the Council to reconsider its position as a party to the agreement. As noted earlier, an application that would give rise to a right of appeal, when the planning merits could be considered by an inspector, cannot be made until the agreement is five years old, i.e. in June 2018.

5.4 As matter currently stand, the developer is in breach of the agreement for the following reasons:

- Payment of £70,167.50 to the District Council for the upgrade of public open space, sport and recreation facilities within the Thirsk hinterland required as a consequence of the development should have been made prior to the occupation of the 7th market unit. Nine market units are occupied and no payment has been made; and
- Payment of £27,192.00 to North Yorkshire County Council for additional education facilities within the Thirsk hinterland required as a consequence of the development should have been made prior to the occupation of the 7th market unit. Nine market units are occupied and no payment has been made.

5.5 The second breach is for the County Council to consider in its own right as a party to the S106 agreement and therefore the analysis below is concerned with the public open space, sport and recreation contribution only.

<u>The developer's position</u>

5.6 The developer is seeking to modify and vary the provisions of a section 106 agreement under Section 106A(1) of Town and Country Planning Act 1990 relating to planning application 12/01346/OUT and 13/02560/REM ("the first permission") for 36 dwellings, comprising 22 market units and 14 affordable units. Only nine market units and seven affordable units have been built; the remainder of the site is subject to a later permission (16/00511/FUL, "the second permission") and therefore no more dwellings will be built under the first permission.

5.7 The developer has submitted a supporting statement setting out their reasons for seeking to change the contributions and explaining their alternative offer, which can be summarised as follows:

(a) They have made a CIL payment of **£174,491.34**. Of this payment 15% is paid automatically to Dalton Parish Council **(£26,173**). As part of the viability assessment in relation to 16/00511/FUL (the second permission) they committed to make a total contribution of £194,719 in relation to the overall development of the site by the first permission and the second permission which comprised the CIL contribution of **£174,491.34** and an additional amount of **£20,227.66** was the same amount as Section 106 obligations for the first permission; that being the education contribution of **£54,384** and the off-site public open space sport and recreation contribution of **£140,335** (not including the affordable housing provisions);

(b) The Section 106 agreement provided for 50% of the education contribution and 50% of the off-site public open space sport and recreation contribution amounts to be paid prior to the occupation of the 7th market unit;

(c) Following the implementation of the second permission, the developer has only built and sold 9 of the 22 market units pursuant to the first permission. As no further housing units are to be constructed under the first permission, the payments due on the occupation of the 7th market units are disproportionate to the to the total number of units covered by the first permission and the obligations in the Section 106 agreement, i.e. these payments are frontloaded;

(d) Therefore it is only reasonable that as a matter of principle only a proportion attributable to the market dwellings occupied should be the starting point; this proportion of the total figure being so **£57, 409.77** for off-site public open space sport and recreation contribution and **£22,248** (rounded up) for education contribution, giving a total of **£79,657.77**;

(e) In the context of the viability statement and previous discussions with officers this would mean the additional charge would be **£79,657.77 - £20,228 = £59,429.77**;

(f) As Dalton Parish Council will receive a contribution from CIL of £26,173, then if that amount is deducted from the proportionate section 106 contributions then that would leave a figure of **£31,256.77**;

(g) The developer is prepared to increase its original payment figure (in addition to the CIL contribution figure) from **£20,228 to £33,257**. The sum paid directly for the recreation facility would be **£26,173** through CIL and an additional payment of **£33,257** making a total payment of **£59,430** available to the Parish Council for its facilities;

(h) The District Council has received a CIL payment of **£174,491.34**. If the Parish Council's share is deducted of **£26,173** Parish amount, this leaves **£148,318** available for payment of a contribution to the County Council for education and for other purposes determined by the District Council. If the education contribution for the whole site in the first permission **(£54,384)** is deducted the District Council still has **£93,934** of the CIL to expend; and

(i) The total contribution to infrastructure by the applicant over the development (by way of the first and second permissions) has been increased to **£207,748.34** from the **£194,719** that was the total infrastructure/section 106 obligation contribution that was part of the second permission.

Analysis

5.8 Parts (a) and (f) – (i) of the developer's case rely upon consideration of CIL payments due from the second permission. However, their request can only reasonably be related to the development permitted and built under the first permission, to which the S106 payments they wish to vary relate. It is appreciated that the developer views their site as a single development but there are two planning permissions and the developer is seeking to count contributions from the second permission in renegotiating payments that are due under the first.

5.9 It is understood that part of the developer's rationale is to make an offer based upon their understanding of the funding requirements for the new football pitch that the Parish Council wishes to create, therefore counting CIL receipts from the second permission already paid to the Parish Council. However, the policy justification for the public open space, sport and recreation contribution, reflected in the wording of the agreement, is related to facilities within the Thirsk hinterland, not necessarily Dalton, and not to a specific project.

5.10 The developer has referred to viability evidence that was presented to planning officers at the time of the second application. This was considered in good faith and in consideration of the public interest in trying to avoid the supply of new housing becoming stalled. However, those discussions were not binding and only the affordable housing element of the S106 agreement was made the subject of formal renegotiation at that time (application16/01018/S106). The only area of viability assessment that was directly relevant to the second permission was in respect of affordable housing and as a result none of the 27 units granted under the second permission are affordable.

5.11 Government planning policy on viability is set out in paragraph 173 of the National Planning Policy Framework (NPPF), which states that sites "should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened". The paragraph also states that "infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable".

5.12 This is expanded upon in the Government's online planning practice guidance, which states "Decision-taking on individual applications does not normally require consideration of viability. However, where the deliverability of the development may be compromised by the scale of planning obligations and other costs, a viability assessment may be necessary." The guidance also states that "A site is viable if the value generated by its development exceeds the costs of developing it and also provides sufficient incentive for the land to come forward and the development to be undertaken".

5.13 As the developer has acquired the site, there is no need to consider whether the S106 agreement prevents the land coming forward. It only remains to be considered whether it risks stalling the delivery of housing. The development to which the open space, sport and recreation contribution relates, i.e. the first permission, is not at risk of stalling because it has been superseded by the second permission. As the text from the Government guidance indicates, viability must be justified by reference to the incentive to develop and there is no need for an incentive for a permission that has been built out as far as it ever will be.

5.14 The evidence submitted by the developer does not include any indication that the implementation of the second permission is at risk because of the contributions due from the first permission. Even if such a claim were made, it is questionable whether

the terms of a pre-existing planning permission should be renegotiated in order to make subsequent one viable. It is open to a developer to seek relief from CIL on the basis of a pre-existing S106 obligation and that course of action could have been taken when the second permission was sought, but was not. It should be noted that prior to submitting this request, the developer was asked to identify precedents in the form of appeal decisions or court judgements supporting their case for relief in respect of a permission that has been abandoned in favour of another but they have not done so.

5.15 Furthermore, it is questionable whether the developer would abandon the opportunity to make a return on the remaining part of the second permission given that the upfront site acquisition and infrastructure costs have been met. At the time of writing, information on the developer's web site indicates that 13 of the 27 dwellings in the second permission have been sold.

5.16 In view of this, the question before the Council is whether the public interest would be better served by securing the open space, sport and recreation contribution due in accordance with Development Plan policies or by helping the developer to maintain profit or recoup losses. On the basis of the evidence presented, which does not demonstrate that the delivery of housing is at risk, it can only reasonably concluded that the public interest lies with securing the contribution.

Proportionality

5.17 In points (c) and (d) above the developer argues that the contributions that were due prior to the occupation of the 7th market unit are disproportionate because the trigger points for payment were frontloaded. The payments that were due prior to the occupation of the 7th dwelling were for 50% of the sums due from all 22 market units permitted, and therefore equate to 11 units, two more than have been built under the first permission.

5.18 Development Plan policy DP2 refers to securing developer contributions where they are necessary to ensure the achievement of sustainable development where the need is generated by new development. Policy DP2 refers to Government advice in a circular that has been replaced by the three tests for planning obligations in paragraph 204 of NPPF. The third of these tests is that a S106 agreement should be "fairly and reasonably related in scale and kind to the development". Additionally at paragraph 205 the NPPF states that "Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled". It is therefore considered appropriate to review the open space, sport and recreation sum due, to assess whether it is proportionate to the number of market units that have been built under the first permission.

5.19 Dividing the £140,335.00 sum for open space, sport and recreation due from all 22 market units in the first permission by the nine that have been constructed and occupied would result in a revised payment of £57,409.77, a reduction of £12,757.73. It is considered that this would be a reasonable adjustment because otherwise the developer would be forced to make contributions for units they have not built. As noted earlier, the developer would have the right to seek formal variation of the agreement, with an attendant right of appeal, from June 2018.

6.0 RECOMMENDATION

6.1 It is recommended that:

(a) The developer is invited to enter a Deed of Variation to reduce the open space, sport and recreation contribution to £57,409.77, proportionate to the nine

dwellings built and occupied under planning permissions 12/01346/OUT and 13/02560/REM, to be paid on completion of the Deed of Variation; and

(b) Officers are authorised to commence proceedings to recover the open space, sport and recreation sum due under the S106 agreement dated 6 June 2013 if the Deed of Variation specified in (a) is not completed by 23 February 2018.