

Agenda Item 8

Development Management Committee

12 January 2010

KAL



Amendment to S106 Agreement on the Exmouth Docks Development

Summary

The Section 106 Agreement for the Regatta Court and Spinnakers phase of the Exmouth Docks development prevents the use of public subsidy to facilitate the affordable housing requirement this development has to deliver – which may be delivered off-site if necessary. In the current economic climate the use of public subsidy has become essential to the delivery of all affordable housing and the relevant clause is now inhibiting an off-site affordable housing scheme proposed by the developer of the Exmouth Docks scheme, at Fore Street, Exmouth. It is proposed that the relevant Section 106 Clause be varied for a time limited period (12 months) to encourage the development to proceed.

This in turn has thrown up the issue of having to re-negotiate affordable housing and other Section 106 requirements during the economic recession and in order to aid negotiations it is proposed that the delegation scheme be amended to allow the Head of Planning and Countryside Services in consultation with the Head of Legal, Democratic and Licensing Services, the relevant Portfolio Holder and the Chairman of Development Management Committee to amend Section 106 Agreements as appropriate, where such changes will bring forward development earlier than would otherwise be the case and/or will improve the viability of the development.

Recommendation

- 1 Subject to the requirement of Clause 7 of Schedule 1 of the 2004 Section 106 Agreement for Exmouth Docks that all reasonable endeavors have been gone through to achieve Clause 6, that Clause 6 be varied, for a period of 12 months only, to require affordable housing to be delivered, but without the restriction that no public subsidy be used for the purpose.
- 2 That the Development Management Committee recommend to the Full Council that the Head of Planning and Countryside Services, in consultation with the Head of Legal, Democratic and Licensing Services, the Portfolio Holder for Communities (in cases relating to affordable housing) and the Chairman of Development Management Committee and Ward Members, be granted delegated powers, under the Council's Constitution, to authorise amendment or variation of Section 106 Agreements where satisfactory evidence has been provided that the viability of a development scheme has been adversely affected by the requirements of the associated Section 106 Agreement and that the variation would be likely to deliver the alternative provision within the following twelve months, after which the agreement would default to its original provisions if the variation had not been complied with.

a) Reasons for Recommendation

This is in order to help facilitate delivery of the Council's top priority of affordable homes.

b) Alternative Options

1. The request to vary the Section 106 Agreement could be refused but the delivery of affordable homes would be affected.

2. The 'reasonable endeavours' requirement could be judged to have been exhausted and the bond for £450,000 could be triggered and the Council could use the monies to deliver affordable homes but the timescale would be longer.

c) Risk Considerations

By reducing the timescale for the variation to 12 months, the risk should be minimised.

d) Policy and Budgetary Considerations

N/A

e) Date for Review of Decision

12 months time if necessary.

1.0 Background

- 1.1 In July 2004 a Section 106 Agreement was entered into between Eagle One Homes Limited and East Devon District Council which required that:

- "1. That affordable housing shall be provided off-site and shall comprise of 20% of the total number of units agreed in any application for approval of reserved matters or planning permission to be built as part of the final phase of the development on the site [Exmouth Docks Development], rounded to the nearest whole unit.....
3. The affordable housing shall comprise (unless otherwise agreed in writing by the Council):
 - 3.1 50% of the affordable housing on the site shall not be occupied other than under an affordable rent tenancy and
 - 3.2 50% of the affordable housing on the site which shall not be occupied other than under either an affordable rent tenancy or an equity sharing lease.....
6. Subject to paragraph 7, the last 10 open market dwellings on the site [Exmouth Docks] shall not be occupied until the owner has constructed, completed and transferred the affordable dwellings to an RSL for a consideration which does not include the use of any public subsidy funds or grant (other than for adaptations for disabled persons or other special circumstances as agreed in writing by the Council) and the Council has confirmed in writing that it is satisfied such a transfer has taken place.
7. Subject to the Council first confirming in writing that it is satisfied:
 - a) That the owner has made reasonable endeavors to comply with the requirements of paragraph 6 and that it is has been unable to do so because of matters not under its control.....
 - b) That the Council has received a satisfactory bond in a form approved by the Council to secure the delivery of the affordable housing in accordance with the terms of this Agreement in the sum of £450,000 index linked to RPI from the date of completion of the bond and that the Council consents to the last 10 dwellings on the site being occupied.

then the owner may occupy or permit to be occupied the last 10 dwellings on the site from the date of this written confirmation (the Council's consent)."

- 1.2 The original outline consent for the Exmouth Docks Development had not secured any affordable housing and consequently all subsequent reserved matters applications submitted in line with the outline planning consent only delivered private market housing. However the time limit for submitting reserved matters applications ran out before the developer could submit them for the final phases of the development known as Regatta Court and Spinnakers. The developer/owner of the site therefore submitted an application to the Council under Section 73 of the Planning Act to vary condition 1 of the consent so as to extend the time limit for submission of the final reserved matters application. This Section 73 application was refused by the Council and the owner submitted an appeal. However before the appeal could be heard the Council negotiated with the developer/owner to secure planning benefits from a future development on the final phase and the 2004 Section 106 Agreement referred to above secured an affordable housing requirement and a public open space contribution.
- 1.3 Clauses 6 and 7 quoted above from the Section 106 Agreement require the developer to provide any of the affordable housing quote without access to public subsidy. If he can prove that all reasonable endeavours have been undertaken to deliver without public subsidy and he provides the Council with a bond for the sum of £450,000 (index linked), then he may proceed with the occupation of the last 10 dwellings on the site, subject to the Council's written confirmation.
- 1.4 The development of Regatta Court is now well under way although the Spinnakers development has been the subject of alternative schemes yet to be determined. The final number of affordable housing units that is required from the Exmouth Docks development is as yet therefore not quite resolved as it is on a percentage basis, but dependant on the Spinnaker scheme being finally approved will probably be in the order of 11 dwellings.
- 1.5 The developer has meanwhile secured a site at Fore Street in Exmouth near the former gas works in order to deliver the off-site affordable housing requirement. The scheme has planning permission for 18 units and the developer has sought and obtained agreement from the Council that any units delivered through an RSL above the requirement for Exmouth Docks can be 'banked' against any future scheme that he undertakes in Exmouth.

2.0 The Fore Street site

- 2.1 Negotiations had been undertaken with an RSL to take on the affordable housing at the Fore Street site but in order to do so it was necessary to bid for public subsidy from the Housing and Communities Agency (HCA).
- 2.2 The (expected) 11 units required as a direct result of the Exmouth Docks development are effectively constrained by the terms of the Exmouth Docks Section 106 Agreement ie they should not be the subject of public subsidy. The developer therefore has approached the Council with a view to a variation of the relevant Clauses of the 2004 Section 106 Agreement in order to remove the requirement that the affordable housing be delivered without public subsidy.
- 2.3 Unfortunately in the interim the RSL the developer was working with has now withdrawn from the scheme and the developer is seeking an alternative RSL partner. However the question of the restrictive clause remains pertinent.

3.0 Delivery of Affordable Housing

- 3.1 Whilst in 2004 it was common practice to require that affordable housing be delivered without the need to draw on public funds ie the developer carried the cost in total of the requirement for affordable housing, economic circumstances have changed in the interim and that requirement is no longer incorporated in Section 106 Agreements for affordable housing delivery. With the economic downturn the only way to deliver affordable housing is now with access to funds from either the HCA and/or through Local Authority subsidy.

- 3.2 It could be argued that the Fore Street development whether it be for 11 or 18 affordable units could be delivered as an independent affordable housing development scheme not constrained by a legal agreement associated with another site. However the connection between the Fore Street site and the Exmouth Docks development is well known and will be an issue in terms of clearing the Section 106 Agreement Clauses for the Exmouth Docks development in due course. It could also affect how the HCA assess the grant bid where the requirement is under a Section 106 Agreement to be delivered without public subsidy and therefore the HCA could feel no obligation to assist as it can deliver no added value by the grant as the requirement is a fixed component anyway.

4.0 Best Endeavours

- 4.1 The developer of Exmouth Docks and of the Fore Street Site, Eagle One has been asked to provide open book access to the construction build economics including the transfer values to RSLs. The developer initially did not provide this information and an alternative request was made that evidence was provided by the RSL involved as to its inability to finance the project in the absence of public subsidy. The information requested was rental income, borrowing capacity, transfer values and construction costs with an estimation of the shortfall involved if the RSL was to do the construction itself and the first three if it was having transferred to it completed units. This was not forthcoming either. However the developer has subsequently provided some preliminary appraisal viability figures for the development of Fore Street which includes the transfer offer made by the Housing Association involved originally with no grant attached to at that time the 10 units. These figures show a substantial loss would be involved in the development. There are abnormal construction costs involved in this particular site given its former use as a gas works but added to this has been the requirement to increase the sustainability value of the properties through the Code for Sustainable Homes which the HCA is currently setting at Code Level 3. However the developer has argued that there has been a rise in construction costs during the recession which is not in fact the case. From evidence we are receiving elsewhere, construction costs are falling.
- 4.2 However whatever the precise details of the figures there is clearly a position where this scheme is not viable without public subsidy and indeed this is the case for all other affordable housing schemes throughout the district which we are aware of.
- 4.3 The alternatives then are to accept the financial settlement in default of the developer not providing the affordable homes which is the sum of £450,000, or to agree a Deed of Variation on the 2004 Section 106 Agreement to remove the requirement that the houses are built without public subsidy for a specified period.
- 4.4 The sum of £450,000 would allow the Council to proceed with building affordable homes if a site is available but not in the immediate future. The alternative of varying the Section 106 Agreement would allow the developer to proceed and could deliver 18 affordable homes of which 11 are directly linked to the Exmouth Docks development, for a period of 12 months. If the developer does not deliver within that timescale the option of reverting to the financial settlement still exists if Eagle One cannot provide the 11 required units without subsidy.
- 4.5 It is proposed that the Council agree to a temporary variation to the relevant Clause of the 2004 Section 106 Agreement in order to facilitate an early delivery of affordable homes for Exmouth.

5.0 General Issues

- 5.1 The issues explained above have wider implications for other developments in the district where the potential lies for developers to come back and re-negotiate their Section 106 Agreements in the light of the changed economic climate. It is not anticipated that we will be looking to vary all Section 106 Clauses to remove the requirement they are delivered without public subsidy; the Exmouth Docks/Fore Street example is considered to be quite a rare scenario as most development is relying on legal agreements drawn up since that time, which no longer impose the 'no public subsidy' requirement.

- 5.2 In order to overcome the necessity to bring individual reports back on each case where an approach is made to re-negotiate a Section 106 Agreement it is recommended that delegated powers as described in recommendation 2 are secured to deliver the ability to negotiate as and when circumstances require, variations to or alterations of, existing Section 106 Agreements.

Legal Implications

The relevant chronology and legal implications of agreeing the Section 106 variation are explained in the report. The recommendations would be consistent with advice contained in current guidance, for example. HCAs Good Practice Note, Investment and planning obligations: Responding to the downturn. S.106A of the Town and Country Planning Act 1990 gives the Council power to modify S.106 obligations by agreement with the developer. The variation needs to be by deed (prepared by the legal team) and the statutory requirements complied with.

Financial Implications

The financial implications are included in the report.

Consultation on Reports to the Executive

1. Consultation with the Virtual Housing Team.

Background Papers

1. Investment and Planning Obligations – Responding to the Downturn
2. Section 106 Agreements relating to the development the subject of this report.