Report to the District Development Control Committee

Epping Forest District Council

Date of meeting: 26 June 2013

Subject: **Determination of Applications to Modify, Remove or Discharge Affordable Housing Obligations – Growth and Infrastructure Act 2013**

Responsible Officer: **Alan Hall, Director of Housing (01992 564004)**

Democratic Services Officer: **Simon Hill (01992 564249)**

Recommendations:

(1) That the provisions of the Growth and Infrastructure Act 2013, relating to the new ability for developers to apply to have previously-agreed affordable housing obligations within signed Section 106 agreements modified, removed or discharged, together with the resultant implications for the Council, be noted;

(2) That the Act's requirement for the Council to determine such applications and issue its formal Determination Notice within 28 days of request be noted;

(3) That authority be delegated to the Director of Housing to determine applications received under Section 7 of the Growth and Infrastructure Act 2013 to modify, remove or discharge affordable housing obligations, subject to:

(a) Prior consultation with the Director of Planning and Economic Development and the Chairman (or in his/her absence, the Vice-Chairman) of the relevant Area Plans Sub-Committee; and

(d) Details of the application and the resultant Determination being reported in the following issue of the Council Bulletin; and

(4) That applicants be required to meet the Council's full costs in appointing a consultant to validate their revised affordable housing proposals.

Background:

1. Whenever planning permission is granted by the Council that includes planning obligations relating to the provision of affordable housing, whether it be the provision of affordable housing on the development site or the provision of a financial contribution in lieu of on-site affordable housing, the Council's requirements are included within an agreement under Section 106 of the Town and Country Planning Act 1990 (a "Section 106 agreement"). Even when the proposed Community Infrastructure Levy (CIL) is introduced, Section 106 agreements will continue to set-out the affordable housing requirements, since affordable housing will not be covered by the CIL.

2. The Government has recently stated that it believes the affordable housing requirements within previously-negotiated Section 106 agreements can be an obstacle to agreed developments going ahead, and that the Government is keen to see such development coming forward, in order to assist the economy. Within Section 7 of the recently enacted Growth and Infrastructure Act 2013 (25th April 2013), the Government has therefore introduced a provision to require local planning authorities (LPAs) to formally determine applications from developers to modify, remove or discharge affordable housing requirements within previously-agreed Section 106 agreements.

Growth and Infrastructure Act 2013

3. The new Act amends the Town and Country Planning Act 1990, through the addition of three new sections relating to planning obligations that contain an affordable housing requirement. However, the Act states that these three new sections will be repealed after 30 April 2016 (i.e. three years). The reason for this is that the Government wants this new ability for developers to seek to modify, remove or discharge planning obligations relating to affordable housing to be time-limited - only until the time it expects new house-building to no longer require this flexibility. It should be noted that "rural exception site" planning obligations are excluded from the provisions of the new Act.

4. The new Act also requires that LPAs must have regard to any Guidance which the Secretary of State may issue. Such Guidance has since been issued ("Section 106 affordable housing requirements – review and appeal" – April 2013).

5. The Guidance states that the Act's requirements do not replace the existing powers to re-negotiate Section 106 agreements voluntarily. However, under the new provisions, a person responsible for complying with an affordable housing requirement can apply to have the requirement:

- Modified or replaced;
- Removed from the obligation; or
- Discharged (where the obligation only relates to affordable housing)

6. If the LPA accepts that the proposed development has become unviable due to the current affordable housing requirements, the LPA must consider and apply one of the above options, so that development becomes viable. If the LPA does not accept that the development has become unviable, the LPA must formally determine that the affordable housing requirements are to continue.

7. Modifications to affordable housing requirements cannot be more onerous than the original requirements, although determinations of *subsequent* applications can be more onerous, although they must not be unviable.

8. LPAs must give formal notice of its determination within a period set by the Secretary of State (or within 28 days of request if the period is not prescribed), although a longer period can be agreed in writing by both parties. Under the Act, the Secretary of State can regulate on the form and content of applications and determination notices.

Viability

9. The Guidance states that applications to revise affordable housing obligations should contain a revised affordable housing proposal and be supported by viability evidence. It states that a development is viable if the *current* cost of building the whole site (at today's prices) is less than a level that enables the developer to both sell market units and make a "competitive return".

10. It is the responsibility of the developer to demonstrate that the existing affordable housing obligation(s) make the scheme unviable, and the developer can propose adjustments to the tenure or mix of the affordable housing, or the phasing / timing of the affordable housing provision or financial contributions. However, any modified obligation should still deliver the maximum level of affordable housing possible.

11. The Guidance states that the evidence provided should preferably be an "open book review" of the original viability appraisal. However, where there was no original appraisal, the developer must provide evidence of why the existing scheme is unviable and submit a proposal to make the scheme viable.

12. At appeal, if developers are unwilling to work on open book basis, they can submit "general evidence of changes". However, presumably in an attempt to encourage developers to be open about developers their costs and income, the Guidance states that developers must consider if this approach would provide sufficient evidence for the planning inspector to decide on viability.

13. The Guidance also states that developers should not be required to provide new viability appraisals, but should submit revised viability appraisals, using the same methodology as their original. They should also:

- Make the same policy assumptions as original;
- Assume all other obligations remain the same; and
- Not seek to re-open policy issues

14. The LPA can undertake its own viability appraisal and, if necessary, submit its appraisal to the Planning Inspector on appeal.

Appeals

15. Planning applicants can appeal to the Secretary of State (i.e. the Planning Inspectorate on his behalf), within the timescale set by the Secretary of State (or 6 months if not prescribed), if the LPA:

- Fails to give notice of determination within the required time limits
- Determines that there should be no modification to the obligation(s)
- Modifies planning obligation(s) differently from the submitted application

16. If, as a result, the Secretary of State modifies the obligation(s), the modifications will <u>not</u> apply to uncompleted (parts of) developments after three years of the date the applicant was notified of the Secretary of State's determination. The Government has stated that this provides an incentive for developers to deliver within this period.

Implications for the Council

11. In view of these new provisions, it is anticipated that some developers will seek to renegotiate previously-agreed affordable housing obligations within signed Section 106 agreements, especially those negotiated some time ago.

12. It is therefore very important that the Council is ready and prepared to robustly evaluate any such applications, and (if necessary) modify, remove or discharge affordable housing obligations, within the required timescale.

13. The Council already receives viability appraisals submitted with planning applications, where developers are of the view that the Council's affordable housing requirements should not be fully met, or even met at all. This is usually for one of two reasons:

- The developer is of the view that it would be unviable to provide the required level of affordable housing referred to within the Local Plan (generally 40% for urban areas; 50% for rural areas) – either because the overall costs to the developer would be higher than the income, or the residual land value would be lower than the existing use value; or

- The developer is of the view that it would be inappropriate to provide the required affordable housing on-site, and proposes a financial contribution in lieu of on-site provision to help fund the provision of affordable housing elsewhere. The submitted viability appraisals seek to justify the level of financial contribution.

14. Since the Council does not possess the required expertise in-house to properly evaluate, challenge and validate viability appraisals when they are submitted with planning applications, a

specialist consultant is appointed, at the applicant's cost, to undertake a formal validation. It would therefore be necessary to appoint a consultant to validate applications received under the Growth and Infrastructure Act 2013 to modify, remove or discharge affordable housing obligations; it is suggested that, as with the validation of other viability appraisals, the cost of appointment be met in full by the applicant.

15. This validation process is considered essential, since it has been proven on most occasions that developers seek to overstate the level of viability and/or offer a lower financial contribution than is properly justified. The information provided by the validation process is also essential to enable the Director of Housing to then undertake the required negotiations with the developer.

16. The importance of using specialist consultants, and officers undertaking the subsequent negotiation, can be demonstrated with the outcome of the last three viability appraisals submitted with planning applications that have been validated and negotiated within the past two months, as shown below:

Site	Proposed A/H Development	Original A/H Provision Proposed by Developer	Final A/H Provision Negotiated by Officers
Willow House, Sheering	2 X 4 bedroom detached houses	None	Financial contribution of £207,777
Green Man PH, Waltham Abbey	28 X private sheltered apartments	Financial contribution of £172,764	Financial contribution of £ 430,000
Stonehall Business Park, Matching Green	6 X 3 bedroom terraced houses	Financial contribution of £60,000	On-site provision of 3 X 3 bed houses (50%)

17. The problem is that it can take some time for:

- Applicants to provide any additional information required by the Council's consultants to validate the appraisals;
- The consultants to validate the proposals and produce their report;
- Negotiations to be undertaken by officers, which can be a lengthy process because officers take a robust approach to negotiations; and
- The planning application (and the outcome of negotiations) to be reported to, and considered by, Area Plans Sub-Committees.

18. As explained earlier, if an application is received from a developer in future to modify, remove or discharge an affordable housing obligation, the Act requires the Council to determine and issue its Determination Notice within 28 days of request. This will not be possible under the current arrangements; Agendas for Area Plans Sub-Committee alone have to be published almost two weeks before the date of the meeting.

19. The Council therefore needs to have a mechanism whereby it can quickly validate, negotiate and determine applications to modify, remove or discharge affordable housing obligations, otherwise applicants will be able to appeal to the Planning Inspectorate for non-determination within the required timescale – taking the decision out of the Council's hands.

20. It is therefore suggested that authority be delegated to the Director of Housing to determine applications to modify, remove or discharge affordable housing obligations, subject to prior consultation with the Director of Planning and Economic Development and the Chairman (or in his/her absence, the Vice-Chairman) of the relevant Area Plans Sub-Committee - and details of the application and the resultant determination being reported in the following issue of the Council Bulletin.