

**HIGH PEAK BOROUGH COUNCIL  
DEVELOPMENT CONTROL COMMITTEE**

**Date: 16<sup>th</sup> August 2021**

<b>Application No:</b>	HPK/2019/0280	
<b>Location</b>	Land Between 15 And 23, Batham Gate Road, Peak Dale, Derbyshire	
<b>Proposal</b>	Request to be released of s106 planning obligations relating to affordable housing provision and contributions to off-site leisure and open space relating to HPK/2019/0280, approval for 27 residential dwellings and new access road.	
<b>Applicant</b>	Thistledown Developments Ltd	
<b>Agent</b>	N/A	
<b>Parish/Ward</b>	Wormhill and Green Fairfield Parish / Limestone Peak Ward	<b>Date registered</b> 27 <sup>th</sup> June 2019
<b>If you have a question about this report please contact:</b> Tom Hiles-Email <a href="mailto:tom.hiles@highpeak.gov.uk">tom.hiles@highpeak.gov.uk</a> Tel: 01538 395400 Ext: 5430;		

## **REFERRAL**

This report has been brought to the Development Control Committee because it relates to a modification to a Section 106 Agreement relating to a major development which was previously determined by the committee.

### **1. SUMMARY OF RECOMMENDATION**

**REFUSE** the request to remove all the S106 obligations

**And**

**APPROVE** to enter into a deed of variation of the approved s106 agreement to reduce affordable housing provision from 8 units to 7 and to remove the obligation to provide contributions towards off-site infrastructure provision.

### **2. DESCRIPTION OF THE SITE AND ITS SURROUNDINGS**

- 2.1. The site is a residential development previously approved (under permission ref HPK/2019/0280) located within the built up area boundary of Peak Dale.
- 2.2. The site takes access from Batham Gate Road through a field gate. It has a frontage with Batham Gate Road which extends to some twenty

five metres and lies between existing residential development which forms a part of a street scene of ribbon development stretching along this part of Batham Gate Road.

- 2.3. The north eastern boundary of the site is bounded by existing residential development on Church Avenue and Holy Trinity Church. The land to the south and west is open countryside.
- 2.4. Detailed matters have since been approved by several discharge of conditions applications. Development of the approved scheme has commenced and is understood to be well underway if not in fact reaching completion.

### **3. THE APPLICATION PROPOSAL**

- 3.1. The application was for the erection of 27 new dwellings served by a new access road on land between 15 and 23 Batham Gate Road, Peak Dale.
- 3.2. The committee determined to approve the application at its meeting on 20<sup>th</sup> January 2020, subject to conditions and subject to the completion of a Section 106 Agreement. The s106 agreement was to secure the following:
  - On-site affordable housing, comprising of the new properties as affordable units, equating to approximately 30% of the development, in accordance with Policy H4 of the High Peak Local Plan. These would comprise six units for rent and two for shared ownership.
  - Contributions towards off-site play and outdoor sports facilities and allotments as follows: £5,184 for play area improvements at Peak Dale Play Area; £13,213 towards improvements to outdoor sports facilities at Peak Dale Recreation Ground; and £2,077 towards improvements to Batham Gate Allotment Site. These contributions were required in order for the development to comply with the requirements under policy CF7 that new development and were required to be paid to the Council prior to occupation of the first of the units.
- 3.3. The s106 agreement on these terms was completed and agreed on 3<sup>rd</sup> March 2020. The site was subsequently sold to the current owner, Thistledown Developments Ltd, shortly afterwards.
- 3.4. The current site owner has requested to be released of all of the developer obligations agreed within the s106 agreement. This request is supported by a financial viability appraisal prepared on behalf of the developer.

#### **4. RELEVANT PLANNING HISTORY**

**HPK/2019/0280** - 27 residential dwellings and new access road. Approved, 09/03/2020

- NMA/2020/0008 - Non material amendment in relation to HPK/2019/0280 adjustment to positioning of plots 1 and 2 on the site plan. Approved, 16/06/2020
- DOC/2018/0022 - Discharge of Condition number(s): 8 and 10 in relation to HPK/2015/0174. Part approved, 20/04/2018
- DOC/2018/0025 - Discharge of conditions 18 and 19 relating to HPK/2015/0174. Approved, 27/07/2018
- DOC/2020/0031 - Application for approval of details reserved by condition 2, 3, 7, 11 and 12 in respect of HPK/2019/0280. Approved, 25/08/2020
- DOC/2018/0033 - Application for discharge of details reserved by condition 11, 12, 13 & 16 in respect of HPK/2015/0174. Approved, 02/08/2018

**HPK/2015/0174** - Proposed Development of 27 Residential Dwellings and a New Access Road Between Nos 15 and 23 Batham Gate Road. Approved, 21/07/2015

- HPK/2018/0106 - Application for variation of condition 2 in relation to HPK/2015/0174 (To allow the development to be built with alternative materials) Pending.
- DOC/2017/0093 - Discharge of condition 3 in regard to planning reference HPK/2015/0174. Withdrawn, 17/04/2018

#### **5. PLANNING POLICIES RELEVANT TO THE DECISION**

##### **Adopted High Peak Local Plan 2016**

Policy S1	Sustainable Development Principles
Policy S1a	Presumption in Favour of Sustainable Development
Policy H4	Affordable Housing
Policy CF7	Planning Obligations and Community Infrastructure Levy

##### **Supplementary Planning Guidance**

- Housing Needs Survey
- Planning Obligations

##### **National Planning Policy Framework (NPPF) July 2021**

##### **National Planning Practice Guidance (NPPG)**

## 6. CONSULTATIONS

**HPBC Regeneration Officer (Affordable Housing):** comments awaited

## 7. OFFICER COMMENTS

- 7.1. Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended) are a mechanism which makes a development proposal acceptable in planning terms, which would not otherwise be acceptable. In this case, the planning obligations secured onsite affordable housing provision and contributions towards off-site leisure and open space provision.
- 7.2. If the s106 is not complied with, it is enforceable against the person whom entered into the obligation and any subsequent owner. The legal tests for a s106 agreement are: (i) necessary to make the development acceptable in planning terms, (ii) directly related to the development, and, (iii) fairly and reasonably related in scale and kind to the development. Under the Planning Act s106 (A) a person bound by the obligation can seek to have the obligation modified or discharged after five years.
- 7.3. The principles for modifying an obligation are to consider whether the agreement continues to serve a useful purpose and should remain; that it no longer serves a useful purpose and should be discharged; or that it continues to serve a useful purpose, but would serve the purpose equally well if the modification proposed took effect.
- 7.4. The developer has requested a variation to the agreed obligations and the Council is able to assess these obligations and decide whether they prevent the development from being economically viable (i.e. when assessed together with all the other contributions due, the costs of development, for example abnormal costs associated with remediating contaminated land and expected profits) and if it does prevent the development from being completed whether that means the obligations no longer continue to serve a useful purpose.
- 7.5. Policy H4 Affordable Housing sets out the requirements for affordable housing to be provided as part of residential schemes of 25 units or more, requiring 30% of the total units to be affordable. The policy notes that:

*Where the provision of affordable houses proposed is below the requirements set out above, the Council will require applicants to provide evidence by way of a financial appraisal to justify a reduced provision.*

- 7.6. If the Council finds that the obligations prevent the development from being economically viable, then the proposal should be dealt with in a way that safeguards and promotes the economic viability of the permitted scheme to which it relates, balanced against modifications to the obligations.
- 7.7. In order to achieve this, the Council has two options: (1) it can modify the obligation either in the way the application suggests (or in another way if the applicant agrees), (2) it can remove the obligation altogether.

#### Developer's Financial Viability Assessment

- 7.8. The FVA sets out that, taking into account the value of the development including the sale value of affordable units, and the costs of the site, construction, services, technical requirements, and agreed contributions totalling £20,474, the development would yield -£333,069.00 profit (-7% loss).
- 7.9. The report notes that this means the scheme as approved and subject to the s106 terms would be financially unviable.
- 7.10. The FVA further notes that without the requirement to make eight units affordable housing and without paying the contributions to open spaces, the development would achieve a gross profit of £312,925, or around 5%.
- 7.11. On this basis the developer has requested that the development no longer be subject of the obligations agreed in the s106 agreement, in order that the scheme can be profitably completed.

#### Review of the Financial Viability Assessment

- 7.12. A review of the developer's financial viability assessment has been commissioned and produced on behalf of the Council by Keppie Massie. This has reviewed the viability assessment in terms of the accuracy of various costs, the accuracy of expected sales values, and against National Planning Policy Guidance on development viability.
- 7.13. The Keppie Massie review notes that the site was bought by Heron Homes in February 2018 for £480,000 and that the site was subsequently bought by Thistledown in March 2020 for £1,300,000, as recorded by the Land Registry.
- 7.14. The review report notes that the viability assessment does not follow accepted principles for development viability, particularly in terms of determining land value as part of the costs of development. The report notes explains that:

*“The FVA appraisals include a land cost of £1,300,000. No commentary is provided in the FVA to explain how this land value has been assessed and why it is the correct BLV (baseline land value) for the application site.”*

- 7.15. The review report refers to National Planning Practice Guidance (PPG) paragraph 013 which notes that:

*“To define land value for any viability assessment, a benchmark land value should be established on the basis of the existing use value (EUV) of the land, plus a premium for the landowner. The premium for the landowner should reflect the minimum return at which it is considered a reasonable landowner would be willing to sell their land. The premium should provide a reasonable incentive, in comparison with other options available, for the landowner to sell land for development while allowing a sufficient contribution to comply with policy requirements. This approach is often called ‘existing use value plus’ (EUV+).”*

- 7.16. With further reference to the PPG, the report then notes that:

*“The guidance is very clear that “where viability assessment is used to inform decision making under no circumstances will the price paid for land be a relevant justification for failing to accord with relevant policies in the plan”*

and goes on to note that:

*“The (developer’s) FVA simply adopts the purchase price for the site which is contrary to the guidance contained in the PPG. Furthermore the PPG is very clear that under no circumstances will the price paid for land be a relevant justification for failing to accord with relevant policies in the plan. When purchasing the site the developer in this case will have been fully aware of the planning contribution requirements contained in the S106 Agreement. Hence they should have ensured that the site was purchased at a price that fully reflected these contributions. The suggestion in the FVA that the developer started the project without feasibility advice is surprising. They have presumably received funding for the land purchase and the development and any funder will have required the necessary due diligence to be undertaken before making an offer of funding. The LPA should not in any event be expected to waive planning obligations to offset the impact of a lack of due diligence by the developer.”*

- 7.17. The review report then presents a viability assessment undertaken on the basis of a baseline land value based on existing use value plus a landowner premium, as recommended by the PPG. The review report notes that the BLV on this basis should be £355,000.

- 7.18. The review report notes that the BLV included in the developer's FVA appears to be based on the purchase price of the site, and notes that *'the fundamental difference between our assessment and the FVA is the approach to land value with a difference between us of £945,000'*
- 7.19. On the basis of a BLV of £355,000, the assessment in the review report finds that the scheme as approved and subject to the agreed obligations, is not in fact viable, but that with the removal of the contributions to off-site open spaces and recreation and the removal of one unit from the affordable units, the development would be viable.
- 7.20. In response to the findings of the review report, the developer has advised that upon purchasing the development site they expected to be able to make the scheme viable despite the elevated purchase price, due to operational efficiencies achieved from being a small householder, but that these financial efficiencies have been eroded due to circumstances arising from the Covid-19 pandemic, including difficulty in obtaining cement and other building materials and construction elements at usual prices.
- 7.21. Whilst the developer has offered to provide details of these costs, no such details of additional costs were provided in the developer's FVA. The review report commissioned on behalf of the Council has assessed the financial considerations set out in the submitted FVA, and it is considered that the Council should not be obliged to further consider further financial details at this stage.
- 7.22. In any case, it remains apparent that the substantive reason the scheme appears to be unviable is the price paid for the site by the current owners.
- 7.23. The developer obligations agreed through the s106 agreement were necessary in order to ensure that the approved development was acceptable in terms of the policies of the development plan, particularly with regards to provision of affordable housing and provision of leisure and recreation infrastructure.
- 7.24. It has not been demonstrated that waiving of these obligations is necessary in order for the development to become viable, in the manner required by National Planning Policy Guidance. In the terms of policy H4, the developer's viability assessment has not justified the provision of affordable housing below the required 30%.
- 7.25. Agreeing to waive the obligations entirely would therefore be contrary to the guidance and would be contrary to the relevant policies of the Local Plan and the National Planning Policy Framework.
- 7.26. However, on the basis of the viability assessment undertaken by the Council's consultants, it is considered that it would be appropriate to proceed to vary the s106 agreement to remove the requirement for off-

site provision and to reduce the number of affordable units to seven, subject to agreement by the Council's housing officer. Comments from the housing officer are outstanding at the time of report preparation, and an update will be provided ahead of the committee meeting.

- 7.27. The Council's parks Service Development Officer has been consulted on this potential way forward and has not objected.
- 7.28. The developer has been invited to proceed on this basis but at the time of report preparation no response has been received. Any response and confirmation of the recommended means of proceeding will be set out in the update report.

## **8. RECOMMENDATIONS**

- A. REFUSE to vary the terms of the s106 agreement to remove the requirement for the provision of affordable housing and contributions to off-site open space and leisure facilities for the following reason:**
- a. The developer has not demonstrated that viability considerations would justify provision of zero affordable housing as part of the approved development. Varying the terms of the s106 agreement on this basis would therefore be contrary to policy H4 Affordable Housing.**
- B. APPROVAL to vary the terms of the s106 agreement to allow for the removal of contributions to off-site infrastructure provision, and for the reduction of houses to be retained as affordable units from eight to seven.**
- C. In the event of any changes being needed to the wording of the Committee's decision (such as to delete, vary or add conditions/informatives/planning obligations or reasons for approval/refusal) prior to the decision being issued, the Head of Development Services has delegated authority to do so in consultation with the Chairman of the Committee, provided that the changes do not exceed the substantive nature of the Committee's decision.**

### **Informative**

The recommendation is made following careful consideration of all the issues raised through the application process and through discussion with the applicants. In accordance with Paragraphs 186 and 187 of the NPPF the Case Officer has sought solutions where possible to secure a development that improves the economic, social and environmental conditions of the area.



