Our Ref: P22-2886

20th December 2024

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Dear Suzanne,

Submission of an application pursuant to Section 106A of the Town and Country Planning Act 1990 to modify a planning obligation contained within the Section 106 Agreement as agreed under outline planning permission 14/02121/OUT.
At Himley Village, North West Bicester, Middleton Stoney Road, Bicester, Oxfordshire

Introduction

I am instructed by my client, Cala (Cotswolds) Ltd, to submit an application pursuant to Section 106A of the Town and Country Planning Act to modify a planning obligation. The obligation relates to the completed Section 106 Agreement dated 30th January 2020 that related to outline planning application **14/02121/OUT**.

My client has significant concerns about the viability of the consented scheme. In order to avoid this important site from stalling, they are keen to secure agreement with Cherwell District Council on a reduction in affordable housing requirements. This would then enable them to deliver on the Zero Carbon and other sustainability policy requirements.

We previously opened discussions with the Council with regards to this matter via the submission of a pre-application enquiry in August 2024 which have been ongoing. This current submission formalises those discussions into an application and does not contain any further information to that already submitted.

Background

As you will be aware, the site (known as 'Himley Village') was allocated for large scale mixed use development as part of Policy Bicester 1 (North West Bicester Eco-Town) of the Cherwell Local Plan 2011-2031 Part 1. Policy Bicester 1 allocates land at North West Bicester, which includes Himley Village, for a new zero carbon mixed use development including 6,000 homes. The policy includes an affordable housing requirement of 30%.

Himley Village was the subject of an outline planning application **14/02121/OUT** which was registered on 31st December 2014, almost 10 years ago. The development was described as follows:

> **"Development to provide up to 1,700 residential dwellings (Class C3) a retirement village (Class C2), flexible commercial floorspace (Classes A1, A2, A3, A4, A5, B1, C1 and D1), social and community facilities (Class D1), land to accommodate one energy centre and land to accommodate one new primary school (up to 2FE) (Class D1). Such development to include provision of strategic landscape, provision of new vehicular, cycle and pedestrian access routes, infrastructure and other operations (including demolition of farm buildings on Middleton Stoney Road)."**

The application was for outline planning permission, with all matters (access, appearance, landscaping, layout and scale) reserved for future determination.

In October 2019, the Council's Planning Committee resolved to grant outline planning permission following the completion of a Section 106 Agreement to secure various planning obligations. The decision notice was issued on 30th January 2020. The application proposed (and the Section 106 secured) 30% affordable housing.

More recently, three reserved matters applications have been approved pursuant to this approval. Application **23/00214/REM** was submitted for two junctions from Middleton Stoney Road into the site that will provide access to the development and was approved in February 2024. Application **23/01493/REM** was submitted for internal roads and was approved in July 2024.

The first reserved matters application for housing was submitted in June 2023 under application reference **23/01586/REM**. This application seeks reserved matters approval for 123 houses and includes 37 affordable dwellings (30%). The application was approved on 20th November 2024.

The purpose of this letter is to set out the background context to the proposal and to formally introduce the submission to the Council, both in terms of the reasoning and in the context of the relevant legislation. As with the pre-application submission, the application is accompanied by a Financial Viability Assessment (FVA) that has been prepared on behalf of the applicants by Rapleys.

The Proposal

As set out above, my client is seeking to address viability concerns on this site.

Much has changed since the original application was submitted in 2014 (ten years ago), and following the grant of planning permission in 2020, (almost five years ago). Our client has serious concerns about ever increasing build costs associated with the carbon reduction and sustainability measures required by Policy Bicester 1, combined with the substantial infrastructure delivery costs, and the implications this has for being able to deliver 30% affordable housing.

It is therefore proposed to vary the completed Section 106 agreement via this application to reduce the affordable housing requirements at the site. This would then enable the applicants to deliver on the Zero Carbon and other sustainability policy requirements.

The proposal requires a modification to Schedule 9 of the signed Section 106 Agreement relating to affordable housing, specifically the various clauses and definitions that require a 30% provision to a reduced level to be agreed under this application.

Relevant Legislation

The relevant legislation for considering this DoV is Section 106A of the Town and Country Planning Act 1990 which sets out the following:

(1) A planning obligation may not be modified or discharged except-

(a) by agreement between the appropriate authority (see subsection (11)) and the person or persons against whom the obligation is enforceable; or

(b) in accordance with this section and section 106B.

(2) An agreement falling within subsection (1)(a) shall not be entered into except by an instrument executed as a deed.

(3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the appropriate authority for the obligation-

(a) to have effect subject to such modifications as may be specified in the application; or

(b) to be discharged.

(4) In subsection (3) "the relevant period" means-

(a) such period as may be prescribed; or

(b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.

(5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against who the obligation is enforceable.

(6) Where an application is made to an authority under subsection (3), the authority may determine-

(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it should be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

(7) The authority shall give notice of their determination to the application within such period as may be prescribed.

(8) Where an authority determine that a planning obligation shall have effect subject to modifications specified within the application, the obligation as modified shall be enforceable as if it had been entered into on the date which notice of the determination was given to the applicant.

(9) Regulations may make provision with respect to-

(a) the form and content of applications under subsection (3);

(b) the publication of notices of such applications;

(c) the procedures for considering any representations made with respect to such applications; and

(d) the notices to be given to applicants of determinations under subsection (6).

(10) Section 84 of the Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to a planning obligation.

(11) In this section "the appropriate authority" means-

(a) the Mayor of London, in the case of any planning obligation enforceable by him;

(aa) the Secretary of State, in the case of any development consent obligation where the application in connection with which the obligation was entered into was (or is to be) decided by the Secretary of State;

(ab) the Infrastructure Planning Commission, in the case of any other development consent obligation;

(b) in the case of any other planning obligation, the local planning authority by whom it is enforceable.

In respect of the above, the application is made by Cala (Cotswolds) Ltd who now own the site and have submitted the various recent applications referenced above. As the planning obligation 'runs with the land' it is enforceable against the applicant and can therefore be modified by them in accordance with subsection (1).

As set out in subsections (3) and (4), the "*relevant period*" is five years. This would imply that the applicant is not yet entitled to modify the obligation as the relevant period has not yet passed. However, in ***R (Batchelor Enterprises Ltd.) v. North Dorset DC*** [2004] it was indicated that a local planning authority nonetheless has discretion to entertain an application to modify or discharge prior to the expiry of the relevant period, and that a failure to do so would be amenable to judicial

review. The difference was that after the expiration of the relevant period, the local planning authority is bound to determine the application within a prescribed time, and if it fails to do so or if it refuses the application, an appeal may be made to the Secretary of State. Within the relevant period there would be no right of appeal, however, it would be unreasonable for a local planning authority to refuse even to consider a request made under Section 106A (1)(a) simply because it had been made within the five year period. The same approach was followed by the High Court and Court of Appeal in ***R (Millgate Developments Ltd) v. Wokingham BC*** [2011].

In any event, the five year period will expire shortly after this application is made, on 30th January 2025 and the applicant is content for the Council to determine the application after the five year period has expired.

Justification for the modification of the obligation

My client's submission is supported by an independent Financial Viability Assessment (FVA) prepared by Rapleys, which accompanies this letter. There is no need to repeat the content of that report verbatim; instead, the most relevant findings of this assessment can be summarised as follows:-

The report tests three scenarios for the 1,700 dwelling Himley Village site:

- Bicester Policy 1 requirements for zero carbon development as a 100% private dwelling scheme.
- Bicester Policy 1 requirements including a 30% policy compliant mix of affordable housing.
- A development implemented under current building regulations as a 100% private dwelling scheme. This has been included to demonstrate the impact on building costs of the carbon reduction and sustainability measures that are required by Policy Bicester 1.

The FVA makes a number of assumptions with regards to the development, as it has to do, and assumes a unit mix based on reports and the indicative layout within the planning application submission.

It explains how viability is calculated; in planning terms, a scheme is considered viable if the value generated by the development is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, planning obligations, land value, landowner premium and developer return. An acceptable level of profit required by a development is considered by Planning Practice Guidance[1] to be 15-20% of gross development value.

However, the delivery of a scheme based on True Zero Carbon and sustainability requirements is obviously far more onerous, and therefore riskier than a 'traditional' housing scheme. A 20% margin for the private tenure units is therefore considered to be suitable, and a 6% margin on the affordable units is also assumed.

[1] Paragraph 018, Reference ID 10-018-20190509

The viability appraisal tests the three scenarios set out above, taking into account private and affordable gross development values, commercial development values, construction costs, professional fees, contingency, S106 contributions and various other costs.
The results of this testing are set out within Section 10 of the FVA and result in a negative residual land value for both scenarios that include Bicester Policy 1 requirements (a 100% private scheme and a 30% affordable scheme). To demonstrate the impact of the zero carbon and sustainability requirements of Bicester Policy 1, a 100% private scheme based on current building regulations standards is also modelled, which results in a positive residual land value.

However, once a benchmark land value is established and the existing value of the land is applied, all three scenarios produce a deficit.

It is clear from the FVA that the development approved under application 14/02121/OUT is unviable, and that this is driven primarily by costs of the zero carbon and sustainability requirements of Bicester Policy 1, combined with the substantial infrastructure delivery costs.

The Firethorn Appeal

The results of the FVA will not come as a surprise to the LPA. Indeed, a very similar case was considered at the recent Land at North West Bicester, Charlotte Avenue, Bicester, appeal. This is another site within the same North West Bicester allocation [PINS ref. APP/C3105/W/23/3315849].

In that case it was common ground that the development could not viably provide 30% affordable housing whilst delivering a True Carbon Zero development. The Inspector, who allowed the appeal with a reduced affordable housing requirement, agreed with this conclusion [§28].

Given the similarities with my client's site it is helpful to draw out some of the key paragraphs from that decision.

In relation to viability generally, the Inspector commented that the LPA's evidence base was likely out of date and that a viability appraisal to support the appeal development is justified:-

> **"16. The most recent viability evidence base underpinning the Local Plan dates to 2017. This is now dated and sales values and build costs in particular are likely to be out of date. As there have been significant changes in the macro economic landscape since then, including Brexit, Covid, the war in Ukraine and related high build cost inflation and falling house prices, the submission of a viability appraisal to support the appeal development is justified."** (my emphasis)

The Inspector observed that the appellant had justified the reason for a viability review, and it was agreed by the Council [§17].

At §18 the Inspector comments that Local Plan policy BSC3, in dealing with affordable housing, requires open book financial analysis of proposed developments to enable in-house economic

viability assessment, where proposed development is considered unviable. He goes on to note that:-

> **"18. ….. Viability testing is therefore an integral part of determining a viable affordable housing requirement……"** (my emphasis)

In this case, the Council and appellant had worked together, to agree the inputs to a detailed viability appraisal. The two main parties signed a SoCG on viability matters which indicated no outstanding areas of disagreement [§19].

At §20 to 21 the Inspector notes the build costs include significant recent cost inflation and they are based on delivery of a True Zero Carbon development.

With regards to developer profit, the Inspector observes that:-

> **"24. The developer's profit used is 20% on Gross Development Value for private sales and 6% for affordable tenure units. Those values fall within the ranges set out in the PPG. Given the True Zero Carbon and other sustainability requirements which set a very high bar for construction methods and associated costs, and the inherent risk therein, I consider them appropriate. NWBA suggest a blended average margin of 8.6%, but no evidence is advanced to indicate that is a realistic level and acceptable in the market.**"

Overall, the Inspector was satisfied with the viability appraisal and documents underpinning it. He went on to say that:-

> **"26……For that reason, I find it a sound basis on which to assess the contribution that the appeal scheme should be required to make to carbon reduction measures, affordable housing and its infrastructure impacts."** (my emphasis)

Turning to the issue of affordable housing more specifically, the Inspector rightly notes that Local Plan policy BSC3 sets out a requirement for 30% affordable housing, but it also makes it clear that those requirements are subject to viability [§27].

The commentary at §28, which I referred to earlier, is particularly important as it records the agreed position that 30% affordable housing is not viable, if the zero carbon and other sustainability policy objectives are to be achieved:-

> **"28. It is common ground between the two main parties that the appeal development cannot viably provide for 30% affordable housing, in accordance with Local Plan policy BSC3, whilst delivering a True Zero Carbon development, compliant with Local Plan sustainability policies and mitigating its infrastructure impacts. Given my findings on the viability evidence, I have no reason to take an alternative view on this matter."** (my emphasis)

The Inspector's overall conclusion at paragraph 129 states that:-

> **"129. I have found that the appeal development would not viably be able to provide 30% affordable housing in accordance with Local Plan policies BSC3 and Bicester 1. However, given my findings on viability, I am content for the reasons given earlier, that no policy conflict would result. In any event, with the review mechanisms in place, secured through the legal Agreement, a higher level nearer the 30% may yet still be achieved."** (my emphasis)

Conclusions

The proposal now being put to the Council by my client, to a large extent, mirrors that put to the Council, and subsequently the Planning Inspectorate, at the Firethorn appeal. The development at Himley Village was allocated by the same local plan policy (Policy Bicester 1) which requires the development to be zero carbon but also to provide 30% affordable housing. As I said earlier, it will come as no surprise that my client needs to revisit viability on their site in a similar way. It is evident both from the appeal decision and the independent FVA submitted as part of this enquiry, that the original policy aspirations are not all achievable.

My client is therefore keen to work with Officers at the LPA to find a mutually acceptable solution. Clearly the LPA wants to deliver on its Zero Carbon aspirations and so other policy objectives will need to flex to enable this to happen, and for the site to deliver on its housing targets. The application complies with the relevant legislation under Section 106A of the Town and Country Planning Act 1990 and as such the option is available to all parties to resolve this issue via this application.

We trust that our submission and the reasons behind it are clear, however if any clarification is required, please let us know. We remain happy to discuss the proposals and negotiate a mutually acceptable solution via the submission we have already made before this application is determined.

Yours sincerely

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