

Application Report

Strategic Development & Planning

Place Services

North Devon Council

Lynton House, Commercial Road,

Barnstaple, EX31 1DG



Report to Planning Committee

9 December 2020

Application No.: 60385 by Acorn Developments (SW) Ltd.

Proposal: Erection of 17 dwellings (3 bungalows and 14 houses), land adjacent Pearldean, West Down.

Reason for Report:

Report by: Michael Tichford, Head of Place

1. Introduction

- 1.1 The purpose of this report is to consider the Financial Viability Statement for development at West Down submitted on behalf of Acorn Developments (SW) Ltd, which seeks '100% open market sale (no affordable dwellings), and for the Council to re-evaluate/remove all other S106 contributions'.
- 1.2 The Financial Viability Statement is included as Appendix A to this report. Appendix B is the analysis of this by Plymouth City Council on behalf of North Devon Council.
- 1.3 Appendix C is counsel's view on the matter of validity of section 106 agreement in respect of land at Pearldean, West Down, Ilfracombe. This is not for publication.

2. Recommendations

- 2.1 That the Planning Committee considers the financial and legal advice contained within this report and agrees on one of:
 1. Accept the information supplied by the applicant and require no S106 contributions
 2. Accept the offer of the applicant to pay the cash contributions contained within the S106 of £118,000

3. Accept the suggestion of Plymouth City Council that developer profit of 10% or circa £600,000 be given and to accept no less than:
 - a) a further £240,000 of contributions taking the total to £360,000 or
 - b) two affordable dwellings plus the £118,201 and this would also still result in a developer profit of circa 10%.
4. Accept no compromise on the S106 and pursue delivery of five affordable dwellings and £118,201.

The officer recommendation is to negotiate the amendment of the S106 agreement to require the provision of two affordable dwellings plus £118,201.

2.2 Reason for Recommendations

- 2.3 The recommendation recognises the analysis of viability undertaken by Plymouth City Council to achieve a portion of the S106 contributions. This is a pragmatic approach to try and achieve some community benefit, however, it is recognised that members may reasonably take the view that any demand, other than the offer by the applicant of £118,201, will precipitate legal challenge by the applicant and in this scenario Option 4 be agreed requiring the discharge of all the S106 obligations.

3. Background

- 3.1 Consent was given for the erection of 17 dwellings (3 bungalows and 14 houses) on land adjacent to Pearldean, West Down on 17 August 2017, following its approval at Planning Committee in 2016, subject to completion of a S106 agreement. The record of this applications is held on the [Council's website](#).
- 3.2 The S106 Agreement attached to that consent aimed to secure the following contributions:

Contribution	Value (£)
Education	5,934.35 + 34,084.23
Highways	8,000.00
Recreation	64,578.00
Affordable Dwellings	Three two-bedroom Two three-bedroom
Total	112,596.58 + 5 affordable units

- 3.3 The variation of condition applications [No 63893](#), for the variation of Condition 10 (drainage ditch) and [No 64125](#) to amend design and layout were approved 30/11/2017 and 09/08/2018 respectively.
- 3.4 A deed of variation should have been produced to modify the S106 agreement so that it related to the consent as amended by the subsequent applications. Unfortunately this was not done, due to an oversight.
- 3.5 This error was not identified until pointed out in a letter to North Devon and

Devon County Councils dated 18 March 2020. The letter notified the Councils that, acting on legal advice the applicant had received, which gave the view as the S106 obligations no longer bound the site, they intended to proceed with the development of this site without complying with any of the terms of the S106 agreement.

- 3.6 North Devon Council notified the developer that they did not accept the conclusion reached by them and commissioned their own legal advice which is attached at Appendix C and is not for publication but for consideration by members of the planning committee in private session. The legal advice is that there may be an opportunity to defend the S106, however, it is by no means a clear case and impossible to suggest the outcome of court action.
- 3.7 A case on the same issue of no deed of variation upon approval of a variation application was being pursued in 2020 by Norfolk County Council and North Norfolk Council, however, they received an adverse outcome at the High Court and the District Council decided that public interest would be better served by trying to engage with the developer rather than commit further public resource to an appeal.
- 3.8 As well as the challenge to the legality of the S106 applying to the development notice was also given by them that the scheme was not viable. This resulted in the submission in July of a Financial Viability Statement (Appendix A) to support their case.
- 3.9 Plymouth City Council provide North Devon Council with development valuation services and were commissioned in July to scrutinise the developments Viability Statement and give their own view on viability. This work was received by the developer and the Council in October 2020. By this time an offer had been received from the developer to provide £118,000 of cash contributions but not the affordable housing.
- 3.10 It should be noted that by this time the development had all but been completed.
- 3.11 The outcome of the Plymouth City Council advice notes that:

“We are of the opinion that should the Council allow the developer to not provide the affordable dwellings and only £118,201 of 106 contributions they will have made a profit (on the 18 dwellings) of around £900,000 or 13.5%.

What constitutes a reasonable profit in this scenario is up for debate. Planning Practice Guidance on viability suggests that for a site at planning stage a profit of between 15-20% is appropriate. This is a reflection of the risk involved in bringing a site from pre-planning through to sale. The risk to the developer at this late stage of development is many times lower than it would have been 3 years ago when they started the process. Furthermore, we have considered the developer’s actual costs and these actual costs include all their realised development risk such as unexpected ground conditions or sub-contractor cost overruns. It is not reasonable for a developer to expect

the LPA to allow them to reduce their obligations based on their realised risks *and also* allow them a profit level that is equivalent to a maximum risk scheme.

In this scenario we are at the post construction phase where all prior risks have been realised and the only remaining risk is sales risk on approximately 2/3rd of the dwellings. My view would be that at this stage the absolute maximum profit that the Council should be enabling would be 10% or circa £600,000. This would allow for a further £240,000 of 106 contributions taking the total to £360,000. Alternatively the Council could seek a number of plots, for example plots 4 and 5, to be affordable plus the £118,201 and this would still result in a developer profit of circa 10%.

Conclusion

We do not consider that the Council is obliged to review the viability of the development at this stage and any failure by the developer to achieve their profit targets is not the responsibility of the Council. However, should the Council wish to renegotiate the section 106 agreement our recommendation would be that they seek no less than £360,000 of section 106 contributions or two affordable dwellings and £120,000 of other section 106 contributions.

3.12 Options

3.13 The considerations in this matter are the assessment of viability and the likelihood of successfully defending a challenge to the legitimacy of the S106. Members will be fully briefed on the latter matter in private session.

3.14 With regard to the outcome of the viability exercise the options for members' consideration are:

- 1 Accept the information supplied by the applicant and require no S106 contributions
- 2 Accept the offer of the applicant to pay the cash contributions contained within the S106 of £118,000
- 3 Accept the suggestion of Plymouth City Council that developer profit of 10% or circa £600,000 be given and to accept no less than:
 - a) further £240,000 of contributions taking the total to £360,000 or
 - b) two affordable dwellings plus the £118,201 and this would also still result in a developer profit of circa 10%.
- 4 Accept no compromise on the S106 and pursue delivery of five affordable dwellings and £118,201.

Appendices

Appendix A Applicant's Financial Viability Statement

Appendix B Viability report by Plymouth City Council on behalf of North Devon Council.

Appendix C North Devon Council's commissioned legal view on the matter of validity of section 106 agreement in respect of land at Pearldean, West Down, Ilfracombe. This is not for publication.