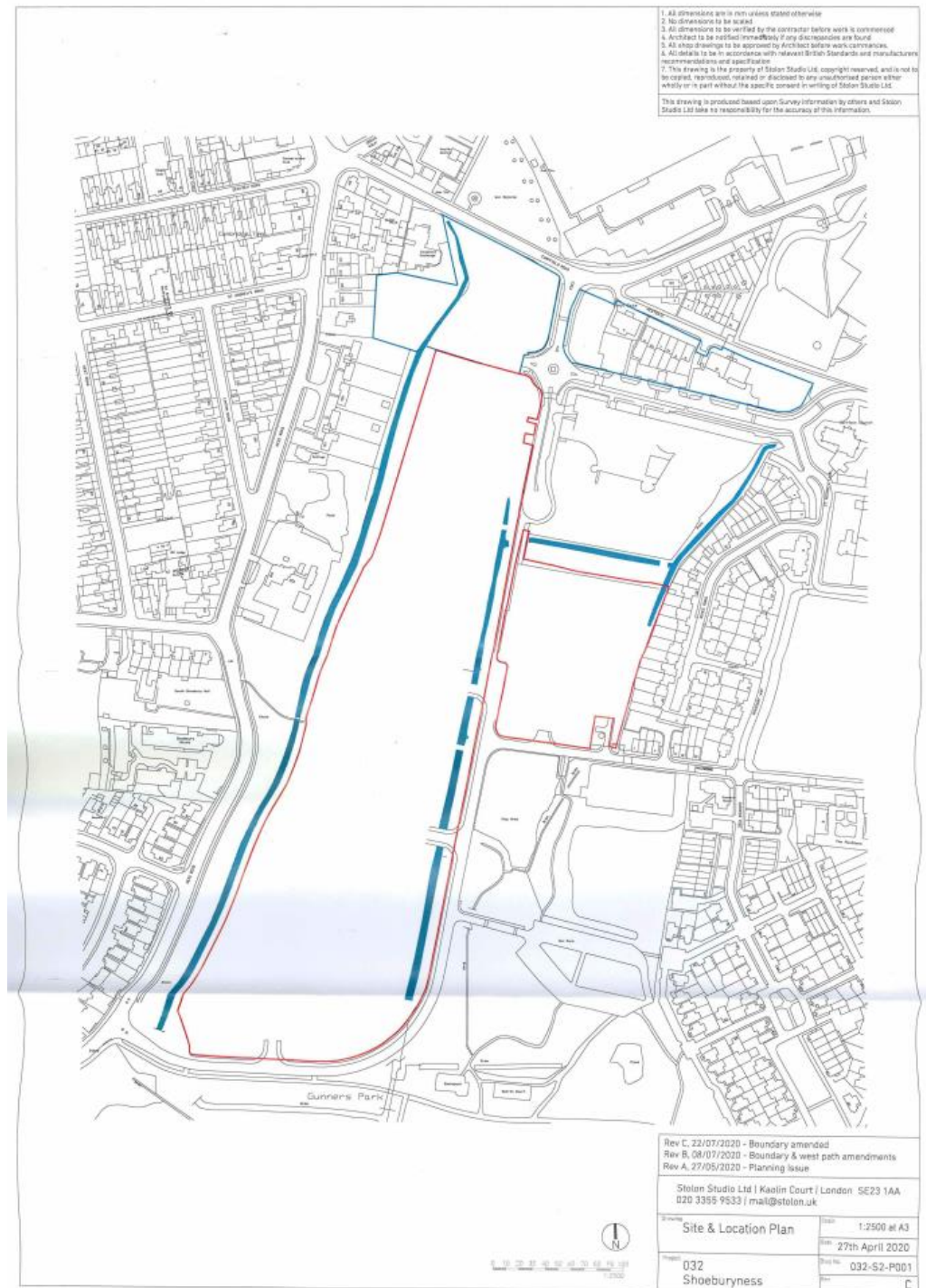


Reference:	21/01887/DOV5	
Application Type:	Deed of Variation within 5 years	
Ward:	Shoeburyness	
Proposal:	Modification of planning obligation (Section 106 agreement) dated 26 <sup>th</sup> February 2021 pursuant to application 20/01227/OUTM to amend the chargee provisions in relation to the affordable housing.	
Address:	Land Between Barge Pier Road and Ness Road, Shoeburyness, Southend-on-Sea, Essex	
Applicant:	Devonshires Solicitors LLP	
Agent:	N/A	
Consultation Expiry:	N/A	
Expiry Date:	17 <sup>th</sup> June 2022	
Case Officer:	Amanda Rogers	
Plan Nos:	N/A	
Recommendation:	Delegate to the Director of Planning or Service Manager for Development Control to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 26 <sup>th</sup> February 2021 pursuant to planning permission ref. 20/01227/OUTM	

## 1 Site and Surroundings

- 1.1 The site consists of two parcels of land totalling 8.51ha; the larger of the two is 7.1 ha and is located to the west of New Barge Pier Road and the smaller parcel of land to the east of New Barge Pier Road is 1.4ha. The site is undeveloped, but there are existing access points into the site.
- 1.2 The wider area includes the Shoebury Garrison to the east, which has developed over the last 15 years to include housing and protected wildlife and heritage assets.



## 2 The Proposal

- 2.1 Outline planning permission was granted on 26<sup>th</sup> February 2021 (application ref. 20/01227/OUTM) to 'Erect up to 214 residential units (Use Class C3), provision of a new health centre up to 1000sqm (Use Class D1), up to 400sqm of retail floorspace (Use Class A1-A3), land raising, all associated car parking, new foot and cycle paths, public open space, landscaping and ancillary works and infrastructure, Install vehicular access off Barge Pier Road, New Garrison Road and Magazine Road.' No submissions have been received to date in relation to the reserved matters.

2.2 This permission was subject to a Section 106 agreement dated 26<sup>th</sup> February 2021 between the Council and Garrison Developments LLP (“the S106”) to secure the following:

- **30% affordable housing on site (65 units) with a 60/40 tenure split (39 social/affordable rent and 26 intermediate units)**
- £493,000.40 contribution towards secondary education
- Essex RAMS payment of £26,874.12
- £30,000 highways contribution towards Campfield Road/Ness Road junction improvements
- £10,000 S106 monitoring fee

2.3 Under Section 106A of The Town and Country Planning Act 1990 (as amended) (TCPA) the applicant is seeking (on behalf of Chelmer Housing Partnership) to amend the chargee provisions in relation to the affordable housing.

2.4 The applicant has requested that the S106 is varied to fall in line with Greater London Authority standard Mortgagee in Possession clauses (“GLA Clauses”), as supported by the National Housing Federation (NHF). Their claim is that this Council’s provisions would be considered adverse to a lender, who would restrict the affordable housing part to Existing Use Value for Social Housing (EUV-SH), rather than Market Value – Subject To Tenancy (MV-STT), resulting in the lender only being willing to lend a smaller amount against the property. This is due to a concern that the chargee’s duty to safeguard the affordable housing will bind future owners after it has been exercised.

### **3 Relevant Planning History**

3.1 The site has an extensive planning history although the only directly relevant history for this application is that set out in paragraph 2.1 above.

### **4 Representation Summary**

#### **4.1 Strategic Housing**

Keen to assist delivery of affordable housing provided it is not detrimental to the Council. No objections to utilising the NHF document.

#### **4.2 Legal and Democratic Services**

No objections.

#### **4.3 Public Consultation**

None required. A representation has been received on behalf of Shoebury Residents’ Association objecting to any changes being made to the S106 on the basis that the inclusion of MV-SH (Market Value – Social Housing) and other conditions will protect the provision of affordable homes, and changes will affect the outcomes.

[Officer Comment – the representation is noted]

## **5 Planning Policy Summary**

- 5.1 The National Planning Policy Framework (NPPF) (2021) and National Planning Practice Guidance (NPPG).
- 5.2 Core Strategy (2007) Policy CP8 (Dwelling Provision).
- 5.3 Development Management Document (2015) Policy DM7 (Dwelling Mix, Size and Type).
- 5.4 Supplementary Planning Document 2: A Guide to Section 106 & Developer Contributions (2015).

## **6 Planning Considerations**

- 6.1 The key consideration in relation to this application is whether or not the policy compliant provision of 30% affordable housing within the development will remain equally secure with the proposed modifications to the Section 106 agreement as set out in paragraph 2.4 above.
- 6.2 Section 106A of the TCPA allows for an application to be made to a local planning authority to consider a proposed modification or discharge of a planning obligation.
- 6.3 Planning obligations can be renegotiated at any point, where the local planning authority and the person or persons against whom the obligation is enforceable agree to do so. A planning obligation is enforceable as a contract and whether it is varied or not is at the local planning authority's discretion. Where there is no agreement to voluntarily renegotiate, and the planning obligation is over 5 years old, an application may be made to the local planning authority to change the obligation where it "*no longer serves a useful purpose*" or would continue to serve a useful purpose in a modified way (ref. Section 106A of the TCPA). As this application to modify the S106 has been made within 5 years of completion, this statutory test is not applicable.
- 6.4 The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (as amended) set out the procedure for dealing with applications to modify or discharge a planning obligation that is more than 5 years old. However, these Regulations do not apply to requests to modify a planning obligation that is dated less than 5 years ago, which is the case in this instance. As such, an application form and public consultation is not required.

## **7 Appraisal**

- 7.1 The Council's solicitor has negotiated extensively with the applicant to agree the amended S106 wording to ensure that the Council's position is protected in terms of ensuring that the policy compliant provision of affordable housing is delivered as part of this development. Officers are now satisfied with the proposed amendments as set out below.

- 7.2 Notwithstanding the concerns raised by the applicant in this respect, the Council's current wording (based on [Southend's published model S106](#)) does ensure that the chargee's duty will fall away once exercised. However, in the interests of cooperation and to assist with the delivery of affordable housing, it is proposed that the amendments set out below are accepted.

Previous definition of Chargee:

**"Chargee"** any mortgagee or chargee of the Registered Provider or the successors in title to such mortgagee or chargee or any receiver or manager (including an administrative receiver) appointed pursuant to the Law of Property Act 1925.

Proposed definition of Chargee:

**"Chargee"** any mortgagee or chargee (or any receiver (including an administrative receiver) appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator) of the whole or any part of the Affordable Housing Units or the successors in title to such mortgagee or chargee.

Paragraph 1.4 of Schedule 2 of the S106 shall be amended as follows, with strike throughs showing deletions and new wording highlighted in yellow:

- 1.4 The Chargee shall prior to seeking to dispose of the Affordable Housing Units pursuant to any default under the terms of its mortgage or charge or otherwise give not less than one months' prior notice to the Council of its intention to dispose and -
- (a) in the event that the Council responds within one month from receipt of the notice indicating that arrangements for the transfer of the Affordable Housing Units can be made in such a way as to safeguard them as Affordable Housing then the Chargee shall co-operate with such arrangements and use ~~best~~ **reasonable** endeavours to complete such transfer,
  - (b) if the Council does not serve its response to the notice served under paragraph 1.4(a) within one month then the Chargee shall be entitled to dispose free of the restrictions set out in this Part of Schedule 2 **which restrictions shall determine absolutely**,
  - (c) if the Council or any other person cannot within three months of the date of service of the Chargee's notice under paragraph 1.4 complete a transfer of the Affordable Housing Units then provided that the Chargee shall have complied with its obligations under paragraph 1.4 the Chargee shall be entitled to dispose free of the restrictions set out in this Part of Schedule 2 **which restrictions shall determine absolutely**,
  - (d) the sale price of any disposal of any interest in an Affordable Housing Unit entitles the Chargee to not less than the amount due and outstanding under the terms of the relevant security documentation including all accrued principal monies, interest, costs and expenses together with all professional fees or costs incurred by it in affecting such a disposal,

PROVIDED THAT at all times the rights and obligations in this paragraph shall not require the Chargee to act contrary to its duties under the charge or mortgage and that the Council must give full consideration to protecting the interest of the Chargee in respect of monies outstanding under the charge or mortgage.

## **8 Conclusion**

- 8.1 Based on the appraisal set out above and the recommendations of the Council's solicitor, it is considered that, although the Council's original S106 wording in respect of chargee's duty (based on Southend's published model S106) was sound in any event, there is reasonable justification to modify the S106 requirement to amend the chargee provisions relating to affordable housing. There will be no detrimental effect on the delivery of affordable housing and, if anything, this may assist its delivery.

## **9 Recommendation**

- 9.1 Members are recommended to delegate to the Director of Planning or Service Manager for Development Control to **AGREE A MODIFICATION OF THE PLANNING OBLIGATION** dated 26<sup>th</sup> February 2021 pursuant to planning permission ref. 20/01227/OUTM to amend the chargee provisions in relation to the affordable housing.