

Committee: Strategic Development	Date: 9 th January 2014	Classification: Unrestricted	Agenda Item Number:
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Report of: Director of Development and Renewal	Title: Application for a deed of variation to a Section 106 agreement
Case Officer: Iyabo Johnson	Ref No: PA/13/00846 and PA/07/03282
	Ward: Millwall

1. APPLICATION DETAILS

Location:	Indecon Court (Phase 2 site), 20 Millharbour
Existing Use:	Disused
Proposal:	Deed of variation to Section 106 agreement dated 13 th June 2008, relating to application PA/07/03282
Drawing Nos/Documents:	N/A
Applicant:	Galliard Homes and One Housing Group
Ownership:	Galliard Homes
Historic Building:	N/A
Conservation Area:	N/A

2. SUMMARY OF MATERIAL PLANNING CONSIDERATIONS

- 2.1 The Council has received a request to variation the S.106 Agreement attached to the second phase of the Indecon Court development (granted planning permission in 2008) to alter the tenure of affordable housing (from social target rent to affordable rent). The amount of affordable housing remains unchanged.
- 2.2 The approved scheme included 546 units in total, of which 123 were affordable, to be let at social target rents. The applicants have presented financial evidence demonstrating that with 123 units at social target rent, the scheme would not be economically viable. Instead, the applicants are seeking a deed of variation to enable the affordable units to be made available as an affordable rented tenure. The viability evidence presented suggests that at affordable rents, the scheme would be viable. Officers accept that the provision of the affordable units at social target rents would have rendered the scheme unviable. Officers have negotiated a bespoke rent schedule for this scheme which ensures that all rents fall below the Council's POD rent levels and that the units will be affordable for households on the Council's waiting list as a result. Officers consider that the provision of the units at affordable rents, with the greatest reduction below POD levels in the family sized units, accords with current policies which seek to maximise the provision of affordable housing both in the Borough and London more generally.
- 2.3 However, officers have sought to negotiate an overage mechanism within the S.106 Agreement, which would allow for the viability to be reconsidered once the development has been completed. This would ensure that should financial viability improve (for instance through reduced build costs, higher yields or sales values) the Council could recover some of the additional profit to be used toward the delivery of affordable housing. Officers and the applicant did not reach an agreement in this respect and accordingly, the variation is recommended for refusal.

3. RECOMMENDATION

- 3.1 That the Strategic Development Committee resolve to ratify officers recommendation to refuse to agree a deed of variation to the original S.106 Agreement to alter the tenure of affordable housing to the affordable rent product.

4. SITE AND SURROUNDS

- 4.1 The Indecon Court site comprises 1.76ha and is located within the Millennium Quarter Master Plan area (MQMP) on the Isle of Dogsto the south of Canary Wharf area.
- 4.2 Phase 1 of the site is now complete and includes approximately 360 residential units together with commercial uses at ground floor. The first phase of the development also included an area of public realm known as Lightermans Gardens which is identified in the Millennium Quarter Masterplan (MQMP) as being at the heart of the Millennium Quarter.
- 4.3 This application relates solely to the eastern side of the site and is known as Phase 2 of the original outline planning permission and incorporates an area of 0.94ha.
- 4.4 The site is bounded by three roads being Lightermans Road to the north, Millharbour to the east and Lanterns Lane to the south.

5 RELEVANT PLANNING HISTORY

Outline Planning Permission (PA/02/01330)

- 5.1 Outline planning permission was granted on 22nd June 2004 for:

A mixed use development up to a maximum height of 19 storeys (78.5 metres) comprising residential (Class C3), offices (B1), shops/financial and professional services/food and drink units (A1,A2,A3), B1 workspace units, public open space and pedestrian routes with basement car parking, access and new highway arrangements. The application is accompanied by an Environmental Statement under the Town and Country Planning (Environmental Impact Assessment) Regulations 1999.

Phase 1 (PA/06/00900)

- 5.2 The first phase element of the outline permission included a provision of 71 affordable homes, which represented 27% of the overall total in terms of habitable rooms which accorded with the Council's Unitary Development Plan (1998) which was the relevant policy document at the time. Of the 71 affordable units, 54 were within the Social Rent tenure and 17 within the Intermediate tenure.

Phase 2 (PA/07/03282)

- 5.3 Full Planning Permission was granted on 13 June 2008 for:

The demolition of the existing buildings on site and construction of a mixed use development comprising of two buildings. The main building ranges from 12 to 32 storeys with a maximum height of 95 metres (99.5 AOD) and a 10 storey 'Rotunda' building being a maximum height of 31.85 metres (36.15 AOD).

Use of the new buildings for 546 residential units (Use Class C3) (87 x Studios, 173 x 1 bedrooms, 125 x 2 bedrooms, 147 x 3 bedrooms, 14 x 4 bedrooms), 5,390sqm for hotel (Use Class C1) and /or Serviced Apartments (Sui Generis), 1,557sqm of Leisure floorspace (Use Class D2) and 1,654sqm commercial floorspace (Use Classes A1/A2/A3 and/or A4). Plus a new vehicle access, 150 car parking spaces in one basement level, public and private open space and associated landscaping and public realm works at ground floor level.

- 5.4 On 29 May 2012, a certificate of lawful development in respect of a development was granted for continued demolition of existing buildings and construction of a mixed use development pursuant to planning permission dated 13 June 2008, Ref: PA/07/03282. The Certificate served to confirm that demolition works associated with the implementation of the planning permission granted in June 2008 had commenced before the five year deadline for implementation and that as a result the works were lawful and the planning permission extant.

6 BACKGROUND TO PROPOSED VARIATION

Interpretation of affordable rent

- 6.1 The S.106 Agreement in respect of the PA/07/3282 application was signed in 13 June 2008, before the affordable rent product as we now understand it (being rent up to 80% of market rent) was in place. However, within the Agreement, the term 'affordable rent' had been used to describe the social target rent tenure.
- 6.2 In October 2012, the developer (Galliard Homes) together with the Registered Provider (One Housing Group) approached the Council to seek to clarify the meaning and effect of clauses relating to the provision of affordable housing as set out in the S.106 Agreement.
- 6.3 One Housing Group had agreed to enter into a development partnership with Galliard on the basis of them being able to provide the affordable units (123 in total) at affordable rent (i.e. up to 80% of market values) levels rather than at social target rent levels (typically 28% to 40% of market rent). Both One Housing Group and Galliard were of the view that the S.106 Agreement provided scope for both parties to agree this.
- 6.4 The Section 106 Agreement defined affordable housing as "*residential accommodation for which the asking price/rent is significantly lower than prevailing market/prices rents in the Council's Area.*" Affordable Rent is defined as "*rent levels not exceeding rent caps (or such other standards that replace the same) set by the Housing Corporation from time to time or such other standards.*"
- 6.5 The applicants sought to demonstrate that as the S.106 included the term "affordable rent", the provision of the affordable units at affordable rent (as the term is understood today) instead of social target rents would be acceptable and within the terms of the S.106 Agreement. On this basis, the applicants argued that the Council would be acting against the terms of the S.106 Agreement by insisting on social target rent.
- 6.6 Council officers did not accept this position, contending that as the affordable rent product was introduced by the Government in 2011, it could not have been in the contemplation of the parties when the S.106 Agreement was completed in 2008. Officers considered that the use of the term "affordable rent" was merely coincidental and that the intention of the Council at the time was to secure the units at social target rents, to which "rent caps" are typically associated.
- 6.7 Officers subsequently advised the applicants that the original intent of the Agreement was to deliver social target rent affordable housing. However officers advised that a blended approach to the provision of affordable housing could be considered acceptable in policy terms subject to sufficient evidence being tabled demonstrating that the provision of the affordable units at social target rents would threaten the overall viability and deliverability of the scheme.

Viability

- 6.8 The developers (Galliard) acquired a debt of around £60m upon purchasing the site. This debt was owed to an Irish Building Society. This debt has now been acquired by the National Asset Management Agency (NAMA), a body established by the Irish government to acquire loans linked to land and development from Irish banks.
- 6.9 NAMA has placed a minimum residual land value on the site of £25m. The residual method of valuation essentially subtracts total scheme costs and profit from total scheme revenue to arrive

at a residual land value. NAMA have stipulated that £25m is the minimum residual land value it would be willing to accept before releasing the site for redevelopment.

- 6.10 Following on from officers' advice, the applicants submitted two viability appraisals to the Council. The appraisals illustrated the impact of providing the affordable units at social target rent and at affordable level (POD) rents, on the profitability and viability of the scheme. Both appraisals were verified by an independent assessor on behalf of the Council. In both scenarios (social target rent and affordable rent at POD levels), the appraisals showed that a residual minimum land value of £25m would be achieved which would meet NAMA's criteria for releasing the site.
- 6.11 However, both scenarios would return sub market levels of profit. Typically, developers would seek a fixed profit margin of around 20% of the gross development value (GDV). If the affordable units were let at social target rents, the scheme would achieve a 13% profit margin which would be undeliverable. If the units were let at affordable rents, a 16% profit would be achieved which whilst being lower than typical market expectations, would be acceptable to NAMA. This would make the development viable and deliverable as a result.
- 6.12 In addition, the GLA have iterated that grant funding for the scheme will only be made available to subsidise a reduction in rents to POD levels. The GLA have confirmed that grant would not be available if the Council insists on social target rents. Without grant funding, the scheme will not be deliverable.

Rent levels

- 6.13 Officers have considered the findings of the viability assessments and the advice of the Council's independent assessor and accept that the provision of all 123 of the affordable units at social target rent would render the scheme unviable and inhibit its delivery.
- 6.14 However, officers expressed concern that current POD rents for properties in the Isle of Dogs, which is a relatively high value area, would prove to be unaffordable for many households on the Council's housing waiting list.
- 6.15 In response to these concerns, the applicants have agreed to set the rent levels below the Council's POD levels. In the case of the family sized units, there is a significant reduction from the POD levels.

The proposed rents inclusive of service charges are set out in the table below:

Unit Type	No of units	POD Rent 13/14 (including service charge)	Proposed rent	Social target rents (excluding service charge)
1 bedroom	26	£210.35	£206.55	£132.16
2 bedroom	37	£235.25	£231.00	£139.92
3 bedroom	46	£249.00	£234.00	£147.70
4 bedroom	14	£276.00	£238.00	£155.47

- 6.16 All of the weekly rents are below the Council's POD levels. Significant reductions have been secured for the family sized units, for which the Borough has an acute need.
- 6.17 The applicants are seeking to amend the S.106 Agreement to reflect the new agreed rents.

7. POLICY FRAMEWORK

- 7.1 Following the adoption of the Managing Development Document on 17th April 2013 the

development plan now consists of the Managing Development Document (MDD), the Core Strategy 2010 and the London Plan 2011 (Revised Early Minor Alterations – 2013). The following policies are relevant to the application:

Core Strategy Development Plan Document 2010 (CS)

SP02 Urban living for everyone

Managing Development Document (Adopted 2013)

DM3 Delivering Homes

Spatial Development Strategy for Greater London (London Plan 2011) (Early Minor Alterations 2013)

- 3.8 Housing Choice
- 3.9 Mixed and Balanced Communities
- 3.10 Definition of Affordable Housing
- 3.11 Affordable Housing Targets
- 3.12 Negotiating Affordable Housing on Individual Private Residential and Mixed Use Schemes (as amended by the Early Minor Alterations 2013).

Government Planning Policy Guidance/Statements

The National Planning Policy Framework 2012 (NPPF)

8. CONSULTATION RESPONSE

8.1 The views of the Directorate of Development and Renewal are expressed in the MATERIAL PLANNING CONSIDERATIONS section below:

8.2 The following were consulted and made comments regarding the application:

LBTH Affordable Housing Team

8.3 *All rents are below our preferred POD Affordable rent levels and the rents on the family sized larger units are much lower especially on the 4 bed homes. This will make them more attractive to families as the impact of Welfare Reform starts to impact on them.*

The Affordable Housing Team would always want to see rental levels as close to social target levels as possible and in all circumstances below our preferred POD affordable rents. This scheme was approved before the concept of 'affordable rents' was introduced. The GLA are grant funding the scheme and the scheme is only viable with the new affordable rents. Additional grant funding in the region of £4m would be required to reduce the rents to social target rent levels – the GLA did not consider this to be good value for money but were prepared to allow the grant to subsidise rents at the levels set out above

Given the circumstances, on balance the Affordable Housing Team considers the scheme at these rent levels acceptable."

9. MATERIAL PLANNING CONSIDERATIONS

Delivery of affordable housing

9.1 The London Plan (LP) has recently undergone minor alterations to ensure consistency with the National Planning Policy Framework (NPPF) (2012). Paragraph 3.58 of the LP (Early Minor Alterations 2013) identifies the new affordable rent product as being a means through which boroughs can achieve the aims of policy 3.9 of the LP (2011) which seeks to deliver mixed and balanced communities. Paragraph 3.68 of the LP (Early Minor Alterations 2013) states that "boroughs should enable the range of affordable rents to be applied" in order to maximise the provision of affordable housing across London.

9.2 Strategic policy SP02 of the Core Strategy (CS) (2010) sets an overall target for the delivery

of affordable homes of 50% until 2025. The policy states that this target will be achieved through requiring 35%-50% affordable homes on sites providing 10 new residential units or more (subject to viability).

- 9.3 Policy DM3 of the adopted Managing Development Document (MDD) (2013) states that development will be required to maximise affordable housing provision in accordance with the Council's tenure split (70% Social/Affordable Rent and 30% Intermediate) as set out in the CS (2010).
- 9.4 Phase 2 of the Indecon Court development will deliver a total of 546 new homes, 165 of which are affordable which equates to 35% of the total by habitable rooms (42 of these units are intermediate homes). The overall split between rented and intermediate tenures would not change as a result of the proposed deed of variation.
- 9.5 The supporting text to policy SP02 of the CS (2010) acknowledges that instances will arise where affordable housing requirements will need to be varied where policy obligations cannot be met. In these instances, *"detailed and robust financial statements must be provided which demonstrate conclusively why planning policies cannot be met"*.
- 9.6 Members are reminded that this application only seeks to alter the tenure of the affordable housing and in a policy context, the requisite amount of affordable housing remains unchanged and to be delivered. Whilst the applicant has provided a robust economic justification for the switch to affordable rents and in doing so met the Council's policy requirements, the wider policy context does merit consideration.
- 9.7 The emerging amended version of the London Plan (Early Minor Alterations 2013) promotes the new affordable rent product as a tool for promoting the delivery of affordable housing across London. Boroughs are advised to *"not attempt to set rent targets"* in order to avoid impeding the maximisation of affordable housing provision.
- 9.8 In the current economic climate, issues around development finance and viability are playing a significant role in the delivery of new affordable homes. Phase 2 of the Indecon Court development was granted planning permission in 2008 and following that, the owners of the site went into insolvency, owing a sizeable debt to an Irish funder. This debt has been acquired by NAMA and works to implement the 2008 permission began on site in May.
- 9.9 Through the financial evidence that has been provided, officers have reached the conclusion that an insistence on the provision of the affordable units at social target rents would render the scheme unviable. Such an insistence could threaten the delivery of the scheme, despite the commencement of ground works which have begun in order to keep the 2008 consent extant.
- 9.10 The Borough has ambitious housing targets and needs to deliver approximately 2,885 units per year in order to meet these. The failure of this scheme to deliver 546 new units would compromise the Borough's ability to deliver against its targets. Whilst the 123 affordable units would not be made available at social rents, they would be priced below the Council's POD levels and would as a result be affordable for households on the Council's waiting list.
- 9.11 The proposed deed of variation would secure the delivery of 546 new homes of which 123 would be affordable with 60 of these being large enough for families. Given the general thrust of both the Council's policies and the London Plan (2011) (as amended) which seek to maximise affordable housing including within the affordable rent tenure, the proposed switch from social target rent to affordable rent is considered acceptable and is necessary to ensure delivery of the scheme.

10. Overage

- 10.1 Whilst the principle of a change of tenure is considered acceptable in policy terms, policy SP02 of the CS sets an overall target of affordable housing of 50%, a position which is further supported by policy DM3 of the MDD which seeks to maximise the level of affordable housing. Accordingly, given the current policy position, together with the increase in rent levels for the relevant affordable units, it is the view of officers that an overage mechanism should be introduced, ensuring that should the development profits exceed those which are set out in the viability report, then some of those profits should come back to the Council to be ring-fenced for the delivery of affordable housing. This approach accords with the above policies and the general desire to maximise affordable housing, especially were economic circumstances have changed during the life of the project alongside changes in the affordable housing policy dynamic.
- 10.2 Officers sought to negotiate a mechanism whereby profits were split between the developer and the Council, should overall profit margin exceeded 20% (currently 16% under affordable rent scheme) which is an accepted profit level in the current economic climate. However, the applicants have set out that they would only agree to a review mechanism based on an uplift in the private sales values.
- 10.3 It is the view of officers that such an approach is flawed, as private sales are not the only variable in the development. There are other aspects of the build which could lead to a decrease in costs and increases in values and hence, to agree the applicant's position would not ensure a full appraisal of the financial situation.

11. Conclusions

- 11.1 All other relevant policies and considerations have been taken into account. Whilst the principle of varying the tenure of affordable housing is considered acceptable, the failure to agree to an appropriate overage mechanism means that in the event the financial viability of the scheme improves significantly, the Council would not secure the maximum reasonable amount of affordable housing.
- 11.2 Ratification of officers' recommendation not to accept the deed of variation is therefore sought.