

<b>Agenda Item</b> A11	<b>Committee Date</b> 31 May 2017	<b>Application Number</b> 16/01487/VLA
<b>Application Site</b>  Land East Of Railway Line St Michaels Lane Bolton Le Sands Lancashire		<b>Proposal</b>  Variation of legal agreement attached to planning permission 15/01167/FUL to vary the affordable housing provision
<b>Name of Applicant</b>  Mr Gary Middlebrook		<b>Name of Agent</b>  Mr Daniel Hughes
<b>Decision Target Date</b>  16 January 2017		<b>Reason For Delay</b>  Independent assessment of initial viability appraisal and subsequent reviews of rebuttal documentation and revised financial viability appraisals.
<b>Case Officer</b>		Mrs Jennifer Rehman
<b>Departure</b>		No
<b>Summary of Recommendation</b>		Refuse

**(i) Procedural Matters**

This application was to be reported on the 3 April 2017 (agenda item A9) with a recommendation of refusal (in relation to the affordable housing provision) but was deferred ahead of the committee meeting to allow further consideration and independent assessment of the applicant's rebuttal documentation and revised appraisals.

**1.0 The Site and its Surroundings**

- 1.1 The application site relates to a 0.71 hectare parcel of pasture land located on the south-eastern periphery of the built-up area of Bolton-le-Sands. The site is situated to the east of the West Coast Main Line (WCML) with residential development bordering the site to the north and east. To the southwest is agricultural land designated as Green Belt. The Green Belt designation extends to the west and north beyond the WCML. Native hedgerows and trees surround the site with an open drainage ditch running along part the western boundary. The nature of surrounding residential development is predominately two-storey in scale but of varying styles and architectural periods.
- 1.2 The site is accessed off St Michael's Lane which runs along the northern boundary of the site. This road links to the A6 in the east over the WCML immediately to the north west of the site. The A6 runs through the east of Bolton-le-Sands providing access to both Carnforth and Lancaster and junctions 34 and 35 of the M6. The nearest bus stop (with operating bus services) is approximately 375m to the south east of the site on the A6. A range of local services and facilities are located within the village including the local primary school.
- 1.3 The site is within the District's Countryside Area, which sweeps across the entire village, and partly located with land designated for Mineral Safeguarding. The north-western edge of the site is located within an area indicated to suffer surface water flooding but is located outside flood zones 2 and 3. There are no other designations or land use allocations relating to the application site.

## **2.0 The Proposal**

- 2.1 The applicant has submitted an application to vary the terms of the legal agreement attached to planning permission 15/01167/FUL, for the erection of 20 dwellings with an associated new access.
- 2.2 The permission was granted subject to planning conditions and a legal agreement securing the following:
1. Provision of a minimum of 40% affordable housing of which 50% will be provided as intermediate affordable housing and 50% as social rented housing (unless an alternative affordable housing scheme is approved in writing with the relevant parties);
  2. An Education Contribution to the sum of £79,444.00 (equivalent to 1 secondary school place and 5 primary school place); and
  3. An Open Space Contribution to the sum of £25,000 (£10,000 to off-site improvements to equipped play areas; £10,000 for off-site improvements to children and young person's facilities and £5,000 for off-site improvements to parks and gardens).
- 2.3 The applicant has submitted an application to vary the terms of the legal agreement under Section 106A of the Town and Country Planning Act. This can be done where the relevant parties agree to renegotiate. This application has been submitted with a financial viability appraisal (FVA) to support the applicant's claim that the development cannot meet the requirements of the originally agreed affordable housing obligations and therefore seeks to agree an alternative affordable housing scheme. As viability is a material planning consideration and the legal agreement contains provisions to agree an alternative affordable housing scheme, it would not be conducive to the Council's role in facilitating the delivery of housing for the Council not to agree to consider changes to the planning obligation. The landowners of the site (also a relevant party) have also confirmed agreement to vary the terms of the agreement.
- 2.4 The applicant seeks to vary paragraph 1.1 of the Third Schedule which reads:
- "To submit an Affordable Housing Scheme to the Council which provides for a minimum of 40% Affordable Housing Units out of the 20 dwellings built on the Site, of which 50% will be provided as intermediate Affordable Housing and 50% as Social Rented Housing unless an alternative Affordable Housing Scheme is approved by the Council, which must firstly be agreed in writing between the relevant parties";*
- and paragraph 2 of the Third Schedule which reads:
- "Not to allow the Occupation of more than two (2) of the Market Dwellings prior to payment to the Council of the Education Contribution".*
- 2.5 The applicant originally sought to reduce the affordable housing provision from 40% to 10% of the 20 dwellings built on the site. The applicant's original submission indicated the affordable units would comprise two 2-bedroom intermediate affordable housing units. The applicant's original proposal did not seek to remove other planning obligations (POS and Education contributions) but to vary the trigger relating to the payment of the Education Contribution only.
- 2.6 The applicant and case officer have been negotiating on this case for some time with a number of iterations to the original FVA being submitted, assessed and reviewed by our appointed consultant. The applicant's latest position seeks to vary paragraph 1.1 of the Third Schedule to allow four (20%) affordable housing units out of the 20 dwellings built on site. The applicant is offering these four units as intermediate tenures (shared ownership), comprising two 2-bed dwellings and two 1-bed dwellings. The applicant claims that to deliver this level of affordable housing (an increase of 2 units from their original proposal), they now propose to omit the education contribution. This was not part of the applicant's application and has not been agreed with the Education Authority or officers of the Council. Previously the applicant had sought to alter the trigger for the payment of the contribution which had been accepted and agreed by officers and the Education Authority.
- 2.7 At this stage a draft Deed has not been prepared but if the proposals were found acceptable there would be necessary, associated amendments required to other sections/paragraphs of the s106 (e.g. the removal of the cascade provision, removal of the relevant paragraphs relating to nomination rights for social rented units, removal and changes to definitions etc). Such would not go to the heart of the principle considerations which are described below.

### **3.0 Site History**

3.1 The relevant planning history is set out in the table below:

Application Number	Proposal	Decision
15/01167/FUL	Erection of 20 dwellings and associated access	Approved

### **4.0 Consultation Responses**

4.1 The following responses have been received from statutory and non-statutory consultees:

Consultee	Response
Strategic Housing	Recommends <b>refusal</b> - based on the independent review of the viability.
Education Authority	<b>No objections</b> to the changes to the trigger for payment of the education contribution. In response to the applicant's latest proposals, the Education Authority <b>would object</b> to any proposal that cannot provide mitigation against the impacts of new development on education places.

### **5.0 Neighbour Representations**

5.1 Whilst there are no statutory requirements to publicise applications to vary legal agreements, a site notice has been posted adjacent to the application site along with an advert in the local press. At the time of drafting this report, no representations have been received.

### **6.0 Principal National and Development Plan Policies**

#### **6.1 National Planning Policy Framework**

Paragraphs 7, 14 and 17 – Presumption in favour of Sustainable Development and Core Planning Principles;  
Section 6 – Delivering a wide choice of high quality homes;  
Paragraph 72 – Supporting education provision to meet the needs of the community;  
Paragraph 173 – Ensuring viability and deliverability;  
Paragraphs 204 and 205 - Planning obligations.

#### **6.2 Local Planning Policy Overview – Current Position**

At the 14 December 2016 meeting of its Full Council, the local authority resolved to undertake public consultation on:

- (i) The Strategic Policies and Land Allocations Development Plan Document (DPD); and,
- (ii) A Review of the Development Management DPD.

This enabled progress to be made on the preparation of a Local Plan for the Lancaster District. Public consultation took place from 27 January 2017 to 24 March 2017. Whilst the consultation responses are currently being fully considered, the local authority remains in a position to make swift progress in moving towards the latter stages of: reviewing the draft documents to take account of consultation outcomes, formal publication and submission to Government, and, then independent Examination of the Local Plan. If an Inspector finds that the submitted DPDs have been soundly prepared they may be adopted by the Council, potentially in 2018.

The **Strategic Policies and Land Allocations DPD** will replace the remaining policies of the Lancaster District Core Strategy (2008) and the residual 'saved' land allocation policies from the 2004 District Local Plan. Following the Council resolution in December 2016, it is considered that the Strategic Policies and Land Allocations DPD is a material consideration in decision-making, although with limited weight. The weight attributed to this DPD will increase as the plan's preparation progresses through the stages described above.

The **Review of the Development Management DPD** updates the policies that are contained within the current document, which was adopted in December 2014. As it is part of the development plan the current document is already material in terms of decision-making. Where any policies in the draft 'Review' document are different from those adopted in 2014, and those policies materially affect the consideration of the planning application, then these will be taken into account during decision-making, although again with limited weight. The weight attributed to the revised policies in the 'Review' will increase as the plan's preparation progresses through the stages described above.

6.3 Development Management DPD Policies:

DM41 (New Residential Development)  
DM42 (Managing Rural Housing Growth)  
DM48 (Community Infrastructure)

6.4 Lancaster District Core Strategy Policies:

SC1 (Sustainable Development)  
SC4 (Meeting Housing Requirements)  
MR1 (Planning Obligations)

6.5 Other Considerations

Meeting Housing Needs SPD (February 2013)  
National Planning Practice Guidance  
Financial Viability in Planning - RICS Guidance Note 1st Edition (RICS, August 2012)

**7.0 Comment and Analysis**

7.1 Section 106A of the Town and County Planning Act 1990 relates to the modification and discharge of planning obligations. S106A (1) states that a planning obligation may not be modified or discharged except-

- (a) By agreement between the appropriate authority and the person or persons against whom the obligation is enforceable; or
- (b) In accordance with this section and section a106B (appeals).

7.2 The NPPF states at paragraph 205 that '*where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planning development being stalled*'. Similarly, the NPPG states that '*where local planning authorities are requiring affordable housing obligations or tariff style contributions to infrastructure, they should be flexible in their requirements*' (Planning Obligations Paragraph 006). Subsequently, it is clear from national planning policy and guidance, local planning authorities should be flexible and should engage with developers to understand and assess any change in circumstances that affect the delivery of development. Whilst there has not been a significant length of time between the planning permission being granted (14 April 2016) and the submission of this application to vary the legal agreement, Officers have been advised that following further on-site ground investigations there are increased abnormalities associated with developing the site leading to development viability issues. Local authorities are to be flexible in seeking planning obligations, although the NPPF is clear that where safeguards are necessary to make a particular development acceptable in planning terms, and these safeguards cannot be secured, planning permission should not be granted for unacceptable development. The principal consideration here relates to whether the applicant has provided compelling justification to demonstrate that the viability of the development is unduly threatened by the scale of obligations set out in the original legal agreement, namely the provision of affordable housing and the education contribution, and; whether the reduction in affordable housing and loss of the education contribution would lead to unacceptable development.

7.3 National planning policy seeks to significantly boost the supply of housing and notes that housing applications should be considered in the context of the presumption in favour of sustainable development. This is particularly notable in cases where Councils cannot demonstrate a 5 year housing land supply. However, national planning policy also requires local planning authorities to plan for a mix of housing to appropriately meet local needs and demands, including affordable housing. This policy approach is echoed in the Development Plan where Policy DM41 requires proposals for more than 10 dwellings in the rural areas to provide 30% affordable housing on site and up to 40% on greenfield sites. Local planning policy (DM41 and the supporting SPD: Meeting

Housing Needs) does, however, recognise that the scale of planning obligations, in particular affordable housing, can in certain circumstances have the potential to negatively impact the viability of a proposed development. The policy states that *'where compelling and detailed evidence demonstrates the provision of affordable housing...would have a disproportionate and unwarranted negative impact on the viability of proposed development, applicants may seek to provide fewer affordable dwellings than would be ordinarily acceptable'*. Reducing the level of affordable housing may not necessarily make the development unacceptable (if justified) but the degree to which proposals deviate from the policy requirements will be weighed against the benefits of the resulting scheme.

- 7.4 In accordance with policy DM41, to support the applicant's proposed variations to the planning obligations, viability evidence (in the form of a financial viability appraisal (FVA)) has been submitted for consideration. The local planning authority subsequently appointed an independent consultant to review the applicant's viability appraisal (to the cost of the applicant). Our consultant reviewed the initial FVA and the key assumptions therein and concluded in their professional opinion that the site was capable of providing an affordable housing contribution of 40% in accordance with the Development Plan - contrary to the applicant's submission. It was at this point the application was prepared and reported to April's Planning Committee. Following this initial review of the applicant's original FVA, the case officer (in consultation with our consultant) has considered a number of iterations of the applicant's FVA and rebuttal documentation. The amendments to the applicant's FVA have led to the applicant's current proposal to reduce the level of affordable housing from 40% to 20% (four shared ownership units) and to omit the education contribution.
- 7.5 The applicant's offer of four affordable housing units on a shared ownership basis does not comply with the Council's affordable housing policy (DM41 and SPD Meeting Housing Needs), which seeks up to 40% affordable housing units on greenfield sites and tenures to be based on a 50:50 split of intermediate units and rented units, with a preference for social rented units. The reduction to the affordable housing provision is on the basis of development viability. With regards the proposed affordable tenures, the applicant has indicated that the reason to request all shared ownership units is based on anecdotal evidence that there could be difficulties getting a registered provider (RP) to purchase the two rented units, which would put further financial strain on the scheme. As a starting point the local planning authority should always seek to ensure that the tenures of the affordable housing are policy compliant. However, recognising the potential difficulties the applicant has identified, it would not be unreasonable (if the proposals were found to be acceptable) to provide some flexibility within the planning agreement to later agree alternative tenures of the affordable housing units should robust evidence demonstrate no RP interest.
- 7.6 The affordable housing provision is below (20%) the policy requirements (and the requirements previously agreed by the developer in the s106 only 13 months ago). It is understood this has come about due to additional abnormal costs associated with developing the site, such as deep trench/pile foundations, cut and fill, water attenuation, additional costs associated with working alongside the railway line and radon protection. Their latest FVA has been analysed and reviewed by our appointed consultant. There are a number of key factors to be taken into account when assessing viability, namely gross development value (GDV), costs, land value and competitive return to developers and land owners. There is agreement between the parties in relation to the submitted land values and the level of developer return (18%). With regards to abnormals, our consultant indicates that these are slightly higher than the expected range (10-20% of basic build cost) but in their professional view, at this stage (without detailed scrutiny of the costs), the figures appear realistic. The main areas of disagreement relate to the detailed analysis of GDV and costs.
- 7.7 Despite some agreement in the consideration of the viability testing of this case, there remains continuing disagreement over various assumptions in the FVA. Having regard to the evidence submitted by the applicant and the subsequent FVA review reports from our appointed consultant, officers are not satisfied that the applicant's evidence is sufficiently robust and compelling to allow the reduction to the affordable housing provision and the loss of the education contribution. In summary, in the applicant's latest FVA it is considered that the sale values are too low and do not reflect market evidence (or the applicant's own sale values as originally submitted); the affordable housing transfer values are too high and do not reflect expected average transfer values that officers of the Council have encountered on other sites in the area; the tenure split is not policy compliant; the timescale for house sales considered too long which has a negative impact on total cost of scheme finance; and sales/marketing/incentives too high; not to mention the loss of the education contribution which has not been agreed with the Education Authority or officers here, nor was this

originally applied for. Subsequently, to allow the proposed variations at this stage would be contrary to the policies referenced above in section 6.0 of this report. Members are advised that through the viability testing of this application it has become apparent that the provision of 40% affordable housing with the other scale of obligations would be challenging and our consultant has indicated that 25% affordable housing provision may be more realistic.

7.8 Much of the discussion and negotiations to date have focussed on affordable housing provision and the key viability factors affecting the outcome of affordable provision, which relates to the principal considerations of this application. However, it is important to also reflect on the loss of the education contribution. The purpose of an education contribution is to mitigate the impacts of the proposal on the local education infrastructure. The Education Authority (Lancashire County Council) reported at the time of the planning application being considered that the proposal (based on their adopted methodology at the time of assessment) would lead to an impact on both primary and secondary school places and sought a contribution of £18,397.28 towards a secondary school place and £61,047 towards 5 primary school places. The applicant accepted this requirement and it was subsequently secured in the legal agreement. The applicant has sought to retain the education contribution throughout the negotiations, until very recently when the applicant increased the affordable housing provision from 10% to 20%. The failure to provide an education contribution would be contrary to Core Strategy policy M1, Policy DM48 of the DM DPD and paragraph 72 of the NPPF. The Local Education Authority has also indicated that they would object to any development that did to mitigate the impacts of new development on education places.

7.9 In your officers' opinion, providing contributions to support local education infrastructure is a significant material consideration. It is also noted that pressure on school places was one of the main reasons for opposition (from the public consultation) at the time the application was being considered. Subsequently, there is preference to see this obligation retained. Again, Members are advised that through the viability testing of the application, our consultant has indicated that the development is viable with a reduced affordable housing provision but with the retention of the education contribution.

## **8.0 Planning Obligations**

8.1 The proposed amendments to vary paragraph 1.1 and the removal of paragraph 2 of the Third Schedule are not accepted.

## **9.0 Conclusions**

9.1 The existing legal agreement associated with planning permission 15/01167/FUL shall continue to have effect without modifications to the affordable housing provision on the basis that the submitted viability evidence, which has been reviewed and tested by an independent consultant on behalf of the Council, is not considered sufficiently robust or compelling to accept a reduction to the provision of affordable housing to the level proposed (20%) or the loss of the education contribution, contrary to the policies listed in section 6.0 of this report. Members are recommended to resist the applicant's amendments to the planning agreement.

## **Recommendation**

That in respect of the applicant's proposal to vary the legal agreement attached to the grant of planning permission:

- (i) The proposed changes to Paragraph 1.1 of the Third Schedule to reduce the affordable housing provision from 40% to 20% (comprising 4 x intermediate units) is **refused**; and,
- (ii) The changes to omit Paragraph 2 of the Third Schedule (and associated definitions) relating to the payment of the Education Contribution is also **refused**.

## **Background Papers**

None.