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**WARD :** Rhyl South West

**WARD MEMBERS:** Cllr Pete Prendergast (c)  
Cllr Pat Jones

**APPLICATION NO:** 45/2019/0415/ OB

**PROPOSAL:** Application for Deed of Variation to remove Plot 5 from Section 106 Obligation relating to affordable housing provision in connection with planning permission 45/2006/0816/PF

**LOCATION:** Land at Brookdale Road Rhyl

**APPLICANT:** J & T Gizzi Builders Ltd.

**CONSTRAINTS:** None

**PUBLICITY UNDERTAKEN:** Site Notice - No  
Press Notice - No  
Neighbour letters - No

**REASON(S) APPLICATION REPORTED TO COMMITTEE:**  
**Scheme of Delegation Part 2**

- Recommendation to grant / approve – Town / Community Council objection

**CONSULTATION RESPONSES:**

**RHYL TOWN COUNCIL**

“Object: While the Council appreciates the reasons for the request to vary the Section 106 the Council is concerned that if the development had been completed within a reasonable timescale of the original application (45/2006/0816) being approved then the agreed affordable housing would have been provided. No reason or justification for the delay in delivering the development has been provided by the applicant. Therefore the Council must conclude that the delay was the responsibility of the applicant and as such the S106 obligation should be honoured.

In the event that the Local Planning Authority determine that the variation should be approved then the Town Council would request that the developer be required to provide a suitable commuted sum for community facilities”

**DENBIGHSHIRE COUNTY COUNCIL CONSULTEES –**

Housing Strategy and Development Officer  
No objection to the case presented

Valuation & Estates Manager

No objection, verifies the viability case that has been presented to the Council

**RESPONSE TO PUBLICITY:**

None

**EXPIRY DATE OF APPLICATION: 17/7/2019**

**PLANNING ASSESSMENT:**

**1. THE PROPOSAL:**

**1.1 Summary of proposals**

- 1.1.1 This application seeks a modification to a Section 106 obligation completed in 2016 requiring provision of one affordable dwelling as part of a housing development at land at Brookdale Road in Rhyl.
- 1.1.2 The development was originally granted planning permission in May 2016 for the construction of 18 no. 2 bed dwellings and associated works.
- 1.1.3 The application seeks the discharge of the obligation insofar as it relates to the need to provide Plot 5, a 2 bed property, as an affordable dwelling to be sold in accordance with the Council's Affordable Housing Policy.
- 1.1.4 The grounds on which the modification is sought is that the affordable requirement of the S106 increases the financial unviability of the housing development, and a financial viability appraisal has been submitted to support this.

#### **Background**

- 1.1.5 Members are aware that Section 106 Obligations are the Council's preferred mechanism for securing the provision of affordable housing in new developments and for retaining units in perpetuity for local residents in affordable housing need.
- 1.1.6 Planning permission was originally granted at Planning Committee for the development of 18 dwellings at land at Brookdale Road under application code no. 45/2006/0816/PF in December 2006. The permission was subject to completion of a legal Agreement setting out requirements for the provision of 5 affordable housing units (for low cost sale) and also for the payment of an open space contribution for off-site provision (and maintenance costs) of £53,308.80 in order to comply with the policies of the Development Plan in place at that time (Denbighshire's Unitary Development Plan (UDP)). The legal agreement was not signed but the application was not withdrawn.
- 1.1.7 In 2011/2012 the applicants approached the Council to discuss the case as there were concerns relating to the viability of the scheme and the ability to provide 5 affordable units. A Viability Appraisal was submitted and the application was referred back to Planning Committee, still under the same application code no. 45/2006/0816/PF in September 2012. The viability case was accepted and permission was granted subject to completion of a legal Agreement setting out requirements for the provision of 1 affordable housing (for low cost sale) and also for the payment of an off site open space contribution (provision and maintenance costs) of £60,168.96 (due to indexation from 2006 to 2012) in order to comply with the policies of the Development Plan in place at that time, which was still the UDP.
- 1.1.8 Plot 5, a 2 bed property, was designated as the low cost home for sale. The completion of the legal agreement was delayed and was only completed in 2016. The planning permission was dated 18th May 2016.
- 1.1.9 The Section 106 Obligation contains specific conditions relating to the provision of the affordable unit and the trigger to provide the unit has been reached. The basic intention of the obligation was to ensure that the dwelling was provided for affordable purposes and remains available in perpetuity for local residents in proven housing need, in accordance with Council Policies and Guidance in relation to affordable housing.
- 1.1.10 Under the current guidance the price of the affordable property in this area (Rhyl South West Ward) would be £55,192.

#### **The applicant's submission**

- 1.1.11 The current application seeking the consent of the Local Planning Authority to the modification of the Section 106 (S106) Obligation was submitted in May 2019 with a Financial Viability Assessment, and a covering letter from the applicant's solicitor

summarising the case to modify the S106 on the basis of financial viability.

#### 1.2 Description of site and surroundings

- 1.2.1 The application relates to plot 5 within a development consisting of 18 dwellings in total.
- 1.2.2 The site is located off Brookdale Road in Rhyl directly opposite existing residential properties. The properties would all be accessed off Brookdale Road.
- 1.2.3 Construction of the 18 dwellings is almost complete with the final construction works ongoing on the last 3 dwellings. 10 dwellings are occupied and others are undergoing sale.

#### 1.3 Relevant planning constraints/considerations

- 1.3.1 The site is located within the development boundary of Rhyl as defined in the Local Development Plan.

#### 1.4 Relevant planning history

- 1.4.1 Full planning permission granted in May 2016 upon completion of a Section 106 agreement. A more detailed overview of the planning history has been provided above.

#### 1.5 Developments/changes since the original submission

- 1.5.1 None

#### 1.6 Other relevant background information

- 1.6.1 The commuted sum for off-site open space provision and maintenance costs, as required by the S106 agreement has been paid in full (£60,168.96).

### **2. DETAILS OF PLANNING HISTORY:**

- 2.1 45/2006/0816/PF Erection of 18 No. dwellings and construction of new vehicular access RESOLVED TO GRANT at Planning Committee September 2012. Section 106 completed and planning permission GRANTED 18<sup>th</sup> May 2016.

### **3. RELEVANT POLICIES AND GUIDANCE:**

#### **Context for assessment of the application**

The detailed legal/planning context within which an application to modify or discharge a planning Obligation is outlined in Circular 13/97 (including Annex C), Section 106A (6)(b) of the 1990 Planning Act, and Welsh Government's Planning Policy Wales.

The basic requirements are:

- Where the applicant seeks the discharge of a planning obligation, the test under s.106A(6)(b), whether the obligation *"no longer serves a useful purpose"*.
- Where modification is sought, the test under s.106A(6)(c) is whether 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"*.

In relation to the requirements outlined, it is also considered relevant to assess whether:

- the obligation still accords with the 5 principles applying to the use of obligations (necessary, relevant to planning, directly related to the proposed development, fairly and reasonably related in scale and kind to the development, and reasonable in all other respects);
- there has been a genuine change of circumstance since the signing of the obligation which makes insistence on compliance unreasonable.

The above reflect the contents of PPW and Regulation 122 of the Community Infrastructure Levy Regulations 2010 in relation to the tests to be satisfied in order for planning obligations to be required in respect of new development proposals. These are that an Obligation must:

- be necessary to make the proposed development acceptable in planning terms
- be directly related to the proposed development
- be fairly and reasonably related in scale and kind to the proposed development.

Also to be considered are the relevant contents in :

- Government Policy / Guidance  
Planning Policy Wales (Edition 10) December 2018  
Development Control Manual November 2016
- WO Circular 13/97: Planning Obligations
- Other material considerations

## MAIN PLANNING CONSIDERATIONS

- 3.1.1 Having regard to the above context, in this instance, the main issue in relation to the application is therefore considered to be whether the planning obligation still serves a useful purpose, taking account of the applicant's case, the Council's Policies and Guidance and whether there has been a genuine change of circumstance since the signing of the obligation which makes insistence on compliance unreasonable.
- 3.1.2 As noted, the basis of the applicant's case is that the affordable requirement of the S106 makes the housing development financially unviable, as supported by a financial viability appraisal.
- 3.1.3 The Council's Valuation and Estates Manager has assessed the applicant's financial viability assessment and in summary concludes:
  1. *Information contained in the development appraisal provided in support of the application has been used and compared to BCIS and Land Registry published information.*
  2. *The scheme is substantially complete with 7 units close to or at practical completion and other units have been sold and another 4 are occupied but these details are not recorded at the Land Registry.*
  3. *The completed scheme gross development value is £1.740m. Total development costs are estimated to be £2.602m. The fundamental viability of the scheme has not improved since 2011/2012 showing a net loss of £862,000. It is not envisaged there to be any windfall increase in house prices on this scheme so the current values of £95,000 per unit will not materially change.*
  4. *Appreciates the need for affordable housing but this scheme is so far below a commercially viable break even figure that even if the affordable housing unit planning condition is varied then then this does not make a material difference to the overall negative development viability.*
- 3.1.4 The Valuation and Estates Manager concludes that the submission demonstrates the financial difficulty the development scheme is in and to insist on compliance with the affordable requirement of the S106 would add to this difficulty, making compliance unreasonable.

- 3.1.5 It is to be noted that the developer has fully complied with the requirement to contribute towards off site open space, having paid the agreed financial contribution of £60,168.96.
- 3.1.6 Having regard to the above matters, it is also concluded that there has been a significant change in the financial circumstances since the signing of the obligation which makes insistence on compliance unreasonable.

#### Other matters

##### Rhyl Town Council comments

In respecting the representations, it has to be pointed out that there is a basic misunderstanding over the planning the history and when the development commenced - which is perhaps understandable given the complex background and the 2006 planning application reference. For clarity, planning permission was only granted in 2016 upon completion of the Section 106 agreement. There has been no delay on the developer's side in undertaking the development itself, the delays have come about in completing the legal agreement

In relation to the suggestion that the developer be required to provide a suitable commuted sum for community facilities if this modification is approved, it has to be acknowledged that the developer has already contributed over £60,000 towards off site open space provision and there is no policy requirement or reasonable grounds on which to seek any additional contributions at this point in the development process.

##### Well – being of Future Generations (Wales) Act 2015

The Well-being of Future Generations (Wales) Act 2015 imposes a duty on the Council not only to carry out sustainable development, but also to take reasonable steps in exercising its functions to meet its sustainable development (or well-being) objectives. The Act sets a requirement to demonstrate in relation to each application determined, how the development complies with the Act.

The report on this application has taken into account the requirements of Section 3 'Well-being duties on public bodies' and Section 5 'The Sustainable Development Principles' of the Well-being of Future Generations (Wales) Act 2015. The recommendation is made in accordance with the Act's sustainable development principle through its contribution towards Welsh Governments well-being objective of supporting safe, cohesive and resilient communities. It is therefore considered that there would be no significant or unacceptable impact upon the achievement of well-being objectives as a result of the proposed recommendation.

#### **4. SUMMARY AND CONCLUSIONS**

- 4.1 The application relates to a planning obligation tied to a planning permission for a housing development at Brookdale Road in Rhyl.
- 4.2 The report outlines the background history and details the applicant's case for the modification of the S106 Obligation which is based on financial viability.

Having regard to the above matters, it is concluded that there has been a change in the financial circumstance since the signing of the obligation which makes insistence on compliance unreasonable.

**RECOMMENDATION: APPROVE**