

**WAVERLEY BOROUGH COUNCIL**

**COUNCIL**

**27 APRIL 2021**

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**EXE 74/20 Affordable Housing SPD**

**Report back to Council on Affordable Housing SPD**

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1. At the Council meeting on 22 March 2021 (concluding the meeting that commenced on 23 February 2021), Council considered a recommendation from the Executive to approve an Affordable Housing SPD. The original report (dated 23 February 2021), draft SPD, and Consultation Statement, are attached.
2. At the Council meeting on 22 March 2021, Cllr Mulliner proposed an amendment, to revise the wording of Paragraphs 93 and 94 of the SPD. There had been no opportunity for the Council's Planning and Legal Officers to review the proposed revised wording. Therefore Council agreed to defer further consideration of the amendment, and the SPD, and await a report from Officers on whether the proposed revised wording would withstand legal challenge.
3. **Extract of minutes from Council Meeting: 21.03.21**
  - 96.2 The Mayor opened up the debate to Members, and Cllr Mulliner proposed an amendment to strengthen the wording of paragraphs 93 and 94 of the SPD, in order for the council to protect its position with developers who sought to reduce their affordable housing contribution for viability reasons after planning permission had been granted.
  - 96.3 Members debated the amendments and whilst sympathetic with the aim, noted that the wording of the SPD would need to be carefully considered to ensure that it would withstand challenge. Therefore, the Leader proposed, it was duly seconded by Cllr Mulliner, and unanimously
  - 96.4 RESOLVED that further consideration of the Affordable Housing SPD would be deferred to the next meeting of Council, to allow officers to consider the wording proposed by Cllr Mulliner and report back to Council.
4. The following schedule shows the original wording of paragraphs 93 and 94, Cllr Mulliner's proposed revised wording, and Officer's comments along with Officer's recommended alternative to Cllr Mulliner's revision.



Original wording from SPD document	Council Mulliner's proposed amendments	Officer comments
<p>93. Where the level of affordable housing provision is reduced, due to an accepted viability submission position, clawback or top-up by way of an affordable housing financial contribution may be pursued by the Council. If the development of the site proves to be significantly more financially viable as it progresses than the initial position suggested would be the case, subject to further viability assessment, clawback or top-ups may be considered by the Council.</p>	<p>93. Where the level of affordable housing provision is reduced, due to an accepted viability submission position, clawback or top-up by way of an affordable housing financial contribution will be pursued by the Council if it believes that the development of the site will prove to be significantly more financially viable on completion than indicated in the initial viability submission. This will be established by a further viability assessment of the completed development using the same methodology as used in the initial viability submission with updated costs, values and revenues. The further viability assessment will be carried out by an independent RICS-qualified surveyor/valuer appointed by the Council and at the Council's expense. It shall be carried out at a time agreed by the parties within 60 days before or after completion.</p>	<p><u>It is important to note that the scope for a 'clawback' or 'top-up' arrangement does need to be agreed with the developer and must be place at the time permission is granted. There is no legal mechanism to impose such arrangements on developers either unilaterally, or retrospectively.</u></p> <p><u>Accordingly, clawback under Section 106 of the TCPA 1990 is not a feasible approach in the absence of agreed baseline land values from the outset and the willingness of all parties to enter into such an arrangement.</u></p> <p><u>The proposed amendment as suggested by Councillor Mulliner cannot work in practice, as it is written, because the Council cannot retrospectively impose clawback or top-up payments on a development.</u></p> <p><u>In order to strengthen the wording of paragraph 93, and to clarify the circumstances under which agreement to a clawback or top-up clause in a s106 agreement will be pursued with the developer, officers would recommend the text be amended as follows:</u></p> <p><u>"93. Where the level of affordable housing provision is reduced due to an accepted viability submission position, clawback or top-up by way of an affordable housing financial</u></p>

		<p><u>contribution will be pursued by the Council with the developer prior to the grant of planning permission if it is believed that, should market circumstances materially alter between the granting of permission and delivery, the development of the site may potentially prove to be significantly more viable on completion than as indicated in the initial viability submission.”</u></p>
<p>94. If the Council decides that a clawback or similar arrangement is required this will be incorporated into a Section 106 Agreement or Deed of Variation. This will usually be based on the actual costs, values, revenues etc. of the completed development compared with the viability submission made with the application or agreed subsequently</p>	<p>94: When paragraph 93 applies, the Council will incorporate its right to require a further viability assessment into a Section 106 Agreement or, if a Section 106 Agreement already exists, in a Deed of Variation. If a development will be completed in phases, the Council will also incorporate the right to treat each phase as a separate application for the purposes of determining viability at completion. Any financial contribution shall not exceed that required for the application to meet the requirements of Policy AHN1.</p>	<p><b><u>Officers consider that the amended wording suggested by Councillor Mulliner is not workable as currently drafted, but note the valid point made about larger developments that are undertaken in separate phases. Officers therefore recommend the text be amended as follows</u></b></p> <p><u>94. If the Council decides a clawback or similar arrangement is required, this will be incorporated into an initial Section 106 Agreement with the developer, which will include details of the mechanism for calculating any clawback or top up provision. This will be based on the estimated initial costs, values, revenues, etc. of the proposed development from the viability submission made with the application, and the s106 will provide for this to be reviewed subsequently on the completion of the development, if the Council considers this is required. In the event of disagreement between the parties any further viability assessment that may be necessary will be carried out by an independent RICS-qualified surveyor/valuer. Where a development is to be carried out in phases, the s106 Agreement may provide for</u></p>

		<u>further viability assessment and possible clawback or top up payments on, or prior to, the completion of phases.”</u>
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