

PLANNING COMMITTEE – 10 SEPTEMBER 2020

PART I - DELEGATED

5. **19/2133/FUL - Demolition of existing buildings and provision of 345 residential units (Use Class C3) in 2 buildings ranging from 3-7 storeys including a 1 and 2 storey podium; 621sqm of flexible commercial floor space (Use Class A1-A5, B1, D1/D2); 1,754sqm retail floorspace (Use Class A1) podium and surface level car and cycle parking; landscaping; and associated works at LAND AT SOUTH OXHEY, SOUTH OXHEY CENTRAL, HERTFORDSHIRE (DCES)**

Parish: Watford Rural

Ward: South Oxhey

Expiry of Statutory Period: 25.09.2020 (Agreed extension)

Case Officer: Claire Westwood

Recommendation: Approval subject to the Conditions and Informatives as set out in Appendix A, with Conditions C3 (Affordable Housing) and C38 (Bats) and Informative 9 (Affordable Housing – Definitions) amended as set out below and subject to the completion of a Section 106 Agreement.

Reason for consideration by the Committee: Council interest in the land.

1 Background

- 1.1 A preliminary report was brought to the Planning Committee on 23 January 2020 where the application was discussed and clarification was sought on a number of aspects.
- 1.2 The report and analysis was updated and a full report was returned to the Planning Committee on 19 March 2020 where Members resolved to grant planning permission subject to conditions and the completion of a S106 Agreement.
- 1.3 A copy of the officer's report to the 19 March 2020 Planning Committee is attached as **Appendix A**.
- 1.4 At the 19 March 2020 Planning Committee meeting officers reported a verbal update to the wording of condition C38 (Bats) which was agreed by Members as part of the resolution to grant.
- 1.5 Condition 38 (Bats) as approved reads:

A dusk presence/absence bat survey of the low-risk roost features identified in Table 1 of the Bat report should be undertaken prior to demolition should this take place between the months of April to September inclusive. The survey must be undertaken by suitably qualified ecologists, in accordance with Bat Conservation Trust's Bat Surveys for Professional Ecologists: Good Practice Guidelines (3rd Edition) recommendations for structures with low risk of supporting roosting bats; advice provided in the survey must be followed.

Reason: To maintain wildlife habitat and to meet the requirements of Policies CP1, CP9 and CP12 of the Core Strategy (adopted October 2011) and Policy DM6 of the Development Management Policies LDD (adopted July 2013).

- 1.6 Since the 19 March 2020 Planning Committee meeting, discussions have been ongoing to secure the completion of the S106 Agreement. It has come to light during these discussions that the appointed Affordable Housing Provider for phases 1, 2 and 3 of the scheme Homegroup Limited is unwilling to purchase the affordable dwellings which will be secured as part of the grant of this planning permission without an alteration to the mortgagee in possession element of the affordable housing condition whereby the moratorium period is

reduced from 5 months to 3. For the reasons set out below, without this amendment officers are satisfied that there is a real risk that the planning permission will not be implemented, resulting in a reversion to the original 2016 planning permission and the consequent loss of the provision of an additional 145 dwellings of which 65 will be provided as affordable housing.

- 1.7 This addendum report deals only with the proposed amendment to Condition C3 (Affordable Housing). All other aspects of the development are as previously considered and approved by Members on 19 March 2020.

2 Analysis

2.1 Affordable Housing Policy

- 2.1.1 The original 2016 permission was subject to an affordable housing condition which contained a "Mortgagee in Possession" (MIP) clause. Under this, a lender to the Affordable Housing Provider (AHP) would in the event of a default on the mortgage over the affordable dwellings and a decision by the bank to step in and sell the properties to realise its security, have 3 months to try to sell the affordable housing (AH) as affordable housing to a new AHP. If a sale cannot be concluded in that period, the AHP is able to dispose of the AH on the open market, free of any obligation they remain as affordable housing.
- 2.1.2 In recent years, the Council's approach to these risks has become more sophisticated, given that 3 months is very likely in practice to be inadequate to deal with the re-sale of the affordable housing in the event of a default. This gives rise to the risk that in the event of AHP default and step in by the lender, the AH stock would be lost simply because the period was too short. The inadequacy of the 3 month period in this sense appears to be recognised more widely, because RICS registered valuers are willing to increase the value of the affordable units for the purposes of lending against them to a full market value (subject to tenancy) where the 3 month period is used (i.e. treating them as being free of any affordable housing restrictions in the event of a step in by the lender without having to await the outcome of the process during the 3 month period).
- 2.1.3 The current MIP clause as set out in condition C3 ensures that should the AHP get into financial difficulties, the Council would be provided with a 5 month period to find and arrange the transfer of the affected affordable dwellings to a new Affordable Housing Provider. In this scheme, there are 65 affordable dwellings that would be affected in that scenario.
- 2.1.4 The 5-month period is considered necessary in the event of default, to provide a reasonable period of time for the Council to arrange and secure the transfer of the dwellings, and is proportionate to the overall importance of preserving the AH stock where reasonably possible, thus giving effect to national planning policy on the use of planning conditions
- 2.1.5 At the time of the drafting of the Committee Report it would appear that Homegroup were unaware of the change to the MIP clause from that as contained in the 2016 planning permission and assumed that the 3 month MIP clause used in 2016 would be repeated. Homegroup seek the application of the 3 month period.
- 2.1.6 This short period would mean that in the event of a mortgage default there would be a real risk that the dwellings would be lost as affordable housing. This would be contrary to national planning policy.
- 2.1.7 Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that the Council determines applications in accordance with the adopted development plan unless material considerations indicate otherwise. The Annex to the NPPF which advises that affordable housing should (subject to certain enshrined rights) be provided in perpetuity is a material consideration. The use of MIP clauses is an exception which is commonly adopted. The Council's approach to the detail of these provisions has evolved since 2016 given the

balance between the risk and other factors noted above. However officers consider that there are exceptional factors in this case which justify the continued application of the 3 month period in this case:

- The scheme is a multi-phase long term project where the 3 month period was used at the outset. The applicant Countryside Properties UK Limited and Homegroup are established development partners in respect of the whole of the South Oxhey regeneration scheme, having entered into a Development Agreement to purchase and develop the site in 2015. Homegroup is the AHP who will own and manage all of the affordable dwellings on the Site: both those 96 dwellings provided as part of phases 1 and 2 and the additional 65 dwellings to be provided as part of the proposed planning application. Additionally it is a development partner in respect of the open market housing to be provided pursuant to the current planning application.
- Homegroup have indicated that the price agreed to be paid for the affordable housing (which was renegotiated and agreed in [early] 2020) was based on an assumption that the MIP clause which would be imposed as part of the grant of this planning permission, would reflect the 3 month 2016 MIP clause. If the 5 month MIP clause were to be imposed, Homegroup would be contractually free to walk away from the currently proposed phase 3 scheme.

Officers are mindful of the fact that seeking and appointing a new AHP as a result of such disruption would be likely to delay the delivery of this element of the scheme which involves a substantial contribution of affordable housing and new market homes (80 open market and 65 affordable dwellings) in the context of the Council's shortfall in 5 year housing land supply and pressing need for affordable housing.

Countryside have also raised concerns with regard to the potential detrimental effect on the consistency and quality of management of the development were a new Affordable Housing Provider to be found willing to purchase the affordable housing. They explain that the project objective of Countryside and Homegroup's joint submission to the Council was to provide a consistent joined up housing and neighbourhood management solution with a single Affordable Housing Provider owning and managing all of the affordable housing to be provided on the Site.

- 2.1.8 On balance, officers therefore consider that the most appropriate balance of risk and benefit in this case lies in continuity with the arrangements imposed on the wider scheme in 2016.
- 2.1.9 Whilst the 3 month MIP clause is accepted, other amendments to the condition such as the inclusion of 'and costs and expenses' at D (i) are not agreed. Such costs and expenses, the amounts of which are unknown and uncapped, could in the event of a default be significant and would further undermine the efficacy of the MIP Clause. The Law Society's model S106 which was prepared in conjunction with the Council of Mortgage Lenders and which contains standard MIP clauses does not permit the passing on of such costs and expenses to a new AHP in the event of a distressed sale. In essence, it would not be appropriate to expect any new Affordable Housing Provider to pay these additional costs.

3 Recommendation

- 3.1 That PLANNING PERMISSION BE GRANTED subject to the Conditions and Informatives as set out in Appendix A, with Conditions C3 (Affordable Housing) and C38 (Bats) and Informative 9 (Affordable Housing – Definitions) amended as set out below and subject to the completion of a S106 Agreement.

C3 Affordable Housing

No development shall take place until a scheme for the provision of sixty five dwellings to be constructed on the site pursuant to the planning permission as Affordable

Housing has been submitted to and approved in writing by the Local Planning Authority. The Affordable Housing shall be provided in accordance with the approved scheme. The scheme shall include:

- i. The nine x one-bed two person units, five x two-bed three person units, fourteen x two-bed four person units and five x three-bed five person units identified in the table below which shall be constructed on the site and provided as Affordable Rented Dwellings.
- ii. The twenty one x one-bed two person units, six x two-bed three person units and five x two-bed four person units identified in the tables below which shall be constructed on the site and provided as Shared Ownership Dwellings.

Block K (Plan references SOX-BPTW-02-00-DR-A-1060 C01, SOX-BPTW-02-01-DR-A-1061 C01, SOX-BPTW-02-02-DR-A-1062 C01, SOX-BPTW-02-03-DR-A-1063 C01, SOX-BPTW-02-04-DR-A-1064 C01 and SOX-BPTW-02-05-DR-A-1065 C01)

	1B2P	2B3P	2B4P	3B5P
Affordable Rent	K2.05, K2.06, K2.07, K3.05, K3.07, K4.05, K4.07, K5.05, K5.07,	K0.01, K0.02, K3.06, K4.06, K5.06,	K1.01, K1.02, K2.01, K2.02, K2.04, K3.01, K3.02, K3.04, K4.01, K4.02, K4.04, K5.01, K5.02, K5.04,	K1.03, K2.03, K3.03, K4.03, K5.03,

Block L (Plan references SOX-BPTW-02-00-DR-A-1060 C01, SOX-BPTW-02-01-DR-A-1061 C01, SOX-BPTW-02-02-DR-A-1062 C01, SOX-BPTW-02-03-DR-A-1063 C01, SOX-BPTW-02-04-DR-A-1064 C01 and SOX-BPTW-02-05-DR-A-1065 C01)

	1B2P	2B3P	2B4P	3B5P
Shared Ownership	L1.01, L1.02, L1.04, L2.01, L2.02, L2.03, L2.04, L2.06, L3.01, L3.02, L3.04, L3.06, L4.01, L4.02, L4.04, L4.06, L5.01, L5.02, L5.04, L5.06,	L0.01 L3.03, L4.03, L5.03,	L1.03, L2.05, L3.05, L4.05, L5.05,	

Block U (Plan references SOX-BPTW-02-00-DR-A-1060 C01, SOX-BPTW-02-

01-DR-A-1061 C01, SOX-BPTW-02-02-DR-A-1062 C01, SOX-BPTW-02-03-DR-A-1063 C01, SOX-BPTW-02-04-DR-A-1064 C01, SOX-BPTW-02-05-DR-A-1065 C01 and SOX-BPTW-02-06-DR-A-1066 C01)

	1B2P	2B3P	2B4P	3B5P
Shared Ownership	U3.07	U3.08, U3.13		

- iii. the timing of the construction of the Affordable Housing and its phasing in relation to the occupancy of the Market Housing;
- iv. the arrangements for the transfer of the Affordable Housing to an Affordable Housing Provider or the arrangements for the management of the Affordable Housing if those dwellings are not to be transferred to a Affordable Housing Provider;
- v. the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the Affordable Housing; and
- vi. the occupancy criteria to be used for determining the identity of occupiers of the Affordable Housing and the means by which such occupancy criteria shall be enforced.
- vii. the timing of the completion of a Nominations Agreement to be entered into formalising the details to be agreed in respect of paragraphs (iv) and (v) above (in any event that Nominations Agreement to be completed prior to first Occupation of the Affordable Housing).
- viii. where public subsidy or grant monies are used, the arrangements for the use of any Net Proceeds following the sale of an interest in any of the Affordable Housing (in accordance where applicable with Homes England guidance).

The Affordable Housing shall be provided in accordance with the approved scheme. The dwellings constructed shall not be used for any other purpose than as Affordable Housing in accordance with that approved scheme, subject to:

- (A) any rights to acquire pursuant to the Housing Act 1996 or any equivalent statutory provision for the time being in force;
- (B) any right to buy pursuant to the Housing Act 1985 or any equivalent statutory provision for the time being in force;
- (C) where a tenant of a Shared Ownership Dwelling granted a Shared Ownership Lease has purchased the remaining shares so that the tenant owns the entire Shared Ownership Dwelling).
- (D) the restriction upon the use and disposal of the Affordable Housing shall cease to apply to the whole or any part of an Affordable Dwelling (hereafter referred to as the 'Affected Affordable Dwelling') where that whole or part is transferred or leased, pursuant to an event of default by any mortgagee or chargee of the Affordable Housing Provider or the successors in title to such mortgagee or chargee, or by any receiver or manager (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 (each a Receiver) of the whole or any part of the Affected Affordable Dwelling or any persons or bodies deriving title through such mortgagee or chargee PROVIDED THAT:
 - (i) such mortgagee or chargee or Receiver shall first give written notice to the Council of its intention to dispose of the Affected Affordable Dwelling and shall have used reasonable endeavours over a period of three months from the date of the written notice to complete a disposal of the Affected Affordable Dwelling to another registered provider or to the Council for a consideration not less than the amount due and outstanding under the terms of the relevant security documentation including all accrued principal monies and interest; and
 - (ii) if such disposal has not been completed within the three month period, the

mortgagee, chargee or Receiver shall be entitled to dispose of the Affected Affordable Dwelling free from the Affordable Housing provisions which provisions shall determine absolutely.

Reason: This is a pre commencement condition to meet local housing need within the Three Rivers district and to comply with Policies CP1, CP2, CP3 and CP4 of the Core Strategy (adopted October 2011) and the Affordable Housing SPD (approved July 2011).

C38 Bats

Demolition should take place outside the active bat season. If demolition takes place in May 2020 as planned or between the months of April to September inclusive, the destruction of the potential roost features identified in Table 1 of the Bat report should proceed only under the supervision of a suitably qualified, experienced ecologist. Should evidence of bats be found, work must cease immediately.

Reason: To maintain wildlife habitat and to meet the requirements of Policies CP1, CP9 and CP12 of the Core Strategy (adopted October 2011) and Policy DM6 of the Development Management Policies LDD (adopted July 2013).

19 Affordable Housing – Definitions:

The following terms (and those related to them) referred to at Condition C3 shall be defined as set out below:

Affordable Housing means Affordable Rented Dwellings and Shared Ownership Dwellings meeting Scheme Design and Quality Standards at costs below those associated with open market housing and which is available to, affordable by and occupied only by those in Housing Need.

Affordable Rented Dwellings means a dwelling provided through an Affordable Housing Provider let to households who are in Housing Need subject to rent controls that require a rent that does not exceed the South West Herts Local Housing Allowance (including any Reasonable Service Charge).

Affordable Housing Provider means a registered provider registered with the Homes England (HE) or other body registered with the HE under the relevant Housing Act or other body approved by the HE to receive social housing Grant such Affordable Housing Provider in any event to be approved by the Council.

Choice Based Lettings Scheme means the system which is used by TRDC which enables properties to be let to applicants.

Housing Allocations Policy is the Council's policy which determines the Council's priorities and procedures when allocating accommodation in accordance with the requirements of Section 167 of the Housing Act 1996.

Dwelling means a residential unit comprised in the development.

Homes England (HE) means the agency of that name established by the Government (pursuant to the Housing and Regeneration Act 2008) which exercises the function of the former Housing Corporation in relation to financial assistance for new affordable homes (or any successor body).

Housing Need means persons who are assessed by the Council as being unable to resolve their housing needs in the private sector market because of the relationship between housing costs and incomes in accordance with the Choice Based Lettings Scheme.

Market Housing means those dwellings constructed on the site pursuant to the planning permission which shall not be Provided as Affordable Housing.

Net Proceeds means any receipts or consideration received by a Affordable Housing Provider from the sale of an interest in any of the Affordable Housing following its initial occupation after deduction of the Affordable Housing Provider's reasonable evidenced costs of acquisition, construction and sale of the relevant affordable dwelling and the deduction of any Grant repayable.

Nominations Agreement means a contract to be entered into between the Council and the owner of the Affordable Housing whereby the Council shall have 100% nomination rights in respect of the Affordable Housing on first Occupation and 75% thereafter on re-lets to enable the Council to nominate occupiers. It shall also secure the prioritisation of Shared Ownership Dwellings to persons who are TRDC residents (have resided in the District for 5 years) or who have a local connection (as per the TRDC Housing Allocations Policy).

Open Market Value means the value confirmed by a certificate (from a professionally qualified valuer and produced in accordance, where applicable, with the Homes and Communities Agency Capital Funding Guide or successor requirements) that the relevant interest in the dwelling would fetch if sold on the open market by a willing vendor to a willing purchaser

Provided means practically completed, ready for first occupation, fully serviced and subject to a contract with an Affordable Housing Provider for the acquisition of the freehold or no less than a 125 year leasehold interest.

Reasonable Service Charge means a sum that covers the contribution requested from time to time for those services and facilities which are of a nature and to a standard reasonably required in connection with and which directly benefit the relevant Affordable Housing, such sum to be set at a fair and reasonable proportion of the costs relating to the services provided.

Scheme Design and Quality Standards means standards in relation to the internal environment sustainability and external environment of Affordable Housing as set out in the Housing Corporation's document entitled 'Design & Quality Standards 2007' or such other replacement design standards as may be issued from time to time.

Shared Ownership Dwellings means Affordable Housing owned and managed by an Affordable Housing Provider sold subject to a Shared Ownership Lease

Shared Ownership Lease means a lease substantially in the form approved or published by the HCA whereby:

- (a) the initial share sold to the leaseholder
 - i) is a minimum of 25% (twenty five per cent) and a maximum of 75% (seventy five per cent) of the total equity in the unit; and
 - ii) is sold for a premium equal to the corresponding percentage of the Open Market Value of the property; and
- b) the annual rent:
 - i) does not initially exceed 2.75% (two point seven five per cent) of the full Open Market Value (assessed in accordance with the HCA's Capital Funding Guide) of the Registered Providers retained share of the equity in the relevant Shared Ownership Dwelling

- ii) is not at a level which is in conflict with any applicable Homes and Communities Agency successor restrictions relating to charges payable by the tenant; and
- c) the tenant:
 - i) pays no more than a Reasonable Service Charge (where applicable) and
 - ii) may in successive tranches purchase the remainder of the equity in the dwelling