

**Application No. 16/01707/MOUT**

**Agenda Item**

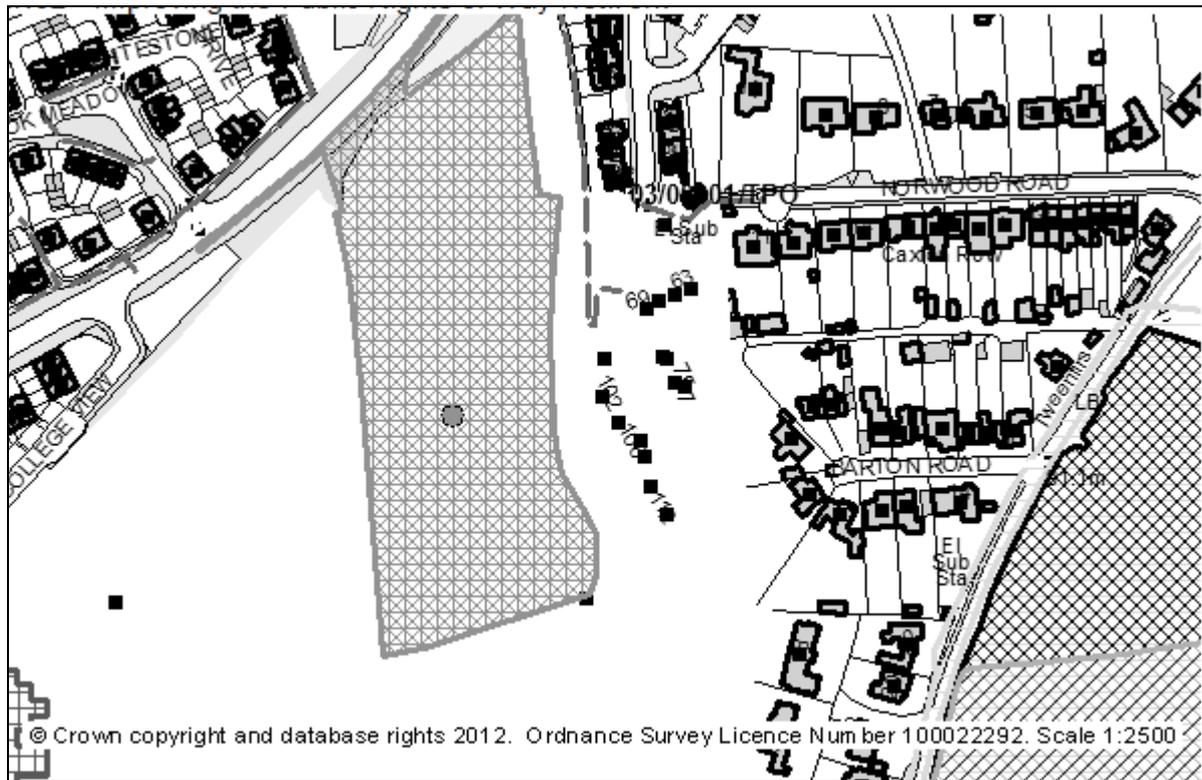
**Grid Ref:** 113644 : 295527

**Applicant:** The Frankpitt Family Trust

**Location:** Land at NGR 295527 113644 (South Of Lea Road) Tiverton Devon

**Proposal:** Outline for the erection of 41 dwellings and formation of vehicular access

**Date Valid:** 2nd November 2016



## AGENDA ITEM

PLANNING COMMITTEE  
1<sup>st</sup> December 2021

### REPORT OF THE DEVELOPMENT MANAGER

#### **16/01707/MOUT - OUTLINE FOR THE ERECTION OF 41 DWELLINGS AND FORMATION OF VEHICULAR ACCESS - LAND AT NGR 295527 113644 (SOUTH OF LEA ROAD) TIVERTON DEVON**

##### **Reason for Report:**

Outline Planning Permission 16/01707/MOUT was approved on the 10<sup>th</sup> July 2019, being subject to a Section 106 Agreement. An application has been received for a modification to the S106 planning obligations following conclusions of Financial Viability Assessments (FVA) which outline that the current development approved is unviable and could only be delivered through the removal of the affordable housing provision and reducing of financial contributions from £192,987 to up to £23,000, hence the reason a Variation to the S106 agreement has been submitted by the applicant.

##### **RECOMMENDATION(S)**

In light of confirmation from an independent valuer's appraisal of the FVA that the development would be unviable through the planning obligations secured by the S106 agreement, Members are recommended to consider supporting the changes to the S106 agreement. The government's guidance outlined within the National Planning Policy Framework states that the Local Plan should set out the contributions expected from a development but such policies should not undermine the deliverability of the plan. In order for this site to be developed for housing, a policy compliant scheme would not be possible based on the evidence submitted and assessed.

##### **Relationship to Corporate Plan:**

###### Homes

- Work with applicants/organisations to deliver homes retained in perpetuity for local need

###### Environment

- Protecting the natural environment, enhancing biodiversity and addressing carbon pressures

##### **Financial Implications:**

The applicant may make an application for costs on any appeal against the Council and such costs claims are made by demonstrating that there has been unreasonable behaviour. That being the case, Members must be able to clearly justify why any refusal to accept a Deed of Variation would be in line with the development plan and all other material considerations.

## **Legal Implications:**

The report identifies the risks in proceeding with an appeal based on a refusal to consider changes to a S106 agreement where it is found that the planning obligations would be too onerous and make a development unviable.

## **Risk Assessment:**

If Committee decide to refuse the application for reasons that cannot be sustained at appeal there is a risk of a successful appeal costs claim against the Council for reasons of unreasonable behaviour.

## **Consultation carried out with:**

1. Chair of Planning Committee
2. Ward Members
3. Cabinet Member for Housing & Property Services
4. Tiverton Town Council

## **1.0 BACKGROUND OF THE APPROVED DEVELOPMENT**

- 1.1 Outline application 16/01707/MOUT was approved on the 10<sup>th</sup> July 2019 for the erection of 41 dwellings (12 affordable) on land south of Lea Road and to the west of the existing Moorhayes development at Oakfields. Access is to be from Lea Road and was determined under this outline application. Layout, scale, appearance and landscaping have been reserved for later consideration under a reserved matters application and the reserved matters application would need to be submitted by the 10<sup>th</sup> July 2022 to prevent the permission lapsing.
- 1.2 The site comprises approximately 1.29 hectares of sloping pasture land between the existing residential development at Oakfields, Moorhayes, and the school sports pitches fronting Bolham Road. Planning permission was previously granted under reference 07/01559/MFUL for the erection of 95 dwellings on a larger parcel of land including the site the subject of this application, however, that planning permission was not implemented and expired. This site was allocated for residential development in a previous plan but there is no current development allocation but it is within the settlement limits of Tiverton. A suitable surface water drainage scheme with attenuation was also proposed as part of the outline application approved.
- 1.3 The outline planning permission is subject to a S106 agreement securing the following:
  1. The provision of 12 affordable dwellings on site (35%)
  2. A financial contribution of £49,405 towards the provision of a new play area garden at the entrance to Amory Park, including new fencing, entrance gates, furniture and signs
  3. A financial contribution of £139,933 towards the provision of additional primary education facilities

## **2.0 PROPOSED DEED OF VARIATION TO THE S106 AGREEMENT**

- 2.1 In line with the procedural decision made at planning committee and motion carried at Full Planning Council on the 24th April 2019 for requests to vary or delete pre-

existing planning obligations (S106 agreements), set out below is the request to undertake a variation to the Section 106 agreement for outline planning permission 16/01707/MOUT relating to the residential development of 41 dwellings and formation of vehicular access on land at NGR 295527 113644 (South of Lea Road), Tiverton.

- 2.2 As set out above, the outline planning application was approved subject to a S106 agreement which requires:
1. The provision of 12 affordable dwellings on site (35%)
  2. A financial contribution of £49,405 towards the provision of a new play area garden at the entrance to Amory Park, including new fencing, entrance gates, furniture and signs
  3. A financial contribution of £139,933 towards the provision of additional primary education facilities.
- 2.3 The applicant has outlined that the development is no longer viable taking into account the required planning contributions. The applicant sent the Local Planning Authority (LPA) a financial viability assessment (FVA) carried out by Greenslade Taylor Hunt dated 15<sup>th</sup> June 2020 to make this case and the LPA in turn sought an independent review of this with the outcome being that the independent valuer (District Valuer in this case) agreed that the development would not be viable if the applicant was to provide the above planning obligations.
- 2.4 The conclusion was reached that within the respective FVAs that the Proposed Residential Development Scheme (PRDS) is unviable based upon the current Affordable Housing provision and the Agreement contributions and does not achieve the Benchmark Land Value. In order to make the development viable it was outlined that the affordable housing provision would need to be reduced to 0% (with no off-site contribution) and that the Agreement contributions would need to be reduced from £192,987 to up to £23,000. The fundamental issue with the site is its topography and the associated abnormal build costs, as outlined in both FVAs.
- 2.5 It has been stated that the Applicant, whilst the discussions on the viability were taking place, instructed its Agent to market the site based upon the current S106 agreement package and those interested in it were unable to generate offers due to it being unviable. The Applicant, since conclusion of the viability discussions, has currently instructed its agent to re-market the site based upon the revised package with the aim to prove to the Council that the applicant intends to enter into contract with a buyer and for that party to deliver the PRDS on the Site.
- 2.6 Through consultation with the Chair of Planning Committee, Ward Members, Cabinet Member for Housing and Property Services and Tiverton Town Council, responses were received that this matter should be called in for consideration at planning committee in order that Members could consider the proposed changes put forward to the S106 agreement and whether these could be agreed, as concerns were raised to the removal of affordable housing and reduced planning obligations.
- 3.0 **CONCERNS RECEIVED THROUGH CONSULTATION**
- 3.1 Initially, concerns were raised as to how an outline application approved in 2016 was still live and how an affordable housing contribution at 35% would result in 14 affordable houses and not 12. In answer to these matters, with respect to the outline planning permission 16/01707/MOUT, this was issued on the 10th July 2019 so it is

still extant requiring a submission of reserved matters before the expiration of three years from the date of this permission.

- 3.2 On the matter of the S106 agreement which secures the provision of 12 affordable dwellings on site noted as being 35%, within the committee report the calculation is explained as follows:

*'The proposal includes the provision of 12 affordable dwellings on site. This provision accords with the requirements of policy AL/DE/3 of the AIDPD which requires open market housing sites of more than 4 dwellings to provide affordable housing of 35% applied to the number of dwellings by which the site exceeds the 4 dwelling threshold (41 - 4 x 35%), rounded down to the nearest whole. The applicant has agreed to enter into a Section 106 Agreement to secure 12 on site affordable dwellings. Policies AL/DE/4 requires affordable housing to be limited to households in need of affordable housing and this will also be secured within the Section 106 Agreement. Policy AL/DE/5 seeks an inclusive design and layout for the affordable housing and this policy will be addressed at reserved matters stage. Mid Devon's SPD on meeting housing needs provides additional guidance on affordable housing which should also be taken into account at the reserved matters stage.'*

Therefore in light of the above, the calculation at the time of the application was for 35% of 37 dwelling (subtracting the first four from the calculation) which meant a figure of 12.95 which was then rounded down in line with guidance.

- 3.3 Turning to the Section 106 and proposed changes, consultee responses were received raising concern that the original outline planning permission would not have been secured if the proposed section 106 contributions had been put forward at the time and secondly the underlying issue of the topography of the site would have been no different in 2016. Therefore the view is that the applicant should still be providing for these contributions.
- 3.4 The Cabinet Members for Housing and Property Services commented that *'The financial viability is not as far as I'm aware a site specific issue but more of a plan wide matrix and the NPPF has been adjusted to reflect this, therefore I would argue that given the LA has an agreed and updated local plan that has been recently tested this outweighs any site specific issues raised and a wider view should be taken as set out in the NPPF. The current agreed price differential in house prices from 2016 until current is set at over 8% (office of national statistics) so I'm curious how an increase of this magnitude has been seen to reflect the need to reduce section 106 contributions that at best remain static with no ability to alter for the evident inflation, given as an average of 2.7% over the period or aprox 11.4% over the whole period. It is not the LA's concern to protect the developers bottom line but to protect and deliver the affordable housing as prescribed in the local plan and recently published (as yet unagreed ) housing strategy document.'*
- 3.5 Consultee responses also highlighted the fact that it was noticed that an article in the Tiverton Gazette has the site advertised as providing 41 market houses only which was considered a little forward. In addition to this, having read the papers the conclusion had been reached that given the problems the applicant is seeking to associate with the site and the total removal of any affordable housing or meaningful section 106 contributions the site adds little value to the people of Tiverton or the LPA's ambition on affordable housing. Therefore they asked that the application be sent back to the planning committee for their combined consideration.

## 4.0 MATERIAL CONSIDERATIONS

- 4.1 Government guidance allows for a LPA to agree to consider varying an existing S106, based on full viability evidence being submitted that meets the guidance in the NPPF/PPG. This should include recent comparisons of land values and revenues elsewhere, on comparable sites with similar S106 requirements, rather than just the price being asked for the land. The price being asked, should of course reflect the policy requirements and the difficulty in developing the site, whilst providing the land owner with the minimum return required for them to part with the land (based on realistic assumptions). The evidence should also consider different formats for the affordable housing, e.g. discounted open market.
- 4.2 The NPPF outlines in respect to Development contributions at Para. 34 that *'Plans should set out the contributions expected from development. This should include setting out the levels and types of affordable housing provision required, along with other infrastructure (such as that needed for education, health, transport, flood and water management, green and digital infrastructure). Such policies should not undermine the deliverability of the plan.'*
- 4.3 With respect to planning conditions and obligations, the NPPF states:
- '58. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.'*
- 4.4 The Mid Devon Local Plan 2013-2033 outlines that 7,860 dwellings are required over the plan period, equating to 393 dwellings per year. The table within the Local Plan sets out the situation at 31st March 2018 indicating a remaining need for about 3,512 dwellings to be allocated. In Tiverton, there are to be 2,358 houses (which equate to 30%), 478 were completed as of March 2018 with commitments of 1,275 (as of 1 April 2018) leaving a remainder of 605 houses to be found.
- 4.5 This development would have been picked up as a windfall site as whilst the site was previously allocated for housing, the site is not currently allocated within the Local Plan but it is located within the settlement limits. Therefore Members need to weigh up the delivery of houses as outlined within the Local Plan and whether viability concerns preventing the deliverable of these houses would result in acceptance of reduced S106 obligations.
- 4.6 Viability reports were received for this development (both from the applicant and from the District Valuer). Following the initial valuation undertaken by the District Valuer, the LPA sought further clarification from the District Valuer on the matter as to whether it is only the affordable housing which would need to be removed from the S106 agreement for the development to become viable or all of the other S106 contributions also such as Education, Public Open Space etc.
- 4.7 The District Valuer carried out a further appraisal for a scheme providing no affordable housing and also no s106 contributions. The resulting Residual Land

Value (RLV) for a scheme on this basis is £342,337 (see attached). Compared against the opinion of Benchmark Land Value at £319,000, the resulting RLV provides a surplus above this in the region of £23,000. On this basis, the District Valuer is of the opinion that it would be financially viable to provide a scheme comprising 100% Open Market housing and s106 contribution of up to £23,000. As a result of the above, the applicant has submitted a Deed of Variation to remove the requirement to provide affordable housing and to provide s106 contribution up to £23,000.

- 4.8 In response to concerns from consultees whilst it is understood that the topography of the site has not changed and that the applicant should have taken this into account prior to submitting the planning application, the case remains that outline planning permission was approved for a residential development on site and since the signing of the S106 agreement the applicant is now putting forward the case that the approved development is not viable. The independent valuer is of the view that one reason the development was not considered unviable back in 2016 when the application was lodged is that due diligence may not have occurred with site investigations not up to scratch in identifying the high abnormal costs from the development at the time with the S106 agreement entered into. Therefore as a result, if housing is to be delivered, the planning obligations would need to be reduced.
- 4.9 The matter is therefore now in front of Planning Committee for Members to consider whether the changes proposed to the S106 agreement can be agreed, deciding to accept the Deed of Variation or alternatively through weighing up the policy requirements decide to refuse it on the basis that as the development is not viable for a policy compliant scheme the residential development should not be brought forward on this site.

## **5.0 ASSOCIATED RISKS**

- 5.1 The local planning authority makes decisions on applications to modify or discharge planning obligations under S106 of the Town and Country Planning Act (TCPA) 1990. Appeals to modify or discharge a planning obligation are known as S106B Appeals and can be made where an applicant disagrees with it or a decision wasn't made within the specified time limit. In the event of a decision to refuse to agree the changes, the applicant would have the ability to appeal the decision and make the case to the Planning Inspectorate.
- 5.2 The applicant has submitted a FVA which concludes that the development is not viable based on the agreed S106 agreement and this has been independently assessed and agreed by the District Valuer. The applicant has considered alternative developments in terms of providing alternative numbers of houses and with differing tenures but the outcome remains the same that to provide affordable housing would make the development unviable given the high costs involved in developing on this site.
- 5.2 Another risk resulting from this outline planning permission for 41 dwellings lapsing is that this would have an impact on the number of housing to be delivered in Tiverton and the wider district. This would leave a shortfall in housing to be found and delivered within the Local Plan Period. On the matter of affordable housing being provided for residents in Tiverton, whilst this Deed of Variation to the S106 agreement would remove 12 affordable dwellings, it is noted that the Council have recently submitted a scheme for 8 affordable dwellings (21/01957/FULL) on a site within Tiverton which is due to be brought in front of Planning Committee early next year. It is also noted that there is an appeal lodged for the erection of 22 dwellings

(20/01263/MFUL) which is a scheme for 100% affordable dwellings on an exception site which if approved by the Planning Inspector would also assist in meeting affordable housing needs in the Town.

- 5.3 Therefore the recommendation of Officers would be to accept the proposed Deed of Variation to the S106 and for Members to consider how the £23,000 should be allocated, either towards off site affordable housing, a financial contribution towards the provision of a new play area garden at the entrance to Amory Park, a financial contribution towards the provision of additional primary education facilities or a split between the differing obligations. Alternatively, this could be delegated to the Interim Development Management Manager to assign and the Legal Department instructed to complete this change to the S106 agreement.

**Contact for any more information**

Mr Adrian Devereaux, Area Team Leader  
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**Background Papers**

Committee Report

**File Reference**

16/01707/MOUT

**Circulation of the Report**

Cllrs Richard Chesterton  
Members of Planning Committee

[Attach previous Committee report](#)