

**OFFICER DELEGATION SCHEME
RECORD OF EXECUTIVE DECISION**



TO BE UPLOADED TO THE E-MEETINGS MANAGER

Date: 24 JULY 2019	Ref No: BGI0006
Responsible Officer: D FOWLER	
Type of Decision:	
Key <input type="checkbox"/>	Non-Key <input checked="" type="checkbox"/>
Status: For Publication	
Title/Subject matter: Land at Salisbury Road, Radcliffe BELLWAY HOMES - SALISBURY ROAD, RADCLIFFE S.106 OVERAGE PAYMENT - £598,955.82	
Budget/Strategy/Policy/Compliance – Is the decision:	
(i) within an Approved Budget	N/A
(ii) not in conflict with Council Policy	Potentially
(iii) not raising new issues of Policy	YES
Equality Impact Assessment [Does this decision change policy, procedure or working practice or negatively impact on a group of people? If yes – complete EIA and summarise issues identified and recommendations – forward EIA to Corporate HR]	NO
Summary:	
<u>BACKGROUND</u>	
<ol style="list-style-type: none"> 1. In 2014 Bellway Homes Limited (Bellway) submitted a planning application for the residential development of 86 dwellings on land at Salisbury Road in Radcliffe. 2. There was a policy requirement for S.106 planning obligations as follows:- <ol style="list-style-type: none"> a. £273,731.42 recreation contribution in accordance with Policy RT2/2 of the Bury Unitary Development Plan and Supplementary Planning Document 1; and b. 25% affordable housing (21 units) in accordance with Policy H4/1 of the Bury Unitary Development Plan and Supplementary Planning Guidance Note 5. 3. Bellway submitted a Viability Assessment with the application which indicated that the scheme would not be viable if full obligations were provided. After some negotiations, Bellway agreed to the following: <ol style="list-style-type: none"> a. 20% affordable housing (17 Units); and b. £100,000 recreation contribution together with the provision of a recreational route; and c. an overage clause whereby the Council would be able to “clawback” further 	

monies in the event that the scheme was more viable than indicated in the Viability Assessment.

4. The Council's Planning Control Committee resolved to approve the application subject to a S.106 Agreement on the terms indicated above.
5. The Council, the landowner and Bellway entered into a S.106 Agreement and planning permission was granted on 9th July 2015.

SUMMARY OF THE AGREED OVERAGE TERMS

6. Under the terms of the S.106 Agreement Bellway (now the landowner) is required to pay an Overage Payment to the Council in the event that the Gross Development Value (GDV) is greater than the Overage Trigger.
7. The Overage Trigger is expressly defined in the Agreement as being £15,582,428.00 but there is a clause allowing Bellway to submit a Development Costs Report (setting out certified details of the developer's actual costs with receipts) and, if this is accepted, the Overage Trigger will be increased.
8. The Agreement specifies that the Development Costs Report may be submitted any time before the Overage Trigger is reached.

DISPUTE

9. The sales contracts for each of the 86 dwellings have been assessed and they confirm that the Overage Trigger was reached in May 2018 and that an Overage Payment of **£598,955.82** is due under the terms of the S.106 Agreement.
10. Bellway have submitted a Development Costs Report seeking to increase the Overage Trigger and thereby reduce the Overage Payment to nil. The report wasn't prepared until November 2018 and is therefore outside of the timeframe indicated in the S.106 Agreement.
 - The cost report has not been evidenced with the necessary receipts / evidence **as required** in the s106 (Bellway have indicated that it would be difficult for them to evidence this); and
 - the costs report indicates that Bellway paid significantly more for the land than what their VA said it was worth – taking account of all constraints and development costs (i.e. they paid significantly more than the residual land value). It seems that this factor is the main reason they are arguing for the increase in costs.
11. Bellway dispute that the payment is due and argue that the Development Costs Report should still be considered even though it is late but are seeking to negotiate.

The Council's legal department have been involved and the advice is that the Council's position on the construction of the Agreement is strong but that litigation is inherently a risk and costly and it is arguable that the Council has not suffered any prejudice as a result of the report being submitted late.

Wards affected: Radcliffe North

Consultations:


Scrutiny & Review Committee Interest:

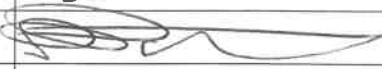

Options considered:

The Council can either :

1. Proceed to strictly enforce the terms of the Agreement; or
2. Consider a settlement whereby Bellway be given a further opportunity to submit a properly evidenced Development Costs Report out of time (but excluding any increase in land value). This will then be independently assessed, with Bellway to fund the costs. A letter setting out the proposed offer is attached.

Decision [with reasons]

Proceed to apply/adopt option 2. 

Decision made by:	Signature:	Date:
Director or Chief/Senior Officer		7/8/19
Members Consulted [see note 1 below]		
Executive Member		7/8/19
Lead Member		
Opposition Spokesperson		

Notes

1. Where, in accordance with the requirements of the Officer Delegation Scheme, a Chief Officer consults with the appropriate Executive Member they must sign the form so as to confirm that they have been consulted and that they agree with the proposed action. The signature of the Opposition Spokesperson should be obtained to confirm that he/she has been consulted.
2. **This form must not be used for urgent decisions.**

WITHOUT PREJUDICE

Dear Mr Martin

Salisbury Road – Overage

I am instructed to act on behalf of the Council's Planning Department in connection with this matter and I write further to your email correspondence of the 31st May 2019.

Firstly, you provide details of an email sent to you by Mr Logue of the Council dated 29th May 2015 and claim that this sets out the agreement between the parties which the Council is acting inconsistently with.

This is quite simply wrong. The contract itself was entered into after the correspondence referred to above. The Council does not accept the existence of any collateral agreement and the position is as per our previous e-mail (with reference to paragraphs 4 to 8 of the Ninth Schedule, Part 1). It is denied that the Council is adopting an inconsistent position. The Council is quite rightly seeking to apply the express terms agreed.

I shall deal with each of the further matters raised in your email using the same numbering:-

1. Paragraphs 8 and 9 of the Ninth Schedule do not make time of the essence in relation to the provision of the Development Costs Report;

We agree that the contract does not expressly make time of the essence. Please confirm why this makes our contention non-sustainable. The contract expressly and comprehensively defines and implements time periods, triggers and the consequence of failing to comply with the same in that the Council can issue an invoice.

2. Paragraphs 8 and 9 of the Ninth Schedule do not provide a contractual consequence for the submission of the Development Costs Report after the Trigger Date. If the parties had intended such a consequence the Agreement would have set that out in clear terms. As set out above, there was never any discussion or agreement about such a contractual consequence.

The contract requires the Development Costs Report to be submitted 'any time prior' to the Overage Trigger being reached. If there was an expectation that the Report could be submitted after this period then the contract would have confirmed this. As a matter of construction, the right to submit a Report is lost after the Overage Trigger has been reached (May 2018).

- 3. Worked example 5 in Part 2 of the Ninth Schedule is the one applicable to a situation where a Development Costs Report has been submitted. There is nothing in this example to suggest that the Development Costs Report was provided before the Trigger Date but nevertheless the Overage Trigger is revised.**

On interpretation and construction, the Development Costs Report can only be submitted at any time in Trigger Review Period as clearly confirmed in paragraph 8.

- 4. As a matter of common sense the level of detail required by the Development Costs Report (requiring detail of all expenditure) is unlikely to be available until after the development has been substantially built out which is also likely to be after the Actual Aggregate Development Costs have exceeded the Overage Trigger.**

If there was any concern regarding the terms proposed, then this should have been dealt with during negotiations for the Section 106 with the contract being revised to reflect such issues prior to execution. The contract terms are, in our opinion, clear, unambiguous and binding.

You further indicate that if the Council's construction of the Agreement is correct, then the Council have either waived the timing requirement and/or are estopped from relying on the same as a result of the correspondence between the parties in March 2018. This is denied. It is unclear on what basis you believe there to be any agreement or representation by the Council which may result in waiver, estoppel or otherwise. It is denied that the Council was on notice that the Overage Trigger was to be revised and you are put to strict proof. In simple terms, in March 2018 we received an enquiry regarding the format of a Development Costs Report and responded to this enquiry at our earliest convenience. There is no requirement for any agreement in respect of format, as the Report should meet the definition contained in the Agreement.

For the reasons set out above, the Council maintains the position set out in its email of the 20th May 2019.

Without Prejudice Offer to Settle

Without prejudice to the Council's position set out above and without any admission of liability, the Council is prepared to offer a further opportunity to submit a Development Costs Report out of time.

This offer does not constitute a variation or waiver of the terms of the Contract and is made as gesture of goodwill in the hope that we can maintain a good working relationship.

The terms of this offer are strictly as follows:-

1. The Development Costs Report must be provided to the Council within [] days of the date of this letter (i.e. by no later than [] pm on []).
2. The Development Costs Report must include the following:-
 - a. Certified copies of contracts or receipts for the build costs.
 - b. Receipts/invoices for the professional fees incurred.
 - c. Evidence of actual costs of sales and marketing.
 - d. Evidence of actual interest incurred.
 - e. Justification for retention of 1% contingency as the site is now completed and many of the units outside of the 2 year defects liability period.
3. The increase in site value will **NOT** be taken into account. The viability issues and policy requirements were known.
4. The Council will refer the Development Costs Report to an independent expert of its choosing to assess. The costs of this exercise are to be met by Bellway. The Council must be in receipt of cleared funds of £[] by no later than []pm on [].
5. The decision of the expert on whether the overage trigger ought to be reviewed as a result of the Development Costs Report shall be binding on both parties.

I should be grateful if you would confirm within the next [] days if you wish to accept the Council's offer to settle. If you do not, or the terms of the offer are not complied with, then the Council will be immediately at liberty to issue an invoice for the **£598,955.82** overage payment due under the terms of the S.106 Agreement.

Yours sincerely

