AGENDA ITEM NO 11

REPORT NO 154/21

ANGUS COUNCIL

DEVELOPMENT STANDARDS COMMITTEE – 18 MAY 2021

PLANNING OBLIGATION APPEAL DECISION: LAND SOUTH OF GARDYNE STREET, FRIOCKHEIM

REPORT BY SERVICE LEADER – PLANNING & COMMUNITIES

Abstract:

This report presents the findings of the Reporter appointed by Scottish Ministers to determine an appeal by Guild Homes (Tayside) Ltd against the decision of Angus Council to refuse modification of a planning obligation relating to payment of commuted sums towards affordable housing provision in respect of a development on land south of Gardyne Street, Friockheim. The Reporter dismissed the appeal and the planning obligation continues to have effect without modification.

1. RECOMMENDATION

It is recommended that the Committee notes the outcome of the appeal.

2. INTRODUCTION

2.1 Planning permission was granted for a residential development on the land subject of the appeal (Reports 255/11 and 131/15 refer). The permission required a planning obligation to secure a 20% contribution towards affordable housing provision. The obligation as concluded allowed for the affordable housing to be provided on site, or through payment of a commuted sum towards delivery of affordable housing within the housing market area. A plan showing the appeal site identified as Fk1 is provided at Appendix 1.

2.2 In 2016 the developer sought modification of the planning obligation specifically to allow delivery of the affordable housing through the payment of commuted sums (16/00154/MDPO refers). The modification was sought due to limited housing association interest in providing on-site affordable housing at that time. The developer proposed the provision of the required 20% (16) affordable units through payment of four commuted sums each to the value of four units to be made on completion of the 20th, 40th, 60th and 79th house, and all to a value determined by the District Valuer. That application was approved.

2.3 The developer subsequently made two staged payments to a total value of £212k. Payment of the third staged financial contribution to a value of £100k was requested in April 2019. That payment has not been made and the developer has to date not met the trigger point for payment of the fourth and final staged payment contribution which is also likely to be in the region of £100k.

2.4 The developer indicated an intention to seek modification of the planning obligation in advance of payment of the third financial contribution. An application (20/00305/MDPO refers) was submitted and sought to limit the total commuted sum value to £216k. The effect of this would have been to reduce the required affordable housing contribution by around £200k.

2.5 That application was refused for the following reason: -

The proposal to modify Clause Second of the planning obligation, as previously modified by permission reference 16/00154/MDPO relating to planning permission reference11/00002/PPPM, would result in the affordable housing contribution for the development being insufficient to meet the requisite 20% contribution level when assessed in the context of the agreed calculation method contained in the obligation and current Angus Council adopted guidance in respect of affordable housing delivery. The planning obligation is required by development plan policy and meets the tests in Circular 3/2012 Planning Obligations and Good Neighbour Agreements. It should continue to have effect without modification as the contribution as detailed in the planning obligation remains valid. There is no material justification for the modification contrary to the terms of the planning obligation or provisions of the development plan.

2.6 An appeal was submitted in relation to that decision. The appeal was dismissed and the planning obligation continues to have effect without modification. The Reporters decision is set out below.

2.7 Payment of the third staged contribution of £100k remains outstanding. The requirement for the fourth staged payment has yet to be triggered.

3. REPORTER'S DECISION

Determination

I dismiss the appeal.

Decisions and section 75 Agreement

1. On 13 December 2011, planning permission was granted for planning permission in principle for the erection of a residential development at Gardyne Street, Friockheim, Angus, including a health centre, open space, servicing and public car park with detailed layout of road and site access (11/00002/PPPM).

2. Prior to the permission being issued the applicant had entered into a section 75 Agreement with the Council. That Agreement provides that 20% of the total number of dwelling units permitted to be constructed (which is now 80, as permitted by the Council on 11 March 2015) shall constitute affordable housing in perpetuity. It shall only be offered to persons in the priority client group. That group is defined in the Agreement being persons with an established and demonstrable housing need and meeting other criteria of residence or place of work and subject to maximum levels of household income. In order to provide further detailed provision on form, location and unit types and on delivery thereof, a second Agreement was required. On the information before me, that was not entered into.

3. Where such provision of affordable housing is shown to have good reason for not being achievable, the Agreement provides that, in lieu of that obligation, the parties may agree that the developer may instead make payment to the authority a commuted sum. That sum is described as the relevant Affordable Housing Commuted Sum. It is defined as being a sum determined by the Aberdeen Valuation Office of the District Valuer (DV) as being payable in lieu of the relevant type of affordable housing at the date due multiplied by the number of affordable housing units in respect of which a financial contribution is to be made in lieu of the provision of affordable housing on the planning permission subjects.

4. Following an application dated 2 March 2016 (16/00154/MDPO), the Council agreed to modify the planning obligations contained within that planning consent to facilitate the making of a commuted sum.

5. The modification sought was required to allow for the provision of the required 20% (16) affordable units to be provided through a commuted sum the value of which is provided by the DV as valid at the time of each payment. Four equal phased payments are to be made to the value of 4 units to be made on completion of the 20th, 40th, 60th and 79th house. Angus Council approved the application on 29 April 2016.

6. Payments were made by the developer consistent with that modification. The first payment of £108,000 was made on 21 June 2017 and the second payment of £104,000 was made on 15 March 2018. These payments were as calculated by the DV as specified in the Agreement. The third payment, requested on 29 March 2019 following calculation by the DV, was withheld to enable the validity of the commuted sum amounts requested to be explored.

7. On 27 April 2020, the developer and current Appellants sought the further modification of that planning obligation as it applies in relation to this site to substitute, for the modification made in 2016, the following-
"The provision of the required 20% (16) affordable units is to be provided through a commuted sum the value of which is a total of £216,000 to be paid through varying instalments of three phased payments to be made on completion of the 20th, 40th and 78th house."

Planning policies and policy principles

8. The development site is allocated for housing under policy Fk1 of the Angus Local Development Plan 2016 (LDP). The securing of delivery of affordable housing is a policy objective under the LDP in terms of policy TC3 on Affordable Housing. Policy DS5 of the LDP provides for developer contributions to that end.

9. These LDP policies are consistent with national and wider regional strategic policies set out in Scottish Planning Policy (SPP) 2014 and in policies on homes and developer contributions in TAYPlan 2017 (adopted after the 2016 modification). SPP is to be read with Planning Advice Note (PAN) 2/2010, which covers relevant issues at paragraphs 19 to 22.

10. Implementation guidance in relation to affordable housing designed to ensure fair and consistent implementation of the affordable housing policies of the Council applicable from time to time was adopted in 2007. After a short consultation process, the Council's Supplementary Guidance (SG) on Developer Contributions and Affordable Housing was adopted in October 2018 to support policies DS5 and TC3. It forms part of the development plan framework. The introduction to the SG stated "Whilst the provision of affordable housing to meet an identified need is not a developer contribution, but nonetheless required, the Council considers that this document is appropriate to set out the approach on how affordable housing will be delivered in Angus".

11. The main issues in this appeal are whether the obligation complies, or continues to comply, with the five tests in Planning Circular 3/2012: Planning Obligations and Good Neighbour Agreements (as updated in November 2020). There is considerable inter- relationship between the five tests. Circular 3/2012 states that planning obligations must meet all the following tests:

    - Necessary to make the proposed development acceptable in planning terms

- Serves a planning purpose
- Relates to the proposed development
- Fairly and reasonably relates in scale and kind to the proposed development, and
- Reasonable in all other respects

Main issues in dispute

12. The Appellants have made wide ranging criticisms of the 2016 modification and have justified the proposed further modification under a number of those headings in the Circular. In essence, the dispute between the parties revolves around whether the modification requested would provide sufficient sums to enable a proportionate provision of off-site affordable housing as required by the relevant planning policies in lieu of provision on site. There is no real dispute in my view between the parties that the provision of affordable housing (either on or off site) can be capable of serving a planning purpose. From my assessment of the appeal submissions, I consider that the main determining issues are:

    - The correct purpose and basis for determining the payment of the commuted sum
    - Whether the District Valuer has adopted a reasonable approach to the valuations
    - Whether there have been material changes in financial circumstances which would impact on the viability of the development
    - Whether there is a continuing need for affordable housing.

Purpose and basis of the commuted sum

13. Cutting across a number of the appeal grounds is the question of the purpose and basis for the payment of the commuted sum and in particular suggested failures to have regard to the local or on-site circumstances at the appeal site.

14. The starting point in this respect is the meaning of the section 75 Agreement entered into in 2011. Central to that is the clause permitting the making of commuted sums in lieu of on-site provision. The Appellants indicate that their understanding of the Agreement is that, in calculating the commuted sums, regard would be had to the local or on-site circumstances at the appeal site. Doing so would equate the commuted sum per unit broadly or precisely with the original obligation requiring on-site provision of affordable housing units for sale and/or serviced plots, as anticipated when the Agreement was entered into. The Appellants make general claims about failure to act consistently with the Agreement. They do not though offer an interpretation of the Agreement in support of their understanding of it in this respect.

15. To support such an understanding, the reference to payments “in lieu” requires to be read as meaning that the commuted sum is intended to be the same or broadly the same sum as the cost of on-site provision and that, in order to do so, an allowance requires to be made for on-site factors at the appeal site.

16. In the absence of clear indicators to that effect, I do not read the references in the Agreement to making commuted sum payments “in lieu” in that way. The making of payment of commuted sums is simply an option instead of making on-site provision. I accept that broad equivalence across the Housing Market Area can be implied as part of the benchmarking carried out in the exercise of valuation judgement (to which I return below). However that is not the same as requiring precise equivalence to the costs of provision on-site.

17. If such an alternative was intended, the Agreement would have been worded to so indicate. In the Agreement, the terms “affordable housing commuted sum” and “affordable housing units for sale and/or serviced plots” are used and are carefully defined. These definitions are different. If the intention was that these terms had precise equivalence of outcome, the Agreement would have said or suggested that. There is nothing in the wording to direct the DV to build on-site factors at the development site into the valuation of the commuted sum relevant to provision of affordable housing units elsewhere. There is nothing to direct the DV to make an on-site calculation and treat that as the commuted sum. That degree of equivalence is particularly hard to assume in the absence of a second Agreement which was acknowledged in the 2011 Agreement as intended. That second Agreement would have provided further detailed provision from which the on-site obligation could be more precisely ascertained.

18. The Appellants suggest that their understanding is supported by paragraph 22 of PAN 2/2010. I consider that paragraph 22 does not support them. The site specific references there to “development costs, other contributions that are being sought, and other relevant factors, for example layout and design” in my view are to such factors relevant to provision off-site through the commuted sums. In the context of commuted sums for affordable units which are provided off site by others, I see nothing in the PAN that supports the argument that regard ought to have been had, in calculating the commuted sum, to the local or on-site circumstances at the appeal site.

19. The Council’s Implementation Guidance in relation to affordable housing was adopted in 2007. It was in force in 2011 and remains relevant. The Appellants do not offer an interpretation of the section of that Guidance dealing with commuted sums in support of their view. Consistent with that Guidance, I agree with the Council that the purpose of the obligation in the framework of the Agreement is to establish as accurately as practicable the sum that would facilitate the provision off-site in an appropriate housing market area of a unit of affordable housing. That best meets the planning policy outcome of provision of affordable units through the developers contribution. This is consistent with both the current and previous SG in setting out the meaning of commuted sum, as set out in the glossary.

20. These locally relevant factors will be important where the provision of affordable houses (or serviced units) is by the Appellants, whether on-site or off-site. This is recognised in section 7 of the Royal Institute of Chartered Surveyors (RICS) guidance on valuation of land for affordable housing. However, the effect of the 2016 modification was to move to the provision of a commuted sum to be paid to the Council to otherwise secure delivery of affordable units off site. This was instead of actual provision on site of affordable units or serviced plots within the framework of the section 75 Agreement.

21. I have also had regard to the actings of the Appellants in respect of the payments sought in 2017 and 2018. These were paid under protest. But the protest challenged the uplifts. They did not challenge the benchmark figure of £24,000 per unit. They did not question how a calculation could have been made by the DV without regard having been had to the local or on-site circumstances at the appeal site. That might have been expected on the Appellants view of the Agreement.

Conclusion

22. I find in conclusion in this regard that the purpose of the obligation in the applicable framework is to establish as accurately as practicable the sum that would facilitate the provision off-site in an appropriate housing market area of a unit of affordable

housing. That is a correct expression of the underlying planning policy purpose and meaning of the Agreement and of the 2016 modification.

Approach to the calculation by the District Valuer of the commuted sums due per unit

23. A number of appeal grounds can be grouped within the general head of criticisms of the approach taken by the DV in the application of the appropriate methodologies, in the underlying assumptions made and in the application of valuation judgement to the circumstances. These are essentially valuation matters.

a) Role of DV

24. I have initially considered whether the role to be undertaken by the DV as described in the Agreement is, so far as relevant, aligned with the meeting of the tests in the Circular. In light of my finding on the purpose and basis for the payment of the commuted sum, I find that it is. In principle, there is nothing in the way that the role is described in the obligation which is inconsistent or incompatible with the meeting of those tests.

25. Having so concluded, I have considered whether the approach adopted by the DV suggests that an amendment is needed to give effect to the obligation. Doing so includes whether the approach taken falls within reasonable parameters of valuation judgement.

26. The modification proposed in the appeal does two things. It seeks through this appeal to fix the total sum due, in relation to the full commuted sum. It thereby seeks to remove the role of the DV to resolve disagreements between the parties on methodology and assumptions and make a determination on the application of the appropriate methodology to the facts.

27. The section 75 Agreement provides for a role for the DV in these specialist valuation matters where they have recognised expertise. The use of the DV in this way is supported by paragraph 22 of PAN 2/2010 setting out recommended good practice. There is RICS guidance in respect of that role.

28. Moreover, there remains a valuation matter to be addressed. The 79th and 80th units remained uncompleted. The stage has not been reached as to when the fourth commuted sum has become due. The calculation of the due sum at that point may or may not equate to the sum suggested, according to the assumptions or the circumstances at the relevant time. The Appellants seek to address this in making the sum of £216,000 due on completion of the 78th house. That house is already completed. While removing the element of future valuations (if agreed), this does not fully address the issue of this being a valuation rather than planning matter.

29. For these reasons, I see no basis to depart from the existing and recommended approach to valuation, as reflected in the existing Agreement.

b) Valuation methodology

30. The Appellants make a range of criticisms of the approach of the DV. These include whether the right valuation method was used and whether, in any event, the DV was right in the extent to which comparable information was considered. The position of the Appellants is that use of or the giving of more weight to comparable valuation evidence would have given rise to a more representative basis on which to determine the respective sums due. Had that been done, the figure suggested in the modification would have been reached.

31. In addressing these issues, I have considered in particular the RICS guidance, the reports from the DV dated 14 April 2015, 31 July 2018 and 26 August 2020, the DV's email dated 19 January 2021 and the information provided by Graham & Sibbald, a respected firm of chartered surveyors.

32. The RICS guidance in relation to valuation of land for affordable housing (at paragraphs 1.7 and 1.8) indicates that there are two approaches to the valuation of development land for affordable housing. These are valuation by comparison with the sale price of land for comparable development; and by assessment of the value of the completed scheme and deduction of the costs of development (including developer's profit) to arrive at the underlying land value, called the residual method.

33. I accept that there are two methods of approaching these valuation issues. Each have their place and offer advantages and disadvantages. The DV here inclined to the use of the residual method, with the comparison method providing potential value as a "reality check". That is consistent with RICS guidance which notes that valuation will in practice rely on the residual method. It notes the limited usefulness of the comparison method in light of the legislative and planning complexities concerning affordable housing and the risk of variation of values from site to site.

34. That approach by the DV can be seen from their valuation reports. These reports show an awareness of alternative valuation approaches and of different outcomes on different sites in this area. The reports include market commentaries and the 2020 Report assessed market uncertainty in respect of the impact of Covid. Covid related valuation issues of course are new and do not touch on the first three payments which fell due prior to Covid. The DV was aware of a different potential approach to the inclusion or otherwise of shared equity as a form of affordable housing tenure.

35. The approach of the DV was consistent with the underlying purpose and basis of the payment of the commuted sum set out by me above. I reject the argument that the DV was in error in making calculations by failing to make allowance for the "particular terms and scale of the site itself", otherwise described as the characteristics of the site. I reject the argument that, in the face of the use of the residual method, certain comparison sites (such as the site at Hillhead) should be preferred in a benchmark analysis because of similarities with Friockheim.

c) Comparison method

36. In support of their appeal, the Appellants have submitted valuation information set out in a letter of 1 October 2019 from Graham & Sibbald. This sets out comparative data from the Dundee and Angus area. This supports the suggestions that sufficient comparable market place data is available to allow meaningful conclusions to be drawn from other sites. It indicates that, if considered, a lower commuted sum would or should be the outcome of due consideration of that data in the current context. Submitted with that letter is a note that sets out how the proposed total commuted sum of £216,000 is calculated. Further explanation of their view is provided by Graham & Sibbald, attached to the Appellants further submission on 3 February 2021. Amongst other things it sets out a case for preferring the comparison to the residual method.

37. The contrast between the lists in the letter of 1 October 2019 and in the 2020 Report is marked, both in numbers of comparisons cited and the notable lack of overlap between them. However, both the Appellants and the DV recognise the risks of drawing conclusions from incomplete data (including due to commercial sensitivity) or differing circumstances in looking at other sites. The need for full contextual information in the use of this method is recognised in the RICS guidance. Variations may arise depending on whether the comparators are on-site or off-site delivery. As

the Appellants note (under reference to the DV reports), variations are known of, leading to values from nil to £10,000 due to site specific factors. They cite a development at Hillhead where a 2011 figure was modified to £5,000. On the other hand, both sides acknowledge a calculation of the commuted sum at the Princess Alexandra site at Forfar as £25,000 per unit.

38. The email of 1 October 2019 provides no more than a general indicator of possible other outcomes by using the comparison method. The value of that data is therefore of itself limited. Its value depends on the application of professional judgement to it, giving due regard to the different valuation methods.

39. The Appellants question the inter-relationship of timings between the trigger points for payment and the dates of the DV assessments. The dates of assessment in the DV's reports do not match up precisely with the trigger dates for payment in terms of the Appellants evidence. But the figures in terms of those reports over a prolonged period do not extensively vary and come nowhere near the figures suggested by the Appellants. I therefore place little weight on the importance of any such mis-match of dates.

d) Non compliance with SG

40. A specific criticism is that the approach of the DV does not accord with the adopted SG and that, in consequence, the approach taken is flawed and leads to very different and erroneous outcomes. I do not agree that the valuation approach taken by the DV in respect of benchmarking failed to align with the SG (or the section 75 Agreement). That approach was based on the difference between the unrestricted market value and the affordable housing value considered reflective of the amount a Registered Social Landlord or the Council would have to pay over and above the affordable land value to obtain the alternative plot. The DV considers that, using that methodology, the developer contribution is directly related to land costs and reflects the difference in market values in Housing Market Areas. Although expressed differently in the SG, the purpose is the same. It is consistent with the underlying planning policy intention.

41. Specifically, in giving effect to the purpose in a way consistent with the Agreement and the SG, the DV was correct in not giving weight to on-site values or considerations. The DV has been consistent throughout in the approach taken to benchmarking. I see nothing inherently wrong in that approach, as a matter of valuation judgement. Nor that the approach of the DV was outside the range of reasonable valuation judgements.

42. Even where the words are different, there is limited basis for the Appellants to have been significantly surprised by the outcomes from the DV calculations. Three pieces of evidence lead me to that conclusion. Firstly is that the indicative outcome in the example in the Annex to the SG in respect of the Housing Market Area (HMA) for East Angus is broadly in line with the concluded outcomes of the DV. Secondly, the benchmark starting point figure in the alternative wording suggested by the Appellants (if parties were to use a more up to date obligation) uses a figure broadly in line with the concluded outcomes of the DV.

43. Thirdly is the position of the Appellants regarding their past understandings. In relation to the first two triggered payments, I recognise that they reserved their position of valuations when making payments on 21 June 2017 and 15 March 2018. They questioned the extent to which the sums sought per unit has increased (to £27,000 and £26,000 respectively). However, they did not challenge the base figure of £24,000 per unit. In pursuing the proposed modification, the Appellants argue that the valuations were always wrong. However, from the appeal papers in the round, I

do not fully recognise their assertion that the Appellants have "queried the payments being sought from the outset, and regardless, have continued to pay the contributions due up to the amount the Appellant considers relevant". The former may be correct to a degree, but the latter is not apparent from the appeal papers or the actings of the Appellants.

e) Conclusions

44. In conclusion on these matters, I see nothing inherently unreasonable in the professional valuation judgement of the DV. I do not consider that the DV has taken an unreasonable approach to the consideration of comparison sites. The DV makes it clear that using comparisons is the sub-optimal approach. The DV considered that the primary use of the residual approach is more reliable with comparisons of value essentially as a sense check. In this geographical area where comparison sites were considered limited in number, the DV too was of the view that the value and conclusions from comparison of sites would be minimal. The DV was aware of competing arguments on site valuations.

45. The DV has used consistent methodologies for benchmarking throughout. These are aligned consistently with the purpose and basis of the calculation and payment of the commuted sum. As seen from the three valuation reports on affordable housing land valuations and commuted sum payments produced, that approach to benchmarking has been consistently applied throughout. Regard has been had to local circumstances in the HMA. The implications of notional plot sizes on valuations were understood by the DV. I see no basis to consider the DV's approach to benchmarking was inappropriate or contrary to RICS guidance.

46. In light of those conclusions on valuation matters, I can see nothing in respect of the role or approach of the DV that supports the appeal. The use of the DV in the way envisaged is appropriate. The DV applied reasonable professional judgement to the valuations. I do not consider that an amendment of the terms of the obligation is needed.

Viability

a) General

47. Consistent with LDP policy DS5, scheme viability is a material consideration in testing the appropriateness or reasonableness of the imposing of a condition requiring a number or proportion of the units to comprise affordable housing. A condition which is so onerous as to make the development non-viable would not be reasonable nor appropriate. It is a key element of matters of planning judgement on risk to the amenity of an area that viability must be considered if there is a risk that an unduly onerous condition might lead to the development not being completed (or the developer failing).

48. Viability is primarily a matter to be assessed at the outset. I agree with the Reporter in paragraph 8 of POA-230-2009 in that respect. To be a material consideration at this stage, a change in development viability in the course of the building of the site requires to be both material and unforeseeable. Degrees of changes in income and costs are inevitable in developments of this scale. It is to be expected that prudent forward planning would involve the building in of an allowance for additional costs over the life of the project.

49. It is not a matter of dispute that the development in this case was regarded as viable at the outset. That seems clear from the actings of the Appellants and from the Development Viability Statement. The balance struck between planning

considerations and viability was reflected in setting the proportion of affordable housing at 20% and, through the 2016 modification, in fixing the staged basis on which the 4 phased payments were to be made.

50. A later review based on viability brings two factors into the balance of consideration of reasonableness. Firstly is that the risk of the development not proceeding or not being completed is not being viewed from the outset. Viability arises now at the stage when only 2 units are left unbuilt out of a potential, in terms of the consent, to build 80. The risk of the harm to planning amenity now in play is considerably lower than at the outset. Secondly, certain factors point to caution in allowing their removal at this late stage. These are the nature of the obligation here in its policy context and the benefits of clarity and certainty to the Council of the fulfilling of that obligation in support of their identified policy outcomes on the provision of affordable housing.

51. The Appellants narrate a range of unexpected additional costs to under-pin their argument on viability. The degree to which these are reasonable to take account of at this point is disputed by the Council who argue both generally and in specific items, that the case to do so is not made. The Council suggest that, in certain respects, cost savings are not factored in to the Appellants calculations. In certain respects, the additional and unexpected costs impacting on viability and presented by the Appellants as such are difficult to objectively categorise. As a generality, I note the acknowledgement by the Council that the various sums accurately reflect the costs that would in practice be involved. I accept that.

b) Affordable housing and purchase incentives

52. I do not agree that it is correct to include the costs relating to affordable housing or purchaser incentives.

53. On costs relating to affordable housing, given the range of contra-indicators throughout as to the Appellants stated views, the working assumptions narrated about expected sums due per unit of £10,000 by way of commuted sums seem unrealistic and unsafe.

54. There is information before me from the Council's Implementation Guidance suggesting in Appendix 2 that the then current 2007 benchmark for affordable housing in the Arbroath area was £17,000. From the Appendix to the 2018 SG indicates that in January 2018 it was £26,000. An earlier version of the SG used the figure of £24,500 as at December 2015. The sum of £22,000 per plot was in contemplation by the Appellants at Wester Restenneth in 2014. In their letter of 21 June 2017, the Appellants notably question the increase per unit rather than the 2016 base figure of £24,000 per unit.

55. I accept that such earlier indications are a matter of disputed understanding and disputed application to the current site. The DV reports from that period were only seen later by the Appellants. However, it is clear from what was known is that reliance on a 2014 assumption of paying £10,000 per unit was unsafe. I find that the Appellants ought to have known or realised from the outset that the figure per unit was at risk of being significantly higher than their preferred £10,000 per unit. Assumptions made on a calculation based on such costs would be unsound.

56. On purchaser incentives, that additional cost was a commercial choice of the Appellants. I do not question that decision but seems to me to be part of normal commercial decision making based on development viability when those decisions were made. They were made in light of the existing obligation.

c) Other costs

57. It is not clear from the Development Viability Statement the extent to which it was not reasonable to foresee that other additional costs might occur. It is not clear what planning was undertaken to build in the risk of future costs, even if not specifically able to be foreseen. Certain of the additional costs are not in themselves insignificant. But, in the context of the scheme as a whole, they have not been shown to be other than relatively marginal. Even if unforeseen in detail, the likelihood of such additional costs occurring was not unforeseeable in the round. There are always likely to be certain unforeseen costs in any project and that it would have been reasonable to forward plan for such eventualities. More specifically, there is nothing clearly demonstrating either that the contribution in terms of the current obligation makes the scheme unviable or that the contribution requires to be as low as the level of the proposed sum in order to make it viable.

58. Although not directly linked by them to the considerations relevant to viability, the Appellants make fairly general references in the appeal to the impact of Covid on the development. These are expanded upon in their letter of 3 February 2021, but are not developed in depth. No detailed Covid-related information points to a change of circumstances since March 2020 justifying a different conclusion in respect of viability.

d) Conclusions

59. In conclusion in this respect, I have considered the limited impact on planning amenity in light of the advanced stage of the building out of the site, the desirability of certainty in future planning for the Council (proceeding on the basis of the obligation as it stands at present) and the absence of a sufficient basis for a review in relation to development viability. There is no basis on matters of viability to find that the tests in the Circular are no longer met. I find no basis to support a different level of contribution as an appropriate planning obligation. Accordingly, I find no basis to support the substitution of the proposed alternative obligation.

Relationship to local housing needs

a) General

60. In principle, I consider that the need for the making of an affordable housing contribution from this development has been shown. It is necessary in order to secure compliance with local development plan policy. The affordable housing contribution serves a planning purpose as it relates to the provisions of policy TC3 of the Angus LDP on affordable housing. I see the argument that this development does not in itself create the need to provide affordable housing. However, the requirement for the contribution to such housing (as translated here into a commuted sum) arises directly from the development proposed and the need for compliance with that policy, as read with the SG.

61. The policies of the Council support the imposing (and maintaining) of a contribution from a development of this size and nature. Policy TC3 points to that contribution being 25%. Consistent with the approach appropriate to this Housing Market Area, the Council imposed a contribution of 20%, which is a level which has remained uncontested throughout the history of the site. Although in parts of the appeal challenging that view, the Appellants both in the terms of the modification now proposed and in their letter of 3 February 2021, seem themselves to concede the reasonableness of that 20% contribution. I see no basis for a suggestion that such percentage is or has become unreasonable. I consider that requirement and that level of contribution to be reasonable and appropriate and is a requirement related to the development.

62. The Appellants question the inter-relationship between planning policies and local housing need, in terms of the current Housing Needs and Demand Assessment. That inter- relationship is required by policy TC3 of the LDP. The Appellants argue that the "affordable housing obligations in the Agreement are no longer necessary to make the proposed development acceptable in planning terms".

63. I have considered the Local Housing Strategy and the 2015 Housing Background Paper and as it is informed by Housing Needs and Demand Assessment 2013 and feeds into policy TC3 of the LDP. These documents identify a need for affordable housing.

64. Consistent with the Local Housing Strategy, I note the very clear indication to that effect from the 2015 Housing Background Paper ahead of the then current LDP review. Policy TC3 of the LDP was based on the most up to date assessment of the requirement for affordable housing across Angus. This, through the 2013 TAYPlan Housing Needs and Demand Assessment, identified a substantial backlog of need for affordable housing across the 4 relevant Housing Market Areas (HMA's).

65. The SG supports this conclusion. The SG at Annex A indicates, across these 4 HMA's, that "meeting the identified need by the HNDA would require between 30% and 65% of all new houses to be affordable". It then breaks the need down into each of the HMA's in Table 1. The percentage in the East Angus HMA is 62.4%.

66. The Local Housing Strategy and the SG recognise that affordable housing policies require to be realistic and set lower affordable housing targets than that need implies. That does not detract from the clear need across the whole HMA and in the East Angus HMA. That is the basis and clear justification for the policy at TC3 of the LDP.

67. The Appellants suggest that the identified needs in support of the Local Housing Strategy for the period to 2022 are or can be fully met without requiring a contribution (or further contribution) from this development. They question the need under reference to the actings in practice of the Council and suggest that – even if the DV's valuations are right – they will yield sums in excess of what is actually required for off site delivery.

68. In my view the Appellants arguments underplay the importance of the contributions from this and other private developments in helping to shape the Council's annual delivery programme. In any event, an ongoing and detailed critique of policy decisions relating to housing matters does not materially assist in countering the evidence of established need. It provides only limited support, in the face of the above, of the suggestion of an absence of need. Criticism of the steps taken in pursuance of more modest targets does not form a basis to lower them further. I find that there remains a need for an affordable housing contribution across the whole HMA and in the East Angus HMA. As far as a contribution from this development is concerned, this for these reasons meets the relevant test in policy TC3 of the LDP.

b) Local need

69. The appeal raises two specific matters concerning local need relevant to these heads. This is where matters arising from underlying policy decisions concerned might raise questions about proportionality of the ongoing obligation or its relationship to the particular development. The Appellants question whether there is a sufficiently direct relationship of scale and kind between the development (and where it is located) and where affordable housing is needed.

70. The first matter relates to the question of affordable housing demand in Friockheim or the immediate vicinity (so far as that can be understood or defined). If there is little or no such demand locally (or if such demand as previously existed has now been met), the Appellants argue that there is no longer a need to continue to apply the requirement to make commuted payments from the date when that situation arose. The proposition that there is limited demand or need for such housing is not new. The Appellants indicate that the 2016 modification made at that time was wholly or primarily driven by that lack of demand.

71. However, the Council's policy on affordable housing and the Housing Needs and Demand Assessment does not sub-divide the area of the district of Angus Council in this level of local detail. The applicable policy, along with the SG, recognises a degree of localism in framing the policy approach and its application here around the wider East Angus HMA. The existing Agreement does the same, described there as the Arbroath HMA. It is not further broken down to the providing of affordable housing into sub-areas such as Friockheim or the immediate vicinity. I consider that this policy adopted and applied by the Council of taking an area wide approach across the relevant HMA is reasonable and appropriate. This is consistent with PAN 2/2010. In circumstances where a site is unsuitable for affordable housing, paragraph 21 of PAN 2/2010 recognises that a contribution may assist to meet an identified need in the same housing market area. That reference to the same housing market area supports the approach of the Council.

72. The second matter is the argument that the policy justification for requiring 16 affordable units (or commuted sums in lieu) falls because the Appellants have in fact and in part included in the units built by them an equivalent of what the policy was aspiring to. If so, in effect a credit ought to be given in amending the obligation to reflect that. This, the Appellants argue, is reflective of the position on the ground now.

73. In my view, the units provided unilaterally in the way they have been by the Appellants have cannot be said to reasonably satisfy the policy outcomes of the Council, in whole or part. Such provision does not guarantee that these units will be so provided in future. The section 75 Agreement so envisages. An obligation requires to bind successors in order to be fully effective. Reading the Agreement and the 2016 modification together cannot secure that outcome for those units. No other documents of a conveyancing nature securing it have been provided. I see nothing in the appeal that meets this point in a satisfactory way.

74. I cannot see how the steps taken by the Appellants can be said to sit with the obligation entered into by them by means of the section 75 Agreement. Under that Agreement (as originally signed) affordable housing was carefully defined. On the basis that there may be no likely market for such affordable housing, the option of making commuted payments in lieu was provided for. It was exercised by the Appellants. That is anticipated in express terms in clause (SECOND). The option for the Appellants of unilaterally now going back to the original version of the Agreement is neither anticipated nor provided for in the Agreement. In any event (as above), there is no indication that such units will be so available in perpetuity.

75. The Appellants argue that they "honoured the agreed mix". I was able to observe a mix of housing units on my site visit. That argument though is hard to reconcile with the 2016 move to 16 commuted payments.

76. Unsatisfactory though all of that might be, it might still be considered acceptably reasonable if agreed to by the Council or if in my judgement this approach achieves in effect the same policy outcome on affordable housing as the Council aspire to.

77. In respect of past provision, I am clear that it has not been agreed to by the Council, either in the past or in the course of this appeal. There is no reasonable basis before me to suggest that the agreeing or acquiescing to the building of the units on this site concerned equates to a recognition that this was satisfying, in whole or part, the obligation to pay commuted sums under the Agreement. I reach that view even on a recognition that these units could be regarded as or assumed to be affordable in nature, as is suggested was indicated by Council housing officers.

78. In light of the policy context, my conclusions on the appropriate local framework and on need in the context of provision made by the Appellants, I find that there is an appropriate relationship between the obligation and the development. The scale and kind test is met.

79. Moreover, there is a further scale and kind issue which has a valuation dimension. The modification proposed by the Appellants seeks to fix the overall contribution and in doing so supplant the role of the DV. I reject that approach above. If that though were done, I would require to address the question of whether the proposed overall contribution of £216,000 itself meets the scale and kind test, for a development of this size and nature. Averaged out, the contribution per unit would be £13,500. Based on the information provided on the steps taken and assessment made by the DV (including on the reasonableness of the use of the residual method), there is in my view a limited basis in the valuation exercise to support the modification proposed.

80. I have considered the implications of the proposed contribution set at that level. In the absence of such a valuation basis supporting the modification proposed, it would result in a significant reduction in the sum available to the Council for off-site affordable housing provision. In light of my findings above, that would be contrary to the aims and policies of the LDP and associated guidance. Even if I had been persuaded that is was appropriate to supplant the role of the DV, I consider that the proposed overall contribution of £216,000 by way of planning obligation risks failing to meet the scale and kind test in Circular 3/2012.

Other matters

81. In this appeal, the Appellants raise a number of other issues which are convenient to deal with together.

82. I can deal briefly with the necessity test in the Circular concerning options for the resolution of issues in other ways before proceeding with the use of a planning obligation. The Appellants do not dispute the issue of necessity in that sense. Had there remained in place an on-site contribution, the continued application of the affordable housing requirements to successors in title is clear. Such provision by on-site contribution is no longer required as payments are now to be made by way of commuted sum. In a planning obligation appeal, the question is whether the need is such that the obligation should be retained. As paying by commuted sum is in substitution of an obligation in respect of which the necessity test is met, I find that the substituted obligation should continue until fulfilled. The necessity test in the Circular continues to be met.

83. The Appellants make points about consistency and flexibility on the part of the Council, conformity with policy and on consideration of appropriate precedent. On the information before me, there is little to suggest that the Council to a material extent has been insufficiently responsive in considering the particular circumstances of the development site or in applying an objectively consistent approach to the Appellants. In any event, the concerns expressed by the Appellants in these respects have no bearing on the main determining issues.

84. No Convention Rights argument is developed in detail by the Appellants. I see no basis to suggest that the processes or procedures applicable to planning obligation agreements nor appeals of this nature point to a systemic failure to balance such rights against the wider public interest justifications for these.

85. The Appellants make arguments relating to the characteristics of the site as part of the commuted sum valuation process. In terms of policy TC3, I do not consider that the characteristics of the site lead to inconsistency with the application of that policy as part of the consideration of the planning purpose.

86. The Appellants also argue the Agreement is ambiguous in one very specific regard. They argue the wording implies the making of 4 equal payments. Parity of payment can only be ascertained at the start (if known in advance) or at the end (once finally known). However, I consider that the use of the term “equal” was intended to serve a different purpose. The reference relates to the multiplier number of units per commuted sum (ie 4 when dividing out the 16 units into 4 trigger dates). That is consistent with how the Agreement has been operated. The parties could, if so advised, agree an amendment outwith the appeal process to put this beyond doubt. I see no need for me to propose a modification to that effect.

Overall conclusion

87. I find that the planning obligation sets out the purpose and basis for correctly calculating the payment of the commuted sum based on off-site provision in lieu of on-site provision as a matter of planning policy and as set out in the associated guidance.

88. In my opinion, use of the DV in the way envisaged is appropriate. The DV applied reasonable professional judgement to the valuations. The general outcomes of these are not and cannot be regarded as unexpected.

89. I accept that financial circumstances will have changed during the construction of the development. However, that is inevitable for any relatively large scale development of the order of 80 houses built over several years. The relevant increases in costs were not unforeseeable in the round. There is nothing clearly demonstrating either that the contribution in terms of the current obligation makes the scheme unviable or that the contribution requires to be as low as the level of the proposed sum in order to make it viable. There is no basis in this respect to find that the tests in Circular 3/2012 are no longer met.

90. There is a continuing need for affordable housing in Angus and in particular the East Angus Housing Market Area. There is an appropriate relationship between the obligation and the development. The scale and kind test is met. I find that the current obligation continues to comply with the tests in Circular 3/2012.

91. In the absence of a valuation basis to support it, the proposed modification would result in a significant reduction in the sum available to the Council for off-site affordable housing provision. That would be contrary to the aims and policies of the LDP and associated guidance. It would risk failing to meet the tests in Circular 3/2012.

92. For the reasons set out above in relation to the main determining issues in this appeal, I find that the current obligation continues to comply with the tests in Circular 3/2012. I see no basis to impose a different obligation as proposed. I conclude that there is no material ambiguity in the obligation expressed in the 2016 modification.

93. Accordingly, I dismiss this appeal. I determine that the planning obligation shall continue to have effect without modification.

4. FINANCIAL IMPLICATIONS

There are no financial implications arising from this Report.

NOTE: No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) were relied on to a material extent in preparing the above report.

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DATE: 4 MAY 2021

Appendix 1 : Location plan