

DOVER DISTRICT COUNCIL

PLANNING COMMITTEE – 25 AUGUST 2016

WHITFIELD URBAN EXPANSION PHASE 1 – REQUESTED VARIATIONS TO S106
ATTACHED TO DOV/10/01010

1. In February 2016, a request was received from the developers' solicitors requesting a number of amendments/variations in a Deed of Variation (DoV) to the above S.106 agreement which had been completed on 30 April 2015. There has been a steady process of negotiation which is now culminating in accord being reached and reporting back to the parties for formal agreement. It is understood that all parties are in agreement subject to one minor point raised by Kent County Council which is being confirmed at the time of writing and a verbal update will be given to Committee.
2. With one exception, the proposed changes are of a technical and non controversial nature, essentially involving rewordings or updated information in light of changed circumstances since the S.106 was signed. Such changes are set out in **Appendix 1** with a commentary from a DDC point of view in *italics*. In summary they comprise:
 - Changes are proposed around the definition of timings in relation to the S.278 and S.38 Highways agreements to reflect the situation as it now exists
 - Changes reflect the need for a new plan to cover the slight realignment of the Primary Street and Spine Road as a result of detailed work subsequent to the S.106 being signed
 - Changes to cover the need for enhanced payment of SPA contributions should the developers be granted permission for housing instead of the permitted Nursing Home
 - Changes around arrangements for the SAC mitigation land have been overtaken by DDC approval of details but the original plan is retained with an additional clause to require submission of an updated schedule of plans every time changes are approved
 - A request to use S.106 monitoring fees to meet Planning Performance Agreement costs was not agreed and has been struck out
 - The Schedule of ownership and parties to the agreement has been updated
3. However, the S.106 restricts the commencement of house building until identified road building has been completed and the remaining variation in the DoV seeks to alter this to preclude occupation of any houses until those works have been carried out. It is this matter that requires more detailed consideration.
4. During the preparation of the S.106, the relevant wording at Paragraph 1.1 of Schedule 4 was drafted as follows:

1.1 Not to commence construction of any residential unit in the development until the A256 roundabout and Primary Street works have been constructed

(a) in accordance with a specification and to a standard approved in writing by the County Council; and

(b) made available for pedestrian and vehicular use by members of the public

And certificate one of the Primary Street s.278 Agreement has been issued

This was intended to prevent the commencement of building residential units prior to the construction of the new A256 roundabout and associated length of Primary Street. The commencement of those highway works is imminent but has not happened. This requirement was imposed to ensure that the development site was opened up and any new dwelling would be served by an adequate road. There was no reference to any use of Archers Court Road (ACR). However traffic on ACR has become of concern locally and led to a site visit which confirmed that foundation works have begun on some 15 residential plots. There is therefore a technical breach of the S.106 as currently drafted

5. Since the S.106 was signed, detailed plans have been approved for 94 dwellings. In addition details have been approved to discharge some 30 relevant planning conditions. These included a Code of Construction Practice (COCP), a Construction Traffic Management Plan (CTMP) and a temporary construction access onto ACR. The CTMP which was approved in May 2016 recognised that the developer needed to gain access from ACR to physically commence the construction of the new roundabout and access off the A256. As shown on the plan attached at **Appendix 3**, each of the ACR accesses has an associated compound.
6. During the development of the CTMP, it became apparent that the S.278 and S.38 agreements were close to being signed with Kent County Council and that a start was expected soon on the construction of the roundabout and roads with a contract to run for some 40 weeks. The proposal to allow housebuilding concurrently with road building would avoid delay, take account of the very substantial upfront infrastructure costs associated with a start of this project and the need for the developer to recoup some of that investment sooner if the project is to be commercially sustainable. Members should note that it is also in the District Council's interests for an earlier start to be made on the housing, bearing in mind this is the Council's major housing allocation for the whole District and the need for a 5 year housing land supply.
7. When planning permission 10/01010 was granted, condition 13 specified that construction traffic should only access the site from the A.256 unless otherwise first agreed in writing by DDC. However as the process to discharge the planning conditions unfolded, it was agreed that construction traffic could use ACR for 22 weeks from the start of the contract to build the new roundabout on the A.256 and Primary Street, after which both of the temporary accesses to ACR are to be closed to traffic except for emergency use and all access to the site must be via the A.256. This 22 week period had been negotiated down from the original proposal of 40 weeks and the formal date for the commencement of the A.256 works and the start of the 22 weeks period is expected to be identified soon. The CTMP accords with the proposal that no housing shall be occupied until the A.256 access is substantially completed and that there will be no access to the new housing from ACR.

8. However, the potential safety issues and inconvenience to residents of Whitfield were uppermost in assessing impacts. Consequently the detailed use of ACR and associated construction activities have been set out at length and rigorously scrutinised in the Code of Construction Practice and the Construction Traffic Management Plan submitted by the developer and now approved. A summary of some of the more important provisions/controls is set out in **Appendix 2** for ease of reference.
9. Nevertheless there have been some local concerns about the use of ACR and it is important to understand the context for its use. The definitions in the S.106 agreement allow some operations to be carried out without them amounting to a formal start on site as defined in planning law. These include: Site clearance; demolition; archaeology; laying of services; access and highway works; and temporary means of enclosures. This is primarily what has been happening to date including the use of the temporary construction access from ACR opposite the Church Whitfield turn. No planning permission was needed for these site preparations or for traffic to use ACR as a public highway. However, to reduce the effects of the related traffic, parking restrictions were introduced on ACR. In addition, a new approved temporary construction access has been surfaced up to sub base with temporary kerbs and white lines. It is not yet in use but is ready for when the 22 weeks period begins.
10. Whilst delivery levels appeared low during a recent site visit (which lasted nearly three hours), the developers have been requested to provide information about deliveries to the site, including traffic related to the housing development. It is understood that deliveries associated with the housing do not exceed 10 per day and are often lower but are subject to the need to accept deliveries on bricks and blocks etc. of which there is a national shortage and consequent waiting list. It was also pointed out to the developers that the CTMP requirements had not always been followed and the need to observe them was emphasised. The site agent has proved responsive when problems are raised and the developers have agreed to take up these issues with their suppliers.
11. So the situation is that the CTMP facilitates the building of housing during a 22 week period beginning from the start of the contract to build the new A.256 roundabout contract. This has not yet occurred and the new temporary ACR access has not been brought into use. However, as house foundations have been commenced, there is a failure to comply with the provisions of the CTMP although this is expected to be a flexible and living document. This is being pursued.
12. Under these circumstances, it is necessary to consider firstly whether it is acceptable to agree the proposed variation changing the restriction on housebuilding from precluding commencement until identified road building has been completed to precluding occupation of any houses until those works have been carried out. There are considered to be cogent and compelling arguments to justify this as set out above in paragraph 6.
13. The remaining proposed variations are considered in **Appendix 1**. These are not considered by Officers to be controversial and it is therefore recommended that these should be accepted by Members as part of the proposed DoV, subject to clarification of the outstanding point raised by Kent County Council.
14. It is considered that there are two options open to the Committee:

Option 1 To agree the Deed of Variation

This is the option recommended by officers. In addition to the reasons set out above, Members will note that this would regularise the situation so that a line is drawn and the development can move forward at an earlier stage. It also reflects the basis on which the CTMP was prepared.

Option 2 To refuse to agree the Deed of Variation

In these circumstances, the Committee may wish to consider potential enforcement action in response to the breach of the S.106 as it stands. As this may involve seeking an injunction, a further report to Committee would be needed.

15. Bearing the analysis above in mind and all other relevant planning matters, the conclusion is to RECOMMEND Option 1.
16. If this is accepted and the outstanding point raised by Kent County Council has not been resolved, it is FURTHER RECOMMENDED that the Head of Regeneration and Development be authorised to satisfactorily resolve that issue in consultation with the Chairman and Vice Chairman of the Planning Committee, failing which a further report will be brought to Committee.

Case Officers

Mike Dawson/Kim Bennett

Appendix 1

COMMENTARY ON THE PROPOSED DEED OF VARIATION

to an agreement dated 30 April 2015 made pursuant to Section 106 of the Town and Country Planning Act 1990 relating to land at Phase 1, Whitfield Urban Expansion Dover, Kent

(As initially submitted on 12 February 2016 and subsequently developed)

Economic Viability Assessment

1. Recital 7 deals with the review of the Economic Viability Assessment. Our amends are designed to make it clear when we refer to construction of the A256 Roundabout and Primary Street Works we mean construction to base course level i.e. no top course in relation to the Primary Street. We believe that should correspond to certificate 1 of the s278 agreement but will need to check this against the provisions of the draft s278 you are about to issue. If not we will need to amend both the Deed of Variation and s278 agreement to provide for this. A similar amendment has been made to Paragraph 2.1 of Schedule 3.

DDC Commentary

These are simply clarifications which are needed to reflect progress on the S.278 agreement and what has now been concluded.

The text has subsequently been altered to include "later of the" date of the Primary Street s278 Agreement "and the Primary Street s38 Agreement" and certificate one of the Primary Street s278 Agreement "and certificate number 1A of the Primary Street s38 Agreement, in so far as it relates to the Primary Street, has been issued.

The addition of the reference to the S.38 agreement is important for completeness and clarity but has no practical effect on the timing of the need to submit a revised Viability Statement. Recital 7 in the S.106 requires that to occur if the A.256 and Primary Street works have not been constructed and made available within 3 years and 3 months of the date of the agreement i.e. by 31 July 2018. The effect of the variations would be by October 2018 (S.278) and as the S.38 has not been signed (but that is imminent) by say October 2018. Both dates are thus after that relating to the S.106 signing and the addition of the reference to the S.38 can be accepted.

Restriction on Occupation of Residential Development

2. Paragraph 1.1 of Schedule 4 has been amended to allow the residential development to start on site but not to be occupied until the A256 Roundabout and Primary Street Works have been constructed to base course level

DDC Commentary

.This has been addressed in the main body of the report

Primary Street

3. The revision to the definition of Primary Street is to provide a degree of flexibility to amend the alignment of the Spine road between the A256 Roundabout and the triangle as currently shown on Plan 7, as its alignment has altered as part of the discussions with your authority on the s278 Agreement, however the extent of the works remains consistent and that is what the plan is showing.

DDC Commentary

This realignment of the Primary Street has emerged as being necessary for highways and layout reasons as addressed in the Reserved Matters application and the variation is necessary for clarity.

Spine Road

4. The revision to the definition of the Spine Road is to provide flexibility to amend the alignment of the Spine road as shown on Plan 10 as its alignment has altered as part of the discussions with your authority on the s278 Agreement, however the extent of the works remains consistent and that is what the plan is showing.

DDC Commentary

As in the case of the Primary Street, this realignment of the Spine Road has emerged as being necessary for highways and layout reasons as addressed in the Reserved Matters application and the variation is necessary for clarity.

Nursing Home

5. A new clause 3.7 has been added to capture any new s73 application or non-material amendment to increase the number of residential dwellings to take into account future residential development on the nursing home site and to change the approved plans to delete reference to the nursing home.

DDC Commentary

This variation is sought in the event that the developer decides not to proceed with the permitted Nursing Home but then seeks residential development on the site instead. That will be an issue to be determined through a future planning application. However should such an application be granted, it would have implications for the SPA contributions – see below.

SPA Contribution

6. The definition of the SPA Contribution has been amended to provide for an additional payment in the event the number of residential units increase as a result of a subsequent s73 consent relating to deletion of the nursing home proposal and substitution of residential in that location. A consequential amend has been made to paragraph 2.3 of Schedule 5. The total remains below the total (1400) originally subject to EIA. It isn't proposed to make that application at this time and this amendment doesn't pre-empt that decision, but merely means if it is permitted at some time in the future a further s106 variation won't be needed.

DDC Commentary

See above under point 5. It is agreed that provided the additional dwellings plus the 1250 already permitted do not exceed 1400, then no further EIA would be needed. However a provision has been added for payment of an additional amount of the SPA Contribution if an application is approved in accordance with the terms of the new clause 3.7 after commencement of the development as the SPA Contribution has to be paid before commencement. The contribution per dwelling would be as in the original S.106 agreement. At the time of writing, consideration was being given to a request from the County Council that a cap of 20 additional dwellings should be included which if exceeded would allow an opportunity to reassess any possible traffic and travel issues. An update will be given to your Meeting.

SAC Mitigation Plan

7. Paragraph 5.1 of Schedule 3 has been amended to alter the timing for the provision of the specification and management plan for the SAC Mitigation Plan to Occupation of the Development.

DDC Commentary

This amendment is not necessary now as not only has the mitigation plan been submitted it has now been approved by DDC. In consequence the final variation document will revert to the existing wording of the S106 agreement with some minor amends to capture any future changes to the management plan approved by the Council on 9 June 2016.

SAC Mitigation Land

8. The definition of SAC Mitigation Land needs to be changed to provide the flexibility to substitute a new Plan 8 as the detailed design of the SAC Mitigation progresses.

DDC Commentary

The SAC Mitigation Land plan has now been agreed with the Council. However for reasons of clarity, the reference to Plan 8 will remain but an additional clause has been added by DDC requiring the submission of an updated schedule of plans every time there is a change. This required a change to paragraph 5.2 of the original agreement to refer to the approved plan.

PPA Agreement/Monitoring Fees

9. Clause 12 has been amended to add a proviso enabling any fees incurred under a PPA with DDC to be deducted from the S106 Monitoring Fees

DDC Commentary

This variation was not acceptable to the District Council and has been struck out.

Change in Ownership

Paragraph 1 of Schedule 1 has been amended to reflect the up to date title details for Whitfield at HM Land Registry. The developers have subsequently added an additional 2 parties to the agreement who have charges over the Site.

DDC Commentary

No objection is raised to such changes following sight of title.

Appendix 2

Code of Construction Practice and the Construction Traffic Management Plan

Summary of selected provisions/controls.

1. The access from ACR is restricted to 22 weeks as opposed to the 40 weeks originally requested.
2. Following 22 weeks, the northernmost access will be closed off and the southern access will be used for emergency purposes only. This is also a change from the original proposal where the developer wanted to instigate a longer term one way system from ACR and out on to the A256.
3. Kent Highways have been fully involved throughout and have raised no highway safety issues subject to single yellow lines being put along the entire length of ACR , temporary additional speed restrictions put in place, and improved visibility put in at the southern access. As you are aware these have now all been implemented.
4. All deliveries from HGVs will take place outside of school collection and dropping off times.
5. Detailed measures to protect the surrounding area from noise, dust and mud on roads are all contained in the documents referred to above. Similarly general working hours are also restricted.
6. A Communication Plan will be established with the Parish Council and a Site Manager has now been appointed, part of his duties being to deal with any local queries
7. The above documents also include various control mechanisms which the local community or the Council can take up with the Developer if agreed working practices are not being complied with.