

Recommendation Report for Request to Modify or Discharge a Planning Obligation on a S106 Agreement Less Than 5 Years Old

REF NO: BN/23/26/DOV

LOCATION: Land South of Barnham Station
Barnham

PROPOSAL: Request to enter into a Deed of Variation to modify a Planning Obligation dated 3.12.21 relating to planning application BN/142/20/OUT to modify condition Schedule 1 clause 2 to provide the affordable housing units as Discount Market Sales units.

SITE AND SURROUNDINGS

REASON FOR DECISION	CONTEXT
	This application seeks a Deed of Variation to the Section 106 dated 03/12/2021 linked to planning permission BN/142/20/OUT in relation to Schedule 1 Clause 2 (Affordable Housing). Schedule 1 Clause 2 has previously been varied under BN/66/24/DOV, with the Section 106 DoV dated 21/02/25. This variation sought to incorporate first homes as part of the affordable housing tenure mix; altering the mix from 75% affordable rent and 25% intermediate to 67% affordable rent, 25% first homes, and 8% intermediate. This was accepted by the Planning Committee on 18th December 2024. VARIATION AND DECISION Developers nationally are facing significant challenges in disposing of Section 106 Affordable Housing with Housing Associations facing a perfect storm of mounting pressures from constrained financial capacity, higher costs of finance, rising build costs and commitments to remediate existing stock to meet building safety and decarbonisation targets. Recent research undertaken by Savills has revealed that over half of the Housing Associations they surveyed (53%) reported that they were either no longer intending to acquire Section 106 homes or had reduced their requirements for them. Given the challenges faced by developers in this regard, it is understandable why they are looking to overcome these issues and ensure that development can proceed even in the absence of agreement with a Housing Association for the disposal of Section 106 affordable housing. It is proposed to amend Schedule 1 Clause 2 for the following reasons:

- To provide the affordable housing units (other than those to be provided as First Homes) as Discount Market Sales units;
- After 12 months from the last tender to re-market the affordable apartments; the cascade mechanism will be altered such that it will conclude with the sale of the apartments as discount market sales units, instead of the payment of a commuted sum.

On 18th March 2025, Officers took a Report to ADC Planning Policy Committee regarding the deliverability of affordable housing through the Section 106 process. Produced by the Three Dragons consultant, this report was commissioned in response to a growing number of approaches from developers who had been unable to dispose of their affordable housing, as required under Section 106 agreements. It sought to produce a framework for the purposes of discussions and negotiations with applicants who are seeking to submit a DoV in respect of affordable housing, and provide options for how issues with affordable housing can be resolved. This report was subsequently adopted by the Planning Policy Committee, and is relevant now in consideration of this application. The Three Dragons report can be found here:

<https://democracy.arun.gov.uk/documents/s20726/Appendix%20to%20Item%208%20-%20Affordable%20housing%20delivery%20-%20Three%20Dragons%20Report.pdf>

The report identifies the benefits of Cascade Mechanisms within S106 agreements pertaining to the disposal of affordable housing, and sets out pathways for how these cascades should work. On Page 27 of the report, Figure 5.1 provides a 'Framework for response to request for DoV - two pathways'. This sets out an Officer methodology for DoV Requests, where two pathways are provided and can be followed, dependant on whether there has or has not been RP interest.

This Deed of Variation follows application BN/126/25/DOV, which was submitted for the same proposal; however was refused on the basis of limited information and evidence to support the variation. It was understood that engagement was made with the Group Head of Planning and Housing Development Officer prior to the submission of the previous application. This prior engagement confirms support for the principle of this DoV, but due to the limited clarity in the proposed changes to Clauses and Definitions, Officers could not support BN/126/25/DOV. The vagueness of the previous application has been rectified under this application, and as such the completed DoV permits the following deletions and insertions into Clause 1 of the Principal Agreement

(Definitions):

- Deletion of 'Affordable Housing Commuted Sum'.
- Insertion of 'Affordable Apartments'; 'Affordable Houses'; 'Apartment'; 'Discount'; 'Discount Market Restriction'; 'Discount Market Sale'; 'Discount Market Sale Units'; 'House'; 'DMU Market Value'.

Deletion and entire replacement of Clause 9.4; Schedule 1 Para 2.5.1, 2.6, and 2.8 to 2.15.

Clause 9.4 is amended to address who the Planning Obligations under the S106 shall not be enforceable against. The First Schedule (Part 2, Affordable Housing) is modified to allow the following:

- 2.5.1 is modified to link occupation numbers to the provisions of paragraphs 2.14, 2.14A and 2.15.8.
- 2.6 is modified to link occupation to only a Qualifying Occupier, and subsequent occupiers to paragraphs 2.14, 2.14A, 2.15.8, 2.21 and 2.22.
- Paragraph 2.8 sets out the Affordable Houses - Mechanics of Transfer, and covers paragraphs 2.8 to 2.14A. This sets out the cascade mechanism for the disposal of Affordable Houses as Discount Market Sales in the event that a first and second housing offer is not accepted.
- Paragraph 2.15 sets out the Affordable Apartments - Mechanics of Transfer, and covers paragraphs 2.15 to 2.15.8. This sets out the cascade mechanism for the disposal of Affordable Apartments as Discount Market Sales in the event that a first and second apartment offer is not accepted.
- Paragraph 2.15A sets out the Sale of Discount Market Sale Units. This covenants that the Owner of the DMU shall not cause or permit the sale of any DMU for more than the Discounted Market Value, and not to dispose of the DMU unless it is subject to the Discount Market Restriction on the register of title to the relevant Discount Market Sale Unit.

These modifications to the S106 sets out that the first housing offer to an Affordable Housing Provider shall remain open for no less than two months; and that if that offer is not accepted, a second offer be made no later than one month after the expiry of the first housing offer period. This second offer shall remain open for no less than two months. Only after this time shall the cascade mechanism for disposal of the Affordable Housing Units as Discount Market Sales Units be engaged; requiring the Owners to serve notice to the Council in writing in respect of all Affordable Houses subject to the second housing offer. This election to dispose as DMU may be made at any point prior to the occupation of 25% of the Market Dwellings (subject to compliance with the periods set out in paras 2.8-2.13). However, this disposal will only be permitted by the

Council should there be sufficient written evidence of reasonable endeavours to dispose of the units as Affordable Housing to an AH Provider, and this is corroborated in writing by the Council.

The Mechanics of Transfer for the Affordable Apartments are reliant on the Affordable Housing Mechanism. Paragraph 2.15.2 requires that the First Apartment Offer be made no less than twelve months from the date of the Second Housing Offer being made. As such, the Apartments cannot be disposed of at the same time as the Affordable Houses. The first apartment offer shall remain open for no less than two months, and a second offer shall not be made no later than one month after its expiry. The second apartment offer shall remain open for no less than two months. Only after this time shall the Apartments be disposed of as Discount Market Sale Units; and the requirements of this are the same as the Affordable Houses. All disposals must accord with paragraph 2.15A.

It is determined that the modifications to the S106 to implement a cascade mechanism for the Affordable Housing and Apartments as Discount Market Sales Units, in the case that an Affordable Housing Provider does not accept a first or second offer, is acceptable and reasonable. The variations allow for a sufficient period of time for reasonable endeavours to be undertaken to dispose of the Units to an Affordable Housing Provider, and allow for a fall-back option should these endeavours result in no acceptance of offers. There are reasonable restrictions in place to ensure that the Affordable Housing is not disposed of as Discount Market Sales prematurely, or without sufficient evidence or justification, to ensure as much of the secured AH is provided on site as possible. This aligns with the findings of the Three Dragons Reports, and as such is an acceptable agreement. This Deed of Variation is subsequently approved.

DECISION

The planning obligation(s) the subject of this request can only be modified or discharged by agreement between the authority and the person against whom the obligation is enforceable and shall not be entered into except by an instrument executed as a deed.

The modification proposed is acceptable and a deed of variation has been completed on 1 July 2026.

RELEVANT SITE HISTORY

BN/29/26/S73	Variation of condition 28 following the grant of BN/149/22/PL relating to rewording of condition.	Refused 28-05-26
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BN/126/25/DOV	Application to enter into a Deed of Variation to the Section 106 dated 3.12.2021 linked to planning permission BN/142/20/OUT in relation to Schedule 1 Clause 2 (Affordable Housing).	Refused 30-01-26
BN/169/24/AOO	Application to approve Schedule 1, Clause 2.2 (affordable housing scheme) in the Section 106 dated 03.12.21 (as amended) in relation to planning permission BN/142/20/OUT.	Approve 04-04-25
BN/66/24/DOV	Application to enter a Deed of Variation to the Section 106 agreement dated 3/12/2021 linked to BN/142/20/OUT (APP/C3810/W/21/3273087) (as varied by BN/142/20/OUT) in order to an an additional first homes tenure to schedule 1, part 2 - affordable housing.	Approve 03-04-25
BN/147/22/RES	Approval of reserved matters following BN/149/22/PL for 200 dwellings respect of appearance, landscaping, layout and scale. This application may affect the setting of listed buildings, may affect the Church Lane, Barnham Conservation Area & affects a Public Right of Way.	ApproveConditionally 10-01-24
BN/142/20/OUT	Outline planning application with all matters reserved, other than principal means of access, for up to 200 No. dwellings, with access taken from Marshall Close, associated infrastructure & landscaping & demolition of existing buildings. This application is a Departure from the Development Plan, may affect the setting of listed buildings, may affect the Church Lane, Barnham Conservation Area & affects a Public Right of Way.	Refused 23-02-21
		Appeal: Allowed+Conditions 05-01-22

DEVELOPMENT PLAN POLICIES

RECOMMENDATION

APPROVE