

**5h 3/12/1485/SV - Modify the S106 agreement attached to planning permission 3/06/0314/FP to remove the elderly persons age restriction (defined as being over 50 years of age) at Land at Stocking Hill Lane, Cottered for Darling Homes LLP**

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**Date of Receipt:** 03.09.2012

**Type:** Variation of S106 - Minor

**Parish:** COTTERED

**Ward:** MUNDENS AND COTTERED

**RECOMMENDATION:**

That the removal of Clause 4.1 of the S106 Legal Agreement signed on 23<sup>rd</sup> August 2007 under planning reference 3/06/0314/FP be **GRANTED**.

\_\_\_\_\_ (148612SV.TA)

**1.0 Background:**

- 1.1 The application site is shown on the attached OS extract and comprises a residential development of 8 no. two storey units (6 no. 2 bed and 2 no. 3 bed) with associated parking and landscaping. At the time of the application, four of the units are occupied and four are being marketed. It is understood that at least one of the units, No.11, is occupied by persons under the age of 50.
- 1.2 The site is located in the Rural Area Beyond the Green Belt, at the northern end of Stocking Hill Lane backing onto open countryside with a sewage treatment plant adjacent to the north. There is an existing age restricted residential development located to the south (Nos. 1-9 Stocking Hill) which falls outside the application site and was developed in line with the original planning consent in 1987.
- 1.3 This application proposes to remove Clause 4.1 of the legal agreement signed in relation to application 3/06/0314/FP. The clause is worded as follows:

*“to use the dwellings permitted by the Planning Permission for the purpose of providing accommodation for elderly persons only (being persons over the age of 50 years) and not for any other purpose.”*

**2.0 Site History:**

- 2.1 The site is the subject of a lengthy planning history for residential developments. Initially, outline permission was granted in 1987 for 15

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no. elderly persons dwellings (reference 3/86/1939/OP) together with a community building, subject to a legal agreement restricting occupation to 'elderly persons' (with no age specified), and 5 of the units to be rented to meet local housing needs. A reserved matters application was then approved in 1988 under reference 3/87/1750/RP.

- 2.2 Those consents were implemented but then an application was later approved in 1992 for a revised layout (reference 3/92/0474/FP), omitting the community building. 9 no. units were completed on the southern part of the site (now occupied as Nos. 1-9 Stocking Hill), but apparently the developer got into financial difficulties, and the remaining 6 units were not constructed.
- 2.3 The site was then purchased by the Hexagon Housing Association who proposed a community care home and two bungalows, but that was refused consent under reference 3/97/1392/FP. The Housing Association then chose to sell the site but had difficulties, and applied for a variation of the original legal agreement to remove the requirement to make 5 units available for local housing needs, and to define the term 'elderly persons' as being aged 50 years or over. This was approved at Committee in November 1999.
- 2.4 Darling Homes, the current owner, then purchased the site at auction in December 2000. They were granted permission for an amended scheme for 8 no. units under reference 3/02/0696/FP. Again, this was subject to a legal agreement restricting occupancy to those aged 50 years or over. Two further applications were then submitted for 10 and 11 units respectively (3/03/1804/OP and 3/03/0608/OP), but both were refused and dismissed at appeal on the grounds that the higher density schemes would harm the character and appearance of the area, and conflict with sustainability objectives.
- 2.5 A revised application was then submitted (reference 3/06/0314/FP) for 8 no. units, which was approved in 2007 and has now been constructed. Again, this was subject to a similar legal agreement restricting occupancy to those aged 50 years or over, along with several other clauses.
- 2.6 Members may recall that a planning application was submitted in February 2011 under reference 3/11/0086/SV which sought to modify the legal agreement by removing the age restriction. Officers recommended the application for approval, however, Members were concerned about the impact of the proposal on the residential amenity of the existing and adjacent properties and refused the application for the following reason:

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1. *The Council is of the view that removing the restriction could lead to a harmful impact on the residential amenity of existing and adjacent properties contrary to policy ENV1 of the East Herts Local Plan Second Review April 2007.*

2.7 At the time of this refusal, none of the units on the site were occupied. However, in July 2011, Officers were advised that the property known as 11 Stocking Hill was being occupied by persons under the age of 50 with children, in breach of the S106 agreement.

2.8 Following on from this, Members may also recall being asked to consider whether to take Enforcement Action under reference E/11/0234/B in respect of the breach of the legal agreement. In line with Officers recommendation, Members resolved to take no further action at Committee on 9<sup>th</sup> November 2011.

#### **3.0 Consultation Responses:**

3.1 The Council's Housing Team comment that they have looked at the housing register applicants who have specifically ticked Cottered as an area they would be interested in. There are approximately 43 households where the lead occupier is over 50 who have expressed an interest in living in Cottered. However, they do not all currently live in Cottered and Cottered is not their only area of choice.

3.2 County Highways comment that as the development is served by a private Restricted Byway (RB), occupiers of the development will be billed for the maintenance of the surface of the route being used by private vehicular traffic. No further comments received.

3.3 No response has yet been received from the Council's Solicitor.

#### **4.0 Parish Council Representations:**

4.1 Cottered Parish Council have raised no objection to the proposal.

#### **5.0 Other Representations:**

5.1 The application has been advertised by way of press notice, site notice and neighbour notification.

5.2 3 no. letters of objection have been received from Stocking Hill Residents Association, No.8 Stocking Hill and No.6 Stocking Hill which can be summarised as follows:

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- Removal of the age restriction would be a breach of the human rights of residents at No's 1-9 Stocking Hill;
- Properties are already being occupied by persons under the age of 50;
- Purchased the properties wanting a certain lifestyle in mature years;
- Failure to comply with the age restriction has resulted in additional noise from dogs barking;
- The developer has totally ignored the age restriction.

5.3 3 no. letters of support have also been received from Nos. 1, 3 and 7 Stocking Hill, which can be summarised as follows:

- The restriction has left empty homes as people cannot get mortgages for age restriction properties;
- Properties will only get harder to sell with the age restriction in place;
- Imposing the age restriction would render some occupiers housebound.

5.4 An email has been received from Councillor Jim Ranger objecting to the application on the following grounds:

- Planning permission was only granted for these homes in light of the legal agreement to restrict the age;
- Proposal to remove the restriction is opposed by nearly all of the residents;
- The first houses to be let have all been to younger people.

## **6.0 Policy:**

6.1 There are no saved Local Plan policies relevant to this application. Historically, the 1981 East Hertfordshire District Plan included a policy, H4, which encouraged development proposals that make special provision for the elderly as a 'special needs group'. Subsequent Local Plans (adopted in 1993 and 1999) included policies which favoured proposals that make a particular provision for 'special needs groups', but only within the towns and selected rural settlements, and Cottered was not one of these selected settlements. No equivalent policy applies in the saved 2007 Local Plan.

## **7.0 Considerations:**

### **Evidence and Need for Elderly Accommodation**

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- 7.1 The main issue in this case relates to the planning justification and evidence of planning reasons for the age restriction to remain in place on this development. Circular 05/2005 which set out policy on Planning Obligations was cancelled with the publication of the NPPF in March 2012. Paragraph 204 of the NPPF replicates the requirements of the previous circular however, stating that planning obligations should only be sought where they meet the following tests:
- *necessary to make the development acceptable in planning terms;*
  - *directly related to the development; and*
  - *fairly and reasonably related in scale and kind to the development.*
- 7.2 Paragraph 205 of the NPPF states that ‘where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.’ Furthermore, in order for an obligation to be deemed necessary to make the development acceptable in planning terms, there must clearly be a policy justification.
- 7.3 In this case there is no saved policy in the adopted Local Plan that requires any specific accommodation to be provided for elderly residents in this district, or to require the restriction of the occupation of any dwellings to those over a certain age. Although there was a policy in the 1981 Local Plan that favoured proposals making special provision for the elderly, this policy was not repeated in subsequent plans. The restriction was only put in place originally as it was offered by the applicant at the time as a way of securing planning consent for housing in the Rural Area. Officers advised at the time that permission should be refused on the grounds of the presumption against development in the Rural Area.
- 7.4 The Council has no evidence, in the form of housing needs surveys; to identify a particular need for age restricted residential units in the Cottered area. Members may be aware that a Strategic Housing Market Assessment (SHMA) was carried out by the Council in 2008 to identify any particular housing needs to inform future policy making. This report recognised the importance of ensuring that a part of the new housing delivery across all tenures is particularly suited for the elderly, and identified that specialised ‘extra care housing’ for the elderly should form part of the future housing requirement.
- 7.5 It is important to acknowledge that these recommendations will be taken

into account in forming future housing policy for the district, as part of the Local Development Framework, but this does not identify any specific need for age restricted accommodation in the Cottered area. Further, any future need that may be identified in Council policy would be likely to relate to 'extra care housing', which includes a high level of on-site support, not present at Stocking Hill, and would most likely cater for those far over the age of 50. There is therefore no evidence in the SHMA to justify retention of this age restriction.

- 7.6 Members may recall the comments of the Council's Housing Team on the previous application to modify the agreement (3/11/0086/SV). These stated that although a few people over the age of 60 had shown an interest in living in Cottered, it would be difficult for them to provide sufficient evidence to justify retention of the age restriction. Unfortunately it is not possible to obtain similar figures of demand for those over the age of 50. However, the Housing Team have stated that there are 43 households where the lead household member is over 50 and the household has registered an interest in living in Cottered. It should be noted that Cottered is not the only area of choice for these households. The planning statement accompanying the application indicates that marketing of the properties for over 50s has been carried out and that 4 of the units remain unoccupied.
- 7.7 A Committee report for application 3/92/0474/FP in 1999 to vary the terms of the legal agreement stated that there was no local reason or statistical evidence requiring either restriction to remain (the age restriction or the 5 units for local rent). However, it is noted that at the time, Officers recommended refusal of removing the age restriction entirely. They considered that there was limited parking provision on site, and given that the development was planned for elderly people in mind, "the provision of unrestricted dwellings on this part of the site would be out of keeping with the remainder of the development to the detriment of existing occupiers".
- 7.8 The 2011 application to vary the legal agreement (3/11/0086/SV) was recommended for approval by Officers on the basis that there was no policy justification for such an agreement and no evidence to identify a particular need for age restricted living. Members were minded of this but the application was refused for the reason of detrimental impact on the amenity of existing and adjacent occupiers. Regard is had to potential impacts on neighbouring amenity in paragraph 7.14 of this report.
- 7.9 Members may recall an appeal decision to remove an age occupancy restriction at 5 Finches End, Walkern (3/09/1849/SV). This was refused

by the Council and allowed on appeal. The Council was viewed as having taken an unreasonable position on this proposal and a costs award was made against it. The Inspector considered that there was a lack of evidence to justify the restriction. Whilst Officers acknowledge the geographical differences, it is considered that the issue is largely the same and that, as a result, significant weight should be given to this appeal decision in this case. The Inspector made it very clear that policy justification for an age restriction has to be available and relevant in each case.

- 7.10 Members are advised to note that the site is located in a remote rural location without convenient access to facilities, and with no shops in the village. There is a bus stop on the main road, involving a walk of some 280m. Officers therefore do not consider the site particularly suited for older generations, particularly those with mobility problems.
- 7.11 Finally, it is important to note that because the agreement is less than 5 years old, the applicant does not have the right to appeal against the previously refused application (3/11/0086/SV). Members are reminded that currently at least one of the dwellings is occupied in breach of the agreement. Officers advised at the Committee meeting of 9<sup>th</sup> November 2011 that no enforcement action be taken in light of the lack of policy justification for the restriction, the lack of evidence of need in the area and the decision of the Inspectorate on the similar case in Walkern. At this time, Members were in agreement not to take any further action, the legal costs of which could be significant to the Council.
- 7.12 Since this time, there has been no new policy justification to warrant the retention of Clause 4.1 of the legal agreement and the decision not to take enforcement action effectively renders the agreement void.

#### Design and Layout

- 7.13 Officers consider that there is nothing in the layout or design of the development that would make the units unsuitable for any other age occupant. Each unit is provided with a small private garden area, whereas the adjacent age restricted development is laid out on a more open plan basis. The units also provide satisfactory internal living accommodation to suit all ages. The layout would not therefore result in unacceptable living conditions if the dwellings were occupied on an unrestricted basis.

#### Neighbour Amenity

- 7.14 In terms of neighbour impact, a concern has been raised by one of the existing residents at No.6 Stocking Hill that a removal of the age

restriction would result in noise and disturbance, particularly from barking dogs. This could also relate to other noise from younger people and children. Whilst the point being raised is understood, it is of course common for residential developments to accommodate a mix of people and ages, which contributes to a mixed community. In addition, the common counter argument is that many elderly residents enjoy the activity and vitality that living in an area with mixed age groups brings. Any additional noise or other issues arising from family living is not considered to be so significant as to result in harm to those living on the adjoining site. Officers consider that only limited weight can be assigned to this matter.

#### **Parking Provision and Access**

- 7.15 In terms of parking provision, there are currently 17 no. spaces for the 8 units (6 no. 2 bed and 2 no. 3 bed units). The maximum parking provision for the development, given its location, would amount to 13 no. spaces. The existing 17 space provision therefore already exceeds the maximum parking provision, and cannot be used as a reason to refuse this application. It is acknowledged that there was originally a shortfall in parking provision for the neighbouring site; however the developer for application 3/06/0314/FP provided 3 further spaces for those residents. Officers have confirmed on a recent site visit that 20 no. spaces have been provided on site in accordance with the approved plans.
- 7.16 Officers are aware of previous concerns, not raised in relation to this application, that there is the potential for the increased frequency of vehicular movements for unrestricted living, compared to age restricted living. Officers have no evidence to support this concern, but note that any increase in vehicular movements would be unlikely to be significant. It is also important to remember that the existing age restriction of 50 years could still accommodate full-time workers, commuting on a daily basis and having families to visit. Further, the units are predominantly 2 beds and would therefore not be capable of accommodating large families. The proposal is therefore considered to be acceptable in this regard.

#### **8.0 Conclusion:**

- 8.1 Overall, Members are advised that there is no policy justification in Local or National policy to require this residential development to be occupied solely by those over the age of 50 years. The restriction was originally offered by the developer at the time as a way of securing permission, but was not considered to be justified in planning policy



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terms, hence the original Officer recommendation to refuse permission on the grounds of Rural Area policy and the later recommendation for approval of removal of the condition on application 3/11/0086/SV.

- 8.2 A similar application to lift an age restriction in Walkern was recently allowed on appeal, with full costs awarded against the Council due to the lack of evidence to justify the restriction. When considering the possibility of enforcement action against a breach of the agreement on this particular site, Members resolved not to take any further action at a meeting on 9th November 2011. Since this time there has been no new policy justification or evidence of need to justify the retention of Clause 4.1 of the agreement to secure occupation only for over 50s.
- 8.3 Overall, Officers consider that the planning obligation fails to meet the tests set out in paragraph 204 of the NPPF and the application to remove it is therefore recommended for approval.