

Case Officer: Suzanne Taylor

Applicant: CALA (Cotswolds Ltd)

Proposal: Application for a Deed of Variation to vary the S106 Legal Agreement entered into in respect of planning permission reference 14/02121/OUT for the modification to Schedule 9 of the signed Section 106 Agreement relating to affordable housing, specifically the various clauses and definitions that require a 30% provision to a reduced level to be agreed under this application

Wards: Fringford and Heyfords AND Bicester North and Caversfield

Councillors: Bicester North and Caversfield:
Councillor Simon Lytton; Councillor Julius Parker; Councillor John Willett

Fringford and Heyfords:
Councillor Jean Conway; Councillor Grace Conway-Murray; Councillor Nigel Simpson

Reason for Referral: Significant departure from adopted development plan or other CDC approved policies/strategies

Expiry Date: 9 April 2025

Committee Date: 02 July 2026

SUMMARY RECOMMENDATION: AGREE MODIFICATION TO S106 LEGAL AGREEMENT

MAIN REPORT

1. BACKGROUND INFORMATION

- 1.1. The Himley Village application site is situated to the northwest of Bicester, north of Middleton Stoney Road and west of Howes Lane and it forms part of the wider North West Bicester Eco Town area within the extent of the site allocated by Policy Bicester 1. The land sits detached from the Western extent of the town and is separated from it by Howes Lane and the Axis J9 employment site (which also forms part of the wider NW Bicester allocation – Policy Bicester 1 of the adopted Cherwell Local Plan 2015). A private residence called Lovelynych House sits adjacent to the southern site boundary. The land extends to approximately 90.3ha and is primarily agricultural land divided by field hedgerows.
- 1.2. Outline planning permission was granted by 14/02121/OUT for 1,700 houses, including affordable housing, and supporting infrastructure including a primary school, non-residential uses, and open space (including the main sport pitch land for the wider NW Bicester site). The development is proposed to meet true zero carbon standards in line with the policy allocation and all matters were reserved. Subsequently, reserved matters applications for Phase 1A (site accesses); Phase 1B (infrastructure to serve the first 500 dwellings); Phase 2A (123 dwellings including 37 affordable = 30%); and Phase 2B Part 1 (44 dwellings including 13 affordable = 30%) have also been approved.

- 1.3. Work has been completed on Phase 1A and Phases 1B, 2A and 2B Part 1 have commenced and are under construction.
- 1.4. The outline planning permission was granted in January 2020 subject to a S106 legal agreement which included Schedule 9 to cover the provision of Affordable Housing (AH). This schedule required that 30% of the total number of (up to 1,700) dwellings to be provided on the site were affordable units in line with Policies BSC3 and Bicester 1 of the adopted Cherwell Local Plan 2015. Therefore, the development was expected to deliver up to 510 affordable homes.
- 1.5. In accordance with the S106, the first residential reserved matters permissions granted will provide 30% of the total dwellings as affordable units which amounts to 50 affordable units out of a total of 167 dwellings.
- 1.6. The applicant submitted an informal request to vary the S106 agreement Affordable Housing Schedule (ref: 24/03392/M106) in December 2024 and this was followed by a formal request to modify the affordable housing provision (ref: 25/00366/DOV_5) in February 2025 after the expiry of 5 years from the date that the legal agreement was signed. These applications have been made under Section 106A(1)(a) AND Section 106A(3)(a) of the Town and Country Planning Act 1990, respectively. The first is an informal route which is normally used before the 5 year expiry and the second is a formal route following the expiry of 5 years from the grant of permission.
- 1.7. Both routes allow for a modification by agreement between the relevant parties, but the Local Planning Authority does not have to agree to consider any changes until 5 years or more have passed since the agreement was made. In contrast, the formal route after 5 years requires the variation to be considered and includes a provision for the applicant to appeal against the decision or against non-determination within 6 months of the expiry of the application determination date. [*Officer Note: This 6 month window has expired.*]

2. PROPOSED MODIFICATION

- 2.1. Since the aforementioned reserved matters were approved the applicant advised that the development was not financially viable and provided a Financial Viability Assessment (FVA) in order to demonstrate this. The initial FVA indicated that 0% affordable housing could be provided on the entire scheme of up to 1,700 dwellings.
- 2.2. At the point of this initial submission there was no proposal to include a review mechanism. A review mechanism is a clause included in a S106 legal agreement where the policy compliant amount of affordable housing (or other developer contributions) have not been secured due to viability issues. They allow the financial viability of a scheme to be re-examined at a specified point, or points, over the course of the development build-out to see if the scheme has become more financially viable. Such mechanisms are one-way (i.e. upward only in favour of the Local Authority). Therefore, if the developer's profit margin has improved the applicant will be required to provide additional affordable housing/contributions but if the scheme viability is the same or worse the agreed percentage of affordable/contributions must still be delivered and does not reduce under the review.
- 2.3. The applicants sought a proposed modification to the S106 agreement that reduced the provision of 30% affordable housing to a percentage to be agreed based on the outcome of an FVA.
- 2.4. The applicant's FVA has been independently assessed by Cherwell District Council's own Viability Consultant and Quantity Surveyor, and this is explained in more detail below. Based on their advice, it was agreed that the development could support the

delivery of 10% affordable housing for the entire 1,700 dwellings and that a review mechanism at the mid and late stages of the development would be justified. Therefore, the proposed modification to Schedule 9 of the S106 legal agreement is that the development will provide 10% affordable housing, and, in addition, it is proposed that a review mechanism for the mid and late stages of the development is added to Schedule 9 of the agreement.

3. FINANCIAL VIABILITY APPRAISAL

- 3.1. The applicant submitted an FVA in August 2024 in support of their informal request to vary the S106 agreement Affordable Housing Schedule (ref: 24/03392/M106). An addendum to this report was then submitted in January 2025. This FVA and addendum are also relevant to the consideration of the formal request to modify the affordable housing provision (ref: 25/00366/DOV_5) submitted in February 2025.
- 3.2. According to Planning Practice Guidance on Viability (Paragraph: 019 Reference ID: 10-019-20190509) the accepted level of profit for a developer is assumed to be 15-20% of gross development value (GDV). In this case, the applicant contended that the ambitious Bicester 1 eco-town policy requirements for a zero carbon scheme are more onerous, and therefore riskier, than typical housing developments and consequently the higher 20% margin should be assumed as a minimum return.
- 3.3. The initial FVA from the applicant looked at 3 scenarios for Himley Village: A Bicester 1 Policy compliant scheme with 30% AH, a Bicester 1 Policy compliant scheme with 0% AH and a current building regulations compliant scheme (prior to Future Homes Standards) with 0% AH. Their FVA concluded that neither of the policy compliant schemes was viable but a standard, building regulation compliant scheme did return a positive residual land value (RLV) albeit only where 0% affordable housing was provided (RLV - the amount remaining once the gross development cost of a project is deducted from its gross development value (GDV), and an appropriate return has been deducted).
- 3.4. The RLV should be compared to the Benchmark Land Value (BLV) to calculate the viability of a development. BLV is calculated using this formula: $BLV = \text{Existing Use Value (EUV)} + \text{Premium}$. The EUV is the value of the land in its current state; i.e. without planning permission. The Premium is an evidence-based financial incentive for a land owner to bring forward land for development while allowing a sufficient contribution to fully comply with policy requirements.
- 3.5. Deducting the BLV from the RLV the applicant's initial assessment of the policy compliant scheme produced a viability gap of circa £75 million.
- 3.6. Our independent assessment initially re-tested a policy compliant scheme (providing 30% AH, TZC and all other S106 contributions) and agreed that there was a viability gap, however this was closer to circa £16 million. Some of the key differences between the applicant's assessment and Cherwell's independent assessment were: the way that GDV had been calculated and the underlying assumptions about Market Sales Values which CDC found to be higher; a higher value was assumed by CDC for Affordable Housing; assumptions about the Development Timescales were also very different with CDC considering the scheme in 2 phases with phased infrastructure delivery and reducing their assumed 12 month lag between construction and first occupation. The applicant was asked to provide a number of clarifications and justifications and the Quantity Surveyors for both sides reviewed the scheme costs (Costs Plan). It also sought clarity on some of the S106 costs and costs associated with the Strategic Link Road (SLR).

- 3.7. Further information was supplied by the applicant and based on this, CDC’s consultants then reviewed and refined the initial draft appraisals (taking on board additional information and clarifications from both Officers and the Applicant) and produced a ‘Review of Applicant’s FVA’ in December 2025 which included another appraisal of the baseline policy compliant scheme with 30% AH and three Sensitivity Tests. The updated, independent assessment revealed a viability gap of approximately £26 million.
- 3.8. The table below summarises the independent finding:

Scenario	Residual Land Value (RLV)	Benchmark Land Value (BLV)	Viability Gap (£) (Difference between BLV and RLV)
Baseline Scenario – Highgate appraisal with 30% affordable housing (approximately 75.88% Affordable Rented and 24.12% Shared Ownership; ‘TZC’ costs in line with MGAC’s Cost Plan (and the Applicant’s interpretation of the Energy Strategy); Section 106 contributions in line with those provided by CDC of £49.53 million) plus a further assumed contribution of £9,334,310 for the SLR.	+£7.34 million	+£33.45 million	£26.11 million

Source: Highgate Viability Analysis (December 2025)

- 3.9. The first sensitivity test applied a corrected tenure mix for the affordable housing of 70% affordable rented and 30% Intermediate/Shared Ownership (as required by CDC policy and recommended by Cherwell’s Strategic Housing Team). This resulted in a slightly higher RLV of £8.25 million. Whilst this reduced the viability gap to approximately £25.2 million the scheme was still unviable.
- 3.10. The second sensitivity test was undertaken at a strategic level and assumed an alternative market housing mix (which would require further work to fully review the impact of this on costs). This found that the viability gap was increased to circa £29.3 million.
- 3.11. The third sensitivity test assumed a reduction in AH to 10% (with an acceptable 70/30 tenure mix) but retaining all other S106 contributions in full. This sensitivity test was undertaken by making high level adjustments to the number of affordable housing units and floorspace in the appraisal in order to provide Officers with an indication of the likely viability of a 10% affordable housing scenario. This increased the RLV to just under £39 million resulting in a viable scheme with a surplus of approximately £5.5 million as summarised in the table below:

Scenario	Residual Land Value (RLV)	Benchmark Land Value (BLV)	Viability Gap/Surplus (£) (Difference between BLV and RLV)
Sensitivity Test 3 – As Sensitivity Test 1, but with 10% affordable housing provision assumed.	+£38.95 million	£33.45 million	+£5.5 million (surplus)

Source: Highgate Viability Analysis (December 2025)

- 3.12. It was acknowledged that further refinement would be needed to determine the precise level of AH that would be viable (as this was a strategic sensitivity test of a reduced affordable housing provision of 10%).
- 3.13. CDC's consultant recommended that if we were to agree to the reduction in AH below 30% that we should add a review mechanism to the S106 *"in order to re-assess viability during the life of the scheme (should the level of affordable housing be reduced from the policy compliant level of 30%). Securing such a review mechanism should capture any improvement in viability in the future."*
- 3.14. The applicant then re-ran CDC's independent FVA with an adjustment to the mix of development assumed for a 10% affordable housing scenario refining it to ensure that it better reflected the illustrative layout that had been utilised for viability testing. This resulted in a small viability gap of circa £3.26 million. Whilst the applicant maintains that the scheme is still not viable (and they do not agree to all of the assumptions in CDC's independent FVA) they offered to deliver 10% Affordable Housing. They also agreed to the inclusion of a review mechanism in the legal obligation for both the mid and late stages of the build-out.
- 3.15. CDC considered whether there were any areas where savings could be made on other S106 contributions, but it was concluded that there was no justification for revising these at the current time and that they remained compliant with Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). It was therefore agreed between the parties that the maximum of AH that could be provided for Himley Village was 10% subject to the addition of a one-way review mechanism and in the interests of allowing the development to be brought forward as quickly as possible.

4. RELEVANT PLANNING POLICY AND GUIDANCE

- 4.1 Paragraph 59 of the **National Planning Policy Framework (NPPF)** says of viability assessments:
"Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning practice guidance, including standardised inputs, and should be made publicly available."
- 4.2 **Planning Practice Guidance on Viability December 2025** is relevant to the consideration of these applications. Paragraph: 008 Reference ID: 10-008-20190509 states that *"It is up to the applicant to demonstrate whether particular circumstances*

justify the need for a viability assessment at the application stage". Circumstances that could justify an FVA include: "where a recession or similar significant economic changes have occurred since the plan was brought into force."

- 4.3 The **Cherwell Local Plan 2011-2031 - Part 1** (CLP 2015) was formally adopted by Cherwell District Council on 20th July 2015 and provides the strategic planning policy framework for the District to 2031. The Local Plan 2011-2031 – Part 1 replaced a number of the 'saved' policies of the adopted Cherwell Local Plan 1996 though many of its policies are retained and remain part of the development plan. Policy Bicester 1 is relevant to these applications and, in particular, this includes a requirement for North West Bicester to provide 30% Affordable Housing.
- 4.4 Policy BSC 3: Affordable Housing of the CLP 2015 sets out the Council's aims for affordable housing on new residential developments, for schemes at Banbury and Bicester, 30% affordable housing is expected with 35% elsewhere (on schemes of 11 or more dwellings). The policy concedes that the percentage of AH can be negotiated where a scheme is unviable:

"Should the promoters of development consider that individual proposals would be unviable with the above requirements, 'open book' financial analysis of proposed developments will be expected so that an in house economic viability assessment can be undertaken. Where it is agreed that an external economic viability assessment is required, the cost shall be met by the promoter.

Where development is demonstrated to be unviable with the above requirements, further negotiations will take place. These negotiations will include consideration of the mix and type of housing, the split between social rented and intermediate housing, the availability of social housing grant/funding and the percentage of affordable housing to be provided."

5. APPRAISAL

- 5.1 Applications have been made under S106A(3)(a) AND Section 106A(1)(a) of the Town and Country Planning Act 1990. The first is a formal route following the expiry of 5 years from the grant of permission and the second is an informal route which is normally used before the 5 year expiry. Both allow for a modification by agreement between the relevant parties. The formal route includes a provision for the applicant to appeal against the decision or against non-determination within 6 months of the expiry of the application determination date. This has expired.
- 5.2 **Garnham J in R (Mansfield DC) v Secretary of State for Housing, Communities and Local Government [2018] EWHC 1794 (Admin)** referred to the correct approach to considering a s106A application as that articulated by Richards J (as he then was) in **R (The Garden and Leisure Group Ltd) v North Somerset Council [2003] EWHC 1065 (Admin)** at [28]:

"there are four essential questions to be considered: what is the current obligation? what purpose does it fulfil? is it a useful purpose? and if so, would the obligation serve that purpose equally well if it had effect subject to the proposed modifications? [Counsel] lays stress on the words 'equally well' and describes them as ordinary English words importing a principle of equivalence..."

- 5.3 The four essential questions can be applied to the current proposal as follows:

What is the current obligation?

The current S106 obligation requires the provision 30% of the total number of dwellings across the site to be AH. There is no review mechanism.

What purpose does it fulfil?

Policy Bicester 1 of the adopted Cherwell Local Plan 2015 (CLP 2015) sets out the expectations for the development of the NW Bicester Eco-Town. In terms of AH it specifies that 30% is required, which also aligns to Policy BSC3 of the CLP 2015. The CLP 2015 acknowledges the “high level of need for affordable housing” in the district as informed by the Oxfordshire Strategic Housing Market Assessment 2014. The obligation therefore seeks to ensure that the required percentage of AH is delivered by the development in accordance with the adopted policy.

Is it a useful purpose?

Yes. The obligation seeks to achieve the requirements of Policy Bicester 1 of the CLP 2015 in ensuring that the required amount of AH is provided.

And if so, would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?

No. The proposed modification will reduce the percentage of AH that will be delivered by this development below the policy compliant 30%. However, the modified obligation will still secure at least 10% AH from the development and the addition of a review mechanism will ensure that the level of AH being provided could be increased for future phases if the viability of the scheme improves. The modification also maintains all other agreed contributions and obligations.

Assessment

- 5.4 The developer has justified that a viability review of the scheme was necessary and has adequately demonstrated that the development is not viable in accordance with paragraph 59 of the NPPF and the PPG on Viability 2025. Independent scrutiny of their FVA on CDC’s behalf has resulted in an agreed financial position for the development which shows it to be unable to deliver 30% AH but that 10% AH is viable. The relative age of the adopted CLP means that the underlying 2013 viability assessment upon which it was based is out-of-date and clearly there are a number of significant international and national events that have negatively affected the economic context since Policy Bicester 1 was adopted and planning permission was granted in 2020 (e.g. events such as Brexit, the COVID 19 pandemic, the 2022 ‘mini-budget’, the invasion of Ukraine in 2022 and, more recently, conflicts in the Middle East).
- 5.5 In determining these applications it is important to consider that the scale of this development (and the wider NW Bicester allocation) means that there are an extensive amount of infrastructure and financial contributions required to serve the needs of future residents and to mitigate the impacts that the new community would have upon existing residents and infrastructure. Amongst other things, this includes a strategic link road, primary schools and a secondary school, primary health care, a country park, a burial ground, sport pitches, green spaces to cover 40% of the site (with at least half of this being publicly accessible), play areas, allotments, community facilities, a network of active travel and leisure routes and bus services.
- 5.6 The higher infrastructure needs increase the development costs, and this makes it more likely to be financially unviable.

- 5.7 This modification would result in the development providing a total of 170 affordable dwellings rather than the anticipated, policy compliant, level of 510. This is disappointing but still a very substantial number of affordable homes and significantly higher than the 50 originally implied by the applicant's FVA. The agreed addition of a review mechanism also gives the Council opportunities in the future to secure more AH in the event that financial viability improves.
- 5.8 Whilst the modification of this obligation will mean that a policy compliant target level of 30% AH will not be secured, this needs to be balanced against the benefits of approving the variation. Firstly, allowing the modification will allow up to 1,700 dwellings to be delivered on an allocated site in the adopted local plan providing much needed homes and significantly contributing towards CDC's 5 year housing land supply (5YHLS).
- 5.9 Secondly, this will enable the development to deliver 170 affordable homes along with a full package of other S106 contributions and obligations which will mitigate the impacts of the development and fully support the needs of the new community at NW Bicester. Much of the infrastructure and contributions are shared with the rest of the current NW Bicester allocation for up to 6,000 houses in total and will facilitate the delivery of these.
- 5.10 Thirdly, these houses will be achieving very high, true zero carbon standards and contributing towards the Council's aims of reducing carbon emissions in the context of the declared climate emergency, but this comes at an additional cost.
- 5.11 Finally, the addition of a one-way review mechanism acts as a safeguard to ensure that more AH will be provided at the mid and late stages of the development if viability improves in the future.
- 5.12 Also, and whilst not a matter for consideration now, Officers are aware that on other sites where viability has been challenged, Developers and Registered Providers have sought funding from Homes England for 'additional' affordable housing which is usually only available for units to be delivered as affordable over and above those secured via a s106. Whilst there is no guarantee that this will occur here (and accessing funding may not always be possible), grant support is something that could possibly be secured to achieve a higher level of affordable housing provision than required by the Section 106 in the future.
- 5.13 In deciding whether to agree this modification it is also necessary to consider consistency with other sites at NW Bicester where there are FVAs; namely Firethorn and Hawkwell Farm.
- 5.14 The Firethorn scheme is an outline planning permission (ref: 21/01630/OUT) for up to 530 dwellings on the northern part of the NW Bicester allocation where a viability case was agreed which reduced the percentage of affordable housing from the policy compliant 30% to 10% and included reductions of other S106 contributions and a one-way review mechanism. It ensured that a True Zero Carbon development would be achieved and acknowledged the significant changes in the macroeconomic landscape which had occurred since the evidence for the CLP had been completed. This was decided and tested at an appeal and therefore sets a compelling and comparable precedent for the Himley Village development. The economic, policy and infrastructure context are all very similar to this case. It should also be noted that the FVA for Himley Village has followed the approach and assumptions that were considered in detail during the Firethorn appeal as far as possible.
- 5.15 Hawkwell Farm is a pending outline planning application (ref: 21/04275/OUT) for 3,100 dwellings north of the railway line and predominantly within the NW Bicester

allocation. An FVA has been submitted and is being independently assessed pending further information from the applicants. The initial FVA indicates that the development is not viable and that AH will need to be reduced below 30% to around 13%. The FVA is yet to be scrutinised (and the assumptions checked) but bearing in mind the contextual similarities this adds weight to the findings of the Himley FVA that AH needs to be substantially reduced.

- 5.16 Taking account of the independent, expert advice given to CDC, the applicant has adequately demonstrated that the development is not viable and that the scheme can only deliver 10% AH. Refusing the applications to modify the S106 would therefore be extremely difficult to defend at appeal and there would be a significant risk that the Council would lose and potentially have to pay the applicant's costs. Although less likely, there is also a possibility that CDC could lose the opportunity for a review mechanism to be added to the agreement.
- 5.17 Other risks in refusing to amend the legal agreement are that the development would stall and homes won't be delivered on an allocated site; thereby worsening our 5YHLS and making speculative applications for housing on unsuitable sites more likely to succeed. Delivery failure at Himley Village could also jeopardise the delivery of the wider NW Bicester Eco Town development as this scheme contributes towards wider essential infrastructure needs (sports pitches, SLR, highways and active travel links, bus services, schools etc...) to serve the entire area.

6. CONCLUSION

- 6.1 The Local Planning Authority considers that the proposed modification would serve a useful purpose by ensuring that 10% AH would be delivered across the scheme along with a one-way review mechanism that will allow more AH to be provided if the viability of the development improves in the future. It will also secure all other S106 obligations required to mitigate the impacts of the development.
- 6.2 Agreeing the modification to the legal agreement will facilitate the continued delivery of homes at Himley Village which supports CDC's 5YHLS and the delivery of the entire NW Bicester Eco Town and strengthens the Council's ability to resist inappropriate residential developments on speculative sites elsewhere in the district.
- 6.3 It is recommended that the proposed modification to the Section 106 attached to planning application 14/02121/OUT be agreed.

7. RECOMMENDATION

That the following modification be made to the Section 106 agreement attached to application 14/02121/OUT:

Amendments to Schedule 9 Affordable Housing needed to vary the % of AH from 30% to 10% and subject to review mechanism.

Addition of a review mechanism to Schedule 9 Affordable Housing at the mid and late stages of the development (triggers to be agreed – initial recommendation of approximately 800 dwellings and 1,200 dwellings) which should:

Allow additional AH to be provided if the scheme is more viable AND; Be one-way (i.e. if scheme viability is worse a lower % AH is not allowed).

To be agreed – whether review to involve a fresh 'open book' viability assessment of actual costs and actual sales values compared with the original financial viability assessment OR a formula-based approach based

on the original viability assessment.

To be agreed – Review mechanism to also allow a review of other S106 contributions to see if they are still justified or if they could be reduced/removed to allow additional AH to be delivered.

THE EXACT WORDING TO BE DELEGATED TO THE ASSISTANT DIRECTOR FOR PLANNING (AND ANY AMENDMENTS TO THE WORDING AS DEEMED NECESSARY)