Dear Mr Burgess,

Thank you for your email below and I have now had the opportunity to meet with the relevant planning officers to discuss this.

If, as a matter of principle, you do not accept the committee resolution being the form of overage as we have put forward in the revised S106, then this is not something we are going to resolve in correspondence. It is clear from the report to committee, and indeed following the debate from the committee itself, that the Council has concerns over the viability appraisal that has been submitted. The only way that the committee were persuaded to agree to grant permission for this development was on the basis of there being overage in the form we routinely use, being the clawback of a percentage of any future ‘superprofit’. This is not what you are proposing and so even if officer’s agreed with your suggested approach, this matter would have to be taken back to committee for them to reconsider. Clearly this is not going to happen within the timeframe you have stipulated. I ought to add that, even if you did wish this to happen as the way forward, officer’s view is that Members are unlikely to support it. However that is for you to decide upon.

As for the points you raise, we disagree with what you say for the reasons set out below (although please note this is me paraphrasing our discussions);

I am surprised to hear you say that that ‘costs will not be known when bidding for the land’ because, while I accept that the actual costs may not be known, it is inconceivable that a commercial operation would not have undertaken an assessment of likely costs before bidding for the land. Indeed, you need to have done this very exercise to inform the viability appraisal. Moreover, a clawback provision of this type, does not in anyway affect the requirements of paragraph 173 of the NPPF about ensuring a competitive return to a willing landowner and willing developer. You have acknowledged that you are in contract with the landowner and therefore your purchase costs is actually known or the formulae by which it is to be calculated established. The clawback provision accepts that the actual sale price is used and that you get the same level of profit as you have stipulated in the viability appraisal as being your expected return. Essentially therefore, your company have therefore already satisfied this aspect in terms of your deal with the landowner and your viability appraisal.

We accept there are uncertainties involved in development. However this clawback provision does not create any more uncertainty than that which already exists. If you make less than you expect the clawback provision has no relevance at all. It doesn’t make the profit situation worse – you still get your 20%. It only becomes operative effectively if you obtain more profit than you currently expect to receive. You are not expecting to receive it, so how is paying 50% of something you don’t envisage having adding risk or uncertainty? As I have said, all legitimate costs (including those post completion costs incurred prior to final disposal) are capable of being taken into account. This also addresses the point about risk. How can increased profit (again, not anticipated) count as a risk or be viewed as a potential cost? You don’t believe there is profit beyond what you have stated as being obtainable so the 20%
margin is predicated on that risk profile. Any unexpected profit should necessarily reduce the risk I would suggest and, in the circumstance it arises, you still get 50% of that additional profit.

While I note that a different approach to assessment is used at the end of a development, this is because cost positions are actually known and therefore capable of being used. As you quite rightly point out, your appraisal, at this time, is a snapshot in time when costs and values are not actually known. As for the RICS guidance note, it is a guidance note to surveyors and does not have any particular status in planning terms. I ought to say that our Local Plan Inspector was well aware of the RICS guidance, as he had been referred to it during the hearings of our Local Plan / CIL examination. He nonetheless went on to recommend Strategy 34 as it currently appears.

Regarding the transfer of land by Churchill and this being restricted. We don't accept this. The circumstances are certain as to the development requirements when the developer assesses the situation and whether they wish to buy the land. If they anticipate they will make additional profit over the 20% they know that 50% of that goes to the Council. The 20% profit element and potential for sharing additional profit is their commercial choice. But remember that if their assessments are showing there is additional profit to be made then had that been in front of the LPA that there would have been increased affordable housing requirements (either as a contribution or as on-site provision) so there is balancing aspect to this argument.

You state that you have appeal decisions that support your position. Assuming you are referring to the ones sent through by Simon Cater, then I would repeat the comments in my email below – they all reflect a different policy context either because of the nature of the appeal or the status of the policy documents relied upon by those LPAs.

In light of the above the Council maintains the stance that a clawback provision in the form we have proposed is necessary to meet the committee’s expectations. No doubt you will let us know how you are going to proceed from here.

Yours sincerely,

HENRY GORDON LENNOX

Strategic Lead (Governance and Licensing) and Monitoring Officer
East Devon District Council
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Email: HGordonLennox@eastdevon.gov.uk

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From: Andrew Burgess [mailto:Andrew.Burgess@planningissues.co.uk]
Sent: 13 January 2017 15:18
To: Henry Gordon Lennox
Cc: Partridge, Sam; James Barnes; Martin Young; Simon Cater; Duncan Scholes; James Brown; Nigel Barrett; Andrew Wood; Chris Rose; Ed Freeman; Rachel Danemann; Price, Matthew; Hewson, Kirsten; Simon Mitchell; Simon Cater; Mark Williams; Spencer McCarthy
Subject: Churchill Retirement Living - Sidford 106 Agreement
Importance: High

Dear Mr Gordon Lennox,

I refer to you e-mail dated 11 January. You have asked that I provide a rationale for why an overage clause has the effect of introducing uncertainty. I reply with reference to your e-mail, local and national planning policy and guidance and best practice. There are a number of points to make.

**Uncertainty**
You have suggested that it is agreed that overage is both applicable and acceptable. It is not; we accept that a review mechanism should be in place should we not complete the building within an
acceptable time frame. ‘Overage’, which you claim is different to a review, is contrary to RICS guidance as it will still introduce significant uncertainty and inconsistency of approach. Strategy 34 of the adopted local plan seeks to capture future profits. Paragraph 173 of the NPPF specifically states that the costs of any requirements should “provide competitive returns to a willing land owner and a willing developer”. By introducing post development overage, you are introducing uncertainty – costs will not be known when bidding for land and making development decisions. Our schemes have a prolonged sales period and costs post completion are uncertain depending on the state of the market, the length of time sales take and future values all of which can fluctuate greatly during the long sales period for retirement housing. Instead development appraisals and, therefore, viability appraisals are undertaken as a “snapshot in time and reflect current costs and values” as recognised in East Devon’s own Viability Guidance Note (Note 2 published on your website and updated 15 December 2016). Indeed, your Guidance Note acknowledges that claw-back or overage clauses are more likely to be applied to schemes with “longer build out rates” which involve phased development.

Consistency
We should be applying policy and appraisals in a consistent manner. This is not only best planning practice, it is also enshrined in viability guidance. RICS guidance note 12 seeks consistency of approach (RICS guidance Page2) and consistency “in viability principles”. The original viability appraisal explicitly used generic non developer specific inputs and industry norms. This approach has clearly been accepted by your authority in accepting the original viability appraisal undertaken on our behalf by Levevel (now Bailey Venning Associates). The basis of the “overage” is to consider actual costs, assumptions etc. This clearly means that we would be undertaking a reassessment on a different basis; not comparing like with like. In other words; an inconsistent approach.

Industry Benchmarks
Best practice in viability appraisals is that they reflect industry benchmarks in order that benefits or disbenefits of the applicant are ignored. The principle should be that the appraisal reflects what a typical developer would encounter. This supports the planning principle that a planning permission runs with the land. RICS guidance on viability is built upon this basic principle (see especially paragraph 2.5.2 and Box 10 on page 14 of RICS guidance. Your overage requirements run contrary to this by seeking developer specific inputs. This position was set out clearly in the initial affordable housing submission.

Restricting Commercial Activity
As a planning permission runs with the land this should enable Churchill to transfer the land with the benefit of that planning permission. With this onerous requirement it is extremely unlikely that Churchill would be able to secure a sale as the costs and values you are requesting are developer specific. This would be an unacceptable encumbrance and would effectively restrict the value of the land.

Certainty Before Building
Despite your assertion, this clause provides anything by certainty. Development funding and long term programming require that costs are known. Profit is predicated on taking into account known against future unknown costs and values and the margin set accordingly. By introducing further uncertainty (values, holding costs, sales periods will not be known) this would mean that margin would have to be adjusted to reflect this risk. As you will have realised, the 20% margin reflects the typical developer risk of this particular type of development. Introducing further uncertainty would mean that this margin does not reflect the true risk.

Conclusion
To conclude, we cannot agree with your requirement to introduce an overage for the following reasons:
• Final costs are unknown;
• It introduces an inconsistent approach;
• It contradicts planning policy and guidance;
• There are a number of appeal decisions that support our position;
• It introduces developer specific inputs contrary to viability guidance;
• It restricts the commercial viability of the scheme.

As you are aware, we are willing to accept a review mechanism that captures any change in circumstances if the scheme is delayed beyond a certain period. This mechanism has been accepted by us (and, I understand, other retirement living providers) elsewhere and is a reasonable position for a single phase development.

I hope this information provides you with the clarification you require and aids discussions at your end. I trust that we can now proceed as proposed with a shell and core review mechanism. I have instructions to submit an appeal if this matter is not resolved by next Friday 20 January.

I look forward to hearing from you as soon as possible.

Yours sincerely

Andrew Burgess
Managing Director Planning Issues Director Churchill Retirement Living Ltd

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From: Henry Gordon Lennox [mailto:HGordonLennox@eastdevon.gov.uk]
Sent: 11 January 2017 09:10
To: Mark Williams; Andrew Burgess
Cc: Partridge, Sam; James Barnes; Martin Young; Simon Cater; Duncan Scholes; James Brown; Nigel Barrett; Andrew Wood; Chris Rose; Ed Freeman; Rachel Danemann
Subject: RE: Churchill Retirement Living - Sidford 106 Agreement - UNCLASSIFIED:

Dear Mr Burgess,

Further to Mark’s email below, this is something that I am going to pick up with the planning officers.
In the meantime though, I believe that we are agreed that overage is both applicable and acceptable as a matter of principle. The reason I say that is because the appeal decisions referred to and comments below would seem to query this. So, or completeness at this stage, I would point out that those appeals all related to situations where the requirement for overage was because of guidance in an SPD. In our case it is in the development plan itself (Strategy 34). In addition the guidance which accompanied S106B is no longer applicable (as those provisions are now of no effect). Essentially we are left with the PPG and that guidance doesn’t specifically deal with overage / clawback provisions. The PPG effectively says that further viability appraisals may be appropriate in the context of phased development, but that is not from the perspective of overage, rather it is saying that where you have phased development then it may be appropriate to financially review development proposals to see if there can be contributions / affordable housing delivery as the development progresses. Where it isn’t phased then such ‘review’ mechanisms would be inappropriate due to the uncertainty that this introduces. We don’t disagree with that, but that is not what is proposed here.

It is my view that we are not faced with a situation of introducing uncertainty due to a review mechanism. Rather the clause as proposed provides certainty that your actual purchase price, actual developments costs, actual sales receipts and your 20% of GDV (if I recollect) profit are all accounted for. Only if you then get additional profit (over and above that anticipated) does 50% of that profit come to the Council to offset the affordable housing provision that you would have otherwise had to make.

I do accept that there is refinement required of what constitutes development costs, and this was made clear in my earlier correspondence. However provided an appropriate list of your costs can be drawn up (using the RICS guidance perhaps), I struggle to see how the clause as proposed has the effect you say it will. Ultimately you still end up with 50% of profit you weren’t anticipating and you will have ensured a competitive return to the land owner because of relying on your agreed sale price.

So in order to aid discussions our at end, please can you provide the rationale of why this overage clause (as opposed to the ‘review’ type clause in phased development) has the effect of introducing uncertainty and not providing a competitive return as you say it will. Once I have that we will discuss whether refinement is appropriate or not.

Yours sincerely,

HENRY GORDON LENNOX

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From: Mark Williams  
Sent: 11 January 2017 08:24  
To: Andrew Burgess  
Cc: Partridge, Sam; James Barnes; Martin Young; Simon Cater; Duncan Scholes; Henry Gordon Lennox; James Brown; Nigel Barrett; Andrew Wood  
Subject: RE: Churchill Retirement Living - Sidford 106 Agreement

Dear Mr Burgess,

Thank you for this e-mail. I have asked my legal team to assess the scope for refining our approach and we will respond asap.

Yours sincerely,

Mark Williams
From: Andrew Burgess [Andrew.Burgess@planningissues.co.uk]
Sent: 10 January 2017 13:07
To: Mark Williams
Cc: Partridge, Sam; James Barnes; Martin Young; Simon Cater; Duncan Scholes; Henry Gordon Lennox; James Brown; Nigel Barrett; Andrew Wood
Subject: Churchill Retirement Living - Sidford 106 Agreement

Dear Mr Williams,

I thought you should see this. I would appreciate your assistance in resolving this matter as it would be regrettable if we had to lodge an appeal.

I look forward to hearing from you as soon as possible this week.

Regards

Andrew Burgess
Managing Director Planning Issues Director Churchill Retirement Living Ltd

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From: Simon Cater
Sent: 10 January 2017 12:20
To: Nigel Barrett
Cc: James Brown; HGordonLennox@eastdevon.gov.uk; Price, Matthew; Andrew Burgess; Simon Mitchell; Duncan Scholes; Partridge, Sam; Andrew Wood
Subject: Re: Churchill Retirement Living - Sidford
Importance: High

Dear Nigel,

We have now had sight of your comments on the section 106 Agreement and I can confirm that the applicant will not accept the onerous overage clause you have inserted into the agreement.

The overage clause that you propose does not follow RICS Financial Viability in Planning Guidance Note (Copy attached). It will also compromise the development by the uncertainty provided by this clause and this is directly against advice by RICS.

The overage clause proposed undermines the competitive return as envisaged by the National Planning Policy Framework by introducing uncertainty post the implementation of the development, therefore the applicant will only accept an review mechanism on the basis that it is undertaken to shell and core only.
The overage clause also veers away from the appraisal already undertaken, submitted with this planning application and accepted by the Council’s planning committee by resolving to grant the planning approval.

In relation to the calculation proposed, this is again very onerous and unnecessarily complex and the calculation proposed takes no account of any movement in benchmark land values and there are no full definition of costs that are to be considered.

The ‘overage cap’ is reasonable amount and the Applicant will not agree to raise this figure. The Applicant feels the figure proposed is wholly reasonable.

We therefore have instructed the applicants solicitor to insert the shell and core clause back into the s106 agreement, with a review mechanism only if the development is not built to shell and core within 28 months.

There are a number of appeal decisions that supports the Applicant in the position not to accept the overage clause proposed by the Council. I refer to Appeal References. 2207771, 2228249 and 3005876, copies are attached for information.

If this agreement is not completed by the 21st January 2017, due to the applicants contractual arrangements, an appeal will be submitted for non determination of the planning application, I therefore seek your urgent response to the above.

Kind regards

Simon

Simon Cater
Senior Associate Planner

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