Report to: **Elsea Park Community Trust Board**

Date: **Wednesday 5 February 2014**

Subject: **Articles of Association**

From: **Sally Waltham – Community Trust Manager**

1.0 The position on adoption of new Articles of Association is summarised for information below:

- The Board wish to adopt new Articles to reflect the fact that the Trust is a resident led organisation

- The Board has approved the draft new Articles

- Prior to doing so they commissioned an independent financial viability report which concluded that the Trust was financially viable without recourse to the financial guarantee available under the S.106 Planning Agreement to underpin the Trust in specified circumstances

- Adoption of new Articles requires consent from both:

    - The Appointer i.e. Kier Homes, followed by
    - A positive vote on adoption by the Members

- The Appointer is in agreement with the adoption of the new Articles but requires to be released from the S.106 Agreement financial guarantees in return for consenting to new Articles of Association

2.0 The current position is that for the past several months I have been in dialogue with South Kesteven District Council about a variation to the S.106 Agreement to release Kier from the financial guarantees. Such a variation would enable new Articles to be put before the Members for adoption.

3.0 At some point in this period of dialogue the Board resolved that a meeting should be sought between the Planning Department and the Trust, represented by the Chairman, the Appointer and the Trust Manager. However when it became clear that the Trust and SKDC needed to reach a common view on interpretation of the S.106 and the Trust's position in wishing to have new Articles, I met with the Senior Planning Officer and the Council's Legal Officer. Below I report in detail on the outcome of that meeting.

4.0 The view presented by the Trust was that

i. The guarantees were put in place to financially underpin the Trust should it become insolvent

ii The S106 provisions on the guarantees state that 'the Original

Owners' obligation in that regard shall not exceed the level or term

of the financial parameters set out in the Business Plan'.

iii. The business plan itself states that 'the bond, guarantee or other form of security, would be reduced and withdrawn in accordance with the cash flow forecast'.

iv. Financially the Trust is viable and healthy

Taking all these points into account it is the Trust's belief that there is no reason why the Council should require the guarantees to remain in place. Indeed to do so would prevent the Trust from adopting new Articles of Association which are designed to make the Trust a truly led community organisation as envisaged at the outset of the Elsea Park development

4.0 The Council's informal view is:

- The S106 Agreement guarantees exist to protect the Council's position in the event the Trust failing or ceasing to exist
- They recognise that the guarantees have a finite life under the business plan
- They appear to accept that life exists for 14 years dating from the incorporation of the Trust in 2002 i.e. 2016
- They recognise the community case for new Articles
- They have asked their finance section to appraise the Trust's financial position against the business plan parameters and have been supplied with the financial viability report for this purpose
- They would be minded to recommend to the Planning Committee that the S.106 Agreement be varied. However ultimately the decision on whether give the go-ahead would rest with the Planning Committee.

5.0 Following the meeting I have asked the Council to consider two issues:

Firstly, whether the current financial position of the Trust satisfies the business plan that the financial guarantee may be 'withdrawn in accordance with the cash flow' and so does not require variation to the S106 Agreement; or

Secondly, if an application to vary the S.106 Agreement is required, would the Council look favourably on it being varied prior to the expiry of the 14 year term

I have yet to receive a reply to the letter which was sent before Christmas. I have sent a follow-up email.

6.0 There are issues around seeking a variation, summarised below:

- Process – the Council's expectation is that the body seeking the variation leads the process which involves gaining the agreement of all parties to the S.106 to the proposed variation
- Cost – aside from its own legal expenses the Trust would incur costs from the District and County Council running into a few thousand pounds
- Time – the process is likely to take a lengthy period and would also be time-consuming

7.0 Given the implications for the Trust in seeking a variation there are a number of options to be considered:

Option A

The Trust to pursue a variation as outlined above taking the lead

Option B

Kier Homes to pursue the variation taking the lead and/or bearing the cost

Option C

Kier Homes be asked to give unconditional agreement to the new Articles of Association meaning that the variation to the S.106 Agreement is not necessary and the draft Articles of Association can be put to an EGM

Option D

Given the time and cost involved, the Trust defers adoption of new Articles of Association until the time that the financial guarantees expire i.e. 2016. This date would need to be confirmed in writing by the Council.

8.0 It is recommended that the Board gives consideration to these options.

Recommendation

Board decision required