

Forward Plan reference number: FP/754/07/20

Report title: Variation to a Section 106 Agreement relating to the Lawford Development, Tendring	
Report to: Councillor Ray Gooding, Cabinet Member for Education and Skills	
Report author: Clare Kershaw, Director for Education	
Date: 28 July 2020	For: Decision
Enquiries to: Carolyn Terry, Sufficiency and Sustainability Manager, Education	
County Divisions affected: Tendring Rural West	

1. Purpose of Report

- 1.1 The purpose of this report is to recommend the variation of a Section 106 Agreement that is in place between ECC and Rose Builders (Properties) Limited ("Rose") to enable the delivery of a 30 place early year's and childcare facility (the "EYCC Facility") in lieu of capital funding. Associated variations to the Section 106 Agreement are also required in relation to the timing of the transfer of the land to ECC.

2. Recommendations

- 2.1 To agree that the Director for Education, in consultation with the Head of Planning, is authorised to agree the variation to the existing Section 106 Agreement between ECC and Rose.
- 2.2 To agree that the Director for Education, in consultation with the Head of Planning, is authorised to agree the terms of the Performance Bond to be provided by Rose.
- 2.3 To note that ECC will take a transfer of the EYCC Facility and the early years land in accordance with the terms of the existing Section 106 Agreement and on terms to be agreed by the Head of Property.
- 2.4 To agree that the Head of Property is authorised to agree the terms of a lease for the EYCC Facility following a modified application process and ratification by the Early Years funding panel.

3. Summary of issue

- 3.1 ECC has a statutory duty to ensure there is sufficient childcare within the local area. Section 6 of the Childcare Act 2006 defines 'sufficient childcare' as sufficient to meet the requirements of parents in the area who require childcare in order to enable them to take up, or remain in work or undertake education or training which could reasonably be expected to assist them to obtain work.
- 3.2 Section 7 of the Childcare Act sets out a duty to secure sufficient free early years provision for preschool children as follows:
- Universal early years provision - every child aged three or four is entitled to 15 hours per week free early years provision for 38 weeks of the year or 570 hours per year.
 - Extended entitlement - three- and four-year olds from eligible working families are entitled to up to an additional 570 hours per year.

- Free early years provision for eligible two-year olds, entitling the 40% most disadvantaged two-year olds to 15 hours per week of free nursery education.
- 3.3 The Lawford Green housing development in Tendring consists of 360 new homes. A Section 106 agreement was entered into in April 2017 between ECC and Rose and requires from Rose, as part of the planning obligations for the site, the provision of a 0.14 hectare piece of land for an early years facility and a capital contribution of £355,000.
- 3.4 No site-specific viability has been undertaken however, based on comparable Early Years Capital projects elsewhere in the county, it is believed that the cost of the build to ECC would be in the region of £794,000, this is in excess of the capital contribution set out in the Section 106 Agreement and therefore the funding is unlikely to be sufficient for ECC to procure the construction of the EYCC Facility.
- 3.5 Rose have agreed to replace the existing planning obligation for capital funding with an obligation to provide the EYCC Facility. Alongside the varied Section 106 Agreement, Rose will provide a Performance Bond to the value of £355,000 to minimise any financial risks to ECC.
- 3.6 The EYCC Facility will provide full day care all year round for children from the age of 3 months to meet the needs of working families. This provision is not currently available within this ward. It will also offer places of Free Early Education Entitlement (FEEE) for 2, 3- and 4-year olds and will help the local authority meet its statutory duty as detailed above.
- 3.7 The Section 106 Agreement currently provides that the land for the EYCC Facility will be transferred after the fiftieth occupation, but the Section 106 Agreement will be varied such that the land will transfer on completion of the EYCC Facility.
- 3.8 Whilst the amended Section 106 Agreement will ensure that Rose adhere to certain quality standards and an early years design specification, ECC will not have control over the design and execution of the works in the same way that it would if ECC were entering into a building contract with a developer.
- 3.9 Monitoring of the progress of the build will be carried out by the Infrastructure Delivery team.

4. Options

4.1 Option 1 – Vary the Section 106 Agreement – Recommended Option

With Option 1, ECC will acquire a completed EYCC Facility enabling ECC to meet its statutory duty to ensure sufficient childcare places in the area. ECC will have an additional asset that will incur costs such as maintenance and running costs. In due course, a lease will be awarded to a third-party provider that will generate income to cover all costs.

4.2 Option 2 – Do not Vary the Section 106 Agreement

Option 2 is not recommended. ECC would receive £355,000 and 0.13 hectare of land which is unlikely to cover the build costs if ECC were to procure the development. This would result in ECC waiting for additional section 106 funding thereby delaying construction of the EYCC Facility and the creation of early years places in the area.

5. Next steps

- 5.1 To enter into the Deed of Variation to the existing Section 106 Agreement.
- 5.2 Rose will submit a planning application to Tendring District Council. The aim will be for construction to commence in September 2020, for completion with handover scheduled by August 2021.

6. Issues for Consideration

6.1 Financial Implications

- 6.1.1 As per the current s106 agreement, ECC will receive 0.13 hectare of land (valued at £95,000) and a capital contribution of £355,000. No site-specific viability has been undertaken, however a high-level view provided by our professional advisors puts the build cost at £794,000, well in excess of the capital contribution of £355,000.
- 6.1.2 The variation to the s106 agreement will clearly state that the developer will build the EYCC building and hand over to ECC, rather than providing the land and contribution for its construction. Tax advice has been sought and providing the Deed of Variation is executed by all parties there will be no VAT implications.
- 6.1.3 Rose Builders will put in place a performance bond to the value of £355,000, to minimise the financial risk to ECC if the company ceases to trade. In the event that that performance bond is called upon, it is unlikely that the value of the bond will be sufficient for ECC to complete the build.
- 6.1.4 All costs incurred by Essex, to include legal, surveyor and quality inspector costs, will be met from the Lawford Green S106 envelope, with £29,000 of received s106. The outstanding balance will be returned to the developer. The table below sets out the indicative costs at this stage:

	£
Legal Fees	TBC
Agent Fees	2,250
ECC Infrastructure Delivery/Building Surveyor	2,000
Total	4,250

6.2. Legal implications

- 6.2.1 A Deed of Variation will need to be entered into to agree the proposed changes to the Section 106 Agreement.
- 6.2.2 It is not considered that the Section 106 Agreement constitutes a public works contract as the Section 106 Agreement is entered into by ECC in the exercise of its planning functions and ECC will not exercise a decisive influence on the type or design of the work, however a court may not uphold this view. Even if it is considered to be a public works contract, the proposed value of the works is significantly below the value at which the opportunity needs to be advertised in the Official Journal of the European Union.

7. Equality and Diversity implications

- 7.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:
- (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful.
 - (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.
- 7.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).
- 7.3 The equality impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic.

8. List of appendices

- 8.1 Equality Impact assessment

9. List of Background papers

- 9.1 Outline Business Case – endorsed by Investment Board on 5th December 2019
- 9.2 Essex County Council Developer's Guide to infrastructure Contributions
- 9.3 Children Act 2006 – Local Authorities duty of Sufficiency
- 9.4 ECC Employers Requirements (V14 April 2019)
- 9.5 Early Years Design Brief (sizing brief for EY settings)

I approve the above recommendations set out above for the reasons set out in the report.	Date 18 Aug 2020
Councillor Ray Gooding, Cabinet Member for Education and Skills	

In consultation with:

Role	Date
Councillor Tony Ball, Cabinet Member for Economic Development	18 Aug 2020
Executive Director for Finance and Technology (S151 Officer) Stephanie Mitchener on behalf of Nicole Wood	11 August 2020
Director, Legal and Assurance (Monitoring Officer)	17.8.20

Katie Bray on behalf of Paul Turner	
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