



Appeal Decision

Inquiry held on 23 March 2010
Site visit made on 23 March 2010

by **J O Head BSc(Econ) DipTP MRTPI**

**an Inspector appointed by the Secretary of State
for Communities and Local Government**

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**Decision date:
26 April 2010**

Appeal Ref: APP/Y3940/Q/09/2115524

Land adjacent to Hackett Place, Hilperton, Wiltshire BA14 7GN

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a refusal to modify a planning obligation.
- The appeal is made by Marston's PLC against the decision of Wiltshire Council.
- The development to which the planning obligation relates is residential development together with a local centre, highway improvements and public open space.
- The planning obligation, dated 6 February 2004, was made between West Wiltshire District Council (1), Marshgate Investments Ltd (2) and Gallagher Estates Ltd and Heron Land Developments Ltd (3).
- The application Ref W/09/01022/FUL, dated 23 March 2009, was refused by notice dated 24 June 2009.
- The application sought to have the planning obligation modified by the discharge of clauses 1.5.1, 5.2 and 5.3.

Decision

1. **I allow the appeal** and determine that the planning obligation, dated 6 February 2004, made between West Wiltshire District Council (1), Marshgate Investments Ltd (2) and Gallagher Estates Ltd and Heron Land Developments Ltd (3), shall have effect subject to the modifications as set out below:
 - (a) The deletion of clause 1.5.1
 - (b) The deletion of clause 5.2
 - (c) The deletion of clause 5.3.

Application for costs

2. At the Inquiry an application for costs was made by Marston's PLC against Wiltshire Council. This application is the subject of a separate Decision.

Background

3. The appellants seek the discharge of 3 of the clauses of the planning obligation, which modifies an earlier S106 Agreement (dated 8 August 1995) requiring the provision of various facilities in connection with the residential development of the land, including facilities at the new Paxcroft Mead village centre. The appeal site (referred to in the obligation as "The Former Public House Site") is a grassed plot located at the junction of Hackett Place and Leap Gate, in the north-western part of the village centre. The centre contains a range of local

facilities including shops, a community centre, nursery and a school (a little to the east). Amongst the shops is a retail pharmacy.

4. The relevant clauses are as follows:
 - Clause 1.5.1 requires the provision of *"a site for a medical centre to include a doctor's surgery with an option for an ancillary retail pharmacy in the location of the Former Public House Site."*
 - Clause 5.2 states that *"The Former Public House Site shall be re-allocated for use as a medical centre (to include a doctor's surgery and possibly an ancillary retail pharmacy operation). Marshgate shall use all reasonable endeavours to procure end users for the Former Public House Site in accordance with such re-allocation to include a doctor's surgery and with an option for an ancillary retail pharmacy."*
 - Clause 5.3 says that *"Marshgate shall use all reasonable endeavours to procure the establishment of a medical practice, and a retail pharmacy where appropriate, for the Former Public House Site."*
5. Marshgate Investments Ltd was the previous owner of the appeal site. It was explained at the inquiry that the appellants (Marston's PLC) now have a long leasehold interest.
6. The original development brief for Paxcroft Mead was published in August 1988. Facilities envisaged for the local centre included, amongst other things, a public house and a "community health facility." The brief indicated that the form of that facility would be decided "following discussion with the Local General Practitioners Association." Outline planning permission was granted for the local centre in 1995, with an associated S106 Agreement confirming that a public house would be provided and land reserved for a doctors/dentists surgery.
7. Subsequently, permission has been granted for the area originally intended for the medical use to be used for additional retail floorspace. As a result, the medical facility was to be provided at the appeal site, there having been little interest in the site from public house operators at that time. The S106 Agreement of 6 February 2004 confirms the intention to provide the medical facility at the appeal site.
8. Since that time, however, the appellants have expressed an interest in operating a public house at the site. Planning permission was granted in April 2006, on appeal, for the erection of a public house with ancillary staff flats, car parking, landscaping and access arrangements. That permission remains extant, and it is common ground that the principle of a public house/restaurant on the site is in accordance with the development plan. No development plan policies are referred to in the Council's decision notice in connection with the appeal proposal.
9. The Council's reason for refusal is that the 3 clauses continue to serve the purpose of seeking to find a medical use for the site and the appellant has not used all reasonable endeavours to procure the establishment of a medical practice as required by the S106 Agreement.
10. The Council did not appear at the inquiry to produce any evidence in support of that decision.

Main issue

11. Having regard to paragraph A20 of Circular 05/2005, the main issue is whether clauses 1.5.1, 5.2 and 5.3 of the S106 Agreement dated 6 February 2004 continue to serve any useful purpose in land-use planning terms. This raises 2 questions: (i) have all reasonable endeavours been made to procure a medical use as required by the Agreement and (ii) is there still a need for the site to be retained for medical purposes?

Reasons

Attempts to procure a medical use

12. The appellants called evidence from Chartered Surveyors¹ retained since July 2006 to market the site on a 999 year lease for medical centre use in accordance with the S106 Agreement. The marketing has been handled from the local office of the firm, which has experience of marketing land in the area for medical uses. Marketing has included advertisements in local newspapers and journals, together with mailing details to applicants of the firm's in-house database, to some 30 other property agents and to all doctors, dentists and chiropractors in Wiltshire, along the M4 from Bristol to Reading, north to Gloucester and south to Blandford Forum. The site has also been advertised on a number of websites, including the Council's Commercial Property Register. A board has been displayed at the site continuously apart from periods when it became damaged or was vandalised, and was in place at the time of my site visit.
13. A list of all responses received for each year from 2006 to 2009, all of which were followed up, was presented in evidence. However, the appellant's witness, Mr Scragg, of Carter Jonas, stated that no party has been identified who was willing to enter into meaningful dialogue with a view to acquiring the site for medical use. From the evidence given, no uses of a medical nature were ruled out during marketing. In addition to GPs' practices I note that inquiries from developers, private clinics, pharmacies, and veterinary surgeons were all responded to, without success.
14. Some criticisms of the marketing were raised at the inquiry by interested persons. However, as to the length of time during which marketing has taken place, a period in excess of 3 years should, in my experience, be sufficient to indicate with some certainty the level of interest in the site. Although I have not been directed to any policy requirements in that regard, the Council's Area Development Manager, in response to my question at the inquiry, stated that a "rule of thumb" of 12 months is usually adopted by the Council's officers in cases where marketing is an issue. The potential market for the site is quite a specialised one and there will, in my view, be diminishing value in continued extensive advertising once the availability of the site has become well known to relevant agents and the medical community.
15. The appellant's witness also explained that it is not appropriate to advertise in medical journals that do not have a property advertising section, and that the existence of a pharmacy in one of the retail units in the local centre restricts the viability of the site for a medical practice rather than makes it more viable,

¹ Carter Jonas LLP

since rental income from a pharmacy will be important to the overall income of a medical centre.

16. On the basis of the submitted evidence, which was not challenged by the Council, I have no reason to believe that the marketing of the site has been anything other than thorough and genuine and that it has been undertaken for an appropriate length of time. Accordingly, I conclude that "all reasonable endeavours" have been made to procure a medical use of the site as required by clauses 5.2 & 5.3 of the S106 Agreement.

Need to retain the site for medical use

17. As to the need for the site to be retained for medical use, the intention in the original development brief for Paxcroft Mead was for a "community health facility," although that term is not defined. The description of the intended facility appears to have changed over time, the S106 Agreement dated 8 August 1995 referring to "a doctors/Dentist's surgery" and the approved plans of November 2000 showing land reserved for "a doctor's surgery." In the 6 February 2004 Agreement, the subject of this appeal, the facility is described as a "medical centre, to include a doctor's surgery with an option for an ancillary retail pharmacy."
18. In my view, these various descriptions all imply a General Practitioners' surgery and associated facilities to serve the needs of local residents, rather than a privately operated clinic or specialised medical use, which would draw clients from further afield and would not necessarily meet local needs. It is hard to see how a veterinary practice, which is clearly not a doctor's surgery, would meet the requirements of the Agreement.
19. It is an important material consideration that the Wiltshire NHS Primary Care Trust has, on 6 separate occasions between 2003 and 2009, stated that it has no interest in developing a healthcare facility at the appeal site. Letters from the Trust and its predecessors state that there is no funding for or intention to build a doctors' practice on the site and that it is, in any event, too small for that purpose. An email of 12 June 2006 from the Trust says that Trowbridge is "adequately doctored" and that no NHS funding would be granted for any private proposals at the site. Following a review of facilities in Trowbridge, planning permission has been granted (on 23 February 2010) for a new primary care centre and surgery extension² on land to the north-east of Trowbridge Hospital. That should assist in addressing the capacity issues at the 4 existing GP surgeries, mentioned in the October 2009 Core Strategy Consultation Document which was referred to at the inquiry. The Primary Care Trust confirmed (on 14 September 2009) that the appeal site is "too small and in the wrong location" to provide such a facility.
20. Given that consistent response from the Primary Care Trust I consider it unlikely that there will, in the foreseeable future, be any realistic chance of an NHS community healthcare facility being developed at the appeal site. Private clinics or "fringe" medical uses at the site would not, in my view, meet the original intention of providing a medical facility to serve the local community of Paxcroft Mead. Part of that requirement has now already been met in the

² referred to at the inquiry as a "polyclinic"

provision of a retail pharmacy in the local centre shopping parade. If NHS doctors provision is to be made in the locality in the future, it seems clear from the Primary Care Trust's response that a larger site would need to be set aside, and that this would need to be done in consultation with the Trust to take account of its requirements.

21. In all the circumstances, it seems to me that the continued reservation of the appeal site for the purposes mentioned in the S106 Agreement would serve only to prevent the implementation of the permitted scheme for a public house, which is in line with development plan policy. In that regard, I give some weight to the new S106 Unilateral Undertaking submitted as part of the Statement of Common Ground, in which, in the event of the appeal being allowed, the appellant covenants not to use the site for any purpose other than Classes A3 (Restaurants & Cafes) or A4 (Drinking Establishments). This would ensure that, in the absence of a medical centre, the site would be used beneficially for the provision of a community facility that was envisaged in the original development brief.

Conclusion

22. I find that no useful purpose in land-use planning terms would be served by retaining clauses 1.5.1, 5.2 and 5.3 of the S106 Agreement dated 6 February 2004. Accordingly, the appeal is successful and the clauses are deleted.

John Head

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr A Tait QC

Instructed by Mr D Proctor of RPS Planning & Development Ltd

He called:

Mr D Proctor DipTP MRTPI
Mr C Scragg FRICS

RPS Planning & Development Ltd
Carter Jonas LLP

INTERESTED PERSONS:

Mr E Clark
Ms R Hawkes

Councillor for Hilperton Division, Wiltshire Council
Paxcroft Mead Community Forum (116 responses to poll relating to the appeal proposal)

The Local Planning Authority was represented at the inquiry by Mr P Taylor, Solicitor for the Council and Mr D Hubbard, Area Development Manager (West), but called no witnesses and gave no evidence. Mr Taylor responded, on behalf of the Council, to the appellant's application for an award of costs.

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Copy of e-mail from C Shimmin-Vincent dated 2 February 2010
- 2 Complete copy of the S106 Agreement dated 6 February 2004
- 3 Planning permission for primary care centre and extension to existing surgery adjacent to Trowbridge Hospital (23 Feb 2010)
- 4 Letter of notification of inquiry and list of those notified
- 5 Core Strategy consultation document
- 6 Signed addendum to Statement of Common Ground
- 7 Mr Clark's statement
- 8 Ms Hawkes's statement

PLANS

- A Plan showing location of medical practices in the surrounding area