WILTSHIRE COUNCIL

SOUTHERN AREA PLANNING COMMITTEE

12 January 2011

Subject: Appeal by Marston's PLC against a refusal to modify a planning obligation on land at Hackett Place, Hilperton (W/09/01022/FUL)

At the meeting of 24th June, 2009, the Western Area Planning Committee considered an application to discharge obligations within a section 106 agreement dated 6th February 2004 in respect of land at Hackett Place, Hilperton (Item 3 on the planning application list at that meeting).

The committee resolved, contrary to officer recommendation, that clauses 1.5.1, 5.2 and 5.3 of the Section 106 Agreement dated 6th February 2004 should not be discharged for the following reason:
'The clauses still serve a useful purpose, seeking to find a medical use for the site. The applicant has not used all reasonable endeavours to procure the establishment of a medical practice at the site as required by the Section 106 Agreement.'

The minutes of the meeting recorded that the motion not to discharge the clauses of the agreement was carried unanimously.

This decision was consistent with four previous decisions taken by the planning committee of the former West Wiltshire District Council in respect of informal requests to discharge these clauses of the agreement.

An appeal against the refusal was lodged on 26th October 2009 with the appellants requesting that the appeal be heard at a public inquiry. The date for the public inquiry was set for 23rd March 2010.

At an initial meeting to discuss the appeal between the legal section and planning officers, the council's legal section advised that counsel's opinion be sought about the strength of the council's case and evidence to support the two points in the reason for refusal, i.e. that the clauses still served a useful purpose in seeking to find a medical use for the site and that the applicants had failed to use all reasonable endeavours to procure a medical practice at the site. Instructions were sent to counsel on 23rd November 2009.

Counsel's opinion was received on 8th December. On the four key questions asked in the instructions, counsel advised:

- There were no apparent grounds for the council to defend the appeal.

- He saw no chances of success if the council decided to continue to defend the appeal.
- The appellant's evidence was overwhelming in supporting the application and the appeal and the committee's decision to refuse the application was not based on solid evidence. The council would be extremely fortunate to escape a full (and substantial) award of costs if it continued to fight the appeal.
- The council should indicate to the appellant that it would withdraw from the appeal and that a new application would be approved forthwith.

A confidential report was prepared for the WAPC meeting of 6th January 2010 which recommended that:

- the council should not defend the appeal at the forthcoming public inquiry and that the appellants and the Planning Inspectorate be advised accordingly;
- all appropriate steps be taken to limit the council's exposure to claims for cost against the council.

The report could not recommend that the appellants be advised that a new application be submitted and would be approved forthwith. A new application could be submitted but the council could not give any undertaking as to its likely outcome. Such an application would need to go through the full application process before a decision could be made.

However, an option would have been available to vary the S106 Agreement by mutual agreement between the parties resulting in deletion of the clauses in question which would have effectively discharged the obligations. It was decided that this option would not be taken up as it would have been poor practice to take a decision in this way without some form of consultation and neighbour notification process with the local community and further consideration by the planning committee following the completion of that process. In effect this would have been virtually the same as the formal application process and without such a process the council would have been vulnerable to accusations of maladministration.

The report was not considered on 6th January 2010 because the meeting was cancelled due to bad weather and consideration was deferred to the meeting of 27th January. (Agenda item 10 at that meeting). The committee resolved to agree with the recommendation as detailed in the report.

The Planning Inspectorate was notified of the committee's decision on the following day. A copy of a letter was e-mailed to them and a hard copy followed. The e-mail was copied to the appellants' agents.

The committee's decision was discussed with the appellants' agents over the following days and meetings followed between the appellants and their advisors. An informal request to discharge the clauses of the agreement was received on 12th February 2010. The appellants indicated that they were not prepared to withdraw the appeal before this further request to discharge the clauses of the agreement had been agreed

and that they reserved their position to proceed with the appeal and a costs award claim if they considered this appropriate. Similarly they were not prepared to request the appeal be held in abeyance pending the outcome of such an application.

The appellants' position with regard to the public inquiry left the council in a difficult position. The informal application would have to follow the same process as the earlier including consultation with interested parties, neighbour notification and if appropriate reference to this committee for a decision to be taken in open session. To have followed another route – delegation, no or limited consultation and notification - would have gone beyond what was considered to be 'all appropriate steps are taken to limit the council's exposure to claims for cost against the council' and would have left the council open to a charge of maladministration. There was not enough time between the receipt of the appellants' informal request and the public Inquiry for this process to be followed through. Officers had no choice but to advise the appellants' agent that their informal request could not be determined before the Public Inquiry. The appellants did not proceed with their request.

The Public Inquiry went ahead, with the local ward member and parish councillors making the case for the local community before the Inspector. In accordance with the Committee decision of 27th January 2010, the council presented no evidence at the enquiry. The appeal was allowed and the appellants awarded full costs against the council. Copies of both the appeal decision and costs award letters are appended to this report.

The appellants made a costs award claim of £55,137.91p. The appellants' figures were scrutinized by planning officers. The planning officers viewed that the rates for an advocate and various expert witnesses and the time spent preparing their cases were at levels to be expected.

Analysis of the costs details submitted by the appellants indicates that approximately half of the costs claimed were accrued before the council's decision not to defend the appeal. Had the appeal not proceeded beyond this time it would have been in accordance with normal practice for the appellants to claim their costs up to that time and for the council, which had changed its position about the appeal to meet those costs.

By not defending the appeal the council saved itself the costs of employing an advocate and expert witnesses to present the council's case. Based on the costs of a recent public enquiry the council could have expected to pay £8,000 to £10,000 for these people.

Taking all of this into account, in total, the additional cost to the council of this appeal proceeding to the public inquiry was £17,500 to £19,500.

Conclusions

- The advice the council received from counsel was sound. Having read the Inspectors decision letter, I am of the view that the outcome of the appeal and the costs award would have been no different had the council defended the appeal at the enquiry. Indeed, had the council defended the appeal, it is likely that the appellants' side would have invested further time in preparing their case resulting in higher costs.

- Counsel's opinion was sought in good time and his comments were received by the council in 15 days.

- A report was prepared for the first available Western Area Planning Committee but the cancellation of the 6th January committee was unfortunate but unavoidable given the extreme weather conditions that day but cost the council a vital three weeks. This left less than eight weeks between the decision being made not to defend the appeal on 27th January and the opening of the Public Inquiry on 23rd March. As the applicants were unwilling to withdraw or delay the appeal, there was not enough time to properly consider a further request to discharge the clauses of the agreement.

- Had the Public Inquiry not taken place the council would have had to pay the appellants' appeal costs accrued up to the end of January 2010. It is estimated that these would have amounted to about £27.500. Had the council defended the appeal an advocate and expert witness would have cost the council £8,000 to £10,000. This leaves the additional cost to the council of the Public Inquiry going ahead to be £17,500 to £19,500

Recommendation – the report be noted.

Report Author:

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