

West Wiltshire District Council

Planning Committee

8 March 2007

Request to discharge a section 106 agreement dated 6 February, 2004 in respect of facilities at the District Centre, Paxcroft Mead, Trowbridge

Officer – David Hubbard, Development Control Manager

Purpose

To consider a formal request from Marston Inns and Taverns to discharge a section 106 agreement in respect of facilities at the district centre at Paxcroft Mead. A copy of the letter making this request is appended to this report. Copies of the supporting documents referred to in the letter may be viewed at the planning department.

This request follows a similar request considered by the Committee at its meeting of 1st June 2006.

The issue concerns the alternative use of a site at the District Centre, Paxcroft Mead for either a medical centre or a public house. A section 106 agreement requires the owners of the site to use all reasonable endeavours to procure the establishment of a medical practice before the site can come forward for 'such other use as may be agreed with the council'.

At the meeting last June, the committee resolved to decline the request to discharge the section 106 agreement as the committee considered that insufficient evidence had been put forward to demonstrate that the owners of the site had used all reasonable endeavours to procure the establishment of a medical practice.

Background

Two section 106 are involved in this case. Parts of both agreements relate to facilities at the district centre. The earlier agreement is dated 8th August 1995 and the latter which varies certain clauses of the first agreement is dated 6th February, 2004.

The variations in the later agreement which are relevant to this request provided for:

- A site for a medical centre with an option for a pharmacy on a site previously identified for a public house (Site A on the attached Plan).
- Retail development of the previously identified medical centre site (Site B on the attached plan).

In 2004 the then owners of the site considered that there was no commercial interest in developing the public house site. Reserved matters had been approved for a public house in 2000 as part of the development of the district centre but there was commercial interest in the additional retail units adjacent to existing shops at site B.

The original agreement provided that if within 10 years from the occupation of the first dwelling on the development, no doctor or dentist shall be found willing to practice from such surgery the said site may be put to such other use as may be agreed with the council. A clause in the latter agreement deleted this requirement.

During 2004 and 2005 three planning applications were received for the construction of a public house on site A. All three applications were refused planning permission. The subsequent appeals against all three refusals were allowed. The owners of the site have followed up these decisions by requesting that the section 106 agreements be modified

At the time the planning applications were considered the council took the view that the planning applications and an alteration to the section 106 agreement need not be considered at the same time. However, in the event of planning permission being granted it was accepted that it would need to be demonstrated that obligations in the section 106 agreement had been modified or discharged before the implementation of any of the planning permissions for a public house could proceed. The Inspector makes the same comment in the decision letter.

In addition to the three planning permissions for a public house on this site granted recently on appeal, reserved matters for a public house on this site were approved in 2000, as part of proposals for other development at the village centre. That approval remains extant as other parts of the development approved at that time have been implemented and is not revoked by the second agreement. However as with the recent permissions that approval can not be implemented until the obligations in the section 106 agreement have been met or the council agrees to vary or discharge the agreement.

Key considerations

The first occupation of the first houses at Paxcroft Mead

The first houses at Paxcroft Mead were first occupied in early 1998. This means that there is just under one year left of the 10 years for a doctor or dentist to come forward to practice from a medical centre on the site.

Removal of the requirement allowing ten years for a doctor or dentist to come forward to practice from a medical centre on the site

Clause 5.4 of the agreement dated 6th February 2004 deleted this requirement.

The Primary Care Trust confirming they do not wish to construct a medical centre at this site

Four letters from the Primary Care Trust between November 2003 and December 2005 indicate that they have no funding, intention or interest in constructing a medical centre and pharmacy at this site and that they in conjunction with possible developers consider the site unsuitable as it was too small for this use.

Since June 2006, the owners of the site instructed architects, who are familiar with the requirements of health care providers, to appraise the site with regards its appropriateness to accommodate a health facility, based principally on a doctors surgery and pharmacy, referred to in the Section 106 Agreement.

This feasibility exercise took place on the basis of detailed discussions with the PCT on the basic requirements for such a facility and relevant standards with regards size of accommodation, parking requirement, etc.

The architect's concluded that the site is of an insufficient size and scale for a doctor's surgery and pharmacy. In particular they considered there would be difficulties in providing car parking on site to an appropriate standard. Only a very small proportion of parking could be provided on site raising questions about the appropriateness of having parking for a health facility physically removed from the building and pressure on existing parking in the rest of the local centre.

Appropriateness of a public house on this site

The council have considered that a public house would be appropriate within the district centre since the mid 1990s. The planning merits of a public house on this site have been tested through the planning process and have been found to be acceptable albeit after a planning appeal. In light of the appeal decision, the council has no alternative but to accept this as 'such other use as may be agreed with the council'.

Availability of alternative site for a medical centre at the District Centre

Site B – the original proposed location for a medical centre in the 1995 agreement – is currently being developed with retail units with flats at first floor level in accordance with the amended agreement and subsequent planning permission.

Comments by the appeal inspector

In her decision letter, the appeal inspector notes that a public house has been identified as a suitable use for the district centre in the past. A public house would 'differ in nature and function from the existing licensed family club in the community centre thus adding to the range of facilities available and to the centre's vitality.' She accepts that a medical centre would be beneficial but points to the lack of substantive evidence to demonstrate a need for the surgery. She points out that no proposal for a surgery has come forward in 10 years since planning permission was granted for Paxcroft Mead was put in place and to the written confirmation on two recent occasions that the primary care trust is not interested in this site.

Marketing of the site since June 2006

The owners of the site instructed Dreweatt Neate to undertake a comprehensive marketing exercise of the site. This property consultancy has substantial experience of dealing with the health sector.

Correspondence from Dreweatt Neate summarising the extent of this marketing exercise has been submitted to the council. It details the sales particulars setting out clearly the basis upon which the site was being marketed, i.e. for the provision of a medical centre to include a doctors surgery and retail pharmacy. The extent of press advertising and sign boards. Details are provided of the extent of the mail shots agents, developers, healthcare providers with even a remote interest in such provision and to all existing health practices within a very wide radius of the site as far as Gloucester, Bath, Bristol, Reading etc.

The letter refers also to an approach from a Mr Cullern, a Hilperton parish councillor who asked for a set of particulars and confirmed that he would seek to raise interest from local medical practices. Dreweatt Neate had received no feedback from him at the time of writing their letter in early January.

The letter records initial interest from nine medical service providers and others but the initial interest was not pursued in any of these cases.

No firm interest or ongoing interest of any kind has materialised following this extensive marketing campaign. Obviously, if any interest were shown then a fair market price would have to be paid to acquire the site.

The owners of the site have undertaken full marketing of the site since June 2006. They have also re-instated the site to an appropriate condition following an unauthorized commencement of work last summer.

Given the facts set out above, the April 2006 appeal decisions and the marketing exercise carried out by the owners of the site over the past six months, it is considered that the committee should agree to modify the agreement dated 6th February 2004 and allow the development of the public house

Sec.106A of the Planning and Compensation Act 1991 provides that if an obligation "no longer serves a useful purpose" it should be discharged. An obligation should be modified "if it would serve that purpose equally well" with modification. There is a right to appeal (similar to a planning appeal) against the local authority's refusal to discharge or modify an agreement which comes into play five years after the appeal was executed. The owners of the site could also seek judicial review.

Risk management Implications

The report addresses the site owner's right of appeal in this case and assesses the likely outcome of any appeal.

Finance and performance implications

In the event of the committee not accepting the recommendation the council could be faced with the costs of defending an appeal (albeit not until 2009) or legal challenge against the decision and the risk of any costs being incurred by the other party being awarded against the council.

Legal and human rights implications

Sec.106A of the Planning and Compensation Act 1991 provides that if an obligation "no longer serves a useful purpose" it should be discharged. An obligation should be modified "if it would serve that purpose equally well" with modification.

There is a right to appeal (similar to a planning application appeal) against the local authority's refusal to discharge or modify an agreement which comes into play five years after the appeal was executed. This now applies in respect of the 1995 agreement.

Recommendation

That the committee agrees to discharge the Section 106 Agreement dated 6th February, 2004.

Background papers

- Section 106 Agreement Dated 08.08.1995
- Section 106 Agreement Dated 06.02.2004
- Planning Applications-
- 88/01650/OUT
- 00/00533/REM
- 04/02221/FUL
- 05/00194/FUL
- 05/01709/FUL
- Letter from RPS Planning and Development Limited dated 9 February 2007 and enclosures

Appendix

Letter from RPS Planning and Development Limited 9 February 2007

Our Ref: DP/SF/JMA2107
Your Ref:

E-mail: proctord@rpsgroup.com
Direct Dial: 01480 499049
Date: 9 February 2007

Mr D Hubbard
Development Control Service Manager
West Wiltshire District Council
Bradley Road
Trowbridge
Wiltshire
BA14 0RD

Dear Mr Hubbard

Formal application to discharge Section 106 Agreement re local centre site at Paxcroft Mead, Trowbridge for Marston's Inns and Taverns

I write on behalf of my clients'', Marston's Inns and Taverns, (formerly trading as Pathfinder Pubs), in connection with the above site and further to our recent conversations and our receipt of your letter of 14 July 2006.

I would be grateful if you could take this letter to be a formal request for the discharge of any outstanding requirements of the relevant Section 106 Agreement dated 6 February 2004 relating to this site, so that the public house proposals, which have the benefit of planning consent, can be progressed.

You will be aware from our recent conversations that my clients' have undertaken a marketing exercise of this site for a medical use for a period of 6-months in accordance with the

suggestion set out in your letter of 14 July 2006 and I set out my comments on the results of this exercise below.

However, as the history of these considerations is extremely complex I address the relevant issues under separate headings and I have enclosed the relevant documentation which I trust will be helpful to you and your Members in determining this application.

I would be extremely grateful if, as discussed, this matter could be taken to the earliest possible Committee, which I understand is likely to be the March Committee. If your Members agree to the discharge of the Section 106 then my clients' would hope that the development could be completed and open for trading before Christmas 2007, an important commercial consideration.

I, therefore, set out below comments on the relevant issue areas, relevant evidence and other material to support my clients' position.

History of site and health facility proposals

You will recall from correspondence, conversations and the case put at the most recent planning Inquiry that my clients' believe that a great deal of weight should be placed on the history of this site with regards the length of time that a medical facility of some form has been a part of the comprehensive redevelopment facilities and package of that despite these proposals being in the public domain for this length of time, no interest has been forthcoming from any developer, operator or agency in taking up the site for this purpose.

The design concept/development brief was first prepared in August 1988 and was cross-referred to in the Local Plan First Review of 1992 when the first reference was made to some form of health facility within the development.

The original outline planning consent for the overall local centre reflected the design concept referred to in the Development Plan and was granted on 8 August 1995 under your reference 88/0165/OUT.

This outline planning consent was accompanied by the first of the Section 106 Agreements, dated 8 August 1995, confirming, amongst other things, that a portion of this site should be reserved for a doctors/dentist surgery.

In other words, the concept including some form of medical facility has been with us for approximately 19 years and more formally for 12 years.

The reserved matters were approved in November 2000 under your reference 00/00533/REM and a supplemental Section 106 Agreement signed simultaneously.

The local centre itself was substantially completed by July 2003, some 8 years after the original outline consent had been granted, (no interest whatever had come forward for any form of health use on the site in the interim) and, as you aware, a further variation to the Section 106 Agreement was signed during February 2004 rearranging allocations within the overall site.

During correspondence in connection with my clients' application for a liquor licence at the end of 2004, the Hilperton Parish Council raised the issue of the Section 106 Agreement and my clients' responsibilities.

However, despite this and formal applications for the proposed public house made under your references 04/02221/FUL and 05/00194/FUL, (dealt with in more detail below), and all of the publicity, consultations and notifications which formed a part of the submissions there were still no approaches made from any party showing interest in any part of the site for a medical facility.

The final, formal application was made during August 2005 and determined under your reference 05/01709/FUL and once more the Hilperton Parish Council made reference to the requirements of the Section 106 Agreement.

The refusal of these three applications went to Public Inquiry commencing in February 2006 and, despite all of the widespread publicity in connection with the various applications and the appeal and the Parish Council's continued concern, the Inspector at the Inquiry had no evidence before her from any party relating to the potential development of a health facility at this site.

(The Inspector's comments on these issues are dealt with in more detail below.)

Finally, at the Planning Committee meeting on 1 June 2006, a formal request to discharge the requirements of this Section 106 Agreement was refused, against officer recommendation, on the basis that insufficient evidence had been put forward to demonstrate that my clients' had used all reasonable endeavours to procure the establishment of a medical centre and retail pharmacy on this site.

(I have set out the Local Authority's position in terms of the various committee reports in more detail below.)

In conclusion, on a basic assessment of the history of the site, the overall concept for the provision of this local centre, including a health facility, has been in the public domain for 19 years, the site has had the benefit of consent for 12 years, there are now two extant planning consents for a public house development on this site. There have been three formal applications for a public house development on the site and a subsequent application for the discharge of the Section 106 Agreement requirements, all of which have had widespread publicity, including major interest taken by the Hilperton Parish Council.

Despite all of this, no interest whatever has been shown by any party in the development of any form of health facility on this site.

Local Planning Authority position

In the Committee Reports on application references 05/00194, 05/02221 and 05/01709, officers have made it absolutely clear to Members that the issues relating to the Section 106 Agreement are a separate matter from the proposals for a public house use on this site.

These Committee Reports have also confirmed that, in planning terms, neither the public house nor the surgery/retail pharmacy element is any more preferential than the other and that both are acceptable in principle.

The Committee Report on application number 05/00194/FUL, for example, states:

“At the present time no planning application has been submitted for any doctor’s surgery use/ancillary retail pharmacy on this site, and there exist no other permissions for any other alternative use of this application site. In planning terms, neither the public house nor the doctor’s surgery/retail pharmacy is any more preferential than the other, and as such both are acceptable, in principle, on this site as shown by the original Masterplan as appropriate land uses at this local centre. At the present time we are being asked to consider the application before us, which is for a public house.”

Despite the above, debates at Committee and the Members concerns have revolved very largely around this requirement, which clearly figured in the refusal of all three of the above applications against officer recommendations.

The Planning Committee Report of 1 June 2006, dealing with the request to discharge the Section 106 Agreement, sets out the case fully for Members, including references to the relevant Agreement and the Inspector’s decision on the appeals and recommends:

“that the Committee agrees to discharge the Section 106 Agreement dated 6 February 2004.”

The report, in assessing the facts, states, that in the officers view:

“.... it would be unreasonable to come to any other conclusion at this time....”

Applicant’s position

Marshgate Developments, a signatory to the relevant Section 106 Agreement, believe they have endeavoured to accommodate a health facility at this site, in accordance with the requirements of this Section 106 Agreement.

The appeal site has been available for this use for many years but, as confirmed, no interest whatever has been shown by potential occupiers.

During June 2004, as part of detailed discussions between Marshgate and the Local Authority, Marshgate confirmed by letter, dated 8 June 2004, suggestions that the community centre building could be remodelled internally to incorporate a health facility in addition to space for community purposes.

Detailed drawings were submitted at that time showing a scheme for the rearrangement of this building and these are attached.

These drawings show a retained community centre facility with a floorspace which, as amended, still equates to the original requirement for a community centre of not less than 3,000 sq feet and not more than 3,200 sq feet (clause 2.5 of the original Section 106 Agreement).

No positive response was received from the Local Authority to these suggestions.

During the lead up to the submission of the third application, Marshgate and Marston’s had discussions and correspondence with the Local Authority, Marshgate making a formal offer to provide an area above the existing retail units for such a use with ground floor entrance and

consulting rooms with the necessary lift/disabled access, etc, confirmed in their letter of 4 March 2005.

This featured in discussions with the Local Authority but this suggestion was not taken further and no positive response received.

Immediately prior to the determination of application reference 05/01709, Marshgate wrote to the Head of Planning, by letter dated 30 September 2005, explaining the situation with regards the potential provision of a health facility at this site and how discussions on this issue had progressed over the relevant period, confirming their view that every endeavour had been made to provide such facilities to meet any demand forthcoming.

Following the appeal decision, and by letter dated 22 April 2006, Marshgate suggested to the Chief Executive Officer of the Local Authority that as the site had been marketed for a period of approximately 10 years with no interest being shown that this matter should be set aside.

Finally, immediately prior to the determination of the third application an email was received from the Local Authority, dated 26 September 2005, suggesting the Appellants might like to pay a commuted sum contribution, to be secured through a further Section 106 Agreement, towards the provision of a future doctors surgery should a suitable site become available in the area.

Not surprisingly, my clients' responded, by letter dated 29 September 2005, confirming that these suggestions went far beyond the tests of reasonableness set out in planning policy guidance on the scope, form and content of such Agreements.

Not surprisingly, my clients' were not willing to enter into an open-ended arrangement of this nature.

Primary Healthcare Trust Position

Marshgate Developments Ltd have been in continuous and regular contact with the West Wiltshire Primary Care Group as Gallaghers had before them.

This has involved meetings, regular telephone conversations and substantial correspondence.

The West Wiltshire Primary Care Group, as providers and funders of health facilities have made their position clear repeatedly.

The Primary Care Trust letter of 24 November 2003, made it clear that they:

"....do not have, at this time, funding or intention, to building a doctors practice on this site."

The Primary Care Trust letter of 21 April 2005, confirms that:

"....a prospective developer has assessed the plot in question and has advised that it is too small for the use anticipated...."

The Primary Care Trust letter for 21 November 2005, to Marshgate confirms that:

“...following a visit to the site in April by a Primary Care developer, the PCT came to the decision that the piece of land available was too small for Primary Care use. I wrote to the District Council at the end of April 2005 informing them of this decision....”

The Primary Care Trust letter to the Chief Executive Officer of the Local Authority dated 19 December 2005, again confirms that:

“....a prospective developer has assessed the plot in question and has advised that it is too small for the use anticipated....”

An email from the Primary Care Trust was received in June 2006 giving information on funding, further confirming that any such development of this was would be unlikely.

The Primary Care Trust's position and views on the prospects of a health facility at this site have been consistent and are clear.

Secretary of State's position

Although the Public Inquiry into the refusals of planning consent for a public house development on this site dealt largely with the planning merits, evidence was given on the range of facilities to be provided at this local centre and, including the potential establishment of a medical practice.

In making her decision on the appeals (references APP/F3925/A/05/1173902, 1177980 and 1193804), and in her decision letter dated 21 April 2006, the Inspector deals with facilities in the local centre in her paragraphs 18-21 inclusive.

Comments in her paragraph 20 are very telling and this states:

“...I note the Council's reference to PPS1: “delivering sustainable development”, in arguing that health facilities are the only ones, in a range of facilities that Authorities should seek to provide at an accessible level, which are not currently available in this local centre. In this context, I agree that such facilities would be beneficial. However, although the Council highlighted the distances from Paxcroft Mead to doctors' surgeries elsewhere in the town, and residents have referred to pressure on existing surgeries, no substantive evidence was produced to demonstrate the need for a surgery. No proposal for a surgery has come forward, more that 10 years since outline permission was granted for the Paxcroft Mead development, and the Primary Care Trust has confirmed, on two recent occasions, that it is not interested in this site.”

Clearly, and contrary to the suggestion in the Local Authority's evidence at that Inquiry there is no requirement to provide a medical centre. The requirement is to use reasonable endeavours in respect of such provision. The Primary Care Trust is not interested in the land and has made its position clear.

Appropriateness of site

Following receipt of the Local Authority's letter of 7 June 2006, my clients' instructed architects, who are familiar with the requirements of health care providers, to appraise the site with regards its appropriateness to accommodate a health facility, based principally on a doctors surgery and pharmacy, referred to the in the Section 106 Agreement.

This feasibility exercise took place on the basis of detailed discussions with the PCT on the basic requirements for such a facility and relevant standards with regards size of accommodation, parking requirement, etc.

The architect's conclusions are set out in a self-explanatory email of 2 October 2006.

They conclude that the site is of an insufficient size and scale to meet the necessary provision, particularly with regards necessary parking provision to meet standards, only a very small proportion of which could be provided on site, thus placing pressure on the rest of the local centre and its parking (a major issue at the recent Public Inquiry) and the appropriateness of having parking for a health facility physically removed from the building itself.

Marketing of the site

My clients' have instructed Dreweatt Neate to undertake a comprehensive marketing exercise of the site, this property consultancy practice having substantial experience of dealing with the health sector.

Attached is a letter from Dreweatt Neate of 11 January 2007 to my clients' summarising the extent of this marketing exercise in terms of the limited interest shown, the extent of advertising in the local press, sign boards etc, the sales particulars setting out quite clearly the basis upon which the site was being marketed, ie for the provision of a medical centre to include a doctors surgery and retail pharmacy.

As can be seen, mail shots were sent out to agents, developers, healthcare providers with even a remote interest in such provision and to all existing health practices within a very wide radius of the site as far as Gloucester, Bath, Bristol, Reading etc.

No firm interest or ongoing interest of any kind has materialised following this extensive marketing campaign.

Obviously, if any interest were shown then a fair market price would have to be paid to acquire the site.

Conclusions

My clients' have the benefit of two extant consents on this site for the provision of a public house, granted in outline on 8 August 1995, under Local Planning Authority reference 88/01650/OUT and the subject of a reserved matters approval granted on 6 November 2000, under reference 00/00533/REM, the Local Authority having accepted that this consent is extant.

More recently, consent has been granted on appeal by decision letter dated 21 April 2006, under appeal references APP/F3925/A/05/1173902, 1177980 and 1193804.

The site and references to some form of health facility have been in the public domain and widely publicised via planning application submissions, consultations, press articles etc for a period of just under 20 years in terms of the principle of the use, 12 years in respect of a formal planning consent and during this period no interest whatever has been shown by any individual, group, agency or practice in this site.

No applications have been brought forward for this form of development on the site and no approaches made to my clients' during this period.

The Primary Care Trust position is clear. The site is inappropriate, in any case, for the provision of a facility to meet modern standards.

My clients' believe that every endeavour has been made to facilitate provision for such a facility on this site should the demand arise.

Notwithstanding this issue being within the public domain and all the various submissions made, including a formal Public Inquiry, my clients' have now completed a six months marketing exercise, as suggested by the Local Authority, which has produced no firm interest in the site.

It is absolutely clear to my clients' that the continued requirement set out in the relevant Section 106 Agreement of 6 February 2004 no longer serves any planning purpose and should be discharged accordingly.

Attached is a list of enclosures.

I trust the above and the enclosures are sufficient for you to be able to take this request/application to the next available Planning Committee for determination.

Clearly, if refused again my clients' have the right to appeal against this decision in the normal way and will certainly pursue such an appeal vigorously.

I look forward to discussing this with you further and providing you with any additional information you may require.

Yours sincerely
For RPS

Don Proctor
Senior Planning Director

Enclosures

- Appeal decision dated 21 April 2006
- Primary Care Trust letters
- Marshgate Development Ltd letters and drawings
- Architects appraisal
- Marketing report
- Officers report to Planning Committee, 1 June, 2006

Copies of the enclosures can be viewed by members at the planning department,
Bradley Road, Trowbridge.