

**West Wiltshire District Council**

**Planning Committee**

**13 September 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 further 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 1<sup>st</sup> June 2006 and 8<sup>th</sup> March, 2007

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 endeavors 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 in June 2006, 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 endeavors to procure the establishment of a medical practice.

In March of this year the committee resolved to defer a decision on this request for a further six months for the owners of the site to demonstrate that the site had been marketed as a satellite surgery and to resolve issues about the earlier marketing exercise.

**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 8<sup>th</sup> August 1995 and

the latter which varies certain clauses of the first agreement is dated 6<sup>th</sup> 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 report to the meeting of 8<sup>th</sup> March identified and commented on the following 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 6<sup>th</sup> 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 is recorded also. 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 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.

### **Actions taken by the owners since 8<sup>th</sup> March.**

In a letters dated 29<sup>th</sup> May and 19<sup>th</sup> June 2007, the owners planning consultant reiterates the request that the Section 106 Agreement dated 6<sup>th</sup> February, 2004 be discharged.

In respect of the marketing of the site they explain that they have investigated with two leading medical journals the prospects of advertising the site in those publications. However as neither publication is property based they were not considered appropriate vehicles for advertising this site. They repeat their contention that the mailing list used previously was the appropriate approach to take as it covered every type of medical practice in Wiltshire and beyond.

With regards to the development of the site as a subsidiary surgery to an existing practice they comment that the advertising of the site has been as open as possible so as not to be over specific in terms of potential occupiers. They add that this has included the possibility of a surgery on the site and the need to reflect the requirements of the section 106 agreement. They add that the marketing exercise has now run for over nine months with no material interest being shown by potential purchasers.

The planning consultant acting for the owners of the site has indicated that further details of the marketing exercise over recent weeks will be sent to the council just before the meeting of 13<sup>th</sup> September. This information will be reported on the late list.

A letter has been received from the Royce Clinic Limited, providers of physiotherapy and acupuncture, who have contended that their interest in setting up a medical centre / rehabilitation centre at the site was not followed up by the selling agents or others associated with the site. A copy of their letter has been passed to the planning consultant acting for the owners of the site. He has commented as follows:-

‘In the marketing report prepared by my clients, agents you need to be aware that Mr R Menezes (of the Royce Clinic Limited) contacted Dreweatt-Neate (the agents handling the marketing of the site) in November 2006. details of the site were sent to him on 3<sup>rd</sup> November, 2006

There is no note of any follow up phone calls from him or any follow up at all. A further letter was sent to this gentleman on 4<sup>th</sup> May, 2007 and a reply received.

A further letter was sent on 7<sup>th</sup> June, 2007 but no reply to that has been recorded from Mr Menezes.

I think in this context that the letter seems a little mischievous as clearly Dreweatt-Neate have had considerable correspondence to and from Mr Menezes and there has been no follow up since June of this year.

I trust that this will be brought to the attention of your members as we would be very concerned if the wrong impression was being given about the thoroughness with which our agents are dealing with this marketing exercise.

Notwithstanding this going and froing with the Royce Clinic, they are not operators of a "surgery". Their form of clinic is clearly not what was intended by the original legal agreement or what the community apparently wishes to see on this site and I believe that this is an important issue which should also be brought to the members' attention

I can confirm that marketing continues as you are aware and there is still no material interest in this site forthcoming.'

Finally, the owners' planning consultant adds that his clients are considering court action to expedite this matter and that he has been charged with putting together the necessary papers for this action. This action is likely to take the form of the owners of the site seeking a declaration from the courts under general contract law that they have discharged their obligations under the relevant part of the agreement. Papers will be served on the council in the near future.

## **Conclusions**

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 nine months, it is recommended that the committee should agree to modify the agreement dated 6<sup>th</sup> February 2004 and allow the development of the public house.

The Royce Clinic Limited is a commercial provider of certain medical services but is not a mainstream provider of general medical care. The section 106 agreement requires the provision of 'a medical centre with an option for a pharmacy' on the site. On the basis of the information in the letter from the Royce Clinic Limited it is difficult to substantiate an argument that they would be providing the type of medical service indicated in the agreement. The letter does call into question some aspects of the marketing exercise but these are countered by the site owners' planning consultant.

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 have indicated that are likely to seek to take action through the courts.

### **Risk management Implications**

The report addresses the site owner's right of appeal in this case and assesses the likely outcome of any appeal. Reference is made by the owner's consultants to court action under general contract law. Costs claims in such cases would include usual legal and professional costs for preparing and presenting the case and could be extended to damages based on loss of turnover arising from avoidable delays should the council be shown to have behaved unreasonably.

### **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 owners of the site 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 6<sup>th</sup> 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

