Agenda Item No. 6

West Wiltshire District Council

Planning Committee

8 May 2008

Heywood House, Park Lane, Heywood
Change to Resolution to grant planning permission in principle on 13 September 2007 subject to a Section 106 Agreement 07/01377/FUL

1. Purpose

To consider Counsel's opinion in respect of a proposed modification to the Heads of Terms of the Section 106 Agreement previously agreed by this committee.

2. Background

Members will recall that this application was referred back to the Planning Committee on14 February as Agenda Item 6, for reconsideration of the original resolution and the Heads of Terms of the Section 106 Agreement. The applicant has queried the lawfulness of a clawback provision with regard to affordable housing, and following Members' instructions, Counsel's opinion has been sought and now received on this matter.

The report to the meeting on14 February was as follows: -

"To consider further a clause in the proposed Section 106 Agreement in respect of the above application, following a response from the applicant to the Heads of Terms previously agreed by this Committee.

At its meeting on the 13 September 2007, the Planning Committee considered a formal planning application for the change of use and conversion of existing buildings from commercial to residential use (17) and the erection of a number of new dwellings (10) at Heywood House, Heywood.

The site comprises the main house, a Grade 11* Listed building; a number of substantial outbuildings; a derelict walled garden and substantial grounds extending to some 25 acres. The site was formerly the Headquarters of the National Trust until their relocation to purpose built offices in Swindon in 2005. Since then, the premises have remained largely unoccupied, except for a short-term commercial lease in part of the Coach House.

Following a long period of negotiation and discussion with the Planning Authority, an application for the conversion of the buildings, together with enabling development in the grounds, was finally submitted for consideration. In the report to the Planning Committee, the Planning Officer recommended that subject to the application not being called in by the Secretary of State, conditional permission should be granted at a future date following the completion of a Legal Agreement to secure the following: -

(i) A planned and agreed phased timetable for the implementation of the proposed works to ensure the listed structures, including the landscape and garden features, are fully restored before the new build is completed/occupied.

(ii) A "clawback" arrangement of 50% of any residual profit made over and above the figures set out in the supporting financial appraisal, to contribute to the provision of affordable housing.

(iii) In place of a financial contribution to public open space, an agreed arrangement for public access to the grounds and gardens, and the erection of an information board or similar for educational benefit.

Members may recall that prior to agreeing this recommendation, the applicant had raised an objection to the recommended clawback provision for the following reasons: -

- The supporting financial appraisal shows the financial viability of the development to be exceedingly precarious, with a profit margin of just 3%.

- Were the above recommendations to be approved, it would be impossible to obtain the necessary funds to undertake the project, whether such funds were sourced as equity or loan capital.

- In the early days of discussions between WWDC officers and the applicant, before an open book financial exercise had been compiled, a tentative figure of £50,000 was mentioned as a possible contribution.

- According to the Planning Policy Manager, it is not 3% but a 20% profit margin which *"provides an approximate threshold for reasonably seeking contributions towards the improvement and enhancement* of *community facilities."*

A revised wording was therefore proposed by the applicant as follows: "A clawback arrangement whereby £50,000 is paid over to contribute to the provision of affordable housing on once the profit margin on the development has exceeded 20%."

The opinion of the Housing Enabling Manager on this modification was

that this was unacceptable, but that some further modification might be considered "so that the clawback does not operate until the developer has made a profit margin inline with usual market requirements."

This less prescriptive recommendation was formally put forward to the Committee, but the decision was taken to adhere to the original Section 106 recommendation as given at the start of this section.

Following confirmation from the Secretary of State that the application was not to be called in but could be determined by the Local Planning Authority, Solicitors were instructed and the Section 106 is currently being prepared.

3. Key Issues

As part of the negotiations with the applicant over the Heads of Terms, the applicant has continued to express concern over the provisions of section (ii) and the requirement for a clawback arrangement to contribute to the provisions of affordable housing.

The issue now raised is not the precise wording of any clawback or other affordable housing provision, but that the principle of a contribution towards affordable housing at all is not appropriate. A letter from the applicant's Solicitor states the following: -

"As you are aware, my client does not accept that the Application is within an area which should be subject to any affordable housing policies, whether comprised within the Local Plan or the SPG. A review of the relevant policies confirms the position. Policy H2 states that affordable housing to meet local needs may be negotiated, on housing sites "of 1.00 hectares or more, or sites containing more than 25 dwellings, at Bradford on Avon, Melksham, Trowbridge, Warminster and Westbury; [and/or] within defined Village Policy Limits". Policy H2 confirms that the District Council will actively pursue the provision of affordable homes within the District on all allocated and windfall housing sites which meet the above criteria. Policy H17 of the Local Plan lists those villages which are within Village Policy Limits.

It is clear that policy H2 is not applicable to the Application. The site of the Application is not within any of the main towns listed in policy H2, nor is it within any of the Village Policy Limits set out in Policy HI? It follows, therefore, that the affordable housing policies in the development plan are not applicable (in any respect) to the Application. (Although you had pointed out in previous correspondence that paragraph 5.12 of the SPG refers to clawback arrangements, this paragraph (in common with all paragraphs within the SPG) does not, in policy terms, fall to be considered in relation to the Application.)

As you will be/aware, one of the key tests set out in Circular 05/05

(Planning Obligations) is that a planning obligation must be relevant to planning (paragraph B5 of the Circular). This requirement is further expanded upon in paragraph B8 which states as follows:

'Development plan policies are therefore a crucial pre-determinant in justifying the seeking of any planning obligations since they set out the matters which, following consultation with potential developers, the public and other bodies, are agreed to be essential in order for development to proceed'.

As you will be aware, a fundamental requirement of the Circular is that all the relevant tests are met when assessing whether a planning obligation ought to be imposed. In respect of the Application it is clear that there are no development plan policies (in affordable housing terms) which relate to the Application. As a consequence, the test set out in the Circular is not met.

Given the above, our client is firmly of the view that any requirement to secure such an affordable housing clawback would be unlawful (in the context of Section 106 of the Town and Country Planning Act 1990). As a result, whilst my client remains keen to work with the District Council in respect of the Application and its subsequent development, he would be grateful if you could now re-consider your position."

The opinions of both the Housing Enabling Manager and the Planning Policy Manager have been sought - the former objects to the removal of the clause (there are approx 15 in priority need in Heywood although the development site, itself, is not suitable for 'affordable' accommodation); the latter has no further comment to make beyond the advice given during the processing of the original application.

That advice was as follows:

'Affordable Housing Provision - This is an area of the proposal on which the Planning Policy Team have previously been consulted. My response (dated 7 February 2007) set out the Policy position. Namely, that this site could not be treated as an affordable hosing exception site. However, as the site is unique and subject to exceptional circumstance we could consider it under our orthodox Policy H2 and seek an appropriate contribution towards affordable housing. Any contribution towards the improvement and enhancement of community facilities (lE affordable housing or education) would be subject to the outcome of the then proposed financial open book exercise.'

The previous comments referred to (February 2007) were essentially the same.

'I have spoken at length on this issue with both the Planning Policy Manager and members of the Housing Services Team. The conclusion of my discussions is that the proposal site cannot be considered to be a rural exception site. Why? The proposal is not seeking to provide 100% affordable housing provision. The proposal is not well related to any existing settlement. Additionally, the Housing Services Team informs me that there is insufficient

need with the locality to justify the development of a rural exception site. It is also noteworthy that the Housing Services Team does not consider the on-site housing to be appropriate for meeting any affordable housing need.

My discussions With the Planning Policy Manager suggest that the proposal should be considered as a unique/exceptional development. As such the proposal could be considered under the District Council orthodox Policy H2, as a site within a village/rural area. In this respect, there is a reduced emphasis that the District Council demonstrates an affordable housing need. Consequently, the District Council could theoretically seek a contribution towards off-site provision.'

There are a number of conclusions which may be drawn from this.

1. This application represents a unique situation for which there is no definitive policy directive, but a general framework within which a range of options exist. Since the development is not exclusively an affordable housing scheme, Policy H22 does not apply; since the application site also lies outside of any established village or town boundary limits, it would seem that Policy H2 does not apply. However, an interpretation has been made based on "exceptional circumstance" that it should. The exceptional circumstance in this case is the provision of 27 new dwellings in the open countryside, which would normally be resisted except for the overriding heritage objective of restoring this Grade 11* Listed building and its surrounding estate.

As an 'exceptional circumstance', there is, clearly, no general policy "precedent" with regard to affordable housing, with every case to be judged on its individual merit. Unless, however, the need for a contribution can be fully justified, the fall-back position set out in policy H2 must form the basis for any determination.

2. The fact that the Council 'could' (Planning Policy Manager's comment) consider this proposal under Policy H2, equally suggests an option for the Council not to do so. Such an option must clearly relate to the competing planning objectives of the development, which in this case, hinge significantly around the heritage imperative. Since the Council has recognised the importance of restoring the estate by granting enabling development in the countryside, contrary to policy, it could be argued that other policies could be "waived" against the background of the overriding heritage objective. What adds weight in this case, is that, prima-facie, the affordable housing policy does not necessarily apply in the first place.

3. Since, in policy terms, the proposal can be considered unique, the Council is at liberty to consider whether a contribution towards affordable housing is relevant in this case without concerns being raised over the issue of precedent.

4. Notwithstanding the above consideration on the principle of the policy, a contribution towards affordable housing as part of any development is ultimately dependant on the viability of the proposal as tested by a financial open book exercise. The appraisal submitted as part of this application shows the viability of the development to be exceedingly precarious with a margin of

only 3%. This, in itself, raises two issues:

(i) While the clawback contribution might not be required in this case because of marginal viability, there is no certainty in this issue. The applicant makes the point that the "providers of funds will view clawback as a negative factor which would jeopardise still further the ability to finance this development." While there is no evidence to support this view, any action which might jeopardise the implementation of this permission would be unwelcome.

(ii) If marginal viability is unlikely to trigger a clawback, it raises the question as to whether it is actually necessary. In considering the need for a planning obligation, it must meet a number of tests including that it is "necessary to make the proposed development acceptable in planning terms" (Circular 05/05). The fact that it is unlikely to be needed must raise some doubt that this test can properly be met.

Conclusion

Against this background, the Committee is being asked to reconsider its original terms for the Section 106 Agreement with regard to the inclusion of a possible future contribution towards affordable housing. Irrespective of the particular arguments with regard to the wording, timing or amount of contribution, the case put forward by the applicant is that the relevant policy simply does not apply in this case and should be deleted from the Heads of Terms.

If the Committee is not minded to agree this course of action and the original agreement is not signed, the application would have to be refused with an opportunity for the applicant to defend his view on appeal. In the light of the uncertain policy position, the Council's position would not be easy to defend on appeal, with the possible risks of costs being awarded against the Authority.

Of equal concern, however, must be the delay to the commencement of works which would result in deterioration to the fabric of the main building and the walled garden in particular, contrary to the heritage objective which underpins the entire project."

3. Consideration of Counsel's Opinion

A summary of this opinion is as follows: -

- A community's need for affordable housing is a "material planning consideration" in determining planning applications (Circular 6/98 and PPS3).
- This remains a "material consideration" whether or not there is a specific Development Plan policy relating to affordable housing, and whether or not that particular policy is applicable to a given development.

- While District Plan policy H2 may not be directly applicable in this particular case, the requirement to provide affordable housing as part of the development applies "indirectly" as a "material consideration".

- Both Government Policy (PPS3) and Development Plan policy (H2) recognise the importance of the "economics of provision in terms of affordable housing" ie viability – in this particular case, as evidenced by the open book exercise, the viability is clearly marginal and no contribution is currently justified. This same conclusion is reached whether assessed against the terms of government policy (PPS3) or Development Plan policy (H2).

- Notwithstanding any of the above points, Policy C27 (sic*) of the District Plan allows for the relaxation of other policies in special circumstances if it would secure the retention of a building of architectural or historic interest.

- The planning merits in favour of this particular proposal are "overwhelming". Against the background of the overriding heritage objective, any action which might jeopardise or otherwise delay the implementation of these "works to an important heritage asset at the cusp of being at risk" would be unwelcome.

- The final conclusion is that "on balance, would be better not to insist on a clawback in all the circumstance of this case".

Conclusion

In the light of the above advice, the recommendation now before Members is that the Heads of Terms of the original Section 106 Agreement be modified to exclude a clawback provision with regard to affordable housing.

5. Recommendation(s)

That planning permission be granted at a future date in the event of the Development Control Manager being satisfied as to the prior completion of a Legal Agreement to secure the following:

(i) A planned and agreed phased timetable for the implementation of the proposed works to ensure the listed structures, including the landscape and garden features, are fully restored before the new build is completed/occupied.

(ii) In place of a financial contribution to public open space, an agreed arrangement for public access to the grounds and gardens, and the erection of an Information Board or similar for education benefit.

All conditions and informatives as agreed by the Committee in the Resolution of the 13 September will continue to apply.

6. Financial Implications

- The potential loss of a commuted sum to affordable housing in the event that a residual profit was made in excess of that anticipated in the open book appraisal.
- A risk of costs being awarded against the Council in the event of a refusal of planning permission being challenged on appeal, and particularly in the light of Counsel's opinion.

7. Human Rights

No issues to report.

8. Background Papers

Planning application file 07/01377/FUL
Planning Committee papers for meeting of 13 September 2007
Agenda Item 13
West Wiltshire District Plan 1st Alteration 2004
Counsel's Opinion dated 3 April 2008.

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