

Agenda item No. 6

West Wiltshire District Council

Planning Committee

31 July 2008

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.

This request follows a similar request considered by the Committee at its meeting of 1st June 2006 and 8th March and 13th September, 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 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 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 endeavours to procure the establishment of a medical practice.

In March 2007 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.

At the meeting of September, 2007 the committee resolved

- to decline the request to discharge the section 106 agreement, as it still considers that the owners of the site have not used all reasonable endeavours to procure the establishment of a medical Practice a
- that Community Development and West Wiltshire District Council work with the applicant and interested parties with a view to establishing a medical centre.

Background

Two section 106 agreements 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 on site A (the site that is the subject of this report) 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.

The latter agreement required the owners to 'use all reasonable endeavours to procure the establishment of a doctor's surgery with an option for an ancillary retail pharmacy.' No period was specified for the use of these reasonable endeavours.

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.

Removal of the requirement allowing ten years to find a doctor or dentist willing to practice from a medical centre on the site

Clause 5.4 of the agreement dated 6th February 2004 deleted this requirement. It should be noted however that this ten year period has now ended.

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 – has been 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.

Details of the extent of this marketing exercise which includes marketing the site as a satellite surgery of a larger medical practice and other medical uses have been submitted to the council. These include

- the sales particulars setting out clearly the basis upon which the site was being marketed,
- press advertising and sign boards
- the extent of the mail shots 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.
- reasons why two leading medical journals were not considered appropriate vehicles for advertising the site

Details record initial interest from ten 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.

Actions since September 2007

The marketing exercise of the site by Drewett Neate has continued and goes on today. There has been no interest in bringing this site forward as medical practice.

The Primary Care Trust have publicised proposals for a polyclinic at the Trowbridge Hospital site. This is a clear indication of the PCT's vision for the future of primary health care in Trowbridge. At the time of preparing this report no planning application had been received.

One of the shop units at Hackett Place is now occupied by a branch of a national chain of chemists that includes a pharmacy. A pharmacy is part of the section 106 requirements for this site.

A meeting has taken place with a representatives of the site owners and Sustainable Communities. Sustainable Communities have indicated a community aspiration for a medical practice at Paxcroft Mead

Other Courses of action available to the owners of the site

Proceedings were served by Marston's PLC on the council on 3 July. Marston's claim is for declaratory relief that it has discharged, by performance, its obligations under clauses 5.2 and 5.3 of the Section 106 Agreement dated 6 February 2004. The Council has informed the Court provisionally that it will be defending the action. The claim also seeks damages, which could be substantial, depending on how unreasonable the Court may find the Council has been in not allowing the two clauses of the Section 106 to be discharged. If the Court found the Council to be unreasonable then as well as awarding damages it would award that the Council pay the legal costs of Marston's, which again could be substantial. The Council will also have to meet its own legal costs.

Section 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 agreement was executed. In this case the right of appeal becomes available after 6th February 2009.

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 since June 2006, it is recommended that the committee should agree to modify the agreement dated 6- February 2004 and allow the development of the public house.

The Primary Care Trust have not supported the provision of a medical practice on this site for several years. Their proposals for the Trowbridge Hospital site area give a clear indication of the PCT's vision for the future of primary health care in the Trowbridge area which do not include the development of small medical facilities in the residential areas of the town.

There is now a pharmacy at Hackett Place. This meets part of the section 106 requirements for this site.

Discussions with Sustainable Communities have indicated a community aspiration for a medical practice at Paxcroft Mead. However the above factors, particularly the position of the owners of the site and the PCT make it unlikely that this aspiration will be met.

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 to possible 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 profit 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 including damage being incurred by the owners of the site being awarded against the council.

Legal and human rights implications

The owner has the right of appeal after five years relating to planning obligations as outlined above and the option of legal action under other areas of law as outlined above.

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