



Planning Committee

24 September 2015

Report from the Head of Planning

For Action

Wards affected:

HARLESDEN

Application for the Modification or Discharge of Planning Obligations under Town and Country Planning Act 1990 (Section 106A) and Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992

SUMMARY

An application under section 106A of the Town and Country Planning Act 1990 (as amended) to modify or discharge a planning obligation was received on 9 June 2015, to modify the obligation to pay a financial contribution within the Legal Agreement dated 4 June 2009 and Deed of Variation dated 26 October 2009 to reduce the financial contribution due.

RECOMMENDATION

That the application to modify or discharge the planning obligation be refused.

SITE DESCRIPTION AND PROPOSAL

The development is known as Florence Court (Site of former Willesden Court House), St Marys Road, London, NW10, a development of 38 residential units and a 162sqm ground floor community facility.

PLANNING HISTORY

On 7 October 2008, Members resolved to grant consent subject to a legal agreement to secure the following benefits, as set out in the original Committee Report (see Appendices 1, 2 and 3 for the original committee report, supplementary report and minutes from the committee meeting).

The legal agreement was negotiated under delegated authority and completed with Mary Development Ltd on 4 June 2009. The principal points of the agreement are as follows:

- 100% affordable housing
- 162sqm of community facility
- A Primary Financial Contribution (PFC) of **£223,200** to be paid 60% on Material Start (commencement) and 40% two years after Material Start, to be utilised by the Council towards the provision and/or improvement of all or some of the following: (a)

education facilities in the Borough; (b) sustainable transport in the local area; (c) sport and/or open space in the area

- A Secondary Financial Contribution (SFC) of **£50,000** to be paid upon Practical Completion or any reduced sum to be agreed in writing by the Council to be utilised by the Council towards off-site community facilities *unless an independent financial appraisal shows a return on the Development of less than 15% of the total cost.*
- Sustainability (Code for Sustainable Homes Level 3) and energy (20% on-site renewable energy generation)

A deed of variation was signed in 26 October 2009 which made minor changes to the tenure of the affordable housing, which is not considered material to this application.

See appendices 4 and 5 for the Legal Agreement and the deed of variation.

The development was commenced in March 2010. Payment of the first instalment of the PFC, due on commencement, was not made until April 2011. Accordingly, payment of the second instalment of PFC was due on March 2012 (two years after commencement).

In November 2011 the Council agreed to waive the SFC on grounds of viability.

Payment of the second instalment of the PFC was not received on March 2012. Mary Developments Ltd were pursued by letter for late payment in March 2014. This letter was returned in late March 2014. Your officers undertook steps to ascertain the identity of the land owners by carrying out searches of the Land Registry. This revealed the land had been sold to Catalyst Housing Ltd and a letter was issued to that company in May 2014, alerting them of their obligations under the legal agreement as successors in title. No response was received and in October 2014 an invoice was issued by FSC to Catalyst Housing Ltd. Catalyst Housing Ltd advised officers in May 2015 that the responsibilities under the legal agreement remained with Kitewood Ltd, who were behind Mary Developments Ltd. An invoice was issued to Kitewood in May 2015.

CONSULTATION

A press notice was published on 2 July 2015. No responses were received.

POLICY CONSIDERATIONS

Section 106 agreements over five years old are eligible for a specific statutory process under section 106A which allows an application to be submitted to the local planning authority requesting that it be modified or discharged.

In accordance with the Legislation, the local planning authority must consider whether the obligation(s) contained in the section 106 agreement still serves a "useful purpose". In making such a determination, the local planning authority can reach one of three conclusions (section 106A(6)):

- that the planning obligation shall continue to have effect without modification;
- that the obligation no longer serves a useful purpose, in which case the local planning authority shall discharge it; or
- that the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, in which case it shall have effect subject to those modifications

REMARKS

This development is complete and occupied.

A statement and cost summaries have been submitted in support of the application. The applicant has given the following reason for applying for the modification:

“The development of the land for a 100% affordable housing scheme has resulted in a scheme that has not made the development company any profit. Payment of the outstanding s106 costs will result in the company making a significant loss.”

The statement further explains the applicant’s reasoning: (1) the development is wholly affordable and the Council should provide flexibility in delivering affordable housing and not unnecessarily burden the developer with contributions that impact its viability and deliverability; (2) under CIL, social housing is exempt from making a contribution to infrastructure and it would be equitable for this to be taken into account when considering this application; (3) the development will produce a negative return.

Your officers respond as follows:

1. the development is completed as 100% affordable housing; reducing the PFC would have no effect on the deliverability of this affordable housing;
2. the provisions of the CIL Regulations are irrelevant to this application: consent was granted and the legal agreement signed before CIL was introduced;
3. The payment of the PFC is not subject to viability: the applicant entered into the legal agreement and covenanted to pay the PFC willingly, as a condition of gaining planning consent. That the developer failed to pay the PFC on time and subsequently this project may not have met their financial expectations is not grounds for the Council to forego its right to pursue the payment of the second instalment of the PFC.

In accordance with section 106A(6), the obligation continues to serve a useful purpose: this financial contribution is required to provide infrastructure (education in the borough, sustainable transportation in the local area, sports and/or open space in the area) to mitigate the impact of the development and to make it acceptable in planning terms. The sum owed was calculated in accordance with the approved methodology set out in the adopted Supplementary Planning Document for S106 Obligations 2007. The obligation would not serve that purpose equally well if it were modified to reduce the PFC by 40%, as the Council would be unable to provide the level of mitigation required.

The applicant also seeks to avoid payment of the monitoring fees. The applicant was a willingly signatory to the Legal Agreement which includes a clause requiring the payment of reasonable fees to monitor compliance with the terms of the agreement.

FINANCIAL IMPLICATIONS

The outstanding sum is £89,280 plus indexation plus the monitoring fee of £1,750 which takes the total outstanding to £107,803. The failure to ensure payment of this obligation would limit the Council’s ability to provide infrastructure necessary to make this application acceptable in planning terms whilst the failure to pay the monitoring fee will limit officer’s ability to ensure compliance with the terms of the legal agreement now and in the future.

BACKGROUND PAPERS

- Appendix 1 – Committee report (7 Oct 2008)
- Appendix 2 – Supplementary report (7 Oct 2008)
- Appendix 3 – Committee minutes (7 Oct 2008)
- Appendix 4 – Legal agreement (4 June 2009)
- Appendix 5 – Deed of variation (26 October 2009)

CONTACT OFFICERS

Any person wishing to inspect the above papers should contact Angus Saunders, Development Funds & Information Officer 020 8937 5237

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