

# COMMITTEE REPORT

Planning Committee on  
Item No  
Case Number

7 February 2024  
04  
N/A

## SITE INFORMATION

RECEIVED	N/A
WARD	Wembley Hill
PLANNING AREA	Brent Connects Wembley
LOCATION	Fairgate House, 390-400 and 402-408, High Road, Wembley, HA9
PROPOSAL	<p>Deed of Variation to the Deed of Agreement dated 3rd May 2023 under Section 106 under the Town and Country Planning Act 1990, as amended in relation to planning application reference: 22/2225 for the following development:</p> <p><i>Demolition of existing buildings and construction of an up to part 13 and part 17 storeys (including ground level) building comprising purpose built student bed spaces (Use Class Sui Generis) together with ancillary communal facilities, flexible non-residential floor space (Use Class E), cycle parking, mechanical plant, landscaping together with other associated works</i></p> <p>The Deed of Variation would secure the following changes:</p> <ul style="list-style-type: none"><li>• The removal of the requirement to provide student bedspaces at affordable rent levels within the development (the extant scheme secured 122 affordable student bed spaces on site)</li><li>• To secure the provision of a financial contribution towards affordable housing (a payment in lieu) of £2.224 m to be utilised to fund the provision of additional permanent low-cost rent affordable housing, being affordable housing that is provided that goes beyond the minimum secured through the relevant planning consents for the site(s).</li><li>• Changes to the early stage review and the incorporation of a late stage viability review mechanism, in connection with the new off-site affordable housing payment.</li></ul>
PLAN NO'S	N/A
LINK TO DOCUMENTS ASSOCIATED WITH THIS PLANNING APPLICATION	N/A

## RECOMMENDATIONS

That the Planning Committee resolves to enter into a Deed of Variation under Section 106A of the Planning Act to vary the Section 106 agreement associated with planning application reference 22/2225 and delegates authority to the Head of Planning and Development to agree the wording of the Deed of Variation.

The Deed of Variation would secure changes to the obligations secured through the legal agreement to require the payment of a financial contribution of £2.224 million (indexed from date of decision) towards the provision of additional low-cost rented Affordable Housing (within Use Class C3) and would remove the requirement to provide on-site Affordable Student Accommodation.

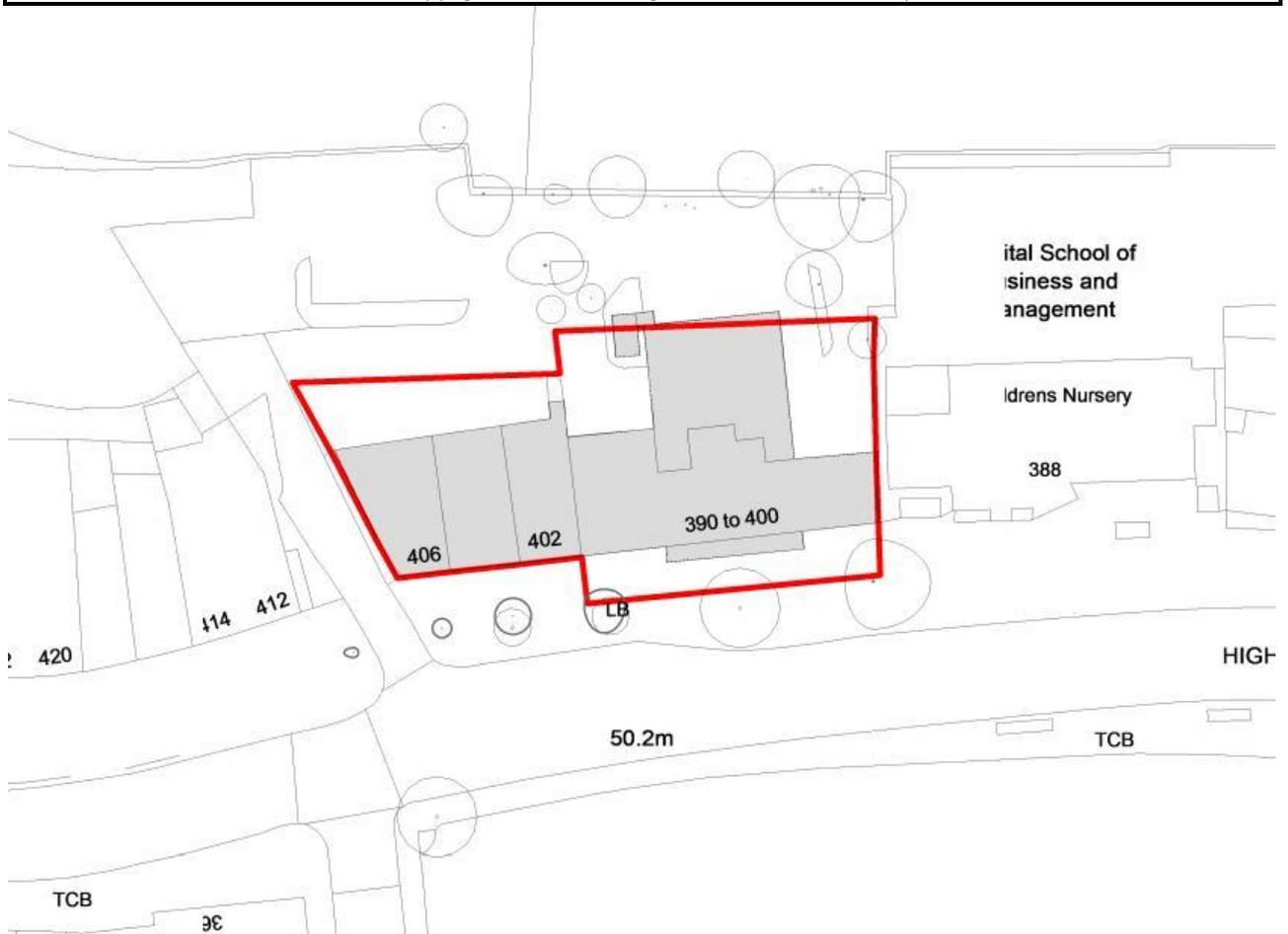
## SITE MAP



### Planning Committee Map

Site address: Fairgate House, 390-400 and 402-408, High Road, Wembley, HA9

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This map is indicative only.

## PROPOSAL IN DETAIL

### Background – planning history

Planning permission was granted in May 2022 for the demolition of the existing buildings on site and the construction of a part 13 and part 17 storey building comprising purpose built student accommodation. This also included ancillary communal facilities, flexible non-residential floor space (Use Class E), cycle parking, mechanical plant, landscaping together with other associated works.

A subsequent application under Section 73 was submitted for amendments to the approved scheme to amend planning conditions 2 (development built in accordance with approved plans and/or documents), 4 (commercial floor space - Use Class E) and 31 (storey heights of building) which would result in changes to the form and layout of the permission. 10 additional student bedspaces were also proposed from the original permission and the proposal would result in a slight reduction in student accommodation floorspace from 11,257.2 sq.m. to 10,958.78 sq.m. The scheme would also secure the widening of the underpass at the eastern end of the building to allow managed vehicle access to Network Rail land to the rear of the Site, together with other associated minor changes to the scheme. The S73 application also sought to change the requirement to enter into a nominations agreement with a higher education provider so that the developer was required to demonstrate that reasonable endeavours had been taken to enter into such an agreement. The Section 73 application has a resolution to grant consent under delegated authority subject to the completion of a deed of variation to the Section 106 Agreement and stage 2 referral to the GLA.

The removal of the on-site affordable student accommodation and its replacement with an off site payment in lieu contribution towards conventional affordable housing within the Borough was initially also proposed within the Section 73 application. However, this was not the appropriate route to propose such a change and it was removed from that application. Subsequently the request was made to amend the affordable provision under Section 106A of the planning act, which is considered to be the appropriate route for such a change.

The phase 2 scheme at the rear of the site (application reference: 23/2811) also included a payment in lieu towards off site additional permanent affordable housing rather than the delivery of affordable student accommodation on site. The Planning Committee resolved to grant permission for the Phase 2 scheme in December 2023.

### Deed of Variation through Section 106A of Town and Country Planning Act

Section 106A of the Town and Country Planning Act 1990 makes provision for existing planning obligations to be modified or discharged by agreement between the authority and the person or persons by whom the obligation is enforceable. Section 106A enables modification or discharge to be achieved either by an agreement with the local planning authority (which must be executed as a deed), or by an application to the local planning authority.

For obligations entered into after 6 April 2010, an application can only be made after 5 years beginning with the date the obligation has been entered into to. However, the Council may (at its own discretion), agree to vary obligations to a legal agreement within this period. In this case, as the original obligation was made within the last 5 years, an obligation can only be modified or discharged through an agreement with the local planning authority (which must be executed as a deed). In such cases, there is no right of appeal under section 106B if any application is refused.

The applicant has requested that the Council enters into a Deed of Variation to make changes to the obligations associated with the s106 Legal Agreement to secure the following:

- Removal of the requirement to provide the student bedspaces on site at affordable rent levels (the extant scheme secured 122 affordable student bed spaces on site)

- Secure the provision of an off site affordable housing payment in lieu of £2.224m to be utilised towards the provision of additional permanent low-cost rented affordable housing, being affordable housing that is provided that goes beyond the minimum secured through the relevant planning consents for the site(s).
- Changes to the Early stage review and introduction of a late stage viability review to reflect the change to the provision of a payment in lieu.

## EXISTING

The existing site consists of Fairgate House, a vacant seven-storey office building at 390-400 High Road, and Pitsman House, a vacant three-storey office building at 402-406 High Road, both with some retail floorspace at ground floor level. The site is on the north side of the High Road in Wembley Town Centre and is part of a secondary shopping frontage. The site adjoins an area of hardstanding and mixed scrub to the north, and further to the north are railway embankment land and the Chiltern Line railway tracks.

The site is not in a conservation area and does not contain any listed buildings.

## RELEVANT SITE HISTORY

Fairgate House (phase 1)

### **23/3188 Under consideration**

Variation of Conditions 2 (development built in accordance with approved plans and/or documents), 4 (commercial floor space - Use Class E) and 31 (storey heights of building) of Full Planning Permission (ref. 22/2225 dated 3 May 2023), as amended by Non-Material Amendment (ref. 23/2537).

### **23/2437 Granted 18/09/2023**

Non-material amendment (remove number of storeys from development description) of Full Planning Permission reference 22/2225 dated 3 May, 2023, for Demolition of existing buildings and construction of an up to part 13 and part 17 storeys (including ground level) building comprising purpose built student bed spaces (Use Class Sui Generis) together with ancillary communal facilities, flexible non-residential floor space (Use Class E), cycle parking, mechanical plant, landscaping together with other associated works, subject to Deed of Agreement dated 3rd May 2023 under Section 106 of Town and Country Planning Act, 1990, as amended.

### **22/2225 Granted 03/05/2022**

Demolition of existing buildings and construction of an up to part 13 and part 17 storeys (including ground level) building comprising purpose built student bed spaces (Use Class Sui Generis) together with ancillary communal facilities, flexible non-residential floor space (Use Class E), cycle parking, mechanical plant, landscaping together with other associated works, subject to Deed of Agreement dated 3rd May 2023 under Section 106 of Town and Country Planning Act, 1990, as amended.

**Adjoining site:** Land to the rear of Fairgate House (phase 2)

### **23/2811 Planning Committee resolved on 13/12/2023 to grant consent subject to completion of section 106 agreement, stage 2 referral to the GLA and planning conditions**

Erection of 2 purpose-built student accommodation buildings up to 20 and 22 storeys with basement level (Sui Generis) connected at ground floor level by a podium together with ancillary communal facilities, internal and external communal amenity space, cycle parking, mechanical plant, hard and soft landscaping, new public realm, play space and other associated works. This application is accompanied by an Environmental Statement.

## CONSULTATIONS

It should be noted that there is no statutory requirement to carry out public consultation on an application under Section 106A to modify or discharge existing planning obligations.

## DETAILED CONSIDERATIONS

### Proposed Amendments

#### *Acceptability of proposed off-site cash in lieu approach*

1. London Plan policy H15 requires the provision of the maximum level of affordable student accommodation within proposals for purpose-built student accommodation.
2. The consented scheme secured the provision of 122 of the student bedspaces at affordable rent levels. This equated to 35% of the student bed spaces within the consented scheme and therefore qualified for fast track under policy H15 of London Plan. This meant that no financial viability assessment (FVA) was required to be submitted, and only an early stage review was secured within the Section 106 Agreement as set out by policy.
3. The S106A application seeks to remove the requirement to provide the need for any affordable accommodation onsite. Instead a £2.24m Payment in Lieu (PiL) is proposed, which would be utilised for the delivery of additional permanent low-cost rented Use Class C3 affordable housing in the Borough.
4. The proposed contribution towards traditional affordable housing (as opposed to the provision of affordable student accommodation) recognises the very significant need for low-cost rent affordable housing (Social Rent and London Affordable Rent) within the borough. Whilst it would not accord with policy H15 (as it would not secure the provision of affordable student accommodation), it is considered to result in significant benefits given the current levels of need together with the ability to deliver additional affordable homes in the homes within extant consents already held by the Council.
5. Nevertheless, with regard to affordable housing delivery, the starting point as set out in London Plan Policy H4 (Delivering affordable housing) is that it should be provided on site and that it must only be provided off-site or as a cash in lieu in exceptional circumstances. Supporting text (Paragraph 4.4.10) states that cash in lieu contributions should be used in even more limited circumstances, and only where there is detailed evidence to demonstrate that on-site affordable housing delivery is not practical, off-site options have been explored but are not acceptable and that accepting a cash in lieu contribution will not be detrimental to the delivery of mixed and balanced communities.
6. The following policy criteria must also be met in each case:

***Additionality:*** Any cash in lieu payment must result in additional affordable homes over and above any affordable homes that would otherwise be expected to be provided.

***No financial benefit:*** To avoid incentivising off-site provision, there must be no financial benefit to the applicant relative to on-site provision.

***Monitoring:*** Robust monitoring and reporting mechanisms should be put in place to ensure the additional affordable homes are delivered.

***Viability and reviews:*** Where a cash in lieu contribution is proposed then the viability tested route must be followed and schemes will need to be subject to early and late stage review mechanisms.

7. In the context of policy H4, firstly consideration has been given to whether affordable accommodation could be delivered on site. While the provision of affordable student

accommodation would be practical on-site, taking into account the design challenges of the site, its constraints, limited footprint available and proximity to the other developments, it would not be practical to deliver high quality Use Class C3 housing in addition to the student accommodation, including the necessary proportion of family housing that would be required.

8. Secondly, off-site delivery of affordable housing has been considered. The applicant has advised that they do not have any undeveloped land interests in the borough that could deliver the additional affordable housing. It is noted that the applicant is currently on-site with the Euro House development in Wembley, but that construction is well underway, and it is acknowledged that it would be difficult, or operationally impossible to change the tenure of homes at this point in construction. As such, it is acknowledged that the provision of additional affordable housing on this site would be unrealistic, and it is accepted that it would not be practical to require off-site provision.
9. In these circumstances, the alternative is a financial contribution which in this instance would be secured as a PiL towards delivery of conventional C3 affordable housing in the local area. As referred to above, the applicant proposes a PiL of £2.224m, which would be utilised specifically for this purpose, and would enable the provision of additional low-cost rent affordable housing within existing consented schemes, which is considered to be significant planning benefit when considered against the viability assessment. The proposed PiL would equate to the equivalent of approximately 5% affordable student accommodation on-site whereas the extant consent was subject to the fast-track route, securing 35% affordable student bedspaces on site.
10. Delivery of conventional affordable housing is a strategic priority in Brent, with a particular emphasis on Social Rent and London Affordable Rent properties, as stated in the Local Plan. The proposed PiL approach provides the opportunity to help meet these priorities and is welcomed as this would help to address local housing need for low cost rented accommodation. The PiL secured would help contribute towards the delivery of additional traditional C3 affordable homes, which would help to provide additionally of affordable homes for already consented schemes, for which there is the greatest need at local and strategic level. This is considered to carry significant material weight which on balance is considered to be acceptable.
11. There would be a requirement through the s106 agreement that the PiL secured is specifically used to fund additional traditional low cost rent affordable housing, being affordable housing that is provided which goes beyond the minimum secured through relevant planning consents for other site(s) in the Borough. At this stage it is envisaged this could benefit either the Brent Council Homes programme, Wembley Housing Zone programme or the Estate Regeneration programme, where there are a number of potential site(s) across the programmes. The proposed approach is therefore supported by the Council, subject to agreement on the PiL figure.

### ***Assessment of Scheme Viability***

12. As stated in London Plan policy H4, applications proposing off-site or a cash in lieu contribution must follow the viability tested route, and the applicant has submitted a Financial Viability Assessment (FVA) to support the application. The FVA, prepared by Gerald Eve (on the applicant's behalf) has been independently assessed on behalf of the Council by BNP Paribas. Paragraph 4.4.13 of the London Plan states that cash in lieu contributions should provide no financial benefit to the applicant relative to on-site provision and should include review mechanisms.
13. The submitted FVA includes appraisals on different counterfactual scenarios that compare various on-site and off-site affordable student / housing options. These scenarios can be summarised as follows:

*The proposed application* – a student accommodation scheme (100% market rent) with no on-site affordable accommodation.

*Counterfactual 1* – a policy compliant / Fast Track Route compliant student accommodation scheme with 35% on-site affordable student accommodation

*Counterfactual 2* – a market student accommodation scheme alongside Class C3 affordable housing (35% floorspace)

*Counterfactual 3* – wholly residential (Class C3) scenario incorporating 35% on-site affordable housing at a policy compliant tenure mix (70:30)

*Counterfactual 4* – 100% market Class C3 residential scheme with a financial contribution towards off-site affordable housing

14. The applicant's FVA concludes the proposed scheme (with the PiL of £2.24m) would generate the highest gross development value of each of the scenarios and is more viable than the counterfactual examples. None of the other scenarios are considered viable or deliverable, as set out in the submitted FVA. The FVA finds that whilst each scenario generates a deficit, the level of deficit would be lowest in the proposed scheme, meaning the PiL received from the proposed scheme would provide the greatest quantum of affordable housing.
15. The Council commissioned BNP Paribas to provide an independent assessment of Gerald Eve's viability assessment to determine whether the affordable housing offer (i.e. the PiL) and Section 106 contributions as proposed have been optimised. Evidence from both reviews has informed what the appropriate (i.e. maximum viable) PiL should be. The following paragraphs summarise how the viability position has evolved following further discussion between the parties.
16. Initial FVA prepared by Gerald Eve found the proposed scheme (with a PiL of £2.24m) to be unviable, resulting in a viability deficit of -£11.9m.
17. BNP Paribas review raised several areas of difference, these include (but are not limited to), the adopted yield for the student accommodation, finance rates, operating expense costs, build costs and the benchmark land value (BLV). On this basis it was initially concluded the proposed development would generate a deficit of -£240,115 against the BLV.
18. A rebuttal was subsequently provided by Gerald Eve, this disagreed with BNP Paribas adjustments to inputs and assumptions and initial conclusions overall providing additional evidence to support this. The FVA's originally adopted yield of 4.75% has been maintained, and justification provided for this; the operating expense cost assumptions have been maintained as originally stated; the build costs retained; a finance rate (7%) suggested and the BLV applied by BNP Paribas (£3,443,768) has been accepted. It was concluded the proposed scheme (with a PiL of £2.24m) to be unviable, with a 9.12% return on GDV, which is some way below the developers target return on GDV, of 15%, resulting in a viability deficit of £4,967,610.
19. In conclusion, and on the basis of the degree to which the proposed scheme is agreed to be in deficit (£4.967m), and agreement that each of the counterfactual scenarios are even less unviable and deliverable than the proposed scheme, including where 35% affordable student accommodation is provided on site, the proposed PiL of £2.224m is considered the maximum viable.
20. The proposed PiL of £2.224m equates to 5% provision, which although is somewhat short of 35% on an equivalency basis, this is backed up by the agreed viability position, and therefore represents the maximum viable. Securing this payment would, it is considered result in the greater public benefit than affordable student accommodation being delivered on-site, and meeting an identified local need within the Borough.
21. In accordance with London Plan policy, it is recommended that s106 obligations secure early and late stage review mechanisms to capture any uplift.

### **Balance of benefit and harm**

22. As discussed above, the proposed financial contribution would equate to the provision of approximately 5 % on-site affordable student accommodation. While it has been demonstrated that this represents the maximum viable contribution, the Council must consider whether the reduced provision would result in a different outcome when weighing the planning balance (of benefit and harm) associated with the development as a whole. The scheme (LPA 22/2225) was noted to result in some impacts, including some daylight and sunlight impacts beyond BRE guidelines and an Urban Greening Factor which was marginally below policy targets. However, the daylight and sunlight impacts were considered to be reflective of the emerging context (within a designated tall building zone) while the opportunities for greening had been optimised and the proposal resulted in a significant gain in biodiversity. The full assessment of the original scheme was set out within the committee report for that application  
<https://democracy.brent.gov.uk/ieListDocuments.aspx?CId=115&MId=7129&Ver=4> .
23. The proposal would continue to result in significant benefits, including the regeneration of the site within a Growth Area, the provision of student accommodation (which meets a London wide need) and the provision of the contribution towards affordable housing, enabling the provision of low-cost rent affordable homes. It is considered that the benefits associated with the development as a whole will continue to outweigh the harm.

### **Conclusion**

24. It is recognised that there is a London wide need for affordable student accommodation and the proposed change in the provision (to a Payment in Lieu towards traditional affordable housing) would result in the affordable provision diverging from the requirements set out in London Plan Policy H15. However, given the very significant need for low-cost rent affordable homes (Social and London Affordable Rent) and the presence of extant consents held by the Council within which additional affordable housing could be provided, it is considered that a change to a payment in lieu would result in significant planning benefits.
25. It is considered that there are exceptional circumstances for the PiL approach to be supported in this particular instance, as set out above. This offers greater public benefit to Brent by contributing towards addressing local and strategic housing needs for conventional Use Class C3 affordable accommodation. It is recognised that the proposed payment in lieu would represent a significant reduction when compared to the extant consent which was subject to the fast-track approach. However, the contribution would represent the maximum viable affordable contribution. The benefits of the development are considered to outweigh the harm associated with the scheme. It is recommended that members delegate authority to the Head of Planning and Development Services to enter into a Deed of Variation to secure the legal obligations set out above.