

Report to: PLANNING COMMITTEE

Date: 15 December 2016

Report from: Assistant Director of Housing and Built Environment

Application Address: **Station Plaza, Station Approach, Hastings**
Proposal: **Application to modify existing planning obligation - namely Section 106 agreement relating to Planning Permission HS/FA/06/00983, amendment to Affordable Housing Requirements**

Application No: **HS/LA/16/00344**

Recommendation: **Agree Change**

Ward: CASTLE
File No: DE90000X
Applicant: Indigo Planning Ltd Swan Court Worple Road London SW19 4JS

Interest: Developer
Existing Use: Mixed Use

Policies
Conservation Area: No
Listed Building: No

Public Consultation
Adj. Properties: Yes
Advertisement: No
Letters of Objection: 4
Petitions Received: 0

Application Status: Not delegated - More than 2 letters of objection received

Site and Surrounding Area

The application site forms part of the Station Plaza complex (granted planning permission in 2006) which currently comprises Sussex Coast College and the Primary Care Trust (PCT) walk in centre and pharmacy. The complex lies between Hastings Station, Devonshire Road, the railway line and South Terrace. The proposed, undeveloped residential buildings will sit immediately in front of the disused sidings of Hastings Station, between Sussex Coast College and South Terrace Bridge.

There are 2 no. car parks serving the college, PCT and application site located beneath podium (street) level. The proposed car park to the application site is accessed separately from the College and PCT car park, alongside the rear of Devonshire Road properties.

Details of application

This is an application made under S106BA of the Town and Country Planning Act to modify the existing S106 affordable housing obligation attached to planning permission HS/FA/06/00983 for a mixed use development of five new buildings comprising education, health, retail and 103 residential units.

The S106 currently requires the provision of 30% onsite affordable housing with a tenure split of 25% social rented and 5% intermediate housing.

The application is supported by the following documents:

Affordable Housing Financial Viability Report, Housing Expectations 27th April 2016
Development appraisal dated 2007

Relevant Planning History

HS/FA/14/00083 Erection of a 7 storey building comprising 223 student rooms and 1 staff/warden flat

Approved 09 June 2014

HS/FA/06/983 Demolition of warehouse and workshops, mixed-use development of five new buildings comprising education, health, retail and 103 residential units (62 x 1 bed, 39 x 2 bed, 2 x 3 bed) with associated open space, landscaping, car parking and engineering works.

Approved 11 May 2007

National and Local Policy/Guidance

Hastings Local Plan - Development Management Plan

Policy LP1 - Considering Planning Applications

Hastings Local Plan - Planning Strategy

Policy CI1 - Infrastructure and Development Contributions

Policy H3 - Provision of Affordable Housing

National Planning Policy Framework (NPPF)

Para 205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.

Section 106 affordable housing requirements - Review and appeal, April 2013 Department for Communities and Local Government

"Unrealistic Section 106 agreements negotiated in differing economic conditions can be an obstacle to house building. The Government is keen to encourage development to come forward, to provide more homes to meet a growing population and to promote construction and economic growth. Stalled schemes due to economically unviable affordable housing requirements result in no development, no regeneration and no community benefit. Reviewing such agreements will result in more housing and more affordable housing than would otherwise be the case".

Consultations comments

District Valuer Service (DVS) - No Objection

The District Valuer Service is of the opinion that any requirement for Affordable Housing cannot be viably provided.

Representations

There have been 4no. objections received raising the following concerns:

Loss of affordable housing (confidential reports)

Greenway provision

Application should be full application not an amendment

Principle of residential/amount of units

Validity of planning permission - as 3 no. conditions not discharged is the approval extant?

Discussion

This is an application submitted under Section 106BA of the Town and Country Planning Act which enables developers to apply to modify an affordable housing obligation.

In 2013, the Growth and Infrastructure Act inserted a new Section 106BA into the 1990 Town and Country Planning Act. This Section introduced a new application and appeal procedure for the review of planning obligations on planning permissions which relate solely to the provision of affordable housing.

This application procedure does not replace existing powers to renegotiate Section 106 agreements on a voluntary basis. The application and appeal procedure assesses the viability of affordable housing requirements only.

It should be noted that this application does not reopen any other planning policy considerations or review the merits of the permitted scheme. The principle of the development and the use of the land is not therefore a consideration in the assessment of this application.

As per the procedure for the assessment of the application under Section 106BA a viability statement was submitted as part of the application by the applicant. The viability statement was subsequently submitted by the Council to the District Valuer Service (DVS) for further assessment.

The conclusion of the DVS is that the requirement for affordable housing cannot be viably provided

Validity of extant planning permission

Following concerns from local residents regarding the validity of the permission granted for a mixed use development (HS/FA/06/00983), legal advice was sought from Legal Services . The query revolves around the non compliance of pre-commencement condition no. 15 for public art. Looking further into this matter it is noted that three conditions have not been discharged, those being condition 13 (travel plan), 15 (public art) and 18 (car park layout). Of these only condition 15 is written as a pre-commencement condition. Below lists the conditions and includes an explanation of their current status for information purposes. The acceptability of this application does not rest on these points:

13. Prior to the occupation of any of the buildings, a green travel plan, with the objective of reducing car-borne traffic to and from the site, shall be submitted to the Local Planning Authority and upon approval in writing shall be implemented to the satisfaction of the authority when the buildings are brought into use. The plan shall include an assessment of the adequacy of bus services to and from the site.

Although a discharge of condition application was submitted in 2011 it was not determined. It is unclear why a decision was not issued. However, given that the site is in a Town Centre location, adjacent to a train station and bus interchange it is not considered expedient to take enforcement action given that the site is in a highly sustainable location.

18. Prior to the occupation of any buildings, a scheme for the management of the car park, including the allocation of spaces and parking charges if appropriate, shall be submitted to the Local Planning Authority and approved in writing. On approval the scheme shall be implemented when the buildings are first occupied.

Although a discharge of condition application was submitted it was not determined. However, approved drawing number 10_010H (lower ground car park) clearly shows 102 residential car parking spaces laid out beneath the flat development. The approved parking layout is also attached to the S106 Agreement and safeguarded in condition 17 which states:

17. The car parking spaces and service areas shown on the approved plans shall be provided prior to the occupation of the development hereby permitted and thereafter shall not be used for any other purpose.

It is not therefore considered expedient to take enforcement action with regard to Condition 18.

15. Prior to commencement of development a scheme for the provision of public art in the Plaza shall be submitted to the Local Planning Authority and on approval in writing shall be implemented prior to the occupation of any of the buildings.

Condition 15 (public art) has not been submitted as a discharge of condition application. Various schemes for public art have been discussed over the years, one of which was a media screen for the front of the college building. A full planning application for a media screen was submitted but was subsequently withdrawn. The absence of public art would not make the development unacceptable in planning terms.

Question of Condition 15 as a pre commencement condition

Pre-commencement conditions are conditions which require various actions to take place before any work can commence on site. A typical example would be wildlife surveys or archaeological investigations. They are pre-commencement conditions because the works/findings are fundamental to the remainder of the development and how it is carried out. If a planning application is granted planning permission subject to a pre-commencement condition and development starts without that pre-commencement condition having been discharged, the development is deemed unlawful because it has not complied with the terms of the pre commencement condition(s) which underpins the acceptability of the development. In considering the validity of the permission to which the S106 subject of this application relates, condition 15 is the only pre-commencement condition and it relates to a requirement for public art. Concern has been raised that if the development is unlawful because the pre-commencement condition has not been complied with, how can the S106 attached to a permission that was not implemented, and now lapsed, be amended. The critical question that needs to be explored is whether the requirement for public art should have been a pre-commencement condition. Would the agreeing of details of public art prior to the commencement of development been essential? If it is deemed that it should not have been a pre-commencement condition, the permission would remain valid and the Council would then determine whether enforcement action would be expedient in progressing the other conditions. The expediency of taking enforcement action is noted above however and not repeated here.

In this instance it is not considered that this condition would render the planning permission invalid. Advice from Legal Services is set below which further explains case law associated with this matter and their conclusion in respect of condition 15 and its requirement for public art:

To be lawfully implemented there are two key considerations:

1. Has there been a material operation as defined by section 56 of the TCPA 1990 that is in accordance with the planning permission, including the approved plans?
2. Has that material operation been carried out without breaching conditions that go to the heart (sometimes called conditions precedent) of the permission?

According to the general principle commonly referred to as the *Whitley* principle, works that contravene conditions precedent cannot be taken as lawfully commencing development. *R (on the application of Hart Aggregates Ltd) v Hartlepool BC* [2005] is authority that this principle does not apply to all conditions but only to those which 'go to the heart of the permission'. The issue was considered again in *Bedford Borough Council v The Secretary of*

State for Communities and Local Government and Aleksander Stanislaw Murzyn [2008]. This case concerned the refusal of the local planning authority to issue a certificate of lawful use or development for a barn conversion. The local planning authority took the view that the development that had been carried out was unlawful as two conditions attached to the planning permission for the development (requiring the approval of the landscaping scheme and boundary treatment prior to commencement) had not been complied with. It was found by an inspector on appeal and subsequently in the High Court that neither of these conditions were 'true conditions precedent'. Therefore, although the conditions had been breached, the building works that had been commenced were not, by definition, unlawful. It was confirmed by the court that central to the analysis of whether a condition is a 'true' condition precedent is the precise language used in the condition. It was also appropriate to consider the nature and extent of the condition and the reasons stated as being behind its imposition. If the breached condition is not central to the development (and landscaping and boundary treatment were found not to be central to a barn conversion), it will not render the development unlawful and the permission remains 'alive'. This case is of particular interest given the comparison with the condition in dispute regarding provision of public art.

A true condition precedent must both prohibit development without compliance with it and must also go to the heart of the permission (and not merely be concerned with some minor detail). If not a condition precedent, then this breach of condition will not have rendered the development as a whole unlawful (although there is, of course, a breach of planning control comprising the breach of the condition itself, which may require enforcement action limited to that particular breach of condition). It follows that if, on this basis, enforcement action cannot be taken against the development as a whole, then the commencement of that development must be taken to have been lawful.

It is considered that breach of condition does not in any way invalidate the planning permission as the requirement for public art certainly does not go to the heart of the permission.

Conclusion

As the merits of the scheme are not being assessed as part of this application, the only consideration is whether the proposed residential element of the Station Plaza development is viable or unviable with a provision of 30% affordable housing.

Government Guidance is such that building new homes is paramount and local authorities should not be seen to stall house building due to non viability and affordable housing contributions.

Given that the viability submitted by the applicant and assessed by the District Valuer concludes that the scheme is unviable with affordable housing provision it is recommended that the modification of the S106 be approved.

These proposals comply with the development plan in accordance with Section 38 (6) of the Planning and Compulsory Purchase Act 2004 which states:

"If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

The Human Rights considerations have been taken into account fully in balancing the planning issues.

Recommendation

That the Planning Services Manager be authorised to modify the Agreement under Section 106BA of the Town and Country Planning Act 1990 to delete the provision for 30%, affordable housing.

Officer to Contact

Ms K Phillips, Telephone 01424 783250

Background Papers

Application No: HS/LA/16/00344 including all letters and documents