

Decision maker:	Planning Committee
Subject:	15/00788/PAMOD Request to modify legal agreement attached to planning permission ref 09/00643/OUT relating to land at 10 St James's Street Portsea
Report by:	Assistant Director of Culture & City Development
Wards affected:	Charles Dickens
Key decision:	No
Full Council decision:	No

1 Purpose

This relates to a request to modify a legal agreement, completed on 8 December 2009. The agreement secures planning obligations associated with (outline) permission for a halls of residence (ref 09/00643/OUT), which has been implemented. The agreement restricts the way the halls of residence are occupied to ensure that the property does not become permanent dwellings. The principal occupation of the halls of residence (36 study/bedrooms) for term-time accommodation for students would remain unchanged.

A clause of the agreement is sought to be modified. It presently limits occupation to students only and, as a consequence, during the period of the summer vacation the premises may be empty (in accordance with the current terms of the planning agreement). The owner/operators seek temporary accommodation for non-students outside of the academic year (for periods not exceeding 2 months in the case of any individual resident). For this reason, they are seeking to vary the agreement.

This matter was originally reported to the meeting held on 24 June 2015. The committee resolved that this modification request be deferred to enable the owner/operators to investigate working with the university regarding the use of their car parks.

The owner/operators have provided updated information addressing this case, as set out in a letter dated 6 April 2016 attached as an Appendix, leading now to this report.

2 Recommendations

That the agreement be varied (within three months of the date of the Committee's decision) so that during academic terms only students may occupy the accommodation (as now) and at all other times the accommodation must be used as temporary residential accommodation for periods not exceeding two months in the case of any individual resident so occupying any of the accommodation at such times.

3 Background

The owners/operators of two sites for halls of residence branded 'Unilife' providing term-time accommodation at 61 Earlsdon Street and 10 St James's Street implemented permissions in March 2012 and December 2009 respectively. Both permissions were subject to legal agreements containing, amongst other things, clauses restricting the use and occupation in the halls of residence for no purpose other than as residential accommodation for students during their period of study.

In the adopted Student Halls of Residence Supplementary Planning Document the standard provisions seek to secure that "*During University of Portsmouth Academic Terms not to use nor permit or allow the use of any of the<insert> study/bedrooms in the Halls of Residence for any purpose other than as temporary residential accommodation for a Student during his or her period of study*".

The same 'Unilife' developer secured planning permission on 22 Middle Street for a proposed halls of residence, in 2013. The development is restricted to use as specialist residential accommodation for students by legal agreement but includes provision for limited and temporary 'unrestricted' (non-student) occupation outside of term time.

The applicants' agent accompanying letter includes the following comments: "*The ability to make student accommodation at St James's Street available to provide temporary accommodation for non-students and use out of term time to support events such as conferences, seminars and a whole range of cultural attractions would (as at Middle Street) contribute to the wider local economy of the City and business community (through investment and spend), including leisure and tourism. This could include events hosted or operated by the University.*"

4 Representations

One representation was received and previously reported. Whilst it comments generally about the quality of construction on a very tight site "However I am very disappointed in the strong yellow colour of the finish of the structure. The detailed original design agreed with your planning and conservation officers called for a white structure over a small brick plinth."

This approved white finish 'colour' for the new building complements the adjoining award winning University Portland building designed by the late Sir Colin Stansfield Smith and Hampshire CC Architects Department. The strong yellow colour prevents the intended composition and it is considered to do nothing for the streetscape.

In the representation it suggests if the City is minded to extend the buildings use in the manner of this application which would be assumed to increase its overall profitability, in return for the amendment to the planning approval the owners should undertake to repaint the building in a white finish, before the new use can be implemented.

The building has been finished in a 'through colour' render but there is now precedent in the City for the redecoration over such finishes using the appropriate spirit based paints, manufactured by national paint companies, such as the former Horseshoe PH site

development by PLC Architects at Kings Road Southsea (roundabout). The representation comments "I do not think the cost of such work would be unreasonable if set against the continued long term additional rents such an amendment would provide."

5 Assistant Director of Culture & City Development comments

The request to modify a legal agreement at 10 St James's Street would be consistent with the Student Halls of Residence SPD and more recent decisions securing planning obligations for other students halls of residence; unrestricted use outside of term time, additional to the principal occupation as a halls of residence for students during the academic term, presents a more sustainable approach to development that avoids empty property and, as outlined by the agents, some potential contribution to the local economy.

The agents have drawn attention to the fact that "The Council has previously supported and agreed to the use of Unilife student accommodation out of term time elsewhere in the City at Middle Street with no need to consider alternate car parking arrangements (in that case for 124 study bedrooms)." This is correct and the same provisions accepted for other halls of residence now being developed at 'Zurich House' (1000 study/bedrooms) and Greetham Street (836 study/bedrooms). The merits of allowing temporary short-stay accommodation outside of term time contributing to the local economy has been held to outweigh any impact on parking demand.

The letter from the applicant's agent comments that the UoP has a car park ('Portland') next to 10 St James's Street with spaces to park 50 cars (including 4 disabled bays). During the vacation period when the car park would have little or no UoP use, the car park would be available to occupiers of Unilife.

As previously reported, there is no justification for amendment to the colour finish of this building or relevance to the applicant's modification request. The original outline application (ref 09/00643/OUT) excluded appearance and landscaping, for Reserved Matters approval. The Reserved Matters application ref 10/00143/REM proposed external materials to include a render finish in *white or off white* (above a brick plinth). The 'cream' colour render finish accords with the Reserved Matters approval.

6 Highways comments

The Highways Authority comment that the site falls within a highly sustainable location, where reliance on the private car is not necessary and having regard to permit controls there is no available on-street car parking (but ample cycle parking should this be required). The Highways team raise no objection to these premises being used outside of term time, although suggest an advisory: 'The web site and any information communicated to enquiries for the use of this accommodation includes information on the fact that there is no available car parking within the near vicinity of the site, and any cars would need to be parked in public car parks'.

7 Equality impact assessment (EIA)

The document is a consultation document and therefore there is no significant impact.

8 Legal services' comments

The statutory provisions of Section 106A (S106A) regulate the modification and discharge of planning agreements made pursuant to Section 106 Town and Country Planning Act, 1990 ("the Act"). An agreement may only be modified by deed undertaken in accordance with the provisions of S106A. The effect of the provisions is that where an agreement (which does not relate to affordable housing provision) has been completed for a period in excess of five years, it may be modified by agreement with the local planning authority responsible for its enforcement. The consent of all parties against whom the modified agreement is enforceable is required. An application has been made on the standard form available which proposes the specific terms of the modification required.

Having been completed on 8th December 2009, the agreement in this case is in excess of 5 years old. In such a case S106A provides a statutory process of application for modification or discharge of the agreement. The Member's decision is subject to a right of appeal to the Secretary of State in the same way as any other form of planning application. Such an application for modification is made pursuant to Section 106A(3) and must be submitted and determined in accordance with the statutory provisions.

By S106A subsection (6), the authority may determine

- That the planning obligation shall continue to have effect without modification
- If it no longer serves a useful purpose, that it shall be discharged (this does not have to be a useful planning purpose)
- If 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, that it shall have effect subject to those modifications.

It has been judicially determined that in the case of an application under Section 106A the Council have only the discretions provided for by the Act. It is not open to the Council to make a decision that the agreement might be modified, but rather than a modification in the terms proposed within the application, by a modification in some other terms.

In particular, in this case, it is not open to the Council, in determining the application under Section 106A, to require any variation or modification of the development itself.

Having regard to the terms of the modification proposed, and the advice of the City Development Manager, the Member's must therefore determine the application, if they consider that the agreement no longer serves a useful purpose, by resolving that it be discharged, and if they consider that it does serve a useful purpose, in the terms of the modification proposed by the application.

Although the reference is to the terms proposed by the application, if modification is authorised to proceed, the terms of the deed of variation, taken together, would need to be effective to secure the modifying effect approved, rather than use directly the terminology in the application, which may not be apt to achieve the modification effectively. Whilst the revised terms of the covenants would accord with the application, the structure of the

document would have to be one that accorded with the standard legal practice in such matters.

If the recommendation of the Assistant Director of Culture & City Development to modify the agreement is approved by Members, it will be necessary to prepare a Deed of Variation. It is not open to parties to an agreement to vary it by unilateral undertaking.

8 Finance comments

None.

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 Signed by:

Background list of documents: Section 100D of the Local Government Act 1972

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

Title of document	Location
Student Halls of Residence SPD (October 2014) 15/00788/PAMOD - includes <ul style="list-style-type: none"> • Agent's letter dated 8 May 2015 & 6 April 2016 • Copy of the S106 Agreement dated 8 December 2009 	