

Decision maker: Planning Committee - 17 August 2016

Subject: 15/02010/PAMOD - Request to modify legal agreement attached to planning permission 12/01382/FUL relating to land at 249 Fratton Road

Report by: Assistant Director of Culture & City Development

Wards affected: Fratton

Key decision (over £250k): No

This item is accompanied by an appendix containing confidential information relating to the viability of the scheme and therefore the Chair will ask the Committee to pass a formal resolution relating to the exclusion of press and public for the consideration of the exempt information under paragraph no 3 of Schedule 12A to the Local Government Act 1972 relating to Access to Local Authority Information.

The public interest in maintaining the exemption must outweigh the public interest in disclosing the information.

Members are reminded of standing order restrictions on the disclosure of exempt information and are asked to return their exempt documentation to the City Development Manager at the conclusion of the meeting.

The Paragraph 3 exemption covers "Information relating to the financial or business affairs of any particular person (including the authority holding that information)".

[The applicant and their representatives are invited to stay to be questioned by members of the Committee]

1 Purpose

The purpose of the report is to present detail to the Members for their consideration further to their decision taken on 22nd June 2016 relating to a request to modify the legal agreement attached to planning application 12/01382/FUL in relation to affordable housing provision. The report clarifies key facts and the issues that arise in determining this matter.

2 Recommendation

Having regard to the further information, Members approve the proposed modification of the legal agreement to remove the requirement to provide three units of affordable housing.

3 Comments

Since the Planning Committee meeting the applicant and agents for the proposal have met with Planning Officers with a view to challenge the options that are available for affordable housing delivery.

Having regard to the representations made this report seeks to detail facts which need to be fully considered as part of the Members decision making process.

Key Facts

At the time of securing planning permission in December 2013, the proposed redevelopment of the site included a policy compliant affordable housing offer of three (3) on site dwellings.

Legislation and policy provide the mechanism to enable applicants to seek to amend s106 agreements. The application has been made in accordance with these provisions on the basis that the requirement for affordable housing is unviable.

The application was supported by a professionally prepared viability appraisal, which was independently reviewed by the District Valuer, arriving at the conclusion that the scheme is not viable as an open market scheme, with the deficit only increasing where the permitted scheme with affordable housing is delivered.

It is on this basis that the Local Planning Authority recommends the s106 agreement for the site be amended to not require the provision of affordable housing. There are no further material considerations which should be considered. The applicant / owner has exhausted all other avenues prior to making this application to vary the s106 agreement.

The Review of the Development Viability Assessment prepared by DVS Property Specialists dated 19th May 2016 is confidentially provided to enable Members to have full regard to the facts.

Analysis

The Member decision on 22nd June 2016 prevents more than six (6) units, of the total eleven (11), being disposed of without the otherwise provision of the three (3) affordable housing units, as permitted.

The definition of disposal includes the rental occupation of the units, meaning the lawful occupation of the development would result in five (5) vacant units on the site.

Where the Local Planning Authority determines that a planning obligation shall continue to have effect without modification the applicant can appeal the decision, however those appeal rights are not available until five (5) years from the date of the s106, which in this case is December 2018.

In the interim should the applicant commence to occupy more than six (6) units on the site the Local Planning Authority would have the powers to enforce the non-compliance by way of serving an injunction. In addition if an LPA is aware that there is a strong likelihood that a breach of a planning obligation may occur it can seek an injunction to restrain such breach before it takes place, where it considers that such action is necessary and it is expedient to do so. Enforcement action could be taken against any person who entered into the s106, and any person who derives title from that person.

This potentially exposes future owner / occupiers, and may have housing implications for the Authority.

The principle that arises from this application is whether the Local Planning Authority have reasonably considered all the relevant facts with this matter and in arriving at its decision has considered the extent of action it will go to enforce that decision.

Options Going Forward

It is open to the Planning Committee to:

- A Agree to enter into a deed of variation to remove the requirement for affordable housing to prevent properties being competed that cannot be occupied.
- B Decline to enter into a deed of variation and in so doing accept that (on the basis of the applicants submission) five (5) accommodation units will remain vacant until such time that the applicant can appeal this decision to the Secretary of State which would be in December 2018.
- C Decline to enter into a deed of variation and in so doing require the Local Planning Authority to enforce this obligation where the applicant / owners / occupiers commence to unlawfully occupy the development.

4 Representations

No comments have been received.

5 Equality impact assessment (EIA)

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

6 Legal services' comments

The City Solicitor is satisfied that it is within the City Council's powers to approve the recommendation as set out.

Duty to act reasonably

Section 106A of the Town and Country Planning Act 1990 provides that the City Council may agree, with the other parties, to a change in the terms of an agreement. Importantly, the Council is bound to consider the request and any decision made is susceptible to judicial review.

Accordingly, the Council is compelled to consider the request, whether the relevant obligation continues to serve a useful planning purpose and - if minded to refuse - to consider and to articulate the planning purpose to be served by such a refusal.

Given that the passage of time since the entering into the planning obligation has not exceeded 5 years, the applicant is not yet entitled to seek a discharge or modification of

the obligation. However, given the reported impact of this obligation on this stage of the development, it is appropriate that the matter be determined forthwith.

Enforcement Matters

Section 106(5) of the Town and Country Planning Act 1990 ("TCPA") specifically allows a Local Planning Authority ("LPA") to seek an injunction to enforce a breach of a planning obligation.

If the LPA is aware that there is a strong likelihood that a breach of a planning obligation may occur it can seek an injunction to restrain such breach before it takes place, where it considers that such action is necessary and it is expedient to do so. (s. 187B TCPA 1990)

Whilst it is open to the LPA to seek an injunction the courts are unlikely to grant an injunction where an award of damages would be an adequate remedy. An award of damages is intended to put the injured party back into the position that he would have been in had the obligation been complied with. In appropriate cases, the Council may be awarded damages representing what it could have charged for permitting a breach of the obligations.

Where the obligations have already been breached and the properties are occupied the Courts are unlikely to grant an injunction if this would result in a person being removed from their home as this may be considered disproportionate.

In any event the Courts will seek to balance the losses suffered by the Council against the resultant impact an injunction may have on occupiers of the properties, when determining the appropriate remedy.

It is not possible to provide a summary or projection of the likely level of damages, which may be awarded following any such claim.

7 Finance comments

There are no finance implications.

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Signed by:

Appendices:

Appendix 1 - District Valuers Review of applicants viability submission (exempt)

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
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<p>Legal Agreement dated 5th December 2013 Planning Obligations SPD (September 2008) National Planning Policy Framework (March 2012) Providing Affordable Housing in Portsmouth (May 2012) Planning Practice Guidance on viability (March 2015)</p>	<p>Planning Services</p>
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