

REPORT BY THE HEAD OF PLANNING AND PUBLIC PROTECTION

OUTCOME OF PLANNING APPEAL

**DISCHARGE OF PLANNING OBLIGATION RELATING TO PAYMENT OF
COMMUTED SUM FOR THE PROVISION OF AFFORDABLE HOUSING & OPEN
SPACE**

PLAS DERWEN, ABBEY ROAD, LLANGOLLEN

APPLICATION 03/2011/0696

1. PURPOSE OF REPORT

- 1.1 The report relates to the outcome of the above planning appeal which was dealt with by way of an Informal Hearing in Llangollen on 4 September 2012.
- 1.2 The appeal was allowed. The Inspector concluded the Section 106 Obligation no longer served a useful purpose and agreed to its discharge. A copy of the Inspector's decision letter is attached at the end of this report.
- 1.3 The report provides Members with feedback on the appeal and commentary on the issues arising from the case.

2. BACKGROUND

- 2.1 The Informal Hearing in September and the Inspector's decision were the culmination of a long history of events relating to the redevelopment of the site of the old Bryn Derwen Hotel on Abbey Road, Llangollen.
- 2.2 In brief, the history of direct relevance to the case is set out below:
 - The original outline planning permission for the redevelopment of the site in the form of an apartment scheme was granted in August 2005. The issue of the permission was dependent on the completion of a Section 106 Obligation to secure payment of a commuted sum in lieu of on site open space provision; and contained a planning condition requiring approval of a mechanism for provision of 4 affordable houses in Llangollen.
 - The dialogue between the developer and Officers at the time of progressing the outline application, and the decision of Planning Committee to consent to the development was in the context of the Council's Unitary Plan policies and Supplementary Planning Guidance in relation to provision of Affordable Housing and Open Space in connection with new developments. The ability to secure payment of a commuted sum in lieu of on site provision of open space, and the imposition of a condition to secure 4 affordable houses were important material considerations in the weighing up of the planning merits of the outline application.

- Planning Committee subsequently agreed in September 2005 to a variation to the planning condition relating to the provision of 4 affordable houses in Llangollen, by accepting the option of a commuted sum payment to the equivalent value.
 - A revised Section 106 Obligation was completed in June 2006 encompassing both the open space and affordable housing commuted sums. The respective sums were £47,526 for open space and £226,432 for affordable housing. The commuted sums were subject to indexation and the trigger point for the payments was the occupation of the first apartment.
 - Detailed plans of the 20 apartment scheme were approved at Planning Committee in September 2006.
 - Development commenced on site in 2007, but progress was slow and a number of construction problems were encountered which delayed completion until 2010. It is understood the first apartment was occupied in mid 2010.
 - Representatives of the developer approached Officers prior to completion of the development, to record ongoing financial difficulties and to request consideration of variations to the Section 106 Obligation. Officers advised that any fundamental variations could only be sought by way of formal applications to vary or discharge the Obligations.
 - An application to discharge the Section 106 Obligation (I.e. to waive the requirement to pay the commuted sums referred to above) was submitted to the Council in November 2010. This was considered and refused at Planning Committee in March 2011.
 - A second application to discharge the Section 106 Obligation was submitted in June 2011. The application consisted of detailed information on cash flow, out-turn construction costs, and sales price lists for the apartments. The argument for discharging the Obligation was that sales of apartments could not cover site acquisition and construction costs, and there was a clear cash deficit which could not sustain the commuted sum payment.
 - Planning Committee considered the second application in February 2012. By this time, legal advice had been sought on the relevant 'tests' to be applied to consideration of an application to discharge the Section 106 Obligation. The basis of that advice was that the Obligation still served a useful purpose (the key test to be applied), having regard to the existence of affordable housing need and open space provision in Llangollen, notwithstanding the developers financial circumstances. Planning Committee duly refused to discharge the Obligation, and the developer lodged the appeal which was then the subject of the September 2012 Informal Hearing.
- 2.3 The Council's case at the Informal Hearing in September 2012 was presented by the Planning Section Case Officer Ian Weaver, Principal Solicitor Susan Cordiner, supplemented by contributions from Local Members (Councillors Rhys Hughes and Stuart Davies) along with the Affordable Housing Officer Maureen Lee, Llangollen Civic Society and Town Council, and interested private individuals.

3. PRINCIPAL ISSUES AT THE APPEAL HEARING

THE APPELLANT'S CASE

3.1 The basis of the appellant's case was:

- The Obligation was entered into in good faith when the housing market was buoyant and there was a demand for apartments.
- The viability of the development had been severely prejudiced by the construction costs, the financial crisis and the collapse of the housing market – particularly affecting the value of apartment developments.
- The value of the development fell in excess of 11% at a time when costs rose and sales of units dried up even at reduced prices.
- Sales returns could not cover development costs, to the extent that the scheme showed a deficit in excess of £3 million.
- The development Company is a single purpose company with no other resources to be drawn on.
- Pursuing the Section 106 payments would simply increase the Company's debts and the prospects of liquidating the Company.
- In the situation where the Company has no money, and has no prospect of any to make a contribution, the Section 106 no longer serves a useful purpose and should be discharged.

The appellants did not challenge the need for affordable housing or open space in Llangollen at any stage of the appeal process.

THE COUNCIL'S CASE

3.2 The Council's main arguments in support of its decision to refuse to discharge the Section 106 Obligation were:

- There was still clear evidence of affordable housing need and a need for contributions to open space provision in Llangollen (supported by planning policy, guidance and updated statements of need from relevant Officers).
- In accepting that consideration had to be given to the developer's financial circumstances, the fact there remained no developer profit from which to provide commuted sum payments should not in itself justify the discharge of an Obligation (the basis of legal advice).
- The Council were aware of the Enforcement scenarios to be addressed, but if there remained a reasonable prospect of obtaining a commuted sum if the Obligation was not discharged, this suggested it still served a useful purpose.

- A developer's projected financial losses should not dictate the outcome of an appeal, since that ran contrary to basic principles that it is not for the public to meet the losses of a private sector scheme or to protect a private company.
- Taking all matters into account, there remained a useful purpose for the Obligation and its discharge was likely to set a significant precedent.

4. THE APPEAL INSPECTOR'S DECISION

- 4.1 In his 3 page decision letter, the Appeal Inspector came to the view that there was no real prospect of the Council recovering the commuted sums, and that he would adopt a 'pragmatic approach' and conclude the Obligation no longer served a useful purpose. He accordingly allowed the appeal and discharged the Obligation.
- 4.2 The decision letter confirms the key test on such appeals is whether an Obligation continues to serve a useful purpose.
- 4.3 The letter highlights the extent of common ground between the parties at the Hearing. There was no challenge to the Council's policies relating to Affordable Housing and Open Space in connection with new development, nor to the clear evidence of continuing need at the time of considering the appeal. There was no dispute over the developer's financial situation or the likely extent of loss on the scheme.
- 4.4 The Inspector's focus is largely on the practicality of the Council securing the Commuted Sum through relevant legal enforcement processes. He spent some time at the Hearing seeking guidance from the Principal Solicitor on this matter. In his decision, he took the view that pursuing the debt would be a difficult matter given the particular circumstances of the appellants, the fact that all the apartments had been sold and that this could ultimately end in stalemate benefiting no one and impacting adversely on the occupiers of the apartments.
- 4.5 The decision to grant the discharge of the Obligation therefore seems to have been taken largely on the Inspector's interpretation of the legal scenarios particular to the enforcement of the debt. The Inspector recognised the Council's concerns over precedent but considered in the circumstances that the lack of prospect of securing the moneys was significant and suggested the Obligation no longer met the 'useful purpose' test.

5. ISSUES ARISING FROM THE APPEAL

- 5.1 The Appeal Inspector's decision letter sets out some important principles which are of relevance to the Council's consideration not only of applications which seek to vary or discharge Section 106 Obligations, but to matters relevant to new applications where assessment of open space and affordable housing provision are involved.

The 'Useful Purpose' Test

5.2 The appeal decision confirmed the overarching issue to address on applications to vary or delete Section 106 Obligations remains whether the Obligation still continues to serve a useful purpose. This is the basic best set in Section 106B of the 1990 Planning Act.

5.3 In examining the 'useful purpose' test, the Appeal Inspector sought discussion between the parties on the following considerations at the Hearing:

- Relevant planning policies and guidance (Unitary Plan, Supplementary Guidance, Planning Policy Wales, Technical Advice Notes and Welsh Government Practice Guidance on Section 106 Agreements)
- Need for affordable housing
- Need for public open space
- Viability Considerations

Officers would suggest the above topics are likely to assume significance in relation to any new application for housing development and any challenge to existing Section 106 Obligations.

Relevant Planning Policies and Guidance

5.4 The appeal outcome confirmed support for the Council's policies and guidance requiring the provision of open space and affordable housing with new development, where it can be established that there is clear evidence of such need in a particular locality. The Council's policies and guidance remain consistent with Welsh Government's approach to provision of open space and affordable housing in Planning Policy Wales and Technical Advice Note 2.

5.5 It was also clear from the Informal Hearing and the Inspector's decision letter that the idea of payments of commuted sums in lieu of on site provision of open space and affordable housing is an acceptable approach to deliver resources and provide facilities elsewhere in an area. In circumstances where it is physically impossible to provide useable open space, and affordable housing in a particular scheme may be an impractical option as a consequence of the detailing of a development or a remote location, commuted sums offer a useful mechanism to generate sums for use in improving recreation facilities and contributing to affordable housing initiatives under the control of the Council.

5.6 The decision highlights the need to apply policy and guidance appropriately in the light of the financial viability of a scheme. There is a potential for challenges to a number of existing Section 106 Agreements relating to as yet unbuilt, and partly complete housing schemes, and the likelihood of new applications containing detailed financial viability analysis to argue a case for reduced or no open space or affordable provision. These will oblige detailed evaluation in order to inform Members of the case to insist on provision. Officers are considering options for neutral 'external assessment' of

submissions and how updated Supplementary Planning Guidance may assist consideration of viability issues.

Need for Affordable Housing and Open Space

- 5.7 There was no challenge to the Council's evidence at the appeal over the existence of need for affordable housing and open space in Llangollen. The Inspector makes note in his decision of the continuing high need for affordable housing, and additional pressures on existing open space in Llangollen. It remains incumbent, however on the Council to ensure when making decisions on new applications and when addressing proposals to vary or delete Section 106 Obligations, that there is clear, up to date evidence of continuing need for affordable housing and open space provision at the time of making a decision. It has therefore to be recognised that at appeal, little or no weight may be attached to the need for provision at the time an original decision was made on an application, where a Section 106 Obligation has been used to help deliver commuted sum payments.

Viability Considerations and Legal Enforcement of Debts

- 5.8 It is clear from the contents of the Inspector's decision that the key issues he considered relevant to the Plas Derwen case were the developer's financial circumstances at the time of considering the appeal, and the prospects of the Council actually recovering the outstanding commuted sums. The significance of this approach can not be overlooked as it was applied in the context of advice from Welsh Government in September 2009 on the delivery of affordable housing using Section 106 agreements, which refers to the need for Councils to take a pragmatic approach and not ignore economic realities and stick to a policy requirement drafted and approved at different times.
- 5.9 Whilst it is a disappointing decision in setting aside the Section 106 Agreement in this instance, it has to be recognised that in this and other cases nationally, Inspectors are reflecting government pressures for local Councils to re-think their Section 106 demands and accept the reality of economic problems being faced by developers in starting and progressing schemes.
- 5.10 The decision on the appeal is notable for its focus on the legal process of recovering the commuted sum debt. The final conclusion that the slim prospect of recovery and the other implications meant that the obligation no longer served a useful purpose is particularly significant.

6. DEVELOPMENTS SINCE THE APPEAL DECISION

- 6.1 Following discussion between Officers and Members, the Legal Officer sought further advice from Counsel on the merits of Judicial Review of the Inspector's decision. Challenge by Judicial Review can only be pursued where it can be shown that a decision is unfair, illegal, irrational or disproportionate.

6.2 The advice from Counsel was:

- That there was no procedural irregularity.
- The decision is not illegal – the Inspector has reached conclusions from the evidence before him which, in the main, was not in dispute between the parties. It cannot be said that he has erred in law.
- The Inspector followed the guidance as regards applicable policies relating to Section 106 Agreements and their modification/discharge. He considered specifically the Welsh Government's advice September 2009 – Delivering Affordable Housing using Section 106 Agreements and the Inspectorate's own view that it would be unreasonable to ignore economic realities and adhere to something which was drafted at different times, i.e. a more buoyant market.
- It was accepted that the planning need continued and the single issue of dispute was whether or not there was a reasonable prospect of obtaining the sums due if the obligation was discharged.
- In terms of whether there was a reasonable prospect of success, the Inspector considered everything before him in this respect. This included that all apartments have been built and sold, the Appellant is a single purpose company with no significant assets, the extent of deficit in excess of £3m, the position of the mortgagee and the very likely absence of any real prospect of recovery and it cannot be said that he came to an irrational/perverse decision.

6.3 For the above reasons, Counsel found that the Inspector properly concluded that the obligation no longer served a useful planning purpose and there are no grounds for Judicial Review. Local Members and the Chair and Vice Chair of Planning Committee have been notified previously of Counsel's conclusions.

7. CONCLUSIONS

- 7.1 The report outlines the background to the Plas Derwen appeal and issues which arose from the exchanges at the Informal Hearing. The Inspector's decision on whether the Section 106 Obligation still served a useful purpose hinged on the relatively narrow issue of the prospects of the Council recovering the commuted sums given the financial circumstances of the developer.
- 7.2 Having regard to the outcome, Officers share Members' disappointment over the implications for the consideration of new applications and ones seeking variation or discharge of Section 106 Obligations. The messages from the Inspector's decision are, nonetheless, clear and can not be ignored. They oblige Officers and Members to urgently consider how best to handle future applications and legal agreements.
- 7.3 Officers are therefore suggesting a fundamental review of the approach to the use of Section 106 Obligations. A paper is being prepared for consideration at a future

Scrutiny Committee to cover a range of issues pertaining to the whole process, including -

- the approach to the negotiation of Section 106 Obligations
- the system of scrutiny of financial viability information to determine the case for full, reduced, or no affordable housing, or open space provision
- the contents / terms of Section 106 Obligations
- the potential use of bonds to secure payments
- the timing of 'trigger points' for payments, so these are earlier in the life of a scheme
- the monitoring of developments and the system of invoicing for payments
- the system of enforcement of debts through immediate service of notices, etc.
- the development of Supplementary Guidance

7.4 Members feedback on the issues arising from the appeal case and ideas for improving the approach to the consideration of applications and the development of the Section 106 process would be welcomed.

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