

The application referred to in this report is for outline planning permission for the erection of up to 139 dwellings and associated works. Only details of the means of vehicular access to the highway network are for consideration as part of this application, with all other matters reserved for subsequent consideration.

The 13-week period for the determination of this application expired on 9 January 2014. The applicant is being requested to agree an extension of the statutory period (within which an appeal against non determination cannot be made).

This application was considered by the Planning Committee at its meeting on the 7th January.

The resolution of the Committees was that :-

1. Subject to the applicant entering into a Section 106 obligation by 3rd March 2014 to secure
 - i. A financial contribution of £313,926 towards the provision of education facilities
 - ii. In perpetuity, provision of 2 affordable units
 - iii. A management agreement for the long-term maintenance of the open space on the site
 - iv. A contribution of £2,150 towards travel plan monitoring
 - v. That the financial viability assessment be reviewed if the development has not been substantially commenced within 12 months of the grant of planning permission and appropriate adjustments be made to the numbers/sums referred to in (i) and (ii) above,

(i, and ii being on the basis that the development as built is for the full 139 units)

the application was approved subject to conditions relating to the matters indicated in the agenda report

2. Should the matters referred to in (i), (ii), (iii), (iv) and (v) above not be secured by the 3rd March 2014, that the Head of Planning have delegated authority to refuse the application on the grounds indicated in the supplementary report or, if he considers it appropriate, to extend the period of time within which the obligation can be secured.

The application is brought back to the Committee to address a specific matter within the proposed Section 106 obligation which potentially has significant implications for both parties.

RECOMMENDATIONS

1. That the Committee receive a supplementary report on the application (to be issued prior to the meeting), that they accept the broad principles set out in that supplementary report, and give the Head of Planning appropriate authority to conclude an agreement based upon such broad principles;

2. That subject to the applicant agreeing in writing to extend the statutory period to a date yet to be advised, and subject to the Section 106 agreement (securing the obligations listed above) being concluded by no later than a date yet to be advised, planning permission be granted subject to the conditions indicated in the agenda report to the 7th January Planning Committee; and

3. Should the agreement not be secured by the date which is yet to be advised that the Head of Planning have delegated authority to refuse the application on the grounds that without such matters being secured the development would fail to secure appropriate provision for required education facilities, an appropriate level of affordable housing, the provision of adequately maintained public open space, and measures to ensure that the development achieves sustainable development outcomes, and that without such an undertaking, account would not be able to be taken of a change in market conditions and a development that could have made required contributions would not do so; or, if he considers it appropriate, to extend the period of time within which the obligation can be secured.

Material considerations relevant to the issues referred to in this report include:-

National Planning Policy Framework (NPPF) (March 2012)

Draft National Planning Practice Guidance (August 2013)

Circular 11/95 – the use of conditions in planning permissions

Developer Contributions SPD (September 2007)

Affordable Housing SPD (2009)

Staffordshire County Council Education Planning Obligations Policy approved in 2003 and updated in 2008/09

APPLICANT'S/AGENT'S SUBMISSION

Background

They understand that resolution to grant was secured at Committee on 7th January subject to completion of s106 obligations which would include a mechanism to ensure that scheme viability was reviewed 12 months from the date of consent if 'substantial commencement' had not been achieved. They also understand that there was no clarification in the resolution, in the body of the report or through the debate as to what would be required to meet the trigger of 'substantial commencement'.

They note that your Officer's report proposed the same, other than that the trigger period identified was 18 months. As such, they were comfortable with that approach on the understanding that your Officer would agree that the site access works would be deemed as 'substantial commencement'.

Applicant's Preferred Approach

Their preferred approach would be to agree a scope of works that is substantial and can be achieved within a 12 month period- and this could include the completion of the site access works but it is wholly unrealistic that it could include the completion of substantial works to the dwelling units themselves. They have provided a project programme which we have shared with officers and they understand that your Officer recognises this point.

LPA Position

Notwithstanding this, your Officer's judgment is that the construction of a site access is not consistent with your Officer's thoughts as to what 'substantial commencement' is and in light of other decisions that the Council has reached in related matters such as the West Avenue case (albeit that there are differences between the cases).

In terms of the proposal site, it is understood that in recognition of the construction programme that has been provided that officers would be agreeable to an amendment to the trigger dates but that in other respects your Officer would prefer to relay upon the methods used in the West Avenue case. To that end, this would provide for:

- The completion of up to 10 dwelling units to DPC level and the completion of access roads (to base course level) to serve them within 18 months of the date of outline consent;
- The 'practical completion' (a term with a defined meaning in Building Regulation terms) of 15 dwelling units within 24 months of the date of outline consent;
- The practical completion of a further 15 dwelling units within each 12 month period thereafter commencing on the anniversary of the release of outline consent.

Your Officer's preferred position would be that the assessment be undertaken by the DV as there can be no certainty that Gerald Eve or other named consultant would be available or that suitable terms could be agreed.

Applicant Response

Notwithstanding their preference to undertake works that could be completed within 12 months and could be deemed as substantial, your Officer's point is duly noted. As such, they have reflected upon your Officer's preferred approach and comment accordingly.

They firstly address the advice of the Royal Institution of Chartered Surveyors (RICS) guidance document 'Financial viability in Planning'

As a point of principle, it is material to recognise that the 2012 RICS guidance post-dates the release of the West Avenue decision. As such, its advice should be given weight alongside the precedent provided by the West Avenue case. A number of key points emerge from the RICS guidance, and in this context they refer particularly to the reference to re-appraisal as advised at section 3.6.4. It is agreed that this is not a Development Plan Document, but it has been widely employed and thus should be afforded weight as an "industry document."

The RICS guidance agrees it is important to establish the parameters and methodology employed through any re-assessment and also makes very clear that they typically apply to larger schemes and that "as such re-appraisal mechanisms should only be considered in exceptional cases."

It is also clear from this guidance that the whole principle of re-appraisal introduces significant risk for the developer which "undermines the basis of a competitive return as envisaged by the NPPF by introducing uncertainty post the implementation of the development. This may make funding the scheme difficult or unlikely in many cases." It then goes on to state that "it is important to ensure that the drafting of re-appraisal provisions do not result in the...unfortunate effect of stifling development."

It is also very evident from this RICS guidance and indeed the submitted assessment (agreed by the Council's adviser) that the use of Building Cost Information Service (BCIS) indices of the RICS for construction costs are appropriate and that the use of best available information for sale values are similarly acceptable, in addition to the other inputs.

The applicant is also progressing a housing scheme in Wigan and has been given this decision and mechanism as a model of good practice by Wigan MBC. There are of course a number of clauses relevant to the case itself, but on the specifics, they refer the Council to the key issues on re-assessment as bulleted below:

- The trigger for re-assessment is 18 months from the date of signing the S106
- Re-assessment is BCIS index-based
- Following re-assessment, there is no further mechanism to review viability.

The above s106 relates to a larger scheme providing 198 houses, which itself formed part of a much larger mixed-use consent. As such, there is a case to argue that the need for a re-appraisal mechanism on that site was more pressing and that the need for continued re-appraisal would again have had some weight. Nonetheless, it is evident that there has been no requirement for further re-assessment to be undertaken other than the initial one.

The other key point is that there is an acceptance of the use of the BCIS index to undertake the re-assessment of Development Costs and the use of best available sales information to inform Development Value. It is noted that the other costs are retained exactly as is and therefore no link to inflation had.

Applicant Proposal

Taking all of the above on-board, they propose the following which they consider to be a pragmatic response which is robust and equally understood between the parties.

In terms of the proposal site, the s106 would include a clause for re-appraisal. To that end, this would provide for:

1. The provision of the travel plan sum prior to commencement;
2. The provision of the education contribution in two instalments, 50% prior to commencement and the remainder prior to the occupation of the 31st dwelling hereby approved;
3. The provision of the two affordable dwelling units within the first 30 units sold, or the provision of a commuted sum of £53,924 to be made prior to commencement;
4. The completion of up to 10 dwelling units to DPC level and the completion of access roads (to base course level) to serve them within 18 months of the date of outline consent;
5. The practical completion of 15 dwelling units and estate roads within 24 months of the date of outline consent;
6. The onus is on the applicant to provide evidence of above (1 and 2) being completed;
7. In the event that the above is breached then a re-appraisal shall be undertaken by the applicant. The basis of the appraisal shall be informed by the submitted and approved assessment (showing residual figure of £370k). This appraisal would have the build cost figure updated through indexation on the basis of the BCIS Mean Base Construction Costs including prelims (adjudged from point of release of outline consent to the date of any re-appraisal had);
8. Assumed sale values to be indexed from average Land Registry transaction records for 12 month period ending at date of consent, to the 12 month period ending a any subsequent re-appraisal for the localised area;
9. All other input values to be adjusted on a Retail Price Index (RPI) basis;
10. That the above be provided by the applicant within 15 working days of a request to do so by the Council;
11. That the s106 will include an arbitration clause should there be a dispute in these terms- the re-appraisal will be deemed to be agreed if there is no formal request for arbitration within 10 days of the date of receipt of the re-appraisal by the Council. Costs to be equally shared and works to be undertaken from a panel of appointed parties (to include Gerald Eve and the District Valuer)

Their proposal clarifies the proposed payment points and triggers for the s106 items and a mechanism for the affordable units to be delivered on site or by commuted sum. The mechanism for the education contribution is entirely reasonable as the actual impact upon the education service cannot be had until those children are resident. With 100% of the contribution provided before 25% of the dwellings are occupied this is a strongly front-loaded approach.

In terms of the affordable housing provision, the flexibility to provide on or off-site is a clear benefit as it allows the parties to best respond to the marketplace. In any event, there is a commitment to ensure that the affordable provision is delivered early.

In terms of the re-appraisal process, it is considered preferable that this is provided by the applicant and can likely be agreed between the parties as the constituent elements are clearly defined. If arbitration is necessary, advice from within a named panel provides flexibility and comfort that the advice is from a reputable organisation and that this panel is capable of withstanding market

conditions. In general terms, Gerald Eve should be on this list as it is they who have been involved from the outset.

The Council will note that this approach does not include reference to further windows for re-appraisal. It is their judgment that this scheme is not of a major scale and to require it here would conflict with the advice of the leading RICS guidance and was not required in terms of the larger Pemberton case. It is also the case that they have offered to increase the value of input costs on an RPI basis, and as such this ensures that there is sufficient comfort herein to ensure that those would move with inflation. This is inclusive of the values to be attributed to education provision and travel plan contribution.

KEY ISSUES (YOUR OFFICER'S RESPONSE TO THE ABOVE APPLICANT'S SUBMISSION)

Although your Officer has been in discussion with the applicant concerning the issues raised above, the applicant's proposal has only been very recently received. Your officer is broadly accepting of the point that substantial commencement cannot reasonably be expected until 18 months, but the proposals now received raise some issues which require careful consideration. The item is placed on the agenda, in this format, so that members have the opportunity to consider the applicant's proposals in advance of the meeting and because of the importance of the matter being dealt with very promptly given that the application will, by the 11th March, have been received some 21 weeks ago.

Background Papers

Planning files referred to
Planning Documents referred to

Date revised report prepared
28th February 2014