

The Planning Committee resolved, at its meeting of 3<sup>rd</sup> February 2015, to grant full planning permission for the demolition of the former Newcastle Baptist Church and the erection of a residential development containing 14 two bed units and 8 one bed units, subject to the applicant first entering, by the 17<sup>th</sup> March 2015, into Section 106 Obligations to secure the review of the financial assessment of the scheme if there is no substantial commencement of the development within a year of the grant of planning permission and contributions then being made to affordable housing (up to 6 units), and public open space (up to £60,684 index linked) if the scheme is evaluated at that time as able to support such contributions. Any permission to be granted was to be the subject of a number of conditions as set out in the resolution.

Failing completion by the 17<sup>th</sup> March of the above planning obligations the Head of Planning was given delegated authority to either refuse the application on the grounds 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 considered it appropriate, to extend the period of time within which the obligations could be secured

As previously reported at the end of March in the light of the inability of the Council, due to capacity issues at that time within Legal Services, to provide a draft in a timely manner, it was necessary to set a new deadline (for completion of the Section 106) beyond the 31<sup>st</sup> March. In June members were advised that since March the applicant had prepared a draft agreement, but that had not been responded to by your Officer, and they (the applicants) had actively been pursuing progress – i.e. the Council's comments upon the Draft.

**The applicant has now, following the provision of comments in late August by the Council on the Draft prepared by the applicant in early April, requested that the agreement be concluded on the basis that a reappraisal of the financial position is only required if, within two years of the planning permission rather than one, there is no substantial commencement of the development. This report addresses that request.**

**The applicant has also proposed a further alternative and this too also is considered within this report.**

**The reason this item is brought to the Committee as an item of urgent business is that the applicant, who is most concerned about delays on the Council's part, is proposing unless agreement can be reached, to lodge an appeal against the non-determination by the Council of the application, and if the Council is to agree to the applicant's request it needs to do so without delay.**

## **RECOMMENDATIONS**

- 1) That the Committee confirms that it considers that a reappraisal of the financial viability of the development should be required if the development is not substantially commenced within 18 months of the date of the grant of planning permission;**
- 2) That the Committee confirms that it considers clearance of the site in this case would not constitute “substantial commencement” of the development, for the purposes of the desired planning obligation;**
- 3) That the Committee confirms that it considers that the agreement should not be worded so as to accommodate some provisions whereby if the applicant encounters adverse ground conditions on this then, in such circumstances, the deadline in the Section 106 after which a reappraisal would be required can be extended; and**
- 4) That should the applicant not indicate that they are willing to enter into a Section 106 agreement on the basis set out within recommendation 1), within 14 days of being informed of this decision, that the application be refused on the ground that without such an undertaking account would not be able to be appropriately taken of a change in market conditions and a development that could have made required contributions would not do so**

## **Reason for Recommendations**

Whilst the service provided to the applicant has not been satisfactory, and indeed were the matter to go to appeal, an Inspector may find the Council's delay in dealing with the matter to have been unreasonable and the applicant's appeal costs might well then be awarded against the Council, the principle that there should be a financial reappraisal within a reasonably short period should there be no substantial commencement of the scheme is sound and it is considered that the Council should only be prepared to indicate that a reappraisal is required in the event of there being no substantial commencement of the development, as defined by the Council, within 18 months of the date of the planning consent.

## **KEY ISSUES**

The proposed residential development at this site of some 22 units was considered acceptable by the Planning Committee in February 2015. To achieve a policy compliant scheme affordable housing provision was required as was a contribution towards public open space improvement and maintenance. Such a contribution was one that was compliant with the Regulations 122 and 123 of the Community Infrastructure Regulations, being necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development.

The applicant had however advised that in this case the development could not support financially any element of affordable housing provision within the scheme nor any substantial financial contribution towards public open space either.

To ensure that it based its decision upon firm evidence the Council, at the applicant's expense, commissioned the District Valuer to undertake an appraisal. The conclusion of the District Valuer in a report dated 13<sup>th</sup> January 2015 was that on the basis of the developer's appraisal and her own appraisal it was not viable for the developer to either provide any affordable housing whatsoever or to make any financial contribution and to maintain a reasonable profit. Your officers having asked the District Valuer to test various scenarios were satisfied that the District Valuer's conclusion was a sound and robust one. This was accepted by the Committee and the Committee agreed that in the particular circumstances that neither affordable housing nor a public open space contribution should be sought, noting that if the Council were to pursue either affordable housing or a public open space contribution the development would simply not happen and accordingly much needed housing in a sustainable development would not take place.

The report did however conclude by indicating that market conditions and thus viability could change and on this basis it would be quite reasonable and necessary for the Local Planning Authority (LPA) to require the independent financial assessment of the scheme to be reviewed if the development referred to in the planning consent had not substantially commenced within one year of the assessment, and that this would need to be secured via a Section 106 agreement.

The resolution of the Committee itself referred to the trigger for such a reappraisal being substantial commencement not being achieved within a year of the grant of the **planning permission** (reflecting the advice of the District Valuer). The applicant was informed of this immediately following the Committee meeting.

As indicated above subsequent to the Planning Committee the Council did not provide a draft legal agreement to the applicant, as it would normally have done, although it did agree to extend the period of time within which the Section 106 agreement could be completed. The applicants submitted to the Council a draft Section 106 on the 10<sup>th</sup> April 2015.

It was not until the 26<sup>th</sup> August that the Council provided detailed comments upon the Draft legal agreement, the applicant's solicitor having regularly sought such comments from the Council. On the 11<sup>th</sup> August the applicant's solicitor detailed in correspondence costs which his clients had incurred as a direct result of the Council's inactivity and delay, and they notified the Council that their clients would be seeking compensation from the Council. For reasons only of commercial confidentiality it is considered that it would be inappropriate to provide details within this public report. Members should however not that the compensation sought is considerable. Your officers whilst accepting that there has been an unacceptable delay would contest whether such compensation is justified – on the basis that it arises from assumptions made by the applicant as to the timing of receipt of planning permission – assumptions that were made at their own risk.

On the 28<sup>th</sup> August the applicant responded indicating that the biggest problem arising from the amendments sought by the Council to the draft was the "substantial commencement" definition which the Council was seeking to insert into the agreement. The Council's proposal is that "substantial commencement" should mean the completion to damp proof course level of the whole of the ground floor of this flatted development and the construction to base course level only of the access and car parking serving the development.

Such a stage would and should be a point after which it would be most unlikely that the development would not then eventually proceed to completion.

How the delay, on the Council's part, in dealing with the draft Section 106 and thus in issuing the planning permission had damaged the scheme was set out in the correspondence of the 28<sup>th</sup>. Again for reasons only of commercial confidentiality it is not considered appropriate to provide such details within this report.

The point being made by the applicant's solicitor is that had the Council issued the planning permission in a timely manner then the issues would not have arisen and commencement of the building project would not have been set back until 2017 (the original intention being to deliver the development in time for occupation by students at the beginning of the 2016 term (i.e. by September 2016)

Secondly the solicitor indicates that even if his clients could find a way of bringing the project forward expecting them to clear the site and bring the building to damp proof course level is littered with all sorts of issues. The Council's position, he says, is basically asking his clients to take a gamble on unknown ground issues. For example they may find conditions which require remediation and the Council's Land Contamination Officer may not agree remediation in time. Similarly his clients could also discover archaeological issues or generally unknown problems that would inherently cause delays in the progress of the works.

With these issues in mind they state that the agreement must not require a reappraisal should substantial commencement be achieved within 2 years (of the date of grant of planning permission). They indicate that if the Council is unwilling to agree to the above then their clients will be left with no option but to consider referring the matter to the Planning Inspectorate (i.e. to lodge an appeal). The

Council could expect that as part of an appeal, an application for an award of appeal costs against the Council would be made.

In response your officer has acknowledged the extent of the delay in his response to the draft agreement. He has pointed out that the April draft would have needed amendment to reflect the resolution of the Planning Committee would have however been self-evident to the applicant.

The reason for the requirement for a reappraisal of the financial viability is that financial circumstances can change.

The District Valuer herself observes that *“it is likely that market circumstances may change over a reasonable period of time and I would recommend that this assessment should be reviewed, if any planning consent has not been substantially commenced within one year of being granted, or if the development was to be constructed in phases”*.

With it being likely that, subject to agreement being reached, a planning permission could be issued by the end of September a period of at least 20 months (from the date of the District Valuer’s report) could pass prior to any possible reappraisal of the viability of the scheme.

Your officer is not aware of there being any specific government guidance on what would be an appropriate period of time before, in the absence of a substantial commencement, a reappraisal is justified. The RICS Guidance Note “Financial Viability in Planning” does not specifically address the issue. It does consider the reappraisal approach where the decision is to be made prior to the commencement of the development whether or not there should be contributions – but that is not what the Council has been seeking in this case.

The Council’s Developer Contributions SPD similarly provides no guidance. It has however generally been the Council’s practice to seek such reappraisals if there is no substantial commencement within one year of the date of the planning permission – this being on the basis of the consistent advice of the District Valuer on this matter. There have however been at least two exceptions – in the case of the development at Apedale South the reappraisal trigger is a failure to achieve substantial commencement within two years, although the circumstance of the case are very different. In the case of the residential development on Linley Trading Estate the Section 106 refers to an 18 month period from the date of the consent. That case bears some comparison with the proposal here being considered – the development involving the demolition of substantial buildings upon the site

Your officer is not aware of any precedents established by appeal decisions.

On being advised of the view that a year (12 months) was the appropriate period, the applicant’s solicitor again expresses concern about the lack of cooperation by the Council.

He states that despite the terrible way the Council have acted, his clients still think it feasible for them to clear the site and demolish the existing buildings within the next 12 months. If that is not acceptable to the Council then, as an alternative the time limit for bringing the building project to the level now requested by the Council should be extended to a period of 2 years in the light of the Council’s previous failing.

Finally if the Council are not willing to support these proposals then at the very least they expect that officers recommend some provisions within the agreement whereby if his clients encounter adverse ground conditions when they commence development work on the site, then, in such circumstances, the deadline in the Section 106 agreement can be extended to allow these issues to be resolved.

### Conclusion

Your officer has to note that as already indicated clearance of the building on the site would fall well short of the point after which it would be most unlikely that the development would not then eventually proceed to completion. As a trigger point to be referred to it is therefore unsuitable. Similarly 2 years appears to your officer to be an excessive period – one year is the period recommended by the District Valuer. However it is accepted that there is at least one precedent for an 18 month period which does not appear unreasonable particularly given current economic trends since January 2015

– of sharply rising construction costs, as reported to the Committee when it considered the Pepper Street, Keele affordable housing reduction proposal. Finally the request that the Section 106 include provisions that should the developer encounter adverse ground conditions the period be extended is considered both to be contrary to the underlying principle or justification for a reappraisal clause, and furthermore to be incapable of being the subject of legal provisions that have certainty and clarity.

**Policies and Proposals in the approved development plan relevant to this decision:-**

Newcastle- under-Lyme and Stoke-on-Trent Core Spatial Strategy 2006-2026 (CSS)

Policy CSP5: Open Space/Sport/Recreation  
Policy CSP6: Affordable Housing  
Policy CSP10: Planning Obligations

Newcastle-under-Lyme Local Plan 2011 (NLP)

Policy C4 : Open space in new housing areas.  
Policy IM1: Provision of Essential supporting Infrastructure

**Other material considerations include:**

National Planning Policy and guidance

National Planning Policy Framework (March 2012)

National Planning Practice Guidance (March 2014)

Supplementary Planning Documents

Developer Contributions SPD  
Affordable Housing SPD

Background Papers

Planning Policy documents referred to  
Planning files referred to

**Date report prepared**

12<sup>th</sup> September 2015