

The above application was for planning permission for the construction of a 273 room student development with associated communal area and car parking. The application was refused by the Planning Authority on 24<sup>th</sup> May 2016 (the decision notice being issued on the 1<sup>st</sup> June 2016) and an appeal was then lodged against that decision.

**RECOMMENDATION**

**That the decision of your Officer, following consultation with the Chair, that the Council should agree to enter into a Section 106 agreement, be noted**

**Reason for Recommendation**

The matter was urgent, in the light of the deadline imposed by the Planning Inspectorate, and an immediate decision was required which was then taken following consultation with the Chairman. The basis for the decision is explained in the report below

**KEY ISSUES**

As Members may perhaps recall, the Planning Committee refused at its meeting on the 24<sup>th</sup> May 2016 an application (16/00244/FUL) to increase the number of units within the Sky Building on the former Jubilee Baths site (from the already permitted 244 to 273). The decision of the Committee was to refuse the application on the ground that *“the proposed development will result in the loss of residential amenity for occupiers of properties in nearby streets as a result of on-street parking, congestion and pavement parking arising from the development due to the inadequate provision of parking spaces within the development site to address parking demand. The development is therefore contrary to the aims and objectives of the National Planning Policy Framework (2012) and the Ministerial Statement of March 2015.”*

When the original scheme for 244 units had been approved by the Local Planning Authority (ref 15/00166/FUL) this followed the entering into, with the approval of the Planning Committee, of an agreement by the developer and others under Section 106 of the Act which secured both the payment of a sum of money to upgrade a public open space in the vicinity of the development and the payment of a sum of money to pay for the introduction, if justified by the results of 2 on-street parking surveys, of a Traffic Regulation Order (i.e. a residents parking scheme).

In recommending application 16/00244/FUL for approval your officers' advice had been that before any such approval was issued the applicant should be required to enter into a Section 106 obligation by no later than 30<sup>th</sup> June , to secure the following:

- (i) a financial contribution to the enhancement and maintenance of an area of public open space of £219,172 (a greater sum than previously secured, reflecting the additional number of units) and a travel plan monitoring fee of £2,200.
- (ii) a financial contribution of £50,000 to be used to fund a Resident Parking Zone in the event that it has been demonstrated (through surveys secured by condition) that the development has resulted in on street parking problems

The Committee did not, in its decision to refuse the application on the 24<sup>th</sup> May 2016, refer to a lack of such obligations being “on the table”.

An appeal was then lodged against the decision on 16/00244/FUL. In completing and submitting the appeal form in late September the appellants' agents indicated that it was intended to submit a planning obligation with the appeal. In their Statement of Case, in support of their appeal and submitted at the same time, the agents indicated that “the applicant will enter into discussions with the Council with regard to Contributions as part of the planning application process” – even though an appeal had by then been lodged.

In their acknowledgement of the appeal, sent to the principal parties on the 9<sup>th</sup> November, the Planning Inspectorate (PI) stated that if it was intended to submit a planning obligation the party

concerned should read the PI's guidance and a certified copy of such an obligation should be submitted to the PI by the 28<sup>th</sup> December.

On the 14<sup>th</sup> December officers submitted the Council's Statement of Case with respect to the appeal and addressed the issue of the lack of a new planning obligation. The basis for the obtaining of the original Section 106 agreement was explained, and the case was made, in the Statement, that given that there had been no changes in planning circumstances it remained the case that in principle such obligations would comply with CIL Regulations and the adopted Developer Contributions SPD and that *"the development should only be granted planning permission if an appropriate planning obligation is entered into which secures all of the same obligations as already secured subject to an increase in the contribution to improvements to the Queens Gardens to reflect that the increased number of students (an increase to £219,172 compared to the £198,716 already secured)"* and that *"In the absence of such an obligation the appeal should be dismissed"*.

The appellant's agents received, from the Planning Inspectorate, on the 15<sup>th</sup> December, a copy of the LPA's Statement of Case and they then submitted their "Final Comments". In these final comments dated 23<sup>rd</sup> December the agents stated their clients had informed them that they intended to submit a Section 106 agreement for consideration as part of the appeal.

On the 16<sup>th</sup> January your officers became aware that the Planning Inspectorate had now given the appellants what they described as a final deadline of 25<sup>th</sup> January to submit any planning obligation (that was to be taken into account in the consideration of the appeal). Your officers were advised, by the Planning Inspectorate, that there would be no further extension of this period. The agents sought to progress this, some 9 days before the 25<sup>th</sup> January.

The authority to enter into a section 106 agreement rests with the Planning Committee (Planning functions part of Appendix 5 to the Constitution)

The decision about whether or not to enter into a Section 106 agreement is thus for the Planning Committee to make. Appendix 4 of the Council's Constitution in the section headed Matters of urgency in the General Instructions Section indicates that in the event of a matter which is not delegated by the Officer Scheme of Delegation requiring action where there is no scheduled meeting where the matter can be considered by the appropriate Committee (and where the matter does not make or change policy), ....an Executive Director ( having consulted with the Leader or a Cabinet Portfolio holder or the Chair of the appropriate Committee (or in their absence the Vice Chair) shall have delegated authority to take such action, and the action taken be shall be reported to the next available meeting of the..... Committee as appropriate.

Acting on the basis that unless the Planning Inspectorate received a planning obligation by the 25<sup>th</sup> January no account would be taken of that obligation and being of the view that it was in the public interest for the Council to enter into such an agreement, your Officer consulted with the Chairman -the next Planning Committee then being on the 2<sup>nd</sup> February (i.e. after the 25<sup>th</sup> January)

One alternative open to the appellant was to submit a Unilateral Undertaking to the Planning Inspectorate. A unilateral undertaking however cannot bind parties who are not signatories to it, and accordingly from the appellant's perspective it was unlikely to be an attractive prospect, particularly as the existing agreement contains provisions requiring both the repayment with interest (by the Borough Council) of the two parts of the public open space contribution (in the event of them not being spent within 5 years and 15 years respectively) and by the County Council, again with interest, of the Residents Parking Zone Contribution should that sum not be expended within 5 years from the date of a parking survey. Your officer in principle wished to see these obligations continued in any new obligation, in the interests of an appropriate audit trail and the transparency of obligations associated with this development.

The urgency of the decision arose entirely as a consequence of the appellant's dilatoriness - however there were grounds to consider that it would be desirable, from a public interest perspective, for a decision to be made immediately upon this matter.

First of all the appellant had an alternative (a fall back) which they could pursue, if the decision were not made - the preparation and submission by the 25<sup>th</sup> January to the Planning Inspectorate of a

Unilateral Undertaking - this would not tie the recipients of the contributions (the Borough Council and the County Council) to expend the money for any stated purpose and such expenditure would be entirely a matter of their goodwill.

Secondly it was possible that the Inspector might side with the appellants with respect to the reason for refusal of the original application, but consider a planning obligation was justified . This would mean that a further application for planning permission would need to be submitted this time with a Section 106 obligation, to no public benefit at all (and indeed at a cost to the public purse as such an application could potentially be fee exempt).

Thirdly the Council had a particular interest in receiving the public open space contribution (which is to be put towards the enhancement of the Queens Gardens) promptly so a swift resolution of this matter was in the public interest.

The decision to be made was not one that made or changed policy. The Planning Committee previously determined that the 244 unit to be acceptable required such obligations (and they were secured by the original S106 agreement), the only difference is the amount payable to reflect the increased number of units.

On the 27<sup>th</sup> January the appellants obtained a further extension from the Planning Inspectorate – this time to the 31<sup>st</sup> January – a date which still fell before the 2<sup>nd</sup> February Planning Committee.

On that same day following negotiations with the appellant's solicitor the Borough Council signed an agreement. However the appellant did not obtain the signatories of the other parties involved and the 31<sup>st</sup> January passed without a completed obligation being submitted to the Planning Inspector

The action taken (the authorising of the signing of the agreement) is reported to the Planning Committee as required.

There is a postscript to this matter. On the 13<sup>th</sup> February the Planning Inspectorate issued their decision on the matter. A separate report elsewhere on this agenda is provided on that decision, but members may wish to note that the Inspector with respect to the issue of the agreement wrote as follows

*“In the appeal form the appellant states the intention to submit a planning obligation under Section 106 of the Town and Country Planning Act , 1990, as amended. This has not been submitted by the time of my site visit (on 3<sup>rd</sup> January 2017). I allowed additional time for an executed copy of an obligation to be submitted. On the 31<sup>st</sup> January 2017 a draft obligation was provided by the appellant but the document was not signed or dated. The obligation therefore has no legal effect. Under the approach set out in the Planning Inspectorate's Procedural Guidance, I am not required to delay the issuing of a decision to allow further time for a legally binding planning obligation to be submitted. I have therefore determined this appeal on the basis of the information before me”*

## APPENDIX

### **Policies and Proposals in the approved Development Plan relevant to this decision:-**

Newcastle-under-Lyme and Stoke-on-Trent Core Spatial Strategy 2006-2026 (adopted 2009) (CSS)

Policy CSP10: Planning Obligations

Newcastle-under-Lyme Local Plan 2011 (NLP)

Policy IM1: Planning obligations

### **Other material considerations include:**

National Planning Policy Framework (on planning obligations)

National Planning Practice Guidance (on planning obligations, and on appeals )

### **Supplementary Planning Guidance/Documents**

Developer Contributions SPD (September 2007)

### **Background Papers**

Planning file

Planning documents referred to

### **Date report prepared**

17<sup>th</sup> February 2017