

LAND ADJACENT TO SLACKEN LANE
MR STEPHEN LOWNDES

17/00791/FUL

Mr Lowndes is asking the Council to discharge a s106 Planning Obligation previously entered into by him, to pay the Council a sum of £5,579 (Index Linked) towards public open space contribution for improvement of offsite public open space.

The public open space contribution if received is to be used to upgrade the play equipment at Townsfield Close, Talke.

The obligation was entered into prior to the granting of planning permission for a development of 2 detached bungalows in lieu of an earlier proposal for a single dwelling on the site. The obligation was entered into 24th April 2018 and the related permission was subsequently granted on the 20th June 2018.

The development is now complete and the houses are occupied.

RECOMMENDATION

That the Council do not agree discharge the obligation

Reason for recommendation

The Unilateral Undertaking was freely entered into by the parties and the contribution should be paid

Key Issues

An obligation, by Unilateral Undertaking, was entered into by Mr Lowndes's company AGH Holdings and the then Homes and Communities Agency (now Homes England) (as Mortgagee) prior to the granting of planning permission for a development of a 2 detached bungalows in lieu of an earlier proposal for a single dwelling on the site. The obligation was entered into 24th April 2018 and the related permission was subsequently granted on the 20th June 2018.

Payment of the contribution in this case was due either upon the issuing of the planning permission or commencement of the development whichever was the later. In that the development had commenced prior to the issuing of the planning permission payment was due as at 20th June 2018. The sum now due at the time of writing, as a result of the application of both index linking and interest, is £5751..

The development is now complete and the houses are occupied.

Section 106A of the Town and Country Planning Act 1990 allows a person bound by an obligation to apply to the Local Planning Authority to have the obligation discharged.

Because less than 5 years have elapsed since the planning obligation was entered into in this case it follows that the applicant is unable to make a formal application to the Borough Council under Section 106A to revoke or modify the planning obligation. Where such an application is made the LPA may determine

- a) That the obligation shall continue to have effect without modification
- b) If the obligation no longer serves a useful purpose that it shall be discharged

A refusal by the Local Planning Authority to consider the modification of a s.106 agreement within the five year period is judicially reviewable.

The Council needs to address whether it is in the public interest to continue to require the public open space contribution and if it is to explain what planning purpose would be served by a refusal (to discharge the obligation)

As Members will be aware the Planning Committee resolved on the 26th February 2019 to cease to apply the policy of seeking public open space contributions in respect of developments of 10 or less dwellings, other than in the circumstances expressly stated as possible in the Planning Practice Guidance Note. The development referred to in the agreement is such a development.

Mr Lowndes has submitted his reasons for asking the Council to discharge the obligation.

- 1) That when he submitted the application he should have been informed of the change in March 2017 of the Council's policy.
- 2) The delay in the determination of the application causing additional costs to his business
- 3) That the policy from March 2017 (to seek public open space contributions for developments of 10 units or less was contrary to national policy
- 4) That the Council, at the meeting of the Planning Committee held on the 26th February, has accepted this, so it is reasonable to request that the Council agree to discharge the obligation, particularly as the development was only for one unit and is at the lower end of the Government policy on 10 units or less
- 5) That his company has had to pay, in relation to a development off Sandford Street, both for a financial viability appraisal by the District Valuer (£3179) to justify why the development was not financially viable with a public open space contribution and then legal fees (£1000) for a s106 agreement that the Council then asked be drawn up to secure a reappraisal in the event of the development not proceeding. These were unnecessary costs incurred by his business for a planning policy that was flawed based on existing Government Policy

He concludes that his company which is a local house- building company employing local trades people has already incurred significant costs due to the revoked public open space policy and he feels that it is reasonable in all the circumstances that the s.106 obligation should be discharged.

Point 1) has already been the subject of a Corporate complaint which was not upheld by the Customer Relations officer. In any case it is not considered relevant to the decision that the Committee are being asked to make

Point 2) has already been the subject of a Corporate complaint and a complaint to the Ombudsman. The corporate complaint was upheld in part, in that it was found that there had been a significant delay between the receipt of the completed Unilateral Undertaking on 24th April 2018 and issuing of the planning permission. The development initially proceeded without the planning permission and was thus theoretically at the developer's risk

With respect to Point 3) the Council has accepted, following the receipt of the Wade Court decision in February 2019, that its previous policy cannot continue to be pursued. Your Officer's view is that until that decision the Council's position was not an unreasonable one, based as it was upon a literal interpretation of that guidance

Whilst Mr Lowndes's company will have incurred legal fees, these will have been for work undertaken, and such work would only have been undertaken following the receipt of an undertaking to pay the Council's legal costs. The key point is that such legal costs were agreed by the applicant. Had they disagreed with the Council's position – that a public open space contribution was required or (in the case of Sandford Street that a legal agreement was required) – they could have pursued an appeal against the Council's failure to determine the application within the statutory period. They chose not to. In that sense the undertaking was freely entered into.

The Council's position that the additional dwelling will lead to additional demands upon open space in the locality remains, and so it continues to be in the public interest that the payment be made. The contribution continues to serve a clear purpose.

Given that the development has been built out that must have been pursuant to the planning permission. Even if the applicant were to submit a further application for the same development and ask for it to be determined in the light of the Council's new policy the position would still be that the terms of the original obligation apply and the sum would be due. In contrast with those situations where there is a fall back consideration which needs to be taken into account this is not so in this case.

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 CSS)

Policy CSP5: Open space, sport, recreation
Policy CSP10: Planning Obligations

Other Material Considerations

National Planning Policy Framework (NPPF) (2019)
Planning Practice Guidance (PPG) (2019, as amended)

Supplementary Planning Documents/Guidance

Developer Contributions SPD (September 2007)

Views of Consultees

None undertaken

Date report prepared

15th March 2019