



*St Edmundsbury*  
BOROUGH COUNCIL

**DEV/SE/16/59**

# **Development Control Committee**

## **4 August 2016**

### **Planning Application DC/14/0906/FUL**

#### **Land at Station Hill, Bury St Edmunds**

**Date:** 23 January 2014      **Expiry Date:** 29 February 2016 (with agreed extension)  
**Registered:**

**Case Officer:** Gareth Durrant      **Recommendation:** Grant planning permission, subject to Section 106 Agreement

**Parish:** Bury St Edmunds Town      **Ward:** Risbygate

**Proposal:** Erection of 135 no. 1 and 2 bedroom flats with associated access, car parking, landscaping, bin & cycle storage (following demolition of existing buildings), as amended.

**Site:** Land at Station Hill, Bury St Edmunds

**Applicant:** Peal Estates LLP

#### **Synopsis:**

Application under the Town and Country Planning Act 1990 and the (Listed Building and Conservation Areas) Act 1990 and Associated matters.

#### **Recommendation:**

It is recommended that the Committee determine the attached application and associated matters.

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**Background and synopsis:**

**This application was considered previously by the Committee on two occasions culminating in a risk assessment and resolution to grant planning permission at the meeting on 3 December 2015.**

**The planning application is returned to Committee to enable Members to consider a legal point which has emerged since they reached their decision last year.**

**The Committee will recall that a full package of infrastructure measures was secured from the development but, on grounds of adverse financial viability, a reduced package of affordable housing provision was secured. The applicants offered a viability review as part of the S106 Agreement for the development. This was accepted by officers and given weight by Members as part of their consideration of the planning application. Indeed the discussion is documented as part of the recorded minute of the meeting.**

**It has subsequently emerged that it would be potentially unlawful for the Council to secure a viability review clause from a development of the size and type proposed here. In particular, such a clause would be contrary to National Policies set out in the NPPG and, as a consequence, would also be contrary to Regulation 122 of The Community Infrastructure Levy Regulations 2010.**

**The S106 Agreement (currently in draft form) needs to be amended to remove reference to the viability clause. Otherwise the Council's decision would potentially be unlawful and could be vulnerable to formal challenge. Removal of the viability clause would mean the resolution of the Development Control Committee meeting and the reasonable expectations of the Committee Members with respect to a later viability review of the scheme could not be implemented. Accordingly the matter is returned to the Committee for further consideration.**

**The previous officer reports to the Development Control Committee (6 August 2015, report reference DEV/SE/15/044 and 4 December 2015, report reference DEV/SE/15/67) are included with these reports as Working Papers 1 and 2.**

**Proposal:**

1. A description of the proposal is included at paragraphs 1 to 9 of Report DEV/SE/15/044 (Working Paper 1), although Members are to note that the two commercial units were removed from the application which reverted to residential development (135 flats) by the time Members last considered the proposals in December 2015.

**Application Supporting Material:**

2. The documents comprising the planning application are listed at paragraph 10 of Report DEV/SE/15/044 (Working Paper 1).

**Site Details:**

3. The site and its surroundings are described at paragraphs 11 to 16 of
4. Report DEV/SE/15/044 (Working Paper 1).

**Planning History:**

5. There are a number of planning applications relevant to the current commercial uses operating from the buildings on site, but none are of direct relevance to this residential led mixed use development.

**Consultations:**

6. These are set out at paragraphs 18 to 49 of Report DEV/SE/15/044 (Working Paper 1), with further representations summarised at paragraphs 6 and 7 of Report DEV/SE/15/67 (Working Paper 2).

**Representations:**

7. These are set out at paragraphs 50 to 58 of Report DEV/SE/15/044 (Appendix B).
8. Further representations received after Report DEV/SE/15/044 (Working Paper 1) had been completed were reported verbally to the August 2015 meeting and were later documented at paragraph 9 of Report DEV/SE/15/67 (Working Paper 2) to the meeting in December 2015.

**Policy:**

9. Relevant Development Plan policies are listed at paragraph 59 of Report DEV/SE/15/044 (Working Paper 1).

### **Other Planning Policy:**

10. Other relevant planning policy is discussed at paragraphs 60 to 67 of Report DEV/SE/15/044 (Working Paper 1).

### **Officer Comment:**

11. The full officer assessment is included at paragraphs 68 to 234 of Report DEV/SE/15/044 (Working Paper 1). Members deferred their consideration of the planning application to provide opportunity for the submitted viability appraisal to be updated to reflect current market conditions and to consider a more detailed report on the planning obligations to be secured by S106 Agreement. Further assessment in those respects and a risk assessment of the Committee's resolution to grant planning permission were included at paragraphs 13-56 of Report DEV/SE/15/67 (Working Paper 2).
12. This section of the report does not intend to re-open any of the issues considered previously by the Committee but instead focusses on a material change in circumstances which became apparent subsequent to the Committee resolution to grant planning permission in December 2015.
13. The matter in question is the insertion of a requirement in the S106 Agreement for the developer to carry out a viability review of the proposals at a future point (trigger to be agreed). The purpose of the viability review clause (which had been offered by the applicants and accepted by officers) was to establish whether market conditions had improved following the grant of planning permission such that should the development be more profitable than had been predicted by the original viability assessment, further affordable housing contributions could be secured.
14. The Joint Affordable Housing Supplementary Planning Document (October 2013) addresses viability review clauses in S106 Agreements as follows:
  - *If an initial percentage of less than the CS9 (FHDC) and CS5 (SEBC) requirement is agreed, the S106 Agreement will include provisions for a review mechanism such that if the development is not completed within 3 years of the date of the planning permission, a further consideration of viability will be carried out at that stage (and every 3 years thereafter). It will be down to the Authority to use its discretion for the purposes of determining whether the percentage of affordable housing should increase on the balance of the development still to be completed and any revision should not be limited to the appropriate percentage as set out in policy CS9 (Forest Heath) and CS5 (SEBC) but may increase to cover a shortfall on an earlier part of the development, provided that, overall, no more than the original policy target is achieved.*
15. The use of viability review clauses in S106 Agreements is also addressed in

National Planning Policy. Whilst the National Planning Policy Framework (the Framework) discusses the importance of viability in a general sense, it does not refer specifically to mechanisms for later re-review. The matter is addressed in the Planning Practice Guidance which states:

- *Viability assessment in decision-taking should be based on current costs and values. Planning applications should be considered in today's circumstances.*
- *However, where a scheme requires phased delivery over the medium and longer term, changes in the value of development and changes in costs of delivery may be considered.*

16. It can be interpreted that where a reduced S106 package is secured from a medium-long term phased development it can be appropriate to require viability review during the build out of that development. On the contrary, it also appears inappropriate to use viability re-reviews on smaller developments (i.e. non-phased or short-term phased developments) such as that proposed by this planning application.

17. Whilst the passages from the National Planning Practice Guidance set out at paragraph 14 above are not absolute in their requirements, a planning inspector considered the matter as part of a recent appeal decision from outside the Borough. In that case, the relevant Council had refused planning permission for a development and one of the reasons for refusal related to the absence of a viability review mechanism as part of the applicants' S106 Undertaking. The Inspector considered the viability review clause desired by the Council was contrary to Government Policy on the matter set out in the Practice Guidance (paragraph 14 above). The appellants appeal costs in defending this point were awarded against the Council.

18. The matter is slightly different in this case insofar as the applicant has offered the review clause to the Council. However, officers consider that if the review clause is taken into account in the 'planning balance' in reaching a decision on this planning application, that decision would be potentially unlawful and could be vulnerable to challenge in the Courts.

19. The Framework repeats the tests of lawfulness for planning obligations which are derived from Regulation 122 of The Community Infrastructure Levy Regulations 2010. Regulation 122 states that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is:

- 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.

20. In this case (and given the national policy position) a viability review clause is not necessary to make the development acceptable in planning terms and thus should not constitute a reason for granting planning permission for the development (i.e. the decision maker should not place any weight on it in reaching a decision).

21. The minute of the meeting of the Development Control Committee on 3 December, which resolved to grant planning permission for this development, includes a record of Members debate of the planning application. It is clear from the record that Members considered and gave weight to the viability review clause in reaching their decision:

[extract from the published minutes under the heading officers' response to Members questions]

*"the amount of affordable housing agreed with the applicants was 10% of the total although a review mechanism (as recommended by the Council's viability consultant) had also been accepted by them. This would ensure that enhancements in the market could be captured with potentially more affordable housing contributions being received. Whilst it may not result in a greater number of affordable homes being built on the application site it may require a contribution to be made towards the provision of such dwellings elsewhere in the town";*

22. Given that it would be potentially unlawful for the S106 Agreement in this case to carry a requirement for the developer to carry out a further viability review of the development, the Committee is required to re-visit the decision it reached at the 3 December 2015 meeting and re-consider the planning application without the review clause. This is in spite of the applicants continuing offer to provide it.

23. The following officer comments are intended to assist Members further consideration:

- The proposals are likely to be completed within four or five years following commencement and are most likely to be built in a single phase given the nature of the scheme (there is potential for the scheme to divide into two phases, but this is less likely).
- The scheme would deliver 10% affordable housing and a full suite of other S106 contributions as follows:
  - Education contribution (Primary and Secondary School - £282,049)
  - Pre-school contribution (£42,637)
  - Tayfen Meadows Play Area Contribution (£75,000)
  - Economic Development Contribution (£50,000)

- Travel Plan contribution and/or bond (final amount to be agreed and will be dependent upon the degree of the Travel Plan to be provided by Suffolk County Council).

- There are no guarantees that a viability review clause would deliver any more affordable housing provision than the 10% provision already secured. Indeed, the way in which the clause has been drafted by the applicants would have meant that a significant degree of uplift in the viability of the overall scheme would have been required before the developer would have been liable to make any further contributions.
- Increases in sales values of the flats would have needed to significantly outstrip increases in build and other costs over a 3-5 year period in order for any additional affordable housing contributions to be triggered.
- Officers' do not consider the removal of the viability review clause from the S106 Agreement should significantly affect the planning balance of this planning application or materially affect the resolution of the 3<sup>rd</sup> December 2015 meeting.
- Members considered that planning permission should be granted for the development, subject to a S106 Agreement. Officers' consider that decision to grant planning permission should not be altered as a consequence of the amendment to the S106 Agreement to remove the viability review clause on legal grounds.

### **Recommendation:**

That the Committee note the Council is not able to secure a viability review clause as part of a S106 Agreement and ratify its resolution of 3<sup>rd</sup> December 2015 to grant planning permission for this development subject to:

i) The completion of a S106 agreement to include:

- Affordable housing (10% = 13 units)
- Education contribution (Primary and Secondary School - £282,049)
- Pre-school contribution (£42,637)
- Tayfen Meadows Play Area Contribution (£75,000)
- Economic Development Contribution (£50,000)
- Travel Plan contribution and/or bond (final amount currently being negotiated).

iii) conditions, including:

- Time limit (3 years for commencement).
- Compliance with approved plans.
- Materials, detailing and colours.
- Archaeology.
- Water efficiency (higher standards set out in the Building Regulations).
- Bin and cycle storage strategy.

- Landscaping (precise details of new hard and soft landscaping and strategy for future management and maintenance).
- Ecology (strategy for provision of enhancements at the site).
- Construction management plan, including working hours.
- As recommended by the Local Highway Authority.
- No planting, structures or development to be carried out in the foot/cycleways to the frontage of the site (to protect visibility splays).
- As recommended by the Environment Agency, including contamination & remediation (further investigations and any remediation necessary).
- Means of enclosure.
- Noise mitigation (measures to be applied to flats).
- Fire Hydrants.
- Waste minimisation and re-cycling strategy (demolition).
- Foul and surface water drainage scheme.
- Implementation of an agreed Travel Plan (unless the matter is addressed fully via the S106 Agreement).
- Any additional conditions considered necessary by the Head of Planning and Regulatory Services.

**Documents:**

All background documents including application forms, drawings and other supporting documentation (but excluding viability reports) relating to this application can be viewed online.

<https://planning.westsuffolk.gov.uk/online-applications/simpleSearchResults.do?action=firstPage>

Working Papers

Working Paper 1 – Officer report to 6<sup>th</sup> August meeting of the Development Control Committee (confidential paper not included).

Appendix B – Officer report to 3<sup>rd</sup> December meeting of the Development Control Committee (confidential paper not included).

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