

COMMITTEE REPORT

Date: 15 October 2015 **Ward:** Fulford and Heslington
Team: Major and **Parish:** Fulford Parish Council
Commercial Team

Reference: 13/03481/FULM
Application at: Royal Masonic Benevolent Institute Connaught Court St
Oswalds Road York YO10 4QA
For: Erection of 14no. dwellings following demolition of existing
bowling clubhouse and garage block
By: RMBI and Shepherd Homes Ltd
Recommendation: A S106 Deed of Variation is entered into to remove the
obligation relating to payment of the open space contribution
of £48,856 given the operation of Regulation 123(3) of the
Community Infrastructure Levy Regulations 2010(as
amended).

1.0 INTRODUCTION

- 1.1 This report seeks a decision from Members to enter into a S106 Deed of Variation to delete the requirement for an Open Space Commuted Sum Payment of £48,856, and confirmation of the previous decision taken by the Area Sub Committee on 11th June 2015 in relation to the proposed development of 14 dwellings under planning application reference 13/03481/FULM to grant planning permission.
- 1.2 The item was deferred from the September 2015 sub-committee meeting to the next available sub-committee to allow further time for Fulford Parish Council and the Claimant in the ongoing judicial review application to submit comments. At the time of writing no further comments have been received. However, should any be received prior to the sub-committee these will be verbally reported to Members.

Background

- 1.3 Members will recall that a planning permission relating to a site at Connaught Court, Fulford, was the subject of a judicial challenge in the High Court, brought by Mrs Mary Urmston, a Fulford resident. This challenge was on the grounds that the Council had failed to apply the sequential test in relation to flooding and misapplied the legal tests in relation to Heritage Assets. The Council conceded that the decision was legally flawed in these respects and a Consent Order was entered into. The application was remitted back to the Council for determination and the legal flaws were rectified.

- 1.4 Planning permission was therefore granted at the Area Planning Sub Committee on 11th June 2015, and issued on 22nd June 2015.
- 1.5 Mrs Urmston is now seeking leave to judicially review the latest decision on a different ground, and has made an application to the High Court. The Council will be defending the decision.
- 1.6 The latest ground of challenge relied upon by Mrs Urmston is that she says the Council has unlawfully taken into consideration a S106 Obligation requiring a commuted sum payment of £48,856 relating to Open Space when reaching the decision to grant planning permission. This is because the Community Infrastructure Levy Regulations 2010, Regulation 123(3), which came into force on 1st April 2015 (subsequent to the first planning decision), states that (3) "A planning obligation ("obligation A") may not constitute a reason for granting planning permission to the extent that—
(a) obligation A provides for the funding or provision of an infrastructure project or type of infrastructure; and
(b) five or more separate planning obligations that—
(i) relate to planning permissions granted for development within the area of the charging authority; and
(ii) which provide for the funding or provision of that project, or type of infrastructure,
have been entered into before the date that obligation A was entered into."
- 1.7 This now prevents the Council, when granting a planning application, from taking into consideration a S106 obligation where there are 5 or more planning obligations contributing to the same infrastructure entered into since April 2010. On this basis Mrs Urmston seeks an Order of the Court to quash the planning permission and for the planning application to be remitted back to the Council for decision again.

2.0 POLICY CONTEXT

- 2.1 2005 Draft Development Plan Policies:

CYL1C Open Space in New Developments

3.0 APPRAISAL

- 3.1 The Developers have requested in light of the above that the S106 Obligation dated 23rd October 2014 be varied in order to remove any reference to the Open Space Contribution. As the decision was previously made by the Area

Sub Committee, Members are asked to reach a decision in respect of the variation request.

- 3.2 The Council concedes that the open space contribution could not have constituted a reason for granting permission because, at the time of the second decision, the CIL Regulation 123(3) had come into force and there were more than 5 obligations entered into since 2010 towards the same infrastructure. However, the planning decision will be defended on the basis that it would not in any event have made a material difference to the decision if the open space contribution had been explicitly disregarded. The development has been found to be sustainable, is in a highly accessible location and will make a contribution towards the delivery of market housing where the Council is currently unable to demonstrate a deliverable 5 year supply of housing land. In the planning balance, the decision to grant planning permission was not dependent upon the Open Space contribution.
- 3.3 An alternative to seeking a financial contribution would have been to require the three types of open space specified in 2005 draft policy L1c to be provided on site. The three types are outdoor sports facilities, amenity open space and children's play space. Officer's view is that there is insufficient space to provide feasible outdoor sports facilities on site. Although the site is large enough for amenity open space and children's play space to be provided (1.28ha in total), because the land would need to be provided in two separate parcels, this separation prevents open space being provided in any sensible or feasible way.
- 3.4 Furthermore, the absence of open space on site would cause less than substantial harm to the local area in this instance. In 2013 the Council commissioned an open space and green infrastructure study for the emerging local plan (Local Plan Evidence Base: Open Space and Green Infrastructure, AMEC). The study found that Fulford Ward has reasonable provision across the majority of open space categories considered in the analysis with facilities in adjacent wards compensating for deficiencies. Officers consider that the absence of on site open space provision does not give rise to a level of harm that would have warranted refusal of the application.

4.0 CONCLUSION

- 4.1 As the alternative of a commuted sum payment could not be taken into account in determining the planning application, Members are invited to consider whether they would have resolved to grant planning permission in the event that the open space contribution of £48,856 could not have been taken into account as a reason for granting planning permission. In coming to this view, Members should consider the most recent committee report which

concluded that planning permission should be granted, albeit excluding any reference to the public open space contribution.

- 4.2 Members are also invited to consider whether they would have resolved to grant planning permission in the absence of open space provision on site having regard to the other issues in the planning balance outlined at 3.2 above.
- 4.3 As the commuted sum payment could not be taken into account in the grant of planning permission, the developer's request that the S106 obligation relating to the payment of the open space contribution of £48,856 should be removed by way of Deed of Variation, should be acceded to.

5.0 RECOMMENDATION:

- 5.1 It is recommended that a S106 Deed of Variation is entered into to remove the obligation relating to payment of the open space contribution of £48,856 given the operation of Regulation 123(3) of the Community Infrastructure Levy Regulations 2010(as amended).

Annex

Report to Committee - 11 June 2015

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