

## COMMITTEE REPORT

**Date:** 11 June 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 11<sup>th</sup> June 2015 in relation to the proposed development of 14 dwellings under planning application reference 13/03481/FULM to grant planning permission.

#### Background

1.2 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 local 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.

1.3 Planning permission was therefore granted at the Area Planning Sub Committee on 11<sup>th</sup> June 2015, and issued on 22<sup>nd</sup> June 2015.

1.4 Mrs Mary 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.

1.5 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 1<sup>st</sup> 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."

1.6 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 that the decision is remitted back to the Council for decision again.

1.7 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.

## **2.0 POLICY CONTEXT**

### **2.1 Policies:**

CYL1C      Open Space in New Developments

### **3.0 CONSULTATIONS**

3.1 None undertaken

### **4.0 APPRAISAL**

#### Variation of the S106 Obligation

4.1 The Developers have requested in light of the above that the S106 Obligation dated 23<sup>rd</sup> 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.

4.2 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).

4.3 Members are also 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.

**5.0 RECOMMENDATION:** 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**

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