

PLANNING DEVELOPMENT CONTROL COMMITTEE

27 July 2005

MORN HILL SECTION 106 AGREEMENT

REPORT OF CITY SECRETARY AND SOLICITOR

Contact Officer: HOWARD BONE Tel No: 01962 848552

RECENT REFERENCES:

PDC 418 – Morn Hill Section 106 Agreement – 26 May 2004

PDC 247 – Morn Hill - 24 October 2002

EXECUTIVE SUMMARY:

This report sets out details of a request to further vary the Section 106 Agreement dated 4 June 1999 which was entered into prior to planning permission for the NTL development at Morn Hill, Winchester. The original agreement was varied in 2004 to extend the period for the hotel element to be implemented until 4 June 2005.

The Development comprised a satellite teleport and two subterranean buildings, education building for INTECH, a 120 bedroom hotel and associated works. The teleport and subterranean buildings have been partly completed, the INTECH building is operational, but the hotel has not yet been built.

The Section 106 agreement (as originally completed in 1999) provided that each element of the development had to be started in a substantial way within five years (i.e. before 4 June 2004). Following an approach from a prospective developer for the hotel element in 2004, the agreement was amended to extend the period for commencing the hotel development for a further year (until 4 June 2005).

The prospective developer submitted an application for a revised form of hotel, which would have been smaller than that approved under the original 1999 consent. Members resolved to approve this in February 2005. The application was referred to the Secretary of State in accordance with the relevant Direction.

The Secretary of State has now indicated that he wishes to determine the application himself, and has directed the Council to not issue permission for the proposed development. A public inquiry will have to be held, and this is likely to delay the project by at least a year.

The developer's agent has therefore formally written to the Council, seeking a further extension of time to implement the original development. This report sets out details of the request, and examines the planning and legal implications.

RECOMMENDATIONS:

- 1 That the City Secretary and Solicitor be authorised to agree a variation of the Section 106 Agreement dated 4 June 1999 for land at Morn Hill, Alresford Road, Winchester, by further extending the implementation period for the hotel element by three months to 30 October 2005.
- 2 That the Director of Development, in consultation with the Chairman and Ward Members, be authorised to agree any changes to the design of the approved development (W01706/07) which do not require planning permission.

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DETAIL:

1 Introduction

- 1.1 Planning permission was granted on 4 June 1999 for the redevelopment of the former Morn Hill scrap yard, Winchester. The development which was approved included a satellite teleport and subterranean buildings, an educational building for INTECH, and a 120 bedroom hotel.
- 1.2 In conjunction with the planning application, a Section 106 agreement was entered into. This dealt with various aspects of the development, including implementation (Clause 5). The agreement required all elements of the development to be substantially commenced within five years.
- 1.3 By 2004, the teleport and subterranean buildings had been partly completed, and the INTECH building was operational. However, the hotel element had not been commenced. In May 2004, a prospective developer approached the Council with proposals to carry out the hotel development, including a request to amend the Section 106 agreement by extending the time for implementation.
- 1.4 This request was considered and agreed by the Committee on 26 May 2004 (report PDC 418 – Morn Hill Section 106 Agreement – refers), and the Section 106 amended to extend the implementation period.
- 1.5 Subsequently, the developer submitted a revised scheme for the hotel element. This was smaller (in terms of floorspace) than that approved in 1999, omitting/reducing elements such as the leisure and conference facilities. The Committee approved the application in February 2005. Given the nature and extent of the development, the Secretary of State was notified that the Council intended to grant permission, in accordance with the relevant Direction. The Secretary of State has decided that he wishes to determine the application himself, and has directed the Council not to grant planning permission for development which is the same kind as that which is the subject of the called-in application. The reason given in the Direction is that “the Secretary of State is of the opinion that the application is one that he ought to decide himself because he considers that the proposals may conflict with national policies on important matters”.
- 1.6 For Members’ information, Appendix 1 contains more details of the background and history behind the Section 106 agreement and the development of the Morn Hill site.

2 Current Position

- 2.1 Although the Council resolved to grant permission for the revised hotel development, the decision of the Secretary of State to call in the application means that the Council

cannot now issue a consent. A public inquiry will be held to consider the application, and the Secretary of State will then decide whether or not to grant permission for the development.

- 2.2 The developer's agent has formally written to the Council in the light of the Secretary of State's decision. A copy of this letter is attached as Appendix 2. Members will note that the developer now proposes to construct the hotel as originally approved. The Section 106 agreement (as varied) required that the hotel development should have been commenced by 3 June 2004, but this did not happen as the developer was wishing to implement the development as set out in the latest application, and was waiting for the Secretary of State's decision following the Council's referring the application to him. Accordingly, the agent has asked the Council to agree to a further extension of time (of up to three months) to implement the hotel element of the original consent (which is not affected by the Secretary of State's decision).
- 2.3 The decision to call in the application was unexpected. The original scheme approved in 1999 was not called in, and officers have contacted the Office of the Deputy Prime Minister to find out the reasoning behind the decision. However, the Government Office for the South East (GOSE) has refused to indicate the reasons, and the Council cannot now grant planning permission for the latest (smaller) hotel application.
- 2.4 The letter also asked for details of what parts of the scheme officers consider could be omitted without the need for a further planning application. Further thought is being given to this, and the recommendation seeks authority for officers to agree any minor variations which do not require planning permission, in consultation with the Chairman and Ward Member.

3 Legal Position

- 3.1 The effect of the Direction from the Secretary of State prevents the Council granting permission pursuant to its decision to resolve to grant permission for the revised hotel scheme. The Direction may also mean that any application to vary the consent (so as to permit the reduced scheme, as proposed in the latest application) cannot be dealt with.
- 3.2 However, the 1999 Section 106 agreement is a matter for the City Council alone. Section 106A of the Town and Country Planning Act 1990 (as amended) allows the Council to agree to vary the agreement by agreement with the person or persons against whom the obligation is enforceable (i.e. the developer as landowner of the hotel site). There is no appeal against the Council's decision should it decide not to agree the request to vary the agreement.
- 3.3 The Section 106 agreement provides that if any element is not implemented within the specified time period, that element should be returned to open countryside. Although the time limit for the hotel element (as extended) has now passed, officers consider that the agreement can be varied at this stage to further extend the implementation period, if Members so agreed.
- 3.4 In any event, there is an alternative procedure whereby a formal application can be made to modify the terms of the agreement. This procedure does give rise to an appeal process, but so far no such formal application has been made.

4 Options and Implications

- 4.1 The City Council can either grant or refuse the request to vary the Section 106 agreement. This decision is not affected by the Secretary of State's decision, and the Council would not be in breach of the direction if it agreed to extend the period as the developer has requested.
- 4.2 The developer has indicated that it is unlikely that it will be able to wait for the latest application to be determined by the Secretary of State, given the fact that the process is likely to be delayed by up to 18 months.

Granting the Request

- 4.3 Members will recall that until the developer purchased the site, there had been little interest in building the hotel element. Members granted a 12 month extension to the implementation period under the Section 106 agreement in 2004, and officers consider that in view of this and the relatively short further extension period which has been requested (three months), it is reasonable to grant the request and amend the agreement. This would still allow the Council to exercise control over the development (which was the purpose of the original Section 106 provision requiring *each* element of the development to be commenced within five years), whilst still allowing the final part of the development (as originally approved) to be built.
- 4.4 Given the Direction from the Secretary of State, it is likely that planning permission for any major variations cannot be given by the Council. The Section 106 agreement does allow the [Director of Development] to agree to any variations in plans but in most cases variations will require an amended planning permission, which would therefore be contrary to the Direction and not permissible. If Members agree to the extension, further discussions will be held between officers and the developer to explore what might be possible within the current constraints.
- 4.5 GOSE has been informed of the request, and officers' view that the Section 106 agreement can be extended (should Members agree) without contravening the Direction. In addition, all who were previously notified of the revised application have been notified of the request to further extend the implementation period.
- 4.6 Although it is not considered that there are any legal provisions which would prevent the Council agreeing to the variation, Members should be aware that this would permit a hotel to be constructed which would have a larger floorspace than the development which has been called in.

Refusing the Request

- 4.7 Members could decide not to grant the request to extend the implementation period for the hotel. As explained above, there is no appeal against such a decision. However, the developer has indicated that it is unlikely to be able to wait for the Secretary of State's determination of the outstanding revised hotel application, and it may be if the agreement is not varied, the hotel will not be built, even if permission for the revised hotel is eventually granted. Furthermore, the Section 106 agreement provides that where any elements were not developed within five (subsequently varied in 2004 to six) years, that part of the site would have to be returned to open countryside.

OTHER CONSIDERATIONS:

5 CORPORATE STRATEGY (RELEVANCE TO):

5.1 Looking after the natural and built environment is a key objective.

6 RESOURCE IMPLICATIONS:

6.1 The applicant would be expected to pay the legal costs in amending the Section 106 agreement.

BACKGROUND DOCUMENTS:

Letter from Bryan Jezeph Consultancy dated 22 June 2005

APPENDICES:

Appendix 1 – Background information on Section 106 agreement

Appendix 2 – letter from Bryan Jezeph Consultancy dated 22 June 2005

APPENDIX 1Background information on Section 106 agreement1 Details of Section 106 Agreement

- 1.1 The original Section 106 agreement dated 4 June 1999 deals with various aspects of the development. Clause 5 of the agreement deals with implementation.
- 1.2 All planning permissions include conditions requiring the development to be begun within a specified time (normally five years from the grant of permission). Section 56 of the Town and Country Planning Act 1990 provides a mechanism for determining whether development has been begun, and therefore whether the planning permission has been implemented. Normally, once implemented, a planning permission will continue to have effect, even if only part of the development is commenced. Although there is a time limit for the implementing of a planning permission, there is not normally any time limit for the implementation of remaining phases, or the completion of the whole development.
- 1.3 In this case, however, the Section 106 agreement expressly treats each phase of the development (teleport including subterranean buildings, INTECH, hotel) as distinct entities, and the effect of the agreement (in its original form) was that in order to be lawful, each element had to be commenced within five years (i.e. before 4 June 2004). In addition, under the terms of the agreement, a phase will only be deemed to have been "commenced" under the agreement if substantial works (i.e. laying of foundations, etc) are carried out before the deadline.
- 1.4 By 2004, the other phases had been completed or substantially completed, but no work had been done on the hotel element. Without the amendment agreed by the Council in May 2004, this meant that unless a substantial start on the hotel element was made before 4 June 2004 (i.e. something more than excavating foundation trenches, etc), the agreement would (unless varied) mean that the hotel could not be built, and that part of the site would have to be returned to open countryside (under the terms of the agreement).
- 1.5 The effect of the 2004 amendment was to extend the period for implementing the hotel element by a further period of 1 year. The revised agreement therefore required a substantial start on the hotel element before 4 June 2005.

APPENDIX 2