

PLANNING DEVELOPMENT CONTROL COMMITTEE

21 May 2006

MORN HILL - HOTEL DEVELOPMENT

REPORT OF CITY SECRETARY AND SOLICITOR

Contact Officer: HOWARD BONE Tel No: 01962 848552

RECENT REFERENCES:

PDC 578 - Morn Hill Section 106 Agreement – 27 July 2005

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

PDC 247 – Morn Hill - 24 October 2002

EXECUTIVE SUMMARY:

This report updates Members on works which have been carried out at Morn Hill, and gives advice on the possible courses of action which the Council could take in connection with such works.

The works which have been carried out relate to the hotel element of the Morn Hill redevelopment which was given planning consent in 1999. The implementation of the development is governed by a Section 106 agreement.

Detailed legal advice is set out in an exempt Appendix (Appendix 2).

RECOMMENDATIONS:

- 1 That the City Secretary and Solicitor be authorised to serve a completion notice, in respect of the outstanding development at Morn Hill, Alresford Road, Winchester under planning permission W01706/07, specifying a period of 24 months in the notice.

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##### DETAIL:

##### 1 Introduction

- 1.1 Members will recall that planning permission for the redevelopment of the former Morn Hill scrap yard, Winchester was granted in June 1999. The development which was approved included a satellite teleport and subterranean buildings, an educational building for INTECH, and a 120 bedroom hotel. The development was commenced and has been largely completed, although the hotel element was not progressed.
- 1.2 Following an approach from the prospective developer, details of the hotel element were submitted and approved, in accordance with the conditions on the planning permission. Normally, this would have made it possible for the developer to carry out the hotel element of the development, although in this case, further restrictions were imposed by a Section 106 agreement.
- 1.3 The Section 106 agreement required that each element of the development had to be "Implemented" within five years, failing which the relevant part of the site had to be restored to open countryside. Under the agreement, therefore, a "substantial start" on the building work comprised in the hotel element of the development had to be made by a specified date. Following a request from the prospective developer, this deadline (originally 4 June 2004) was extended by two supplemental agreements, first to 4 June 2005, and then up until 30 October 2005. These extensions were granted to allow the developer time to submit the required details (which had to be submitted and approved before the hotel development could commence) and then start the development.
- 1.4 Although the agreement requires a substantial start, so far the only works carried out on site by 30 October 2005 comprise limited foundations works. No further building work has taken place on site since then. This report analyses the work which has taken place, sets out the legal position, and recommends action which can be taken in respect of the works.

##### 2 Section 106 Agreement

- 2.1 The original Section 106 agreement dated 4 June 1999 deals with various aspects of the development. Clause 5 of the agreement deals with implementation.
- 2.2 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.

- 2.3 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, "Implementation" had to have taken place. "Implementation" was defined as:-

*"a substantial start on the building work comprised in the development in question, preliminary operations such as site investigations, site clearance, excavation for foundations, construction of access roads and laying of service media being disregarded."*

- 2.4 Each element had to be commenced within five years (i.e. before 4 June 2004). This meant that unless a substantial start on the hotel element was made before 4 June 2004, 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).
- 2.5 Planning Development Control Committee agreed to vary the agreement on two occasions. The first variation was agreed to allow time for the details to be submitted and approved. The developer also applied for a fresh planning permission for a different form of hotel development, but this application was called in by the Secretary of State and then withdrawn by the developer, who therefore decided to pursue the original approved hotel. By this time, there was only a short period before the deadline for Implementation, and a further request for an extension was made and granted, requiring Implementation of the hotel element by 30 October 2006.

### 3 Description of Site Works

- 3.1 As mentioned above, so far the only works which have been carried out on site are the digging out of part of the site, the excavation of seven slit trenches, and the laying in those trenches of concrete (understood to be approximately 27m<sup>3</sup>). The plans in Appendix 1 show the original hotel development, and the plans for this groundwork. From these, officers believe that the concrete is intended to be foundations for the dividing walls between the bedrooms, although it is not clear how structural these walls would be in the final building. Photographs of the works will be displayed at the meeting for Members' benefit.
- 3.2 The solicitors for the developer have written to the Council, confirming that the groundworks constitute the foundations for a total of 18 bedrooms. A total of 120 bedrooms are proposed over three floors, so the foundations which have been laid would constitute the foundations of 15% of the total accommodation (assuming this would be a two storey part of the development). It appears that the developer only intended to carry out this limited amount of works on the site, as the drawings supplied show no other work proposed. No foundations have been dug or laid for the exterior walls of the building, although without structural plans, it is not easy to say whether the foundations which have been laid would be expected to function as main foundations for the building, or merely as secondary foundations for these internal walls.

#### 4 Legal Considerations

- 4.1 The Section 106 agreement was intended to displace the usual rule on commencement of development, in order to ensure that the site was either developed out, or restored to open countryside. Any elements of the development on which a “substantial start” was not made within five years (as originally set out in the Section 106 agreement) could not therefore be built, and that part of the site would have to be restored.
- 4.2 Without such a provision, development can be “begun” (for the purposes of complying with the statutory time limiting condition) in a very minimal way. Section 56 of the Town and County Planning Act 1990 provides that development is begun for the purposes of specified provisions of the Act (including the time limiting condition) on the earliest date when a material operation comprised in the development begins to be carried out. “Material Operation” means (amongst other things):-
- works in the course of the erection of a building;
  - the digging of foundation trenches
  - pipe laying to such foundation trenches
  - an operation in the course of laying out a road
- 4.3 The Courts have accepted that very low-level operations (e.g. pegging out a road) would constitute a “material operation” for the purpose of Section 56. Although early cases suggested that work which was carried out had to be done so with the intention of genuinely carrying out the development (as opposed to seeking to keep the planning permission alive), the latest cases suggest that the test is an objective one, namely whether the works is in accordance with the planning permission, and are more than “de minimis”.
- 4.4 These cases relate to the interpretation of “material operation” and whether the intention of the developer is relevant. In this case, however, Section 56 does not apply, as clearly the development (as a whole) has been “begun”, and therefore the time limit condition in the planning permission (which covers the other elements, as well as the hotel) has been complied with. The issue which the Council has to determine in considering its options is whether or not the groundworks which have been carried out constitute “Implementation” for the purposes of the Section 106 agreement.
- 4.5 If the works do constitute “Implementation” the agreement provisions have been complied with, as the works were carried out before the 30 October 2005 deadline. If on the other hand they do not constitute Implementation, the agreement requires that the hotel element of the site must be reinstated as open countryside, and used only as such in the future.
- 4.6 The solicitors have confirmed that their client has every intention of carrying out the development, although they have not submitted details of any programme for this, despite having been asked for this. They take the view that, in line with the cases referred to above, their Client does not have to justify to the Council how it has structured its building contracts.
- 4.7 Further legal advice on this issue is included as Exempt Appendix 2.

## 5 Possible Further Action

### **Completion Notice**

- 5.1 If the Committee concludes that the agreement has been complied with, there are no other outstanding issues or planning consents required before the building work can proceed. The 1990 Act does provide a completion notice procedure in Section 94, which may be served where development has been begun in accordance with the time limiting condition in the planning permission (as is the case here) but where the local planning authority is of the view that the development will not be completed within a reasonable time. The procedure entails the service of a notice specifying a period (not less than 12 months) after which the permission becomes invalid, although any works carried out until that time remain lawful. Accordingly, although no further works can lawfully be carried out after the specified time period, the notice is essentially negative in nature, and cannot secure the completion of the building in accordance with the original plans.
- 5.2 A completion notice must be confirmed by the Secretary of State before it takes effect, and a person on whom the notice is served may require the Secretary of State to hold a hearing before the decision on confirmation of the notice is taken.
- 5.3 Service of a completion notice would determine the continued validity of the planning permission, although it could not secure the completion of the building if by the end of the specified period the building work had not been finished. Similarly, if the Section 106 agreement has not been breached, the land could not be required to be reinstated to open countryside.

### **Action under the Section 106 Agreement**

- 5.4 If Members conclude that a breach of the Agreement has occurred, the options are:-
- No further action (with or without service of a completion notice as set out above)
  - Further variation of Section 106 agreement to allow more time for compliance
  - Court proceedings to secure the reinstatement of the land as countryside

Members will need to consider the legal advice in the Exempt Appendix in considering these options. Further advice can be given in Part II of the Agenda if required.

### **OTHER CONSIDERATIONS:**

#### 6 **CORPORATE STRATEGY (RELEVANCE TO):**

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

#### 7 **RESOURCE IMPLICATIONS:**

Service of a completion notice can be accommodated within existing budgets. If court proceedings are pursued, financial and officer time resources would be required, which may be recoverable if the Council were to be successful. If the Council failed in such proceedings, it would have to meet its own costs, and those of the developer, which could be significant.

BACKGROUND DOCUMENTS:

Letter from Lester Aldridge 24 March 2006

APPENDICES:

Appendix 1 – Plans

EXEMPT Appendix 2 – Further legal advice