

<b>Reference:</b>	22/02342/DOV	
<b>Application Type:</b>	Deed of Variation (application S106A(3))	
<b>Ward:</b>	Milton	
<b>Proposal:</b>	Modification of Section 106 agreement dated 30/06/2011 (as amended by Deeds of Variation dated 22/06/2016 and 19/09/2018) pursuant to planning permission 10/02012/EXTM, to extend the payment provisions in relation to the Education, Bus Infrastructure and Warrior Square Contributions.	
<b>Address:</b>	Part Of Former Keddies Building And Maitland House, Chichester Road, Southend-On-Sea, Essex	
<b>Applicant:</b>	Mr David Samuels of Broadway Estates Ltd	
<b>Agent:</b>	Mr Steve Davies of Hobbs Parker Property Consultants LLP	
<b>Consultation Expiry:</b>	02.02.2023	
<b>Expiry Date:</b>	05.05.2023	
<b>Case Officer:</b>	Amanda Rogers	
<b>Plan Nos:</b>	n/a	
<b>Supporting information:</b>	Letter from Hobbs Parker dated 7 <sup>th</sup> December 2022	
<b>Recommendation:</b>	<b>DELEGATE to the Executive Director (Growth and Housing), Director of Planning or Service Manager - Development Control to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 30<sup>th</sup> June 2011 (as amended by Deeds of Variation dated 22<sup>nd</sup> June 2016 and 19<sup>th</sup> September 2018) pursuant to planning permission 10/02012/EXTM and enter into a Planning Obligation by Deed of Variation to allow the modifications set out in paragraph 8.1.</b>	



## 1 Site and Surroundings

- 1.1 The application site is within the town centre and includes offices, a hotel and other commercial floorspace.
- 1.2 Development surrounding the site is mixed and comprises residential, offices, retail and other commercial uses. The site lies opposite Warrior Square Gardens and Conservation Area.
- 1.3 The existing development comprises a 4 storey and an 11-storey building. The development to which this Section 106 (S106) agreement relates is for an additional 11 storeys over the existing 4 storey building and an additional two floors over the existing 11 storey building.

## 2 The Proposal

- 2.1 Planning permission was granted on 30<sup>th</sup> June 2011 (10/02012/EXTM) to extend the time limit for permission 07/01276/FULM, to erect an 11-storey extension over the existing 4 storey building, erect 2 floors over the existing 11 storey building and convert the extended building into 98 self-contained flats ("2011 permission").
- 2.2 A technical start, including preparation works to allow the installation of a canopy over the ground floor entrance, was made on the development following approval of pre-commencement conditions on 27<sup>th</sup> June 2014, thus the development is considered to have commenced. However, the applicant advises that due to viability issues the development has not proceeded beyond the entrance canopy installation. They advise

that complex structural considerations relating to extending above the existing building have significant financial implications; the applicant has confirmed that they are now looking to dispose of the site due to ongoing viability difficulties with the proposed development.

2.3 The 2011 permission was subject to a S106 agreement 30<sup>th</sup> June 2011. This agreement has been modified twice by Deeds of Variation dated 22<sup>nd</sup> June 2016 and 19<sup>th</sup> September 2018. The S106 (as amended) secures the following:

- **Bus Infrastructure Contribution** – outstanding invoice for £30,739.80 dated 4<sup>th</sup> July 2019 (interest to be added at 4% above base lending rate of Barclays Bank Plc from date due to date of payment)
- **Education Contribution** – outstanding invoice for £27,165.67 dated 4<sup>th</sup> July 2019 (interest to be added at 4% above base lending rate of Barclays Bank Plc from date due to date of payment)
- **Warrior Square Contribution** – £38,988.00 paid 28/09/2018 as agreed as part of the terms of the 2018 Deed of Variation
- Affordable Housing (12x1bed flats, 5x2bed flats) – *not yet due - no more than 50% of market housing units to be occupied until all the affordable housing units have been constructed and no more than 50% of the market housing units to be occupied until affordable housing transferred to Registered Provider*
- Public art to the value of £16,321 – *not yet due – to be provided prior to occupation*
- Travel Plan – *not yet due – to be approved prior to occupation*
- Travel Plan monitoring contribution £3,000 – *not yet due – to be paid upon approval of the Travel Plan*
- S106 monitoring fee £4,607 – *paid 16/07/2014*

2.4 The S106 financial contributions are all subject to inflation as set out in the S106. Those highlighted in **bold** above are the subject of this application. The affordable housing, public art, Travel Plan, Travel Plan monitoring contribution and S106 monitoring fee requirements set out in the S106 and above have not yet been triggered and remain unchanged.

2.5 The 2014 commencement triggered some of the S106 contributions (including Warrior Square, Education and Bus Infrastructure Contributions) as they were originally payable within 28 days of commencement of development. However, Broadway Estates Ltd have continually resisted paying these contributions, arguing that the impact on infrastructure has yet to be incurred as the residential development has yet to proceed beyond the initial implementation stage. Notwithstanding this, Broadway Estates Ltd are legally bound by the terms of the S106, and the commencement of the development triggered the aforementioned S106 contributions.

2.6 The applicant has since at least 2016 sought to vary the S106 payment triggers several times to extend the payment periods. In the interests of acting reasonably, the Council agreed to the 2016 and 2018 variations to the S106. In 2016 the payment periods were extended to allow payments to be made within 24 months of the commencement of the development instead of 28 days. Then, in 2018 the payment periods were extended again to allow the education and bus infrastructure contributions to be paid within 60 months of commencement. Part of the terms of the 2018 variation was for the Warrior Square Contribution to be paid and this was done.

2.7 Under section 106A of The Town and Country Planning Act 1990 (as amended) (“TCPA”) the following variations to the S106 are now sought:

- Clause 3.1 of the Second Schedule – Education Contribution payable prior to first occupation of any of the residential units provided by the planning permission (as opposed to within 60 months of Commencement of Development as previously agreed)
- Clause 6.1 of the Second Schedule – Bus Infrastructure Contribution payable prior to first occupation of any of the residential units provided by the planning permission (as opposed to within 60 months of Commencement of Development as previously agreed)
- Definitions, Clause 7 of the Second Schedule, Clause 1.1 and 1.3 of the Third Schedule – Warrior Square Contribution – amend the definition and terms to ‘Local Play Contribution’ to be spent within 10 years of receipt and to be spent on ‘the provision of new play equipment within the vicinity of the Site’

### **3 Relevant Planning History**

- 3.1 19<sup>th</sup> September 2018 (18/00942/DOV): Modification of Section 106 agreement dated 30/06/2011 (as amended by Deed of Variation dated 22/06/2016) pursuant to planning permission 10/02012/EXTM, to extend the payment provisions in relation to the Education, Bus Infrastructure and Warrior Square Contributions – **agreed** (“2018 variation”).
- 3.2 22<sup>nd</sup> June 2016 (14/01054/DOV): Modification of planning obligation dated 30th June 2011 pursuant to application 10/02012/EXTM to allow payments to be made within 24 months of commencement of development – **agreed** (“2016 variation”).
- 3.3 30<sup>th</sup> June 2011 (10/02012/EXTM): Conditional planning permission **granted** to “Erect 11 storey extension over existing 4 storey building, erect 2 floors over existing 11 storey building, convert extended building into 98 flats (application to extend the time limit for implementation following planning permission 07/01276/FULM granted 31/03/2008)”.
- 3.4 31<sup>st</sup> March 2008 (07/01276/FULM): Conditional planning permission **granted** to “Erect 11 storey extension over existing 4 storey building, erect 2 floors over existing 11 storey building, convert extended building into 98 flats (Amended Proposal)”.

### **4 Representation Summary**

#### **Public Consultation**

- 4.1 Site notice posted – no responses received.

### **5 Planning Policy Summary**

- 5.1 The National Planning Policy Framework (NPPF) (2021)
- 5.2 Planning Practice Guidance (PPG)
- 5.3 Core Strategy (2007): Policies KP1 (Spatial Strategy), KP2 (Development Principles), KP3 (Implementation and Resources), CP3 (Transport and Accessibility), CP4 (Environment and Urban Renaissance) and CP6 (Community Infrastructure).
- 5.4 Development Management Document (2015): Policies DM1 (Design Quality), DM3 (Efficient and Effective Use of Land) and DM15 (Sustainable Transport Management).
- 5.5 Supplementary Planning Document (2015): A Guide to Section 106 & Developer

## Contributions

### 6 Appraisal

- 6.1 Section 106A of the TCPA allows for an application to be made to a local authority to consider a proposed modification or discharge of a planning obligation.
- 6.2 Planning obligations can be renegotiated at any point, where the local planning authority and developer wish to do so. A planning obligation is enforceable as a contract and whether it is varied or not is at the local authority's discretion. Where there is no agreement to voluntarily renegotiate, and the planning obligation is over 5 years old, an application may be made to the local planning authority to change the obligation where it *'no longer serves a useful purpose'* or *'if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications'* (see Section 106A of the TCPA).
- 6.3 The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (as amended) set out the procedure for dealing with applications to modify or discharge a planning obligation that is more than 5 years old.
- 6.4 The key material planning consideration in respect of this application is whether the proposed modifications to the S106 (as set out in paragraph 2.7), to allow the Education and Bus Infrastructure Contributions to be paid at a later stage of the development, still allow the Council sufficient time to deliver the infrastructure required to support the development.
- 6.5 In support of the submission, the agent has submitted (on behalf of the applicant) a detailed covering letter setting out how the development continues to be financially unviable to deliver. As the continuation of the development as approved now seems highly unlikely, the applicant has requested that the payment trigger for the Education and Bus Infrastructure Contributions be changed such that they are not linked to commencement of the development but, instead the contributions would be payable prior to first occupation of any of the residential units provided by the planning permission. Their justification for this is that the obligation would serve its useful purpose equally well if modified.
- 6.6 Consideration needs to be given to whether the proposed changes to the S106 contribution payment arrangements would prejudice the Council's ability to deliver the supporting infrastructure for this development thus satisfactorily mitigating its impact. It is deemed reasonable to negotiate triggers to suit both the Council's requirement to have time to deliver supporting infrastructure and the applicant's need to ensure the scheme's cashflow appropriately allows for payment of the sums at the specified time.
- 6.7 The Council has attempted to resolve this matter with the applicant for some time. A position has been negotiated such that alongside the further extension requested for the Education and Bus Infrastructure Contributions, the Warrior Square Contribution (received September 2018), which is currently restricted to a new play area within Warrior Square Gardens, has been made more flexible in the community's interest. The S106 currently requires that the Warrior Square contribution be spent within 5 years but there have been issues with finding a suitable project which could best utilise the sum involved. The proposed changes amend the definition and terms of this contribution to 'Local Play Contribution' to be spent within 10 years of receipt and to be spent on 'the provision of new play equipment within the vicinity of the Site' so no longer restraining the location for the spend to Warrior Square itself. This provides the Council with greater scope to use the contribution for the benefit of the local

community. The Education and Bus Infrastructure Contributions were first legally framed over 12 years ago. Looking at the proposed modifications to triggers now proposed on their merits, it is not considered that these would prejudice those elements of infrastructure delivery in the circumstances of this particular town centre development.

- 6.8 The affordable housing, public art, Travel Plan, Travel Plan monitoring contribution and S106 monitoring fee remain unchanged from the original S106 agreement.

## **7 Conclusion**

7.1 Taking into account all material planning considerations and the specific circumstances of this case, it is concluded that the best solution available to satisfactorily resolve this matter is to modify the S106 agreement as set out below. The approach outlined provides an acceptable solution that is considered to serve the community's best interests.

7.2 It is considered that there is sufficient justification to allow the modifications to the Section 106 agreement dated 30<sup>th</sup> June 2011 (as amended by Deed of Variation dated 22<sup>nd</sup> June 2016 and 19<sup>th</sup> September 2018) pursuant to planning permission 10/02012/EXTM.

7.3 This application is recommended for approval subject to completion of a Deed of Variation to secure the modifications set out in paragraph 8.1 below.

## **8 Recommendation**

### **8.1 Members are recommended to authorise:**

**a) That the Council enter into a Planning Obligation by Deed of Variation under Section 106 of the Town and Country Planning Act 1990 (as amended) to allow the following modifications to the Deed of Agreement dated 30<sup>th</sup> June 2011 (as amended by Deeds of Variation dated 22<sup>nd</sup> June 2016 and 19<sup>th</sup> September 2018) pursuant to planning permission 10/02012/EXTM:**

- i. Clause 3.1 of the Second Schedule – Education Contribution payable prior to first occupation of any of the residential units provided by the planning permission**
- ii. Clause 6.1 of the Second Schedule – Bus Infrastructure Contribution payable prior to first occupation of any of the residential units provided by the planning permission**
- iii. Definitions, Clause 7 of the Second Schedule, Clause 1.1 and 1.3 of the Third Schedule – Warrior Square Contribution – amend the definition and terms to ‘Local Play Contribution’ to be spent within 10 years of receipt and to be spent on ‘the provision of new play equipment within the vicinity of the Site’**

**b) That the Executive Director (Growth and Housing), Director of Planning or Service Manager for Development Control be DELEGATED to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 30<sup>th</sup> June 2011 (as amended by Deeds of Variation dated 22<sup>nd</sup> June 2016 and 19<sup>th</sup> September 2018) pursuant to planning permission 10/02012/EXTM referred to above.**

**8.2 On the basis that the recommendation set out in paragraph 8.1 is agreed, members are also recommended to authorise the cancellation of the associated**

**invoice no. 771452 dated 4<sup>th</sup> July 2019 including Bus Infrastructure Contribution (£30,739.80) and Education Contribution (£27,165.67); as well as ceasing any debt recovery proceedings in relation to this outstanding invoice as the payments would no longer be due at this stage.**