

REPORT OF THE MONITORING OFFICER

SUBJECT: NEWPORT LINKS GOLF CLUB

The role of Monitoring Officer was created by the Local Government and Housing Act 1989 to promote and secure probity in local government.

S5(2) of that Act states that it shall be the duty of the Monitoring Officer, if it at any time appears to him that any proposal, decision or omission by the Authority, by any Committee, or Sub-Committee of the Authority by any person holding any office or employment under that Authority or by any Joint Committee on which the Authority is represented constitutes, has given rise to or is likely to or would give rise to:-

A contravention by the Authority, by any Committee or Sub-Committee of the Authority, by any person holding any office or employment under that Authority or by any such joint Committee of any enactment or rule of law or of any code of practice made or approved by or under any enactment to prepare a report to the Authority with respect to that proposed decision or omission.

It is as a consequence of this legislation that this report has been prepared as I consider the duty to report under S5(2) has been triggered by the circumstances surrounding the sale of 10 accommodation units at Newport Links Golf Club in apparent breach of obligations contained in a S106 TCPA 1990 agreement dated 13.6.2013 made between this Authority and the owner.

Background

Planning permission (NP/04/316 refers) was granted in 2005 for the extension of Newport Golf Course which included the provision of 13 guest rooms/properties (3 existing and 10 additional) for use in association with the golf course activities. Members approved the development subject to the applicant entering into a Section 106 agreement which required the applicant to carry out the formation and extension of the golf course and the proposed re-enhancement of the existing flats to the satisfaction of the local planning authority prior to the occupation of any of the new serviced accommodation approved. A further covenant was attached to the Section 106 agreement that restricted the disposal of all 13 of the guest rooms other than as an integral part of the golf club. A condition was also attached to the original planning permission (NP/04/316) restricting the use of the 13 guest accommodation units for holiday use only and not for use as permanent habitation.

Subsequently in 2012 an application to modify the Section 106 agreement was made, in which approval was sought to lift the restriction in relation to three original guest bedrooms to enable their disposal/sale. The application was recommended for refusal by officers, as it was considered contrary to policy, and was referred to the Development Management Committee for determination in November 2012. Members approved the application, but due to policy grounds and the provision of

development in the countryside, this was subject to monies arising from the sale of the 3 guest rooms/properties being re-invested into the golf club complex rather than providing a contribution to affordable housing and that the 3 properties could only be disposed of by way of lease, a copy of the minutes from that meeting are attached. The earlier Section 106 agreement which formed part of NP/04/316 was discharged as a result of this modification.

Following that meeting officers instructed solicitors to work with the applicant's solicitor to draft the S106 agreement. Several iterations of the S106 Agreement were exchanged which included the clause requested by Members in respect of the re-investment.

On 9th April 2013 a final draft was forwarded from the applicant's solicitor which identified 4 changes in a covering e-mail. The listed changes were checked and agreed by the firm of solicitors instructed by the Authority and the S106 was signed and modified. However, it has recently come to officer's attention that a further change was made to the draft S106 agreement by the applicant's solicitor. This change was not listed within the schedule of changes by the applicant's solicitor in his e-mail of 9th April 2013. This change was the removal of two words 'other than' from the relevant clause in the S106 Agreement. The removal of these two words from the clause has resulted in the ability of the landowner to dispose of 10 of the properties without having to re-invest the monies in the golf course/club, as per Members instructions.

Relevant Planning History

- NP/04/316 – Extension & re-arrangement of clubhouse accommodation; re-modelling of existing flats; extension of driving range shelter, guest rooms, link flat and golf pro-accommodation, extension of golf course to 18 holes. Approved 14th March 2006.
- NP/05/479 – Change of Use from agricultural land to golf course. Approved 14th March 2006.
- NP/06/279 – Change of Use to golf course. Approved 25th May 2007.
- NP/12/0449 – To lift the occupancy restriction to enable the disposal/sale of units 1, 3 and 4 in Block One. Approved 13th June 2013.
- NP/13/0362 – Change of Use from redundant golf equipment store to kitchen/dining room as an extension to existing ground floor residence. Approved 13th September 2013.
- NP/16/0297 - Conversion of 2 guest rooms to a single self-contained holiday accommodation unit - part retrospective. Approved 22nd September 2016.

NP/19/ 0382/S73 - Variation of Condition 11 of Planning Permission NP/04/316 to allow change of use from Manager's accommodation to holiday unit

The Authority instructed independent counsel to advise on the planning implications of this matter

Whilst the circumstances of the execution of the document has awarded an unexpected windfall profit to the owner, neither the Authority nor the public has suffered any pecuniary loss because of it. As a consequence any action which the Authority might have available to it must be viewed from that perspective.

Counsel has considered remedies in both Public Law (judicial review, revocation of planning permission) and in private law.

So far as Judicial Review and Revocation is concerned, neither is an attractive option, firstly because too much time has elapsed and therefore limitation issues arise and so far as revocation is concerned, the Court would not revoke the planning consent when 3rd parties, acting in good faith and at arms-length have purchased all the 10 units.

It might be possible to bring an action in tort (a wrongful act for which a civil action for damages may be brought) but again as the Authority has suffered no pecuniary loss, there is no benefit in pursuing that option as there is always a risk that an action might not succeed and therefore the Authority itself could be at risk as to costs.

An action in professional negligence against Solicitors instructed by the Authority is likely to succeed as liability will in all probability be conceded. However in the absence of a pecuniary loss having been incurred that remedy too is without real merit.

Summary

The effect of the error in the s106 Agreement means that the decision of the Development Management Committee has not been implemented, hence my decision to prepare this report under S5. However the situation which has resulted in this Report is very unusual in that there is no evidence of any impropriety or error on the part of the Authority itself. Consequently I cannot see that there are any steps that can be taken or procedures or policies that could be introduced that would reduce or eliminate the risk of a repetition.

Recommendation

That the contents of this report are noted.



- (d) REFERENCE: NP/12/0449
APPLICANT: Mr C Noott
PROPOSAL: To lift the occupancy restriction to enable the disposal/sale of units 1,3 and 4 in Block One
LOCATION: Newport Golf Club, Newport, Pembrokeshire

The application sought the modification of the Section 106 obligation imposed on planning permission NP/04/316 to remove the occupancy restriction imposed on Flats 1, 3 and 4 Dormy House to enable their disposal/sale separately from the overall golf course.

Members were reminded of the planning history of the site and that an informal request seeking the modification of the Section 106 Obligation as above had been made in August 2011. This had been considered by the Committee in September 2011 when it was resolved to refuse the modification. It was also resolved that should a formal application be received for modification of the obligation that this should be dealt with by the Committee. It was the formal application for modification of the obligation that was the subject of the report before them that day.

The report considered the main issues, which in this case were whether modification of the planning obligation would meet adopted planning policy; whether the planning obligation continued to meet the requirements of Circular 13/97; and other material considerations that would support modification of the obligation.

Officers considered that the request for a modification had not been justified and the original obligation should remain on policy grounds and having regard to national policy advice. It was not considered that other material considerations would justify the modification of this obligation contrary to long and well established national and local policy. In addition the economic gains that were presented in the application were not considered to be sufficiently compelling or with a high level of surety that would justify the release of this accommodation from the original Section 106 requirements. The application was therefore recommended for refusal.

Mr Chris Noot, the applicant, then addressed the Committee. He wished to point out that no new building work was being proposed, neither were there any variations or alterations to the existing buildings. The Club simply wished to dispose of the suites, which were difficult to let out to visitors because of their layout; an occupancy rate of 30% was typically achieved on these flats, compared to 80% on others in the complex. It was intended to re-invest the capital into the business to make what was excellent even better. More integrated landscaping would be undertaken to improve the course to championship level. This, together with its



location, would attract many more visitors. There would be great social and economic benefits to contractors and employees with a long term gain of 6 full time jobs in the first year and more in the second year. This had huge potential to benefit the local economy. He had hoped that the proposals would be welcomed subject to the undertakings made, and didn't think that control of the buildings would be lost. The business took its responsibilities seriously, and endeavoured to do things right; a discounted membership was offered to members of the armed services and the course was opened on 14 times in the previous year for charity events. Mr Noot went on to say that his grandchildren attended the local school and that it made him sad to think that it was inevitable that they would have to leave Newport when they grew up in order to find careers. What was needed was a strong local economy – the two mainstays of agriculture and tourism were both struggling and North Pembrokeshire needed all the help it could get. On that basis he hoped Members would support the application.

One of the Members began by saying that he recalled the debate when the application was first considered by the Committee and did not think that anything had changed in that time. He supported the S106 Obligation and moved the recommendation.

Other Members, however pointed out that the application did not seek to remove the S106 Obligation or make any external changes. The applicant had advised that ongoing maintenance of the flats would be covered in the lease. The money raised by sale of the property would allow investment which would create employment and bring the course into the twenty first century; this was vital to an area like Newport which was dependent on the tourism industry. Local business would carry out the work and this would also benefit the local economy. They pointed out that the Authority had an economic responsibility and that refusal would damage the ability of the Club to obtain Championship status and thereby harm the social and economic wellbeing of the area. They considered that the S106 obligation had done its job in ensuring that the proposal benefitted the local economy and that although the contribution made by these flats was less than had been expected, a long term contribution could still be made through the release of capital and through the owners' use of the facilities. This would all serve to support the sustainability of the business. Approval of the application was therefore moved and seconded.

The Head of Development Management said that she supported Members in considering the social and economic wellbeing of the area and this was central to the original grant of planning permission. At that time, the Club had said that the flats were necessary for their future. There was no surety that releasing the flats from the agreement would



have the effect that Members wanted, and there was no guarantee of reinvestment. Any agreement on maintenance would be a gentlemen's agreement with no means of enforcement. She was also concerned that if the Club were successful, further development would be requested at this sensitive location. It would also be more difficult to resist the release of other accommodation on the site. She reminded Members that the Committee had resolved to refuse the request in 2011 and she questioned what had materially changed since that time.

The Solicitor went on to clarify the legal position regarding modification of S106 Obligations – this could only be done if it no longer served a useful purpose, or if it continued to have a purpose but the purpose would be served equally well if the obligation were removed. Officers had given advice that neither of these tests were met.

Other Members agreed that it was difficult to get the right balance between the economy and policy, however officers had set out sound planning reasons for retention of the Obligation and these were still valid. Also the National Park's principle purpose was conservation and the duty to consider the social and economic wellbeing was a secondary consideration. The message that would be sent out to other businesses in the National Park that the Authority was happy to set aside its policy on development in the countryside would set a dangerous precedent.

Before taking a vote on the amendment, to approve the application, Members agreed that the Section 106 Obligation should be amended to require the capital raised to be re-invested into the Golf Club.

DECISION: That the application be approved subject to amendment of the S106 Obligation to require the capital raised to be re-invested into the Golf Club.

As the decision had been taken contrary to the Officer's Recommendation, the Head of Development Management advised that she would be discussing with the Chief Executive whether the application should be subject to the Authority's cooling off procedure. She also required reasons from the Members why the application had been approved. These were given as compliance with Policy 1 of the Local Development Plan that there would be no negative impact as this was an existing development. It therefore followed that the Authority had a duty to promote the social and economic wellbeing of the area. Members also considered that while the agreement continued to serve a useful purpose, it would serve that purpose equally well if it had effect subject to the modifications approved.



- (a) REFERENCE: NP/12/0449
APPLICANT: Mr C Noott
PROPOSAL: To lift the occupancy restriction to enable the disposal/sale of units 1, 3 and 4 in Block One
LOCATION: Newport Golf Club, Newport

Members were reminded that this application had been reported to the November meeting of the Development Management Committee when it was resolved to approve the modification the existing planning obligation by agreement entered into under section 106 of the Town and Country Planning Act 1990 subject to a variation to the agreement being negotiated that required any monies arising from the sale of the flats to be re-invested into the golf course and club. Officers considered that such a modification would be a significant departure from the adopted Local Development Plan and as such had instigated a 'cooling off' period of one month, in accordance with the Authority's agreed protocol on departure applications, prior to a final decision being made.

There was no requirement to refer the modification to the Welsh Government and the application was now brought back to the Committee for a final decision.

However officers remained of the opinion that the modification sought was contrary to the Development Plan and again recommended refusal.

The Head of Development Management said at the meeting that she was aware that Members had received a letter from the applicant and had noted the content, however she wished to clarify that she had not been questioning the applicant's integrity but wishing to ensure that decisions were made in line with formal procedures and policy.

A number of Members stated they had not changed their opinion, and approval of the modification requested was moved and seconded. One Member asked how the Authority would ensure that the capital raised would be re-invested in the Golf Club, and the Head of Development Management replied that the Solicitor would be working with the Authority and the applicant to agree a revised S106 Agreement setting out a package of works to be undertaken. A further report would be made to the Committee in due course setting out what agreement had been reached.

Other Members reiterated their objection to the modification of the agreement on the basis that a dangerous precedent would be set by allowing accommodation in the Countryside.



The Solicitor invited the Members, if they remained minded to grant approval, to consider a resolution in the following terms which would enable the existing planning obligation to be re-negotiated with the applicant:

- (i) The existing obligation continues to serve a useful purpose of controlling residential use in the open countryside.
- (ii) The Committee is nevertheless minded to agree to the modification of the obligation to allow the disposal by way of lease for residential use of Flats 1, 3 and 4 Dormy House subject to being assured that the proceeds will be applied to the further development of the facilities of the Newport Golf Club.
- (iii) Accordingly, to instruct officers:
 - a) to enter into discussions with the applicants regarding the exact terms of modification of the existing obligations in the light of the views expressed by the Committee;
 - b) to consider whether any other provisions of the obligation can now be discharged as having been fulfilled
- (iv) Officers are asked to report the results of the discussions back to the Committee.

Those who had proposed and seconded approval of the application declared themselves happy with the proposed wording and moved and seconded the wording.

A recoded vote was taken on this revised motion with the following result:

For: Mr D Ellis, Councillor P Harries, Councillor M James, Councillor R Kilmister, Councillor A Lee, Councillor RM Lewis, Councillor P Morgan, Councillor R Owens
Against: Mr A Archer, Councillor JA Brinsden, Councillor L Jenkins, Councillor D Rees, Councillor M Williams

Members confirmed that the reasons for agreeing the modification remained unchanged from those given at the previous meeting of the Committee namely: compliance with Policy 1 of the Local Development Plan that there would be no negative impact as this was an existing development. It therefore followed that the Authority had a duty to promote the social and economic wellbeing of the area. Members also considered that while the agreement continued to serve a useful purpose, it would serve that purpose equally well if it had effect subject to the modifications approved.



DECISION:

- (i) The existing obligation continued to serve a useful purpose of controlling residential use in the open countryside.**
- (ii) The Committee was nevertheless minded to agree to the modification of the obligation to allow the disposal by way of lease for residential use of Flats 1, 3 and 4 Dormy House subject to being assured that the proceeds would be applied to the further development of the facilities of the Newport Golf Club.**
- (iii) Accordingly, officers were instructed:**
 - a) to enter into discussions with the applicants regarding the exact terms of modification of the existing obligations in the light of the views expressed by the Committee;**
 - b) to consider whether any other provisions of the obligation could now be discharged as having been fulfilled**
- (iv) The results of the discussions should be reported back to the Committee.**