



Appeal Decision

Site visit made on 11 February 2020

by Robert Hitchcock BSc DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2020

Appeal Ref: APP/Z5630/W/19/3237459

Underground Car Park at Kingston Riverside, 1 Henry Macaulay Avenue, Kingston, Kingston upon Thames KT2 5FE

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be modified.
 - The appeal is made by Premier Ground Rents No5 Ltd against the Council of the Royal Borough of Kingston-upon-Thames.
 - The development to which the planning obligation relates is a building accommodating a 150 bedroom hotel and 148 flats, and a building comprising 222 flats.
 - The planning obligation, dated 11 July 2011, was made by NHP Leisure Developments Limited, NHP (Kingston) Limited, Merlion Capital Kingston Limited and Irish Nationwide Building Society.
 - The application Ref 19/00766/FUL is dated 19 March 2019.
 - The application sought to have the planning obligation modified as follows: Variation of Sections 27 and 39 to substitute a previously agreed car parking management plan.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Premier Ground Rents No5 Ltd against the Royal Borough of Kingston upon Thames. This application is the subject of a separate Decision.

Procedural Matters

3. The appeal relates to a planning application that was not determined by the Council within the prescribed period. Where an authority has failed to give notice within the prescribed period of the submitted application, it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification¹.
4. The application was originally made using the description of development contained within the banner heading above. This was amended and agreed by the main parties to 'Variation of Sections 27 and 39 of the Unilateral Undertaking of planning application 06/12424/FUL allowed on Appeal APP/Z5630/A/07/2062354/NWF (as amended by applications 09/12648/NMA, 12/12223/NMA, 12/12574/NMA & 14/12118/NMA) to replace the existing Car Park Management Plan'. The planning application was notified using the

¹ S106B (2) of the Town and Country Planning Act 1990

amended description. Consequently, I conclude that there would be no prejudice to interested parties if the amended description is used.

Main Issue

5. The main issue is whether the proposed variation of the planning obligation is valid under the terms of s106 of the Town and Country Planning Act 1990 (as amended) (the Act).

Reasons

6. Section 106A of the Act provides that a planning obligation may not be modified except by agreement between the appropriate authority and the person or persons against whom the obligation is enforceable. Further, s106A requires that such an agreement shall not be entered into except by an instrument executed as a deed.
7. I acknowledge the Council's previous acceptance and determination of a similar application to provide variation to the car parking management plan (CPMP). I also note that this was agreed despite the fact that a conflict between the amendment to the CPMP and the terms of the planning obligation persisted. This was in particular regard to the number of spaces retained for use by occupiers of affordable housing units.
8. The appellant submits that it was consequently a matter for the Council as to whether to under-enforce the terms of the unilateral undertaking in that respect and the same would apply if the CPMP was further amended in conflict with the s106 terms. That may indeed be the case, however, it is not within my gift to determine on that issue or assume the Council's acceptance to under enforce through this appeal process.
9. Whilst planning obligations are intended to be flexible, I note that the proposed provisions within the CPMP are, in part, in conflict with the terms of the signed planning obligation. Therefore, in the absence of any legal instrument to vary its terms, as required under Section 106A of the Act, the proposed variation of the planning obligation would not be valid and the appeal must fail.

Conclusion

10. For the above reasons, I conclude the appeal should be dismissed.

R Hitchcock

INSPECTOR