

Application Number: 11/23/0110

Full Application: Modification of Planning Obligation Deed of Variation (S106) dated 22 April 1998 under S106A of the Town and Country Planning Act 1990

Address: Unit 1, 2 and 4 Hyndburn Retail Park Whitebirk Drive Blackburn BB1 3HT

Registration Date: 10th March 2023

Agent: NJL Consulting Ltd

HUMAN RIGHTS

The relevant provisions of the Human Rights Act 1998 and the European Convention on Human Rights have been taken into account in the preparation of this report, particularly the implications arising from the following rights:-

Article 8

The right to respect for private and family life, home and correspondence.

Article 1 of Protocol 1

The right of peaceful enjoyment of possessions and protection of property.

This application is brought before Planning Committee for consideration as it includes an amended S106 agreement.

Application Site

Unit 1, 2 and 4 are situated at the northern part of Hyndburn Retail Park. These three units form part of a row of 4 retail units separated from the remainder of the retail park by an access road. Unit 3 is situated to the west and Unit 4 to the east are both standalone buildings, and units 1 and 2 are conjoined together. Unit 1 is currently vacant and has been for several years due to PC World merging with the existing Curry's store at the Unit 3. In June 2023, a planning application for the subdivision of Unit 1 to form two separate units was granted planning permission (reference: 11/22/0541).

It is understood that this group of 4 units were originally approved in 1985 under the application reference 11/85/0469 (Erection of three retail units with car parking and subject to a S.52 legal agreement dated 21st January 1986. The S.52 was varied through a S106 Deed of Variation in 1998 which limits the types of goods to be sold at those units to: carpets and floorcovering and accessories; drapery (excluding clothing), motor vehicle accessories; gardening materials, tool and equipment; building tools, material and

equipment; furniture; electrical goods; household DIY tools, materials and equipment; white goods; office and computer equipment supplies and accessories. Currently, Units 2, 3, 4 are currently occupied by Dreams Ltd, Curry's PC World, and Wrens Kitchen Ltd respectively, whilst the Unit 1 remains to be vacant with an unimplemented planning permission for the subdivision.

The Peel Centre is an existing retail park located on the north east side of Whitebirk Drive, off Junction 6 of the M65 and the edge of the built up areas of Hyndburn and Blackburn. The centre is bounded by the Leeds and Liverpool Canal to the north and east. To the North West is the railway embankment, and to the south west is a collection of car dealerships and the Lancashire Constabulary Eastern Divisional Headquarters. The currently developing Whitebirk Strategic Employment site is to the south on the other side of Whitebirk Drive.

The application seeks to modify the planning obligation Deed of Variation (S106) dated 22 April 1998 under the S106A of the T&CPA 1990 between Hyndburn Borough Council and Norwich Union Pensions Management Ltd. Units subject to this Planning Obligation Modification is Unit 1, 2 and 4, as illustrated in the Tenant Layout Plan accompanying this application. The proposed modification would allow closer alignment of the Unit 1, 2 & 4 with the permitted baseline position in respect of the majority of the retail park. It is noted that the proposed modification to the Deed would not introduce any further uses or types of goods other than agreed under the 2009 agreement. There is a very narrow area of good being added through the proposed change to the S106 position within the vast majority of the listing is the same as before. The following table provided by the applicant within the Planning Statement provides a summary for the proposed changes and modifications:

<i>EXISTING GOODS PERMITTED</i>	<i>2009 AGREEMENT</i>	<i>PROPOSED</i>
<i>Carpets and floor coverings and accessories</i>	<i>Carpets and other floor coverings</i>	<i>Carpets and floor coverings and accessories</i>
<i>Drapery (excluding clothing)</i>	<i>Drapery and Towelling goods (but not made-up clothing (save where included in ordinarily incidental to any other class of goods permitted to be sold))</i>	<i>Drapery and Towelling goods (but not made-up clothing (save where included in ordinarily incidental to any other class of goods permitted to be sold))</i>
<i>Motor Vehicle Accessories</i>	<i>Motoring and motorists accessories and equipment</i>	<i>Motoring and motorists accessories and equipment</i>
<i>Gardening materials, tools, and equipment</i>	<i>Garden Centre produce and goods</i>	<i>Gardening materials, tools, equipment and produce</i>
<i>Building tools, materials, and equipment</i>	<i>Builders Merchants goods</i>	<i>All Builders Merchants goods, including tools, materials and equipment</i>
<i>Furniture</i>	<i>Furniture and Furnishings (including soft furnishings)</i>	<i>Furniture and Furnishings (including soft furnishings)</i>

<i>Electrical goods</i>	<i>Electrical goods</i>	<i>Electrical goods</i>
<i>Household DIY goods materials and equipment</i>	<i>DIY goods</i>	<i>Household and all other DIY goods materials and equipment</i>
<i>White goods</i>		<i>White goods</i>
<i>Office and computer supplies and accessories</i>		<i>Office and computer supplies and accessories</i>
	<i>Bulky goods</i>	<i>Bulky goods</i>
	<i>Home improvement goods and accessories (including home fittings)</i>	<i>Home improvement goods and accessories (including home fittings)</i>
	<i>Bedding goods</i>	<i>Bedding goods</i>
	<i>Kitchen Equipment and Utensils</i>	<i>Kitchen Equipment and Utensils</i>
	<i>Crockery and cutlery</i>	<i>Crockery and cutlery</i>
	<i>Bathroom equipment</i>	<i>Bathroom equipment</i>
	<i>Candles</i>	<i>Candles</i>
	<i>Dry flowers and plastic flowers</i>	<i>Dry flowers and plastic flowers</i>
	<i>Clocks</i>	<i>Clocks</i>
	<i>Craft goods</i>	<i>Craft goods</i>
	<i>Pet goods and products</i>	<i>Pet goods and products</i>
	<i>Seasonal decorative goods</i>	<i>Seasonal decorative goods</i>

Consultations

Blackburn with Darwen Borough Council: No comments received

HBC Legal: No comments received.

Relevant Planning History

The site of the Peel Centre was once occupied by buildings and infrastructure associated with the Whitebirk Power Station. In September 1984, outline planning permission (ref 11/83/0679) was granted for the erection of warehouse units (50,000 sq ft) and non-food retail units (50,000 sq ft) garden centre building with open display including car parking service areas and access road. The planning permission was granted subject to planning conditions and a legal agreement (a s.52 agreement) that restricted the range of goods that could be sold from the area of the planning permission.

Planning permission was subsequently granted in January 1985, ref 11/84/0724, for the erection of a non-food retail unit which was proposed to be occupied by a D.I.Y retailer (Do-it-all). This was subject to the same legal agreement.

In 1995 planning permission was granted (ref 11/95/0017) to sub-divide Unit 2 into two separate units and in 1999 planning permission (ref 11/99/0441) was granted for the use of the land to form a garden centre.

In 2005 a planning application (ref 11/05/0395) was submitted for the reconfiguration of the retail park to provide replacement Class A1 retail units, 2no A3 units, recladding of the existing units and the construction of an additional access, associated landscaping and ancillary works. In terms of floorspace, the application proposed the demolition of 9,157m² gross of existing units and the development of 13,769m² gross of new retail floorspace, a proportion of which was mezzanine flooring. The application also provided for the relaxation of the existing s.106 agreements to allow a total of 4,454m² of open A1 (non-food) floorspace. This was refused in July 2007 for two reasons:

1. The establishment of open A1 retailing at this bulky goods retail park would be contrary to established government objectives, as set out in Planning Policy Statement 6: Planning for Town Centres, of focusing retail development in town centres in order to strengthen and regenerate them and to promote vital and viable town centres in order to achieve sustainable development. The proposed development would be likely to adversely impact on both Accrington and Blackburn Town Centres and act as a disincentive for new investment in the town centres.
2. The application does not satisfy the sequential approach to the location of retail proposals in that there are sequentially preferable sites available to accommodate a proportion of the open A1 floorspace. In failing the sequential assessment the application is contrary to Policy EC8 of the Regional Spatial Strategy.

The applicant appealed and following a public inquiry the appeal (ref APP/R2330 /A/07/2051143) was dismissed in June 2008.

In 2009 the Council entered into a s.106 agreement with the applicant that replaced the agreements made under s.52 but still restricted the range of goods that could be sold from a large portion of the Peel Centre. This was achieved through application 11/09/0042 and the officers report recognised that the aim of the original agreement was to protect the vitality and viability of the adjacent town centres of Blackburn and Accrington and the local centres such as Rishton. It is noted that the 2009 modification only covers part of the south element of the Hyndburn Retail Park, and the north element was not included. That means that till now, Units 1, 2 and 4 are still subject to the planning obligation deed of variation dated 22nd April 1998. Unit 1 (occupied by Curry's PC World) is subject to a S106 agreement dated 8th September 1996.

Relevant Policies

Development Plan

Hyndburn Core Strategy

- Policy BD1 The Balanced Development Strategy
- Policy A2 Accrington Town Centre

Development Management Development Plan Document

- GC1: Presumption in favour of sustainable development
- GC2: Infrastructure, Planning Obligations and CIL
- DM3: Development of main town centre uses

Material considerations

National Planning Policy Framework (NPPF) including
 National Planning Practice Guidance (NPPG)
 Hyndburn Retail Study 2016
 Blackburn with Darwen Core Strategy 2011
 Blackburn with Darwen Site Allocations and Development Management Policies 2-15
 Blackburn with Darwen Borough Council Retail Study 2011

Modifications/changes sought

It is understood that this group of 4 units were originally approved in 1985 under the application reference 11/85/0469 (Erection of three retail units with car parking and subject to a S.52 legal agreement dated 21st January 1986. The S.52 was varied through a S106 Deed of Variation in 1998 which limits the types of goods to be sold at the premises, and the Clause 1.1 reads as:

'Clause 1(a) is deleted therefrom and the following inserted in its place:

No items or good other than

Carpets and floor covering and accessories

Drapery (excluding clothing)

Motor vehicle accessories

Gardening materials, tools and equipment

Building tools, materials and equipment

Furniture

Electrical goods

Household DIY goods materials and equipment

White goods

Office and computer equipment supplies and accessories shall be sold on the premises within the prior written consent of the council'

The aim of this agreement was to protect the vitality and viability of the adjacent town centres of Blackburn and Accrington and the local centres such as Rishton. When considering any modifications therefore, it would be essential to ensure that there is no 'significantly adverse' impact on the vitality and viability of town centres or local centres within the catchment area (this is discussed in more detail later in the report).

Modifications are now sought under Section 106A of the Town and Country Planning Act 1990 to the 22nd April 1998 S106 in respect of Unit 1, 2 and 4 at the north section of the Hyndburn Retail Park.

The new agreement shall regulate the use of the Unit 1, 2 and 4 within the northern section of the Hyndburn Retail Park. Within that new agreement, the list of permitted goods applicable to the Unit 1, 2 and 4 contained within the Section 106 will be increased by the inclusion of any additional types of goods which are permitted by the 2009 agreement. Some changes to the wording of the permitted goods are also proposed in the new agreement to consolidate the 1998 and 2009 agreements.

In this instance, the proposed modification to the list of goods as set out at Clause 1.1 of the S106 (dated 22nd April 1998) is required to enable the new occupiers of part of Unit 1 of the northern element of the retail park, which would be subdivided as approved under the planning permission 11/22/0541. The proposed modification would increase the list of permitted goods by the inclusion of any additional types of goods as listed in the First Schedule, Paragraph (2) of the Section 106 agreement dated 23rd June 2009, but still retain the following three items of the 1998 version:

- Household DIY goods, materials and equipment
- White goods
- Office and computer supplies and accessories

Under the act, if a request comes forward to modify an existing S106, the local planning authority can only determine it in one of the following ways:

- a. That the planning obligation shall continue to have effect without modification;
- b. If the obligation no longer serves a useful purpose, that it shall be discharged; or
- c. If the obligation continues to serve a useful purpose, but would serve the purpose equally well if it had affect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

The applicant has confirmed they are applying under point c). As such, if the obligation would serve the purpose equally well subject to the specifications mentioned in the application then the modification should be allowed.

In order to assess whether the planning obligation will continue to serve a useful purpose when modified as is being proposed by the application, it is appropriate to look to local and national planning policy in terms of the impact that the modified S106 would have on the vitality and viability of the town centre.

- Hyndburn Core Strategy Policy A2:

This policy states:

‘Accrington Town Centre will consolidate and develop as the principal centre and historic market town, providing the Borough’s key services and comparison and food retailing

needs. Independent retailers will provide for specialist/leisure shopping needs for the Borough.

New comparison and convenience (including food) retailing will be focused in Accrington town Centre. Existing and future day to day shopping needs will be met in town, township and neighbourhood centres and, at an appropriate scale, in sustainable locations where there are identified deficiencies.

New office development will be focussed in Accrington Town Centre with smaller scale development in Church and Oswaldtwistle gateway and at former employment sites that are being redeveloped for a mix of uses'.

The site is not located within a town, township or a neighbourhood centre, is considered as an out of town location, and Hyndburn's Retail Study (2016) confirms that there is not a deficiency for this type of provision within this area. As such Officers do not consider that the proposal is in line with Policy A2 of the Core Strategy, however, the planning history of this site represents an important material consideration that should be given significant weight.

As the proposal is not in line with Local Planning policy, it is necessary to turn to the NPPF and other local planning policies in order to consider how to assess the request for the modification to the June 2009 S106 agreement at this site.

Under NPPF para 24, a LPA is required to apply a Sequential Test to planning applications for town centre uses, such as retail that are not in an existing town centre and are not in accordance with an up to date Local Plan.

The Hyndburn Development Management Development Plan Document provides further guidance on this matter. Policy DMDPD DM3: Development of main town centre uses point 4 states that:

'Proposals for main town centre uses that are not located in defined Town Centres or Local Centres, and are not in accordance with specific policies in the Site Allocations DPD, should address the following:

- a. Demonstrate that no sequentially preferable site is available or suitable through a proportionate but thorough assessment of more central sites,
- b. That in the application of the sequential assessment above, developers and operators demonstrate flexibility in terms of scale and format'.

Under NPPF para 26 , when considering applications for retail development outside of town centres, which are not in accordance with an up to date Local Plan, LPAs require an retail impact assessment to be submitted, if the development is over a proportionate locally set floor space (see DM3 point 5 discussed later). This is to include an assessment of the following:

- The impact of the proposed on existing, committed and planned public and private investment in a centre or centres in their catchment area of the proposal, and
- The impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and wider area, up to five years from the time the application is made. For major schemes where the full impact will not be realised in five years, the impact should also be assessed up to ten years from the time the application is made.

The Hyndburn Development Management Development Plan Document provides further guidance on this matter. Policy DM3: Development of main town centre uses, point 5 states that:

- Proposal for new retail floor space that are not in accordance with specific policies in the Site Allocations DPD, and are larger than the thresholds set out below, must submit a retail impact assessment. The Council will assess the proposal against the likelihood of ‘any significant adverse’ impacts on Town or Local Centres.

Although the prevailing policy framework seeks to protect town centres through the application of the sequential and impact tests, in this instance the applicant is not seeking to develop new floor space but increase the range of goods being sold on part of the Peel Centre in a manner consistent with other parts of the site.

Having reviewed the information provided with the application, officers have noted that there is very narrow area of goods being added through the proposed changes to the S.106 position. The vast majority of the listing is in fact the same as before and hence is of no relevance in sequential test terms. The provision of items including candles, dried and plastic flowers, clocks, craft goods, and seasonal decorative goods, are ancillary to the usual trading of retail warehouse, units of the scale existing at Hyndburn Retail Park. Furthermore, it is reasonable to consider that given the scale of the retail units subject to this proposal, the types of goods identified in this paragraph is required to let the unit to a specific retailer in this field alone. Rather, the change is needed to allow predominantly bulky retailers to trade in the format and business model that they currently operate.

In light of the above, officers are of the view that given the proposal does not involve the increase of the cumulative retail floor areas for any particular type of retailer, and the additional types of goods introduced as result of the proposal are ancillary to the usual trading of retail warehouse units of the scale existing at Hyndburn Retail Park, and are in line with the 2009 S106 agreement, and allow closer alignment of the Unit 1, 2 & 4 with the permitted baseline position in respect of the majority of the retail park. As such, it is considered that a site sequential assessment would be irrational in this instance.

With regard to the impact of the proposal on the vitality and viability of the neighbouring town and local centre, it is considered that given the scale of the retail food spaces subject to this proposed modification, and the introduction of types of goods which are already included in the 2009 S106 agreement, and ancillary to the usual trading of retail warehouse

at Hyndburn Retail Park, officers are of the view that the proposed modification to the 1998 S106 agreement would have negligible trade impacts on the neighbouring town centre of Rishton and Great Harwood and that these impacts will not therefore constitute significant adverse impacts. It is also noted that the Blackburn and Darwen Borough Council has also been consulted on this application, and provided no comments.

The Council's Legal Services Dept has been consulted but at the time of writing no observations have been received. S.106 agreements are normally drafted in consultation with Legal Services and for this reason the recommendation in this report is that the proposed change to the s.106 be supported subject to no objections from Legal services and that delegated powers be given to the Chief Planning and Transportation Officer to agree any changes needed with the applicant should concerns be raised by Legal Services.

Conclusion:

Officers do not consider that the proposal is in line with the provision of Policy A2 and this weighs against the development. However officers agree with the applicant's view that applying a full site sequential assessment wouldn't be rational, given the nature and scale of the proposed modification. It has also been sufficiently demonstrated that the proposed modification to the 1998 S106 agreement would not have significantly adverse impact on the nearby towns, town ships and local centres and for this reason the development is acceptable.

Therefore, Officers consider that under S106A of the Town and Country Planning Act 1990, the obligation would continue to serve a useful purpose equally well subject to those modifications.

At the point of writing the report, a draft S106 agreement has been submitted to the LPA and currently being reviewed by the Council's Legal Officer. The final wording is delegated s106 to the Chief Planning Officer prior to the s106 being signed. It is also noted that there have been on-going issues with the numbering of the 4 existing units at the north section of the Hyndburn Retail Park, officers would therefore recommend that prior to the signing of the Section 106 agreement, the numbering issues associated with the 4 units at the north section of the Hyndburn Retail Park must be satisfactorily addressed.

Recommendation:

1. That subject to no objection from Legal Services to the proposed changes, the 22nd April 1998 S106 is modified as requested, and;
2. That in the event that concerns are raised by Legal Services about the proposed changes, that delegated authority is given to the Chief Planning and Transportation Officer in consultation with the Director of Legal Services to resolve any outstanding issues with the applicant before the amended s.106 agreement is signed.