

Development Management Sub-Committee Report

Wednesday 1 May 2024

**Application for Planning Obligation
7 Henderson Place Lane, Edinburgh, EH3 5DG.**

Proposal: Section 75A application to modify the affordable housing obligations (planning permission 21/04326/FUL)

**Item – Committee Decision
Application Number – 23/02562/OBL
Ward – 00 - No Ward Number**

Reasons for Referral to Committee

The application has been referred to the Development Management Sub-Committee because the proposal seeks to significantly modify the terms of the obligation and must be determined by the Development Management Sub-Committee.

Recommendation

It is recommended that this application be **accepted, and the agreement be modified** subject to the details below.

Summary

Affordable housing is no longer proposed to be provided on site because it is not financially viable, and a commuted sum is considered acceptable. Independent financial advice has been obtained, and the sum of £56,500 per unit (£593,250 in total) complies with LDP Policy Hou 6, NPF 4 Policy 16, Policy 18 and Non-Statutory Guidance on Affordable Housing where the commuted sum can be used within the ward or an adjacent ward.

The modification to the planning obligation, to provide a commuted sum, is acceptable and the legal agreement can be modified.

SECTION A – Application Background

Site Description

The application relates to a level site measuring approximately 0.20 hectares in area, located on the south side of Henderson Place Lane, and bounded on the south and west sides by Henderson Place which leads off Henderson Row to the north.

The site was formerly part of a larger site occupied by the Edinburgh Tramway depot in the later 19th century. All depot buildings were demolished in the 1980s and the frontage of the 1888 offices on Henderson Row were incorporated into a new office development for Scottish Life (subsequently Royal London).

The surrounding area is predominantly residential in use with mainly late 20th century flatted blocks and terraces of between four and five stories and there is a two/three-storey mews-style terrace to the south of the site. Mixed commercial uses, including retail and cafes, occupy premises at ground floor level within the tenement at the south-east corner of Henderson Row and Dundas Street.

The development on site commenced, following a Notice of Initiation of Development (section 27 of the Town and Country Planning (Scotland) Act 1997) on 1 April 2022. This application was submitted to the Council on 13 June 2023. The development is presently in its basic form in excess of two storeys in height.

Description of the Proposal

This application seeks to modify the planning obligation (dated 14 April 2022) regarding on-site affordable housing forming a part of that development, (reference 21/04326/FUL).

That permission was granted for demolition of the existing building on the site and erection of a residential development comprising 42 flats, including 10 affordable units with private and communal amenity space. With the residential accommodation comprising; 2 x studio, 3 x one-bed, 15 x two-bed, 9 x 3-bed, and 3 x four-bed 'open market' units; and 8 x one-bed and 2 x three-bed 'affordable' units.

This application seeks to remove the existing Clause 3 provisions that require the provision of the 10 on-site affordable housing units and to replace them with clauses enabling the payment of a commuted sum to provide for off-site affordable housing provision calculated in relation to 10.5 units (being 25% of the original 42 units within the development).

The applicant, within his modification submission, proposes a commuted sum of £55,000 per unit at a total of 10 units equating to a total contribution of £550,000. Those values were based on other off-site contributions within the same catchment area.

There are no proposed replacement clauses, at this stage of the process, concerning when the contribution would be paid and nothing that would place a limit on the Council's use of the payment thereafter.

The other provision, within the legal obligation, for an education infrastructure contribution of £41,160(indexed) was paid in full to the Council on 2 August 2022.

Supporting Information

- Supporting Statement and
- Financial Appraisal.

These are available to view on Planning and Building Standards Online Services.

Relevant Site History

21/04326/FUL

7 Henderson Place Lane

Edinburgh

EH3 5DG

Proposed demolition of existing building and erection of a residential development comprising 42x flats with amenity space, landscaping, cycle, parking, and other associated infrastructure.

Granted

16 June 2022

21/04326/VARY

7 Henderson Place Lane

Edinburgh

EH3 5DG

Non-Material Variation of consent 21/04326/FUL to reduce quantity and detail of metal cladding to the building's facades, alterations to window / door design, roof, and floor heights.

VARIED

26 January 2023

21/04326/VAR2

7 Henderson Place Lane

Edinburgh

EH3 5DG

Non-Material Variation of consent 21/04326/FUL - slight relocation of 2x parking spaces for parking space to be used as private spaces minor amendments to fenestration detailing.

VARIED

15 September 2023

Other Relevant Site History

No other relevant planning site history.

Pre-Application process

There is no pre-application process history.

Consultation Engagement

Housing Management and Development (Affordable Housing)

Refer to Appendix 1 for a summary of the consultation response.

Publicity and Public Engagement

Date of Neighbour Notification: Not Applicable

Date of Renotification of Neighbour Notification: Not Applicable

Press Publication Date(s): Not Applicable

Site Notices Date(s): Not Applicable

Number of Contributors: 0

Section B - Assessment

Determining Issues

Section 75A(1)(a) of the Town and Country Planning (Scotland) Act 1997 states - A planning obligation may not be modified or discharged except, by agreement, between the planning authority and a person against whom that obligation is enforceable.

Section 25 of the Town and Country Planning (Scotland) Act 1997 requires that planning decisions, including the modification or discharge of a section 75 agreement, be made in accordance with the development plan, unless material considerations indicate otherwise.

In determining such an application for the modification or discharge of a planning obligation, the specific provision should be considered against the five policy tests set out in Planning Circular 3/2012. These tests relate to necessity, planning purpose, relationship to the proposed development, relationship to scale and kind and reasonableness.

Assessment

To address these determining issues, it needs to be considered whether:

To address these determining issues, it needs to be considered whether:

a) the modification of the obligation is considered to be acceptable.

National Planning Framework 4 (NPF 4) was adopted by the Scottish Ministers on 13 February 2023 and forms part of the Council's Development Plan. NPF 4 policies supports the planning and delivery of Sustainable Places, Liveable Places and Productive Places and are the key policies against which proposals for development are assessed. There are several policies in the Edinburgh Local Development Plan (LDP) that are equivalent to policies within NPF 4. The relevant policies to be considered are:

- NPF 4 Liveable Places: Quality Homes Policy 16.
- NPF 4 Liveable Places: Infrastructure first Policy 18.
- LDP Strategy policy Del 1
- LDP Housing policy Hou 6

The non-statutory 'Affordable Housing Guidance (updated May 2021)' is a material consideration that is relevant when considering the proposal.

NPF 4 Policy 16 (Quality Homes) encourages, promotes, and facilitates the delivery of more high quality, affordable and sustainable homes, in the right locations, providing choice across tenures that meet the diverse housing needs of people and communities across Scotland.

NPF 4 Policy 18 (Infrastructure first) encourages, promotes, and facilitates an infrastructure first approach to land use planning, which puts infrastructure considerations at the heart of placemaking. Those provisions are to be in full compliance with the relevant Circular tests with regards to each development and determination made by the planning authority.

"e) Development proposals for new homes will be supported where they make provision for affordable homes to meet an identified need. Proposals for market homes will only be supported where the contribution to the provision of affordable homes on a site will be at least 25% of the total number of homes, unless the LDP sets out locations or circumstances where:

- i. a higher contribution is justified by evidence of need, or*
- ii. a lower contribution is justified, for example, by evidence of impact on viability, where proposals are small in scale, or to incentivise particular types of homes that are needed to diversify the supply, such as self-build or wheelchair accessible homes.*

The contribution is to be provided in accordance with local policy or guidance."

LDP Policy Del 1 (Developer contributions and infrastructure delivery) requires development to contribute to the specified infrastructure provision where relevant and necessary to mitigate any negative additional impact (either on an individual or cumulative basis) and where commensurate to the scale of the proposed development. In order to provide further detail on the approach to implementation of this policy and to provide the basis for future action programmes the policy states that Supplementary Guidance will be prepared to provide guidance on a number of matters including the required infrastructure in relation to specific sites and/or areas.

LDP Policy Hou 6 (Affordable Housing) states planning permission for residential development, including conversions, consisting of 12 or more units should include provision for affordable housing amounting to 25% of the total number of units proposed. For proposals of 20 or more dwellings, the provision should normally be on-site. Whenever practical, the affordable housing should be integrated with the market housing.

The supporting text to the policy states that the provision on an alternative site may be acceptable where the housing proposal is for less than 20 units or if there are exceptional circumstances.

The Affordable Housing Guidance sets out the criteria for when the payment of commuted sums in lieu of on-site provision will be acceptable. All the below criteria should be met:

- There are exceptional reasons to avoid on-site provision, such as the site being poorly located for affordable provision, where conversions do not lend themselves to affordable provision, where it is evidenced to be unviable or unfeasible or where there are other advantages to the Council in accepting a commuted sum such as achieving more, higher quality or better-located affordable units elsewhere; and
- The Council is confident that that the commuted payments can be spent on providing affordable units within the same area of the city within ten years of the payment being made; and
- The proposal is for less than 50 dwellings or is for a conversion.

The current section 75 agreement sets out in the Affordable Housing clauses the requirement for 25% of the total unit numbers to be affordable housing units. With various clauses in relation to the tenure, location, design standards and milestones. In the details of the original application the total number of residential units was to be 42 dwellings, with the number of affordable housing units to comprise 10 units: 8 x 1-bed and 2 x 3-bed apartments. That would equate to 23.8% provision: 25% equating to 10.5 units.

The supporting financial details of the development and the affordable housing paper have been reviewed. The applicant has provided details that with the present construction cost inflation the average construction cost of each unit on site would exceed £230,000 a figure beyond the threshold for viability for a Registered Social Landlord (or RSL). That figure excludes any land value or profit.

The supporting documentation has been independently checked. On the basis of land value and construction costs this value equates to £56,500 per unit, therefore a total off-site affordable housing contribution of £593,250 for the 10 units (25% of the overall development). It should be noted that this is greater than that offered by the applicant in the modification application.

The District Valuer recommends a commuted sum totalling £593,250. In this instance, and in the absence of any proposed trigger point for the payment of this contribution by the applicant, it is deemed that this would be full contribution payment (index linked from the date of the District Valuers determination (i.e. Quarter 4 of 2023)) made within 3 months of the date of this modification determination.

It is concluded that the proposed commuted sum meets the requirements of LDP Policy Hou 6, the criteria set out in the Affordable Housing Guidance, and NPF 4. Having considered the proposals we are satisfied with the information submitted and is confident that the commuted sum can be used within an agreed timeframe within the ward or an adjacent ward.

b) the proposal meets the tests of Circular 3/2012

Scottish Government Circular 3/2012 (updated 18 November 2020) - Planning Obligations and Good Neighbour Agreements

The circular explains that obligations are to be promoted in strict compliance with the five policy tests. These tests relate to necessity; planning purpose; relationship to the development; scale and kind; and reasonableness.

Necessity:

In terms of the 'necessity' test, the planning obligation should be necessary to permit the proposed development. With a financial contribution a planning condition cannot be used.

The proposal seeks to modify an existing legal agreement to change the requirements for affordable housing to use a commuted sum. The use of a planning obligation for this matter continues to be required. The use of an obligation is appropriate, thereby satisfying the 'necessity' test.

Planning purpose:

The Circular states that planning authorities should satisfy themselves that an obligation is related to the use and development of land. This judgement should be rooted primarily in the development plan.

LDP Policy Hou 6 (Affordable Housing) sets out the parameters for assessing and requiring affordable housing whilst noting that provision should normally be on-site. The Affordable Housing Guidance provides further information on using the policy, including the circumstances for when a commuted sum will be acceptable. This test is met.

NPF 4 Policy 16 (Quality Homes) encourages, promotes, and facilitates the delivery of more high quality, affordable and sustainable homes, in the right locations, providing choice across tenures that meet the diverse housing needs of people and communities across Scotland.

NPF 4 Policy 18 (Infrastructure first) encourages, promotes, and facilitates an infrastructure first approach to land use planning, which puts infrastructure considerations at the heart of placemaking.

This test is met.

Relationship to the proposed development:

Planning obligations must relate to the development being proposed. There should be a clear link between the development and any mitigation offered as part of the developer's contribution.

The information provided justifies a commuted sum in this instance and relates to the specific details of the development.

However, the applicant's offer of £55,000 per unit, providing a total of £550,000, does not meet the level as calculated by the District Valuer and as such cannot be accepted in this instance.

Scale and kind:

In terms of the 'scale and kind' test, the Circular states that the planning obligation must be related in scale and kind to the proposed development.

The requirement for 25% affordable houses as part of the original application was acceptable in scale and kind and met the requirements of LDP Policy Hou 6 and NPF 4 policy 16.

The Circular does state that entering into an obligation can have financial consequences for developers and may make proposals uneconomic.

In this circumstance, the modification to provide a commuted sum in lieu of on-site affordable housing provision meets the 'scale and kind' test as it is tailored to this specific development.

Reasonableness:

In terms of the 'reasonableness' test, the Circular provides a number of questions of which a negative answer to anyone would generally render a planning obligation inappropriate.

- (i) is an obligation, as opposed to conditions, necessary to enable a development to go ahead?
- (ii) in the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
- (iii) is the requirement in the obligation so directly related to the regulation of the proposed development that it should not be permitted without it?
- (iv) will the obligation mitigate the loss of, or the impact upon, any amenity or resource present on the site prior to the development?

Taking these questions in turn:

- i) Yes, the obligation cannot be secure through a condition.
- ii) Yes, the commuted sum would be utilised elsewhere in the area.
- iii) Yes, an obligation is required, or it fails the policy requirement for affordable housing.

- iv) Residential led mixed use development that converts a number of former industrial buildings. Affordable housing is required by the LDP and NPF 4

The affordable housing policy is well established and in assessing the supporting information for the proposed commuted sum it is reasonable to take this approach.

The tests of the circular are met.

c) There are any other material considerations which must be addressed?

The following material planning considerations have been identified:

Emerging policy context

On 5 April 2024, the Planning and Environmental Appeals Division published its report into the examination of the Proposed City Plan 2030 and supporting documents in terms of Section 19 of the Town and Country Planning (Scotland) Act 1997. The Council is currently considering the recommendations and modifications required to the Proposed City Plan 2030. It is the intention that the modifications will be considered by the Council before the end of June 2024. At this time in the context of the consideration of this particular application limited weight can be given to the relevant policies of City Plan 2030 until the proposed modifications have been fully considered.

Equalities and human rights

Due regard has been given to section 149 of the Equalities Act 2010. No impacts have been identified.

Consideration has been given to human rights. No impacts have been identified through the assessment and no comments have been received in relation to human rights.

Public representations

None received.

Conclusion in relation to identified material considerations.

None of the identified material considerations outweigh the proposals compliance with the Development Plan.

Overall conclusion

That affordable housing is no longer proposed to be provided on site because it is not financially viable and that a commuted sum is considered acceptable, as independent financial advice has been obtained, and sum of £56,500 per unit (£593,250 in total) complies with LDP Policy Hou 6, NPF 4 Policy 16, Policy 18 and Non-Statutory Guidance on Affordable Housing where the commuted sum can be used within the ward or an adjacent ward.

The modification to the planning obligation, to provide a commuted sum, is acceptable and the legal agreement can be modified.

Section C - Conditions/Reasons/Informatives

The recommendation is subject to the following.

Informatives

It should be noted that:

1. Please submit an engrossed Discharge or Minute of Variation (as appropriate) in accordance with the terms of this Decision Notice for execution and registration by the City of Edinburgh Council along with the required registration forms and registration fee. Submissions should be sent to The City of Edinburgh Council, Legal Services, 4 East Market Street, Edinburgh, EH8 8BG.

Background Reading/External References

To view details of the application go to the [Planning Portal](#)

Further Information - Local Development Plan

Date Registered: 13 June 2023

Drawing Numbers/Scheme

01

Scheme 1

David Givan
Chief Planning Officer
PLACE
The City of Edinburgh Council

Contact: John Maciver, Senior planning officer
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Appendix 1

Summary of Consultation Responses

NAME: Housing Management and Development (Affordable Housing)

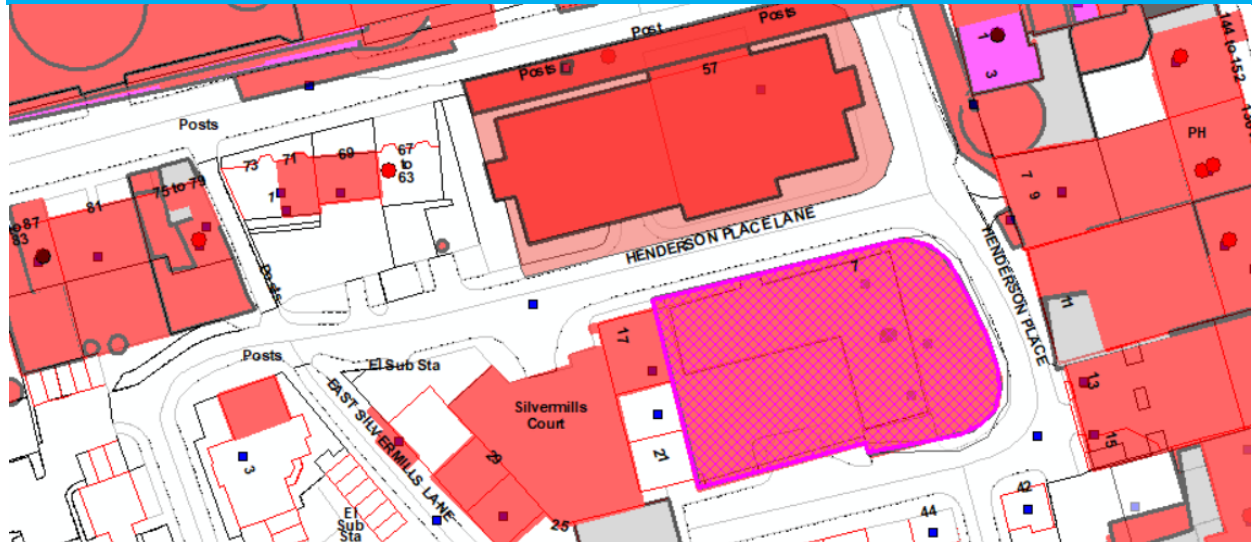
COMMENT: The applicant seeks amendments to the existing Section 75 legal agreement to reflect that the affordable housing will not be able to be delivered onsite.

- The costs of the development have been independently checked and verified.
- The average construction cost exceeds £230k per home.
- The District Valuer recommends a commuted sum which has been calculated based on nationally accepted principles.
- Their recommendation is a commuted sum of £593,250 in total.
- The sum would be secured through a Section 75 legal agreement.
- The Housing Service recommend that a confidential briefing is arranged for members of Development Management Sub Committee in advance of the application being presented to committee so that the details of the costs and the District Valuers report can be scrutinised.

DATE: 26 March 2024

The full consultation response can be viewed on the [Planning & Building Standards Portal](#).

Location Plan



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