

Development Management Sub Committee

Wednesday 31 July 2019

Application for Planning Obligation 19/00536/OBL At Land Adjacent To, New Street, Edinburgh Application for the discharge of a planning obligation clause relating to the provision of affordable business space

Item number

Report number

Wards

00 - No Ward Number

Summary

The proposed discharge of the clause 9 provisions of the 2014 planning obligation are acceptable and the applicants' request for their modification can therefore be accepted.

Links

[Policies and guidance for this application](#)

Report

Application for Planning Obligation 19/00536/OBL At Land Adjacent To, New Street, Edinburgh Application for the discharge of a planning obligation clause relating to the provision of affordable business space

Recommendations

1.1 It is recommended that this application be accepted and the agreement be modified.

Background

2.1 Site description

The site comprises the Caltongate/New Waverley development an overall area of some 2.35 hectares.

It is bounded to the North by Calton Road, to the East by Tolbooth Wynd, to the South by the Canongate and to the West by New Street and Cranston Street.

A number of the elements of this overall development have now been completed including the hotel fronting Canongate, the two hotels on East Market Street, the redevelopment of the Arches fronting Jeffrey Street and East Market Street and the office building fronting New Street is nearing completion.

The site is within the Edinburgh World Heritage Site.

This application site is located within the Old Town Conservation Area.

2.2 Site History

The relevant site history is:

22 May 2013 - Development Management Sub-Committee was minded to grant planning permission subject to an appropriate legal obligation for development on the PA4A part of the wider Caltongate/New Waverley development (application number 13/00096/FUL).

22 May 2013 - A legal obligation was concluded for this and for other planning applications covering the wider Caltongate development area.

29 January 2014 - Development Management Sub-Committee was minded to grant planning permission subject to an appropriate legal obligation for development on the southern part of the wider Caltongate/New Waverley development (the PA5, PA6 and PA7 applications) (application number 13/03406/FUL).

29 January 2014 - Development Management Sub-Committee was minded to grant planning permission subject to an appropriate legal obligation for development on the northern part of the wider Caltongate/New Waverley development (the PA2 and PA3 applications) (application number 13/03407/FUL).

27 March 2014 - A single legal obligation, replacing that concluded on 22 May 2013, was concluded and planning permission granted for both of the above Caltongate applications.

23 April 2018 - Development Management Sub Committee granted planning permission, subject to a legal agreement and the upfront payment of contributions, for the erection of an office development and associated uses (the former PA3 site) (application number 17/04118/FUL).

25 April 2018 - A section 75A application was approved to modify the 2014 legal obligation by discharging clauses 6, 7, 11 and 14 as well as Schedules Parts 4, 5, and 6 of the March 2014 obligation (application number 17/05747/OBL).

Main report

3.1 Description Of The Proposal

This application seeks to modify the planning obligation, made under the provisions of section 75 of the Town and Country Planning (Scotland) Act 1997, regarding the development of the Caltongate/New Waverley and concluded with the Council on 27 March 2014.

The planning obligation has already been authorised to be modified with the discharge of various clauses and schedules under the provisions of the 2018 grant of modification (Reference 17/05747/OBL).

The developer now seeks to modify the planning obligation further by means of a formal discharge of the provisions of clause 9. Those clauses require:

"9. Affordable Business Space

9.1 Contracts shall be let to develop a minimum of 645 square metres of Affordable Business Space within the Site as follows:-

9.1.1 In the event that the Canongate Venture is to be demolished then contracts for the Affordable Business Space shall be let before the demolition commences in terms of listed building consent granted by the Council under Reference Number 13/00101/LBC;

9.1.2 In the event that the Canongate Venture is to be otherwise redeveloped then:-

9.1.2.1 In the event that, at the commencement of such redevelopment, Class 4 business space will be available within the redeveloped Canongate Venture then contract for the Affordable Business Space shall be let before the Practical Completion of the redevelopment of the Canongate Venture; and

9.1.2.2 In the event that, at the commencement of such redevelopment, Class 4 business space will not be available with the redeveloped Canongate Venture then the Canongate Venture may be redeveloped without the provision of the Affordable Business Space and contracts shall be let for the Affordable Business Space prior to the Practical Completion of the Class 4 business space comprised in the Northern Range Development.

'Affordable Business Space' means entry level accommodation which is made available for lease for business purposes (which purposes shall be taken to include any use falling within class 4 of the Schedule to the Town and Country Planning (Use Classes) (Scotland) Order 1997)."

This clause relates solely to this clause of the obligation.

Supporting Documents

The following documents have been submitted in support of the application and are available to view on the Planning and Building Standards Online Services:

- Agreement Paper Apart; and
- Section 75 review for affordable business space (by GVA Grimley Ltd).

3.2 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.

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

3.3 Assessment

To address these determining issues, the Committee needs to consider whether:

- (a) the modification of the obligation, as proposed, is considered to be acceptable; and
- (b) finance implications of the decision.

a) The Modification of the Obligation is Acceptable

Circular 3 of 2012, 'Planning Agreements and Good Neighbour Agreements' sets out those matters to be considered by the Planning Authority in the determination of an application, made under section 75A of the Act, for modification or discharge of a section 75 planning obligation, especially at paragraphs 70 to 75.

At paragraph 73 it states that the process by which a planning obligation can be modified or discharged remains to be considered against those same tests as to whether or not an obligation should be sought in the first instance. If the obligation fails on any one of those tests the obligation fails and the application, to modify or discharge the agreement, should be granted. The policy tests are:

- **necessary**; to make the proposed development acceptable in planning terms,
- **serve a planning purpose**; and, where it is possible to identify infrastructure provision requirements in advance, should relate to development plans,
- **related to the development**; either as a direct consequence of the development or arising from the cumulative impact of development in the area,
- **relative to the proposed development**; fairly and reasonably relate in both scale and kind to the proposed development, and
- **reasonable**; in all other respects.

In this application the developer's justification for discharging the provisions of clause 9, and thereby modifying the terms of the obligation as a whole, has been made on three grounds:

- 1 Non-compliance with the policy tests;
- 2 Change in circumstances since the obligation was originally concluded; and
- 3 Substantive compliance with the terms of the obligation.

and these will be considered in turn.

Policy Tests

The applicant has considered this part of the obligation in terms of three of the tests, namely; necessity, purpose and reasonableness.

In terms of 'necessity' they consider that the requirement for the Affordable Business Space was a community benefit which, whilst desirable, does not directly serve a planning purpose,

In terms of 'purpose' that the requirement be rooted in the provisions of the development plan, and

In terms of 'reasonableness' that the obligation should be so directly related to the regulation of the proposed development that it should not be permitted without it.

In this regard it should be noted that the provisions of section 75A of the Act, providing a means of modification or discharge of the terms of a planning obligation, apply retrospectively to all planning obligations whether or not they were concluded before or after the new provisions of the Act were introduced.

Accordingly, whilst the Council and the previous developer, at that time, entered jointly and freely into an agreement to secure the provisions of affordable business units and affordable business space within the development of the Caltongate area the Circular tests now relate equally to those provisions.

The agreement was originally concluded in October 2008 with a different developer. In it the requirement for affordable business space required:

- *the provision of affordable business units to not exceed 1,840 square metres, and*
- *that 645 square metres of affordable business space be provided prior to the commencement of demolition of the Canongate Venture.*

Those requirements were necessary to ensure a form of development in terms of 'The Caltongate Masterplan' October 2006. The Masterplan sought a proposed mixed use development to achieve a sustainable and integrated city quarter, supporting development that provides for a mix of housing, serviced apartments, business accommodation including offices and small business units, a hotel, shops, food and drink outlets and community facilities.

After the original developers were 'wound-up' the current applicant sought to renegotiate the terms of the planning obligation for the development of the Caltongate site. The replacement obligation, since revised in 2014, did not include the provisions for affordable business units but retained the affordable business space provisions, as they relate to the Canongate Venture building.

The Edinburgh Local Development Plan 2016 at Section 5, Reference CC2 - New Street, sets out the development principles that proposed applications are expected to provide for a mix of uses, including small business units together with the housing, office and hotel uses, as required by the provisions of the 2006 Masterplan.

This requirement is detailed at policy Del 2(b), Area Specific Policies, which requires development in principle to secure a mix of uses appropriate to the location of the site in accordance with the development principles in CC2.

The terms of a planning obligation are to secure those matters that are necessary to mitigate the impact of a particular development, not to ensure that that development merely complies with the requirements of the Local Development Plan.

In terms of the 'purpose' test mitigation requirements should be rooted in the provisions of the development plan. To that end while policy Del 2 seeks to ensure that the redevelopment of the site provides for small business units; policy Del 1, Developer Contributions, does not require affordable business space to be provided to mitigate the negative impact of that development on the surrounding area.

Accordingly, whilst the provisions of Section 5 and policy Del 2(b) clearly set out Council's expectations for the delivery of a suitable scheme of mixed development across the wider Caltongate site the policy does not constitute a formal requirement for mitigation under the provisions of policy Del 1 and as such does not meet the purpose test requirements.

Also whilst it was deemed to be beneficial to make provision for affordable business space within the overall development and the planning obligation sought to secured those provisions at that time, when considered in terms of the Circular tests the overall development of the Caltongate area would not have been refused in the absence of the provision of a minimum of 645 square metres of affordable business space.

Therefore, in terms of this application it is agreed that the clause 9 provisions to provide affordable business space should be discharged and this application to modify the obligation should be accepted.

Change in Circumstance

Further to the provisions of the tests the applicant also makes the case that, in terms of the Circular provisions, the Council should take account of any changes in circumstances affecting the development and its immediate surroundings.

In terms of the present market the requirements for start-up accommodation require a greater flexibility than that which the Canongate Venture building could provide. It was deemed to provide very poor net to gross floor area ratios and therefore the rent costs would not be economically viable within the city centre to provide the necessary affordable business accommodation. The Canongate Venture space was extensively marketed but with no interest.

Other changes to the wider development of the overall Caltongate site have also resulted in a changed form of development from that which was first authorised or envisaged by the Masterplan or the original grants of planning permission. This includes the development of the New Street office building, originally intended to provide ground floor commercial floor space but, due to the security requirements of the end user, the entire building is now required to be for that single user.

Accordingly, the applicant contends that what may have been appropriate 10 years ago is no longer fit for purpose in today's market.

Substantive Compliance

The applicant has also pointed to the fact that they are not seeking to be absolved from a requirement to provide appropriate business space but that that which has been provided may not be in the form as originally envisaged by the Council. They identify that a substantive provision of entry level business accommodation has been formed within the original boundaries of the Caltongate Masterplan area.

The applicant also considers that the planning obligation definition is not exclusively for class 4 business uses and therefore indicates the 'Arches' development as well as the Cranston Street Community Hub as additional areas providing business space of some 754 square metres, in excess of that required by the planning obligation of 645 square metres.

In terms of that argument it should be noted that the agreement defines 'affordable business space' as entry level accommodation which is made available for lease for business purposes, and it is the further meaning that states, '...which purposes shall be taken to include any use falling within class 4 of the ... Order'.

That interpretation is taken to mean that business purposes means any use within the scope of class 4 as identified by the Order, not the applicants' understanding that the definition is not exclusively for class 4 business uses.

Further to the applicants' contentions it should also be identified that the ground floor areas of the PA1 affordable housing buildings, fronting onto Calton Road, provide commercial office space of 169 square metres (No 51 Calton Road) and 515 square metres (No 20 Calton Road), a total of 684 square metres.

Together, the existing floor space provision would be 1,438 square metres. However, not all of this is class 4 office use, nor is it space that could be identified as being 'affordable'; albeit that the Arches are initially being let on for a 'pepper corn' rent.

Whilst the applicants' contentions are material in the overall assessment of this application, in planning terms it is the assessment against the Circular tests that take precedence in the determination of the application in this instance.

As such the application to modify the provisions of the planning obligation should be agreed in this instance.

b) Finance

The Affordable Business Space clause, subject of this application, seeks to provide accommodation for that purpose either within the Canongate Venture building or elsewhere within the wider development site. Accordingly, there would be no financial implications to granting this modification to the 2014 obligation.

Conclusion

In conclusion, the applicants' request to modify the 2014 legal obligation is accepted and the planning obligation should be modified accordingly.

It is recommended that this application be accepted and the agreement be modified.

3.4 Conditions/reasons/informatives

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.

Financial impact

4.1 The financial impact has been assessed as follows:

The Affordable Business Space clause, subject of this application, seeks to provide accommodation for that purpose either within the Canongate Venture building or elsewhere within the wider development site. Accordingly, there would be no financial implications to granting this modification to the 2014 obligation.

Risk, Policy, compliance and governance impact

5.1 Provided planning applications are determined in accordance with statutory legislation, the level of risk is low.

Equalities impact

6.1 The equalities impact has been assessed as follows:

The application has been assessed and has no impact in terms of equalities or human rights.

Sustainability impact

7.1 The sustainability impact has been assessed as follows:

This application is not subject to the sustainability requirements of the Edinburgh Design Guidance.

Consultation and engagement

8.1 Pre-Application Process

There is no pre-application process history.

8.2 Publicity summary of representations and Community Council comments

The application, to modify and discharge an obligation, is required to be notified to any other parties to the original agreement, in accordance with the provisions of Regulation 5 of the Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010.

Background reading/external references

- To view details of the application go to
- [Planning and Building Standards online services](#)
- [Planning guidelines](#)
- [Conservation Area Character Appraisals](#)
- [Edinburgh Local Development Plan](#)
- [Scottish Planning Policy](#)

Statutory Development Plan Provision	Edinburgh Local Development Plan - Urban Area.
Date registered	6 February 2019
Drawing numbers/Scheme	01, Scheme 1

David R. Leslie
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Links - Policies

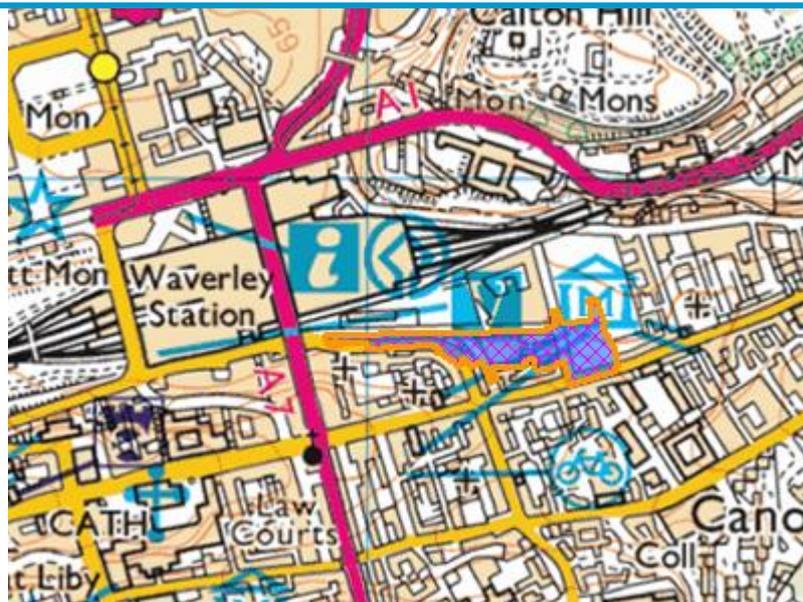
Appendix 1

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Consultations

No consultations undertaken.

Location Plan



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