

**REPORT TO: DEVELOPMENT MANAGEMENT COMMITTEE - 15 AUGUST 2011**

**REPORT ON: LARCH STREET (FORMERLY LARCHFIELD WORKS) -  
PURPORTED APPLICATION TO DISCHARGE SECTION 75  
AGREEMENT**

**REPORT BY: DIRECTOR OF CITY DEVELOPMENT**

**REPORT NO: 362-2011**

## **1 PURPOSE OF REPORT**

- 1.1 To inform the Committee of a purported application under S75A (2) of the Town and Country Planning (Scotland) Act 1997 to discharge the terms of a Section 75 Agreement relating to the prohibition of the use of new dwelling houses in Larch Street, Dundee as Houses in Multiple Occupation and to seek the views of Committee as to how the application should be considered.

## **2 RECOMMENDATION**

- 2.1 It is recommended that the Committee:
- a determines that this application is incompetent as it seeks to discharge an agreement concluded prior to 1 February 2011 using legislative provisions that do not have retrospective effect and remit the Director of City Development to challenge any purported appeal to Scottish Ministers by the applicant or the acceptance by Scottish Ministers of any such appeal as competent on this basis; and
  - b agrees that even if the application were competent it should be refused for the reasons set out in this report.

## **3 FINANCIAL IMPLICATIONS**

- 3.1 There are no financial implications associated with this report.

## **4 BACKGROUND**

- 4.1 This is the second attempt by the owners against whom this agreement is enforceable to seek to have its terms discharged. The previous attempt was a request that the Council agree voluntarily (not an application under the new statutory provisions) to waive and discharge the terms of a Section 75 Agreement relating to the prohibition of the use of 8 new houses in Larch Street, Dundee as Houses in Multiple Occupation.
- 4.2 In June 2006 the Development Management Committee resolved to approve outline planning application 06/00258/OUT for the erection of 8 new town houses on the site of the former Larchfield Works in Larch Street subject to the conclusion of a Section 75 Agreement prohibiting the use of the properties developed on the site as houses in multiple occupation (Article 1(g) of the minutes of the Development Quality Committee of 19 June 2006 refers). The agreement was concluded and the decision notice was issued on 24 August 2006.

- 4.3 Following completion of the development, the developers wrote to the Council on 11 May 2009 seeking to have the terms of the S75 Agreement waived and discharged. This request was first considered by the City Development Committee of 11 January 2010 when it was deferred to allow the Council to consult with local residents on the terms of the proposal and for the Committee to be advised of the extent of existing HMO's in the local area (Article III of the minutes of the City Development Committee of 11 January 2010 refers). The matter came before the Committee again in April 2010 when the developers in their deputation sought a further deferral and this was agreed to (Article 1 of the minutes of the City Development Committee of 26 April 2010 refers).
- 4.4 Finally in January 2011 the Development Management Committee considered the request to waive and discharge the agreement, heard a deputation in support of the request and its decision was to refuse the request (Article II of the minutes of the Development Management Committee of 17 January 2011 refers). At that time there were no provisions for formal applications to discharge S75 Agreements or any right of appeal if the application was refused.
- 4.5 On 1 February 2011 new legislative provisions came into force whereby the Planning etc (Scotland) Act 2006 amended the 1997 Act by replacing the existing Section 75 with a new Section 75 and added new sections including Sections 75A, 75B and 75C which deal with Planning Obligations (the replaced version of Section 75 provided for "Planning Agreements"). Section 75A establishes a formal process whereby a person against whom a planning obligation is enforceable can apply to the planning authority to have that obligation either modified or discharged. S75B provides for a right of appeal to Scottish Ministers where a planning authority either refuses the application or fails to determine it within 2 months.
- 4.6 Planning consultants acting on behalf of Zulco Limited as proprietors of the 8 houses submitted a formal application under S75A (2) of the Town and Country Planning (Scotland) Act 1997 on 15 June 2011 seeking to discharge the terms of an Agreement entered into under the replaced Section 75 and registered on 23 August 2006 relating to the prohibition of the use of new dwelling houses in Larch Street, Dundee as Houses in Multiple Occupation.
- 4.7 The applicants were aware from previous correspondence with the Council that the Council considered that the new legislation was not retrospectively applicable and therefore only related to S75 Planning Obligations concluded after 1 February 2011. However, they proceeded to make the application taking comfort from what they stated was Scottish Government advice that their application was competent. In fact the most recent advice the Council has received from the Scottish Government, whilst suggesting that the provisions are retrospective, concludes by stating "In order to remove any potential for doubt, we intend to lay before the Scottish Parliament an Order clarifying the position". This has not yet happened.
- 4.8 The Council has sought legal advice from a QC on the matter and is firmly of the opinion that this application is incompetent and the Committee is therefore advised to treat the application as incompetent.
- 4.9 However, it is likely that in response to this the applicants will seek to lodge an appeal to the Department of Planning and Environmental Appeals on the basis that the Council has failed to determine their application. It is therefore considered appropriate that given the uncertainties involved in how the Courts will interpret the

legislation and in order to protect its position, the Council gives its views on the merits of the case.

- 4.10 The case submitted on behalf of the applicants is the same as that put before the Committee in January this year (a detailed statement in support of their clients' application and a Financial Statement outlining the investment in the site and the economic impact of the Section 75 restrictions). However they have also included additional information to address the issue of precedent and the extent of the HMO survey area.
- 4.11 The consultants consider the following material considerations should be taken into account:
- a the applicants were aware of the S75 agreement when they purchased the site;
  - b the applicants have contributed to the regeneration of the area;
  - c the applicants have tried to secure family occupation of the site without success and the houses are under occupied;
  - d the main reason for the application is that the applicants are unable to sell or rent to full occupancy;
  - e the applicants do not intend to change the planning use of the properties to HMOs;
  - f local residents were previously surveyed at the request of elected Members and only 4 objections were received from 238 properties; and
  - g the area over which the concentration of HMOs was assessed ignores industrial and derelict buildings which should have been included in the survey and this would have reduced the concentration of HMOs in the area.
- 4.12 The submitted Financial Statement outlines the investment in the site and the expected returns which have been adversely affected by the economic downturn. The solicitors began marketing the properties for sale in December 2007 but withdrew them from the market in June 2010. There has been no demand or interest shown in the properties for normal residential use. The solicitors advise that while the state of the property market will be a factor in that, it is clear that the fact that the Section 75 Agreement exists is an off putting factor to potential purchasers who may be interested in the purchase of one of these properties with a view to occupation by 3 or more unconnected persons. They conclude by stating that Zulco Ltd still wishes to develop sites within the Dundee area but is restrained from carrying on its business because these units cannot be sold.
- 4.13 The further information submitted with the current application refers to the Councils concern that if it granted this application it would set a precedent for the submission of other similar requests. The applicants state that they are unaware of other similarly sized properties in this location with similar restrictions, state that no evidence has been put forward of any similar examples and finally that there is no concept of precedence in planning law and that this case should be considered on its individual merits.

- 4.14 They accept that based on the Census Output Area survey within which this site is located, the provision of HMO's within this development could result in the threshold for HMO's being exceeded further but they feel they are unfortunate in terms of the location of their site at the eastern edge of an area where there are many HMO's. They state that much of the accommodation in this area is being marketed as student housing and that Scottish Government Circular 8/2009 states that purpose built student accommodation should not be counted towards HMO concentration levels as they do not have the same impact on amenity as do high concentrations of HMO's within existing housing stock. Whilst accepting that the other properties in this area are not "purpose built student accommodation" they state that they effectively function as such. Finally they point out that they simply wish to remove the restriction on HMO's that require a licence and not those which require planning permission (up to 5 unrelated people can occupy a dwelling house without the requirement for a change of use planning application).
- 4.15 The Dundee Local Plan Review 2005 promotes new residential development in the Central Dundee Housing Investment Focus Area (in which the residential properties at Larch Street are located). However, many developments in this area were being purchased for multiple occupation purposes. In light of the proximity of higher education institutions, this was a particular issue in relation to the occupation of the units by students. Whilst such properties require to be licensed as HMOs, the houses can be occupied by up to 5 unrelated persons without requiring planning permission for use as an HMO.
- 4.16 The multiple occupation of new houses in the Central Dundee Housing Investment Focus Area made them unavailable to other sectors of the housing market. Furthermore, such occupation can increase pressure in residential areas for facilities such as parking, whilst the relatively "transient" nature of occupants does not contribute to a stable community. In order to achieve the objectives of the Central Dundee Housing Investment Focus Area and retain new residential development for occupation by families, it was considered appropriate that its occupation by 3 or more unrelated people be prevented. The Council has sought to secure this objective through the use of legal agreements as set out in the approved Supplementary Planning Guidance covering HMOs (approved November 2006 and reviewed February 2008). Agreements have been applied to all new residential development within the Central Dundee Housing Investment Focus Area with little to no resistance to them.
- 4.17 During consideration of the outline planning application for the 8 houses in question in 2006, it was considered appropriate by virtue of the size and type of the proposed houses and their proximity to the University of Dundee campus area, to restrict the use of the properties to mainstream housing only. This restriction was discussed in full and agreed with the applicants at that time and this acceptance was reported to the Members of the Council's Development Quality Committee that approved the application on 19 June 2006. It is considered that without this agreement being in place it is unlikely the outline application would have been offered the support of the Council. The applicants have now applied to discharge of this Agreement.
- 4.18 When the previous request to discharge this agreement was submitted the Committee asked that the views of the occupiers of the surrounding residential properties on this matter be ascertained. There is no provision for neighbour notification or publication of applications to discharge S75 Obligations under the new legislation. However given that the previous consultation with neighbours was

carried out in April 2010 it is reasonable to assume that this information remains valid but it should be stressed that these views were not submitted as a response to the current application.

- 4.19 The consultation that took place was in the predominantly residential area bounded by Horsewater Wynd in the east, Brook Street to the north, Edward Street to the west and Blackness Road to the south. This area accommodates 238 residential properties, 67 of which have active HMO Licenses (ie 28% of the residential properties). This suggests that the area is dominated by mainstream housing in accordance with the objectives of the Central Dundee Housing Investment Focus Area. This also clearly demonstrates that the current provision of HMO accommodation in this local area already significantly exceeds the recommended 12.5% maximum concentration of such accommodation within the total residential stock of any Census Output Area within the Central Dundee Housing Investment Area (Policy HMO2 of Supplementary Planning Guidance on Houses in Multiple Occupation 2006 (revised 2008) refers).
- 4.20 The Larch Street properties under consideration are located towards the east side of this identified consultation area. Each individual residential household was advised, in writing, of the request to use the properties in Larch Street as Houses in Multiple Occupation and 4 objections to the proposal were received from local residents on the grounds that:
- a the proposal is contrary to the provisions of the Development Plan and the Councils approved Supplementary Planning Guidance on Houses in Multiple Occupation;
  - b the use of the properties for multiple occupation purposes will further exacerbate disturbance and nuisance to the detriment of the residential amenities of the area;
  - c the proposal will have a significant detrimental impact upon traffic and car parking in the surrounding area;
  - d the proposal would set an undesirable precedent for other properties in the city that are similarly covered by a Section 75 Agreement relating to the prohibition of HMO occupancy; and
  - e that prospective purchasers of a number of the properties in question withdrew their interest due to the restrictions on occupancy imposed by the terms of the Section 75 Agreement.
- 4.21 In line with the views of Committee in January 2011 when it considered the previous request to discharge this legal agreement, the Council considers that:
- a the current economic circumstances and the financial circumstances of the applicants are not sufficient to justify the waiving of the S75 agreement;
  - b it is important to retain the mixed character of the area which includes both family properties and HMOs to encourage the future redevelopment of the remaining vacant and derelict buildings. The removal of the restrictions would tend to result in an area wholly given over to HMO use which would be detrimental to the area and to the amenities of occupants;

- c it is clear that the number of HMO's in this area significantly breaches the threshold. The applicant's argument that if the Census Output Area had been defined differently to include areas with non residential uses makes no sense as the threshold is calculated in relation to residential properties only. Arguments based on purpose built student accommodation are invalid as there is no such accommodation in this area; and
- d the application does not relate to the planning use but to the S75 restrictions which were the subject of an agreement between the parties which the applicants confirm they were aware of when they purchased the site.

## **5 CONCLUSION**

- 5.1 Taking into account all the relevant issues above, it is considered firstly that this application is incompetent as it seeks to discharge an agreement concluded prior to 1 February 2011 using legislative provisions that do not have retrospective effect and secondly that even if the application was competent the terms of the current Section 75 Agreement are compliant with the Council's stated aims in the control of houses of multiple occupation in this part of the city and are consistent with the Section 75 agreements which have been concluded with many other developers. There is concern that the use of these properties as additional houses in multiple occupation in this area would further erode the Council's objectives to retain new residential properties in the Dundee Housing Investment Focus Area for occupation by families. The justification submitted on behalf of the applicant is not supported for the reasons given in this report.

## **6 POLICY IMPLICATIONS**

- 6.1 This Report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues.

## **7 CONSULTATIONS**

- 7.1 The Chief Executive, Depute Chief Executive (Support Services) and Director of Finance have been consulted and are in agreement with the contents of this report.

## **8 BACKGROUND PAPERS**

- 8.1 Article III of the minutes of the City Development Committee of 11 January 2010.
- 8.2 Article I of the minutes of the City Development Committee of 26 April 2010.
- 8.3 Article II of the minutes of the Development Management Committee of 17 January 2011.
- 8.4 Article 1(g) of the minutes of the Development Quality Committee of 19 June 2006.
- 8.5 Section 75 Agreement Minute of Agreement 2006.
- 8.6 Dundee Local Plan 2005.

- 8.7 Supplementary Planning Policy Guidance - Houses in Multiple Occupation (November 2006, reviewed February 2008).
- 8.8 The Planning etc (Scotland) Act 2006.

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28 July 2011

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