

21/01224/OBL

MICHELIN FARM, ARTERIAL ROAD, RAYLEIGH

**MODIFICATION OF SECTION 106 AGREEMENT RELATING
TO PLANNING CONSENT REFERENCE 18/01022/OUT
DATED 14 JULY 2020 TO REMOVE REQUIREMENT TO PAY
FINANCIAL CONTRIBUTION RELATING TO EARLY YEARS
AND CHILDCARE**

APPLICANT: STAR UK RAYLEIGH PROPCO LIMITED

ZONING: NEL1

PARISH: RAYLEIGH TOWN COUNCIL

WARD: WHEATLEY

1 RECOMMENDATION

1.1 It is proposed that the Committee RESOLVES

That the Council enter into a Deed of Variation to modify the s106 agreement dated 13 July 2020 to remove the requirement for the financial contribution relating to early years and childcare.

2 PLANNING APPLICATION DETAILS

2.1 This application is made in relation to the Town and Country Planning (Modifications and Discharge of Planning Obligations) Regulations 1992 which allow an applicant to request modification of a legal agreement attached to a planning consent. In this case the applicant has requested that the original s106 legal agreement dated 13 July 2020 relating to planning consent reference 18/01022/OUT be modified such that it would no longer require the applicant to make a financial contribution to Essex County Council towards early years and childcare provision.

2.2 Requests to modify a legal agreement relating to a planning consent are processed differently depending on whether the legal agreement to which the proposed change relates is less than or more than 5 years old. Where a legal agreement is more than 5 years old an applicant can submit an application to modify to the Local Planning Authority (LPA) and has the right to appeal against the decision if the LPA chooses not to agree to the proposed

modification. Where a proposed modification relates to a legal agreement that is less than 5 years old any modification can only proceed with the agreement of the LPA. As the proposed modification in this case relates to a legal agreement that is less than 5 years old the change can only proceed if the LPA agrees to the proposal.

- 2.3 In the application submission the applicant has detailed the reasons for requesting the proposed modification as follows:-

'Essex County Council (ECC) initially requested the Early Years and Childcare (EY&C) contribution, in line with the ECC Planning Obligations SPD (2016). ECC calculated that based on the expected job creation of application reference 18/01022/OUT, the development would generate up to 8no. EY&C places for Phase 1 and 19.2 EY&C places for Phase 2. A financial contribution of £17,442 per pupil was agreed between ECC and the applicant.

Following completion of the S106, legal advice was prepared on behalf of the applicant and submitted to Rochford District Council and ECC for comment. In summary, the advice stated that the requested contribution failed to meet the Regulation 122 Tests. It was outlined in the advice that ECC had failed to demonstrate the requirement that new employment developments generating 50 or more employees should fund EY&C provision. Furthermore, it was outlined that without evidence which demonstrates the link between employment provision and EY&C floor space in the "immediate area", there is not sufficient evidence of an impact to be mitigated and the contribution is not necessary to make such development acceptable.

In addition, it was outlined that the requested EY&C contribution was not shown to be related to the development (directly or otherwise) and ECC cannot demonstrate that any contribution is fairly and reasonably related to the employment development permitted. It was also outlined that the ratio which underpins the formula is un-evidenced and there is no means of ascertaining whether its use avoids issues of double counting. It cannot therefore satisfy the Regulation 122 Tests. Finally, the advice outlines that there is no indication that the formula takes into account different patterns of working, for example the use of nightshifts, which would have a material impact on a link (if one exists) between new employment and an increased burden of EY&C provision.

Absent of such evidence, a contribution calculated in accordance with the formula cannot fairly and reasonably relate to employment uses which make use of the nightshifts. Given that the obligation does not meet the Regulation 122 'Tests', it cannot be accepted by the applicant and doing so would put the planning permission at the risk of legal challenge, as well as place an inappropriate and financial burden on the development.'

3 MATERIAL PLANNING CONSIDERATIONS

- 3.1 The planning consent reference 18/01022/OUT to which the legal agreement proposed to be modified relates, approved development at a site known as Michelin Farm with the following proposal description:-
- ‘Hybrid planning application: full planning application for erection of buildings for use within Classes B1(c), B2 and B8 with access and servicing arrangements, car parking, landscaping, drainage features and associated highway works (Phase 1); outline planning application for up to 33,500 square metres of employment uses (Classes B1(c), B2 and B8) including means of access with all other matters reserved (Phase 2).’
- 3.2 The planning consent reference 18/01022/OUT was granted subject to a s106 legal agreement dated 13 July 2020 which contained an obligation that the developer pay a financial contribution of some £473,878.00 to ECC towards early years and childcare provision. This was stated in the s106 agreement as a maximum figure with the final exact figure to be calculated according to Essex County Council's standard formula based on floor space delivered at the site.
- 3.3 The original requirement for a financial contribution relating to early years and childcare was identified in the consultation response to the planning application 18/01022/OUT provided by Essex County Council. The County Council identified this as necessary in relation to the proposed development because at that time the County Council's developers guide to contributions contained a requirement for such contributions relating to proposed employment development. Since the issue of the grant of planning permission relating to application 18/01022/OUT on 14 July 2020, the County Council have now updated its developers guide and it now no longer contains a requirement that employment schemes deliver financial contributions towards early years and childcare provision.
- 3.4 Given this change, ECC will no longer be making requests for such contributions relating to employment development schemes going forward and consequently the County Council does not consider that it could robustly justify the continued inclusion for the requirement to pay the financial contribution towards early years and childcare in the s106 relating to the Michelin Farm development approved under 18/01022/OUT.
- 3.5 ECC has therefore agreed to the proposed modification of the s106 agreement dated 13 July 2020 to remove the requirement to pay the financial contribution relating to early years and childcare.
- 3.6 Whilst Policies CLT1 and CLT2 of the Rochford District Core Strategy identify that proposed development including employment development will be required to contribute towards infrastructure provision including relating to early years and childcare, as set out in the table at Appendix CTL1 on page 102 of the Core Strategy, such obligations can only be imposed where appropriate. Given that the County Council as the authority responsible for

education provision no longer seeks such contributions relating to employment schemes it is considered that there is no reason to refuse the applicant's request to remove the requirement to pay the contribution relating to such despite the continued reference to this in policies CLT1 and CLT2.

3.7 Section 106 legal agreements must only include obligations that meet the three legal tests, namely each obligation must be:-

- necessary to make the development acceptable in planning terms;
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

3.8 Given ECC's response confirming that it agrees to the proposed modification as the requirement for early years and childcare contributions relating to employment schemes no longer features in the ECC 2020 developers guide, it is considered that the original obligation would now not be considered to meet the above tests.

4 CONSULTATIONS AND REPRESENTATIONS (summarised)

Essex County Council – Education

4.1 When this original application 18/01022/OUT was submitted and ECC Education responded we still had EY&C employment in the developers guide and a request was sent. In the new 2020 developers guide EY&C employment was removed and therefore ECC will no longer be making requests for this going forward. Now that ECC has decided we can no longer ask for EY&C employment contribution the dispute from the developer regarding this already signed s106 was a difficult one. If this request ended up at appeal ECC would not be able to defend our position. Therefore, it has been decided that on this occasion a DoV to remove the EY&C contribution should be entered into.

5 EQUALITY AND DIVERSITY IMPLICATIONS

5.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need:

- To eliminate unlawful discrimination, harassment and victimisation
- To advance equality of opportunity between people who share a protected characteristic and those who do not
- To foster good relations between those who share a protected characteristic and those who do not

The protected characteristics are age, disability, gender, race, sexual orientation, religion, gender reassignment, marriage/civil partnerships, pregnancy/maternity.

- 5.2 The Equality Impact Assessment (EIA) indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic.

6 CONCLUSION

- 6.1 It is recommended that the proposed modification of the s106 agreement dated 13 July 2020 to remove the requirement that the applicant pay a financial contribution towards early years and childcare be agreed and a Deed of Variation to that effect be entered into.



Marcus Hotten

Assistant Director, Place and Environment

Relevant Development Plan Policies and Proposals

Allocations Plan (2014) Policies NEL1

Core Strategy (2011) Policies CLT1, CLT2

National Planning Policy Framework (NPPF) 2021

Planning Practice Guidance

Background Papers

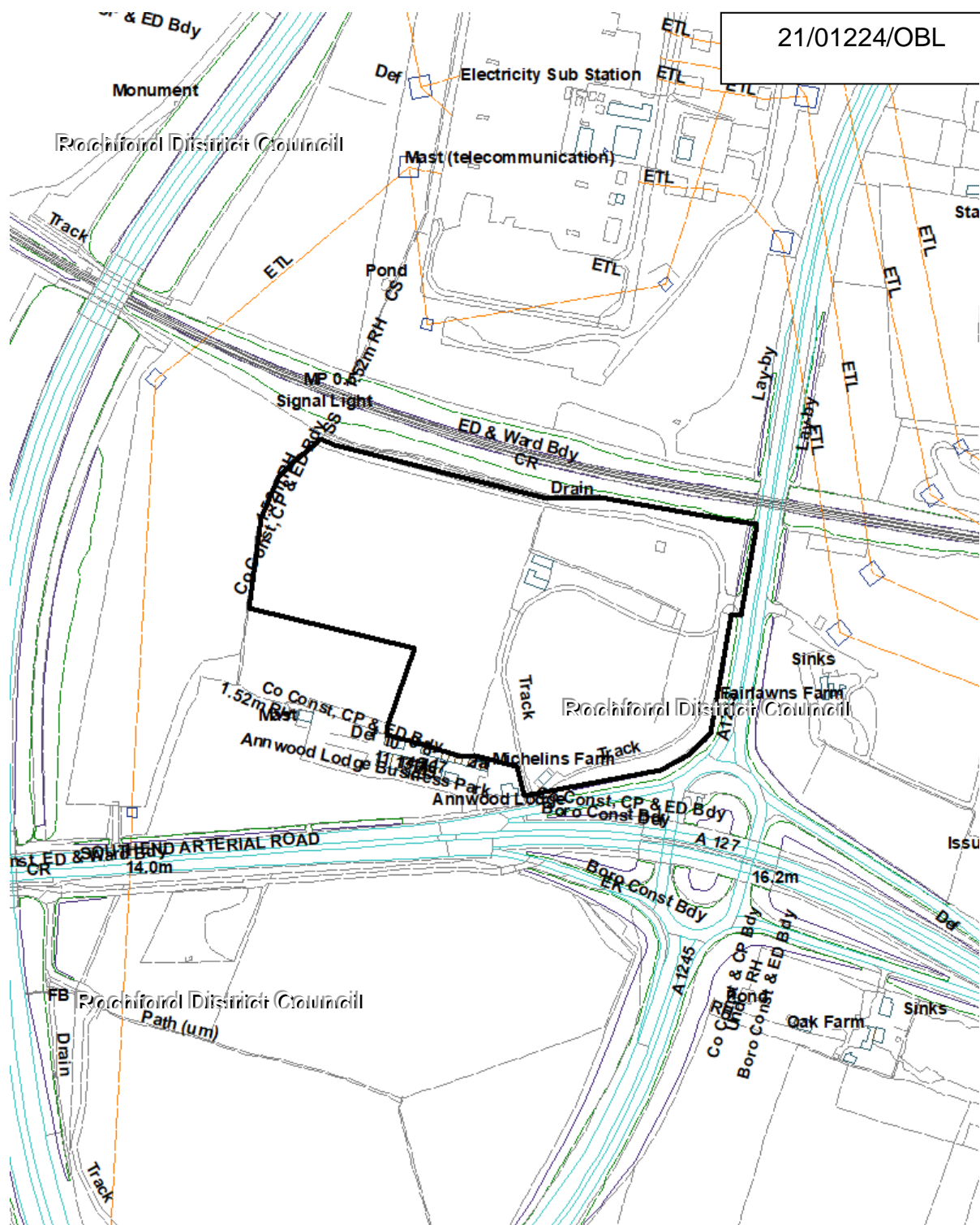
Equality and Diversity Impact Assessment

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If you would like this report in large print, Braille or another language please contact 01702 318111.



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