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FAO: Chris Ries

Dear Sirs

APP/X5210/A/14/22118052 - Development at Gondar Gardens, West Hampstead, London (2013/7585/P) - S106 obligations

In addition to the submissions that have been offered by the Council on the 1st July 2014, the Council offers a response to the two letters dated 26th June 2014 from the Appellant's (Linden Wates) retained solicitors, Cripps LLP, which we hope will be of further assistance to the Inspector.

Letter signed by Fiona McIntosh (Property lawyer) from Cripps LLP to the Planning Inspectorate, dated 26th June 2014

- The letter does not specify which of the planning obligations the Appellant objects to. The lawyer does not appear to have reviewed the S106 obligations in the draft S106 agreement to assess whether these obligations are truly onerous to future owner / occupiers, as she suggests. The response is a standard one offered by property lawyers, namely that they would seek to avoid any and all on-going obligations as this would deter potential purchasers. The Appellants have not offered any evidence to support this assertion and in the Council's lengthy experience potential purchasers are not deterred from buying property in Camden because of these S106 clauses, this is because they are not onerous or unreasonable in nature. If the Appellant truly believed that such obligations prevented future sales they would not have they agreed to their inclusion in three earlier s106 agreements for this site.
- The Council believes that the specific obligations that the Appellant has difficulty agreeing to are the Accessibility Plan, the Energy Efficiency and Renewable Energy Plan, Ecology and Enhancement Plan and the Sustainability Plan, although there may be others.

These obligations need to bind owner/occupiers from the outset in order to ensure their compliance for the lifetime of the development. These obligations have been secured in many Camden S106 agreements, at appeal and otherwise, (including the three agreements

at this site). They are not onerous in scope or nature: no financial payments nor do they place any significant burden on individual occupiers. The intent is to ensure that the same measures (that the Appellant has proposed be put place and are detailed in supporting documents to the planning application such as the Sustainability Strategy) are implemented and complied with during the lifetime of the development. The only way that these obligations can be secured during the lifetime of the development is by binding occupiers in this way. Without compliance, these obligations would not be integrated and these s106 obligations would falter from the outset.

- These obligations are meant to be self-enforcing in their compliance and would not require the Council's intervention as the Appellant has suggested. Owner/occupiers would check that these obligations have been fulfilled when a flat is purchased, and would expect to show that monitoring / compliance has been undertaken when they intended to sell their interest - in this way compliance is maintained. This method is very effective in its operation as is seen in many of the Council's agreements. However without strict compliance, occupiers will simply ignore these obligations or find ways to circumvent them, thereby the on-going nature of these obligations would be broken and would not be continued by successors in title; enforcement would be difficult and in all would, render the S106 obligations useless.
- Both previous Inspectors reviewed their respective S106 agreements in their decision letters (attached) and found these same obligations to be acceptable. In the decision letter dated 1st November 2012 (A/11/2167190) (attached) Inspector Andrew Pykett reviews the same obligations as are in the current draft agreement at paragraphs 66-73. At para 68, he states in relation to the Sustainability Plan that:

"The purpose of the sustainability plan which is also included in the Agreements is to ensure that various sustainability measures are incorporated into the scheme... The plan requires monitoring work to be undertaken to confirm that the various environmental measures have been successfully implemented and thereafter maintained.... I conclude it is necessary, directly related to the development, and fairly and reasonably related in scale and kind to the development." Elsewhere in this decision letter the Inspector has states that the obligations are ongoing and they are secured in perpetuity.

- Again, the Council fails to understand why the Appellant agreed to these provisions in three previous S106 agreements completed in October 2012 and April 2013 (attached) for the previous appeals but now refuses to agree to be bound by the same obligations. A proper explanation for this change of position has not been offered. It is noted that the Appellant was agreeable to the obligations during the application stage but has changed its position during this appeal stage.

Second letter from Cripps Law, dated 26th June 2014

The Council has responded to the numbered paragraphs stated in the letter.

Para. 1 - The Council are of the opinion that Appellant has no intention of securing a bilateral agreement; all of the drafts obligations that the Appellant offered were in the form of a unilateral undertaking. The Council was offered a single day to review and agree the draft on the terms offered by the Appellant, otherwise the Appellant would submit the unilateral undertaking - this is what they subsequently did.

Para. 2 - The Inspector should note that terms of the obligations are not agreed by the Council and the provisions do not replicate the terms of the previous bilateral S106 agreements. Without the provisions being properly secured, the Council is concerned that important obligations such as the Accessibility Plan and the Ecology and Enhancement Plan cannot be secured properly which in turn will cause these obligations to lapse. This will be of detriment to habitat land and the London Wildlife Trust, the occupants of the affordable housing and to the local residents, who were vociferous in raising these concerns at the previous two inquiries.

Para. 3 – The Council does not fully understand the reasons that have been offered here. The Appellant has raised issue about the level of control that the Council has in the Agreement (and that this is the reason why it has not progressed with the bilateral agreement), however the Appellant has failed to explain why it found the same terms, provisions and obligations to be acceptable in three previous legal agreements.

The Council upholds its public law duty to be reasonable in all its undertakings, therefore if the provisions of its legal agreements were found to be unreasonable the Council would find them to be unenforceable and subject to legal challenge. The Council does not accept that its legal agreements impose any unreasonable control over future owner / occupiers, as the Appellant has suggested.

Para. 5 – It should be clear to the Inspector that the substance of the obligations that have been offered in the unilateral undertaking are not on the same terms as the previous agreements.

Para. 6 – the Appellant's have pointed to their use of Law Society model agreement however this is only one suggested form and the Council does not accept this as a standard form of agreement.

With regard to the demolition provisions: the Council requires that demolition triggers the financial contributions that are paid on Implementation. In this way it ensures that developer is financially committed to the scheme from the outset and that the development progresses quickly to completion, minimising any detriment to the sensitive habitat land and the surrounding residential neighbourhood. The risk of a demolished site lying vacant pending a future sale was a significant concern raised by local residents at the previous inquiries, and which the Appellant agreed to overcome within the previous S106 agreements. It is unclear why the Appellant has changed in position with this application.

With regard to binding individual occupiers: the Council has included these standard provisions in many of its S106 agreements and these have been accepted by developers and lenders alike. As stated above, these obligations do not prevent potential purchasers from purchasing properties in Camden. These obligations are required in order to ensure that they make the development acceptable in planning terms so that the ongoing environmental efficiency, sustainability measures and retention and maintenance of the habitat land continue for the

lifetime of the development. The Appellant states that such provisions make this development unviable, but the Council does not accept this and requests that the Appellant offers evidence to substantiate its assertions. Furthermore, if this was truly the case then this issue would have been raised by Queens Counsel retained by the Appellant at the previous planning inquiries, instead they agreed to the inclusion of these provisions in three previous agreements.

Para. 7 - the Appellant's have refused to pay the Council's legal and monitoring fees.

Re: Legal fees - the Appellant offered the Council a cost undertaking in February 2014 to pay for its costs incurred in reviewing and agreeing these S106 obligations, the Appellant now does not agree to pay these fees, on a scale that it has agreed to previously. We are of the opinion that:

- these legal fees are payable to the Council because the parties had been seeking to agree terms of the S106 obligations to overcome planning objections. Similarly, with a Unilateral Undertaking that is being offered to the Council, there is a need to ensure that the terms that the S106 obligations were being offered on were on a basis that were, amongst other things, reasonable and enforceable; if this was not possible then they would not necessarily overcome the planning objections and the relevant planning obligations could not be secured;
- the Council is entitled to charge an Appellant for drafting, reviewing and amending legal obligations that are being offered. This is a discretionary service which the Council can legitimately charge for in accordance with Section 93 of the Local Government Act 2003;
- the Council has a structured policy for charging fees, which the Law Society has found to be legitimate, which set out charges for securing S106 obligations and to which it much adhere to. Any deviation from this policy and the aforementioned legislation sets a dangerous precedent for other local authorities across the country.

It is the Council's opinion that without payment of the Council's legal and monitoring fees that these S106 obligations have not been secured in accordance with paragraphs 2.30 to 2.33 of the Camden Planning Guidance 8 relating to Planning Obligations, these are stated below:

Costs and Charges relating to Planning Obligations

2.30 As a principle the Council will seek to recover all of its costs in relation to the preparation and monitoring and processing of planning obligations and the work arising out of them. These charges fall into two categories –

(i) those relating to work undertaken by legal and other officers in preparing the legal agreement containing the obligations (“Legal and Preparation Charges”) and (ii) those relating to work undertaken by officers post completion of the Agreement in monitoring implementing and processing obligations contained in the agreement. (“Processing and Monitoring Charges”).

2.31 All charges will be based on a standard Charging Schedule referencing the number and type of Heads of Terms in an Agreement. In terms of Legal and Preparation Charges these will be charged at a different rate for major and non-major schemes. To facilitate preparation of agreements standard legal templates will be made available on the Camden web site to give an indication of the likely format of an agreement but the final drafting will be carried out by Camden Legal Services. More detail about the principles underpinning Processing and Monitoring Charges are set out in the paragraphs below.

2.32 Any changes to charges are subject to Cabinet approval and will be available through the Council's website. All charges will be payable at the time that a Section 106 agreement is completed

Processing and Monitoring Charges

2.33 The processing, monitoring and implementation of planning obligations after completion of the Agreement requires the input of significant Council resources. This relates to a range of activities which arise directly from the grant of planning permission for development and are necessary to ensure that measures required to mitigate the development impacts are properly carried out. Costs associated with this work are distinct from any costs associated with processing a planning application and legal fees and in many cases will be ongoing after a development has been completed. Hence it is appropriate that charges relating to such obligations are borne by the developer.

Re: Monitoring fees - the Council confirms that the Appellant has paid monitoring fees in 2012 in accordance with the S106 Agreement following the grant of planning permission by the Inspector on the 1st November 2012. The Council also confirms that it would not seek a duplicate payment of monitoring fees, but would require that the correct amount was paid in accordance with any other planning permission (and related legal agreement) granted. The Appellant has not requested repayment of these fees but if requested, the Council would do so.

The Appellant now argues that monitoring fees should not be payable for this application and rely on an appeal decision from Cherwell District Council. The Council does not know the specific background to this specific appeal case and the reasons why the Inspector came to her determination in this case, however in the determination of the present appeal, the Inspector needs to take account of the following points:

- the two previous Inspector's decision letters, where the level of the legal and monitoring fees were found to be to be acceptable and in compliance with relevant CIL regulations;
- the level or legitimacy of these fees were not contested at the two previous planning inquiries which would have been an appropriate forum to do so;
- that method of assessing the scale of these fees have been accepted by the Law Society as being a legitimate way of charging;
- the Inspectors in the previous two appeals have not only found that these scale of these fees to be acceptable, but that they comply Council policy (Camden Planning Guidance 8: Planning Obligations), CIL regulations and that scope of the monitoring is beyond the scope of normal development control function. The Council is referred to Inspector's appeal decision dated 3rd March 2014 (A/13/2207697) in relation to a residential development in the borough. At paras 33 and 34 the Inspector states:

33. The agreement also includes a monitoring fee of £1,460. At the Hearing, the Council explained that this sum represents £365 per head of term (there being four of them) and reflects its standard fee for a development of the size proposed. The Council also confirmed that the fee was specifically for monitoring the obligations in this agreement over and above its day-to-day development control activity.

34. In the light of the above, I consider that the agreement overcomes the Council's concerns about the matters it addresses and meets the

relevant statutory and policy tests. I therefore give it significant weight in this appeal.”

- the Appellant agreed and paid the Council's legal and monitoring fees for the previous agreements, which were on a similar and same scale and amount as with the present agreement. It is unclear why the issue has now been raised.
- The Council considers that without payment of the Council's legal fees and on the basis that these S106 obligations have not been secured in agreed either by bilateral agreement or an unilateral undertaking that the provisions have not been secured that overcome Council's objections to the application.

The Council respectfully requests that the Inspector considers the points that have been made and would be happy to be offer further details should they be required.

Yours faithfully



Pritej Mistry
Lawyer
for the Borough Solicitor

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