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1 April 2016

Planning Services
London Borough of Camden
5 Pancras Square
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Dear Sir/Madam

TOWN & COUNTRY PLANNING ACT 1990
APPLICATION UNDER S106BA TO VARY THE TERMS OF THE PLANNING OBLIGATION
SITE AT 22 TOWER STREET, LONDON

This letter and accompanying documents constitute an application pursuant to S106BA of the TCPA 1990 to vary the terms of the planning obligation relating to 2014/3425/P. The Application is made on behalf of the owners of the site.

The Application seeks to vary the obligation included within S106 Agreement to provide on-site affordable units t. The application is made in accordance with the guidance in DCLG's April 2013 publication *Section 106: Affordable Housing Requirements – Review and Appeal,* and comprises the following:

1. This letter
2. Financial Viability Assessment
3. Decision Letter APP/X5210/S/15/3133785

The signatories to the original S106 have been advised of this application. London Borough of Camden is notified by way of this application.

History

The relevant determination for this application is:

Change of use and conversion from offices (B1) to 22 residential units (C3) comprising 3 x studio units, 12 x one-bed units, 5 x two-bed units and 2 x three-bed unit including removal of exiting orangery and replacement with new two storey structure (scheme identical to 2014/3425/P save for the affordable housing contribution)

This is the consent which established the principle of residential use for the building, and was subject to a S106 that provided four (4) on-site units.

A similar S106BA application was dismissed at appeal on 23rd February 2015, and the findings of fact and principle bind the decision maker unless a material change of policy or circumstance intervenes. The case of North Wiltshire DC v Secretary of State for the Environment [1991] 2 P.L.R. 67; [1991] E.G. 25 (C.S.) states that a decision in an earlier appeal relating to the same land is capable of being treated as a material consideration. This principle has been constantly re-affirmed by the Courts, including recently in *Dunster Properties Ltd v The First Secretary of State & Anr (2010)*
The Court held the inspector has a duty to consider all material considerations and an earlier decision can be a material consideration since like cases should be decided in a like manner. It did not follow that like cases had to be decided in the same way, the inspector had to exercise his judgment but, where he chose not to follow an earlier decision, but he had to give his reasons for doing so.
"One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in a previous case? The areas for possible agreement or disagreement cannot be defined but they would include an interpretation of policies aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

This is now codified into the PPG as an example of unreasonable behaviour where Local Planning Authorities fail to follow the principles established by a previous Appeal Inspector.

Whilst obviously disappointed with the decision, my Client and its advisors considers that the previous appeal decision established the following important findings of fact and opinion in support of the development of the site as then proposed:-

- That the site need not be stalled for such an application to be contemplated (ironically this was confirmed by the High Court last week in the decision of *Medway Council v Secretary of State for Communities and Local Government & Ors [2016] EWHC 644 (Admin) - copy attached) (para 12-14)*

- That the four units currently assigned rendered the scheme unviable (para 21)

- That on-site delivery was not appropriate in this case (para 24)

- That the Appellant's position on purchase price was not a 'significant overbid' (para 20)

- That the Appellant's viability on the amount of subsidy was robust.

The Inspector's sole criticism on the appeal was that the Appellant had not explored off-site contribution sufficiently (para 27-28)

<u>The Statutory Framework</u>

The Growth & Infrastructure Act 2013 introduced Sections 106 BA, BB and 106 BC into the TCPA 1990 to provide a facility for modification or discharge of affordable housing requirements imposed by a LPA as a pre-condition for a s106 Agreement. This law came in force on 25th April 2013. S106BA allows a person, against whom an affordable housing requirement is enforced, to apply to the appropriate LPA for the requirement to be removed (or varied) from the Planning Obligation if the affordable housing requirement means that the development is not economically viable. The LPA has 28 days to give notice of a determination, and if agreement is not reached, there is recourse to an appeal to the Secretary of State for a binding determination.

NPPF

The NPPF places an obligation on LPA's to boost significantly the supply of housing (para 47) and this is a central tenet of Government Policy. In pursuing sustainable residential development, the NPPF requires careful attention to viability and costs in decision taking. Crucially:

To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.

It is clear that viability is inextricably linked to deliverability, the objective being to ensure that land comes forward for development.

Paragraphs 203 to 206 of the National Planning Policy Framework (NPPF) deal with planning obligations and conditions. Paragraph 205 states, *"Where obligations are being sought or revised, local planning authorities should take into account of changes in market conditions over time and wherever appropriate, be sufficiently flexible to prevent planned development being stalled".*

The Governments most recent policy guidance in respect of affordable housing and viability is set in DCLG *Section 106 Affordable Housing Requirements – Review and Appeal.* The guidance refers to new legislative

provisions in the Growth and Infrastructure Act 2013 that introduces an application and appeal provision for the review of planning obligations on planning permission which relate to the provision of affordable housing. The process is predicated on the submission of viability evidence to inform the maximum level of affordable housing consistent with viability. The opening paragraphs set out the prevailing national economic and planning context within which such applications must be considered:

The Government encourages a positive approach to planning to enable appropriate, sustainable development to come forward wherever possible. The National Planning Policy Framework establishes that the planning system ought to proactively drive and support sustainable economic development. It also requires that local planning authorities should positively seek to meet the development needs of their area.

Unrealistic Section 106 agreements negotiated in differing economic conditions can be an obstacle to house building. The Government is keen to encourage development to come forward, to provide more homes to meet a growing population and to promote construction and economic growth. Stalled schemes due to economically unviable affordable housing requirements result in no development, no regeneration and no community benefit. Reviewing such agreements will result in more housing and more affordable housing than would otherwise be the case

The guidance explains in some detail the relevant viability test for the purposes of this process and the form that the viability evidence should take. The Assessment prepared by Gerald Eve submitted with the application follows this guidance.

Viability Evidence

The viability evidence that underpins the revised affordable housing proposal set out in this application is contained in Gerald Eve's Viability Assessment. This assessment was considered by Mr. Ware in the very recent appeal decision, and he concluded:

As indicated above, I prefer the appellant's evidence related to the viability appraisal. Therefore, were a PIL to represent the appropriate solution to the viability issue, I consider that the appellant's calculation of the

maximum PIL which the scheme could support is more robust

This determination means that whatever the solution for delivery, the maximum amount of subsidy to arise from the scheme will be £250000

Off-site or Payment in Lieu

Paragraph 50 of the Framework requires any need for affordable housing to be met on-site, unless off-site provision or a financial contribution can be robustly justified.

Pursuant to para 3.14 of the DPD, in considering whether it is practical to provide affordable housing on-site, the decision maker needs take account of a number of factors. These include the accessibility of the site; the character of the development, the site and the area; the financial viability of the development; the need to create mixed and inclusive communities; and any other planning objectives considered to be a priority for the site.

It is common ground between the parties that the most appropriate delivery mechanism for the site is by way of off-site contribution. The Borough's Housing Department has been involved in seeking a solution for delivery from the site, but has not sought an on-site delivery. Off-site delivery is permissible when good planning reasons are established, as is the case in relation to the appeal scheme:

- The specific nature of the conversion scheme, as common areas will subject to strict controls due to their listed areas.
- The on-going management of the scheme, which will include a concierge service, and which was identified in the application materials.
- Viability grounds, as any on-site delivery would be resource heavy and inefficiently provided as the number provided would be less than achieved by off-site delivery

The previous Inspector having considered the above, concluded that on-site delivery was not possible.

Para 3.15 then deals with consideration of off-site affordable housing, as follows:

Where the principle of an off-site affordable housing contribution is accepted, the Council will initially seek provision of a specified amount of affordable housing on an identified site or sites. If a site cannot be identified, the Council may alternatively accept a specified amount of affordable housing on an unidentified site or sites, to be brought forward to an agreed timescale. In this situation, the Council will seek to ensure that the affordable housing is developed in reasonable proximity to the proposed market housing and so contributes to a mixed and inclusive community.

The Applicant has not acquired any land within the Ward, and has reviewed market offerings within 'reasonable proximity' of the application site, and due to the capital values of such, none can be sustained on the basis of the Inspector's conclusion on the effective subsidy available. Attached to this letter is a Rightmove search which indicates there are six properties available within the entire Borough at or about that amount. I would note that the properties range in size from 20 – 48sqm metres and query if these can even be considered for affordable delivery when below the national technical standards?

The Inspector was explicitly critical of the Applicant for failing to engage with the Borough's Housing and Planning Officers. This was a strange conclusion when he records earlier of the lack of interest from Registered Providers, which is the normal process for establishing either on-site or off-site deliveries. However, in response to this criticism, the Applicant has sought to discuss delivery with Officers of both the Housing and Planning Departments, and the Ward Councillors.

It was put to the Officers that a potential solution could be a cascade mechanism of, as recorded back to us in Mr. McClue's email of 21 March 2016:

Option 1
The applicant buys what is available on the open market within Camden to the value of £250,000 and hand this over to our housing department as an offsite contribution.

Option 2
The applicant pays Camden £250,000 to invest in whatever housing we may have.

Option 3

Vary the existing s106 to include an option for Camden to find an appropriate scheme to 'house' this £250,000 off-site contribution. We would have up to 6 months from the date of signature to identify a scheme, failing which the applicant would pay Camden the amount of £250,000 as a payment in lieu.

Option 1 seems unrealistic, as any market delivery would be restricted to the outer edges of the Borough, and may not be suitable for affordable housing for a suite of reasons (unit size, management, service charge etc). Ward Councillors are hardly likely to be thrilled with delivery occurring on the other side of the Borough,

Option 2 could be utilized in any scheme with an identified on-site delivery to either enhance viability or to support a change in the tenure mix (eg sustain a shared ownership unit changing to a rented product). We have reached out to Registered Providers on your preferred list to establish what, if anything, is available within the Ward that could be achieved.

Option 3 became compelling when further discussions with the Housing Officer indicated that the Committee would soon consider affordable housing delivery within the Ward and that a site could be identified out of that process. Although it would be akin to a PIL, nothing in the policy text nor amplification prevents the identified site being in public ownership.

Conclusion

First and foremost, the social benefit of the delivery of housing whatever the tenure should be the main driver of the decision maker, as this is the priority land use of the Borough. Certain principles are now established by the previous appeal decision

We assume that a Deed of Variation will be required to the existing S106, and advised that the Applicant is willing to underwrite the Borough's reasonable legal costs.

Should you have any queries regarding the application, please do not hesitate to contact me on 07545 264 252 or at Kieran@krplanning.com

Yours Sincerely

Kieran Rafferty

BA(URP) CUKPL MPIA MRTPI

Encl:

CC: Client