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Your Ref:
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Dear Mr Thuaire

Objection to proposed extension of the Royal Free Hospital

**Proposed New Institute of Immunology, Royal Free Hospital, Pond Street, London NW3 2QG
Planning Permission Application No.: 2014/6845/P**

My Clients: (1) Michael Taylor as Chairman of the Trustees, St Stephen's Restoration & Preservation Trust (2) Andrea Taylor as Principal and Proprietor, Hampstead Hill School (3) Jeffrey Gold as Chairman of the Hampstead Green Neighbourhood Group (unincorporated)

I refer to your email dated 27th March 2017 to my clients' planning consultant, David Kemp. As its contents raise a number of legal concerns, adding to those my clients already have in relation to compliance with the S.106 Agreement generally, the purpose of this letter is to draw all of those concerns together and recommend a way forward.

Context

1) The S.106 Agreement.

The fundamental purpose of a section 106 agreement, in a development management context, is to outweigh the planning disbenefits of a particular proposal so that permission can be granted for it.

In relation to my clients, the major disbenefits which must be outweighed by this S.106 Agreement are the real likelihood of harm and loss of public benefits that would arise from the risk of damage to St Stephens (a Grade I listed building and landmark feature), and to Hampstead Hill School a Pre-Preparatory and Nursery School for 2 to 7 year olds. Founded in 1949 the school has served the local community and beyond for nearly 70 years, offering all year round education and care facilities to around 400 children, many of whom have parents working at the Royal Free Hospital.

Such are the acknowledged risks that this S.106 Agreement provides for the essential mitigation, procedurally, to be provided through the requirements sent out in pages 7-16 of the Agreement i.e. a Detailed Basement Construction Plan, in particular the requirement on page 11 for the development to be undertaken '*without any impact on the structural integrity of the Neighbouring Properties*' such

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impact assessed with reference to compliance with category 0 (negligible) of the Burland Category of Damage (Clause 2.16(ii)(b)).

2) Last year's court proceedings.

You will remember that these proceedings were vacated on the basis that my clients' energies were better directed to upholding the safeguards contained in the S.106 Agreement, and, upon the basis that all other parties were similarly engaged with and committed to ensuring full compliance. This was clearly set out in our letter to Withers dated 29th September 2016, sent to you on the same day.

The degree of reassurance that should flow was reflected not only in the Council's own legal submissions but also in the terms of the High Court Order where Justice Hickinbottom noted in his justification for refusal that the permission and s.106 agreement combined required approval of the CMP and DBCP "all to ensure that there is no possibility of the development being commenced until the Council is satisfied that no harm will be caused by the proposed basement works".

3) Principles of consultation/good governance.

While it is correct that the Council's Statement of Community Involvement (SCI) does not expressly address the instant situation, all relevant parties are bound by overarching common law principles. In relation to consultation, these are generally acknowledged as including the following:

- 1) Consultation should occur when proposals are at a formative stage;
- 2) Consultations should give sufficient reasons for any proposal to permit intelligent consideration;
- 3) Consultations should allow adequate time for consideration and response.

Given that the Council is a public authority these principles should properly be supplemented by Cabinet Office guidance on public consultations including the following:

- 1) Consultations are only part of a process of engagement
- 2) Consultations should last for a proportionate amount of time
- 3) Consultations should take account of the groups being consulted
- 4) Consultations should be published
- 5) Consultation should facilitate scrutiny – which includes the guidance that a response should be published within 12 weeks of the consultation date.

4) Further Considerations.

As Clauses 2.16(ii)(1) and 2.16(v) of the S106 Agreement specifically require the Council to make determinations as to the adequacy of the Covenantors' compliance with the survey and consultation requirements under Clauses 2.16(v)(b) and (d) it can only follow that if there has been (as is currently the case here) inadequate consultation then the Council needs to be sufficiently informed as to why the terms of Clause 2.16(d) have been insufficiently met to achieve the obligations requirements of Clause 2.16(ii)(b) i.e. without **any** impact on the structural integrity of the Neighbouring Properties 'as measurable in accordance with 'category 0 (negligible)' of the Burland Category of Damage.'

Therefore, the Council is obliged to publish the final submissions on its website, and the consultation responses from my clients. Given that the Council is the custodian of the public interest, as local planning authority, it is important that the broader population of Hampstead Borough (and beyond) is aware of how these key planning obligations are being discharged. To act as you suggest would be a serious breach of this obligation as well as contrary to the principles of natural justice and human rights applicable in this instance.

Concerns

Since withdrawing from formal proceedings last year my clients have tried, in good faith, to work with the Council and the Royal Free Trust to ensure compliance with the S.106 Agreement. There are,

however, a number, and growing, areas of concern. Our concerns with the formal consultation on the Detailed Basement Construction Plan have been sent out in correspondence with Withers LLP, with Mr Panniker of the Royal Free Trust and with you directly. You are aware that the lack of documentation and the difficulty of accessing such documentation as there were belied any claim to a 'meaningful consultation' process and indeed resulted in an extension to the consultation period.

Further, there are other issues that have not been resolved which remain areas of growing concern as follows:

1) In his letter dated 26th January 2017 Mr Panniker alleged that the foundations of St Stephen's tower were 'approaching the ultimate capacity of the soils', advising my clients that they had a duty to notify adjacent landowners of this and threatening to 'escalate the matter ourselves' if they did not. Despite a number of requests we have not yet been supplied with the evidence on which these allegations were based or details of the escalation proposed.

2) A number of requests have been made to Withers LLP for a list of the parties consulted on the Detailed Basement Construction Plan, confirmation of when a summary of consultation submissions would be published and clarification of whether or not the Royal Free would publish its response to those submissions. Their most recent letter dated 10 March stated simply that it was 'not appropriate' for that information to be supplied.

3) There was a meeting last December recorded by Mr Owens. My clients have supplied copies of their records of other meetings in response to queries raised by Mr Owens but in spite of repeated requests Mr Owens has not supplied his copy of the tape made. Instead, two separate requests have been made from Mr Owens and the solicitors acting for the Royal Free hospital for disclosure of the following documents:

- Freeman Fox & Partners Report (1970) x three reports.
- St Stephen's paper prepared by N. Burton (1980).
- Condition Survey prepared by GLC (1982)
- Price & Myers Report/Condition Survey (1998).
- LBH Wembley Site Investigation Report (1998).
- Drainage Survey Report (1998).
- Tree Care Consultancy Services Report (1998)
- Diocese of London Property Condition Report (1998).
- Further condition report (2006)

We are working to collate and supply these documents but at the moment the disclosure process seems to be a very one-way process in which only my clients have been honouring requests.

4) Your most recent email states that 'once the reports have been reviewed, revised if necessary and agreed, the planning team will discharge the section 106 clauses.' Your previous email of 24th February states that this will be an 'entirely internal review process'.

Such an approach is inappropriate and legally wrong:

(a) It provides no comfort as to how this review and revision process will be carried out, so that the process could be long, and complex and result in changes to the plans and proposals that directly affect my clients' properties yet remain entirely concealed from public scrutiny.

(b) The statement that '*the planning team will discharge the section 106 clauses*' strongly suggests a pre-determination of the outcome of the review process and, already, potential

bias in favour of discharge rather than displaying an independent stance, as required by the specific wording of the S.106 obligations.

(c) A consultation process cannot be described as meaningful when one party makes detailed and serious comments on the adequacy of the proposals, including identification of the areas of inadequacy, yet receives no response to that consultation submission or how it will be taken into account prior to the submission to the Council.

It goes against the principles of proper consultation if my clients do not have the opportunity of reviewing the final submission of the hospital to the planning authority for consent to proceed. It is also undemocratic. They are effectively prevented from a) knowing whether the hospital has acknowledged their criticisms and b) being able to satisfy themselves that the hospital dealt with those concerns in an appropriate manner in their final submission

Conclusions and future action

While the consultation exercises required in the S.106 Agreement are not subject to the Council's SCI there are general principles, outlined above, that apply. The wording of the Agreement also requires the Covenantors' work to be published on the Council's website, including my clients' responses.

The Covenantors' consultation carried out so far does **not** comply with those principles. There is a direct breach of the requirements set out in Clauses 2.16(v)(b) and (d) of the Agreement. It must be fully remedied before the Council can proceed to the discharge procedural stage under Clause 2.16(v)(e).

More significantly, the defects in the substance of the current basement proposals, detailed in my clients' response to the consultation, make it more than reasonably foreseeable that if construction is carried out as proposed there will be damage to St Stephens (a public heritage asset as well as a privately owned property) and Hampstead Hill School with a consequent risk of injury to users of both premises.

We are clearly at an impasse in a number of areas and in light of the risk to the buildings my clients are considering formal action. We urge the Council to work with us on instituting formal facilitation of the consultation process instead. In the meantime, please can you treat this letter as a formal request for:

- a) A response to be made (and published) to my clients' consultation submissions;
- b) Full and detailed disclosure of the Council's intentions in relation to the review of the documentation submitted so far and still to be submitted;
- c) The opportunity for my clients to be made aware of, and have the opportunity to comment on, any revised proposals or documentation emerging from that review.

I look forward to receiving your responses as soon as practicable, given the seriousness of the issues raised.

Yours sincerely,


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For and on behalf of Birketts LLP

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