

## **Objection by the Belsize Society to Application 2021/0025/P 100 Avenue Road**

Belsize Society object to the application lodged by Essential Living to remove the affordable housing element of the development at 100 Avenue Road.

The Society was one of many objectors to the original proposal which was granted on appeal by the Secretary of State on 18 February 2016. The application was extremely controversial and was opposed by a very large number of local residents and other interested parties. The Inspector's Report and the Secretary of State both placed very significant weight on the value that would be derived from the affordable housing provision. Indeed it would seem highly improbable that the proposals would have been considered at all, let alone achieve a consent, without the affordable housing provision.

The Applicant is now seeking to amend the provisions it agreed with London Borough of Camden to include in the S106 Agreement and the terms of which were approved by the Secretary of State and the Inspector in order to remove entirely the requirement to provide 36 affordable housing units.

Savills state that 'the statutory test to be applied when determining the acceptability of an application to amend an S.106 obligation is set out in S.106A(6)(c) of the Town and Country Planning Act 1990, namely where the (original) obligation continues to serve a useful purpose, whether the obligation sought by the application would serve the purpose (of the original obligation) equally well if it had effect subject to the modification specified in the application.'

Savills go on to say that 'in this case it is possible to view the purpose of the existing S.106 deed either: a. as a document which secures a range of planning benefits including affordable housing, a purpose built community space, capacity for an upgraded entrance to the underground stations and contributions for education, employment and training, public art, public realm improvements and cycling infrastructure; or b. more narrowly as a document which for the purpose of the amendment to the affordable housing obligations sought by the application secures the maximum reasonable amount of affordable housing consistent with policy and the delivery of a viable scheme. Under either scenario the proposal the subject of this application satisfies the test set out in S.106A(6)(c) as it meets the purpose of the original obligations equally well.'

The Belsize Society believes that these statements do not provide any justification for the current application. The effect of the modification being sought would remove the obligation to provide the affordable housing, a key purpose of the original obligation. In order to satisfy the requirements of the statutory test the applicant must show that the obligation to provide affordable housing, which clearly serves a useful purpose, would serve that purpose equally well when modified by the application. Here it could not possibly do so if the affordable housing element is removed. It is absolutely clear that the purpose of the original application was to secure consent for a development of 184 flats, including 36 affordable flats, and other development, to support the case for this very controversial application. Given that the developer's commitment to include affordable flats was seen as a key element in the original decision to grant the consent, neither of the two scenarios set out by Savills mean that the test set out in S.106A(6)(c) can be met by the proposal to omit the affordable housing.

The Belsize Society has reviewed the Inspector's Report and the reasoning given in the letter of 18 February 2016 from the Secretary of State – **emphasis added** to show the importance attached in the original decision process to the inclusion of affordable housing. It is clear from the Inspector's Report and the letter from the Secretary of State that the inclusion of the affordable housing was a

fundamentally important factor in the decision to approve the development. To allow the development to proceed without it would be wrong in law.

### 1. Inspector's Report

23. LP Policy 3.3 relates to increasing Housing Supply. The Mayor recognises the pressing need for more homes in London in order to promote opportunity and provide a real choice for **all Londoners in ways that meet their needs at a price they can afford**. It notes that boroughs should identify and seek to enable additional development capacity to be brought forward to supplement these targets having regard to other policies in the plan. The appeal was recovered for the Secretary of State's determination on 11 March 2015, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990, because the appeal involves a proposals for residential development of over 150 units or on sites of over 5 hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and **create high quality, sustainable, mixed and inclusive communities**
28. LP Policy 3.8 aims to provide **housing choice, including affordable housing**, accessible housing and units of varying sizes and types.
29. LP Policy 3.9 aims to achieve **mixed and balanced communities by tenure and household income through small and large scale developments, which foster social diversity, redress social exclusion** and strengthen communities' sense of responsibility for and identity with their neighbourhoods.
30. LP Policy 3.10 defines affordable housing and LP Policy 3.11 defines affordable housing targets. LP Policy 3.12 **notes the maximum amount of affordable housing should be sought and that this can be the subject of negotiation, taking account of individual circumstances, and allows for reappraising of viability studies**. [In the S106 Agreement Essential Living agreed to increases in affordable housing provision if values permitted this. It did not seek to cover decreases.]
41. Camden's Site Allocations Local Development Document identifies 100 Avenue Road, Swiss Cottage. Allocation guidance indicates a mixed use redevelopment including permanent residential, and other appropriate town centre uses, such as retail and employment. **Development is expected to optimise the site to provide housing, including affordable housing**, include retail use or food and drink particularly to create active frontages at ground level. It is to respect the Swiss Cottage Open Space and contribute to the public realm with respect to public safety and improvements and contribute to local town centre improvements.

### The Proposals

46. The proposal is for a total of 184 new homes, which will include private rented units **as well as affordable housing units**.
110. **The appellant identifies the public benefits of the proposal. Socially it would provide about 54 genuinely affordable homes** and 130 private rented homes, meeting residential space standards. **The mixed use and tenures provide a socially inclusive community**.

The Mayor of London's Housing supplementary Planning Guidance of 2012 has similar aims identifying 1200 town centres of different sizes in London, and in line with the National Planning Policy Framework (the Framework) the London Plan anticipates that they will be the primary geographical focus for most new Londoners.

113. It [the proposed scheme] meets the aspirations of the Framework and would be sustainable development.

#### Camden's case

136. In relation to affordable housing there is a target in CS Policy CS6 for **50%** self contained affordable housing, with similar aims in DP Policy DP3. **However the appellant provided viability information that indicates that what has been offered is the maximum viable and therefore acceptable.**

138. It is accepted that there will be positive benefits from the proposal in terms of housing, **affordable housing** and space for the Winchester project. While the benefit of providing further housing is acknowledged, overall the harm is not outweighed by the benefits of the development.

364. Mr Reed questions whether the occupants of the units would walk or cycle, particularly as there is a Red Route adjacent. I believe the suggestion is that occupants of expensive flats would not wish to. There is no reason why these occupants should not walk and cycle; after all, the Prime Minister and London Mayor cycle and there is no reason why others should not. In addition, **many of the units will be affordable housing** and those occupiers may also wish to walk and cycle.

372. In these circumstances the second part of paragraph 49 would not come into play, **but it is still necessary that housing applications should be considered in the context of the presumption in favour of sustainable development. I consider that great weight should be attached to the housing provision proposed.**

373. **There was considerable concern raised by interested parties about the number of affordable houses proposed. The appellant has undertaken a viability appraisal that demonstrates what is proposed is reasonable and this has been accepted by the authority. In addition, as a check, the 106 agreement requires that the viability of providing affordable housing is re-assessed at the end of the project and if it is found that there should have been more affordable housing a mechanism is set out for adjustment by a deferred payment. I consider that this viability study and method of ensuring that adequate affordable housing is provided is reasonable and necessary and related to the proposal.**

#### Planning Obligation and Conditions

375. The Agreement is made between the London Borough of Camden and Essential Living (Swiss Cottage) Ltd and others with an interest in the land.

376. **I consider that the requirements for affordable housing and other associated controlling clauses are reasonable, necessary and related to the development and when viability is taken into consideration as set out above, I consider that it accords with the aims and objectives of policy. The viability study indicates that the extent of supply is reasonable, but I consider that it is reasonable that should the project viability be improved during construction that the affordable housing situation should be reviewed.**

383. **I conclude overall, apart from as identified above, that the section 106 requirements are 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.**

390. **Overall there is considerable social benefit in the provision of the proposed housing and affordable housing**, and by the provision of space for community use. The potential for the underground station to be improved would also be a significant benefit. There would also be an enhancement to the frontages of the buildings at ground level compared with the existing arrangement that could improve the vitality of the area.

395. **Overall, I conclude that the social, economic and environmental benefits of the proposal make it sustainable development in terms of the Framework and that the substantial benefits considerably outweigh the harm that has been identified.**

## **2. The Secretary of State's letter of 18 February 2016**

42. The Secretary of State has carefully considered the Inspector's analysis of housing issues at IR371-373 and agrees (IR372) that **great weight should be attached to the housing provision proposed.**

43. **The Secretary of State has carefully considered the concerns raised by interested parties about the number of affordable units proposed. He has also had regard to the viability appraisal and the Inspector's analysis of the issue (IR373). He notes the Council and the Appellant agree (IQ30): that the provision of 36 affordable units and 18 discounted market housing units for 15 years comprises a policy compliant affordable housing provision having regard to the viability of the proposed scheme with the provision secured by way of a section 106 obligation; that the s106 agreement includes a review mechanism requiring the viability of providing affordable housing to be re-assessed at the end of the project (within one year after the date of practical completion of the development) and if it is found that there should have been more affordable units a mechanism is set out for adjustment by a deferred payment; that a provision permitting the use of the community space for additional affordable units is necessary if the community space within the scheme is no longer required; and that as such the proposals would satisfy the provisions of Policies CS6 and CS19 and Policies DP3 and DP4. Overall, the Secretary of State agrees with the Inspector for the reasons given that the viability study and method of ensuring that adequate affordable housing is provided is fairly and reasonably related in scale and kind to the proposed development and necessary having regard to the policy framework and the housing needs of the Borough (IR373).**

47. Having carefully considered the s106 agreement and the Council's response letter referred to in DL4, above, the Secretary of State concludes: **That the contributions relating to affordable housing are excluded from Regulation 123**; that the external public open space maintenance contribution is an obligation specific to this particular area of open space being provided and does not form part of any wider project or infrastructure provision; that the landscape and public realm contributions relate solely towards the proposal and do not form part of any wider project or infrastructure provision; that the travel plan monitoring contribution is a contribution towards the cost to the Council of monitoring the travel plan that will be agreed in respect of the development and is site specific and not part of any wider project; and that with respect to the carbon reduction contribution, the Council confirmed that 5 or more separate obligations have not already been entered into since April 2010 within the relevant area which provide for the funding of that infrastructure project or type. The Secretary of State agrees with the Council that aside from these financial contributions that the s106 agreement contains site specific obligations relating to the carrying out, management and operation of this particular

development and that none of the obligations provide for the funding or provision of an infrastructure project which has been part funded or provided by any other obligation.

52. **Weighing in favour of the appeal** the Secretary of State finds, for the reasons given above: **considerable social benefit in the provision of the proposed housing and affordable housing**, and by the provision of space for community use; the potential for the underground station to be improved would also be a significant benefit; there would be an enhancement to the frontages of the buildings at ground level compared with the existing arrangement that could improve the vitality of the area (IR390); and that the proposed development is an attractive design and will fit in with the area, although he agrees with the Inspector for the reasons given that this adds minimal weight to the planning balance (IR391).
53. Applying paragraph 134 of the Framework, the **Secretary of State considers that the public benefits of the proposal outweigh the less than substantial harm**, in Framework terms, to the Belsize Conservation Area.
54. The Secretary of State considers, for the reasons above, and in agreement with the Inspector (IR395) that **the social, economic and environmental benefits of the proposal make it sustainable development in terms of the Framework and that the substantial benefits considerably outweigh the harms that have been identified**. He therefore concludes that there are no material considerations that indicate that the proposal should be determined other than in accordance with the development plan.

The Planning Inspector's Report and the letter from the Secretary of State could not be clearer about the importance of the inclusion of the affordable housing obligations in the context of the approval of the scheme.

### **The current application**

Savills have submitted their analysis on behalf of the Developer seeking to explain and justify the extraordinary suggestion that the affordable housing obligation should now be removed.

#### **1. Planning Analysis**

- '2. Alongside this planning permission, a legal agreement was completed in accordance with Section 106 of the Town and Country Planning Act 1990 (as amended), and was entered into on 24 August 2015.
3. Clause 3.2 of the S106 Agreement relates to the provision of affordable housing. Currently this requires the provision of 36 units (8 intermediate and 28 affordable rent) on a permanent basis and 18 units as discounted market rent for 15 years from practical completion of each unit.
4. In accordance with Section 106A of the Town and Country Planning Act 1990 (as amended), a modification of this obligation is now sought. With specific reference to S.106A(3) and S106A(6), it is noted that more than 5 years have passed since the agreement was made and that the proposed modification will ensure that the modified obligation will serve its purpose equally well relative to the existing wording.
5. Specifically, the modification will revise the provision of affordable to offer 18 units (10% of the units within the development) as discounted market rent units in perpetuity. This modification will ensure that the development continues to provide the maximum reasonable amount of affordable housing consistent with planning policy and the delivery of a viable scheme, as per the original intent of the obligation.'

The Belsize Society disagrees that the 'modified obligation' would serve the original purpose of the obligation to provide 20% of the units as affordable housing as set out in considerable detail in the S106 Agreement. If the obligation has been removed, how could it?

Savills set out the history of the discussions relating to the affordable housing element. 'March 2014 Date of the original viability assessment that underpinned the proposed development August 2014 Completion of BPS' independent assessment, on behalf of the London Borough of Camden, of the submitted viability report 2 - Confirmed that the maximum viable affordable housing provision was 25% September 2014 Increase in affordable housing offer, beyond agreed viable position.'

The Belsize Society challenges the suggestion that a developer can agree obligations to secure a consent and then seek to renege from those obligations once it has the consent. If that were permitted then the system of entering into obligations under a S106 agreement would be worthless. Here the developer took extensive professional advice and made a commercial decision to agree to provide affordable housing in order to secure consent for a development that presumably would not otherwise have been granted.

Savills seek to justify the attempt to resile from the obligations by reference to the delay. The Belsize Society cannot accept that this is a valid reason. Any professional developer will understand that delays are likely to occur with a large scale and complex project. Here the developer appears to have failed to manage the process properly in particular by failing to meet the requirements in relation to the Construction Management Plan. After obtaining consent in February 2016 it belatedly started work with the terms of the S106 agreement in place. It then made a decision to stop work in June 2020, although work on construction projects was not prohibited by Covid-19 regulations. It cannot now claim that it is justified in changing the fundamental nature of the development because of its own delays.

Savills make a number of comments about the current viability of the scheme, which suggest that the original viability calculations were wrong.

'17. The original viability assessments supporting the consent did not reflect build to rent methodology or the consented affordable housing package - which included 18 discounted market rent homes in Block B.

18. In 2014, the viability assessments that informed the consent valued the market homes as market sale rather than market rent. At the time, build to rent assessment methodology was in its infancy. Subsequent GLA guidance set out within the Homes for Londoners: Affordable Housing and Viability SPG 2017 has acknowledged that Build to Rent schemes typically perform less well than Market Sale schemes. The combined effect of the above factors and the additional 18 affordable homes was that the 2014 reports overstated the viability of the scheme.'

The Belsize Society feels that where a developer has employed experienced professionals to advise it and has taken commercial decisions that meant it took on obligations to provide affordable housing in order to gain the consent, then it should not be possible for the developer to seek to walk away from the obligations later. If it was badly advised it can seek redress from its advisers. If it took a commercial decision to accept the obligations in order to get the consent then it needs to live with the consequences of that decision.

Savills make comments about increases in construction costs. The Belsize Society does not have the resources to analyse the information provided but comments that a near doubling in cost from

£58.3m to £108.7m would be significantly higher than by applying any published inflation measure during the period.

Savills seek to interpret the terms of the affordable housing obligations in the S106 agreement in order to justify the current application. The Belsize Society feels that Savills' interpretation bears no relation to the actual position

'26. At the time that planning permission was originally granted, the Secretary of State confirmed the appointed Inspector's assessment that great weight should be attached to the housing provision proposed by the development and that the provision of a purpose-built community facility was a significant benefit when assessing the planning balance during the application's determination. Delivery of both of these elements (together with the other elements of the development) would provide for sustainable development.

27. This aspect of the approved development has not altered; the delivery of this scheme provides significant planning benefits and will contribute to the sustainable development of the Borough.'

The Belsize Society comments that the suggestion that 'this aspect of the approved development has not altered' is clearly incorrect. The modification would mean that 36 affordable units, about a fifth of the total, will not be built. This is much more than a minor alteration.

'28. The Secretary of State also confirmed that, in providing the maximum contribution possible regarding the viability of the scheme, the approved development offered a policy compliant provision of affordable housing.

29. This position was agreed by the Council and followed independent assessment by the Council's appointed assessor. At that time, this reflected the requirements of adopted policies CS6 and DP3. Although these policies have now been superseded by the replacement Local Plan adopted in 2017, the same principle is maintained today through policy H4.

30. This approach also reflects the approach to viability in considering affordable housing contributions set out within Section 5 of the National Planning Policy Framework (NPPF) and supported by the relevant sections of the government's Planning Practice Guidance on viability. This is clear that updated site circumstances and viability information can be taken into account as part of ensuring that development can continue to deliver the widest range of planning benefits.

31. The purpose of Clause 3.2 of the legal agreement is to ensure that the development delivers the maximum reasonable amount of affordable housing consistent with both the requirements of planning policies and the delivery of a viable scheme. The inter-relationship between these two arms is key; if a scheme cannot be delivered viably then it will not be able to deliver the maximum reasonable amount of affordable housing.'

The Belsize Society points out that here the modification will mean the removal of all of the 36 affordable housing units. The proposal would also go against Policy H4 in the Camden Local Plan:

3.83. "...to expect a contribution to affordable housing from all developments that provide one or more additional homes and involve a total addition to residential floorspace of 100sqm GIA or more. The Council will seek to negotiate the maximum reasonable amount of affordable housing on the following basis:

[e.] .. an affordable housing target of 50% applies to developments with capacity for 25 or more additional dwellings”.

Clearly the remaining 18 units (10% of the total) Discount Market Rent allocation would not be consistent with ‘the maximum reasonable amount of affordable housing with planning policy’.

- ‘32. If economic conditions change compared to those in existence at the time when the original viability assessment upon which the clause is based was undertaken, it is reasonable to consider whether the clause as currently written can continue to ensure both of these elements are deliverable.
33. The existing legal agreement includes provision for a review of the affordable housing contribution at the conclusion of the development project, to allow for an additional contribution to be made if the viability of the development has improved over time. This provision ensures that the development continues to be policy compliant by providing the maximum contribution to affordable housing with regard to the viability of the scheme.
34. What this approach does not allow for is a scenario where viability worsens to an extent that the development is no longer viable and cannot be delivered. This reflects that in a normal scenario, where development is no longer viable it will simply not be brought forward.
35. Essential Living do not find themselves in a normal scenario. Despite the significant delays and cost increases faced, they remain committed to developing this project.’

The Belsize Society comments that Essential Living took a commercial decision to enter into the S106 Agreement on these terms, without any provision for reviewing the number of affordable units in the event of an adverse change in viability. That was clearly a commercial decision made to secure the consent. It should not now be able to pick and choose which elements of the commitments it made at the time that it will continue to honour.

Savills suggest that the application is compliant with the original purpose of the S106 agreement.

- ‘36. The amendments now proposed will still be compliant with the requirements of Policy H4 to provide the maximum contribution towards affordable housing with regard to the viability of the proposed development. Indeed, the applicant is prepared to go beyond this point and offer some affordable housing units beyond the maximum required by the viability assessment in the same way that was the case when permission was originally granted.
37. Moreover, this amendment will not alter the existing purpose of Clause 3.2 within the legal agreement. The obligation will still secure the maximum contribution to affordable housing from the development, as was always intended, albeit the overall contribution will differ due to the changed circumstances with regard to the scheme’s viability that now exist.’

The Belsize Society feels that the original purpose of Clause 3.2 of the S106 Agreement would be wholly undermined if the obligation in relation to affordable housing provision is removed. The proposal also conflicts with Policy H4.

Savills suggest that the removal of the obligation is the only way that the development can be undertaken.

- ‘38. As per the requirements of S106A(6), the modification proposed will ensure that Clause 3.2 will continue to serve its original purpose equally well. The purpose was to deliver the maximum



contribution whilst maintaining the viability of the scheme to deliver the widest range of planning benefits; this modification will not change this purpose but will support the viability of the development and its ability to be delivered in much changed economic circumstances 6.5 years after the initial assessment of viability was made.

39. The modification promoted by the applicant will facilitate the delivery of a viable development on this site, the continuation of development on this site and the significant planning benefits of housing delivery and provision of community facilities on-site. The only rational mechanism for addressing the overwhelming viability issue identified in the updated Savills Viability Assessment is the adjustment of the planning obligations and related definitions referred to in this document.'

The Belsize Society would point out that the Inspector and the Secretary of State have made it absolutely clear – see above – that the provision of the affordable housing was a key factor in the decision to permit this highly controversial development.

Savills summarise the reasoning for the current application.

- '41. In accordance with Section 106A, subsections (3) and (4), of the Town and Country Planning Act 1990 (as amended) it is proposed to amend planning obligations and related definitions within the existing legal agreement relating to approved development ref: 2014/1617/P in order to amend the agreed contribution towards affordable housing.
42. It is proposed to revise the agreed contribution to now provide 18 units (10% of the development) as Discounted Market Rent in perpetuity.
43. Without this change, further progression of the approved development cannot proceed. In simple terms, it will not be economically viable to do so and the wider planning benefits of 184 residential units, a purpose-built community facility, improved retail spaces and the capacity for an upgraded entrance to the underground station will not be brought forward.
44. The change in affordable housing provision will help address the economic challenges facing the site; the development will still exceed the requirements of planning policy and provide the maximum contribution towards affordable housing that can viably be offered. With reference to S106A(6) of Town and Country Planning Act 1990 (as amended), this modification will ensure that the obligation continues to serve a useful purpose equally as well as the original wording whilst supporting the viability of the development.
45. In the context of the wider planning benefits, this is an appropriate change in the context of continuing to support sustainable development for the Borough.'

The Belsize Society comments:

The application would mean the removal of the 36 affordable housing units, 20% of the development. The developer's offer to make the minor amendment so that the 18 Discounted Market Rent units are provided in perpetuity rather than for 15 years is a minor insignificant concession in the context of the removal of the 36 units.

The agreement to provide the affordable units was a key factor in the decision to grant the original consent, as evidenced by the Inspector's Report and the Secretary of State's letter of 18 February 2016. The affordable housing is an integral and essential element of the development. If the affordable housing is not provided then the significant harm generated by the development will not be justifiable.

The developer made a commercial decision to agree to these obligations. It cannot expect to be released for the obligations because either the original validity calculations were wrong, or because it knowingly decided to include the obligations in order to achieve the consent.

The application should be refused.