

**TOWN & COUNTRY PLANNING (DETERMINATION BY INSPECTORS)
(INQUIRIES PROCEDURE) (ENGLAND) RULES 2000**

PROOF OF EVIDENCE

**Tom Symes on behalf of the Belsize Society
(Registered Charity No 1180842)**

**FOR PUBLIC INQUIRY COMMENCING ON
09 November 2021**

APPEAL SITE

100 Avenue Road London NW3

APPELLANT

Essential Living (Swiss Cottage) Limited

SUBJECT OF APPEAL

Appeal against London Borough of Camden's refusal to amend the provisions the S106 Agreement which the Appellant agreed with London Borough of Camden to include in the S106 Agreement, 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 forming a substantial part of the Development

COUNCIL REFERENCE: 2021/0025/P

PLANNING INSPECTORATE REFERENCE: APP/X5210/Q/21/3276844

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A. INTRODUCTION

I, Tom Symes, have prepared this proof of evidence for presentation at the Public Inquiry into the appeal on behalf of the Belsize Society, a Rule 6 Party.

The Belsize Society (registered charity 1180842) is an amenity society covering Belsize ward, its adjacent areas and historic environs. The Society has over 500 members. It does not make profits and is non-political. Recently becoming a charitable incorporated organisation, the Society has been a feature of the Belsize area since the 1970s.

Belsize is a vibrant and historic part of London, and the Society seeks to preserve and enhance this. Our activities depend on volunteers. Membership is open to anyone with an interest in the Belsize area, with members living in the area between Lyndhurst and Adelaide Roads from north to south and between Fitzjohns Avenue and the approaches to Fleet Road from west to east.

The Belsize Society's objectives are:

1. To promote for the benefit of the public high standards of architecture, conservation, planning, design, and use of buildings and infrastructure in and/or affecting Belsize Ward, its adjacent areas and its historical environs, and to promote the protection, development, and improvement of features of historic or public interest in that area.
2. To encourage and promote for the public benefit high standards in urban planning, infrastructure, and transport including in the identification of traffic solutions, the maintenance and improvement of streets and public places, the protection of the environment, and improvement of air quality in Belsize Ward, its adjacent areas and its historical environs..
3. To foster interest amongst the public in Belsize Ward, its adjacent areas and its historical environs, and to educate the public in the history, including natural history, and architecture, of the area by organising lectures, visits, and other events.

The appeal site and its surrounding areas are as described by the Appellant and the London Borough of Camden. I am familiar with the appeal site.

The evidence that I have provided for this appeal is accurate to the best of my ability and I confirm that any opinions expressed are my own.

B. STRUCTURE OF EVIDENCE

In my evidence, I provide a summary of the objections made by Belsize Society to the application which is the subject of the appeal. I show the importance given to the affordable housing provision in the original Inspector's Report and the Secretary of State's Decision Letter in order to mitigate the harm to the Belsize Conservation Area caused by

the Development. I show that the changes proposed by the Appellant do not meet the requirements of S106A(6) of the Town and Country Planning Act 1990. My evidence will be divided into seven sections:

Section 1. Summary of objections made by the Belsize Society.

Section 2. Planning Policies.

I shall identify national, regional and local planning policies and guidance relevant to the reasons for refusal and the issues discussed in my proof.

Section 3. Importance of affordable housing provision to mitigate harm.

I show the importance given to the affordable housing provision in the Inspector's Report and in the Secretary of State's Decision Letter dated 18 February 2016. In particular, I examine the comments made by the Inspector and the Secretary of State in relation to the Planning Balance, showing that both the Inspector and the Secretary of State attached considerable weight to the agreement by the Appellant regarding the provision of affordable housing and other planning benefits in order to outweigh the harm that would be caused by the development. This harm needs to be given significant weight in the planning process with a presumption of refusing the development unless substantial public benefits come forward.

Section 4. Useful Purpose.

I show that the 'useful purpose' served by the provision of the affordable housing is not limited to the provision of the affordable housing per se but that it also is a most important element in the package of planning benefits that are recorded in Clause 3 of the S106 Agreement, and which were required to be included to mitigate the harm to the Belsize Conservation Area that will be caused by the development. I demonstrate that the changes proposed by the application cannot meet the requirements of S106A(6)(c) of the Town and Country Planning Act 1990 because the obligation (to provide the specified affordable housing) continues to serve a useful purpose and could not serve that purpose (mitigating the harm caused by the development) equally well if it had been removed as requested in the application.

Section 5. Comments on Appellant's Statement of Case.

I respond to any arguments made by the Appellant in their submitted documents to date.

Section 6. Conclusions and Summary.

I summarise the arguments made in this proof.

Section 7. List of Documents.

Belsize Society will not call any other witnesses.

Section One - Summary of objections made by the Belsize Society

- 1.1. The Belsize Society was one of the objectors to the original development proposals for a new 24 storey and 7 storey building at 100 Avenue Road (2014/1617/P) which was granted on appeal by the Secretary of State on 18 February 2016.
- 1.2. In assessing the planning balance, the Inspector's Report dated 23 September 2015 and the Secretary of State both placed very significant weight on the value and benefits that would be derived from the inclusion of the affordable housing provision and concluded that this and the other planning benefits offered by the Appellant and recorded in the S106 Agreement outweighed the harm that would be caused by the development.
- 1.3. The affordable housing is clearly the most important element in the package of planning benefits that are set out in Clause 3 of the S106 Agreement. Copies of the S106 Agreement, the Inspector's Report ('the Report') and the Secretary of State's Letter ('the Letter') are included in the list of documents in Section 7. Indeed, from reading the Report and Letter and the reports of the original application process and the original appeal it would seem highly improbable that the proposals for the development of the site would have been considered at all, let alone achieve a consent, without the affordable housing provision and the other planning benefits. The original application presented very challenging proposals (given the height of the tower and the widespread impacts that the development would have), as shown in the evidence presented by the London Borough of Camden.
- 1.4. The Belsize Society objected to the application lodged by the Appellant (2021/0025/P) to remove entirely the requirement to provide 36 affordable units by amending the provisions it has agreed with London Borough of Camden and which are included in the S106 Agreement. The Appellant is now seeking to appeal against the refusal by London Borough of Camden to this application.
- 1.5. The Belsize Society has considered the Statement of Case lodged by Savills on behalf of the Appellant in this Appeal. The Belsize Society believes that the Appeal should be refused because:
 - The changes proposed by the Appellant do not meet the requirements of s106A(6) of the Town and Country Planning Act 1990:
 - This harm to the Belsize Conservation Area caused by the development needs to be given significant weight in the planning process with a presumption of refusing consent for the development unless substantial public benefits come forward. A very important element of the existing public benefit will be lost if the application is granted, but the harm remains;
 - An application made under S106A should not be used to seek to re-examine the package of planning benefits that had been put in place to balance the harm caused by the development. This would need to be looked at afresh as part of a new planning application; and

- the revised development would not comply with the adopted policies of the London Plan 2021 and the Camden Plan 2017 both of which have a strong requirement for affordable housing, or with the policies set out within the National Planning Policy Framework (NPPF).

Section Two - National, Regional and Local Planning Policies and Guidance relevant to the reasons for refusal

- 2.1 In its Statement of Case the London Borough of Camden has set out the relevant Policies and Guidance (Section 4 – Legislative and Planning Policy Framework).
- 2.2 The Belsize Society notes that in a number of respects the revisions made to these Policies and Guidance after the original application and appeal change the Policies and Guidance in place at the date of the original application and appeal. However, under NPPF 2021 it is made clear that in Build to Rent schemes, affordable housing for rent is expected to be the normal form of affordable housing provision. The London Plan 2021 Policy H4 and the Camden Local Plan 2017 Policy H4 both emphasise the importance of affordable housing provision and delivery.

*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".*
- 2.3 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'.
- 2.4 There continues to be a huge shortfall in provision of affordable housing against need. This is clearly demonstrated in the London Borough of Camden's Statement of Case in Section 4
- 2.5 In the Statement of Common Ground between the Appellant and London Borough of Camden, the parties accept the position set out in the 2017 London Strategic Housing Market Assessment which concludes that 65% of new homes need to be genuinely affordable. It is also clear that London Borough of Camden is not meeting its borough wide strategic target for 5300 additional affordable homes from 2016/2017 -2030/2031.
- 2.6 The Belsize Society believes that the importance given in the S106 Agreement to the provision of affordable housing in the original application as recorded as one of the planning benefits in Clause 3 of the S106 Agreement was correct at the time and it remains just as important today. Without the affordable housing a fundamental part of the planning benefits package that was included to mitigate the harm caused by the development is removed.
- 2.7 The Framework required that the harm that will occur because of the development needs to be given significant weight in the planning process with a presumption of refusing the development unless substantial public benefits come forward. The Appellant is now seeking to remove the principal public benefit that it agreed to deliver in carry out the development. Without this, there would have been very limited public benefit, clearly insufficient to justify the original consent. This is

evidenced by the numerous references to the importance of the affordable housing and other planning benefits in the Report and the Letter and in the Appellant's agreement in the S106 Agreement to include an 'upwards only' review of the amount of affordable housing it would provide, which was given significant weight by the Inspector and the Secretary of State.

Section Three - The Importance of the affordable housing provision to mitigate harm.

3.1 The Belsize Society has reviewed the Report and the reasoning given in the Letter below – **emphasis added** - to show the importance attached in the original decision process to the inclusion of affordable housing. It is clear from the Report and the Letter that the inclusion of the affordable housing was a fundamentally important factor in the decision to approve the development. It is clear that the need for affordable housing has not changed in the intervening period. To allow the development to proceed now without it would be wrong in law.

3.2 Savills for the Appellant have made no reference to the detailed wording of the Report and the Letter, which could not be clearer about the importance of the inclusion of the affordable housing obligations in the context of the approval of the scheme and the fact that these and the other planning benefits were and must continue to be a 'useful purpose' to mitigate the harm caused by the development.

3.3 Extracts from Planning 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 proposal 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 the Appellant 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.

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.**

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

3.4 The Inspector's comments on 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.*

3.5 Inspector's comments on the 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.*

3.6 Extracts from 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 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.

- 3.7 The agreement to provide the affordable housing clearly was a very significant factor in the decision to permit the development. The Appellant should not be permitted to amend the S106 Agreement now so as to exclude the affordable housing obligations. This would undermine the whole basis on which the decision to grant the consent was made.

- 3.8 The extracts set out above also show that both the Inspector and the Secretary of State recognised that harm would be caused to the Conservation Area by the development but decided that this harm was outweighed by the package of planning benefits to be provided by the Appellant, listed in Clause 3 of the S106 Agreement, principally by the agreement to provide the affordable housing. If that obligation is removed, then there is just harm and no benefit from the development.
- 3.9 An appeal into an application of this kind does not provide a forum to balance the package of planning benefits (as amended) against the harm that is created by the development. The Belsize Society spent considerable resources at the original Inquiry to make its case for the planning balance to mitigate the harm caused by the development but has no opportunity to examine the revised planning balance that is proposed by the Appellant in this new Appeal.
- 3.10 The Appellant has commenced the development after obtaining planning consent including the affordable housing obligation. It should not be permitted to reduce the planning benefit in the way it is proposing once the development has started.

Section Four - Useful Purpose - The Application cannot meet the requirements of S106A (6)(b) or (c)

4.1 As the Appellant has said, the statutory test to be applied when determining the acceptability of an application to amend a S.106 obligation is set out in S.106A(6) of the Town and Country Planning Act 1990. This states:

(6) Where an application is made to an authority under subsection (3), the authority may determine —

(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications

4.2 The relevant (original) obligation in clause 3.2 of the s106 Agreement is the agreement by the Appellant to provide the affordable housing described. The Appellant is seeking to reduce the amount and types of affordable housing being provided by removing all the 36 affordable units. The Belsize Society believes that the planning obligation should continue to have effect without modification as set out in S106A(6)(a).

4.3 S106A(6)(b) introduces the concept of ‘useful purpose’. If the obligation does not serve a useful purpose, it shall be discharged. It is therefore essential to identify the ‘useful purpose’.

4.4 The reason for refusal by London Borough of Camden states that *‘the original obligation is considered to serve a useful purpose which is delivering the consented amount and tenures of affordable housing. Furthermore, the proposed modification would not serve it equally well, because there would be a significant reduction in the amount of affordable housing and a loss of a range of features that are considered genuinely affordable’*.

4.5 The Belsize Society believes that the ‘useful purpose’ served by the obligation is actually much broader than simply the provision of affordable housing. The ‘useful purpose’ of the obligation in Clause 3.2, together with the other eighteen planning benefits set out in Clause 3 of the S106 Agreement, is to mitigate the identified harm to the Conservation Area that will be caused by the development. Without these benefits the Inspector and the Secretary of State could not have consented to the development taking place, as the Appellant must recognise now, and certainly recognised at the time. The Appellant is now seeking to remove the (original) obligation, which, as the Belsize Society shows, continues to serve a useful purpose both in the provision of affordable housing and as a principal component in the package of planning benefits for the mitigation of harm to the Conservation Area.

4.6 Below are extracts from the Letter – **emphasis** added.

17. Overall, the Secretary of State attaches considerable weight to the ‘less than substantial’ harm he finds to the Belsize Conservation Area. Applying paragraph 134 of the Framework, the Secretary of State weighs this harm against the public benefits of the proposal, including securing its optimum use.

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).

Planning balance and conclusion

49. In deciding this appeal, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. In accordance with section 66(1) of the LBCA Act, the Secretary of State has paid special regard to the desirability of preserving listed structures or their settings or any features of special architectural or historic interest which they may possess. **In accordance with Section 72 of the LBCA Act the Secretary of State has paid special attention to the desirability of preserving or enhancing the character or appearance of a conservation area.**

50. For the reasons given above, the Secretary of State considers that the proposal is in accordance with the development plan as a whole. He has gone on to consider whether there are material considerations in this case that indicate the appeal should be determined other than in accordance with the development plan.

51. Weighing against the proposal, for the reasons given above is the ‘less than substantial harm’ in Framework terms to the Belsize Conservation Area, to which the Secretary of State attaches considerable weight. Other factors that the Secretary of State finds weigh against the scheme are: the impact on trees, to which he attaches moderate weight; disruption during construction, to which he

attaches little weight for the reasons in IR392; the impacts on views from around the area and the increase in shading in respect of the Swiss Cottage Open Space, both of which he gives moderate weight.

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.

- 4.7 These extracts demonstrate very clearly that the Inspector and the Secretary of State found that the 'useful purpose' of the obligation to provide the affordable housing, together with all of other planning benefits set out in Clause 3 of the S106 Agreement, is to outweigh the harms which had been identified, and acknowledged. It is the social benefits arising from the provision of the affordable housing, the provision of space for community use and the improvements to the underground station that enabled the Secretary of State to conclude that the harms which had been identified and acknowledged could be outweighed. If the most important of these planning benefits is removed, as the Appellant requests, then the harm caused by the development will not be outweighed and the development cannot be allowed to proceed because of the harm caused to the Conservation Area.
- 4.8 On this basis the obligation to provide the affordable housing, which clearly served a useful purpose in 2015 and continues to serve a useful purpose today, cannot be discharged pursuant to S106A(6)(b).
- 4.9 The Appellant must then address the second element of s.106A(6)(c) 'but would serve that purpose equally well if it had effect subject to the modifications specified in the application'. Again, Savills for the Appellant do not put forward any evidence or argument to explain how the obligation to provide the affordable housing, which, as the Belsize Society has demonstrated, continues to serve a useful purpose both in the provision of much needed affordable housing and as the principal part of the package of planning benefits agreed by the Appellant to mitigate harm to the Conservation Area, can serve that purpose equally well if it is completely removed.

4.10 It is absolutely clear that the purpose of the original application was to secure consent for a development of a 24 storey block and a 7 storey block comprising 184 flats, including 36 affordable flats. The agreement to provide the 36 affordable flats and the other community benefits, was negotiated to support the case for this very challenging application and included in order to mitigate the harm that will be caused to the Conservation Area. Given that the Appellant's commitment to include affordable flats was seen by the Planning Inspector and by the Secretary of State as a key element in the original decision to grant the consent, as carefully documented in the s106 Agreement, the test set out in S.106A(6)(c) cannot be met by the proposal to omit the affordable housing. Obviously, it cannot serve the useful purpose (to mitigate harm to the Conservation Area) equally well if it is completely removed.

Section Five - Comments on the Appellant's Statement of Case

- 5.1 In the application 2021/0025/P Savills for the Appellant 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; [Purpose A] 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. [Purpose B] 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.'*
- 5.2 In the current Appeal Savills for the Appellant now appear to be making a very different argument (Paras 2.16 – 2.20). They suggest that the purpose of the obligation in Clause 3.2 of the s106 Agreement is limited to their Purpose B, to ensure that the development delivers the maximum reasonable amount of affordable housing consistent with both the requirements of the Development Plan and the delivery of a viable scheme.
- 5.3 The Belsize Society believes that this new limited interpretation is wrong for two reasons. First because it completely disregards the extreme importance given to the agreed affordable housing provision in both the Report and the Letter – see Section Three above. Secondly, as explained above in Section Four, the purpose of the obligation set out in Clause 3.2 to provide the affordable housing is to secure the provision of affordable housing in the development, a very important part of the package of planning benefits that the Inspector and the Secretary of State agreed was essential in order to outweigh the harm to the Conservation Area caused by the development. The other eighteen planning benefits appear not to have been given the same weight by the Inspector and the Secretary of State as the affordable housing obligations set out in Clause 3.2 but the package of planning benefits were considered by the Inspector and Secretary of State as being sufficient to outweigh the harm that will be caused by the development. The Appellant cannot be permitted to 'cherry pick' in this way to seek to exclude the most important element of the planning benefits, because the development will simply cause harm without the required benefits to outweigh the harm.
- 5.4 Savills for the Appellant do not put forward any evidence or argument to explain why the obligation to provide the affordable housing no longer continues to serve a useful purpose. The obligation clearly does continue to serve a useful purpose and presumably the Appellant accepts this. The Appellant has not addressed at all the Belsize Society's argument that the 'useful purpose' of the original obligation is both to secure the affordable housing and to mitigate the harm to the Conservation Area caused by the development.

- 5.5 The useful purpose of Clause 3.2 of the S106 Agreement was and remains to record one important element of the package of planning benefits agreed by the Appellant to obtain consent for a development that would in all likelihood otherwise not have received consent. A S106 agreement is not a document that is entered into on a basis that a developer can promise benefits in order to obtain planning consent and renege on them later. Here the Appellant has implemented the development and is now seeking to reduce its risk by seeking to change the obligation it willingly took on in order to obtain the consent.
- 5.6 Savills say *'It is apparent from the delegated officer report, that the LPA is seeking to promote a flawed procedural point on the application, namely that the LPA is not required, as part of its consideration of the merits of the application, to have regard to matters relied upon in support and which go to the heart of the proposed modification (in this case a viability appraisal prepared by Savills), but is simply required to have regard to the S.106A(6)(c) test in isolation. That position is misconceived.*
There is nothing either in the wording of S.106A(6)(c) or elsewhere to support an approach that wider circumstances (in this case, the viability position and submitted appraisal) cannot be taken into account. Indeed, if the LPA is correct there would be no scope for any decision maker at any stage of the application process to interrogate and satisfy itself on the underlying justification for an S.106A application to modify a planning obligation. This cannot be a correct or sound interpretation.'
- 5.7 Belsize Society does not agree with the criticism of the approach taken by London Borough of Camden or that the position is misconceived. The wording of the statute does not say that wider circumstances can or must be taken into account, equally it does not say that they cannot or may not be taken into account. The Belsize Society believes that the relevant point is that the obligation in Clause 3.2 of the S106 Agreement serves a useful purpose in itself, and also comprises the most important element of the package of planning benefits agreed by the Appellant, the original purpose of which was to mitigate the harm caused by the development. If Savills believe that *'London Borough of Camden have to have regard to matters relied on in support and which go to the heart of the proposed modification'* then the Appellant must accept that the fact that the affordable housing is the most important element in the package of planning benefits that have the original purpose of mitigating the harm caused by the development and that the application fails to meet the test in S106A(6)(b) or (c).
- 5.8 The test in s106A (6) (c) has not been met by the Appellant.
- 5.9 Belsize Society believes that the words 'useful purpose' should be seen in their ordinary English meaning, there is nothing in the Statute that suggests a limitation. Therefore, the words must apply to the wider interpretation that the Belsize Society is suggesting is correct and the 'useful purpose' is the mitigation of harm caused by the development.
- 5.10 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.'

- 5.11 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 to be permitted, then the system of entering into obligations under a S106 agreement as an integral part of consent process would be worthless. Here the Appellant 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 could not otherwise have been granted
- 5.12 Savills seek to justify the attempt by the Appellant to resile from the obligations by reference to the delay. The Belsize Society believes that this is not a valid reason to enable the Appellant to avoid meeting its obligations. Any professional developer will understand that delays are likely to occur with a large scale and complex project. Here the Appellant appears to have failed to manage the process properly. For example, 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. The Government actually encouraged more flexible working hours on construction sites – see guidance in Section 7. The Appellant cannot now claim that it is justified in changing the fundamental nature of the development because of its own delays.
- 5.13 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.'*
- 5.14 The Belsize Society feels that where the Appellant has employed experienced professionals to advise it and has taken commercial decisions that meant it took on obligations to provide affordable housing as part of the package of planning benefits it agreed to in order to gain the consent, then it should not be possible for the Appellant 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.

5.15 Savills make comments about increases in construction costs. The Belsize Society does not have the resources to analyse the information provided but comments that it would expect a prudent experienced developer to have made appropriate allowances for all cost overruns.

5.16 Savills seek to interpret the terms of the affordable housing obligations in the S106 agreement in order to justify the current application:

'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.'

5.17 The Belsize Society notes that Savills' statement in Para 26 above suggests that the Planning Inspector confirmed that great weight should be attached to the housing provision proposed by the development. The Belsize Society feels that this statement is very misleading and, as it has demonstrated above in the highlighted extracts from the Report and the Letter, both the Planning Inspector and the Secretary of State went to great lengths to emphasise the importance of the affordable housing which the Appellant agreed to provide and is now seeking to remove entirely

5.18 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 still be built, but not as affordable units. This is much more than a minor alteration. The Belsize Society points out that here the modification will mean the removal of all of the 36 affordable housing units. The principal element of the planning benefits agreed to provide mitigation of the harm caused by the development will be removed, leaving the harm which will remain unchanged.

5.19 The Belsize Society has demonstrated that the Appellant is not correct in suggesting that the obligation to provide the affordable housing does not continue to serve a useful purpose, and obviously if it is removed it cannot continue to serve the useful purpose equally well as it does now. The Belsize Society has also demonstrated that the 'useful purpose' is the mitigation of the harm caused by the development.

5.20 Savills say:

'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.'*

5.21 The Belsize Society comments that the Appellant 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.

5.22 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.'

5.23 The Belsize Society has demonstrated 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 affordable housing is the most important element of the mitigation of the harm caused by the development. The development will be built as per the consent but without the affordable units. There will be no change in the harm generated.

5.24 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.'

5.25 The Belsize Society would point out that the Inspector and the Secretary of State have made it absolutely clear that the provision of the affordable housing was a key factor in the decision to permit this development. The need for the affordable housing has not changed. The consented development causes harm, including to the Conservation Area, and this needs to be given significant weight in the planning process with a presumption of refusing the development unless substantial public benefits come forward. Permitting the modification would mean that the original purpose will not be served equally well, or indeed at all. It is not possible in the current Inquiry to reassess the planning balance between benefits and harm.

5.26 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.'

5.27 The Belsize Society comments:

a. The application would mean the removal of the 36 affordable housing units, 20% of the development. The Appellant'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

- b. The agreement to provide the affordable units was a key factor in the decision to grant the original consent, as evidenced by the Report and the Letter. The affordable housing is an integral and essential element of the planning benefits to be provided by the Appellant as part of the development. If the affordable housing is not provided, then the harm generated by the development will not be justifiable.
- c. The Appellant 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.

5.28 Savills say:

4.27. In this context, the relevant assessment is not to compare the 'planning balance' in 2014/ 2015 to 2021 but instead to consider whether the proposed amendment is an appropriate modification to the approved scheme and serves the original purpose of the obligation equally well. This is the test required by S.106A(6)(c) of the Town and Country Planning Act 1990 and specifically in this case this relates to the provision of the maximum viable amount of affordable housing to ensure that the approved development and the broader package of planning benefits can be delivered. The proposed modification will deliver this.

4.28. All other aspects of the approved development remain unchanged from the approved development and consequently the planning merits of the development are also unchanged.

- 5.29 Belsize Society point out that this limited interpretation of the 'original purpose' of the obligation is wrong. The 'original purpose' is clearly to mitigate the harm being caused to the Conservation Area. The obligation in Clause 3.2 is an integral and important part of the package of planning benefits set out in Clause 3 that the Appellant agreed in order to persuade the Inspector and the Secretary of State that the benefits would offset or mitigate the harm caused to the Conservation Area by the development. The Secretary of State said:

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.

- 5.30 If the principal social benefit is to be removed, as the Appellant is seeking, then there will be no 'substantial benefits' to 'outweigh the harms that have been identified'.

- 5.31 Savills seek to direct the Inspector's attention to an appeal decision in Portsmouth. The Belsize Society does not have the resources to enable it to procure a legal review of this point. However, following a careful reading, the Belsize Society

believes that the case is not on all fours with the current appeal and is not relevant to it.

Section Six - Conclusions and Summary of Case

- 6.1 This development of a 24 storey tower and a 7 storey building will have a very significant impact on the surrounding area, and in particular will cause harm to the Belsize Conservation Area.
- 6.2 In approving the original application for the development, the Inspector and the Secretary of State reviewed and approved a number of planning benefits agreed by the Appellant and recorded in the S106 Agreement in order to provide mitigation of the harms that would result from the development. These planning benefits are set out in Clause 3 of the S106 Agreement and cover a number of items but the principal benefit is the agreement to provide 36 affordable housing units within the development.
- 6.3 The Appellant is now proposing to construct the same buildings but to use the areas that would have been the affordable housing units as flats for private rent. The buildings will cause the same harm, but the harm will not be mitigated by the affordable housing. The need for affordable housing in Camden has not changed since the original consent in 2015.
- 6.4 The Appellant has not identified or apparently understood that the ‘useful purpose’ of the affordable housing obligation is to provide the principal mitigation to the harm from the development that will be caused to the Belsize Conservation Area. The provision of affordable housing is of course beneficial and important in itself, but the useful purpose of the obligation to provide the affordable housing is that it forms a very important part of the planning benefits required to mitigate the harm caused by the development to the Belsize Conservation Area in order to enable the consent for the development to be granted, as clearly stated in the original Inspector’s Report and the Secretary of State’s Letter.
- 6.5 If the development is built without the affordable units, then the identified harm will still be caused, but without the agreed mitigation from the affordable housing units, the principal component of the overall mitigation package.
- a. The Appellant must show that the modification sought in the Appeal satisfies the tests set out in S106A(6). It fails to do this.
 - b. The original purpose of the planning benefits set out in Clause 3 of the S106 Agreement is to mitigate the harm caused by the development to the Belsize Conservation Area. The Inspector and the Secretary of State carefully reviewed the package of planning benefits that the Appellant put forward and agreed that these would outweigh the harms that had been identified.
 - c. The Appellant argues that the sole ‘useful purpose’ of the obligation is the provision of the maximum amount of affordable housing. This is wrong. The principal useful purpose of the affordable housing obligation is to provide the most important of the planning benefits set out in Clause 3.2 and in the rest of Clause 3 of the S106 Agreement which together are required to mitigate the harm caused by the development to the Belsize Conservation Area. The obligation continues to serve a useful purpose and the test in s106A(6)(b) is not met.

- d. The application would mean the removal of the 36 affordable housing units, 20% of the development. The Appellant's offer to make a minor amendment so that the 18 Discounted Market Rent units that it agreed to provide as part of the planning benefits are provided in perpetuity rather than for 15 years is a minor insignificant concession in the context of the removal of the 36 affordable units.
- e. The Appellant has not addressed the second element of s.106A(6)(c) 'but would serve that purpose equally well if it had effect subject to the modifications specified in the application'. The Appellant has not put forward any evidence or argument to explain how the obligation to provide the affordable housing, which continues to serve a useful purpose in itself and as the principal element of the planning benefits that it agreed to in order to mitigate the harm caused by the development, can serve that purpose equally well if it is completely removed. The value and importance of the package of planning benefits would be massively reduced if it were removed but since the development would be the same, the harm generated by it would remain and would not be adequately mitigated. The test in s106A(6)(c) is not met.
- f. The application disregards the importance given to the agreed affordable housing provision in both the Report and the Letter. The agreement to provide the affordable units was a key factor in the decision to grant the original consent, as evidenced by the Report and the Letter. The affordable housing is an integral and essential element of the development. If the affordable housing is not provided but the buildings are still built, then the harm generated by the development will remain but will not be outweighed by the planning benefits from the consented development, the most significant of which is the affordable housing obligation that the Appellant is seeking to remove. The affordable housing obligation continues to serve a useful purpose today, just as it did in 2015.
- g. The Appellant does not put forward any evidence or argument to explain why the obligation to provide the affordable housing no longer continues to serve a useful purpose in itself. The obligation clearly does continue to serve a useful purpose and presumably the Appellant accepts this. However, if the obligation is removed as requested by the Appellant, then the consent will no longer secure the package of planning benefits that the Inspector and the Secretary of State decided were sufficient to outweigh the harm caused to the Belsize Conservation Area by the development.
- h. The revised development would not comply with the adopted policies of the London Plan 2021 and the Camden Plan 2017, which have a strong requirement for affordable housing, or with the policies set out within the National Planning Policy Framework (NPPF). The proposal would also go against Policy H4 in the Camden Local Plan.
- i. The Appellant made a commercial decision to agree to these obligations. It cannot expect to be released from the obligations because either its original viability calculations were wrong, or because it knowingly decided to agree to the obligations in the S106 Agreement in order to achieve the consent, with a view to challenging this later.
- j. The Appellant is seeking to change the planning balance in this Appeal by removing the most important element of the planning benefits that it agreed in order to mitigate the harm caused by the development. The Belsize Society

believes that this cannot be permitted because the mitigation package clearly continues to serve a useful purpose.

- 6.6 For the reasons set out above, the Inspector is respectfully invited to dismiss this appeal.

Section Seven - List of Documents

The documents referred to are mostly annexed to the material provided by London Borough of Camden and the Appellant. I have attached the Inspector's Report and the letter from the Secretary of State and the S106 Agreement. I have also attached a link to the Guidance on extending working arrangements during Covid.

100 Avenue Road - Final Signed Scanned s106 - Dated 24 August 2015

<http://camdocs.camden.gov.uk/HPRMWebDrawer/Record/5542771/file/document?inline>

16-02-18 Secretary of State Letter

<http://camdocs.camden.gov.uk/HPRMWebDrawer/Record/5537309/file/document?inline>

Government Guidance

<https://www.gov.uk/government/publications/construction-working-hours-draft-guidance>