

# **STATEMENT OF CASE**

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

**App/X5210/Q/21/3276844**

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# 1. Introduction

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

## 2. Background Information

The Belsize Society was one of the objectors to the original development proposals for 100 Avenue Road which was granted on appeal by the Secretary of State on 18 February 2016. 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 Belsize Society objected to the application lodged by the Appellant to remove the affordable housing element of the development at 100 Avenue Road (2021/0025/P).

The Appellant is now seeking to appeal against the refusal by London Borough of Camden 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.

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 Appeal should be refused because:

- the changes proposed by the Appellant do not meet the requirements of s106A(6)(c) of the Town and Country Planning Act 1990: and
- 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).

Finally the Belsize Society does not agree that the present Appeal is supported by the decision referred to by Savills in Para 4.6 of the Appellant's Statement of Case (PINS Ref: APP/Z1775/Q/18/3203583).

### 3. Case against modification of the S106 Agreement

3.1 In Application 2021/0025/P Savills for the Appellant stated 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.’

The Belsize Society will show that the relevant (original) obligation is to provide the affordable housing described in clause 3.2 of the s106 agreement and that this clearly continues to serve a useful purpose. The application seeks to remove the (original) obligation and therefore the obligation sought by the application could not serve the purpose (of the original application) equally well if it had effect subject to the modification specified in the application.

3.2 As the Appellant has said, 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) 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*

3.3 In the application 2021/0025/P Savills for the Appellant went 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; [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.’

3.4 In the current Appeal Savills for the Appellant now appear to be making a slightly different argument (Paras 2.16 – 2.20). They suggest that the purpose of 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. The Belsize Society believes and will show that this limited interpretation is wrong, disregarding the extreme importance given to the agreed affordable housing provision in both the Inspector’s Report and the Secretary of State’s Decision Letter – see Para 3.5 below. 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. Savills should 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 continues to serve a useful purpose, can serve that purpose equally well if it is completely removed. The test in s106A(6)(c) is not met.

3.5 The Belsize Society notes that Clause 3.2 of the s106 Agreement was considered in great detail by the Inspector and the Secretary of State in reaching their decision to permit the development. It 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 a further 18 units at discounted market rent for 15 years from practical completion of each unit. The Developer entered into this obligation willingly and with full understanding of the implications. Both the Inspector and the Secretary of State highlight on numerous occasions the benefits that will be derived from the inclusion of the affordable housing units, for example the Secretary of State at Para 43 of his Decision Letter states **that** *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; 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.*

The Inspector states at para 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.*

The Belsize Society will show that the obligation to provide the affordable housing as set out in clause 3.2 of the s106 Agreement continues to serve a useful purpose.

3.6 The effect of the modification being sought would remove the obligation to provide the affordable housing, a key useful purpose of the original obligation. In order to satisfy the requirements of the statutory test the Appellant 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 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. The Belsize Society will show that it is not the case, as Savills suggest in Para 4.3, that the s106 Agreement will meet the same purpose if modified. It is not the case as suggested by Savills in para 4.11 that the modification will not alter the existing purpose of Clause 3.2 within the s106 Agreement. The purpose of Clause 3.2 was and remains to secure the provision of a specific amount of affordable housing from a development that would otherwise not have received consent.

3.7 A s106 Agreement is not a document that is entered into on a basis that a developer can always have a viable development by requiring the omission of any provision which it agrees in order to obtain consent but which it subsequently decides it does not like. S106A(6)(c) is clear that where an obligation continues to serve a useful purpose it can only be modified if it would serve that purpose equally well subject to the modifications. Here it obviously would not. The Belsize Society will show that the test is not met.

3.8 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 in Para 3.10 and 3.11 below – **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 now without it would be wrong in law.

3.9 Savills for the Applicant have made no reference to the detailed wording of the Planning Inspector's Report and the letter from the Secretary of State, 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 were and must continue to be a useful purpose.

### **3.10 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 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.
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.**

### **3.11 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.

### **3.12 The current application 2021/0025/P and Appeal**

In the current application, which was refused, Savills have submitted their analysis on behalf of the Appellant seeking to explain and justify the extraordinary suggestion that the affordable housing obligation should now be removed. The Appeal seeks to allow the modification of the S106 Agreement to remove the affordable housing requirement. The Belsize Society wishes to highlight and comment on the suggestions made by Savills on behalf of the Appellant in the application

#### **3.12.1**

- ‘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?

#### **3.12.2**

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 will challenge 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 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 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 will show that this is not a valid reason. 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 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.

### 3.12.3

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 the Appellant 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 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.

### 3.12.4

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.

### 3.12.5

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.'

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 is very misleading and, as it has demonstrated above in the highlighted extracts from the Planning Inspector's report and the Secretary of State's letter set out in Paras 3.10 and 3.11, both the Planning Inspector and the Secretary of State went to great lengths to emphasise the importance of the affordable housing which the developer agreed to provide and is now seeking to remove entirely.

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. 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'.

The Belsize Society will show 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.

### 3.12.6

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.'

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.

#### 3.12.7

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 will show 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.

#### 3.12.8

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 Paras 3.10 and 3.11 above – that the provision of the affordable housing was a key factor in the decision to permit this development. 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.

#### 3.12.9

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 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.

The agreement to provide the affordable units was a key factor in the decision to grant the original consent, as evidenced by the Planning 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 harm generated by the development will not be justifiable.

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.

### **3.13 Appeal Ref: APP/Z1775/Q/18/3203583**

#### **Queens Hotel, Clarence Parade and 14-16 Osborne Road, Southsea, Portsmouth PO5 3LJ**

In the Statement of Case Savills refer to an Appeal decision relating to the Queens Hotel in Portsmouth. They include the Inspector's decision Letter in the Statement of Case. The Belsize Society has reviewed the Decision Letter and does not see how it supports the case being put by the Appellant.

In his Letter the Inspector says:

'11. There is therefore no certainty of significantly higher sales values than those accounted for by the DVS and I have received insufficient substantive evidence to demonstrate to the contrary. As

such, there is insufficient substantive evidence to contradict the findings of the DVS and to demonstrate that the current situation relating to P1 and P2 and associated planning obligation would be viable; that option 1 would be viable with an affordable housing contribution; or that option 2 would be viable with any greater a financial contribution than that referred to above. I have also received insufficient substantive evidence to demonstrate how on-site affordable housing, instead of a financial contribution, could be viably and practically achieved in these circumstances. 12. With option 2 there would remain uncertainty as to the extent to which P1 would be implemented in terms of the benefits of providing the maximum amount of housing on the site as a whole. Nevertheless, based on the evidence provided, option 2 would secure the potential for viable development of the site, with certainty in respect of P2, including provision for some affordable housing, albeit off-site. Furthermore, it would not prohibit the development of P1, notwithstanding that that scheme has been found to be unviable on an all private basis, particularly with the two being unencumbered by each other. In that context, I consider that the appellant's preferred option 1, in failing to make any provision for needed affordable housing, would represent an unacceptable solution.'

The Inspector seems to have determined that he has received insufficient substantive evidence about the viability of either of the proposals but that option 2 would include provision of some affordable housing. Option 1 'in failing to make any provision for needed affordable housing, would represent an unacceptable solution'. The affordable housing provision was clearly seen as an essential element of the original purpose of the development.

The Belsize Society does not accept that the decision supports the Appellant's case in the way that Savills suggest.



## 4. Summary of Case

- a. The Appellant must show that the modification sought in the Appeal meets the tests set out in S106A(6)(c).
- b. 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. The obligation clearly does continue to serve a useful purpose and presumably the Appellant accepts this.
- c. 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 Belsize Society will show that 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, can serve that purpose equally well if it is completely removed. The test in s106A(6)(c) is not met.
- d. The Belsize Society will show that the application disregards the extreme importance given to the agreed affordable housing provision in both the Inspector's Report and the Secretary of State's Decision Letter as set out above in Paras 3.10 and 3.11. The agreement to provide the affordable units was a key factor in the decision to grant the original consent, as evidenced by the Planning Inspector's Report and the Secretary of State's letter.
- e. The affordable housing is an integral and essential element of the development. If the affordable housing is not provided, then the harm generated by the development will not be justifiable.
- f. 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.
- g. 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 affordable units.
- h. 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 the s106 Agreement in order to achieve the consent.

Respectfully, for these reasons the Appeal should be refused.

The Belsize Society

19-08-2021