



Haringey Council

Report for:	Planning Sub-Committee 13 th October 2014	Item Number:	Urgent Business
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Title:	Application for planning permission in relation to land known as 10-27 Connaught House, Connaught Gardens London N10 3HL
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Report Authorised by:	Assistant Director (Planning) Assistant Director (Corporate Governance)
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Lead Officers:	Emma Williamson (Head of Development Management & Planning Enforcement) and David Merson (Planning & Regeneration Specialist Lawyer)
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1. Describe the issue under consideration

Further legal advice in the form of Counsel's written Advice dated 13 October 2014 (annexed) to the effect that the Planning Sub-Committee and its Members must not vote in favour of any resolution that would involve the Council making an unlawful decision to grant planning permission and, specifically, that the Sub-Committee must remove the requirement to include the affordable housing "*claw back*" clause in the proposed planning obligation imposed at its meeting on 7th October 2014.

The committee report considered on 7th October referred to an affordable housing contribution of £171,717. This contribution was based on the floorspace created by the eight additional flats (481 sq.m.) and used the £357 per sq.m. figure set out in the Draft Planning Obligations SPD. Having reconsidered the plans the additional floorspace to the existing units should have been included in the calculations (total of additional floorspace: 713 sq.m.) and as such the affordable housing contribution has been revised to £254,541.

2. Recommendations

That the Sub-Committee:

- (1) Rescind the decision it purported to make on 7th October; and
- (2) Determines the application lawfully having regard to the provisions of the development plan, so far as material to the application, any local finance considerations, so far as material to the application, and any other material considerations as set out before the Sub-Committee in the Officers' report and presentation to the Sub-Committee on 7th October also having regard to (i) the



revised off-site affordable housing contribution to be provided for and (ii) its earlier decision to resolve to grant planning permission subject to conditions and s106 planning obligations.

3. Alternative options considered

There is no credible alternative option open to the Council given Counsel's advice.

4. Background information

The application was considered by the Sub-Committee at its meeting on 7th October.

On that occasion the Committee considered a report on the application to grant planning permission for the refurbishment and reconfiguration of the existing building including the erection of extensions to the south and west elevations, erection of a one storey roof extension across the top of the existing building, provision of eight additional flats and alterations to the existing parking area. The report set out details of the proposal, the site and surroundings, planning history, relevant planning policy, consultation and responses, analysis, equalities and human rights implications and recommended to grant permission subject to conditions and subject to a s106 legal agreement.

The planning officer gave a short presentation highlighting the key aspects of the report. The attention of the Committee was drawn to a tabled addendum circulated which set out an amended condition covering balcony screening and an additional travel plan s106 heads of term.

A number of objectors addressed the Committee and raised the following points:

- The scheme constituted a dominant and incongruous form of overdevelopment, with the existing building extended in volume by 70%.
- The development would have an overbearing impact on neighbouring properties from the addition of a fourth floor, particularly from the proximity of the new extensions to properties at Eveline Court and Teresa Walk.
- Eveline Court and Teresa Walk would suffer from loss of light and overlooking from the additional windows and balconies. There were also concerns that the use of the balconies would result in noise nuisance and loss of amenity to neighbouring properties.
- The parking provision proposed was inadequate at only 9 spaces.
- The affordable housing s106 contribution was very low considering the likely high sale price of the finished units.

Cllr Engert addressed the Committee in her capacity as ward councillor and raised the following points:



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- The current application did not address the reasons for refusal of the previous scheme.
- The design was not of sufficient quality nor sympathetic to the local area.
- The refurbished building would be too large and overbearing, with a 70% increase to the volume of the existing building.
- The scheme would result in a net loss of social housing provision and the contribution proposed for affordable housing under the s106 agreement was very low.
- The parking provision proposed was inadequate for the number of units.

A representative for the applicant addressed the Committee and raised the following points:

- The block had never been used for social housing although it had been leased on a short term basis to a registered social landlord following the disposal of the site by the Police. The scheme would provide 8 additional residential units.
- The affordable housing contribution was in line with Council policy.
- Comments made by the Planning Service and local residents had, where possible, been addressed such as changing the palette of external materials to suit the local street scene.
- The reconfiguration would enable the creation of units of various sizes including larger family sized and bring the building up to modern standards.
- Trees would be retained to the boundaries for screening and the windows to the extensions provided with angled views.

In response to a question from the Committee regarding the possibility of overshadowing to Teresa Walk, officers confirmed that the applicant had submitted daylight and sunlight reports undertaken to industry BRE standards which had not identified significant problems to any surrounding properties. The building was not considered overbearing due to sufficient separation distances between the balconies and the boundary and the tiered nature of the landscape mitigating to a degree the increase in height of the building.

Confirmation was provided to the Committee that the affordable housing contribution had been calculated using the Council's own methodology focussed on the additional units to be provided and was therefore policy compliant. A viability assessment was therefore not required from the applicant.

Cllr Bevan put forward a motion for the addition of a s106 legal agreement "*claw back*" clause to any approval. Officers advised that this did not meet either the policy or statutory tests for planning obligations (the relevant text from both the NPPF and CIL Regulations having been read to Members by the Legal Officer) and that consequently could expose the Council to the risk of subsequent appeal as the scheme was policy compliant, with no policy basis for seeking additional funds. Additionally, the imposition of the clause would not be feasible as a viability assessment was not in place against which to benchmark future value. Cllr Rice seconded the motion, which at a subsequent vote was carried (4-3).



The Chair moved the recommendation of the report including the addition of a s106 legal agreement “*claw back*” clause, and it was resolved (6-2-1) that the application be approved subject to conditions and subject to a s106 legal agreement including the claw back clause.

Since the earlier meeting the planning officers have reconsidered the question of the quantum of the affordable housing financial contribution. The committee report considered on 7th October referred to an affordable housing contribution of £171,717. This contribution was based on the floorspace created by the eight additional flats (481 sq.m.) and used the £357 per sq.m. figure set out in the Draft Planning Obligations SPD. Having reconsidered the plans the additional floorspace to the existing units should have been included in the calculations (total of additional floorspace: 713 sq.m.) and as such the affordable housing contribution has been revised to £254,541.

5. Counsel’s Advice

Members’ attention is drawn to the following parts of the advice:

“... the Committee’s resolution to grant planning permission subject to the completion of a section 106 planning obligation with the “claw back” clause cannot be justified by national or local planning policy or guidance.” (para. 21)

“The Committee’s attempt to require an additional Affordable Housing Contribution was not necessary to make the development acceptable in planning terms, or compliant with development plan policy.” (para. 21)

“On the information available, in the absence of any cogent reasons for imposing this additional charge on the proposed development, it is impossible to identify a rational or lawful basis for requiring the landowner to pay the additional Affordable Housing Contribution.” (para. 22)

“... the Committee has unlawfully taken account of an immaterial consideration, namely the likely sale price of the dwellings and has imposed an additional financial charge on the development without any justification in policy or law for doing so.” (para. 23)

“Insofar as the Committee did not provide a reasoned justification for imposing the additional Affordable Housing Contribution, the only proper conclusion is that the Committee’s decision to do so was unreasonable, in the Wednesbury sense, and represents an unlawful tax on the development.” (para. 23)

“... as the additional Affordable Housing Contribution was not necessary to make the proposed development acceptable in planning terms, the decision to require the “claw back” clause to be included in the section 106 planning obligation is contrary to the relevant policy within paragraphs 203 to 205 of the Framework.” (para. 24)



“Moreover, for the same reasons, having regard to Regulation 122 of the CIL Regulations 2010, it would be unlawful for the Council to have regard to a planning obligation, which included the "claw back" clause, when granting planning permission.” (para. 25)

6. Next steps

Counsel advises that:

- (1) *“..., it is necessary and appropriate to report the application back to the Committee with the benefit of further legal advice to the effect that the Committee and its Members must not vote in favour of any resolution that would involve the Council making an unlawful decision to grant planning permission and, specifically, the Committee must remove the requirement to include the "claw back" clause in the planning obligation.” (para 29)*
- (2) *“For the reasons stated, this matter should be reported back to the Committee together with this written Advice with a recommendation that the Committee:-*
 - (i) *Rescind the resolutions made by the Committee on 7 October 2014; and*
 - (ii) *Determine the application for planning permission applying the statutory test for doing so in section 70(2) of the 1990 Act and section 38(6) of the Planning and Compulsory Act 2004.” (para. 31)*
- (3) *“In the circumstances, as the Committee considered this matter within the last seven days, it is not necessary for the matter to be fully reported to the Committee again, nor is necessary for the Committee make provision for interested persons to address the Committee. Those who wanted to make oral representations for and against granting planning permission for the proposed development have been given that opportunity and, having regard to the fact that the Committee is being asked to do no more than it ought lawfully to have done on 7 October 2014, there is no need for those persons to be given a further opportunity to make further oral representations to the Committee.” (para. 32)*
- (4) *“For the avoidance of doubt, it is not therefore necessary for officers to re-present the application to the Committee and it will be sufficient for the Committee to consider the further report prepared by officers, the draft of which I have seen. Having provided officers with advice on the content of that report, I am fully satisfied that the proposals in the report will address the unlawful decision taken by the Committee on 7 October 2014.” (para. 32)*
- (5) *“In determining the application, the Committee must take account of all material considerations, as explained in officers further report dated 13 October 2014, including the fact that it voted in favour of granting planning permission within*



the last week. As the only change in circumstances will involve the quantum of the Affordable Housing Contribution, which will in fact be increased, there can be no lawful justification for coming to a different conclusion.” (para. 34)

7. Financial implications

Counsel advises that:

- (1) Were the Council to grant planning permission in accordance with the Committee's resolution, that decision would be vulnerable to a challenge by way of a claim for judicial review, which the Council could not reasonably defend. Granting permission in those circumstances would expose the Council to a significant risk of having to pay substantial costs and incurring serious reputational damage. In my view, the risk of a judicial review challenge is real and may be brought by local residents who objected to the proposed development. (para. 27)*

Additionally:

- (2) Although it does not bear directly upon the lawfulness of the Committee's resolution, the delay associated with a judicial review and the inevitable order quashing any decision to grant planning permission in such circumstances, will inevitably result in the Council failing to secure the contributions within the planning obligations that could not be required after 1 November 2014. (para 28)*

8. Assistant Director of Corporate Governance Comments and legal implications

- (1) Counsel's advice endorses and reiterates the advice provided to the Sub-Committee on 7th October.
- (2) It is not open to the Sub-Committee to knowingly and wilfully make an unlawful decision and it is certainly not open to the Sub-Committee to expect officers to do so in consequence thereof.

9. Policy Implication

- (1) If the Council is unhappy with the current legal or policy position it should lobby Government for changes thereto.
- (2) In circumstances where the Council wishes to change its own Development Plan or Supplementary Planning Documents or Guidance then there is a legal mechanism for doing so.

10. Reasons for Decision

- (1) To avoid a significant risk of having to pay substantial costs and incurring serious reputational damage.



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(2) To comply with the Council as local planning authority's legal obligation to determine the application before it.

11. Use of Appendices

Counsel's Advice is annexed hereto.

12. Local Government (Access to Information) Act 1985

Counsel's Advice dated 13th October 2014.