

In the Matter of:-

THE TOWN AND COUNTRY PLANNING ACT 1990

-and-

AN APPLICATION FOR PLANNING PERMISSION IN RELATION TO LAND KNOWN AS 10-27 CONNAUGHT HOUSE, CONNAUGHT GARDENS, LONDON N10 3LH

LPA REF:- HGY/2014/1973

ADVICE

INTRODUCTION

1. The Council of the London Borough of Haringey ("the Council") instructs me in relation to an application for planning permission (Ref: HGY/2014/1973) to develop land known as 10 – 27 Connaught House, Connaught Gardens, London N10 3LH ("the Site"). The Council is the local planning authority, within the meaning of Part 1 of the Town and Country Planning Act 1990 ("the 1990 Act") for an area including the Site.
2. On 11 July 2014, the Council registered the application submitted on behalf of the owner of the Site, Indra Services Limited, seeking planning permission for development described on the application form as:-

"Refurbishment and reconfiguration of 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 existing parking area."
3. On 7 October 2014, officers reported the application to the Council's Planning Sub Committee ("the Committee"), with an officer recommendation to grant planning permission, subject to a number of planning conditions specified in the report and subject to the completion of a planning obligation under section 106

of the 1990 Act, to include the heads of terms which were also specified in the report.

4. Those heads of terms included the payment of an affordable housing contribution in the sum of £171,717.00 in lieu of making on-site provision for affordable housing ("the Affordable Housing Contribution"). Officers advised the Committee that the Affordable Housing Contribution was necessary to make the proposed development acceptable in planning terms and the payment of the Affordable Housing Contribution fully accorded with the relevant national and local planning policy and guidance.
5. Contrary to the recommendation of officers, before resolving to grant planning permission in accordance with the recommendation within the officers' report, the Committee resolved to alter the heads of terms for the required section 106 planning obligation to include a "*claw-back*" clause in the required planning obligation that would require the payment of an additional Affordable Housing Contribution in the event, the precise circumstances of which the Committee did not specify, the scheme proves to be more profitable for the applicant.
6. My Instructing Solicitor attended the meeting and provided the Committee with legal advice in open session to the effect that including the "*claw-back*" clause in the planning obligation was not necessary to make the development acceptable in planning terms and, therefore, was contrary to government planning policy in the National Planning Policy Framework ("the Framework"). Moreover, my Instructing Solicitor advised the Committee that it was not lawful when granting planning permission to take account of a planning obligation that included the unnecessary "*claw-back*" provision, pursuant to Regulation 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations"). Additionally, officers advised the Committee that the imposition of the clause would not be feasible as a viability assessment was not in place against which to benchmark future value.
7. The Council now seeks my advice as to the lawfulness of the Committee's resolution, the potential risks and consequences of granting planning permission in a manner consistent with the Committee's resolution and the options available

to the Council, including whether the application should be reported back to the Committee for reconsideration.

BACKGROUND

8. As my Advice is sought urgently and those instructing me are very familiar with this matter, it is not necessary for me to recite in detail the factual background relevant to this matter. For present purposes, the officers' report and the addendum thereto, which were before the Committee, provide an adequate summary of the relevant factual background.
9. In addition to those two committee reports, I have also considered the slide presentation presented to the Committee, the account of the meeting provided by my Instructing Solicitor and the draft Minute prepared following the Committee meeting. For the sake of completeness, I have also viewed the relevant part of the webcast of the Committee meeting.

THE COMMITTEE REPORT

10. The report prepared by the Council's planning officers provided the Committee with a comprehensive analysis of the material planning considerations relevant to the determination of the application and concluded that *"subject to the imposition of conditions and the signing of a section 106 legal agreement ... the planning application for the proposed development is recommended for approval."*¹
11. Properly construed, the report demonstrates that officers considered that application proposal to be a sustainable form of development that was fully compliant with Government planning policy and in accordance with the relevant development plan policies. Demonstrably, then officers were satisfied that the planning conditions and heads of terms identified in the report and the addendum thereto were necessary to ensure the application accorded with the development plan.

¹ Committee Report, paragraph 6.11.2

12. In respect of affordable housing, the officers' report stated as follows:-

- "6.3.3 The NPPF states that where it is identified that affordable housing is needed, planning policies should be set for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified and the agreed approach contributes to the objective of creating mixed and balanced communities. However, such policies should be sufficiently flexible to take account of changing market conditions over time (para. 50).*
- 6.3.4 Similarly, The London Plan (2011), Policy 3.12 states that Boroughs should seek "the maximum reasonable amount of affordable housing ... when negotiating on individual private residential and mixed-use schemes", having regard to their affordable housing targets, the need to encourage rather than restrain residential development and the individual circumstances including development viability". Local Plan Policy SP2 states that affordable housing shall be provided on-site subject to viability and sites capable of delivering ten or more units are required to contribute to the borough-wide target of 50% affordable housing subject to viability. Schemes below the ten unit threshold are required to provide 20% affordable housing on site, based on habitable rooms, or provide financial contributions towards affordable housing provision subject to viability.*
- 6.3.5 Given that the proposal involves the refurbishment of an existing building and would require a single unit to be provided on site, in this instance it is considered more practical to accept a financial contribution in lieu of onsite provision. The Council's Draft Planning Obligations SPD (1st Aug 2014) state that the council will seek a financial contribution of £171,717 for affordable housing provision within the borough. The provision will be secured through a Section 106 agreement. Therefore the proposal would comply with the affordable housing requirements set out in Local Plan Policy SP2.*
- 6.3.6 Concerns have been raised that the site was previously leased to a social housing group and should not be permitted to accommodate private housing. Local Plan Policy SP2 seeks to ensure no net loss of existing affordable housing floorspace in development. However although the site was previously occupied by Metropolitan Police staff and leased to a registered social housing providers until recently, there is no mechanism to control the tenure of the accommodation and the existing flats could currently be leased or sold as open market housing. Therefore it would be unreasonable for the Council to require the applicant to provide social housing within the existing units and the proposal is not considered to result in the loss of affordable housing."*

13. The Affordable Housing Contribution of £171,717.00 which was identified in the report as one of the section 106 planning heads of terms, is the product of a simple calculation applying the rate of £357 per square metre specified in paragraph 6.9 of the Council's draft Planning Obligations Supplementary Planning Document ("POSPD"), which was published for the purposes of consultation between 1 August 2104 and 12 September 2014 but is not yet adopted.
14. The purpose of the POSPD is explained in paragraph 1.1 as follows:-

"The purpose of this document is to clearly set out the Council's approach, policies and procedures in respect of the use of planning obligations. It has been prepared as a 'Supplementary Planning Document' (SPD) to support Policy SP17 of Haringey's Local Plan (March 2013), and the local Community Infrastructure Levy (CIL) adopted in July 2014. On 31st October 2014 Haringey will implement its Community Infrastructure Levy on new development in the borough."
15. Having regard to Local Plan Policy SP2 – Housing and the guidance within Section 6 of the POSPD, development schemes below the ten unit threshold will be required to provide 20% affordable housing on site, based on habitable rooms, or provide financial contributions towards affordable housing provision; and, as stated above, the financial contribution payable in lieu of the making of on site provision, is to be calculated applying the appropriate rate per square metre for the area in which the development is proposed.
16. There is no justification in Local Plan policy or the guidance within the POSPD for the Council to require a developer to provide affordable housing on site above 20%, or any additional financial contribution for the provision of affordable housing elsewhere in the Borough in lieu of making provision on the application site.
17. In the present case, Local Plan SP2 would require one of the eight new dwellings to be affordable housing but, for the reasons explained in the Committee report, officers considered and that Committee did not dispute that it was appropriate to require the payment of the Affordable Housing Contribution in lieu of providing one affordable housing unit within the proposed development.

THE COMMITTEE MEETING

18. My Instructing Solicitor has very helpfully provided me with the draft note of the meeting prepared by the Committee Clerk. That note records that one of the issues raised by objectors addressing the meeting was that the affordable housing contribution was very low considering the likely high sale price of the finished units level of affordable housing.
19. The Committee Clerk's draft note also records that 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 and that a viability assessment was therefore not required from the applicant.
20. Notwithstanding that advice, which was correct in all material respects, Councillor Bevan proposed a motion for the addition of a section 106 legal agreement "*claw back*" clause to any approval. In response to that proposed motion, officers advised that this 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, officers advised the Committee that the imposition of the clause would not be feasible as a viability assessment was not in place against which to benchmark future value. Contrary to that sound advice, Councillor Rice seconded the motion proposed by Councillor Bevan, which at a subsequent vote was carried.

THE COMMITTEE'S RESOLUTION

21. For the reasons I have explained, 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. 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.
22. 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. It appears that some Members of the Committee may have agreed with objectors that the Affordable Housing Contribution was very low having regard to the likely sale price of the residential units.

23. If that is the case, in resolving to require the applicant to pay this additional sum by way of a "*claw back*" clause in the required section 106 planning obligation, 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. 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.
24. Moreover, as my Instructing Solicitor correctly observes, 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.
25. 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.

THE WAY FORWARD

26. Having regard to the foregoing, as a matter of law, the Council may not issue a decision notice granting planning permission on the basis of the Committee's resolution. As my Instructing Solicitor correctly notes, the apparent willingness of the Applicant to accept the "*claw-back*" clause does not make the Committee's decision lawful and, in any event, there must be some risk that the Applicant will seek to argue in due course the requirement is unlawful in any event and resist the Council's attempts to recover any additional Affordable Housing Contribution.
27. 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.

28. 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.
29. In those circumstances, 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. As I understand matters, it is the intention of those instructing me to put this written Advice before the Committee in open session, a proposal that I endorse without reservation.
30. For those reasons, I do not consider there to be any option open to the Council other than to report the matter back to the Committee.

CONCLUSION

31. 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.
32. 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.

33. 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.
34. In determining the application, the Committee must take account of all material planning considerations, as explained in officers further report dated 13 October 2014, including the fact that the Committee 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 to £254,541, there can be no lawful justification for coming to a different conclusion.
35. Should those instructing me require anything further I trust that I will be contacted directly in Chambers.

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MARK BEARD

13 October 2014