

Our Ref: MAW/RA/Imperial West
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14 January 2013

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The London Borough of Hammersmith & Fulham

DX 32768 Hammersmith 2 (Legal Only)

BY DX

Dear Sirs,

Our Client: St Helens Residents Association

**Matter: Planning Application 2011/04016/COMB – Imperial
West Development.**

We are instructed on behalf of the members of the St Helens Residents Association, in seeking to challenge the Local Planning Authority's ('LPA) decision of 25 July 2012 as follows:

"...The Committee resolve that the Executive Director of Transport and Technical Services be authorised to determine application 2011/04016/COMB and grant permission up on the completion of a satisfactory legal agreement and no contrary direction from the Mayor of London and subject to the condition set out in the report and Addendum..."

We would be grateful if our interest could be noted in this matter.

Having reviewed the relevant papers and background we are of the view that the above decision is unlawful and subject to legal challenge should planning permission be issued on the present facts.

Material Factual background

1. The application site is the former BBC Woodlands site located on Wood Lane just north of the elevated A40 Westway between LBHF and adjacent to the Royal Borough of Kensington and Chelsea (RBKC). The total area of the Woodlands site is 3.21 hectares and was acquired by Imperial College London (ICL) in September 2009 for development of a new student campus which is referred to as 'Imperial West'. ICL has produced an overall masterplan for the site. The existing buildings were demolished and the construction of the Phase 1 development comprising the erection of postgraduate student accommodation and D1 floorspace (2010/02218/FUL) is nearly complete.
2. The site is located in the White City Opportunity Area (WCOA) which is identified in the London Plan (2011) and LBHF's Core Strategy (2011).
3. This claim concerns the hybrid planning application for Phase 2 of the Imperial West development. Permission is sought for 7 buildings arranged around a new public square. Detailed planning permission is sought for buildings C, D and F. Building C comprising 9 storeys will consist of a new education and research facility. Building D will be 12 storeys and is intended to provide a mixture of offices for lease on the open market and 'incubator' floor space. The largest of the built elements is Building F – a residential building with ground floor retail cafe/restaurant uses. The height of building F from ground level including the spire would be 141m, 35 storeys in height.

4. Outline permission for buildings A, G and E is also sought. Buildings A and G will comprise executive management offices for Imperial College. Building E will comprise a hotel with ancillary gym and restaurant.
5. The area surrounding the application site is comprised of a variety of land uses, ranging from low rise residential terraces and the larger commercial buildings occupied by the BBC. Of particular note is the fact that to the east 80 m from eastern boundary of the site begins the expanse of the 2-3 storey terraced houses which extends to the north and east. The Oxford Gardens/St Quintin Conservation Area begins approx 100m from the eastern boundary from the application site and covers a wide area of low rise terraced housing. To the west the land use is characterised by residential use of 3-4 storey blocks.
6. The planning application for Phase 2 has attracted a substantial level of public objection. English Heritage and RBKC have also objected to the scheme. The main issue of controversy concerns the height of the buildings which are regarded as being out of keeping with the surrounding development. In particular Building F will be 141m. There are concerns about its visual impact and overshadowing on surrounding low rise buildings.
7. Officers prepared a report to committee on 10 July 2012 in which they recommended the committee to grant planning permission for the scheme on the basis that it complied with the London Plan, the CS and is “broadly compliant with the emerging WCOAPF” (‘first OR’).
8. Webster Dixon wrote to the Council on 5 July 2012 pointing out that the draft WCOAPF to which officers had attached significant weight (OR 1 [3.10-3.13]), is being brought forward by the Council as an SPD when it should, lawfully, be examined as an Area Action Plan (AAP) pursuant to Regulation 6(2)(a) of the Town and Country Planning Regulations (Local Development) England Regu-

lations ('the 2004 Regulations'). We attach a further copy of this letter for ease of reference.

9. The letter referred to the decision in *R(oao Wakil) v Hammersmith and Fulham LBC [2012] EWHC 1411* and stated that the draft WCOAPF should not be taken into account at all in determining the Imperial West application since it is being adopted under an unlawful procedure which circumvents the need for public examination. The letter advised that the application was premature since there was no site-specific planning framework against which to determine the proposals. No decision could be taken until the WCOAPF had been properly adopted.

10. In response to this letter, Council officers withdrew the planning application from the committee's agenda and redrafted their report in order to clarify which policies the members were required to assess the proposal against. A second report was put before members on 25 July 2012 ('the second OR') which contained a fundamentally revised section on the planning policy framework for determining the application (OR2 [3.4] – [3.13]). In particular, the report provided that:
 - (a) the principle of regeneration in this area is well established in the London Plan, the Core Strategy and the White City SPG (2004) ([3.6]);
 - (b) the White City SPG remains extant but is almost eight years old and has effectively been superseded by the site specific policies contain in the Core Strategy for the WCOA([3.6]);
 - (c) Core Strategy policies WCOA, WCOA1, WCOA2 and WCOA3 provide the up to date site specific policies for the application site ([3.6]);
 - (d) whilst the White City SPG has not been formally revoked, officers directed members to give it 'no weight' ([3.6]);

- (e) strategic policy WCOA requires all developments within the WCOA to be considered against the White City Opportunity Area Planning Framework (WCOAPF) ([3.7]);
 - (f) the draft WCOAPF, which is still subject to public consultation, provides the overarching strategy for design, land use, housing and transport and provides the site-specific policy guidance for developers to ensure ‘a comprehensive approach is taken to the redevelopment of the area’ ([3.7]);
 - (g) the draft WCOAPF is being brought forward as a Supplementary Planning Document (SPD) and will not form part of the development plan. Since the WCOAPF is only in draft, officers directed members that it was only appropriate to attach ‘very limited weight’ to the draft WCOAPF and focus on whether it complied with the development plan ([3.9])
 - (h) because of the argument raised by the Claimant’s representatives that the draft WCOAPF should have been promoted as an Area Action Plan (AAP) (as in *Wakil* [2012] EWHC 411), it would be inappropriate to attach more than ‘very limited weight’ to this emerging document ([3.10]);
 - (i) having regard to the degree to which the development proposals complied with the development plan, and also having noted that they broadly accord with the emerging WCOAPF, the grant of planning permission in advance of the adoption of the SPD would not be premature ([3.11]);
11. At the conclusion of its meeting of 25 July 2012, LBHF’s Planning Applications Committee resolved to grant planning permission for Phase 2 of Imperial West upon completion of the necessary legal agreements.

Ground 1- Error of law in giving any weight to emerging WCOAPF

12. Members were expressly directed by officers in the second OR that they could attach some, albeit very limited, weight to the draft WCOAPF (see para. 3.8-3.12). It is reasonable to assume, therefore, that they did in fact have regard to

the draft WCOAPF as a material planning consideration. Indeed, officers expressly stated that they themselves had had regard to the draft WCOAPF and considered ‘that [the proposals] broadly accord with the emerging WCOAPF’ (second OR [3.12]). By comparison, members were expressly directed that ‘no weight’ should be given to the 2004 White City SPG. Any reasonable member of the committee would have understood there to be a difference between giving ‘no weight’ to the White City SPG (2004) and the ‘very limited weight’ they were told they could attach to the draft WCOAPF.

13. It was unlawful and/or an irrelevant consideration for members to have regard to the draft WCOAPF and attach any weight to it whatsoever in circumstances where the emerging plan is being brought forward unlawfully, as an SPD when it actually constitutes an AAP. As Webster Dixon’s letter of 5 July 2012 to the Council pointed out, the draft WCOAPF satisfies the statutory definition for an AAP (reg. 6(2)(a)) and must therefore be adopted in accordance with the public examination procedure for development plan documents.
14. The fact that the Council officers fundamentally revised their advice to members in response to this letter demonstrates that they impliedly accepted the arguments set out therein. In the first OR, officers had told members that the draft WCOAPF was a key document and ‘an important evidence base which officers have taken into account in their assessment of the application’ (OR1 [3.11]). This changed in the second OR, in which members were told they should attach only ‘very limited weight’ to the draft WCOAPF (see OR 2 [3.10]). Whilst officers tried to distinguish the present draft WCOAPF from the facts in Wakil they concluded that ‘for this reason [referring to Wakil], it is felt it would be inappropriate to attach more than very limited weight to this emerging document’.
15. Given that the draft WCOAPF has unlawfully been brought forward as a SPD and would if adopted be a nullity (in breach of s.20 of the Planning and Com-

pulsory Purchase Act 2004) the draft plan should have been withdrawn altogether from members' consideration and members should have been told that they could attach no weight whatsoever to it. By directing members that they were entitled to take the draft WCOAPF into account and give it at least some weight, the Council acted unlawfully, and/or had regard to an irrelevant consideration in determining the planning application

Ground 2 – Local Planning Authority acted unlawfully, in breach of s.38 (6) Planning and Compulsory Purchase Act 2004, by granting planning permission for a development which is conflict with Core Strategy policy on affordable housing without any or any adequate reasons and having misdirected itself as to the correct meaning of policy

Policy Framework for Affordable Housing

16. The application must be determined in accordance with development plan policies H2 and WCOA and WCOA1.
17. Strategic policy H2 is a borough wide policy which provides that on sites with the capacity for 10 or more self-contained dwellings, affordable housing should be provided having regard to a borough wide target that at least 40% of all additional dwellings built between 2011-2012 should be affordable. In negotiating for affordable housing to the council is entitled to take into account the financial viability of a scheme having regard to the availability of public subsidy and the need to encourage rather than restrain residential development (CS p.98).
18. WCOA and WCOA1 are the Core Strategy's site specific policies for the White City Opportunity Area. Policy WCOA states that in the area consisting of White City East, where the present application site is located, 40% of the new housing should be affordable housing in accordance with Strategic Policy H2. WCOA states:

“Development of land in White City East should provide a sufficient mix and quantity of social rented housing (approximately 25% [of all new housing units]) to enable a proportion of existing estate residents to rehouse in better accommodation.”

Affordable housing provision in the application

19. The Council has resolved to grant planning permission for 192 units. The scheme’s total affordable housing provision would be for 59 units (31%) (OR2 [3.59]) which are to be provided in the form of key worker housing. The affordable housing provision for the Imperial West scheme thus falls below the 40% target for White City East set out in the CS WCOA (OR2 [3.64]). Moreover, no mention is made in the second OR about any provision of “social-rented housing”.
20. The applicant submitted a Financial Viability Appraisal (FVA) in order to justify the level of affordable housing proposed. This was reviewed by the District Valuers Service part of the Valuation Office Agency (DVS). The DVS considered, and officers appeared to agree, that the applicant’s approach to assessing viability is ‘flawed’. In particular, the FVA’s approach to benchmark land values and its failure to include all the buildings within the red boundary of the application site in order to test whether there was sufficient value in the non-educational buildings to cross subsidise the educational buildings was judged to be ‘flawed’ (OR2 [3.68]).
21. Officers concluded that ‘while the applicant’s approach did not follow the standard market viability assessment methodology, it was an attempt to find additional value in the scheme’. They accepted appraisal’s conclusion that the scheme is unable to provide further affordable housing (OR2 [3.70-71]).

22. Officers concluded that:

- a) the provision of affordable housing was acceptable having regard to the need to encourage residential development and the viability of the scheme (OR2 [3.65]).
- b) the regeneration benefits and infrastructure improvements of the development proposal justified the relaxation of the affordable housing requirements (OR2 [3.75-76], [3.84]);
- c) the affordable housing provision was in accordance with the London Plan, Core Strategy policies WCOA, WCOA1 and H2. (OR2 [3.84]).
- d) the planning permission should include a condition to review the viability of an increased affordable housing offer beyond 31% in the future.

Unlawful approach to affordable housing

23. The Council's approach to the affordable housing contribution was flawed for the following reasons:

- (a) officers failed to take into account the requirement in CS Policy WCOA that development of land in White City East should provide social-rented units making up 25% of any new housing. However, no social housing whatsoever is proposed and none is mentioned in the first or second OR. This was a clear breach of the development plan. The Council failed to have regard to a relevant consideration, namely the need to provide 25% social rented housing, nor did

it justify this clear breach of the development plan by reference to other material considerations in accordance with s.38(6) Planning and Compulsory Purchase Act 2004;

- (b) The officers finding that the proposal could not support any more affordable housing above 31% was predicated on the applicant's FVA which the DVS had concluded was 'flawed' in its approach to assessing viability. Where viability was said by officers to be the primary justification for accepting an affordable housing contribution below the 40% requirement, the Council needed to be but could not be satisfied that the scheme could not support greater affordable housing provision.
24. Moreover, since the LBHF's planning committee resolved to grant planning permission on 25 July 2012, it has emerged that ICL is to receive a further £35 million of public subsidy for its development programme from the Higher Education Funding Council for England. The potential Claimants wrote to LBHF about this grant and were told that the grant is for the educational elements of the scheme only and that the grant has no implications for the overall financial viability of the scheme. However, in the context of a scheme where the commercial elements of the scheme were included (in part) because of their ability to subsidise the educational elements and where the applicant has sought to suggest that it cannot meet the development plan's affordable housing requirements because it is not viable, it is imperative that these issues are reconsidered.
25. In light of this substantial public subsidy the Council must reconsider the financial viability assessment of the development and the applicant's affordable housing contribution before granting planning permission. Core Strategy Policy H2 specifically refers to taking into account the financial viability of a scheme having regard to the availability of public subsidy (CS p.98).

26. If the Council were to proceed to grant planning permission without reconsidering the scheme's affordable housing contribution that would constitute a material breach of the development plan policies on affordable housing. No such conflict with the development plan is acknowledged by the Council and nor have they suggested that there are any other material considerations which justify such a departure from the policy. Consequently, LBHF would be in further breach of s.38(6) P&C Act 2004.

We understand that no notice of planning permission has yet been issued. We therefore invite the Council to withdraw the existing resolution of 25 July 2012 in view of what has been said above.

For the avoidance of doubt, we put you on notice that our client's rights are fully reserved and this letter should be construed as a letter before action should proceedings have to be issued. We do hope that such action will not be necessary and look forward to hearing from you by way of return.

Yours faithfully

WEBSTER DIXON LLP

Enc:

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