From: Simon Kelly
To: Anne Ogundiya
Subject: RE: 13/00444/FUL further matters
Date: 21 March 2014 17:54:08

Anne – comments in the text below. I am happy to talk to this at committee.

It would be worth checking with LBWF re the power it relies on to enter into the agreement, but I am assuming that it is section 1 of the Localism Act.

Simon

From: Anne Ogundiya
Sent: 21 March 2014 16:44
To: Simon Kelly
Subject: FW: 13/00444/FUL further matters

Simon,

Fyi

Anne

From: charman [mailto:[redacted]]
Sent: 21 March 2014 15:19
To: Anne Ogundiya; Anthony Hollingsworth
Subject: 13/00444/FUL further matters

Dear Ms Ogundiya

I am pleased to see that my response and comments have now been reported though I would have an appreciated an explanation for the previous omission. [Mistake – not much more we can say]

Please note these further procedural and legal matters with reference to the current version of the 23 March committee report 'Eton Manor Landscaping'

Letter of support from Hackney Council

I am pursuing a complaint against Hackney Council with regard to the constitutional and statutory powers of the Mayor to express support for a planning application in this way.

The report states on P3:

"The letter from the Office of the Mayor of Jules Pipe, Mayor of Hackney, was sent to PPDT by Office of the Mayor of Hackney as a letter of support and was reported accordingly."

However the position expressed by Hackney Council to date is that it was not a consultation response and was not directed to the PPDT, ie.

the LLDC as LPA.

It is also apparent from the text of the letter of 20 November 2013 that it was not sent to the PPDT.

So I am unclear what backing there is for the claim that was sent to PPDT by the Office of the Mayor of Hackney, since neither the letter nor Hackney Council appear to confirm this.

Regardless of how the PPDT acquired the letter, it was evidently not sent directly and so should not be treated as a letter of support in the report.

I would therefore suggest that the Committee are asked to disregard this letter. [No. If it were a letter of objection, you can bet he would require us to report it (as he did last time around). We have to take a common sense approach – it Hackney has expressed support, then that is a material consideration and should be reported].

Section 106 agreement.

Having studied the content of the Heads of Terms, the agreement does not properly meet the statutory tests for acceptable planning obligations in Reg. 122 of the CIL Regulations 2010 and as set out in Cirular 05/2005 and hence planning approval on this basis would appear be an error of law. There are several other problems:

The proposal does not appear to be one to which a Section 106 agreement can be applied. As I suggested previously it does not appear to be a development within the scope of the TCPA. The officer response on P2 that it is a *"straightforward new application replacing proposed allotments with new landscaping proposals"* fails to acknowledge that landscaping of the proposed type is not development and does not require permission. Clearly the s106 relates to the 'meadow' area of the application only - it does not appear there are footpaths or entrance signage associated with this, though these also would not generally require planning consent. [point already dealt with]

The s106 tests: [He misunderstands the legal tests. In terms of policy, the development is acceptable on its own terms. It does not need the 106 to make it acceptable in planning terms. So the 106 is not a reason for granting permission. However, applying the case of *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759*, the proposed arrangements have a more than *de minimis* relationship to the proposal and represents a planning consideration (i.e. it relates to the use and development of the land) then it is a material consideration in the grant of planning permission.]

1. Is it necessary to make the development acceptable in planning

terms?
No, there is nothing in s9 (Assessment of Planning Issues) in the planning officer's report to suggest that the proposal under consideration is itself unacceptable in planning terms.

2. Is it directly related to the development?
No. How tenancies are allocated at other allotment sites is unrelated to the development in question, and this is not a planning matter.
The LPA have confirmed on P2 of the 23 March report that *"Past promises regarding the relocation of MGS members are not material planning considerations (which can only relate to the use and development of the land)"* yet the agreement deals largely with these promises.

3. Is it fairly and reasonably related in scale and kind to the proposed development?
Difficult to answer as it bears no relation to the development itself.

The agreement could be seen as 'buying' of planning permission through agreeing to assist the LLDC with its inconvenient requirement to provide allotments and with its commitment to MGS plotholders displaced by the CPO and Olympics development. This is explicitly contrary to the intentions of section 106. [see comment above]

Given that planning approval has been deemed to be dependent on the completion of the section 106 agreement, whether the signatories are capable of being parties and whether it can be enforced and will achieve its stated aims are material planning considerations.

It is questionable whether the LVRPA are currently in a position to be parties to the agreement. It is unclear whether signing this agreement is within their statutory powers, and the Members who gave approval to supporting the application were not told of the Section 106 or of any legal implications associated with the application. [LVRPA has broad powers to enter into the agreement under section 1 of the Localism Act 2011].

Normally a s106 would be secured by a charge on the land. I would be surprised if the LVRPA were willing to agree to this, and there has certainly be no Member approval. [The proposed agreement creates a contractual obligation between the parties to the agreement. Where that obligation falls within section 106 (1) it is also enforceable against successors in title. The proposed 106 agreement contains restrictions on commencement of the development that are enforceable under s. 106 (3)]

In the absence of a land charge there does not seem to be any mechanism for enforcing the agreement, while given the failure of the agreement to meet the statutory tests it would almost certainly prove legally unenforceable even if there were a will to do so. [see above comments]

Given all the above, I believe it is mistakenrther matters to recommend approval conditional on completion of a s106 agreement that is legally flawed and likely to be ineffective or not realistically enforceable. [see above comments]

Regards

Paul Charman

From: Simon Kelly
To: Anne Ogundiya
Subject: RE: 13/00444/FUL further matters
Date: 24 March 2014 11:49:31

Nothing new on this. Happy to review your update report.

From: Anne Ogundiya
Sent: 24 March 2014 11:35
To: Simon Kelly
Subject: FW: 13/00444/FUL further matters

Fyi – latest emial

From: charman [mailto:[redacted]]
Sent: 21 March 2014 19:14
To: Anne Ogundiya; Anthony Hollingsworth
Subject: Fwd: 13/00444/FUL further matters

Apologies for the error in the last paragraph which should read:

Given all the above, I believe it is mistaken to recommend approval conditional on completion of a s106 agreement that is legally flawed and likely to be ineffective or not realistically enforceable.

---------- Forwarded message ----------
From: **charman** <[redacted]>
Date: 21 March 2014 15:19
Subject: 13/00444/FUL further matters
To:
anneogundiya@[redacted], anthonyhollingsworth@[redacted]

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The s106 tests:

1. Is it necessary to make the development acceptable in planning terms?
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Regards

Paul Charman