

BURLINGTON DEVELOPMENTS LONDON LTD

CARPENDERS PARK – CALL-IN INQUIRY

PROPOSED UNILATERAL UNDERTAKING

NOTE ON INDIVIDUAL OCCUPIERS CARVE OUT CLAUSE

1 INTRODUCTION

- 1.1 This note is produced on behalf of the applicant, Burlington Developments London Ltd (the **Developer**) and responds to comments made by Hertfordshire County Council (**HCC**) and Three Rivers District Council (**TRDC**) in respect of the application of an ‘individual occupiers’ carve out clause within the Unilateral Undertaking (**UU**), which is proposed to be entered into in relation to the development of (amongst other things) up to 256 new homes at Carpenders Park, South Oxhey (the **Development**).
- 1.2 As we understand it, HCC and TRDC have typically resisted the inclusion of carve out clauses for individual liability within Section 106 Agreements (i.e. clauses which prevent individual occupiers of a dwelling from being bound by the obligations/payment requirements of the master developer pursuant to a Section 106 Agreement). The purported rationale for this approach is to incentivise master developers to fulfil all necessary obligations (by keeping individual owners ‘on the hook’ if they fail to do so) and to reduce the potential risk of any burden on the public purse.
- 1.3 However, for the reasons set out below, we do not agree that this is necessary or appropriate for the Development.

2 BACKGROUND

- 2.1 The Developer continues to engage in negotiations with HCC and TRDC (together the **Councils**) in respect of the UU, which is proposed to be entered into pursuant to section 106 of the Town and Country Planning Act 1990 (the **Act**). The UU is in an advanced draft form and is agreed in almost all respects.
- 2.2 The UU currently includes the following clause 12.1:

‘Except for:

paragraphs 2.3, 3.3 and 4.3 of Schedule 3;

paragraphs 3.3, 4.3, 6.2.4, 6.2.6, 7.2.4 and 7.2.6 of Schedule 4;

paragraph 4.1 of Schedule 5;

paragraphs 4.2.1 and 4.3.2 of Schedule 5 in respect of the Social Rent Units;

paragraphs 4.2.2 and 4.4 of Schedule 5 in respect of the Shared Ownership Units;

paragraphs 2.2, 3.2 and 4.4 of Schedule 7;

paragraphs 5.3 and 6.1 of Schedule 7 in respect of the Housing Care Units;

paragraph 2.2 of Schedule 8;

paragraphs 4.1.1 and 4.2.1 of Schedule 8 in respect of the Children's Home,

*this Deed shall not be enforceable against owners and/or occupiers of (as the case may be) individual Residential Units and/or individual Housing with Care Units and/or individual occupiers of the Children's Home (including their respective successors in title and their mortgagee or chargee (or any receiver including any receiver appointed to the Law of Property Act 1925) or an administrative receiver appointed by such mortgagee or chargee and any person appointed under any security documentation to enable such mortgagee or chargee to release its security or any administrator (however appointed) including a housing administrator (each a receiver) and any person who is a successor in title or derives title through or under any such mortgagee or chargee (or such receiver)) (each a **Relevant Person**).'*

(the **Individual Occupier Carve-Out Clause**).

2.3 Those parts of the Individual Occupier Carve-Out Clause that we have emboldened above (the **Disputed Obligations**) have been requested by HCC and/or TRDC but are not agreed by the Developer. For ease, the Disputed Obligations are set out in full in **Appendix I** to this note. Whilst there are a number of them, it can be seen that there is a common theme i.e. they seek to prevent occupation of an identified part of the Development unless a payment is made (to HCC or TRDC) or an action is carried out.

2.4 It is acknowledged that:

- (a) the Councils typically do not accept Individual Occupier Carve-Out Clauses;
- (b) the Individual Occupier Carve-Out Clause will require an exception in respect of certain provisions – such as ensuring that individual owners are bound by restrictions relating to the use of affordable housing units – and this is secured by the other (agreed) elements of clause 12.1.

2.5 The Developer considers that the inclusion of an appropriately worded Individual Occupiers Carve-Out Clause within the UU is absolutely essential to allow for the timely and proper delivery of the Development, which would deliver (amongst other things) much needed housing (including affordable housing) within TRDC's area. Likewise, the Developer is concerned that inclusion of the Disputed Obligations is likely to have the opposite effect (as to which see further below).

3 **KEY ISSUES**

3.1 We would highlight the following points.

3.2 First, the inclusion of an Individual Occupiers Carve-Out Clause is standard practice across the industry. It is generally accepted that it is not appropriate to keep individual homeowners 'on the hook' for significant contributions and obligations.

3.3 We refer to a decision letter (**DL**) dated 22 March 2024 by the Secretary of State in respect of land to the south of Chiswell Green Lane, Chiswell Green, St Albans¹: relevant extracts of the DL and the related Inspector's report are appended at **Appendix 2** to this note. There, the inclusion of an Individual Occupiers Carve-Out Clause was in dispute between the parties: the developer insisted upon its inclusion whereas HCC required individual owners to be liable.

3.4 In that case, a Section 106 Agreement (the **Chiswell Green S106**) was entered into on 19 May 2023 with (amongst other parties) HCC, which included the following clauses:

'8.12 SAVE where Clause 12.2 applies, the obligations in this Deed will not be enforceable against owners of individual Dwellings nor against those deriving title from them nor their mortgagees or charges save for where there are restrictions on the Occupation² of the Dwellings then such restrictions on

¹ Appeal references 3313110 and 3312277.

² Occupation is defined as 'occupation for the purposes of the Planning Permission but not including occupation by personnel engaged in the construction fitting out or decoration or occupation for marketing or display or occupation in relation to security operations...'

Occupation shall bind the owners occupiers or tenants of the Dwellings who shall not Occupy any Dwelling in breach of such restrictions.'

...

'12.2 In the event that the Inspector in the decision letter states that:

...

12.2.3 that clause 8.12 above should be substituted then, as from the date of the decision letter, Clause 8.12 above shall be read as follows

Once the obligations in this Deed have been complied with then such obligations will not be enforceable against individual Dwellings nor against those deriving title from them nor their mortgagees or chargees and where there are restrictions on the Occupation of the Dwellings such restrictions on Occupation shall bind the owners occupiers or tenants of the Dwellings who shall not Occupy any Dwelling in breach of such restrictions'

- 3.5 Relevant extracts of the Chiswell Green S106 are appended at **Appendix 3** to this note³.
- 3.6 It is understood that HCC sought the amended wording set out at clause 12.2.3 above i.e. that individual occupiers of dwellings should be liable for compliance with the obligations in the Chiswell Green S106 until such obligations have been complied with (provided that restrictions relating to occupation would continue to bind them, in any event). We should add that, in our view, 'restrictions on Occupation' should be interpreted by reference to the definition of Occupation (see footnote 3), which relates to actual occupation or use.
- 3.7 The Inspector concluded as follows on this point:
- '518 Finally, I do not accept the County Council's position that individual house owners should become liable for site-wide obligations, which would be disproportionate, unreasonable and unrealistic. The legal agreement specifies triggers for each obligation and prevents occupations until such time as payments are made or obligations are otherwise met. I take this view, notwithstanding the position set out in the County Council's Guide to Developer Infrastructure Contributions, which is not part of the development plan.*
- 519 It is unfortunate that the parties were not able to work more constructively in resolving these points of detail, which are not matters that should generally be left for determination by an Inspector or the Secretary of State. Nevertheless, it seems to me that the wording of the agreement is satisfactory without invoking the potential alternative clauses at... 12.2.3. I have considered the planning obligations on that basis and recommend that the Secretary of State takes the same approach.'* [our emphasis]
- 3.8 These conclusions were accepted by the Secretary of State⁴. It can be seen that these conclusions related to site-wide obligations which restrict occupation until *payments are made or obligations are otherwise met'* (as above).
- 3.9 Subsequently, HCC were involved in a similar dispute in respect of an appeal relating to land west of Leighton Buzzard, Hemel Hempstead⁵.
- 3.10 In that case, a Unilateral Undertaking (the **Hemel Hempstead UU**) was entered into on 20 March 2025 in favour of HCC, which included the following clauses⁶:

³ A full copy can also be provided.

⁴ See paragraph 33 of the DL.

⁵ Appeal reference 3345435.

⁶ A separate unilateral undertaking was entered into with the local planning authority (Dacorum Borough Council) which did not include the equivalent of option B because it was not required by the authority.

6.1 Pursuant to the Blue Pencil Clause at Clause 3.1.3, either Option A or Option B shall bind the Owner such as the Secretary of State or Planning Inspector (as applicable) confirms this within the Decision Letter:-

6.2 **Option A:-**

6.2.1 The obligations in this Deed shall not be binding upon or enforceable against:

(a) any individual owner-occupier of a Dwelling or their successors in title;

...

6.3 **Option B:-**

6.3.1 The obligations in this Deed shall not be binding upon or enforceable against individual owner-occupiers once the obligations have been fully complied with.

...

3.11 Relevant extracts of the Hemel Hempstead UU are appended at **Appendix 4** to this note.⁷

3.12 It is understood that HCC sought the inclusion of Option B which, in the same way as the equivalent provision in the Chiswell Green SI06, would render individual occupiers liable for compliance with the obligations in the Hemel Hempstead UU until such obligations have been complied with.

3.13 By a decision dated 5 August 2025, the Inspector reached the following conclusions:

162 The unilateral undertaking includes 'Option A' at Clause 6.2, which is the appellant's preference and is consistent with the approach taken by the Borough Council in respect to the bilateral agreement; and 'Option B' at Clause 6.3, which is that preferred by the County Council. A 'blue pencil' clause has been inserted at Clause 3.1.3 of the undertaking to enable me to adjudicate on this matter. This disputed matter was a source of discussion at the round table discussion on planning obligations. It remained unresolved by the close of the Inquiry and has generated applications for costs from both the appellant and the County Council against one another.

163 Regardless of my adjudication on this particular disputed matter, the appellant's actions are a reasonable means to ensure that they have been able to provide legal documents capable of securing the necessary planning obligations to support their proposals and so address the Borough Council's earlier reasons for refusal associated with them.

164 The County Council's approach has the effect of placing liability on individual property owners of the appeal scheme should the developer fail to comply with any of the obligations contained within the unilateral undertaking. The County Council have advised that this is to ensure that the public purse is not burdened by any non-compliance. This could amount to a considerable sum for those occupants, depending on the extent of any non-compliance. However, during the round table discussion the County Council stated that it would be highly unlikely that they would ever initiate that clause against property owners. Whereas the appellant stood very firm that there are other remedial courses of action open to the County Council should that scenario ever arise. They believe that the County Council's approach could have far reaching consequences on delivery from the outset in terms of securing grant funding opportunities to assist in the delivery of affordable housing and also the ability of prospective purchasers to secure mortgages

165 Both the appellant and the Borough Council do not follow the approach of the County Council in respect to liability for the planning obligations contained within the bilateral agreement. I find that the County Council's preferred wording is not appropriate here because the references to limiting and restricting occupation of dwellings against individuals means that the County Council could in theory enforce against individuals.

⁷ A full copy can also be provided.

- 166 Significantly, during the Inquiry my attention was drawn to the Chiswell Green Decision involving the County Council where their approach was clearly rejected by both the Inspector and the Secretary of State. In that case the County Council's approach was found to be disproportionate, unreasonable and unrealistic. Crucially, the evidence before me, including costs submissions made by the County Council after the close of the Inquiry, does not lead me to justify an alternative stance to the Chiswell Green Decision.
- 167 Therefore, Clause 6.2.1 of the submitted unilateral undertaking, which does not place liability on the individual property owners, is that which shall take force for the purposes of implementing the submitted unilateral undertaking and ensuring future compliance with it.' [our emphasis]
- 3.14 In a related costs decision, the Inspector added that:
- '27 Furthermore, it is equally unreasonable for the County Council to have persistently insisted upon the drafting in a section 106 agreement in the knowledge that, in the more recent Chiswell Green Decision, the Inspector and Secretary of State indicated that the County Council's approach to liability is unacceptable, particularly given that legal agreement did include a blue pencil clause which allowed that adjudication to take place.
- 28 The County Council has provided no convincing reason for departing from the Chiswell Green Decision in this case. In that instance the County Council's approach was found to be disproportionate, unreasonable and unrealistic. In determining the appeal which gave rise to this application for costs, I also rejected the County Council's approach to liability for necessary planning obligations for the reasons set out in my Decision.
- 29 The fact that the County Council indicated during the round table discussion that it had no intention of enforcing the obligations against individual occupiers only serves to heighten the level of unreasonableness displayed' [our emphasis]
- 3.15 Relevant extracts of the Inspector's decisions are appended at **Appendix 5** to this note.
- 3.16 The Developer respectfully adopts the same position in respect of the UU.
- 3.17 A copy of the DL has been shared with TRDC and HCC but they maintain their position, They contend variously that:
- (a) the restrictions on occupation (per the Disputed Obligations) would not be effective unless they can be enforced against individual occupiers;
 - (b) occupiers would not be 'on the hook' in relation to the payment obligations which are not included within the carve out from the exclusion of liability;
 - (c) it is unreasonable to diminish the enforceability of the relevant triggers;
 - (d) the Developer has accepted the inclusion of very similar exceptions to the Individual Occupiers Carve-Out Clause in respect of a separate appeal relating to land at Sarratt⁸; and
 - (e) TRDC's position has been accepted in other recent major residential schemes (including no individual owner/occupier clause whatsoever).
- 3.18 Whilst the Developer accepts that liability of the various payments to be made would not be enforceable against individual occupiers, they would still be prevented from occupying a dwelling within the Development until these payments have been made. This still gives rise to the same issues as were identified in the DL and the Hemel Hempstead decision. Moreover, the Disputed Obligations extend beyond payments and include, for example, the carrying out of other actions (such as completion of communal facilities in association with

⁸ Appeal reference 3311477.

the proposed housing with care units) that are plainly beyond the control of an individual occupier. Again, this was recognised in the DL and the Hemel Hempstead decision.

3.19 Nor is it accepted by the Developer that the UU would be ineffective if the Disputed Obligations are excised. The following existing protection is available to the Councils:

- (a) by virtue of the restrictions in the UU, the Development can be effectively ‘stopped’ at a number of key points if the Developer does not discharge its obligations prior to, for instance, the relevant occupation restriction. These triggers have been carefully considered (and agreed with the Councils) so as to ensure they do not come too late in the Development (i.e. to ensure there is sufficient value in the remainder of the Development to incentivise compliance). Plainly, the cost of stopping development (and the residual value in the unbuilt part of the Development) is a significant incentive for the Developer to comply with its obligations;
- (b) the UU includes notification obligations throughout the currency of the Development⁹ pursuant to which the Councils will be fully aware of the Developer’s compliance (or non-compliance) with its obligations and can take steps to enforce against any breach promptly (should the need arise); and
- (c) related to (b) above, the Act includes express provisions for the enforcement of planning obligations (such as the UU). Specifically, section 106(5) of the Act confirms that planning obligations within a UU are enforceable by injunction. Accordingly, the Councils have a specific recourse – outside the terms of the UU itself (and the usual approach of ‘breach of contract’ and/or dispute resolution) – which can be utilised to halt the Development and force compliance, if necessary.

3.20 The fact that the Developer was prepared to accept a different position in relation to another scheme (at Sarratt) does not change the overall position. There, whilst TRDC’s position was resisted by the Developer during the negotiation of the relevant unilateral undertaking, ultimately it was prepared to accept it in order to remove an issue of contention between the parties. As such, TRDC’s position on individual occupiers was not formally challenged before the Inspector at that public inquiry. In addition importantly, the unilateral undertaking in that case pre-dated both the DL and the Hemel Hempstead decision where the position was formally challenged by the developer and, in each case, was found in favour of the developer.

3.21 Second, the Disputed Obligations are not compliant with regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). Regulation 122 requires that planning obligations must be:

- (a) necessary to make the development acceptable in planning terms;
- (b) directly related to the development; and
- (c) fairly and reasonably related in scale and kind.

3.22 Consistent with the DL and the Hemel Hempstead decision, it cannot be the case that enforcing significant obligations against individual homeowners whom are unable to comply with them meets the Regulation 122 tests. In light of the existing protections set out above, the Developer does not consider that inclusion of the Disputed Obligations in the UU could reasonably be considered *necessary to make the Development acceptable in planning terms*. It would also be wholly unreasonable to suggest that they are ‘fair and reasonable’ in the context of the Development.

⁹ See Schedule 2.

3.23 Third, it is important to note that inclusion of the Disputed Obligations would also have significant practical implications:

- (a) several of the Disputed Obligations relate to trigger points pertaining to a restriction against occupation of more than a stated percentage of the Development. These, in particular, are impossible to manage in the manner that the Councils appear to envisage. It is almost impossible for an incoming purchaser of a single dwelling to know where they will come in the overall delivery of the Development (in terms of percentage of occupations). It is inappropriate for a private individual to be uncertain as to whether they are prevented from occupying without knowing the status of occupation of the other dwellings within the Development;
- (b) related to the above, the Councils' position also ignores the reality of new build house sales which may include a measure of sales off-plan. At the time of an individual contracting to purchase, a trigger may not have fallen due but might then have fallen due by the date of completion. It is impossible for such a purchaser to ensure that all obligations are fulfilled prior to contract. This arrangement also further complicates the question of occupation as the order of occupation of off-plan dwellings is not within the purchaser's control;
- (c) as such, inevitably the specific terms of the Individual Occupiers Carve-Out Clause has the potential to negatively (and significantly) hamper sales of dwellings and, as a consequence, delivery of the remainder of the Development (which will be financed – at least in part – through proceeds from the purchase of the early dwellings). As part of the due diligence exercise whilst acquiring a dwelling, each individual occupier will be made aware that they could be jointly or severally prevented from occupying until actions are taken that are beyond their control. In itself, this will have three potential consequences:
 - (i) potential purchasers will be unwilling to proceed with the acquisition;
 - (ii) mortgagees may be reluctant to lend on the acquisition; and
 - (iii) insurers might be unlikely to provide insurance against the risk of enforcement against individual owners (which, in itself, would likely lead to (i) and (ii) above).
- (d) on the basis of the above, the delivery of the Development is, therefore, put at significant risk by inclusion of the Disputed Obligations;
- (e) whilst it is acknowledged that inclusion of the Disputed Obligations is intended to motivate the Developer to comply with its obligations, it follows that (practically speaking) a scenario may occur where the Councils feel the need to enforce against an individual occupier (effectively to give 'teeth' to the incentive). In doing so, it would (in all likelihood) need to enforce against multiple individual occupiers. In addition to the reputational harm that can arise from such action, managing and enforcing planning obligations across numerous individual occupiers (in addition to a house builder) would also create a significant administrative burden for the Councils. It would require extensive monitoring, legal action and dispute resolution, diverting resources from other essential planning and development activities; and
- (f) generally, it is unreasonable and unfair to (in effect) render individual occupiers jointly and severally liable for those matters that are subject to the Disputed Obligations.

3.24 For the reasons set out above, the inclusion of the Disputed Obligations carries a real risk to the successful delivery of the Development and is, therefore, resisted by the Developer. In addition, we note that:

- (a) the Councils can enforce against non-compliance via the terms of the UU which include phased occupation restrictions and extensive monitoring requirements and/or via injunction (in addition to a standard breach of contract recourse); and
- (b) the inclusion of the Disputed Obligations is not compliant with regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended).

3.25 Given the ongoing disagreement between the Developer and the Councils on this issue, we have included a 'blue pencil clause' in the UU so as to permit the Inspector (and the Secretary of State) to adjudicate upon the issue. It is cast in the following terms:

*'No Disputed Obligation shall have any legal effect in relation to a Relevant Person and no Relevant Person shall be under any obligation to comply with it unless the Secretary of State concludes in the Decision Letter that the relevant Disputed Obligation does comply with regulation 122 of the CIL Regulations and/or attaches weight to any Disputed Obligation in determining the Appeal in which case the Relevant Person shall be obliged to comply with any such Disputed Obligation that is identified in the Decision Letter as compliant with regulation 122 PROVIDED THAT, for the avoidance of any doubt, if the Secretary of State does not reach any conclusion about a Disputed Obligation in the Decision Letter, then it shall conclusively be deemed that that Disputed Obligation shall have no legal effect in relation to a Relevant Person and no Relevant Person shall be under any obligation to comply with it.'*¹⁰

3.26 It is understood that the terms of this clause are agreed by the Councils.

3.27 As can be seen, this clause provides that a Disputed Obligation will only take legal effect if the Secretary of State concludes that it complies with the tests in regulation 122 and/or attaches weight to it in reaching their decision. For the reasons set out in this note, the Developer respectfully requests that the Disputed Obligations be excised from taking effect in the UU.

MISHCON DE REYA LLP

JULY 2026

¹⁰ See clause 17.3 of the UU.

APPENDIX I

Disputed Obligations

Schedule 3 (paragraph 2.3)

Not to Occupy nor permit Occupation of the Development unless and until the Healthcare Contribution has been paid in full to the Council.

Schedule 3 (paragraph 3.3)

Not to Occupy nor permit Occupation of the Development unless and until the Housing with Care Contribution has been paid in full to the Council.

Schedule 3 (paragraph 4.3)

Not to Occupy nor permit Occupation of the Development unless and until the Beryl Bikes Contribution has been paid in full to the Council.

Schedule 4 (paragraph 3.3)

Not to Occupy nor permit Occupation of the Development unless and until the First Bus Service Contribution has been paid to the County Council.

Schedule 4 (paragraph 4.3)

Not to Occupy nor permit Occupation of the Development unless and until the Bus Infrastructure Contribution has been paid in full to the County Council.

Schedule 4 (paragraph 6.2.4)

Not to Occupy nor permit Occupation of the Development unless and until the Second SEND Contribution (as specified in the relevant County Reserved Matters Mix Contribution Notice) has been paid to the County Council

Schedule 4 (paragraph 6.2.6)

Not to Occupy nor permit Occupation of more than sixty-four (64) of the Residential Units unless and until the Third SEND Contribution (as specified in the relevant County Reserved Matters Mix Contribution Notice) has been paid to the County Council

Schedule 4 (paragraph 7.2.4)

Not to Occupy nor permit Occupation of the Development unless and until the Second Secondary Education Contribution (as specified in the relevant County Reserved Matters Mix Contribution Notice) has been paid to the County Council

Schedule 4 (paragraph 7.2.6)

Not to Occupy nor permit Occupation of more than sixty-four (64) of the Residential Units unless and until the Third Secondary Education Contribution (as specified in the relevant County Reserved Matters Mix Contribution Notice) has been paid to the County Council

Schedule 5 (paragraph 4.1)

Not to Occupy nor permit Occupation of more than:

fifty percent (50%) of the Market Units until sixty percent (60%) of the Affordable Housing Units have been Provided in accordance with:

- (a) the Agreed Tenure Mix; and*
- (b) the approved Affordable Housing Scheme (including any amendments to it that may be approved in writing from time to time by the Council or an Expert, as the case may be); and*

eighty percent (80%) of the Market Units until all of the Affordable Housing Units have been Provided in accordance with:

- (a) the Agreed Tenure Mix; and*
- (b) approved Affordable Housing Scheme (including any amendments to it that may be approved in writing from time to time by the Council or an Expert, as the case may be)*

Schedule 7 (paragraph 2.2)

Not to Occupy the Development (or any part of it) unless and until the Housing with Care Land has been Transferred to the Care Delivery Partner on the Transfer Terms

Schedule 7 (paragraph 3.2)

Not to Occupy more than twenty-five percent (25%) of the Residential Units unless and until the Housing with Care Scheme has been submitted to, and approved in writing by, the County Council or an Expert (as the case may be)

Schedule 7 (paragraph 4.4)

Not to Occupy any Housing with Care Unit unless and until the Communal Facilities have been Completed in accordance with the approved Housing with Care Scheme (including any amendments to it that are approved in writing from time to time by the County Council or an Expert (as the case may be)

Schedule 8 (paragraph 2.2)

Not to Occupy nor permit Occupation of more than eighty five percent (85%) of the Market Units unless and until the Children's Home has been Completed in accordance with:

- (a) the Planning Permission;*
- (b) all related Reserved Matters Approvals; and*
- (c) the Property Build Specification*

APPENDIX 2
Extracts from the DL



Department for Levelling Up,
Housing & Communities

A. John Boyd
Carter Jonas
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B. Brian Parker
MRP Planning
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By email only

Our refs:

A. APP/B1930/W/22/3313110 &
B. APP/B1930/W/22/3312277

Your refs:

A. 5/22/0927 &
B. 5/21/3194

22 March 2024

Dear Sir/Madam

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEALS MADE BY A: ALBAN DEVELOPMENTS LTD AND ALBAN PETER
PEARSON, CALA HOMES (CHILTERN) LTD AND REDINGTON CAPITAL LTD and B:
HEADLANDS WAY LTD**

A. LAND SOUTH OF CHISWELL GREEN LANE, CHISWELL GREEN, ST. ALBANS &

B. LAND NORTH OF CHISWELL GREEN LANE, CHISWELL GREEN, ST. ALBANS

APPLICATION REFS: A. 5/22/0927 and B. 5/21/3194

This decision was made by the Minister for Housing and Homelessness, on behalf of the Secretary of State

1. I am directed by the Secretary of State to say that consideration has been given to the report of Michael Boniface MSc MRTPI, who held a public local inquiry between 17 April and 9 May 2023 into your clients' appeals against the decisions of St Albans City and District Council (the Council) to refuse your clients' applications for planning permission for the following developments:
 - A. Outline application for the demolition of existing structures and construction of up to 391 dwellings (Use Class C3); the provision of land for a new school, open space provision and associated landscaping, internal roads, parking, footpaths, cycleways, drainage, utilities and service infrastructure and new access arrangements ('Appeal A') in accordance with application Ref. 5/22/0927, dated 29 April 2022.
 - B. Outline application for the demolition of existing buildings and the construction of up to 330 discounted affordable homes for key workers, including military personnel, the creation of open space and the construction of new accesses and highway works including new foot and cycle path and works to junctions ('Appeal B'), in accordance with application Ref. 5/21/3194, dated 12 November 2021.

33. Appeal A: The Secretary of State has had regard to the Inspector's analysis at IR509-519, and the two separate planning obligations dated 19 May 2023, one with the Council and one with the County Council. For the reasons given at IR510 and IR512 with regard to the Council, and IR510 and 513 with regard to the County Council, he agrees with the Inspector's conclusion that the obligations comply with Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 and the tests at paragraph 57 of the Framework. With respect to the Inspector's analysis at IR514-518, the Secretary of State agrees with the Inspector that the agreement with the County Council is satisfactory without invoking the potential alternative clauses at 12.2.1, 12.2.2 and 12.2.3.
34. Appeal B: The Secretary of State has had regard to the Inspector's analysis at IR510 and IR520, the planning obligation dated 18 May 2023, paragraph 57 of the Framework, the Guidance and the CIL Regulations 2010, as amended (including the subsequent handwritten amendments). He agrees with the Inspector's conclusion that the obligations comply with Regulation 122 of the CIL Regulations 2010 and the tests at paragraph 57 of the Framework. For the reasons given in IR521-523, and for clarity, the Secretary of State agrees with the Inspector that it is appropriate to make a proportionate contribution to the cost of land for a new school should this be required to meet the need for education, in accordance with Clause 13.1. He further agrees for the reasons given in IR524 that Clause 9.13 should apply, as opposed to 9.12.
35. With regard to the Appeal B obligation, following the close of the inquiry, a series of handwritten amendments were made to the Agreement and initialled by representatives of all the parties. It was confirmed that the amendments related to simple administrative errors in the creation of the final version for execution. All parties agreed to the insertion of corrective manuscript amendments, and the approach taken was with the agreement of all parties. All parties confirmed that they considered the amended version to be a valid and binding agreement, and the Secretary of State has considered it as such.

Planning balance and overall conclusion

36. For the reasons given above, and in the light of his findings set out at Paragraphs 17-31 of this letter, the Secretary of State considers that the appeal schemes are in accordance with Policies 1 and 102 of the St Albans District Local Plan, and Policy S1 of the St Stephen Neighbourhood Plan, and in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in line with the development plan.
37. As the Council is unable to demonstrate a five-year supply of housing land, paragraph 11(d) of the Framework indicates that planning permission should be granted unless: (i) the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or (ii) any adverse impacts of doing so significantly and demonstrably outweigh the benefits, when assessed against policies in the Framework taken as a whole.
38. Appeal A: Weighing in favour of the proposal is the provision of housing which carries very substantial weight; the provision of land for a primary school which carries significant weight; economic benefits which carry moderate weight; open space/recreation provision which carries limited weight; BNG provision which carries limited weight; and improved bus/cycleway provision which also carries limited weight.
39. Appeal A: Weighing against the proposal is the harm to the Green Belt from inappropriateness, harm to openness, and harm to three of the purposes of the Green

Report to the Secretary of State

by Michael Boniface MSc MRTPI

an Inspector appointed by the Secretary of State

Date 24 October 2023

Town and Country Planning Act 1990

St Albans City & District Council

Appeal A: Land south of Chiswell Green Lane, Chiswell Green, St Albans

Appeal by Alban Developments Ltd and Alban Peter Pearson, CALA Homes (Chiltern) Ltd and Redington Capital Ltd

Appeal B: Land north of Chiswell Green Lane, Chiswell Green, St Albans

Appeal by Headlands Way Ltd

Inquiry held over 8 days between 17 April 2023 – 9 May 2023
Site visit made on 10 May 2023

File Refs: APP/B1930/W/22/3313110 and APP/B1930/W/22/3312277

510. Both the Council and the County Council provided CIL Compliance Statements setting out the justification for each obligation having regard to Regulation 122 of the Community Infrastructure Levy Regulations 2010 (CIL Regulations).

Appeal A

511. Two separate legal agreements were submitted, one between the appellants and the Council, and the other between the appellants and the County Council.

512. All matters are agreed between the appellant and the Council. The obligations include, amongst other detailed provisions and requirements, contributions towards/provision of local medical facilities, leisure and cultural centres, 40% affordable housing, self-build and custom housing, open space provision and management, and measures to ensure a biodiversity net gain. I am satisfied that all the obligations are necessary to make the development acceptable and are otherwise in accordance with the CIL Regulations. I have taken them into account in making my recommendation.

513. The obligations pursuant to the agreement with the County Council include, amongst other detailed provisions and requirements, provisions for a Travel Plan and its ongoing review and implementation, libraries, education (including land), youth provision, waste disposal, bus services, sustainable travel and highway improvements. There is no disagreement between the parties in relation to the substance of the obligations. I am satisfied that all the obligations are necessary to make the development acceptable and are otherwise in accordance with the CIL Regulations. I have taken them into account in reaching my recommendation.

514. Notwithstanding the above, the detailed wording of certain provisions was not agreed between the appellants and the County Council and so Clause 12 of the agreement allows the Secretary of State to determine which wording should apply.

515. I have had regard to the submissions made by both parties but note that, whilst a representative of the County Council attended the Inquiry, he was not the legal officer responsible for the matters in dispute and no opportunity was available to test the authority's position on the disputed legal provisions. I also note that there was some inconsistency in the position taken by the County Council between Appeal A and Appeal B.

516. I am not persuaded that there are any reasonable grounds for refusing to exclude demolition from the definition of commencement. Any obligations secured are to mitigate the impacts of the development only. In any case, there is very little demolition required on the site and the likely impacts in advance of other works constituting commencement would be very small.

517. The inclusion of "or as may be amended as agreed in writing by the County Council from time to time" within the Definition of Serviced Land Specification is entirely reasonable and does not put the County Council at any risk. It provides a degree of flexibility without impacting the clarity of the obligation. The desirability or acceptability of any subsequent amendment would be entirely at the discretion of the County Council.

518. Finally, I do not accept the County Council's position that individual house owners should become liable for site-wide obligations, which would be

disproportionate, unreasonable and unrealistic. The legal agreement specifies triggers for each obligation and prevents occupations until such time as payments are made or obligations are otherwise met. I take this view, notwithstanding the position set out in the County Council's Guide to Developer Infrastructure Contributions, which is not part of the development plan.

519. It is unfortunate that the parties were not able to work more constructively in resolving these points of detail, which are not matters that should generally be left for determination by an Inspector or the Secretary of State. Nevertheless, it seems to me that the wording of the agreement is satisfactory without invoking the potential alternative clauses at 12.2.1, 12.2.2 and 12.2.3. I have considered the planning obligations on that basis and recommend that the Secretary of State takes the same approach.

Appeal B

520. A tripartite legal agreement between the appellant, Council and County Council has been submitted. The obligations include, amongst other detailed provisions and requirements, contributions towards/provision of 100% affordable housing, self-build and custom build housing, measures to achieve a biodiversity net gain, bus service improvements, education provision, local medical facilities, leisure and cultural centres, libraries, open space and play area provision, Travel Plan and its ongoing review and implementation, e-bike provision, sustainable travel and highway improvements, waste contribution and youth provision. There is no disagreement between the parties in relation to the substance of the obligations. I am satisfied that all the obligations are necessary to make the development acceptable and are otherwise in accordance with the CIL Regulations. I have taken them into account in making my recommendation.
521. Notwithstanding the above, as with Appeal A, the detailed wording of certain provisions was not agreed between the appellant and the County Council and so Clause 12 within the agreement allows the Secretary of State to determine which wording should apply to ensure that obligations are suitably secured.
522. I have had regard to the submissions made by both parties but again, whilst a representative of the County Council attended the Inquiry, he was not the legal officer responsible for the matters in dispute and no opportunity was available to test the authority's position on the disputed legal provisions.
523. The appellant accepts that the Primary Education (Land Purchase) Contribution is necessary in the event that both appeals are allowed. I agree that it is appropriate to make a proportionate contribution to the cost of land for a new school should this be required to meet the need for education, in accordance with Clause 13.1.
524. The second area of dispute mirrors that of Appeal A, in that the County Council seeks to make individual homeowners liable for site-wide obligations. For the same reasons as above, I do not consider this to be appropriate, and Clause 9.13 should apply, as opposed to 9.12. I have considered the planning obligations on this basis and recommend this approach to the Secretary of State.

Inspector's Conclusions

From the evidence before me at the Inquiry, the written representations, and my inspection of the application site and its surroundings, I have reached the

APPENDIX 3

Extracts from the Chiswell Green S106

THIS DEED is dated

19 May

2023

BETWEEN

- (1) HERTFORDSHIRE COUNTY COUNCIL of County Hall Hertford Hertfordshire SG13 8DE ("**the County Council**")

And

- (2) THE EXECUTORS OF THE ESTATE OF STANLEY HERBERT DAVIES, HANNAH LOUISA COURTNEY of Flat A,9 Park Road, Surbiton, KT5 8QA and STEPHANIE AMELIA COURTNEY of 10 Almondbury Road, Booragoon 6154, Western Australia ("**First Owner**")

And

- (3) GEOFFREY STANLEY DAVIES of Flat 5, The Royalty, 60 Bargates, Christchurch BH23 1QL and HANNAH LOUISA COURTNEY of Flat A,9 Park Road, Surbiton, KT5 8QA and SOPHIE LOUISE RIGLEY of 99 Mendip Way, Luton, LU3 3JJ ("**Second Owner**")

And

- (4) ALBAN PETER PEARSON of Vienna House, 3 Park Avenue South, Harpenden, AL5 2DZ ("**Third Owner**")

And

- (5) ALBAN DEVELOPMENTS LIMITED incorporated and registered in England and Wales with company number 00752953 whose registered office is at Vienna House, 3 Park Avenue South, Harpenden, AL5 2DZ ("**Fourth Owner**")

And

- (6) CALA MANAGEMENT LIMITED incorporated and registered in Scotland under Scottish Company Number SC013655 whose registered office is at Adam House, 5 Mid New Cultins, Edinburgh, EH11 4DU ("**Cala**")

And

- (7) REDINGTON DEVELOPMENTS (CHISWELL GREEN) LIMITED incorporated and registered in England and Wales with company number 11658888 whose registered office is at Spitalfields House 1st Floor, Stirling Way, Borehamwood, England, WD6 2FX ("**Redington**")

an irrevocable licence at all reasonable times to enter the such parts of the Site to inspect any of the works to be carried out for the purposes of the Development and any materials to be used in carrying out those works for any purpose directly or indirectly connected with or contemplated by this Deed.

- 8.11 The Owner shall give the County Council prior written notice of any change of interests in the Site occurring before all of the obligations under this Deed have been discharged such notice to give details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Site purchased by reference to a plan.
- 8.12 SAVE where Clause 12.2 applies, the obligations in this Deed will not be enforceable against owners of individual Dwellings nor against those deriving title from them nor their mortgagees or charges save for where there are restrictions on the Occupation of the Dwellings then such restrictions on Occupation shall bind the owners occupiers or tenants of the Dwellings who shall not Occupy any Dwelling in breach of such restrictions.
- 8.13 The obligations in this Deed will not be enforceable against any Statutory Undertaker with any existing interest in any part of the Site or acquires an interest in any part of the Site for the purpose of the supply of electricity gas water or sewerage drainage or public telecommunication services
- 8.14 Any future mortgagee or chargee agrees that the security of the charge over the Site shall take effect subject to this Deed PROVIDED THAT the mortgagee shall otherwise have no liability under this Deed unless it takes possession of the Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner.
- 8.15 No person shall be liable for any breach of any of the planning obligations or other provisions of this Deed after it shall have parted with its entire interest in the Site but without prejudice to liability for any subsisting breach arising prior to parting with such interest.
- 8.16 Any money payable to the County Council under this Deed shall be paid in full without deduction or set-off (unless expressly permitted in accordance with the terms of this Deed) and if not paid on the date due shall in every case bear Interest on so much thereof as shall from time to time be due and owing from the date the payment was due to the date of actual payment.

9. WORKS AND TRAFFIC CALMING ON STANLEY AVENUE

If the Department for Transport Technical Design Standards or Advice is amended after the date of this Deed the Director shall be at liberty to review the Works and the Traffic Calming On Stanley Avenue and require any amendments he deems necessary to ensure that the said works comply with the revised standards and advice SAVE THAT in circumstances where detailed contract drawings have been approved in writing by the Director and the Works and the Traffic Calming on Stanley Avenue are commenced within three months of the date of the written approval then the Director shall not

seek any amendments to the Works and/or the Traffic Calming on Stanley Avenue .

10. CALA'S and REDINGTON'S CONSENT

10.1 Cala hereby consents to the Owner entering this Deed and agrees that its interest in the Site shall take effect subject to this Deed

10.2 Redington hereby consents to the Owner entering this Deed and agrees that its interest in the Site shall take effect subject to this Deed

11. VALUE ADDED TAX

All consideration given in accordance with the terms of this Deed shall be exclusive of any valued added tax properly payable.

12. APPEAL: MATERIALITY AND DECISION LETTER

12.1 If the Secretary of State or his Planning Inspector for the purposes of the determination of the Appeal shall in his decision letter for the Appeal clearly and expressly indicate that one or more of the planning obligations secured by this Deed are incompatible with any one or more of the criteria for planning obligations set out at Regulation 122(2) of the CIL Regulations, and/or that any such obligation is not a material planning consideration in respect of the determination of the Appeal and/or that he attaches no weight to the relevant obligation(s) for the purposes of his determination then the relevant obligation so expressly specified in the decision letter shall, from the date of the decision letter cease to have effect and the Owner shall be under no obligation to comply with it (but this shall not affect the validity or enforceability of the other obligations under this Deed) and for the avoidance of doubt where the Secretary of State or his Planning Inspector is silent upon any obligations then the obligations shall apply and be enforceable by the County Council in accordance with the terms of this Deed.

12.2 In the event that the Inspector in the decision letter states that:

12.2.1 the exceptions listed in the definition of "Commencement Date" should not include "demolition" then that definition shall be deemed to read as follows:

"Commencement Date: means the date on which any material operation (as defined in Section 56(4) of the 1990 Act) forming part of the Development begins to be carried out other than (for the purposes of this Deed and no other purpose) operations consisting of site clearance, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, erection of any temporary means of enclosure, the temporary display of

site notices or advertisements and the expressions
"Commence", "Commences", "Commencement" and
"Commenced" shall be construed accordingly"; and or

- 12.2.2 the definition of "Serviced Land" should not include reference to "or as may be amended as agreed in writing by the County Council from time to time" at the end of that definition then that definition shall be read as follows:

Serviced Land: means in respect of the Education Land such land is to be provided in accordance with the terms conditions standards and specification set out in Schedule 8 to this Deed; and/or

- 12.2.3 that clause 8.12 above should be substituted then, as from the date of the decision letter, Clause 8.12 above shall be read as follows:

"Once the obligations in this Deed have been complied with then such obligations will not be enforceable against individual Dwellings nor against those deriving title from them nor their mortgagees or chargees and where there are restrictions on the Occupation of the Dwellings such restrictions on Occupation shall bind the owners occupiers or tenants of the Dwellings who shall not Occupy any Dwelling in breach of such restrictions"

13. COUNTERPARTS

This Deed may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all counterparts together shall constitute a single agreement

14. JURISDICTION

This Deed is governed by and interpreted in accordance with the law of England and Wales.

IN WITNESS whereof the parties hereto have executed this Deed by the same remains undelivered until the day and year first before written

APPENDIX 4

Extracts from the Hemel Hempstead UU

DATED 20 MARCH 2025

(1) FAIRFAX STRATEGIC LAND (HEMEL) LIMITED

TO:

(2) HERTFORDSHIRE COUNTY COUNCIL

**UNILATERAL UNDERTAKING PURSUANT TO
SECTION 106 OF THE TOWN AND COUNTRY
PLANNING ACT 1990**

relating to land at Land West of Leighton Buzzard Road,
Hertfordshire

Planning Application Ref: 21/04508/MOA



Pinsent Masons

THIS UNDERTAKING IS GIVEN ON

20 MARCH

2025

FROM:

- (1) **FAIRFAX STRATEGIC LAND (HEMEL) LIMITED** (company number 11472971) whose registered office is at Buncton Barn, Buncton Lane, Bolney, Haywards Heath, RH17 5RE ("**the Owner**")

3 Present Mersons LLP on behalf of the Owner

TO:

- (2) **HERTFORDSHIRE COUNTY COUNCIL** of County Hall Pegs Lane Hertford SG13 8DQ (the "**County Council**"),

WHEREAS:

- (A) By virtue of the 1990 Act Dacorum Borough Council ("**Council**") is the local planning authority for the purposes of this Deed for the area in which the Site is situated.
- (B) A separate bilateral agreement will be entered into between the Council and the Owner pursuant to section 106 of the 1990 Act on or around the same date of this Deed.
- (C) The County Council is the local highway authority and education authority for the area in which the Site is situated and by whom the planning obligations hereby created are enforceable.
- (D) The Owner is the freehold owner of the Site under Title numbers HD479978 and HD412894 free from encumbrances.
- (E) Following the Council's refusal of the Planning Application on 15 December 2023, the Owner lodged the Planning Appeal on 31 May 2024.
- (F) The Owner acknowledges that the Development should not take place unless certain commitments are entered into for the securing of which the Owner hereto have agreed to enter into this Deed including the provision of infrastructure and payment of contributions which have been assessed according to the projected impact of the Development.
- (G) The Owner is thereby entering into this Deed to create planning obligations pursuant to the provisions of section 106 of the 1990 Act in respect of the Site in the event the Secretary of State (or the Planning Inspector) considers that the obligations contained in this Deed meet the three tests for planning obligations as set out in Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 and therefore capable of being a material planning consideration to be taken into account by the Secretary of State (or the Planning Inspector) in determining the Planning Appeal.

THE OWNER UNDERTAKES AS FOLLOWS:

1. **DEFINITIONS AND INTERPRETATION**

The following definitions and rules of interpretation apply in this Deed (and for the avoidance of doubt additional definitions shall apply where set out in the Schedules to this Deed):

1.1 Definitions:

"1990 Act"	means the Town and Country Planning Act 1990
"1980 Act"	means the Highways Act 1980
"BCIS Index"	means the Building Cost Information Service All-in Tender Price index published from time to time

- 1.13 any words denoting an obligation on a Party to do any act matter or thing include an obligation to procure that it be done and any words placing a Party under a restriction include an obligation not to cause, suffer or permit any infringement of that restriction;
- 1.14 any words following the terms including, include, in particular, for example or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms;
- 1.15 all Parts and Schedules attached to this Deed are to be read as if the same were incorporated into the main body of the Deed; and
- 1.16 insofar as any Clause or Clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed and insofar as reasonably practicable the parties shall amend that Clause or Clauses in such reasonable manner as achieves the intention of the parties without illegality.

2. **STATUTORY PROVISIONS**

- 2.1 This Deed is made pursuant to section 106 of the 1990 Act and to the extent that they fall within the terms of section 106 of the 1990 Act, the obligations contained in this Deed are planning obligations for the purposes of the 1990 Act and are enforceable by the Council and the County Council in accordance with section 106 of the 1990 Act.
- 2.2 To the extent that any of the obligations in this Deed are not planning obligations within the meaning of the 1990 Act, they are entered into pursuant to the powers in section 111 of the Local Government Act 1972, section 1 of the Localism Act 2011 and any other enabling powers.
- 2.3 The covenants, restrictions and obligations contained in this Deed are planning obligations for the purposes of section 106 of the 1990 Act and are entered into by the Owner with the intention that they bind the interests held by those persons in the Site and their respective successors and assigns.

3. **CONDITIONALITY AND LEGAL EFFECT**

- 3.1 This Deed is conditional upon:
 - 3.1.1 the grant of the Planning Permission;
 - 3.1.2 the Commencement of Development;

SAVE FOR the provisions of Clauses 2, 3, 4.1.2, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 and 20 which shall come into effect immediately upon completion of this Deed;
 - 3.1.3 the Secretary of State or her Planning Inspector (as applicable) in determining the Planning Appeal expressly stating in the Decision Letter that in their view the obligations set out in this Deed are material planning considerations and are compliant with the statutory tests set out in Regulation 122 of the CIL Regulations provided that where the Planning Inspector or the Secretary of State (as applicable) expressly states in the Decision Letter that any one or more of the obligations set out in the Deed are not material planning considerations or do not comply with the statutory tests in Regulation 122 then the obligations so specified shall cease to have effect and the Owner shall be released from their obligation to comply with them but the remainder of this Deed and the remaining obligations herein (if there are any) shall continue to have effect (this Sub-Clause shall be referred to herein as the "**Blue Pencil Clause**"); and
 - 3.1.4 any other limitations or directions placed on the obligations as to the amount or otherwise specified by the Secretary of State or her Planning Inspector in the Decision Letter.
- 3.2 Nothing in this Deed shall prejudice or affect the rights powers duties and obligations of the County Council under private or public statutes byelaws orders and regulations (including for the avoidance

of doubt the ability to apply for or be granted any of the following: declaratory relief, injunction, specific performance, payment of any sum, damages, any other means of enforcing this Deed and consequential and interim orders and relief) and the same may be as fully effectively exercised as if they were not party to this Deed.

- 3.3 The obligations, covenants, restrictions and undertakings imposed in this Deed are planning obligations relating to the Site made pursuant to section 106 of the 1990 Act which are enforceable by the County Council as local planning authority against the Owner and which the Parties are satisfied comply with the requirements of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (save for those obligations, covenants and undertakings contained herein which are not planning obligations for the purposes of section 106 of the 1990 Act).

4. OWNER'S COVENANTS

- 4.1 The Owner covenants with the County Council:

- 4.1.1 to observe and perform or cause to be observed and performed the obligations and covenants contained in the Schedules;
- 4.1.2 to give the County Council at least 20 Working Days' written notice of the intended Commencement Date using the proforma set out in Schedule 5;
- 4.1.3 to give the County Council no less than five (5) Working Days' notice of the first Occupation of the Development such notice to be in writing using the proforma set out in Schedule 5; and
- 4.1.4 to give the County Council no less than five (5) Working Days' notice of the completion of the Development such notice to be in writing using the proforma set out in Schedule 5.

5. INDEXATION

- 5.1 All financial contributions payable to the County Council shall be Index Linked.
- 5.2 Where reference is made to an index and that index ceases to exist or is replaced or rebased then it shall include reference to any index which replaces it or any rebased index (applied in a fair and reasonable manner to the periods before and after rebasing under this Deed) or in the event the index is not replaced, to an alternative reasonably comparable basis or index as the County Council shall advise the Owner in writing.
- 5.3 Where any sum to be paid to the County Council under the terms of this Deed is required to be Indexed then an interim payment shall initially be made based on the latest available figure (or figures as the case may be) at the date of payment and any payment or payments by way of adjustment shall be made within ten (10) Working Days of written demand by the County Council or the payer of the interim payment (as the case may be) once the relevant Index has been finalised.
- 5.4 Any money payable to the County Council under this Deed shall be paid in full without deduction or set-off and if not paid on the date due shall in every case bear interest at the Default Interest Rate on so much of the sum thereof shall from time to time be due and owing from the date the payment was due to the date of actual payment.

6. EXCLUSIONS OF LIABILITY AND RELEASE

- 6.1 Pursuant to the Blue Pencil Clause at Clause 3.1.3, either Option A or Option B shall bind the Owner such as the Secretary of State or Planning Inspector (as applicable) confirms this within the Decision Letter:-

6.2 Option A:-

- 6.2.1 The obligations contained in this Deed shall not be binding upon nor enforceable against:

- (a) any individual owner-occupier of a Dwelling or their successors in title;
- (b) any statutory undertaker or other person who acquires any part of the Site or interest therein for the purposes of the supply of heat cooling electricity gas water drainage telecommunication services or public transport services;
- (c) any future mortgagee or chargee shall not be personally liable for any breach of the obligations in this Deed unless committed or continuing at a time when the mortgagee or chargee is in possession of all or any part of the Site PROVIDED THAT a mortgagee or chargee shall only remain liable for the part of the Site for which it has an interest.

6.2.2 No person shall be liable for any breach of a covenant, restriction or obligation contained in this Deed after parting with all of its interest in the Site or the part in respect of which such breach occurs, except in respect of any breach subsisting before parting with that interest.

6.3 **Option B:-**

- 6.3.1 The obligations contained in this Deed shall not be binding upon nor enforceable against individual owner occupiers once the obligations have been fully complied with.
- 6.3.2 Any future charge over the Site shall take effect subject to this Deed PROVIDED THAT the future mortgagee shall otherwise have no liability under this Deed unless it takes possession of any part of the Site in which case it too will be bound by the obligations relevant to that part of the Site as if it were a person deriving title from the Owner.
- 6.3.3 No person shall be liable for any breach of a covenant, restriction or obligation contained in this Deed after parting with all of its interest in the Site or the part in respect of which such breach occurs, except in respect of any breach subsisting before parting with that interest.
- 6.3.4 The obligations contained in this Deed shall not be binding upon nor enforceable against any statutory undertaker or other person who acquires any part of the Site or interest therein for the purposes of the supply of heat cooling electricity gas water drainage telecommunication services or public transport services

7. **DETERMINATION OF DEED**

7.1 The obligations in this Deed (with the exception of Clause 9) shall cease to have effect if before the Commencement of Development, the Planning Permission:

- 7.1.1 expires;
- 7.1.2 is varied or revoked other than at the request of the Owner; or
- 7.1.3 is quashed following a successful legal challenge.

8. **LOCAL LAND CHARGE**

This Deed is a local land charge and shall be registered as such.

9. **COSTS**

The Owner shall pay to the County Council on or before the date of this Deed the County Council's reasonable and proper legal costs together with all disbursements incurred in connection with the preparation, negotiation, completion and registration of this Deed up to the amount of £12,000.

APPENDIX 5

Extracts from the Hemel Hempstead decision



Appeal Decision

Inquiry held between 5 February 2025 and 6 March 2025

Site visits made on 5 and 7 March 2025

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th August 2025

Appeal Ref: APP/A1910/W/24/3345435

Land west of Leighton Buzzard Road, Hemel Hempstead HP1 3LP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant outline planning permission.
 - The appeal is made by Fairfax Strategic Land (Hemel) Ltd against the decision of Dacorum Borough Council.
 - The application Ref is 21/04508/MOA.
 - The development proposed is the erection of up to 390 dwellings (C3 Use), including up to 50% affordable housing and 5% self-build, a residential care home for up to 70-beds (C2 use), along with associated landscaping and open space with access from Leighton Buzzard Road.
-

Decision

1. The appeal is allowed, and outline planning permission is granted for the erection of up to 390 dwellings (Use Class C3), including up to 50% affordable housing and 5% self-build, a residential care home for up to 70-beds (Use Class C2), along with associated landscaping and open space with access from Leighton Buzzard Road at land west of Leighton Buzzard Road, Hemel Hempstead HP1 3LP in accordance with the terms of the application, Ref 21/04508/MOA, subject to the conditions in the attached schedule.

Applications for costs

2. The appellant has sought a partial award of costs against Dacorum Borough Council (the Borough Council) and Hertfordshire County Council on separate matters. Furthermore, the County Council has sought a partial award of costs against the appellant. These are the subject of separate decisions.

Preliminary Matters

3. The Gade Valley Communities Coalition, a combined objectors group (the Group) was granted Rule 6 status under the Inquiry Procedure Rules and participated in the Inquiry.
4. The planning application to which this appeal relates was made in outline, with all matters, except for access, reserved for future consideration. The submitted Master Plan is illustrative, whereas the Parameters Plan (Ref: 2037/PL03M) and highways plans (Refs: SK21611-04 Rev A and SK21611-05 Rev B) form part of the submitted details to be determined through this appeal.
5. An amendment to the description of the proposed development has been agreed between the Borough Council and appellant to reflect an uplift in the affordable

submitted bilateral legal agreement and unilateral undertaking are the legal means to secure the proposed planning obligations.

161. However, the County Council raised concerns about the approach taken by the appellant in respect to liability in the drafting of the initially proposed trilateral legal agreement with the Borough Council and the appellant. As the County Council declined to enter into that original agreement, the appellant converted the content into a bilateral agreement with the Borough Council and a unilateral undertaking for obligations relating to the County Council's functions. A consensus between the appellant and the County Council on this matter could not be secured in the lead up to the Inquiry sessions.
162. The unilateral undertaking includes 'Option A' at Clause 6.2, which is the appellant's preference and is consistent with the approach taken by the Borough Council in respect to the bilateral agreement; and 'Option B' at Clause 6.3, which is that preferred by the County Council. A 'blue pencil' clause has been inserted at Clause 3.1.3 of the undertaking to enable me to adjudicate on this matter. This disputed matter was a source of discussion at the round table discussion on planning obligations. It remained unresolved by the close of the Inquiry and has generated applications for costs from both the appellant and the County Council against one another.
163. Regardless of my adjudication on this particular disputed matter, the appellant's actions are a reasonable means to ensure that they have been able to provide legal documents capable of securing the necessary planning obligations to support their proposals and so address the Borough Council's earlier reasons for refusal associated with them.
164. The County Council's approach has the effect of placing liability on individual property owners of the appeal scheme should the developer fail to comply with any of the obligations contained within the unilateral undertaking. The County Council have advised that this is to ensure that the public purse is not burdened by any non-compliance. This could amount to a considerable sum for those occupants, depending on the extent of any non-compliance. However, during the round table discussion the County Council stated that it would be highly unlikely that they would ever initiate that clause against property owners. Whereas the appellant stood very firm that there are other remedial courses of action open to the County Council should that scenario ever arise. They believe that the County Council's approach could have far reaching consequences on delivery from the outset in terms of securing grant funding opportunities to assist in the delivery of affordable housing and also the ability of prospective purchasers to secure mortgages.
165. Both the appellant and the Borough Council do not follow the approach of the County Council in respect to liability for the planning obligations contained within the bilateral agreement. I find that the County Council's preferred wording is not appropriate here because the references to limiting and restricting occupation of dwellings against individuals means that the County Council could in theory enforce against individuals.
166. Significantly, during the Inquiry my attention was drawn to the Chiswell Green Decision⁶ involving the County Council where their approach was clearly rejected by both the Inspector and the Secretary of State. In that case the County Council's

⁶ Document Ref: CD 8.28.

approach was found to be disproportionate, unreasonable and unrealistic. Crucially, the evidence before me, including costs submissions made by the County Council after the close of the Inquiry, does not lead me to justify an alternative stance to the Chiswell Green Decision.

167. Therefore, Clause 6.2.1 of the submitted unilateral undertaking, which does not place liability on the individual property owners, is that which shall take force for the purposes of implementing the submitted unilateral undertaking and ensuring future compliance with it.
168. The scope, nature and level of each planning obligation to be secured through the submitted legal agreements do not conflict with the local and national planning policy frameworks. I am satisfied that the Borough Council's submitted Compliance Statement demonstrates that each planning obligation is necessary to make the development acceptable in planning terms; is directly related to the development and; is fairly related in scale and kind to the development.
169. As such, each proposed planning obligation accords with the provisions of Regulation 122(2) of the Community Infrastructure Levy Regulations (2010) and the tests for planning obligations set out in the Framework and Planning Practice Guidance (PPG). Therefore, I have taken them into account in my assessment.

Conditions

170. A schedule of planning conditions was agreed between the main parties during the Inquiry. I agree that following some extensive redrafting by the parties these now meet the prescribed tests set out in the Framework and PPG. These include several pre-commencement conditions which are unavoidable in view of the matters in question and the outline nature of the scheme and its individual components. The appellant has confirmed their acceptance of all of these conditions.
171. Condition Nos 1, 2 and 3 are necessary to define the scope of the planning permission and timescales which would assist in accelerating its delivery. Condition Nos 4, 5 and 6 are necessary in order to secure the agreement and implementation thereafter of an Archaeological Written Scheme of Investigation; the associated site investigation and post investigation assessments; and mitigation. Condition Nos 7 and 8 are necessary to ensure that a coordinated approach to the various interdependencies between the different components of the approved scheme is secured at the reserved matters stage. Condition Nos 9, 10, 11, 12 and 13 are necessary to ensure that site specific design, landscaping, layout and appearance matters are addressed as part of the reserved matters applications.
172. Condition No 10 is also necessary to ensure that an appropriate waste and construction management plan is implemented throughout the course of the development phase to safeguard the interests of local residents and environmental assets. Condition Nos 14, 15, 16, 18, 27, 28, 31 and 32 set out technical drainage requirements, management arrangements, mitigation and verification for each phase of development and are necessary in the interests of avoiding flood risk within the site and off site, including on the public highway.
173. Condition No 17 necessarily seeks to secure improvements to the local public rights of way network to encourage active travel and mitigate against the potential effects of increased footfall.



Costs Decision

Inquiry held between 5 February 2025 and 6 March 2025

Site visit made on 5 and 7 March 2025

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th August 2025

Costs application in relation to Appeal Ref: APP/A1910/W/24/3345435

Land west of Leighton Buzzard Road, Hemel Hempstead HP1 3LP

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Fairfax Strategic Land (Hemel) Ltd for a partial award of costs against Hertfordshire County Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for development proposed.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

The submissions for Fairfax Strategic Land (Hemel) Ltd

2. An application for a partial award of costs against Hertfordshire County Council on procedural and substantive grounds was submitted in writing. The application was made following the refusal of the County Council to exclude individual liability for all obligations, and notably the financial obligations entered into in favour of them under a section 106 legal agreement.
3. The applicant has submitted a detailed account of the interaction between the parties since July 2024.
4. In summary, the applicant highlights that in general, all parties to an appeal are expected to behave reasonably to support a timely and efficient process. Unreasonable behaviour is claimed because firstly, this position was expressly considered and rejected by the Inspector and the Secretary of State in the recent Chiswell Green appeal decision¹. Secondly, the appellant states that the County Council refused to agree to a 'blue pencil' clause in a substantially agreed section 106 agreement to allow the applicant's alternative drafting on the exclusion of the liability to be considered by me, as the appointed Inspector.
5. The partial award sought relates to the costs of amending the initial legal agreement in order to respond to the County Council's position; the preparation thereafter of a unilateral undertaking with a blue pencil clause on liability given that common ground could not be reached; contacting the County Council in a bid to resolve the disputed matter; and resources to address the particular matter during the Inquiry sessions.

¹ Document Ref: CD8.28

21. As such, there is no basis for suggesting that the County Council's position on the blue pencil clause in this case is supported by the Tring decision. Whereas, in the more recent Chiswell Green case, which did include a blue pencil clause, it is clear that the Inspector's decision was made in the full knowledge of the County Council's position.
22. Consequently, the County Council has not demonstrated that its preferred approach to liability is reasonable and has been found so by the Secretary of State.
23. Nonetheless, it is not the stance of the County Council on the wording itself which is concerning here. Rather, it is the manner in which that unfolded and the consequences of that on the applicant's purse and Inquiry time that is. It is plainly unreasonable for a party to refuse to include a blue pencil provision to allow an Inspector to determine a disputed issue which could be determinative to the outcome of an appeal.
24. It is clear to me that despite the applicant's attempts both in the lead up to and during the Inquiry, the chronology of events before me demonstrates a clear unwillingness on the County Council's part to engage constructively with the applicant to employ a remedy to assist my adjudication, given the disputed matter ultimately related to the question of whether or not necessary planning obligations could be secured.
25. It is true that a bilateral legal agreement is not the only mechanism available to an applicant. However, the alternative unilateral undertaking avenue can potentially be less favourable to the appellant in terms of securing claw back on unspent sums at the very least. It was not an avenue that the Borough Council favoured.
26. The failure to provide legally compliant and enforceable planning obligations which meet the prescribed tests is a ground for dismissal regardless of the merits of an appeal scheme. Hence, the disputed issue is a matter that falls squarely within my remit. It was wholly unreasonable for the County Council to have effectively held the applicant hostage by declining to accept a blue pencil clause simply because it "is not an approach which the County Council wishes to put to the Inspector's discretion"³; and that is the case, whether or not that was the intention.
27. Furthermore, it is equally unreasonable for the County Council to have persistently insisted upon the drafting in a section 106 agreement in the knowledge that, in the more recent Chiswell Green Decision, the Inspector and Secretary of State indicated that the County Council's approach to liability is unacceptable, particularly given that legal agreement did include a blue pencil clause which allowed that adjudication to take place.
28. The County Council has provided no convincing reason for departing from the Chiswell Green Decision in this case. In that instance the County Council's approach was found to be disproportionate, unreasonable and unrealistic. In determining the appeal which gave rise to this application for costs, I also rejected the County Council's approach to liability for necessary planning obligations for the reasons set out in my Decision.

³ Communication between the County Council and Pinsent Masons on behalf of the applicant dated 21 January 2025.

29. The fact that the County Council indicated during the round table discussion that it had no intention of enforcing the obligations against individual occupiers only serves to heighten the level of unreasonableness displayed.
30. This all amounts to unreasonable behaviour on the County Council's part on both procedural and substantive grounds. This directly resulted in the need for the applicant to arrange for a subsequent unilateral undertaking to be drafted along with additional communication and professional support during the Inquiry itself. Whereas a more cooperative approach would simply have led to the inclusion of a blue pencil clause in the initial section 106 agreement and discussion of the disputed issue at the scheduled round table session.
31. For the reasons given above, unreasonable behaviour resulting in unnecessary and wasted expense has occurred in respect of the applicant being compelled to convert the draft section 106 trilateral agreement into a separate unilateral undertaking and bilateral agreement in order to secure necessary planning obligations for my consideration. Furthermore, that unnecessary wasted expense extends to the preparation and response to additional communication with the County Council and the professional resource in defending the remedial course of action proposed by the applicant during the Inquiry. There is no doubt that a partial award of costs is therefore warranted.

Costs Order

32. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Hertfordshire County Council shall pay to Fairfax Strategic Land (Hemel) Ltd, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in being compelled to convert the drafted section 106 trilateral agreement into separate unilateral and bilateral agreements in order to secure planning obligations, including the expense of additional communication with the County Council and professional resource in defending the remedial course of action proposed by the applicant during the Inquiry; such costs to be assessed in the Senior Courts Costs Office if not agreed.
33. The applicant is now invited to submit to Hertfordshire County Council to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

C Dillon

INSPECTOR