

Committee Date	20 th October 2020		Agenda Item:
Address	Land At Junction With South Eden Park Road And Bucknall Way Beckenham		
Application number	19/01543/RECON	Officer: Claire Brew	
Ward	Kelsey and Eden Park		
Proposal (Summary)	Application under Section 73 of the Town and Country Planning Act 1990 to remove condition 3 (scheme to be submitted for the provision of affordable housing) of permission ref. 19/01543/FULL1 for residential development comprising erection of 6 x four storey buildings consisting of 10 four bedroom houses and 133 x one, two and three bedroom apartments together with concierges office. Construction of basement car park with 204 spaces. Central landscaped area with 10 visitor spaces cycle parking for 286 and refuse stores.		
Applicant		Agent	
Northern Land Developments Ltd		Mr John Escott Robinson Escott Planning	
Reason for referral to committee	Councillor Call-in/Major housing application		

RECOMMENDATION	APPROVE SUBJECT TO VARIATION OF CONDITION 3
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<p>KEY DESIGNATIONS</p> <p>Biggin Hill Safeguarding Area Biggin Hill Safeguarding Area London City Airport Safeguarding London City Airport Safeguarding Smoke Control SCA 21 Smoke Control SCA 9 Smoke Control SCA 18 Urban Open Space</p>

Residential Use – See Affordable housing section for full breakdown including habitable rooms					
	Number of bedrooms per unit				
	1	2	3	4 Plus	Total
Market	24	96	13	10	143

Representation summary	Neighbour letters were sent on 14/04/2020. A site notice was posted from 27/04/2020 and a press ad was displayed in the News Shopper on the 22/04/2020. Initial consultation was for a minimum of 21 days.
Total number of responses	29
Number in support	4
Number of objections	25

SUMMARY OF KEY REASONS FOR RECOMMENDATION

- The development is unviable and would not, at the current time, be able to support any on-site affordable housing. However, the proposal to remove the affordable housing requirement entirely would be contrary to BLP policy 2 and would substantially reduce the weight which the Council previously attributed to the delivery of 143 new units.
- The use of a review mechanism would enable viability to be monitored at a later stage and ascertain the ability for the development to provide some affordable units or a financial sum for off-site affordable housing, should the development become more viable in the future.
- Having regard to the presumption in favour of sustainable development and to support the Government's objective of significantly boosting the supply of homes, condition 3 should not be deleted but should be varied to require a S106 obligation to be entered into to review viability at a later stage and provide for any affordable units or a payment in lieu towards off-site provision.

1. LOCATION

- 1.1 The application site is a roughly triangular shaped parcel of land approximately 1.44 hectares in area located to the east of South Eden Park Road which is located to the south of the B251 Hayes Lane roundabout. The site is located approximately 1.3km to the south of the centre of Beckenham and approximately 3km to the west of Bromley town centre.

- 1.2 The application site is designated as Urban Open Space in the London Borough of Bromley Unitary Development Plan (2006).
- 1.3 The site is accessed off of South Eden Park Road via a gated drive "North Drive" which curves around the north-eastern edge of the site. The site itself comprises grass and scrub land and a number of trees including a green link of mature trees and hedgerow along the eastern side of the site connecting to Bucknall Way to the south. There a number of trees with preservation orders (TPOs) located on the western edge of the site.
- 1.4 Part of the site has historically been used for the storage of cars from the nearby car dealership.

2. PROPOSAL

- 2.1 Planning permission was granted on 5th December 2019 for a development of 143 new residential units on land situated at South Eden Park Road, Beckenham BR3 6XQ. The permission was subject to a number of conditions. Condition 3 of the permission required a scheme for the provision of affordable housing (35%) to be submitted to and approved in writing by the local planning authority.
- 2.2 This permission was also subject to a S106 legal agreement dated 5 December 2019 requiring contributions to health and education infrastructure and a carbon off-setting payment, totalling £1,069,656. The applicant has confirmed that they intend to pay the full CIL and s106 payments in accordance with the s106 agreement and develop out the entire scheme within a sensible time-frame as a single phase.
- 2.3 Following the issue of permission 19/01543/FULL1, and as part of the preparation work necessary to enable implementation of the scheme, the applicant commissioned a full Financial Viability Appraisal (FVA) of the proposed development. The applicant's financial appraisal concludes that the proposed Section 106 Obligations and the Community Infrastructure Levy payment, which together total £2,701,787, is the maximum that the scheme can afford in order to enable the development to be viable. They therefore wish to have the condition requiring the submission of the affordable housing scheme deleted.
- 2.4 Despite the applicant's findings in their FVA that the scheme would generate a deficit in the order of £15 million, the applicant has made a financial offer to the Council of £345,000 which they envisage could supplement the agreed financial obligations.

3. RELEVANT PLANNING HISTORY

- 3.1 **18/00103/ELUD:** Use of land shown coloured yellow, red and white on the submitted drawing ref.15124 S103 J for the storage of cars or for the parking

of cars or as a car park in association with car dealerships. Lawful Development Certificate (Existing): Lawful use certificate granted on 26.02.2020.

- 3.2 **19/01543/FULL1:** Residential development comprising erection of 6 x four storey buildings consisting of 10 four bedroom houses and 133 x one, two and three bedroom apartments together with concierges office. Construction of basement car park with 204 spaces. Central landscaped area with 10 visitor spaces cycle parking for 286 and refuse stores: Permitted subject to S106 legal agreement on 5th December 2019
- 3.3 **18/04519/DET:** Details of appearance, landscaping and scale pursuant to outline permission DC/16/02613/OUT allowed at appeal on 22.03.2018 for the residential development comprising of 105 units with a mixture of 4 bedroom houses and one, two and three bedroom apartments together with concierges office and associated basement car parking. Approved on 26.02.2019.
- 3.4 **16/02613/OUT:** Residential development comprising of 105 units with a mixture of 4 bedroom houses and one, two and three bedroom apartments together with concierges office and associated basement car parking (OUTLINE APPLICATION): Allowed at appeal on 22.03.2018
- 3.5 **17/00757/OUT:** Residential development comprising 15 four storey townhouses and 52 apartments in three and four storey blocks to provide a total of 67 residential units together with concierges office and basement car parking (OUTLINE APPLICATION): Allowed at appeal on 22.03.2018

Other relevant developments in the area include those at the site directly to the north of the application site, Jacanda Lodge, North Drive, Beckenham:

- 3.6 **16/01330/FULL1:** Demolition of two detached dwellinghouses and construction of a crescent terrace of 7 three storey four bedroom plus roof accommodation townhouses with basement car parking, refuse store and associated landscaping: Permission granted on 10.10.2016. The basement proposed under application 19/01543/FULL1 would link to the basement provided at the Jacanda Lodge development.

4. CONSULTATION SUMMARY

a) Local groups:

4.1 Park Langley Residents Association:

- Developer must have been aware of policy requirement when land was acquired – addressed throughout report
- Residential values used in the FVA are a subjective assessment which could be undervalued in the future, which could improve the financial viability of the proposed scheme – addressed throughout report

- If approved, the developer should enter into a binding agreement to finance a comparable number of housing units elsewhere in the Borough – addressed throughout report

4.2 Langley Park Residents Association:

- Support applicant's assertion that this location does not support on-site affordable housing for the following reasons:
 - Affordable housing places additional stress on local medical, welfare and educational facilities – addressed at para.6.23
 - There is already significant affordable housing being provided at the Langley Court development – addressed in paragraph 6.45
 - The proposed development is a high quality, gated, secure environment with an estate management charge to residents, incompatible with the aims and objectives of affordable housing – addressed in paragraph 6.6
 - Applicant has offered a substantial package of contributions under S106 and CIL - addressed at paragraph 6.21 - 6.24

b) Adjoining Occupiers:

4.3 OBJECTIONS

- No justification for removal of condition 3 – addressed throughout report
- Huge shortfall in affordable housing – addressed throughout report
- Provision of affordable housing would have played a significant part in permission being granted initially – addressed throughout report
- Local housing prices are unaffordable for many front line public service staff in health and education – addressed throughout report
- Payment of sum in lieu of physical provision of affordable housing just side-steps issue – addressed throughout report
- Sum may be insufficient to provide number of affordable homes envisaged when consent for original scheme was granted – addressed throughout report
- Conceding a key requirement for affordable housing would set a precedent for future land developers - addressed in paragraph 6.65
- Should build what they promised/submit new plans – addressed through report
- Need for affordable housing will be greater as a result of the economic crisis – addressed through report
- Inspectors decision in 16/02613 should be respected as 19/01543 was only a relative minor revision – addressed through report
- As a matter of planning policy developers are expected to ensure proposals are viable, and this should take into account the potential fluctuations in costs and market conditions – addressed through report

- The Gerald Eve report applies an incorrect EUV to the site: The EUV and BLV should be based on the much smaller area of actual use, therefore resulting in a much lower EUV/BLV – addressed at paragraphs 6.11-6.15
- The Gerald Eve report stresses the very significant impact on construction costs resulting from the extent and complex nature of the unusually large basement parking area. They are not unavoidable ‘abnormal costs’ attached to the nature of the site itself – addressed in paragraphs 6.16 – 6.19
- Unknown and undemonstrated whether an FVA of another scheme with a different mix and layout would produce a different outcome – addressed in paragraph 6.28
- Do CIL and S106 contributions justify being given greater priority than provision of AH? - addressed at paragraph 6.21 - 6.24
- Density of development too high and out of keeping with the area – addressed in application 19/01543/FULL1
- Dangerous amount of traffic on South Eden Park Rd and surrounding roads, especially for school children– addressed in application 19/01543/FULL1

4.4 SUPPORT

- The land purchased is located in a premium area and a premium price has been paid for this site – addressed in paragraphs 6.11 – 6.15
- The developer has shareholders and has to maximise the return on the investment – addressed at para.6.43
- Local Authority should take responsibility for building and then housing styles can be mixed – addressed in paragraph 6.46
- Building costs for affordable housing are same as for larger properties – addressed at paragraphs 6.7 – 6.28
- Bromley needs housing and developers need all the encouragement they can get - addressed throughout report
- Affordable housing inappropriate as will place additional pressure on local medical, welfare and educational facilities - addressed at paragraph 6.21 - 6.24
- Behavioural conflicts are likely if social housing is included in what will be a high-end development – addressed in paragraphs 6.71 – 6.74
- Impact on local house prices - addressed in paragraphs 6.71 – 6.74

5. POLICIES AND GUIDANCE

National Policy Framework 2019

- 5.1 Paragraph 11 states that plans and decisions should apply a presumption in favour of sustainable development. For **decision-taking** this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

i. the application of policies in this 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 would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

5.2. In accordance with Paragraph 47 of the Framework, planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise.

5.3 Paragraph 48 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework.

5.4 Paragraphs 54 to 57 deal with planning conditions and obligations and when it is appropriate to impose them:

Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification.

5.5 Planning obligations must only be sought where they meet all of the following tests:

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 to the development.

5.6 Paragraph 60 states that in order to determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment.

5.7 Paragraph 62 goes on to explain that where a need for affordable housing is identified, planning policies should specify the type of affordable housing required, and expect it to be met on-site unless:

a) off-site provision or an appropriate financial contribution in lieu can be robustly justified; and

b) the agreed approach contributes to the objective of creating mixed and balanced communities.

National Planning Practice Guidance

5.8 Relevant paragraphs are referred to in the main assessment.

Bromley Local Plan 2019

5.9 Relevant Policies:

1 Housing Supply
2 Affordable Housing
125 Delivery and Implementation of the Local Plan

Bromley Supplementary Guidance

5.10 Relevant SPDs:

- Affordable Housing (2008) and subsequent addendums
- Planning Obligations (2010) and subsequent addendums

The 2016 London Plan

5.11 Relevant Policies:

3.9 Mixed and balanced communities
3.10 Definition of affordable housing
3.11 Affordable housing targets
3.12 Negotiating affordable housing on individual private residential and mixed use schemes
3.13 Affordable housing thresholds
8.2 Planning obligations
8.3 Community infrastructure levy

Mayor Supplementary Guidance

5.12 Relevant SPGs:

- Homes for Londoners: Affordable Housing and Viability (2017)
- Housing (March 2016)
- Accessible London: Achieving an Inclusive Environment (2014)
- Sustainable Design and Construction (2014)
- Shaping Neighbourhoods: Character and Context (2014)

- Providing for Children and Young People's Play and Informal Recreation (2012)

Other Considerations

5.13 The Council's Housing Strategy 2019 – 2029 (published July 2020) confirms that Bromley, is experiencing severe affordable housing pressures. Although the borough has managed to deliver slightly above its current target for new homes in recent years, high house prices and increasing rents have meant that the demand for affordable housing dramatically outstrips supply. Homelessness applications are increasing, and the need for homes, particularly those at a social rent, is growing all the time.

Intend to Publish London Plan

5.14 The emerging plan comprises Intend to Publish London Plan (IPLP) 2019. The emerging policies of most relevance to this case include H4 (Delivering affordable housing); H5 (Threshold approach to applications); and H6 (Affordable housing tenure).

5.15 The emerging London Plan is at an advanced stage of preparation, and the Secretary of State has directed the areas where changes must be made. However, details of the way in which the Plan will deliver the aims set out in the Secretary of State's directions are not yet finalised. The Secretary of State considers that policies in the emerging Plan where no modifications have been directed (which includes the above policies), carry significant weight (as seen in a recent SoS call-in decision in the Royal Borough of Kensington and Chelsea). Where specific draft London Plan policies have been given particular weight in the determination of this application, this is discussed in this report.

6. ASSESSMENT

6.1 Section 73 of the Town and Country Planning Act 1990 (as amended) '*Determination of application to develop land without compliance with conditions previously attached*' provides, at sub-paragraph 2, that in determining such applications, the Local Planning Authority should consider only the question of the conditions subject to which planning permission should be granted, and –

- a) If they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
- b) If they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

6.2 The starting point for determining this application is the development plan and any other material considerations.

6.3 Local Plan policy 2 provides that on all housing developments capable of providing 11 or more residential units, negotiations will take place to determine the number of affordable dwellings to be provided. In negotiating the amount of affordable housing on each site, the Council will seek 35% provision with 60% social-rented/affordable rented housing and 40% intermediate provision, unless it can be demonstrated that a lower level should be sought or that the 60:40 split would not create mixed and balanced communities.

6.4 Where it has been determined that a site meets the size threshold and is suitable for affordable housing, payment in-lieu of affordable housing on site or provision in another location will be acceptable only in exceptional circumstances and where it can be demonstrated that:

- it would be impractical to transfer the affordable housing to a registered provider (RP); or
- on-site provision of affordable units would reduce the viability of the development to such a degree that it would not proceed; or
- on-site provision of affordable units would not create mixed and balanced communities and there would be benefit in providing such units at another location.

6.5 Under application ref.19/01543/FULL1 the Applicant committed to providing 35% affordable housing at a policy-compliant tenure split. At that time, the applicant gave no indication that the development would be 'unviable' or unable to provide 35% affordable housing and the application qualified for the 'fast-track' route in the Mayor of London's Affordable Housing SPG, which pre-dates the Intend to Publish London Plan. Under the fast-track route applicants are not required to produce financial viability assessments nor be subject to review mechanisms provided an agreed level of progress is made following the grant of planning permission.

6.6 Furthermore, in the two previous applications allowed at this site (with reference numbers 16/02613/OUT and 17/00757/OUT), the applicant also committed to a policy-compliant level of affordable housing. In allowing these schemes, the appeal inspector noted the significant contribution which the proposed affordable housing would make to the Borough's housing supply:

the amount of affordable housing units that would be delivered from the Appeal A scheme would more than double the total number of such units delivered in the whole Borough of the past 3 years (para 35, ref: APP/G5180/W/17/3174961 and APP/G5180/W/17/3179001).

The fact that the development will be a "*high quality, gated, secure environment with an estate management charge to residents*" does not obviate the need for it to provide affordable housing and the above policies would have applied, regardless.

Financial Viability Assessment

- 6.7 The applicant's Financial Viability Appraisal (FVA) accompanying this S73 application concludes that the proposed Section 106 Obligations and the Community Infrastructure Levy payment, which together total £2,701,787, is the maximum that the scheme can afford in order to enable the development to be viable.
- 6.8 Therefore, even without the inclusion of any affordable housing, the applicant's FVA finds that the scheme would generate a value deficit of **£15,212,133**, rendering it unviable.
- 6.9 The Council have appointed an independent consultant to assess the applicant's FVA. In trying to ascertain the residual value of the development, the Council has adopted their own assumptions on the amount and timing of income and expenditure, explaining why these differ from the Applicant's assumptions, if applicable.
- 6.10 The findings of the assessment including a comparison of the Applicant's assumptions and the Council's assumptions, are summarised below and in table 1.

Benchmark Land Value

- 6.11 One of the most significant differences of opinion between the applicant's assumptions and the Council's assumptions is with regard to the benchmark land value (BLV).
- 6.12 The Applicant's assessment of the residual value of the development is formulated from a benchmark land value based on the whole of the site having a lawful use for the storage of cars or for the parking of cars or as a car park in association with car dealerships, attributing it with a value of £3.9 million.
- 6.13 However, the plan submitted with the lawful use certificate application (CLUED) makes reference to land coloured yellow, red and white on drawing reference 15124S103J and identifies only a part of the Site along the eastern boundary as having an established use the storage of cars or for the parking of cars or as a car park in association with car dealerships.
- 6.14 Whilst the CLEUD confirms what development is lawful, it is permissive only and does not certify unlawfulness. It is open to the developer either to appeal the CLEUD or indeed revert to the Council with further arguments or evidence. Neither of those events has happened. The Council maintains that its judgment when the CLEUD was determined that there were two separate planning units and the lawful use was confined to one of them was sound. Therefore, for the purposes of assessing BLV, the Council has treated the lawful parking use as limited to the CLEUD area, not the whole site.

- 6.15 For the purpose of assessing the BLV the Council has applied a B8 open storage land value to the area with an established lawful use certificate only (approximately 3,300 sqm (35,520 sqft)), with the remainder of the Site valued as urban open space, given the Site a value of £960,000.

Gross Development Value

- 6.16 The proposed four-bedroom town houses are larger than other four-bedroom homes in this area and of a high specification, including an underground double garage and lift to each of the proposed five storeys.
- 6.17 Overall, the Council estimates that the proposed development could achieve a Gross Development Value (GDV) of £83,425,000 compared with the Applicant's proposed GDV of £80,425,000.

Construction Costs

- 6.18 The Applicant's cost consultant has provided additional material for review to justify certain costs. In addition, it also accepted certain cost reductions resulting in a revised build cost of £50,433,989 excluding contingency and inflation to mid-point.
- 6.19 The Council's review of costs indicates a total cost of £49,672,559 exclusive of contingency and inflation to mid-point

Marketing Costs

- 6.20 With regard to sale legal fees, the Applicant has applied a rate of 0.5% of GDV. Based on a total GDV of £80,425,000 and 143 dwellings, the average legal fee would be £2,812. The Council considers this to be higher than would be expected and for the purpose of their own appraisals the Council have applied an average legal fee of £1,200 per dwelling.

S106 contributions

- 6.21 The NPPG (paragraph 006) is clear that it is the responsibility of the site promoter to take into account any costs including their own profit expectations and risks and ensure that proposals for development are policy compliant. Policy compliant means development which fully complies with up to date plan policies:

Where up-to-date policies have set out the contributions expected from development, planning applications that fully comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage.

- 6.22 The assumption is that the developer is sufficiently competent to manage the project and devise and deliver a scheme that is viable (or certainly not loss making) from the outset, taking into account wherever possible the impacts of planning policy, including other S106 and CIL contributions.

- 6.23 The planning obligations entered into under application ref.19/01543/FULL1 were calculated in accordance with the Council's standard toolkit. This took into account the fact that the development was providing 35% affordable housing on the development and the calculations were adjusted accordingly. The financial contributions to health and education infrastructure and the carbon off-setting payment were found to pass the statutory tests of necessity, direct relationship to the proposed development and were fairly and reasonably related in scale and kind to the development, as required by the CIL regulations.
- 6.24 Furthermore, the applicant has not applied for the variation of the legal agreement in order to have the S106 contributions reduced/waived. The Council are only required to ascertain whether permission should be granted without complying with condition 3.

Conclusions of Council's assessment of FVA

- 6.25 Based on the Council's opinion of GDV, benchmark land value of £960,000, reviewed construction costs and a target profit of 17.5% on GDV, the development will generate a deficit of **£1,117,953**. In view of this it is unlikely the proposed development could currently support the inclusion of any on-site affordable housing.
- 6.26 This assessment of GDV is based on evidence currently available in the market. The impact of the Covid-19 pandemic on the housing market in the medium to long-term is yet to be fully revealed. As such, these values have also been considered alongside sensitivity testing.
- 6.27 Sensitivity testing has revealed that an increase in average sales values of 5% would improve viability significantly and allow for additional on-site affordable housing to be delivered, assuming that build costs do not also increase by a proportionally lower amount. However, where sales values fall, this has a more detrimental impact on scheme viability. This is particularly pertinent at the current time with greater uncertainty over the performance of the residential property market post-Covid-19.
- 6.28 There is no requirement, under current or emerging policy, for a developer to consider the financial viability of an alternative scheme (i.e. with more/less units or a different specification). This would need to be the subject of a new planning application with its own FVA.

FVA Element	Applicant Revised FVA Assumptions (Nil Affordable Housing)	Boyer Nil Affordable Housing Assumptions	Comments
Residential Accommodation	Private Sale: 133 x flats 10 x houses Totalling 14,379 sqm (154,772 sqft) NIA accommodation	Private Sale: 133 x flats 10 x houses Totalling 14,379 sqm (154,772 sqft) NIA accommodation	Floor areas based on accommodation schedule on LBB website.
Private Residential Sales Value	£5,586 per sqm (£519 per sqft)	£5,802 per sqm (£539 per sqft)	Private sales values based on market evidence.
Gross Development Value	£80,425,000	£83,425,000	
Benchmark Land Value	£3,900,000	£960,000	Based on EUV plus a 20% premium.
Construction Costs	£50,433,989	£49,672,559	Based on cost review prepared by SFA.
Contingency	5% of build costs	5% of build costs	
Professional Fees	10% of construction costs	10% of construction costs	Standard allowance for this stage of a development project.
S106 Contributions	£1,069,656	£1,069,656	Estimate provided by Applicant. Costs TBC by Council.

CIL	MCIL2: £1,632,131	MCIL2: £1,632,131	Boyer MCIL rate based on net increase of 27,366 sqm (GIA) and adjusted to reflect indexation.
Sales Agent Fee	1% of GDV	1% of GDV	Typical market rate.
Marketing Costs	1% of GDV	1% of GDV	Typical market rate.
Sales Legal Fee	0.50% of GDV	£1,200 per unit	Typical market rate.
Finance Rate	6.50% pa	6.50% pa	Inclusive of arrangement and exit fees.
Total Costs	TBA	£69,997,578	Applicant's total cost figure will need to be re-assessed based on revised build costs.
Developer Profit (on GDV)	Residential: 17.5% £14,074,375	Residential: 17.5% £14,599,375	Considered to reflect the commensurate level of developer risk.
Viability Output	-£15,212,133	-£1,117,953	Proposed development indicated to be financially non-viable.

Table 1: Comparison of FVA assumptions

Need for a Viability Review Mechanism

6.29 The applicant argues that there is no policy support to justify the imposition of viability review mechanisms. The applicant refers to two appeal decisions. In the Lewisham appeal (dated 22nd Jan 2020) the Inspector noted the absence of a development plan requirement for a late stage review in Lewisham and that whilst the emerging London Plan sought to make late stage reviews a requirement of the development plan, at that time objections remained. She said (at [149]):

It is probable that the inconsistency with the LonP will be resolved with adoption of the NLonP, but at the present time, there is no pressing case for a late stage review for a scheme such as this, where development is proposed to be completed in a single phase. The lack of a late stage review would not conflict with the requirements of LonP policy 3.12, the Mayor's Affordable Housing and Viability SPG, Lewisham CS policy 1 and DMLP policy DM7. This element of the S106 Agreement is unnecessary to make the development acceptable in planning terms and does not meet the relevant criteria set out in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010.

6.30 The Secretary of State endorsed the Inspector's conclusions (at [24]) stating that there is "*no pressing case for a late stage review for a scheme such as this, where development is proposed to be completed in a single phase*".

6.31 The Notting Hill Gate appeal decision, is more recent and postdates the Secretary of State's directions letter of March this year. Having noted paragraph 48 of the NPPF, which states that decisions makers may give weight to relevant policies in emerging plans according to: (1) the stage of

preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework, the Secretary of State stated (at [13]) that the emerging policies in the Intend to Publish London Plan which were relevant would carry significant weight on the basis that no modifications had been directed. In the particular circumstances of that case, however, the s.106 obligation imposing a late stage review was held *not* to be CIL compliant since the review and the provision of off-site housing to be funded did not satisfy the necessity requirement.

- 6.32 These two appeal decisions are instructive. The Notting Hill decision shows that the Secretary of State has recently placed significant weight on policies in the London Plan Intention to Publish Version where there are no modifications to be made to them. While there is an issue with a supplemental agreement it is clear that that the principle of late-stage reviews is agreed with.
- 6.33 However, in the Lewisham case where a development was proposed to take place in a single phase, rather than over an extended period of time, there was no “*pressing case*” for a late stage review.
- 6.34 These decisions are material considerations to be taken into account. However, they are specific to the facts of the developments under assessment. They do not form binding precedent that late stage review mechanisms can never be sought.
- 6.35 The Council’s approach in imposing review mechanisms will need to follow the statutory process and take into account the Government’s policy in the NPPF.
- 6.36 In relation to the statutory development plan, it is correct that the Bromley Local Plan 2019 does not refer to late stage reviews; it does not consider review mechanisms. The London Plan 2016 appears to support affordable housing reviews only where a proposal would take “many years to implement” (see Policy 3.12B and the definition of ‘Contingent Obligations’). It is also correct to note that the Mayor’s SPG, which supports the possibility of a late stage review, has been held to be inconsistent with the statutory plan: see *R (McCarthy and Stone Retirement Lifestyles Ltd. and others) v Mayor of London* [2018] PTSR 1996.
- 6.37 The London Plan Intend to Publish Version (which was published in December 2019 and shows changes in response to the Inspectors’ recommendations) sets out in Policy H5 the threshold approach to affordable housing and the requirement for review mechanisms. In particular, it deals specifically with scheme amendments and section 73 applications and deeds of variations and provides (at J) that any proposed amendments that result in a reduction in affordable housing should be rigorously assessed under the Viability Tested Route. In such instances, a full viability review should be undertaken that reconsiders the value, costs, profit requirements and land value of the scheme. Viability Tested schemes will be subject to a viability review (see F).

- 6.38 There are no outstanding objections to draft Policy H5 (which there was at the time of the Lewisham decision) and the Secretary of State has not directed that any modifications needed to be made to it in the Intend to Publish version. Bearing in mind the Secretary of State's decision in the Notting Hill case that the emerging policies in the Intend to Publish London Plan carry significant weight on the basis that no modifications had been directed; Officers therefore attribute emerging policy H5 significant weight. This is in accordance with paragraph 48 of the NPPF.
- 6.39 The applicant has confirmed that the development will be built-out in a single phase and that, due to the underlying basement structure which will need to be in place first, it is not possible to build-out and occupy the blocks individually.
- 6.40 Policy H5 of the London Plan Intend to Publish Version provides for affordable housing reviews, including late stage reviews. Officer's therefore opine that, despite the fact the development will be built out in a single phase, this does not obviate the need for a late stage review mechanism.
- 6.41 The Council considers that an early stage review would only be triggered if the development did not commence within 2 years. Therefore, in the event the development is implemented immediately (as the applicant has indicated) there would be no obligation on the applicant's part to carry out the early stage review.
- 6.42 The applicant also contends that the use of reviews would affect their ability to fund the scheme, particularly in the current climate, and the potential deterioration of market conditions.
- 6.43 However, it is the Council's view that a late stage review will only require an additional payment if the scheme is found to generate a surplus above and beyond the agreed target profit rate. All actual development costs and sale values should be taken into account at the date of the review. If these are higher or lower it will not erode the profit as a % of GDV (this includes finance costs). The developer will still be receiving its profit of 17.5% of GDV which will result in a greater profit sum where GDV has increased. The financier should understand that a review will not reduce the profit allowance or the ability to repay the borrowed sums as this will be a permitted development cost.
- 6.44 On the other hand, if the market has deteriorated and GDV is lower and / or build costs have increased, the review will find that there is no additional sum to pay. The Council's view therefore is that there is no additional risk to the financier in including a late stage review – a top-up payment will only be required where there is clearly a 'super profit' and even then this is usually divided between council and developer so as not to dis-incentivise the developer from improving viability/profitability.
- 6.45 Delivering more genuinely affordable housing is a key strategic issue for London. Meeting the need for circa 43,500 affordable homes per year, as

established in the 2017 Strategic Housing Market Assessment, will require an increase in affordable housing contributions from all sources. All schemes are expected to maximise the delivery of affordable housing and make the most efficient use of available resources.

- 6.46 Despite the provision of affordable housing on other sites in this area, there remains a pressing need for affordable housing in Bromley. According to the Council's housing Strategy 2019 – 2029, in 2017/2018, 574 new homes were built. 88 of these homes were made available as affordable housing. This includes affordable housing which was available on the Council's Housing Register, as well as properties which may have been made available through other providers, including shared ownership. The Council is continuing its review of options for delivering its own affordable homes on Council-owned sites, with progress being made through the securing of a recent planning permission for 25 new dwellings at Car Park, Brindley Way (ref.20/00300/FULL1).
- 6.47 The use of review mechanisms would enable viability to be monitored over the lifetime of the project and ascertain the ability for the development to provide some affordable units or a financial sum for off-site affordable housing in the future. Neither early or late stage reviews are onerous and the applicant will be in no worse a position than that projected at the time of application.
- 6.48 In this instance, the use of review mechanisms, agreed via a S106, is justifiable by virtue of ItP Policy H5 and is considered necessary to make the development acceptable in planning terms.

Section 106 Legal Agreement

- 6.49 The Mayor of London's 'Affordable Housing and Viability Supplementary Planning Guidance' (August 2017) (the "Mayor's SPG") deals specifically with review mechanisms at pages 43 to 37, and formulae are provided in Annex A. The expectation is that any review mechanism will be contained in a s.106 agreement (see, for example, paragraphs 3.64 and 3.65). 'Benchmark land value' is also defined in the SPG (at 3.37) as being "*the value below which a reasonable land owner is unlikely to release a site for redevelopment*".
- 6.50 The applicant has obtained a legal opinion from David Elvin QC who has suggested that it might not be possible to produce a satisfactory and lawful review mechanism in relation to affordable housing. He refers to the inability of a condition positively to require the payment of money in lieu.
- 6.51 Furthermore, the applicant has stated that they are not prepared to agree to the use of a review mechanism by way of a s106 agreement because "*it does not provide us with any mechanism for altering or reviewing its provisions if circumstances were to change*". The applicant has stated that they would appeal a condition that sought to impose reviews were that to be the outcome.

- 6.52 As explained in the Government's Planning Policy Guidance, it is the Council's view that the matter can be addressed through a suitable negatively worded condition that prevents the commencement of development until a s.106 agreement has been entered into to provide for the payment in lieu/provision of affordable units, if it is deemed necessary following the affordable housing review:

No payment of money or other consideration can be positively required when granting planning permission. However, where the [6 tests](#) will be met, it may be possible use a [negatively worded](#) condition to prohibit development authorised by the planning permission until a specified action has been taken (for example, the entering into of a planning obligation requiring the payment of a financial contribution towards the provision of supporting infrastructure

(Paragraph: 005 Reference ID: 21a-005-20190723)

- 6.53 The NPPG further advises:

A negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency.

However, in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases the [6 tests](#) should also be met.

Where consideration is given to using a negatively worded condition of this sort, it is important that the local planning authority discusses with the applicant before planning permission is granted the need for a planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principal terms need to be agreed prior to planning permission being granted to ensure that the test of necessity is met and in the interests of transparency.

Paragraph: 010 Reference ID: 21a-010-20190723

- 6.54 It is considered that exceptional circumstances for a negatively worded condition requiring a planning obligation could be met in this particular instance on the basis that, without such a variation to condition 3 of the existing permission, the delivery of the development would be at serious risk (since it is unviable with that condition remaining in place). Rather than remove condition 3, it should therefore be varied with a Grampian element to require a s.106 obligation to be entered into.

- 6.55 The NPPG advises on when it is appropriate to use pre-commencement conditions. Such conditions should only be used where there is a clear justification. The affordable housing condition attached to the original permission was a pre-commencement one, as were the conditions attached to the appeal schemes prior to that. This demonstrates the fundamental nature of the condition, with the affordable housing scheme needing to be agreed at the earliest stages of the development.
- 6.56 Allowing the condition to be triggered post-commencement would mean that substantial works, including the construction of the large basement, could be implemented before the legal agreement has been entered into. It would mean less certainty for all parties and potentially more problematic in enforcement terms.
- 6.57 As discussed above, the need for affordable housing remains significantly strong. In this particular instance, there is clear justification for a pre-commencement condition requiring the developer to enter into a S106 agreement to review viability by means of an early stage and a late stage review.
- 6.58 Given the uncertainty of future market conditions, securing a review mechanism through S106 would provide the Council with an assurance that, should the development become more viable, it would deliver some of the affordable housing originally promised, or a payment in-lieu towards some off-site provision.
- 6.59 Considering the weight which was originally attributed to the scheme providing 35% affordable housing, it is entirely reasonable to seek this transparency.
- 6.60 The use of such a condition would therefore meet the 6 tests set out in paragraph 55 of the NPPF, i.e. it would be:
- necessary;
 - relevant to planning;
 - relevant to the development to be permitted;
 - enforceable;
 - precise; and
 - reasonable in all other respects.
- 6.61 In accordance with the Pre-commencement Conditions Regulations 2018, the Council has written to the applicant, advising them that they intend to impose a negatively worded pre-commencement condition which will require a S106 legal agreement to be entered into, prior to the start of any development, requiring viability review by means of an early stage and a late stage review.
- 6.62 Notwithstanding the applicant's aforementioned position (at para 6.51) that they would seek to appeal any condition imposing a review mechanism and would not agree to entering into a S106 which seeks to impose a review, the

applicant has not objected, in principle, to the imposition of such a condition, in order to allow the scheme to proceed.

6.63 However, they have made clear that the condition should only be imposed if the Development Control Committee resolves not to accept the applicants offer of an affordable housing contribution of £345,000.

6.64 This offer is made by the applicant despite the findings in their FVA that the scheme would generate a deficit in the order of £15 million. The applicant asserts that:

As no affordable housing contribution is justified this money would simply supplement the CIL and education/healthcare contributions or go to your affordable housing fund. We do not need to justify further how this exact figure has been arrived at but clearly we would be avoiding appeal and delay costs if an agreement were reached and this has been taken into account in this level of offer.

6.65 There is no justification for accepting this offer in circumstances where the scheme is currently unviable, the offer is not based on any demonstrated assessment and where there is an appropriate means of capturing additional contributions/off-site affordable housing payments through a review mechanism. Accepting this offer could also set a precedent for similar means being employed by developers on other sites.

Housing Supply

6.66 The current position in respect of Bromley's Five Year Housing Land Supply (FYHLS) was agreed at Development Control Committee on 24th September 2020. The current position is that the FYHLS (covering the period 2020/21 to 2024/25) is 2,690 units, or 3.31 years supply. This is acknowledged as a significant undersupply and for the purposes of assessing relevant planning applications means that the presumption in favour of sustainable development will apply.

6.67 The NPPF (2019) sets out in paragraph 11 a presumption in favour of sustainable development. In terms of decision-making, the document states that where a development accords with an up to date local plan, applications should be approved without delay. Where a plan is out of date, permission should be granted unless 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 any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

6.68 Policy 2 of the Bromley Local Plan is not considered 'out of date' and carries full weight. The policy does not reference housing numbers, only situations where and how the policy might be applied, subject to viability. Affordable

housing is recognised as particularly important in meeting housing needs in London and the maximum reasonable amount of affordable housing should be sought when negotiating on individual schemes.

- 6.69 Therefore, while the provision of 143 units of housing would significantly boost the Borough's supply of housing and carries substantial weight, the proposal to remove the affordable housing requirement, in the absence of any mechanism to review the situation as the development progresses, would be contrary to BLP policy 2 and would substantially reduce the weight which the Council previously attributed to the delivery of the 143 new units.
- 6.70 As discussed, condition 3 should not be removed but instead should be varied to enable a future review of viability.

Other

- 6.71 Local residents have raised a number of concerns over the affordable housing being provided in this development, citing behavioural conflicts and impacts on local housing prices as a reason to remove condition 3 and provide a 100% market housing scheme.
- 6.72 The impact on local house prices is not a planning consideration. The National Planning Policy Framework (NPPF) specifies that to deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning authorities should identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand.
- 6.73 While Policy 2 of the Local Plan does state that in exceptional circumstances, where on-site provision of affordable units would not create mixed and balanced communities and there would be benefit in providing such units at another location, then a payment in-lieu of affordable housing on site or provision in another location will be acceptable. In this instance there are no demonstrable reasons as to why the provision of 35% affordable housing units at the site would not create mixed and balanced communities and the starting point in planning policy is that they should be provided on-site.
- 6.74 However, as discussed, the applicant has demonstrated that the scheme is currently unviable and the appropriate means of capturing any additional contributions/off-site affordable housing payments is through review mechanism.

7. CONCLUSION

- 7.1 The scheme is currently unviable and would not be able to support any on-site affordable housing. However, the proposal to remove the affordable housing requirement would be contrary to BLP policy 2 and would substantially reduce

the weight which the Council previously attributed to the delivery of 143 new units.

- 7.2 Policy H5 of the London Plan Intend to Publish Version provides for affordable housing reviews, including early and late stage reviews. There are no outstanding objections to Policy H5 and the Secretary of State has not directed that any modifications needed to be made to it in the Intend to Publish version. On this basis and, in accordance with paragraph 48 of the NPPF, policy H5 is afforded significant weight in determining this application.
- 7.3 The use of review mechanism agreed via a S106, and secured by condition, would enable viability to be monitored at a later stage and ascertain the ability for the development to provide some affordable units or a financial sum for off-site affordable housing in the Borough.
- 7.4 Having regard to the presumption in favour of sustainable development and to support the Government's objective of significantly boosting the supply of homes, it is therefore considered that Condition 3 of the planning permission should not be deleted but should be varied to require a S106 obligation to be entered into in order to review viability at a later stage and provide for any affordable units or a payment in lieu towards off-site provision.
- 7.5 In reaching this conclusion Officers have had regard to the statutory provisions of Section 70 of the Town and Country Planning Act 1990 and Section 38(6) of the Planning and Compulsory Purchase Act 2004 which dictate that decisions must be undertaken in accordance with the development plan, unless material considerations indicate otherwise.

RECOMMENDATION APPROVAL SUBJECT TO CONDITIONS

CONDITIONS:

REPEAT CONDITIONS IMPOSED ON APPLICATION 19/01543/FULL1; AMEND CONDITION 3 AS FOLLOWS:

3. No development shall commence on the site until a planning obligation, in accordance with section 106 of the Town and Country Planning Act 1990, has been entered into with the Local Planning Authority.

The Section 106 agreement shall include early and late stage viability review mechanisms, in terms as set out below, in order to ascertain whether it is viable to provide any affordable housing units and/or provide a financial payment towards off-site affordable units.

a) an Early Stage Viability Review which is triggered if an agreed level of progress on implementation is not made within two years of the permission being granted

b) a Late Stage Viability Review which is triggered when 75 per cent of the units in the scheme are sold or let.

The Section 106 legal agreement shall, following the carrying out of the reviews, set out the requirements for the provision of the affordable units and/or for receiving the financial contribution, as deemed necessary.

Reason: To ensure that the maximum reasonable amount of affordable housing can be secured and to accord with policy 2 of the Bromley Local Plan, policy 3.12 of the London Plan and policy H5 of the Intend to publish London Plan.

AND ADD/AMEND ANY OTHER CONDITIONS CONSIDERED NECESSARY BY THE ASSISTANT DIRECTOR (PLANNING)