

## CHESHUNT FOOTBALL CLUB

### SECTION 106 AGREEMENT – SUMMARY, LANDOWNER POSITION AND CIL COMPLIANCE

#### 1. INTRODUCTION AND BACKGROUND

- 1.1 The Section 106 agreement relates to the redevelopment of Cheshunt Football Club in respect of land at Theobalds Lane, Cheshunt (the “**Site**”) and is to be entered into between Cheshunt Sports and Leisure Limited (the “**Owner**”) (1) The Council of the Borough of Broxbourne (the “**Council**”) (2) LW Developments Limited (the “**Owner**”) (3) Co-operative Bank PLC (4) The Football Stadia Improvement Fund Limited (5) and The English Sports Council (6) (the “**S106 Agreement**”).
- 1.2 Planning application reference number 07/18/0514/F for “*Area 1 – New Stadium with capacity for up to 2000 spectators, 53 No 1 Bedroom Apartments, 62 No 2 Bedroom Apartments, 26 No 3 Bedroom Houses and 22 No 4 Bedroom Houses (163 Residential Dwellings) Highway Access works, internal roads and supporting infrastructure, Area 2 Northern Block, New facilities for Cheshunt Football Club in use classes D1, D2 and Sui Generis – matters relating to internal layout and appearance reserved. Area 3 – Western Block – New sports, community, leisure and commercial uses in use classes A1, A3, A4, A5, B1 D1 and D2 – Matters relating to internal layout reserved*” (“the Application”) was refused by the Council on 22 November 2020 and an appeal has been submitted to the Secretary of State. A public inquiry is due to start on 27 July 2021.
- 1.3 Hertfordshire County Council is the freehold owner of the Site and the Council is the long leaseholder of the Site. Neither party is willing to enter into the S106 Agreement so the only interest that the S106 Agreement binds is the 30 years leasehold interest of the Owner, which has a remaining term of 20 years.

#### The Council's Position on the Enforceability of the Obligation.

- 1.4 The freehold and long leasehold interests of the Site are not bound and the Council therefore submits that less weight should be given to the benefits and mitigation secured by the S106 Agreement. Nonetheless, in a similar situation where not all landowning parties have been signatory an “Arsenal condition” has been included within the grant of planning permission to bind those other parties should they seek to implement the permission. The PPG envisages such conditions being used only in “exceptional circumstances...where there is clear evidence that the delivery of the development would otherwise be at serious risk” (Paragraph: 010 Reference ID: 21a-010-20190723). That An Arsenal condition has not been considered appropriate here; firstly in respect of the Council not being able to enforce against itself if in breach of such a condition; and secondly in respect of the fact that the Councils would not

seek to pursue implementation of this scheme without having due regard to planning obligations.- It should however be stressed that the Council is not seeking to frustrate the outcome of this Inquiry by blockading the S106 and the Council as local planning authority would be content to become a signatory subject to resolution on the outstanding matter by the Inspector. If therefore the Inspector found that an Arsenal condition provided more comfort, were planning permission to be granted, the Council would be open to its inclusion.}

## 1.5

### The Applicant's Position on the Enforceability of the Obligation

1.6 Neither the County Council or the Council have provided any substantial justification for their decision not to enter into the s106 Agreement. The County Council have stated that their position is as follows:

*“As far as we are aware the HCC Estates Team were not consulted as landowner on the previous planning application. As such our Legal Services team have advised that HCC is not obliged to enter into a S106 Agreement.”*

1.7 HCC were formally notified of the Application as landowner and confirmed as much in writing at the time the application was submitted<sup>1</sup>. It is unclear as to why they suggest that they were not consulted. In any event, it is not clear why the landowner would be “obliged” or otherwise to enter in to any deed. What has not been offered is any explanation as to why HCC have elected not to play any part as landowner. It is understood to be a political decision.

1.8 Broxbourne Borough Council have provided a note to the Inquiry which purports to set out their reasons for not entering in to the planning obligation as land owner. This focuses on whether or not the Council should be disposing of the site and under what terms. Again, this does not seek to offer any explanation as to why the Council are not prepared to enter in to an obligation which binds the site only in relation to delivery of the development proposed by the Application and would not require or oblige any disposal of the Site. Again, this seems to be a political decision.

1.9 Regardless of the reasons offered the question is now whether any planning obligation which only binds the long leasehold interest of Cheshunt Sports and Leisure provides suitable enforceability to ensure that the development is bound.

1.10 The development permitted by the Application will be subject to the usual statutory time limits for implementation meaning that it will be commenced within three years. There is no dispute that the development would be substantially delivered within 5

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<sup>1</sup> This can be evidenced to the Inspector if so required as we hold email correspondence which shows the same.

years of implementation (indeed, there is a bond proposed to ensure that should delivery not have occurred within 5 years then the Council can step in to complete delivery). This means that all of the obligations will be discharged within the lifespan of the existing lease. Indeed, the open book viability exercise has been drafted to ensure that it occurs within the current lease.

1.11 The residual risk comes from the possibility that either the Council or HCC will dispose of their interests or grant a new leasehold interest which would subsequently not be bound. Clearly the ability of the Council's to do this is substantially constrained by the existence of Cheshunt Sports and Leisure's existing lease which provides for exclusive occupancy. In the event that Cheshunt Sports and Leisure dispose of their lease that interest will be bound, it will only be if the lease ends that the Councils will be able to create new "unbound" interests. The respective Councils are wholly in control of this and will therefore be able to ensure that any subsequent or subservient interests are bound in the future.

4.31.12 Consequently, it is considered that, notwithstanding the unexplained position of HCC and BBC, the s106 Agreement is sufficiently enforceable to be given full weight in the decision making process.

4.41.13 We set out below a summary of the main obligations in the S106 Agreement, followed in each case by a statement setting out compliance with the CIL regulations.

## 2. **DELIVERY, BOND AND TRIGGERS**

2.1 The residential element of the development (defined in the S106 Agreement as the Residential Development) is enabling development for the Commercial Development. The Council therefore requires some control over ensuring that comprehensive development of the Site as a whole comes forward. The triggers set out in Part 1 of Schedule One to the S106 Agreement are drafted to secure (i) the submission and approval of the Commercial Development until development on the Residential Development has Commenced (ii) the provision of a Bond prior to Commencement of the Residential Development (iii) the ability for the Council to step in, use the Bond and deliver the Commercial Development if the Owner has failed to complete the Commercial Development within 5 years of commencement of development on the Site and (iv) restrictions on Occupation of more than 70% of the Houses and 70% of the Apartments prior to completion of the Club House and the Stadium and Commercial Block respectively.

2.2 The value of the Bond and the identity of the Surety are to be approved prior to the provision of the Bond to the Council.

2.3 The Council has agreed to the provision of a phased Bond in that the delivery of the Houses is linked to the delivery of the Club Facilities and the Stadium and the delivery

of the Apartments is linked to the delivery of the Commercial Block. This reflects the restrictions on occupation of the Houses and Apartments and is included to allow for the respective phases to be brought forward as two separate phases. However, it does consider that there is an inevitable element of risk that it will not be able to deliver the Commercial Development as a whole if the Owner did not commence development on either the Houses or the Apartments.

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#### CIL Compliance

2.52.4 The residential element of the development is enabling development for the club facilities and the commercial development. The Council requires control to ensure that the latter are delivered in a proportionate and comprehensive fashion. The triggers the timings and the bond operate together to ensure that eventuality. They are inherently related to the development, are proportionate in their application and necessary for the grant of planning permission.

### **3. FINANCIAL CONTRIBUTIONS**

3.1 A contribution of £270,000 payable towards highways improvements identified in the S106 Agreement is payable prior to Commencement of Development.

#### CIL Compliance

3.2 These payments are in respect of the road works set out within the S106 Agreement that are considered by both the Local Planning Authority and Local Highway Authority as necessary for the safe and convenient delivery of the development. They are proportionate in scale and kind, directly related to the development, being located on the main access to it, and are necessary for the grant of planning permission.

### **4. CLUBHOUSE AND STADIUM MANAGEMENT SCHEME**

4.1 The Owner must submit a Clubhouse and Stadium Management Scheme to the Council for approval as part of the reserved matters application for that element of the Commercial Development. The Clubhouse and Stadium must not be occupied until the Scheme has been approved and the Owner must implement the measures in the approved Scheme from completion of the Clubhouse and Stadium and to maintain the Scheme for the lifetime of the Commercial Development.

- 4.2 A monitoring report must be submitted every three years and any agreed amendments to the Scheme must thereafter be implemented by the Owner.
- 4.3 The purpose of the Clubhouse and Stadium Management Scheme is to ensure that the community benefits of the Development are secured for the lifetime of the Development. The Scheme will secure the following community benefits:
- 4.3.1 A Community Engagement Programme;
  - 4.3.2 A Football Community Engagement Programme including opportunities for various members of the community;
  - 4.3.3 A management plan securing the upkeep of the Clubhouse and Stadium facilities; and
  - 4.3.4 Community Use Agreements which provide access for local government and parish councils, community clubs and charitable trusts to be made available within the Clubhouse and Stadium and which set out the rates at which such access shall be made available.

#### CIL Compliance

- 4.5 These provisions seek to ensure that the clubhouse and stadium elements of the development deliver enhancements to the community. They are inherently related to the operation of the development, are proportionate to the scale of and related in kind to the operation of Cheshunt FC and are necessary for the grant of planning permission.

### **5. COMMERCIAL BLOCK MANAGEMENT SCHEME**

- 5.1 The Owner must submit to the Council for approval as part of the reserved matters application for the Commercial Block element of the Development a Commercial Block Management Scheme. The Scheme must be implemented from completion of the Commercial Block and the Commercial Block must be maintained in good order in accordance with the approved Scheme for the lifetime of the Development.
- 5.2 The Scheme will provide (i) details of the provision of a minimum of 1000sqm of community facilities to be delivered within the Commercial Block which must be made available to users including local government and parish councils, community clubs and charitable trusts and (ii) details of the management plan securing the upkeep of the Commercial Block.
- 5.3 The provision of community space within the Commercial Block is required by the planning policy and the Council is seeking to secure its provision and upkeep for the lifetime of the Commercial Block.

### CIL Compliance

- 5.4 These provisions seek to ensure that the commercial block delivers enhancements to the community by the way of incorporating community facilities. The proposed provisions are inherently related to the operation of the development, are proportionate to the scale of operation of the block and in kind to its delivery of a range of business activities and are necessary for the grant of planning permission in accordance with the policies of the Development Plan.

## 6. **DRAINAGE CONNECTION**

- 6.1 The Owner must use reasonable endeavours to grant rights of surface water drainage for the benefit of the Sports Pitches adjacent to the Site and any rights to be granted which are reasonably necessary to allow the owners of the Sports Pitches to construct and maintain a surface water drainage connection to the surface water drainage apparatus constructed /installed within the Development.

### CIL Compliance

- 6.2 This development must deliver a comprehensive drainage solution for the storage of surface water from the entirety of the Cheshunt FC lands. This storage had originally been proposed within a large detention basin on the site of the proposed housing. If this development proceeds, that proposal will no longer be capable of implementation. The playing pitches to the north of the application site are currently drained through a temporary sump with no on-site detention. The network draining into that sump requires to be diverted into tanks that will be installed beneath the football club car park before draining to the watercourse. The foregoing provisions ensure that connection will be made, utilising land outside the application site. This is inherently connected with the development and a comprehensive drainage network for the entirety of Cheshunt FC, relates in scale and kind to the drainage needing to be provided and is necessary for the grant of planning permission.

## 7. **ESTATE MANAGEMENT SCHEMES**

- 7.1 The Owners must submit Development Management Schemes for both the Residential and Commercial Developments prior to Occupation of each element of the Scheme and set up Management Companies to manage the estate in perpetuity.
- 7.2 The Managed Areas within each element of the Development must be laid out and maintained by the Owner for 12 months following issue of a Certificate of Practical Completion. The Managed Areas must thereafter be maintained until they are transferred to the Management Company.
- 7.3 In relation to the Commercial Development, the Development Management Scheme can be submitted and approved in relation to separate Phases.

CIL Compliance

7.4 These are standard S106 provisions for the management of common areas.

**8. FIRE HYDRANTS**

8.1 This Schedule requires that fire hydrants are designed into and provided at the Development, as approved by the Fire and Rescue Service. They must be provided prior to Occupation of any Dwelling and thereafter maintained.

CIL Compliance

8.2 These are standard S106 provisions for the provision of fire hydrants.

**9. TRAVEL PLAN**

9.1 A Travel Plan for the Development must be submitted to the Council for approval prior to Occupation of the Development and its measures implemented from first Occupation. A monitoring report must be submitted on an annual basis for the lifetime of the Development and a Travel Plan Co-Ordinator appointed not less than 3 months prior to first Occupation of the Development.

CIL Compliance

9.2 These are standard S106 provisions for travel plans.

**10. VIABILITY**

10.1 The Owner must submit to the Council for approval a Viability Assessment following Occupation of the 163<sup>rd</sup> Dwelling or within 5 years of Commencement of Development, whichever is the earlier. The Viability Assessment must be carried out in accordance with the Viability Methodology in Schedule Nine.

10.2 If any Surplus is identified, it must be paid to the Council and the Council may expend the Surplus upon Affordable Housing or the other Planning Obligations identified in the S106 Agreement.

10.3 The Viability Methodology is the only remaining area of dispute between the Council and the Appellant.

10.3.1 -The Council's position is that a Surplus should be paid at the rate of 50% of the Balance if the Developer's Profit is between 3.5% and 15% or alternatively 6.09% and 15% and at 75% if the Developer's Profit is above 15% to a cap of £10,479,015, being the amount of Planning Obligations due for the Development.

10.3.2 The Appellant's position is notes that historic reference to 3.5% was based on substantially different inputs in relation to land value and so has no relevance to the current decision before the Inspector.

10.3.3 The Appellants position is that a Surplus should be paid at the rate of 50% of the Balance is the Developer's Profit is between 9.4% and 17.5% and at 75% of the Developer's Profit is above 17.5% to a cap of £10,479,015, being the amount of Planning Obligations due for the Development. ThisThe Appellant says that this is based on the viability evidence submitted by the Appellant.

10.2.1 The Council have argued that a profit of 6.09% could also function as a lower threshold for payment of the Surplus. The Appellant is willing to include this position within a signed planning obligation in the event the Inspector favours the Council's case.

#### CIL Compliance

10.4 The trigger point for the provision of planning obligations is a matter for the separate evidence of the Council and the appellant.

10.5 The Planning Obligations sum is drawn from the planning application committee report (for a commuted sum for affordable housing) and a range of contributions derived from the Council's Infrastructure Delivery Plan, its application to other housing development sites in the vicinity and proportioning on a per dwelling basis to this development. The Infrastructure Delivery Plan was a key piece of evidence for the Broxbourne Local Plan hearings. The Inspector's Report made the following comment in respect of the IDP:

*234. The Plan is supported by a Draft Infrastructure Delivery Plan 2018-2033 ("IDP") and a Draft Transport Strategy. The IDP seeks to identify all relevant physical, social and environmental infrastructure that is likely to be needed up to 2033 as a result of the development proposed in the Plan. Some of this is as a direct result of the strategic sites proposed in the Plan, whilst some arises as a result of the cumulative impact of development at different times of the plan period. The IDP also identifies the anticipated costs of the infrastructure needed, and potential sources of funding including government programmes, bonds and loans, the private sector, and developer contributions. The total cost is expected to be over £260 million, around half of which would be for transport. Around one third of the transport funding required has already been secured.*

10.6 The Appellant accepts that the development would usually trigger planning obligations and does not dispute the quantum in principle however there is a

discrepancy between the Infrastructure sought by the Council in its committee report, the Councils evidence before the appeal and the information that they have placed in the s106. The Appellant cannot confirm the CIL compliance or otherwise of these obligations.