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London Borough of Croydon
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For the attention of:
Pete Smith (Head of Development Management)
Julie Belvir (Director of Democratic and Legal Services)
By email to pete.smith@croydon.gov.uk and julie.belvir@croydon.gov.uk

26 February 2014

Your ref 12/02542/P and 12/02543/CAC
Our ref ASDM/MIT/135143.00001

Dear Sirs

Client: The Trustees of the Whitgift Trust
Planning Reference Numbers: 12/02542/P and 12/02543/CA – Redevelopment of the Whitgift Centre
Proposed Claim for Judicial Review

This letter is written in accordance with the judicial review pre-action protocol in order to provide formal notification to the London Borough of Croydon ("the Council") that our client proposes to make a claim for judicial review. The purpose of this letter is to identify the issues in dispute and establish whether litigation can be avoided.

Our client seeks a response to this letter within 14 days of receipt.

1. THE CLAIMANT

1.1 The trustees of the Whitgift Trust ("the Trust"). The trustees are Equiom (Isle of Man) Limited and Almark Limited, both of First Floor, Jubilee Buildings, Victoria Street, Douglas, Isle of Man IM1 2SH. The Trust has objected to the proposed development on their land.

2. PROPOSED DEFENDANT

2.1 The Council, Legal Department, Bernard Weatherill House, 8 Mint Walk, Croydon CR0 1EA

3. PROPOSED INTERESTED PARTIES

3.1 Westfield Shoppingtowns Limited, 6th Floor, MidCity Place, 71 High Holborn, London, WC1V 6EA

3.2 Hammerson UK Properties plc, 10 Grosvenor Street, London, W1K 4BJ

3.3 Croydon Limited Partnership, 10 Grosvenor Street, London, W1K 4BJ

3.4 Whitgift Limited Partnership, 10 Grosvenor Street, London, W1K 4BJ

3.5 The Whitgift Foundation, Whitgift Hospital, North End, Croydon, CR9 1SS

A copy of this letter has been sent to the above addresses.

4. MATTERS BEING CHALLENGED

4.1 Planning permission reference 12/02542/FUL dated 5 February 2014 and Conservation Area Consent 12/02543/CA dated 5 February 2014 ("the Decisions"). This is the grant of permission to redevelop the Whitgift Centre and surrounding land in Croydon.

5. BACKGROUND

5.1 The Trust has the main operating interest in the land that is the subject of the Decisions. This comprises primarily long leasehold interests in the Whitgift Centre. Westfield Shoppingtowns Limited and Hammerson UK Properties plc are the applicants ("the Applicants"). Croydon Limited Partnership ("CLP") is the proposed developer. Whitgift Limited Partnership and the Whitgift Foundation have proprietary interests in the land. All of the Interested Parties are signatories to the S106 Agreement dated 5 February 2014 which is linked to the Decisions. The S106 Agreement is entered into by the Interested Parties under Section 106 of the Town and Country Planning Act 1990 other than CLP who have entered into it on a contractual basis and subject to other statutory powers.

6. THE ISSUES

6.1 Depriving parties of the opportunity to review information, understand its implications and make submissions on the deliverability of the scheme as a whole and the provision of affordable housing within the scheme

6.1.1 The Council failed to inform third parties that the proposed development was subject to a viability assessment until a very late stage in the application process. This was by way of the committee report dated November 2013 ("the Committee Report") which was published only a few days prior to the planning committee on 25 November 2013 at which the Council resolved to grant the Decisions.

6.1.2 Letters from the Council to CMS dated 20 December 2013 and 21 February 2014 confirmed that the Applicants' viability assessment ("Viability Assessment") was supplied by CLP to the Council's external advisers, Deloitte LLP. Deloitte LLP has assessed the Viability Assessment and it is understood that it reported its findings ("the Deloitte Assessment") orally to the officers of the Council. The Committee Report referred to the Viability Assessment in paragraphs 3.9 and 8.314 and stated that *"The conclusions of the report are accepted"* ("the Conclusion"). An addendum to the Committee Report ("the Addendum Report") was produced on the day of the committee and stated *"the viability assessment has been provided confidentially to the Council and has been independently assessed by the Council"*. The Trust, third parties and members of the public have seen the Conclusion but not the Deloitte Assessment or Viability Assessment.

6.1.3 Given the information in the Council's letters of 20 December 2013 and 21 February 2014, it is apparent that neither members of the planning committee nor Council officers have seen the Deloitte Assessment or the Viability Assessment but have seen and accepted the Conclusion. We would ask for confirmation that this is the case.

6.1.4 The Viability Assessment and the Deloitte Assessment were significant material considerations in the determination of this application. The information justified both the deliverability of the scheme and the level of affordable housing and was therefore fundamental to an assessment of the scheme's acceptability. The Trust has a legitimate interest in the proposals and has been deprived of the opportunity of commenting adequately on fundamental issues of relevance to the application. The failure to provide any of the confidential information to third parties was of itself unfair. This prejudice extends to the Council's approach towards Community Infrastructure Levy ("CIL"). It is not possible for interested parties to understand how CIL was dealt with in the Viability Assessment. This deprived the Trust of the opportunity to review the information, understand its implications and make submissions on the deliverability of the scheme as a whole.

6.1.5 There is, however, a further and more serious aspect of the Council's conduct in this case which renders it unlawful. By our representation letter of 22 November, the Trust requested disclosure of the Viability Assessment and associated information under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 ("the EIR"). This request was repeated on 27 November, following the Council's resolution to grant planning permission. The Council's decision to refuse to disclose this information was the subject of review following our request of 16 January 2014. The Council upheld its decision not to release the information on 21 February 2014. The letter from the Council to CMS dated 21 February 2014 stated that the Council did *"not consider the information can be considered to be held by Deloitte on behalf of the Council"* for the purpose of the EIR and confirmed that there were no documents in the Council's control that summarise the Viability Assessment or the Deloitte Assessment other than the Conclusion.

6.1.6 The disclosure proceedings were instituted, as the Council is aware, in order to assist the Trust in making its representations on the application. The request for information was a fundamental matter that was required to be resolved prior to the issuing of the decision in this case. The decision of the Council to grant permission while the request was outstanding was both unfair and contravened the principles of the Aarhus Convention. The purpose, in part, of the EIR (which sought to implement the Aarhus provisions) is to ensure that those who may wish to comment on an application are able do so on basis of adequate information and before a determination is made on the merits of the case. The Council's decision to proceed with the grant of the permission in circumstances where the disclosure of information was at large has fundamentally prejudiced the Trust: it is now prevented from making submissions on the merits of the application in so far as it related to questions of deliverability, affordable housing and CIL but can only challenge the decision on the law.

6.1.7 Further, Aarhus has made it a central part of the decision-making process that the decision-maker must have taken into account all material considerations and relevant information when considering whether to grant planning permission. The decision-maker in this case was the Council acting through its committee as advised by officers. It was incumbent on the decision-maker to have considered the information contained in the Viability Assessment and the Deloitte Assessment when reaching its

decision; the mere statement that the viability information has been agreed by a consulting body does not mean that the determining body has properly taken into account the information in question when assessing the merits of the case. The determining body has, accordingly, failed to take into account a material consideration in this case.

6.2 Early Engagement and Deliverability

6.2.1 As we have indicated above, the proposals were found to be acceptable, in part, because of the delivery of various benefits which would arise through the implementation of the scheme over the whole of the application site. We indicated in our letter of 22 November 2013 that the NPPF is clear (see paragraph 188) as to the need for early engagement: *"Early engagement has significant potential to improve the efficiency and effectiveness of the planning application system for all parties. Good quality pre-application discussion enables better coordination between public and private resources and improved outcomes for the community*". The Applicants have failed to meaningfully engage at all with the Trust and other third party landowners. The Applicants have not worked collaboratively and openly with interested parties at any stage in the process to identify, understand and seek to resolve issues associated with a proposed development. The consequence is that the Trust will not consent to the sale of its land and, as a result, the scheme cannot be delivered.

6.2.2 The Council has failed to engage with these points in any meaningful way and has, therefore, failed to take into account a material consideration; the only reference to the issue is in the Addendum Report and the Council's rejection of the matter is by reference to the Environmental Statement ("the ES"). The ES did not, however, deal with the Trust's specific position in relation to the application.

6.3 Deficient Environmental Statement and Environmental Impact Assessment

6.3.1 We and others have already informed the Council of omissions from the ES of necessary environmental information. The Applicants failed to address these omissions and, as a result, the Committee Report seriously misled the committee members that there was sufficient environmental information on which it could base its decision to grant the Decision. The omissions included:

(a) the failure to assess the proposal against the future base case given that Phase 2 would not be commenced until 10 years after the grant of planning permission by virtue of the 7 years reserved matters condition;

(b) the failure to properly assess the cumulative effects of the proposal with the proposed Centrale development; and

(c) the failure to assess the development as a whole and the failure to include the assessment of the effects of lighting within the scope of the Environmental Statement being an example of this.

6.3.2 Given the above, by virtue of regulation 3(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, the Council was not permitted to grant the Decisions as it was not possible for the Council first to take all necessary environmental information into account. The Decisions are unlawful.

6.4 Errors in the committee report that seriously misled the committee members

The OAPF

6.4.1 The Committee Report concluded (see paragraph 8.31) that the development was in accordance with the Croydon Opportunity Area Planning Framework ("OAPF") dated January 2013 in so far as it achieved comprehensive development. The same conclusion is reached in the Addendum Report (at page 5). That conclusion was based on an interpretation of the OAPF which is wrong in law:

(a) As supplementary planning guidance, the meaning of the OAPF is a question of law. Paragraphs 4.29 – 4.30 of the OAPF indicate that the preference for the redevelopment of Croydon is through comprehensive approach as part of a large redevelopment and renewal approach. The meaning of this is clear: a scheme, in order to be in line with the preference of the OAPF, should ensure redevelopment across the retail core (see, for confirmation of that, how Centrale is addressed in the context of incremental development at paragraph 4.32 of the OAPF).

(b) The Committee Report, by contrast, concluded that the proposals are entirely in accordance with this part of the OAPF (see paragraph 8.31). That is plainly wrong. The proper conclusion on a lawful interpretation of the OAPF is that the scheme is not in accordance with the preferred approach in the OAPF.

6.4.2 Second, the OAPF (see paragraph 4.32) is clear that, in circumstances where there is to be an incremental approach to the town centre, as opposed to a comprehensive approach, one of the most important issues will be to ensure that the Whitgift Centre and Centrale complement each other. The Council has concluded in the Committee Report, in one line (at paragraph 8.42), that there will be an improved relationship between the Whitgift Centre and Centrale. Yet the ES and other supporting application documentation refer essentially to one point, namely, that the pedestrian linkages between the centres will be maintained. That cannot, reasonably, be regarded as amounting to compliance with the clear objective of the OAPF. The assessment that there was compliance with the preferred approach of the OAPF patently seriously misled the committee by indicating that the OAPF's aims on these significant points were met by the proposal.

Town Centre Uses Assessment ("TCUA") and Sequential Test

6.4.3 The Committee Report has seriously misled the committee by asserting that a sequential and impact test for the part of the proposals outside of the primary shopping area ("the PSA") is unnecessary (at paragraphs 8.26, 8.33 to 8.37). As such, the Council has failed to comply with the requirements of the development plan and NPPF

The Committee Report and TCUA acknowledged that a significant amount of the proposed main town centre uses are not in the PSA and the proposals are part 'in centre' and part 'edge of centre'. The extent of the PSA in Croydon Metropolitan Centre is defined by the policies map for the Croydon Local Plan: Strategic Policies DPD ("CLP:SP"). The OAPF was adopted as a supplementary planning document on the same date as the CLP:SP was adopted and made no alterations to the PSA. Policy SH3 of the CLP:SP (a saved UDP policy under CLP:SP), the London Plan (policy 4.7)

and the NPPF (paragraphs 24 and 26) all require sequential and impact assessments to be undertaken for retail proposals outside a PSA.

6.4.4 The Council erroneously justifies its decision not to require sequential and impact assessments to be undertaken by referring to emerging policy, Croydon Local Plan: Detailed Policies and Proposals ("CLP:DPP"). PSAs in all town centres within the borough boundaries are capable of being reviewed under policy SP3.7 of CLP:SP. The PSA may be altered by CLP:DPP if it is adopted but it is at an early stage and untested and therefore the PSA remains as defined in the CLP:SP. The Committee Report further misleads the committee by stating that a sequential test and impact test is not required by purporting that the application is in accordance with the CLP:SP and OAPF. As set out above, it is plainly wrong that the proposals are entirely in accordance with the OAPF. In addition, as the CLP:SP itself defines the PSA, the proposals cannot be said to be in accordance with the CLP:SP without undertaking sequential and impact assessments.

6.4.5 The Council's decision not to require a sequential and impact assessment has resulted in the Council failing to consider and demonstrate whether the retail elements of the proposals could be accommodated within the PSA and the impact on the centre and neighbouring centres as required by the development plan and the NPPF.

Affordable Housing

6.4.6 The Addendum Report (see page 12) indicated that the maximum reasonable amount of affordable housing has been provided in this case and that the provision of affordable housing without a review mechanism was both reasonable and appropriate. The Addendum Report indicated that this conclusion derived from the comments of the GLA and the Viability Assessment. The comments from the GLA are contained in GLA's Stage II Report (at paragraphs 8-9) and no reference is made to the question of a review. Of course, we have not had sight of the Viability Assessment, but the explanation in the Addendum Report indicates there has been no proper engagement with the terms of the guidance contained in the written statement to policy 3.12 of the London Plan and/or no assessment as to why such a review should not be put in place in this case. The reference to the Viability Assessment bears out this point: given that the review would be based upon a trigger which would take effect if there was greater viability in the scheme, the reference to the Viability Assessment as a justification (and without more) defies comprehension. An assertion that the lack of a review mechanism was justified is, in these circumstances, wholly misleading.

6.5 Other

6.5.1 The Decision creates an unacceptable risk of liability for the Trust. If the Decisions are implemented, CIL will become payable. The Trust, as the main landowner within the application site, will be at risk of default liability if CLP fails to assume liability or fails to pay. There is no indication that this matter has been taken into account.

7. DETAILS OF INFORMATION SOUGHT

As has been indicated above, the Trust has previously sought from the Council the Viability Assessment, the Deloitte Assessment and any summary of the conclusions of those documents. The officers of the Council have undertaken an internal review and decided not to release the information requested. We repeat the request for copies to be provided.

7.1 In this connection, the Council has ignored a directly applicable recent Information Commissioner's Office decision that the public interest outweighed any commercial confidentiality and required that such information be released (ICO decision FER0461281 dated 16 July 2013).

8. DETAILS OF ACTION THAT THE DEFENDANT IS EXPECTED TO TAKE

8.1 We request that the Council confirms:

8.1.1 that the Council concedes the claim in full;

8.1.2 that the Decisions were unlawful and should be quashed;

8.1.3 whether an Assumption of Liability for CIL has been submitted;

8.2 In any event, we request that the Council provide a copy (if necessary obtaining copies from Deloitte) of the Viability Assessment, the Deloitte Assessment and any summary of the conclusions.

9. AARHUS CLAIM

9.1 This is an Aarhus Claim for the purposes of Rule 45.43 of the Civil Procedure Rules. The Defendant and Interested Parties are invited to agree.

10. THE DETAILS OF THE LEGAL ADVISERS DEALING WITH THIS CLAIM

Ashley Damiral, CMS Cameron McKenna LLP, 160 Aldersgate Street, London EC1A 4DD.

Tel: 020 7367 3000; Fax: 020 7367 2000; email: ashley.damiral@cms-cmck.com

11. THE ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS

CMS Cameron McKenna LLP, 160 Aldersgate Street, London EC1A 4DD.

Tel: 020 7367 3000; Fax: 020 7367 2000; Ref: ASDM/135143.00001

12. PROPOSED REPLY DATE AND ACTION REQUIRED

No later than 12 March 2014.

Yours faithfully

CMS Cameron McKenna LLP

CMS Cameron McKenna LLP

Pinsent Masons

BY REGISTERED POST AND EMAIL

ATTENTION: ASHLEY DAMIRAL
CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London
EC1A 4DD

Your Ref ASDM/MIT/135143.00001
Our Ref 50742672.2\mp44\LO0043.07123

12 March 2014

Dear Sirs

RESPONSE TO LETTER BEFORE CLAIM
PLANNING REFERENCE NUMBERS: 12/02542/P AND 12/02543/CA
YOUR CLIENT: THE TRUSTEES OF THE WHITGIFT TRUST
OUR CLIENT: LONDON BOROUGH OF CROYDON

We refer to your letter of 26 February 2014 in which you provide notification that your client proposes to seek permission to apply for judicial review of the above planning consents, dated 5 February 2014.

We act for the proposed defendant, the London Borough of Croydon ("**the Council**").

Your proposed grounds of review are entirely without merit and the Council will contest any claim for judicial review in full.

1. **Proposed Claimant**

You state that the proposed claimants are the trustees of the Whitgift Trust. Please confirm the identity of the beneficiaries of that trust and confirm that the proposed claimants are duly authorised to bring the proposed proceedings.

2. **Proposed Defendant and Interested Parties**

We agree with your identification of the proposed defendant and the proposed interested parties.

3. **Response to proposed grounds of review**

(1) "Depriving parties of the opportunity to review information, understand its implications and make submissions on the deliverability of the scheme as a whole and the provision of affordable housing within the scheme"

3.1 The Council denies that there is any legal error arising from its handling of the viability information and the fact that a viability assessment was not made available to third parties. Your client had available to it the same information as members of the

Strategic Planning Committee, namely the Officer's Report ("**OR**") which advised that the applicant had provided a viability assessment and that there had been a confidential independent financial viability assessment (see paragraphs 3.9 and 8.314).

3.2 You claim at paragraph 6.1.1 that third parties were not informed that the proposal was subject to a viability assessment until a very late stage in the application process. That is incorrect. The fact that a viability appraisal would be subject to independent assessment was referred to in the application documents which were available for inspection on the Council's website: see for example paragraph 5.16 of the applicant's Affordable Housing Strategy, which was available since February 2013.

3.3 As you are already aware, the applicant provided viability information to the Council's advisers, Deloitte, on a confidential basis. Council officers have not seen the applicant's viability information, but had the benefit of oral reports of that information and draft report on that information from Deloitte prior to writing the OR. The OR accurately reflects the advice received from Deloitte.

3.4 That the Council was entitled to treat the applicant's viability information as confidential, and to rely on the advice of Deloitte, is entirely consistent with established authority. The Council was not obliged to disclose that information to objectors. Your proposed ground of challenge is inconsistent with the judgments of Ouseley J in *R (Bedford & Clare) v LB Islington* [2003] Env LR 22 at [73]-[102] and Flaux J in *R (English) v East Staffordshire* [2010] EWHC 2744 (Admin) and therefore without merit.

3.5 The Council is, of course, aware of the request for information under the Environmental Information Regulations 2004 to which you refer in paragraphs 6.1.5 and 6.1.6. It has responded to that request in full and has nothing to add to its letters of 20 December 2013 and 21 February 2014 that affected the determination of the applications for planning permission and conservation area consent.

3.6 The Aarhus Convention adds nothing to your proposed ground of challenge. Firstly, the Aarhus Convention is an international convention with no direct effect in domestic law and in any event adds nothing to the domestic law which requires public law decision-makers to have regard to material considerations. Secondly, your client has had an opportunity to participate in the decision-making process through consultation on the planning application which accords entirely with the requirements of Article 6 of the Convention.

3.7 For those reasons, this proposed ground of review is entirely without merit and, if pursued, will be resisted.

(2) "Early engagement and deliverability"

3.8 This proposed ground of review is ill-conceived. There was no duty on the applicant to engage in pre-application discussions with third parties such as your client. In any event, your client had an extensive period in which to comment on the planning application and to formulate its grounds for objecting to it. It is unclear how any allegation that the applicant failed to engage with your client could give rise to legal basis for challenging the Council's decision to grant planning permission. It is noted that you are not alleging that the Council's public consultation process was flawed. Accordingly this proposed ground of review is entirely without merit.

(3) "Deficient Environmental Statement and Environmental Impact Assessment"

3.9 In this proposed ground, you claim that the Council were not entitled to grant planning permission because it did not have before it sufficient environmental information to assess the impacts of the proposal. This is denied.

3.10 By way of context, we remind you that the question of whether the Council has sufficient environmental information to determine the application is a matter of planning judgment, subject to review only on ***Wednesbury*** principles: see e.g. *R (Blewett) v Derbyshire CC* [2004] Env LR 29 at [32] to [33] and [37]-[42]. Further, we remind you that an environmental statement ("**ES**") is required to describe the likely significant effects of the development on the environment (see Town and Country Planning (Environmental Impact Assessment) Regulations 2011/1824, Sch 4 Pt 1 para 4). It is not required to describe every theoretically possible environmental effect.

3.11 You identify three alleged omissions from the ES at paragraph 6.3.1 of your letter. These are the same alleged omissions that you highlighted in your letter of 22 November 2013. The content of that letter was reported to the Strategic Planning Committee in the Addendum report (see page 11 of the report), and therefore the Committee was aware of your complaint when it considered the application. As the Addendum report notes in respect of each of your three alleged omissions:

3.11.1 In respect of the future baseline, there is an assessment of the cumulative effects of the proposal based on the indicative programme, which represents the likely programme and thus the likely effects of the proposals. The cumulative impacts were assessed against those projects which were known to be likely to come forward during that timescale.

3.11.2 As to the assessment of cumulative effects with Centrale, the Addendum report noted that there had been assessment of such effects with the extant consents for Centrale, and that if further proposals for that shopping centre came forward they would be assessed in combination with the Whitgift proposals;

3.11.3 In respect of light pollution, it was explained that such impacts had been scoped out of the ES as being non-significant effects which would be subject to further assessment at the detailed design stage: see ES Vol I, paragraphs 2.9 to 2.10 and also the Supplementary Environmental Information Report dated May 2013 (pages 4-5).

3.12 As Ouseley J. held at paragraph 203 in *R (Bedford) v LB Islington* [2003] Env LR 22:

"It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law…"

3.13 In all the circumstances the Committee were entitled to conclude that the ES was adequate and accordingly your proposed ground of challenge is entirely without merit.

(4) "Errors in the committee report that seriously misled the committee members"

The OAPF

3.14 Members were not misled as to the meaning of the OAPF:

3.14.1 Your letter misinterprets the OAPF through reading paragraphs in isolation and failing to understand their context and the OPAF as a whole. As a result, you wrongly assume that the preference for "comprehensive" redevelopment imposes a requirement that the entire retail core must be the subject of a single proposal for redevelopment. On the contrary, the OAPF makes clear that what is preferred is "significant change across a large part of the Retail Core" (paragraph 4.21). Paragraph 4.27 sets out various objectives and

paragraph 4.29 observes that these would be "most achievable through a comprehensive approach as part of a large redevelopment and renewal approach and this comprehensive approach is the one preferred by the Mayor and the Council. This would preferably be carried out as part of a single, or a complementary phased programme of redevelopment proposals and works."

3.14.2 The content of the OAPF was accurately reported to members and members were entitled to conclude as a matter of planning judgment that the proposal achieved the preferred "comprehensive" approach (see OR at 8.31);

3.14.3 As the proposal was not for "incremental development", your reference to paragraph 4.32 of the OAPF adds nothing to your proposed grounds of challenge. However, as you note in your letter, the relationship between the Whitgift Centre and Centrale was considered by the Council, so plainly the Committee were directed to this issue;

3.14.4 The judgment that the proposals were in accordance with the OAPF as a whole was one which the Committee was entitled to reach, and any challenge to this conclusion on ***Wednesbury*** grounds has no merit.

3.15 Accordingly the Committee was not misled in respect of the meaning or effect of the OAPF.

Town Centre Uses Assessment

3.16 There was no requirement to carry out a sequential and impact test. Paragraph 24 NPPF requires a sequential test for "main town centre uses that are not in an existing centre and are not in accordance with an up-to-date Local Plan". The glossary to the NPPF defines a town centre as an "area defined on the local authority's proposal map, including the primary shopping area and areas predominantly occupied by main town centre uses *within or adjacent to the primary shopping area*".

3.17 The OR notes that part of the site is outside the PSA, but that the site is within the CMC and in accordance with an up to date Development Plan (see paragraphs 8.33 to 8.40). It is also noted that the parts of the site not within the PSA are immediately adjacent to it: see 8.36. This area is considered to be "edge of centre" for retail uses (see the Glossary to the NPPF), but there is no requirement for a sequential assessment and impact test to be carried out as the entire site falls within a town centre location and is predominantly in the PSA, the development is in accordance with the adopted Local Plan and supporting OAPF and the area outside the PSA forms an integral part of the comprehensive scheme. Thus the OR did not mislead the Committee in this regard.

Affordable housing

3.18 You express a concern that no review mechanism is proposed. However, such a review mechanism is not required by either the London Plan or the Croydon Local Plan. Accordingly there was no policy justification for a review mechanism, given the proposed provision of 15% affordable housing and the provision of viability evidence to support this level of provision. There was also no advice received from Deloitte advising that a review mechanism should be sought.

3.19 Accordingly, there is no merit in this allegation and the Committee were not misled.

4. **"Other"**

4.1 This proposed ground is entirely without merit and, if pursued, will be resisted. We consider that your client's position in respect of CIL liability is protected both because of its position as landowner and by the terms of the planning permission and Section 106 Agreement.

4.2 Accordingly it is not accepted that this allegation has any basis in fact, and therefore this proposed ground of review is entirely without merit.

5. **Information sought**

We do not propose to provide the information sought. It is commercially confidential and the applicant maintains the position that this information should not be disclosed and that its disclosure would amount to an actionable breach of confidence.

6. **Actions the Council is expected to take**

There is no legal error in the Council's decision. It is not proposed to take the steps to which you refer and any claim for judicial review will be contested in full.

7. **Aarhus claim**

It is not accepted that your proposed claim is an Aarhus claim for the purposes of CPR 45. Please explain your reasons for contending otherwise.

8. **Details of legal advisors**

Mike Pocock, Partner, Pinsent Masons LLP, 3 Hardman Street, Manchester, M3 3AU

Telephone: 0161 250 0223

Email: michael.pocock@pinsentmasons.com

9. **Address for Further Correspondence and Service of Court Documents**

Pinsent Masons LLP

3 Hardman Street

Manchester

M3 3AU

Yours faithfully

Pinsent Masons LLP

Pinsent Masons LLP

cc. Solicitors for the Interested Party

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SMITH
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Our ref
2066/30956646
Your ref
ASDM/MIT/135143.00001
Date
12 March 2014

Dear Sirs

Redevelopment of the Whitgift Centre: Proposed Claim for Judicial Review

We refer to your letter of 26 February 2014 ("**the Pre-action Letter**") addressed to the London Borough of Croydon. We act for Westfield Shoppingtowns Limited and Hammerson UK Properties plc, which along with their jointly owned entities Croydon Limited Partnership and Whitgift Limited Partnership, are named as Interested Parties in the Pre-action Letter. For ease of reference we adopt the terms used in the Pre-action Letter.

Our clients do not consider that there is any merit to the objections set out in the Pre-action Letter. We have seen the Council's letter of 12 March 2014 and fully agree with its contents. While we therefore do not propose to respond to every objection you raise, our clients make the following points.

Viability Assessment and Deloitte advice

As the Council has previously explained to your client, the Viability Assessment contains commercially confidential information. CLP provided the Viability Assessment to Deloitte under the terms of an express Non-Disclosure Agreement ("**NDA**"). The Council was also under a duty of confidentiality to CLP under an NDA in respect of the advice given to it by Deloitte. CLP does not agree to waive its right to confidentiality under these NDAs. Thus CLP released information to Deloitte and the Council on a clear understanding that it would remain confidential.

In any event, the non-disclosure of the Viability Assessment and the advice given by Deloitte to the Council does not unfairly prejudice your client. It is a well-established principle in planning cases that there is no requirement for third parties to see all the details if they have the gist of the

appraisal (*R (Bedford) v London Borough of Islington* [2002] EWHC 2044 Admin). The Council officers received written and oral advice from Deloitte and a summary was provided in the Committee Report and Addendum. In not having direct access to the Deloitte advice and Viability Assessment, your client is in the same position as members of the planning committee and the Council was under no obligation to disclose the additional material to which you refer to your client.

Our client does not accept your attempt (albeit without referring to any provisions) to rely on the Aarhus Convention. The Aarhus Convention, as an international treaty, does not provide any freestanding rights to your client insofar as it is not already incorporated into domestic and EU law. Reference to the Aarhus Convention therefore adds nothing to your client's claim.

Early engagement and deliverability

Our clients do not accept that they have failed to engage with the Trust. The Applicants and the Council have carried out a robust consultation process, which included various steps taken at the pre-application stage. In any event, your reliance on the NPPF in this context is misguided because there was no duty on our client to engage in pre-application discussions with third parties such as your client.

Environmental Statement and Environmental Impact Assessment

Our clients do not accept that the ES is deficient, let alone that the alleged deficiencies (if they were to exist, which is not accepted) would be so significant that the document cannot properly be regarded as an environmental statement. The conclusion of the Committee Report that there was sufficient information to base the Decisions on was entirely proper in the circumstances.

Other elements of the Committee Report

Our clients do not accept that the Committee Report contains the errors you allege and accordingly members of the Strategic Planning Committee were not misled. The Decisions are not unlawful. Your complaints in relation to the OAPF and the requirement for a sequential approach and impact assessment relate to interpretations of the relevant policies that the Council was entitled to make. Further, your objections in relation to affordable housing rest on a fundamental misunderstanding of the relevant policy.

Other

This proposed ground is entirely without merit and, if pursued, will be resisted. We consider that your client's position in respect of CIL liability is protected both because of its position as landowner and by the terms of the planning permission and Section 106 Agreement.

It is clear that the grounds set out in the Pre-action Letter are manifestly ill-conceived and entirely without merit. Our clients will fully support the Council in defending any proceedings the Trust may choose to commence.

Yours faithfully

Herbert Smith Freehills LLP

Herbert Smith Freehills LLP

cc. Pinsent Masons LLP, Solicitors for the Defendant

WHITGIFT CENTRE

SUMMARY OF JUDICIAL REVIEW CLAIM AND COUNCIL'S RESPONSE

1. BACKGROUND

1.1 On the 26 February 2014 a letter was issued in accordance with the Judicial Review pre-action protocol (**"PAP letter"**) on behalf of the Whitgift Trust to London Borough of Croydon ("**Council**"). The PAP letter provided formal notification that the Whitgift Trust proposed to make a claim for judicial review in relation to the grant of planning permission (reference 12/02542/FUL) and Conservation Area Consent (12/02543/CA) to redevelop the Whitgift Centre and surrounding land in Croydon.

1.2 The Council issued a robust response to the PAP Letter (**"Council's PAP Response"**) on 12 March 2014. A similarly robust response was issued by CLP to the Claimants on the same day.

1.3 A formal application to bring judicial review proceedings was issued in the High Court on 19 March 2014 ("**Claim**"). The claimants are listed as being (i) Equiom Limited, (ii) Almark Limited, (iii) Whitgift One Limited and (iv) Whitgift Two Limited ("**Claimants**"). The Grounds of Claim are made under the following four headings:

1.3.1 Ground 1 – Unfairness

1.3.2 Ground 2 – Failure to take into account the Viability Assessment

1.3.3 Ground 3 – Failure to take into account Affordable Housing Review Policy

1.3.4 Ground 4 – Errors in the Committee Report

1.4 The Council has until Monday 14 April 2014 to respond formally to the Claim setting out its Summary Grounds of Resistance. These are currently being prepared by the Council's legal advisors.

1.5 It is to be noted that the number of grounds relied on in the Claim has reduced from those referred to in the PAP letter. The Council is firmly of view, having taken legal advice, that the grounds for the Claim are without merit.

1.6 In this context, the Council's response to the Claim is likely to be similar to the response to the PAP letter. A brief summary of the grounds of claim and the Council's response as set out in its response to the previous PAP letter is set out below:

2. PAP LETTER AND SUBSEQUENT PROPOSED GROUNDS OF CHALLENGE AND COUNCIL'S RESPONSE TO PAP LETTER

2.1 ***Ground 1 - Depriving parties of the opportunity to review information, understand its implications and make submissions on the deliverability of the scheme as a whole and the provision of affordable housing within the scheme***

Proposed Ground of Review

2.2 In the PAP letter, the Claimants alleged that the Council did not inform third parties that the development was subject to a Viability Assessment (**"Assessment"**) until very late in the application process and that whilst the Assessment's findings were reported orally at the Committee Meeting it was not provided to the members. The Claimants claimed that the Assessment was a material consideration as it justified the deliverability of the scheme, the affordable housing provision and the approach to Community Infrastructure Levy.

2.3 Furthermore the Claimants noted that despite requests under the Freedom of Information Act 2000 and Environmental Information Regulations 2004 (**"EIA"**) the Assessment was not disclosed by the Council. The Claimants asserted that the decision to grant planning permission whilst the request under the EIA was outstanding was both unfair and contravened the principles of the Aarhus Convention.

2.4 Grounds 1 and 2 of the Claim provide further detail on this ground and in particular argue that there was:

2.4.1 unfairness and unlawfulness on the basis that a decision was made without providing the Claimants with an opportunity to consider the viability information (Ground 1); and

2.4.2 a failure to take into account the Viability Assessment and therefore the effects of the development were not properly scrutinised as is required by the Aarhus convention (Ground 2).

Response of the Council to the PAP

2.5 In the PAP Response, the Council robustly denied that there was any legal error arising from the Council's handling of the viability information. In particular, the response cited the fact that the Claimants had available to them the same information as was available to Members. The response confirmed that viability information had been provided to Deloitte on a confidential basis and that the Council was entitled to rely on the advice of Deloitte. This is supported by case law.

2.6 In relation to the Aarhus convention, the response confirmed that this added nothing to the proposed ground of challenge and that the Claimants had been afforded an opportunity to participate in the decision making process.

<u>Ground 2</u> - Early engagement and deliverability

Proposed Ground of Review

2.7 The Claimants claimed that the applicant had failed to meaningfully engage at all with the Claimants and other third party landowners as required by the National Planning Policy Framework ("**NPPF**").

2.8 This particular element is not pursued in the Claim.

Response of the Council to the PAP

2.9 The Council's response to the PAP letter stated that this proposed ground was ill-conceived and entirely without merit. In any event, the response to the PAP letter pointed out that the Claimants had an extensive period in which to comment on the application. As a result, there was no legal basis for bringing a challenge on this ground.

<u>Ground 3</u> – Deficient Environmental Statement and Environmental Impact Assessment

Proposed Ground of Review

2.10 The Claimants claimed that certain information was omitted from the Environmental Statement (**"ES"**) and as a consequence the Committee Report was misleading as there was insufficient environmental information on which to base a decision In particular it cited the following apparent omissions:

2.10.1 a failure to assess the proposal against the future base case;

2.10.2 a failure to assess the cumulative affects of the Centrale development; and

2.10.3 a failure to include the effects of lighting within the scope.

2.11 This proposed ground of claim is not pursued in the Claim.

Response of the Council to the PAP

2.12 The Council's PAP Response made it clear that the alleged omissions were reported in the Addendum Report. The Addendum Report addressed why each allegation was incorrect, namely:

2.12.1 an assessment of the cumulative effects based on the indicative programme and thus the likely effects of the proposal had taken place;

2.12.2 an assessment of the Centrale cumulative effects had taken place and they would be assessed in combination with the Whitgift proposals if further proposals came forward; and

2.12.3 light pollution impacts had been scoped out of the ES as they were considered to be non-significant effects.

2.13 In this context, the Committee were entitled to conclude that the ES was adequate.

<u>Ground 4</u> – Errors in the committee report that seriously misled the committee members

(a) The Croydon Opportunity Area Planning Framework ("OAPF")

Proposed Ground of Review

2.14 In the PAP, the Claimants claimed that the conclusions of the Committee Report were based on an incorrect interpretation of the OAPF. Namely that:

2.14.1 it could not be said that the proposals were in accordance with the preferred approach in the OAPF which is for a comprehensive redevelopment across the whole of the retail core, which includes the Centrale centre; and

2.14.2 maintaining the pedestrian linkages between the Whitgift and Centrale centres could not be regarded as complying with the OAPF objective to ensure that the two centres complement each other.

2.15 This proposed ground is set out at Ground 4 of the Claim.

Response of the Council to the PAP

2.16 The Council's PAP Response states that the Committee was not misled as to the meaning or effect of the OAPF. In particular, the Claimants misinterpreted the OAPF which makes it clear that what is preferred is *"significant changes across a large part of the Retail Core"*. Therefore it is stated that the OAPF was accurately reported to members. The Council's PAP Response states that as the proposal was not incremental development reference to the linkages between the Whitgift and Centrale centres are irrelevant.

(b) Town Centre Uses Assessment and Sequential Test

Proposed Ground of Review

2.17 In the PAP letter it is claimed that the Council misled the Committee by asserting that a sequential and impact assessment was unnecessary for the part of the proposals

outside the primary shopping area (**"PSA"**). The Claimants claim that this resulted in the Council failing to consider and demonstrate whether the retail elements of the proposals could be accommodated within the PSA and the impact on the centre and neighbouring centres as required by the Development Plan and the NPPF.

2.18 This proposed ground is set out at Ground 4 of the Claim.

Response of the Council to the PAP

2.19 The Council's PAP Response states that there was no requirement to carry out a sequential and impact assessment and that this is consistent with the NPPF. In support of this, reference is made to the fact that the Committee Report notes that part of the site is not within the PSA but that the site is within the CMC, in accordance with the Development Plan and the area outside of the PSA forms an integral part of the comprehensive scheme. As a result, there is no requirement for a sequential or impact assessment.

(c) Affordable Housing

Proposed Ground of Review

2.20 The Claimants allege that there was no proper engagement with the London Plan guidance in respect of affordable housing. The Claimants cite the fact that the Addendum Report provides that the provision of affordable housing without a review method was both reasonable and appropriate and indicates that this conclusion was reached from the comments of the Greater London Authority and the Assessment. The Claimants claim that given that a review would be based upon a trigger which would take effect if there was greater viability, the reference to the Assessment as a justification defies comprehension and consequently the Committee Report is misleading.

2.21 This proposed ground is dealt with briefly at Ground 1 of the Claim

Response of the Council to the PAP

2.22 The Council's PAP Response states that there is no merit in this allegation and the Committee were not misled. The Council's PAP Response makes it clear that a review mechanism is not required by either the London Plan or the Croydon Local Plan. Accordingly there was no policy justification for a review mechanism, given the proposed level of affordable housing and the viability evidence provided.

2.23 **Ground 5 – Other**

Proposed Ground of Review

2.24 The Claimants claim that the Decisions create an unacceptable risk of liability for the Claimants in that CIL will become payable if the development is implemented.

2.25 This proposed ground is not pursued in the Claim.

Response of the Council to the PAP

2.26 The Council's PAP Response cites the fact that CIL liability is protected because of the Claimants' position as landowner and by the terms of the planning permission or the section 106 agreement. It follows that the proposed ground is entirely without merit.

3. **CONCLUSION**

3.1 The Council is strongly resisting the proposed grounds of claim. They are without merit for the reasons set out in the PAP response and this will be set out in further detail in the Council's response to the Claim. That will be issued on or before 14 April 2014.