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Our Ref: GGA

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cc
Sal Khan
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Please ask for Grant Anderson

Dear Sirs

Re: **B Uttoxeter Property Holdings Limited ("JCB") - Former Bamford Works, Pinfold Street, Uttoxeter**
Planning Application ref: P/2017/01307

At Planning Committee on 19 February, Committee resolved to defer determination of the above application on the basis that JCB be invited to accept that the level of affordable housing for the application should be determined at the reserved matters stage. Notwithstanding Committee's resolution, we consider there are a number of matters/errors which arose out of Committee's consideration of the application which need to be addressed before the application is determined.

Material errors

1. CPV advised Committee that they had requested details of JCB's marketing of the site but that no response had been received. That statement was factually incorrect. Firstly, no such request was received by JCB or its agents and secondly, JCB provided this information in the letter from Savills dated 18 January. The comments of CPV were therefore not only incorrect they were also misleading in that they failed to acknowledge the evidence that had been provided to the Council from a reliable source namely an international residential agency confirming that the higher density scheme for the site is highly unlikely to come forward. CPV therefore materially misrepresented the current position.

2. At Committee, CPV also repeated their earlier comments contained in the Council's email of 26 November that if the Council accepted 2% affordable housing for a policy compliant scheme, the Council would find it difficult to secure any higher affordable housing contribution from a purchaser of the JCB site if a higher density scheme subsequently came forward - the rationale for this view being that a purchaser would pay a purchase price for the site reflecting a 2% affordable housing contribution but then seek to increase the housing density whilst resisting any increase in the level of affordable housing.

Those comments from CPV were inaccurate and constituted misleading advice to Committee. In particular, CPV failed to acknowledge at all JCB's previous response to those concerns namely that:-

- (i) JCB's affordable housing offer ensures through a legally binding section 106 obligation that if a higher density scheme does come forward there will be a re-assessment of viability to determine the level of affordable housing to be provided;
- (ii) Any purchaser of the JCB site will be aware of that legal mechanism prior to its purchase of the site through standard pre-purchase due diligence and will be bound by its terms.

Neither CPV nor officers explained to Committee that JCB had already provided a response to address that concern or to explain why that response was not considered sufficient. There was therefore a misdirection of Committee.

3. Officers also advised Committee that fixing the affordable housing in the JCB application at the outline stage would set a "*dangerous precedent*". Such a statement was wholly unjustified for a number of reasons:-

Firstly, it ignored the comments of CPV who confirmed to Committee that they accept that 2% affordable housing is reasonable for the lower policy compliant scheme.

Secondly, it ignored the affordable housing s.106 mechanism put forward by JCB in relation to both the lower policy compliant scheme and the higher density scheme which provides a means of ensuring that the amount of affordable housing is set having regard to the viability process.

Thirdly, it ignored the approach which has been adopted by officers and the Council in relation to other applications in the Borough (see sections 4 and 5 below).

Fourthly, it ignored the approach set out in the Council's own Housing Choice SPD (see section 6 below).

Such a statement by officers constituted a serious misdirection to Committee.

4. Officers advised Committee that the level of affordable housing in relation to the land west of Uttoxeter had not been determined until the reserved matters stage. That advice was incorrect.

The correct facts in relation to that site are that the Council granted outline planning permission with all matters reserved for up to 700 dwellings, 10 hectares of employment and mixed uses with the level of affordable housing for the first phase of 250 dwellings being determined at the outline stage at 15%. It was only for later phases that the level of affordable housing was to be determined at subsequent reserved matter stages reflecting the large scale of the development. Committee were therefore given incorrect information by officers.

5. Councillor Jessel specifically asked officers at Committee when the level of affordable housing was determined in respect of the Pirelli site commenting that she wanted to ensure that JCB as applicant was being dealt with in an even handed way. Officers did not provide any response to that question at Committee.

Since Committee, we have examined the public planning file for the Pirelli site (application ref: P/2011/01130/JM/PO). It is clear from the officers' report and the section 106 agreement in relation to that scheme that the level of affordable housing was determined at the outline stage.

In particular, officers were willing to recommend and the Council granted planning permission for the Pirelli scheme with a nil affordable housing contribution being determined at the outline stage. This decision was taken on the basis of a viability appraisal for an outline application with all matters reserved and in circumstances where a number of significant costs/abnormal costs were not yet fixed – see in particular:-

- paragraph 3.13 of the officers' report which states specifically that the District Valuer's report is based upon "*an assessment of viability in accordance with indicative details of an outline application*";

- the abnormal costs schedule attached to the s.106 agreement which includes a figure of £1.8m for site remediation notwithstanding the geo-environmental summary submitted with the application makes it clear that further site investigations would be required following which site remediation could be assessed and carried out. The only possible conclusion one can draw from this is that the site remediation costs included in the viability appraisal were assumed/estimated costs. In contrast, the JCB site has already been remediated and those costs are known;

- the abnormal costs schedule which states that the appraisal assumes that drains and services are adjacent and have sufficient capacity – again assumptions made on costs. In contrast detailed design work for the JCB application has been undertaken in respect of both drainage and services.

The Pirelli scheme also included provision for an update to the abnormal development costs schedule to be undertaken prior to the occupation of the 100th and 200th dwelling presumably reflecting the large scale of that development which is more than twice the size of the JCB application.

There can be no dispute that the Council was willing to determine the level of affordable housing on the Pirelli scheme at the outline planning stage notwithstanding the level of detail and known actual costs was significantly less than is the case with JCB's application. In that respect, the Council is not treating JCB in an even handed way.

We would also draw the Council's attention to the following applications.

Land at Dove Way – this was an application for a mixed use development comprising B1, B2 and B8 development and up to 56 dwellings (ref: P/2011/01134/JI/PO). It was an outline application with all matters reserved bar access. The applicant was the Borough Council itself, together with Clowes Securities (West Midlands) LLP.

In that application, the Council determined the level of affordable housing at the outline stage on the basis of a viability appraisal notwithstanding all matters of detail were reserved for subsequent approval. Interestingly, the Council was able to approve the outline application on the basis that no affordable housing or indeed any section 106 contributions would be payable. Officers noted in the report to Committee that "*it is clear that the redevelopment of this site will not be brought forward in the current economic climate unless the requirement for section 106 obligations is waived*".

Notwithstanding no affordable housing or planning obligations were imposed at the outline stage, no review mechanism was required by the Council presumably on the basis the scheme was a smaller scheme than the Pirelli scheme.

Branston Locks – this was an outline application approved by the Council in 2015 (ref P/2012/01467). It was an outline application with all matters reserved for a mixed use development comprising up to 2,500 dwellings, up to 92,900 square metres of employment, local centre, care home, public house, restaurant, school etc.

The site was a multi-phased site. The officer's report noted that "*at the outline stage the developer wishes to agree the amount of affordable housing to be provided during phases 1 and 2, and this is reasonable*".

The Council proceeded to grant outline planning permission with affordable housing being determined at the outline stage set at 10% for the first 1,250 dwellings. Having regard to the scale and length of time over which the development would be built, the section 106 agreement included a provision in relation to the later phases (ie the remaining 1,250 dwellings) that the level of affordable housing for those later dwellings would be determined at the reserved matters stage have regard inter alia to viability.

It is clear from the above, that the Council has been prepared to grant outline planning permission with affordable housing being determined at the outline stage on a number of schemes where viability was at issue and in circumstances where a number of significant costs were not yet fixed. The approach of the Council in relation to the JCB application is plainly inconsistent with the approach adopted for those applications. This was the very point Councillor Jessel was alluding to at Committee when she asked officers about the approach adopted by the Council on the Pirelli application and expressed the view that applicants should be dealt with in an even handed way.

Whilst each planning decision must be made on its own facts, there is an established principle in planning law of consistency in decision making. The Court of Appeal in **North Wiltshire DC –v- Secretary of State for the Environment [1992] 65 P & CR 137** stated that "*one important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities, but it is also important for the purposes of securing public confidence in the operation of the development control system.*"

In the light of the above examples, JCB is entitled to expect consistency of approach by the Council unless the Council considers the JCB application merits a different approach in which case clear reasons for adopting that different approach should be given. Having regard to the reasons stated by officers for not wanting to fix the level of affordable housing for the JCB application at the outline stage and the similarities with the other cases, there is simply no reasonable basis for the Council to adopt an approach in relation to the JCB application which is materially different to that adopted by the Council in relation to those other applications. For those reasons, JCB is not being dealt with in "*an even handed way*".

Officers should reflect on the above and give correct directions to the Committee as to the approach adopted by the Council in relation to the above applications, before the JCB application is determined.

6. The Council's Housing Choice SPD states at paragraph 1.1 that its purpose is to "*provide additional guidance on key development plan policies and how they will operate*" and at paragraph 1.2 that it "*will provide applicants... with information about the Council's requirements, to assist them in planning new housing developments and making planning applications*".

Paragraph 6.22 of the SPD states that where the viable amount of affordable housing is shown by a viability appraisal to be less than the full policy provision, approval may be subject to one or more of three specified provisions set out at paragraph 6.22 a) – c). The approach recommended by officers to Committee for the JCB application does not fall within any of the approaches set out at paragraph 6.22 a) – c). Even paragraph b) which refers to a review mechanism is unambiguous that the review mechanism referred to means the provision of an updated appraisal at a defined trigger point later in the delivery of the development which "*will determine the proportion of affordable housing required for the remainder of the development*". That is clearly

different to the approach being recommended by officers which is to defer setting the affordable housing at the outline stage to the reserved matters stage.

The approach adopted by officers in relation to the JCB application is therefore inconsistent with the Council's own Housing Choice SPD. Furthermore, the failure of the officers' report to draw Committee's attention to the relevant sections of the SPD constitutes a misdirection to Committee.

7. In advance of Committee, JCB submitted evidence from Savills that a consequence of not determining the level of affordable housing at the outline stage would be to delay the site coming forward and that this was one of the reasons JCB was keen to fix the level of affordable housing at the outline stage. At Committee, officers advised that the approach suggested by officers would enable the site to come forward. In doing so, officers failed to acknowledge the evidence to the contrary from Savills or to explain on what basis this evidence was disputed. In this regard, it is noted that neither officers nor CPV have the agency qualifications/experience of Savills whose evidence should therefore carry more weight.

8. At Committee, Councillor Faulkner asked officers about the JCB affordable housing proposal and queried why officers are not offering that as a solution. Officers failed to explain JCB's proposal to Committee or why it is considered unacceptable. In that respect, Committee were not given all necessary facts on which to reach a sound decision.

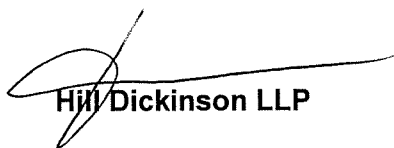
We can see no justifiable reason why JCB's affordable housing offer is not acceptable when it proposes:-

- an affordable housing figure for a policy compliant scheme (2%) which CPV advised Committee on 19 February is reasonable;
- includes a section 106 obligation which provides that in the event that a high density scheme comes forward, the level of affordable housing will be reassessed at the reserved matters stage;
- is consistent with the approach adopted by the Council in relation to a number of other applications; and
- is supported by market evidence that it will enable the site to come forward for development.

For the reasons set out in this letter, we consider the officers' recommendation misconceived and that the corresponding resolution of Planning Committee, based on the misdirection from the Council's officers, is unreasonable and unfairly prejudicial to JCB. We require that the above matters are brought to the attention of Planning Committee when it next meets on 19 March and would request that Committee reviews its resolution of 19 February.

As we have indicated previously, JCB remain willing to meet with officers to explore whether a solution acceptable to both parties can be reached.

Yours faithfully



Hill Dickinson LLP