**RE: Southampton City Gateway**

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**Advice**

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## Introduction

1. I am asked by Planning Potential, who act as planning consultants to Bouygues Development, to advise in connection with an application for planning permission (Planning Application 11/00204/FUL) for the redevelopment of a brownfield site for a mixed use development comprising a three to fifteen storey building to accommodate 53 cluster flats, 4 x 2 bedroom flats; 12 x 1 bedroom flats for 368 students; a medical centre; retail units and community use in Swaythling, Southampton. Southampton City Council ("the Council") resolved to grant planning permission for this scheme on 21 June 2011 subject to agreement to the Heads of Terms of a draft s.106 agreement. That agreement contains clause 6 (set out in full below) which seeks to prohibit car use by student residents at this site. I am asked to advise on, in particular:

   a) the lawfulness of clause 6 of the draft s. 106 agreement; and;
   b) the prospects of success on appeal assuming no agreement is reached between the parties.

## Material Background Facts

2. In early 2010, Bouygues Development, the applicant, submitted its application for the mixed use development described above. The application came before the Council's planning committee on 24 May 2011. The Officer's Report ("the May report") to committee stated that the proposal was "considered to provide substantial positive regeneration benefits to the Swaythling Local Centre" (paragraph 3.2) and was supported by a number of key development plan policies. A material consideration in determining the application was the fact that the Council had recently determined two applications for development at the application site favourably ((08/00081/FUL) and (08/01489/FUL) (which remains extant)).

3. Nevertheless, the May Report recommended refusal. The Council's Highways officer objected to the scheme on the grounds that it provided insufficient on-site parking to meet the traffic generated by its various uses for retail, the medical centre and

residential purposes. There was a consequent risk of overspill parking onto neighbouring streets which, it was claimed, would have harmful impacts on highway safety and local amenity. In particular the Highways Officer drew attention to the applicant's Transport Assessment which stated that there was a potential demand for 42 students cars to park their cars [see Appendix 5; the May Report at 6.27-6.28; the applicant's Transport Assessment Addendum March 2011 paragraphs 2.33-2.47]. The original application provided 24 parking spaces. This figure was revised upwards during the application process to 36 spaces. 36 spaces was, however, regarded as insufficient by highway officers.

4. The Committee resolved to defer their decision on the application to allow officers to reconsider a revised Transport Assessment and parking allocation produced by the applicant's new consultants WSP. The revised scheme provided for 44 parking spaces on-site and on Parkville Road, the entrance road to the application site. Officers considered that the 44 parking spaces provided adequate provision for the non-residential uses proposed for the site. However officers considered that there was need for a mechanism to control the potential for parking overspill generated by the residential student use. This was proposed to be achieved by preventing students from bringing cars to Southampton.

5. On 21 June 2011, the Council resolved to grant planning permission subject to securing agreement on the s.106 agreement. The Planning Committee delegated authority to officers to negotiate the Student Car Ownership clause of the s. 106 agreement. Following Member's resolution Officers issued instructions to their solicitor and they have produced Clause 6 of the draft s.106 agreement. This provides:

> "A Student Car Ownership Restriction as part of any student contract of tenancy shall be agreed and imposed to ensure that no student shall be entitled to park on the land.
>
> Upon the offer of the [university] place a clear written statement shall be given to the students detailing the implications for their tenancy in the event that they are found to have a car. All student contracts to include the agreed penalty clause wording to the effect that they shall not bring a car to Southampton whilst living at City Gateway and will be evicted if found to have done so. This will be enforced by the landowner upon receipt of valid evidence.
>
> The landowner will ensure that a relevant contact number is available to facilitate the report of breaches to this obligation can be reported to the landowner [sic].

In the event that evidence is provided by residents or the City Council that a resident has access to a car they will be given a warning followed by eviction in the event that the car is still available. In the event that no enforcement is taken by the landowner (to either the evidence provided or the eviction notice) within the agreed timescales a breach of planning will have occurred and a financial penalty will be payable, equivalent to one years rent, to mitigate development overspill parking issues, payable within a timescale to be agreed with the City Council." (emphasis added)

**The lawfulness Clause 6**

6. Clause 6 effectively requires the landowner to prohibit student residents' car use through its tenancy agreements with students. The prohibition is achieved through three mechanisms:

   a) A warning to any student who uses their car in Southampton;
   b) Followed by eviction from the student residence ("the eviction clause"); and
   c) Where there has been failure by the landowner to evict, a requirement that the landowner pay a financial penalty worth 1 years student rent ("the financial penalty").

7. The lawfulness of Clause 6 must be tested against the relevant legal framework. The Community Infrastructure Levy Regulations 2010 (as amended) (CIL Regs) have since 6 April 2010 introduced a new legal framework for the consideration of planning obligations. Regulation 122(2) of the CIL Regs states:

   "(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

   (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."

8. All three limbs of the test must be complied with (see *R(on the application of Bleaklow Industries Ltd) v Peak District National Park Authority and Glebe Mines Ltd*

[2006] EWHC 2287 (Admin). The planning obligation must be reasonable in all other respects. Regulation 122 does not automatically render obligations which offend the three principles unlawful. Its effect is that where a planning obligation does not comply with any of the three tests, the obligation cannot constitute a material consideration weighing in favour of granting planning permission.

9. The question of whether Clause 6 is reasonable and complies with the tests laid down in the CIL Regs is not merely a question of law but whether, on applying the evidence available, the tests are satisfied. The central issue is whether the clause is necessary and reasonable to address the identified harm which it is designed to remedy. Eventually, on appeal, an Inspector must consider whether the harm caused by the development, taken together with the section 106 obligation offered to mitigate the harm nevertheless still justifies the refusal of planning permission all things considered.

10. To begin, it is necessary to specify the nature and extent of the harm which clause 6 purports to address. The anticipated impact of overspill parking from the student and non-student users of the site on neighbouring streets was the basis for the Highway Officer's initial objection to scheme.

11. In respect of non-student parking, that objection was overcome by the revised parking scheme which increased the number of on-site parking spaces from 36 to 44 spaces. As a consequence of that revision, the WSP traffic assessment concluded that there would not be any remaining overspill parking from the development. That conclusion was, however, premised on the assumption that there would be a prohibition on the use of cars by students.

12. In respect of the potential for student overspill parking the applicant's Transport Assessment Addendum (dated March 2011) sought to assess the levels of student car use. The assessment's practical estimates of use were based on unconstrained car ownership potential at different universities [page 10 at 2.35]. After examining data for a number of student residencies the consultants concluded that car ownership for students was lower than for other groups and there was less car ownership among students living in halls of residents than in private housing. Taking an average across different universities (and excluding outliers) the level of unconstrained car ownership was assumed to be 11% among students. That gave rise to a potential demand for 42 cars at the application site. The assessors stressed that this prediction was not intended as a realistic forecast of car parking demand but

> "represents an indication of pragmatic worst case demand, where all constraints and restrictions to ownership...[are] ignored" [see 2.47].

13. It is therefore reasonable to conclude that the worst case scenario where student car use is wholly unrestricted is a potential overspill of 42 cars. I am instructed that the applicant has indicated that it is content with requiring a prohibition in the tenancy agreement but is reluctant to include a requirement of eviction as the proposed end user – Southampton University - has indicated that they would not accept student accommodation that contained this requirement.

14. The applicant's highway experts, WSP, in their Transport Assessment dated May 2011, which is specifically directed at considering this matter concluded (at page 22 at para. 5.3.17) that:

> "There is no explicit parking provision for the student accommodation and it is proposed to prohibit the use of cars by students living in the accommodation. In reality, this should substantially reduce parking demand for the student accommodation"

15. Reading the conclusions of the two transport assessments together, it is clear that where there is a prohibition against student parking (for example, stated in the student's tenancy agreement and combined with the lack of any on-site student parking) the figure for student car use will be far less that the "worst-case" figure of 42 student car users. Thereafter the real figure of users, who will contribute to overspill parking is likely to be small, and no more than a handful of students.

***The eviction clause***

16. Therefore the eviction clause targets the small number of potential students who are determined to ignore the prohibition on car use in the tenancy agreement. It is notable, however, that other recent examples of s.106 agreements involving this Council in connection with student housing indicate that up until this application eviction clauses have not been deemed necessary to secure the desired outcome of reducing parking demand. This reinforces the views of WSP that once the prohibition is in place the vast majority of those who might have brought a car (i.e. the worst case scenario of 42) will not in fact do so.

17. As I have already mentioned the University of Southampton has said that whilst it is content for there to be a prohibition on car use in a tenancy agreement it is not prepared to contemplate the requirement for an eviction if a student were to bring a car into Southampton and that it would not accept accommodation that required

that. This indicates that the inclusion of any such clause could hinder the deliverability of the applicant's scheme. Furthermore I am of the view that the University have a point. The requirement to evict allows no discretion whatsoever and therefore fetters the University's discretion. It is also likely to be discriminatory against students with disabilities. It fails to allow for or address the student who may for very good reason need to rely on a car due to disability or other reasons. In my view a tenancy agreement which allowed the option for eviction, but not a requirement for it, could equally serve the purpose of addressing the harm of the persistent offender who for no good reason uses his or her car, which in any event is likely to be small, but allows for the student who has a good reason or need to use a car.

18. Confronted by a prohibition on student car use and the potential of eviction it seems unlikely that many students will insist on using their cars. The harm caused by those persistent offenders who insist on breaching the rules by parking in surrounding streets is likely to be minimal and in any event needs to be weighed against the much needed and substantial regeneration benefits to this part of Southampton which all agree will be delivered by the scheme. A refusal of planning permission by the Council on the insistence that a *requirement,* (rather than an option), to evict, be included in the s.106 obligation is, in my view, unreasonable given that there are no other matters of dispute. On applying the tests set out in the CIL regulations it can strongly be argued that the requirement to evict is not necessary to make the development acceptable in planning terms and not fairly or reasonably related in scale or kind to the development. For the reasons I have already given it is also potentially ultra vires.

19. In my view, the prospects of success on appeal, where a requirement, rather than an option, to have an eviction clause in the 106 obligation constituted the only justification for refusal would be very good indeed and probably at around 70%. In fact it is likely that such a reason for refusal could be characterised as unreasonable giving rise to a successful application for costs.

20. I therefore advise that an amendment to the draft Clause 6 be put forward. Rather than automatically requiring eviction following a single warning the tenancy agreement would include an *option to terminate* the tenancy upon discovery that the student had been using a car in Southampton. This would seem to be a more reasonable approach to remedying the actual, relatively minimal harm which is likely to be generated by the scheme in terms of student parking demand, would accommodate the University's concerns, would not fetter their discretion, would be lawful and would ensure that the substantial regeneration benefits are realised.

***Financial Penalty***

21. Furthermore, in my view, the financial penalty in Clause 6 is unreasonable and does not comply with three CIL tests. The clause states that its purpose is to "mitigate development overspill parking issues". However, it not clear how the financial penalty addresses the harm caused by student car ownership. Nothing is said about what the money is being collected for or what the equivalent of 1 years rent might pay for. The clause appears to be in the nature of a penalty against the landowner rather than being necessary in planning terms or addressed at the specific harm in question.

22. Since the financial penalty is not necessary to remedy the harm of the overspill it does not constitute a reasonable/lawful planning obligation.

23. The Council's reason for including the threat of financial penalty is that without such a sanction it is concerned that the landowner might not evict offending students. However for all the reasons I have explained above I do not consider that the requirement for eviction is either necessary nor reasonable.

*24.* Moreover, there is a danger that the retention of the financial penalty clause could threaten the viability of the scheme. I am instructed that potential funders of the scheme are unwilling to accept this clause. This threat to the financing of the scheme also means that the substantial regeneration benefits of the scheme would not be delivered. I consider that if the financial penalty clause is insisted upon by the Council, this would be unlawful and unreasonable. The applicant's prospects of success on appeal are substantial as is an award of costs.

**Conclusion**

25. For the reasons given above, I consider it would be unreasonable for the Council to refuse planning permission on the basis that the s.106 agreement must retain a *requirement* to evict following discovery of student car use. Given the balance between the small scale of the harm and the substantial regeneration benefits of the scheme, which would be lost were the application refused, the Council's insistence on the mandatory eviction clause is unreasonable and unjustified. An amendment to provide for an option to terminate would be a reasonable, appropriate and proprtionate course to pursue.

26. In respect of the financial penalty, that provision fails to comply with the CIL Regs 2010 in that it is neither necessary nor reasonably related in scale or kind to the development.

27. In relation to costs, a planning authority which seeks a planning obligation that does not comply with regulation 122(2) of the 2010 CIL regulations (and with guidance in circular 05/2005) is at risk of costs. Where an appeal raises the question of whether a planning obligation is justifiable or not, it is usually approached on the basis that the local planning authority bears the initial burden of demonstrating how the obligation it requires is justified by relevant policy and evidence, in accordance with circular 05/2005. For the reasons I have explained I consider the council would struggle to do this.

28. Circular 05/2005 itself advises that the Secretary of State will consider "sympathetically" applications for costs made by a party to an appeal on the basis that an unreasonable obligation has been sought (circular 05/2005, paragraph B57).

29. For the reasons I have set out above I consider that the applicant, in relation to both the eviction clause and the financial penalty clause, would have good prospects of success on appeal and a good prospect of recovering its costs.

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**21 JULY 2011**