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## ADVICE NOTE

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### **Regarding Affordable Housing Contribution request in relation to enabling development at Northaw House, Coopers Lane, Northaw, Potters Bar EN6 4PS**

#### **1. Background**

- 1.1. We are instructed by LW Developments and Northaw Properties Limited (“the Applicants”).
- 1.2. This advice note has been prepared to supplement the first advice note provided on 16 July 2019. It has been prepared in response to the Welwyn Hatfield Borough Council’s comments following that advice.

#### **2. The Council response to initial advice**

- 2.1. Following our first advice note the Council concluded that BNP Paribas had not fully explained their conclusions and assumptions, and consequently the Council sought additional information from them. This information took the form of a revised viability review (now dated 21 July 2019). On the basis of this revised review the Council have reassessed their position. It now appears as though the Council position is as follows:
  - 2.1.1. The use of a clawback review mechanism in relation to affordable housing is not appropriate for this site;
  - 2.1.2. The minimum level of enabling development required for the site has been overstated and a further reduction of 2 units is required;
  - 2.1.3. A change in the quantum of enabling development would lead to a requirement to consult; and
  - 2.1.4. Failure to amend the scheme would lead to a recommendation for refusal.
- 2.2. Although it has not been expressly stated, the implication is that if the suggested changes to the scheme are made, then the proposals would move forward to committee with a recommendation for approval.

3. **Issues with the Councils revised position**
- 3.1. As set out in our initial advice, there are significant flaws with the BNP viability review. Frustratingly, rather than addressing these issues the latest report provided to the Council largely compounds them.
- 3.2. It is apparent that there continue to be a number of unexplained discrepancies in the latest BNP report. Primarily these are:
  - 3.2.1. The adoption of WTPs build costs due to there not being “an agreed position on costs”. This conflicts with BNPs last report in May ’19, which stated that WTP had “*agreed that the revised costs (i.e. those put forwards by the Applicant) are not unreasonable following clarification of issues*” indicating that there in fact is an agreed position. This agreed position is not reflected in the latest report.
  - 3.2.2. The indexation of build costs but not of sales values, which have fallen slightly over the same period. Evidence of this change in position was submitted to the Council in May at their request but has not been used to produce the latest report.
  - 3.2.3. The continued failure to include established costs in the appraisal (or indeed the apparently unsupported increase in costs from the last report). Of particular relevance are the expected s106 costs of circa £125k. These must be factored in if there is an expectation that they will be paid. It should be clear that these costs will further reduce the residual land value of the proposed enabling scheme and therefore impact on the quantum of the required enabling development.
  - 3.2.4. The comparison of the residual land value of the revised scheme to the Conservation Deficit seems to be incorrect. The residual land value should instead be compared to the Benchmark Land Value following the approach that BNP have taken in their previous reports.
- 3.3. These flaws are fundamental to the Council’s request to further limit the quantum of enabling development. The Councils continued reliance on this flawed FVA will inevitably have an impact on the viability of the proposed development and, on a strict legal basis, should not be left unchallenged. It seems apparent that these flaws would be difficult for the Council to defend if they were required to do so in an appeal situation.
- 3.4. That said, there are seemingly two options in front of the Applicants and the decision on which to take will be coloured by commercial considerations.
- 3.5. First, the Applicants can accept the removal of the gate lodge units as required by the Council and secure a recommendation for approval. Whilst this would dispense with any requirement for an unreasonable clawback mechanism, it remains clear that the other s106 costs have not been taken into account. Therefore some clarity should be sought from the

Council as to their treatment of these costs and whether they are still intending on trying to secure them. Further, as this would be proceeding on the basis of the flawed BNP report it should only be done for sound commercial reasons.

- 3.6. Second, the Council should be pushed to deal comprehensively with the continued flaws in the BNP report. Obviously this is likely to lead to further delays which would be best avoided and there can be limited confidence that the Council will not introduce further unreasonable requests at a later date.
- 3.7. It should be apparent that in either event further consultation is likely to be requested by the Council. It is arguable that consultation is unnecessary, however, at the very least the Council should seek to ensure that any further consultation is carried out as swiftly as possible.

#### **4. Conclusion**

- 4.1. As set out above, there are clear issues with the latest BNP report. However, the Council are seemingly content to rely on it. Whilst it would seem that there would be strong support for the Applicants to challenge the Councils position it may be that there are commercial considerations which outweigh this. It remains the case that without further movement in the Councils position the Applicants are faced with either agreeing to amendments and obligations which would serve to damage the viability of the proposed development, to withdraw the application, or to receive a refusal which will inevitably lead to an appeal.
- 4.2. If we can be of further assistance, please contact the writer on 0117 930 9572 or at [fquartermain@thrings.com](mailto:fquartermain@thrings.com).

**Thrings LLP**

**1 August 2019**