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JAL/21-00175

10 August 2021

Planning Inspectorate
The Square
Temple Quay
Room 3 O/P
Temple Quay House 2
Bristol
BS1 6PN

Dear Sir/Madam

Re: Town and Country Planning Act 1990 – Appeal Under Section 106B – London Borough of Harrow – John Lyon School (Local Authority Reference: P/2092/21) – Discharge Appeal

I act on behalf of John Lyon School, and have been instructed to submit an appeal under s106B of the Town and Country Planning Act 1990 (as amended). The appeal follows non-determination by Harrow Council, of a s106A application, submitted on 10 May 2021, to discharge an agreement first entered into in 1995 (and is referred to as the "Principal s106 Obligation"), which was subsequently modified (see details below). This letter sets out the position of the school, the interrelationships between this appeal and others made by the School, and sets out the appellant's case on submission.

This s106B appeal (LA Ref: P/2092/21) is in relation to a planning application currently the subject of a s78 appeal, also made by John Lyon School, for the redevelopment of the Oldfield House site on the School's campus, submitted on 17 May 2021 under appeal reference: APP/M5450/W/21/3275231 (the "s78 Redevelopment Planning Appeal").

This s106B appeal to discharge the Principal s106 (as modified) (and referred to as the "s106B Discharge Appeal"), is submitted in parallel and in preference to another s106B appeal (LA Ref: P/2504/19 - the "s106B Modification Appeal"), both in relation to the above s78 Redevelopment Planning Appeal. The s106B Modification Appeal is against the local authority's refusal, on 25 May 2021 to make a modification to the agreement to allow for the implementation of the s78 Redevelopment Planning Appeal, should the Inspector/Secretary of State be minded allow the planning appeal. The s106B Modification Appeal is a 'fall-back' in the event that the s106B Discharge Appeal is not allowed by the Inspector/Secretary of State.

The summary below and the structure diagram attached to this appeal set out the relationship between the three applications/appeals. The appellant requests that consideration of the appeals be conjoined, as the planning issues arising are inextricably linked.

Background

The obligation subject to this appeal was first entered into by the school in 1995, and has been amended three times since then, with milestones as below:

- On 26 June 1995, planning permission was granted for a part single, two, three and four storey building to provide a sports hall, a swimming pool, a library and ancillary areas, and alterations to external buildings and parking (LA Ref: WEST/695/94/FUL).

- The first obligation was dated 23 June 1995 ("the Principal s106 Obligation") and was associated with planning permission WEST/695/94/FUL. It, inter alia, prevented any extensions and other development from taking place outside building envelopes within the school estate (except in three minor areas) and prevented out-of-school-hours' use of the school sports hall and swimming pool by non-school persons

including non-school local residents. It is this Principal s106 Obligation that this s106B Discharge Appeal seeks to discharge). It also capped the number of pupils on the school roll to 525 (this cap is not being challenged on this appeal and is sought to be reimposed by the inspector by way of planning condition on the s78 Redevelopment Planning Appeal– see below).

- On 24 September 2007, a s106A application was granted in isolation to increase the school roll cap permitted from 525 to 600 pupils, and the Principal s106 Obligation was amended outside any stated association with a planning application (no local authority reference). However, no amendments were made to the first obligation. (This cap is not being challenged on this appeal and is sought to be reimposed by way of planning condition on the s78 Redevelopment Planning Appeal – see below).

- On 16 October 2007, planning permission was granted for a three-storey side/rear extension to provide additional classrooms (LA Ref: P/3420/06), with a deed of variation (modification) agreed in association with this to amend the Principal s106 Obligation to allow implementation of the development.

- On 22 February 2011, a further variation (modification) of the Principal s106 Obligation was agreed to allow implementation of an extension to the Main Building, which was granted planning permission subsequently in March 2011 (LA Ref: P/2160/10).

- 20 February 2016, a s106A application (Ref P/1020/16) was made to increase School pupil numbers from 600 to 710 and was refused by notice dated 1 July 2016 and appealed to the Secretary of State [Note – two other similar s106A applications were made and refused at the same time but not appealed].

- 16 January 2018 – a Decision Letter was issued dismissing appeal to increase School pupil numbers (Ref APP/M5450/Q/16/316072) – copy attached to this appeal.

The grounds for dismissal of the 2018 appeal decision were that the increased pupil numbers would result in increased traffic generation which would cause an unacceptable risk to highway safety (paragraph 77). By contrast, this s.106B appeal and the current planning application (subject to appeal reference: APP/M5450/W/21/3275231) does not seek an increase in pupil numbers and there would be no change in the current traffic, transport or highway effects due to the proposal.

The s78 Redevelopment Planning Appeal was the subject of the planning application for the redevelopment of the Oldfield House building (the Redevelopment Planning Application) to provide a four-storey teaching block with basement, hard and soft landscaping and parking was submitted in April 2019 (LA Ref: P/1813/19). The planning application was refused on 24 November 2020, and an appeal was submitted under s78 of the Town and Country Planning Act (as amended) on 17 May 2021, in advance of the six month deadline for submitting an appeal (24 November 2021). The s78 Redevelopment Planning Appeal has been validated by PINS, and given the reference: APP/M5450/W/21/3275231.

Shortly after submission of the Redevelopment Planning Application, in May 2019, the s106A Modification Application, the subject of the s106B Modification Appeal, was made to Harrow Council and given reference P/2504/19. The application sought to amend the Principal s106 Obligation (as modified) to allow for the redevelopment of Oldfield House, as the new building was proposed outside the building envelope permitted by the 1995 Principal s106 Obligation (as modified). Notwithstanding that the Redevelopment Planning Application and the s106A Modification Application were inextricably linked, the local authority did not refuse the s106A Modification Application in November 2020 when it refused the Redevelopment Planning Application. Rather, the s106A Modification Application was refused on 25 May 2021, and the s106B Modification Appeal has been submitted in parallel to this s106B Discharge Appeal. The s106B Modification Appeal is a 'fall-back' in the event that the s106B Discharge Appeal is not allowed.

The Proposal

In this s106B Discharge Appeal, it is proposed that the John Lyon School Principal s106 Obligation (as modified) be discharged in its entirety, as the obligation:

- unreasonably constrains development, unjustifiably extending existing policy constraints in the area (which themselves are considerable);
- unjustifiably prevents development that is in accordance with planning policy, even if found to be so by the Secretary of State on appeal;
- unreasonably restricts the use of school facilities, including dual or community use, even if such a use would create a substantial public benefit;
- is unnecessary as any obligation which is justified should be properly and preferably addressed by way of planning condition, in accordance with government policy (NPPF 2021 §55);
- has long since been discharged in any event (in two instances relating to landscaping);
- does not meet the statutory tests in regulation 122 (as amended) of the Community Infrastructure Levy Regulations 2010 and policy tests in NPPF 2021 para 57 required to impose planning obligations, and generally, and
- precludes the merits of any restriction imposed being tested on appeal to the Secretary of State before at least 5 years has elapsed since the most recent obligation or variation was imposed, and then only on limited statutory grounds, severely restricting the ability of the School to develop and improve its facilities in accordance with government planning and education policy objectives.

However, as stated above and previously, the Appellant has confirmed that the restriction on school pupil numbers within the Principal s106 Obligation (as modified) can be retained, albeit as a planning condition on the Oldfield House planning permission (should the Inspector/Secretary of State allow the s78 Redevelopment Planning Appeal), with the following wording of the condition:

> *"The number of pupils enrolled for full time education at the school shall not exceed 600 or such increased figure as shall first be approved in writing by the Council."*

Information required in support of the s106B Discharge Appeal

As required by Regulation 7(2) of The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992, the following information is provided:

- The appeal forms have been completed and are attached to this appeal.

- The s106A Discharge Application, the subject of this appeal, consisted of a report and covering letter - they are attached to this appeal, but it should be noted that the s.73 application referred to in the submissions was not registered by the Local Authority and has now been withdrawn (with the appellant requesting that a condition restricting numbers on the school roll be attached to the decision notice for the planning appeal, should the s78 Redevelopment Planning Appeal be allowed).

- The Regulation 4(5) certificate is attached to this appeal.

- The instrument by which the relevant obligation was entered into is the:

  Section 106 Agreement dated 23 June 1995 between (1) London Borough of Harrow (2) The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon and (3) National Westminster Bank Plc

  This agreement was subsequently modified by the following instruments:

Deed of Variation dated 24 September 2007 between (1) London Borough of Harrow and (2) The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon;

Deed of Variation dated 16 October 2007 between (1) London Borough of Harrow and (2) The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon, and

Deed of Variation dated 11 February 2011 between (1) London Borough of Harrow and (2) The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon.

- Correspondence with the authority relating to the application is attached to this appeal.

- Evidently, as this appeal is against the local authority's non-determination of the discharge application, there is no decision notice from the local authority. However, attached is the notice from the local authority that the application was registered from the date of receipt.

Also attached to this appeal is:

- a first draft Statement of Common/Uncommon Ground for further discussion with the local authority, and
- the decision of the inspector on LA reference: P/1020/16) which was the subject of an appeal (Ref: APP/M5450/Q/16/3160672) which was an appeal under s106B against discharge of the obligation in the Principal s106 Obligation (as modified) to increase the cap on number of pupils on the school roll.

For ease, the above attachments are listed in a standalone covering document.

Planning Policy and Guidance

The following planning policy and guidance is particularly relevant to this appeal:

Policy Relating to Planning Obligations

At a national level, the July 2021 National Planning Policy Framework (NPPF) addresses planning obligations in Section 4: Decision-making, and confirms the following principles:

- Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition (Paragraph 55).
- Planning obligations must only be sought where they meet all of the following tests - 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 (Paragraph 57), reiterating the statutory tests set out in Regulation 122 of the Community Infrastructure Levy Regulations.

In terms of the Development Plan, Policy DM50 indicates that planning obligations will be sought on a scheme-by-scheme basis to, inter alia, ensure that development proposals provide or fund improvements to mitigate site specific impacts made necessary by the proposal.

There is no policy support or precedent for an area-wide planning obligation to control development and use of all the buildings and land within the ownership or occupation of a single body, such as John Lyon School. Area control is the subject of Article 4 Directions, and this has been the case in respect of a part of Harrow on the Hill Conservation Area. No Article 4 Direction sought or made has included the land occupied by John Lyon School.

Policy Relating to Educational and Sports Facilities

At a national level, the NPPF, confirms:

- Planning policies and decision should plan positively for the provision and use of shared spaces, community facilities (including sports venues) to enhance the sustainability of communities and residential environments (Paragraph 93).
- Access to a network of high quality open spaces and opportunities for sport and physical activity is important for the health and well-being of communities (Paragraph 98).
- Local authorities should support proposals make more effective use of sites that provide community services such as schools and hospitals (Paragraph 123).

At London-wide level, the London Plan 2021:

- Confirms that those involved in planning and development must plan for improved access to, inter alia, spaces for play, recreation and sports (Policy GG3).
- Encourages shared use and co-location of facilities, and includes schools opening their facilities out of hours by use of the community as a specific example of this (paragraph 5.1.10, and confirmed in Policy S3)
- States that school and college facilities, in particular sports, play, training and meeting facilities, should be capable of use by the wider community outside their main operating hours (Paragraph 5.3.12).
- Confirms that development proposals for sports and recreation facilities should, inter alia, maximise the multiple use of facilities, and encourage the co-location of services between sports providers, schools and other community facilities (Policy S5).

At borough level, the Development Plan (which includes the Harrow Core Strategy 2012 and Harrow Development Management Policies 2013), confirms that:

- John Lyon School is identified as a notable institution and major employer, and as contributing significantly to Harrow's reputation as a place for learning (Core Strategy, Section 3).
- John Lyon School is also identified as being one of the three schools within the Harrow on the Hill and Sudbury Hill Policy Sub Area, and Objective 4 of this area is to support the continued operation of the schools within the sub area and their role as education providers, land and building managers, important economic generators and providers of community facilities (Core Strategy).
- Notwithstanding that the agreement subject to this application prevents it, the benefits of community access to the sports facilities at John Lyon School is highlighted at Paragraph 6.9, and the retention of John Lyon School in the Borough is identified as CS3 Objective 4 (Indicator ICI6) (Core Strategy).
- There is a shortfall of sports hall facilities in the borough equivalent to 22 badminton courts (Core Strategy Paragraph 4.35).
- Community access to sports facilities at John Lyon School will be "maintained", notwithstanding that it is actually prevented by the agreement subject to this application (CS3 Objective 9, Core Strategy).

National Planning Practice Guidance in Respect of Planning Obligations

Current Planning Practice Guidance relative to the use of planning obligations and process for changing obligations was first published by the Government in May 2016, and was most recently updated in September 2019.

This guidance reiterates the statutory and policy tests for the imposition of planning obligations (as reviewed above). It also reiterates the circumstances under which planning obligations can be altered after their agreement.

Planning obligations are legal obligations entered into to mitigate the impacts of a development proposal. (Paragraph: 001 Reference ID: 23b-001-20190315)

Planning obligations, in the form of section 106 agreements and section 278 agreements, should only be used where it is not possible to address unacceptable impacts through a planning condition. (Paragraph: 003 Reference ID: 23b-003-20190901)

Can planning obligations be required for permitted development? By its nature permitted development should already be generally acceptable in planning terms and therefore planning obligations would ordinarily not be necessary. (Paragraph: 009 Reference ID: 23b-009-20190315)

Can an agreed planning obligation be changed? Planning obligations can be renegotiated at any point, where the local planning authority and developer wish to do so. Where there is no agreement to voluntarily renegotiate, and the planning obligation predates April 2010 or is over 5 years old, an application may be made to the local planning authority to change the obligation where it "no longer serves a useful purpose" or would continue to serve a useful purpose in a modified way (see section 106A of the Town and Country Planning Act 1990). (Paragraph: 020 Reference ID: 23b-020-20190315)

The Case for the Appellant relative to the s106B Discharge Appeal

The obligations within the John Lyon School Principal s106 Obligation (as modified) no longer serve a useful purpose, and should be discharged without delay, for the following reasons relative to each of the obligations/covenants within Schedule 2 to the Principal s106 Obligation (as modified):

Obligation 1

This obligation prevents all development outside the building envelope of all the school buildings, including even minor buildings and extensions. It therefore imposes a planning development control regime which is even more constrained than exists within the adjacent MOL or Green Belt, the most restrictive development control policy constraint in the London Area, within Article 4 Direction areas and within the most sensitive locations such as World Heritage Sites or Areas of Outstanding Natural Beauty.

It prevents development that is in accordance with planning policy, however meritorious and prevents it even if planning permission is granted on appeal by the Secretary of State. Not only does it prevent development that it is not harmful, it also prevents development which would produce an enhancement to the local area (and particularly the relevant Conservation Areas).

It is also wholly unnecessary as it duplicates planning controls that are able to be applied through the development management system (including through the imposition of planning conditions), including the Conservation Area within which the school buildings lie. The obligation is not directly related to the development, nor fairly and reasonably related in scale and kind to the development. It is a blanket and unnecessary control. As such, it does not meet the statutory or policy tests for the imposition of planning obligations.

As with any school, in order to continue to provide high-quality education it must be able to improve and redevelop its facilities. This is the purpose and intent of the Government introducing permitted development rights very recently on 31 March 2021 under SI 44/2021 to allow for extensions to existing schools to help deliver more classroom space by enabling schools to extend their buildings more easily, particularly (but not exclusively) in response to the pandemic. The restrictions imposed by Obligation 1 are unjustifiably contrary to this new policy and permitted development right, result in significant additional costs and unnecessary delay to any aspirations the School has for improving its facilities, as well as causing a considerable administrative burden, as a result of – effectively – having to obtain a second permission from the local authority. Further, the need for this additional permission prejudices the School from appealing any refusal if the decision was made less than five years after signature of an amended replacement agreement and, if refused, can only be challenged on a point of law by way of judicial review.

In this context, the obligation imposed by Obligation 1 does not serve a useful purpose not least as, in its absence, the development management system would still have more than adequate control over

development. Further, it is wholly unreasonable, not least as the need to obtain a second permission for any development aspirations requires the School to incur unnecessary significant costs and delay in its pursuit of ensuring that the School can evolve to meet modern standards and expectations. This is both unnecessary and contrary to government policy. It should be discharged without delay.

Obligation 2

It should be noted that since the First Amendment of the Principal Agreement which allowed the current number of pupils, and since the aforementioned appeal decision dismissing an attempt to increase the school roll:

- Restrictions have been imposed on local parking, by way of a CPZ, on 1 October 2020 (The Harrow (Parking Places) (Amendment No. 4) Traffic Order 2020) which has dramatically reduced the traffic flows relative to parents dropping off/collecting pupils, which in turn has reduced traffic congestion in the area, and

- The School has made the decision to become co-educational from September 2021, which will inevitably reduce traffic volume on the Hill further, as educating boys and girls from the same families results in fewer families overall (and therefore generates fewer trips).

Notwithstanding this, the School does not oppose a restriction on pupil numbers being placed by way of planning condition on the s78 Redevelopment Planning Appeal permission which would have the same and arguably greater effect in terms of enforcement control than would a planning obligation. In short, any such restriction imposed should not be by planning obligation as it is currently but, in line with paragraph 55 of the NPPF 2021, it should be restricted by planning condition.

In this context, without prejudice to any future application that may be made to vary or remove the restriction, and should the Inspector/Secretary of State agree with the appellant that the s78 Redevelopment Planning Appeal should be allowed, the following condition should be attached to the s78 Redevelopment Planning Appeal decision, which will effectively replace the restriction on pupil numbers imposed by Obligation 2:

> *"The number of pupils enrolled for full time education at the school shall not exceed 600 or such increased figure as shall first be approved in writing by the Council."*

Obligation 3

This obligation prevents the use of the School's indoor sports facilities outside school hours by users who are not directly connected to School. However, the School's facilities are valuable potential local amenity, and the obligation excludes local residents and pupils from other schools in the area from using them in the evenings and at weekends. This blanket exclusion prevents proper community use of the facilities in a manner that seeks to control the identity of those who may be invited to use the facilities. This is contrary to planning policy (which explicitly encourages the shared use of such facilities with the wider community), serves no useful purpose and is wholly unreasonable. Therefore, the obligation should be discharged.

Obligations 4 and 5

As previously confirmed, the landscaping scheme required by Clause 4 was submitted to and approved by the local authority in or around 1995. Subsequent to this the landscaping scheme was implemented in accordance with the approved scheme, as per Obligation 5. In this context, these obligations clearly no longer serve a useful purpose, and should be formally discharged.

Commentary

For the above reasons, the Principal s106 Obligation should be discharged. However, given that this appeal is against non-determination, and that no feedback has been received to date from the local authority relative to

the s106A Discharge Application, the appellant reserves the right to add to its case in due course, once the local authority's position is clear.

Cojoining of Appeals

As previously confirmed, the two appeals (this s106B Discharge Appeal, the s106B Modification Appeal and the s78 Redevelopment Planning Appeal (Ref: APP/M5450/W/21/3275231) should be conjoined to allow an Inspector to consider them all in parallel as they concern the same school and subject matter, interlinked arguments and policy, and the same factual base.

Response to comments made by neighbouring residents

In response to the s106A Discharge Application, 14 properties have raised objections (albeit some properties have submitted more than one objection letter). Many of the objections highlight the additional complications and difficulties that are imposed on the school by the Principal s106 Obligation (as modified), and its modifications, as a positive matter. However, as confirmed above this is entirely unjustified. It also evidently runs contrary to Government policy, and the presumption in favour of sustainable development which means approving development proposals which accord with an up-to-date development plan without delay. Further, it runs against the spirit of paragraph 38 of the NPPF, which confirms that local authorities should approach decisions on proposed development in a positive and creative way.

Other matters raised, and the appellant's response to them, are reviewed below:

- In terms of the proposed removal of restrictions on building envelope, some objectors have raised similar issues to the s78 Redevelopment Planning Appeal. However, these matters have been addressed in the appellant's submissions to the s78 Redevelopment Planning Appeal, and will be considered by the Inspector in this context. Further, the replication of comments confirm the duplication of control that the Principal s106 Obligation (as modified) generates, which further underlines the Principal s106 Obligation (as modified) does not serve a purpose.

- Objections have been made relative to an increase in pupil numbers, which as confirmed above is not sought by the appellant. In this context, the references to previous attempts to increase pupil numbers the amending the Principal s106 Obligation (as modified) are not relevant to this proposal. Further, references in the s106B Discharge Appeal to the imposition of a Car Parking Zone and co-education are not made to support an increase in pupil numbers, but to confirm that circumstances have changed.

- It is not the case that the School has refused to engage with local residents. Rather, the School has engaged in extensive correspondence, and as confirmed the s78 Redevelopment Planning Appeal, substantially changed the proposals at Oldfield House as a result of feedback received. However, it has to be recognised that – in any redevelopment proposals – the School needs to balance its operational needs with the aspirations of local people.

- It is suggested that the agreement already allows for restrictions on the use of sports and related facilities to be relaxed through correspondence with the local authority. However, this does not address the appellant's case that the condition should – in principle – be discharged (as confirmed above).

- There is also a suggestion in some of the responses that, in the absence of the Principal s106 Obligation (as modified), the School can "do what it likes". As confirmed above this is clearly not the case, as the development management system would still have more than adequate control over development in its absence.

- Some respondents have drawn attention to the legibility of some of the more historic documents. However, the versions submitted to the local authority are the best versions in the appellant's possession, and it is understood the Council does not have a version which differs from that submitted.

In this context, the comments received from neighbouring properties do not raise any matters which would tell against the s106B Discharge Appeal from being allowed.

Route of Appeal – Hearing Procedure Sought

The appellant requests that this appeal be dealt with through the hearing procedure, as it has already requested that the aforementioned s78 Redevelopment Planning Appeal be dealt with through this procedure. In the context of Annexe K of the Appeal Procedural Guide, the reasons for this were:

- The Inspector is likely to need to test the evidence presented by all parties by questioning or to clarify matters such as the character of the area, and the impact of the proposals on it, as well as on identified heritage assets (not least the affected Conservation Areas).
- It is not considered that there is need for evidence to be tested through formal questioning by an advocate, or given on oath.
- The case has generated a level of local interest such as to warrant a hearing.
- It can reasonably be expected that the parties will be able to present their own cases (supported by professional witnesses if required).

In this context, if the appeals are to be conjoined, they should be dealt with through the same procedure.

Conclusion

I trust that the above is self-explanatory, but if further information/clarification would be appreciated on any matter, please contact me using the details below. Alternatively, I look forward to confirmation of receipt of the appeal and, in due course, a start date.

Yours faithfully

Jason Lowes

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Enc
List of all documents attached to the appeal