

APP/A5840/W/22/3303205

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The Council's Response to the Inspector's Initial Queries on the Nomination Agreement Issue

1. Exactly what is the nominations agreement intended to achieve?

- A nominations agreement is entered into between the student housing provider and a Higher Education Institution ("HEI") allowing the HEI to secure rooms exclusively for its students. Policy H15 of the London Plan 2021 states that the majority of bedrooms including all of the affordable student accommodation shall be secured through a nomination agreement for occupation by students by one or more HEIs. A nominations agreement is required to justify the need for Purpose Built Student Accommodation ("PBSA") in accordance with paragraphs 4.15.3 to 4.15.5 of the London Plan 2021. The development will not be considered as meeting the need for PBSA unless a nominations agreement is in place and the accommodation is secured for occupation by students.
- For this site the proposed HEIs are London South Bank University "LSBU" (located within the Borough) and University of London ("UoL") (its member institutions include Kings College which has campuses throughout the Borough). Securing a nominations agreement with these HEIs provides a sustainable approach as students will be local to their university so they can use more active modes of transport (such as walking, cycling) easing impacts on transport infrastructure, and reducing their living costs.

2. What are the two main parties' positions and how is each party's respective position on the nominations agreement justified?

The Council's position

- The relevant policy is P5 Student Homes of the Southwark Plan 2022:

Development of purpose-built student housing must:

- (1) Provide 5% of student rooms as easily adaptable for occupation by wheelchair users; and
 - (2) When providing direct lets at market rent, provide the maximum amount, with a minimum of 35% as conventional affordable housing by habitable room subject to viability, as per policy P4, as a first priority. In addition to this, 27% of student rooms must be let at a rent that is affordable to students as defined by the Mayor of London; or
 - (3) When providing **all** of the student rooms for nominated further and higher education institutions, provide the maximum amount of affordable student rooms with a minimum of 35% subject to viability. The affordable student rent should be set as defined by the Mayor of London.
- Policy P5 offers two scenarios for PBSA: either a scheme with an element of direct let (where the PBSA provider lets directly to students) or a 100% nominations scheme with a nominated university.
 - Policy P5(2) applies in the event all of the units are not secured by a nominations agreement and requires a contribution towards conventional affordable housing, subject to a viability assessment. The affordable housing contribution is appropriate here because there is a critical need for affordable housing in the borough, and PBSA with direct lets have the potential to outbid for suitable sites compared to conventional housing schemes. The need for PBSA should be balanced against the need for conventional housing and in particular, affordable housing. In order to gain the benefit of P5(3) (and avoid the affordable housing contribution), all of the units should be subject to the nominations agreement, with 35% of those units being at an affordable student rent, thus demonstrating the need for PBSA.
 - The application as submitted to the Council presented a PBSA scheme with nomination rights to be secured over all of the units. This is evident in the Viability Report prepared by James R Brown

(dated October 2021) ("Viability Report") which assumed that UoL would have full nominations rights over the whole scheme (see paragraph 14.1.2). The possibility of the scheme having an element of direct let was not evident in any of the application documents or the appeal documents, so it was accepted amongst officers that the policy to be applied was P5(3) alongside Policy H15. The same applies for the second application.

- Roger Hephher in his Rebuttal states that Policy P5 does not cover the type of PBSA represented by the appeal scheme in that it covers the 100% market (direct let) situation and the 100% nominations situation. This is not the case and is an oversimplification of the policy because Policy P5 (2) applies where there is a direct let element and it does not stipulate the number or proportion, it could be 10% or 100%.
- This approach is justified because it is in accordance with development plan policy (the conformity point is discussed below) and is consistent with other decisions (e.g. 671-679 Old Kent Road ("KFC Site") and 313-349 Ilderton Road).

The Appellant's position

- As at the date of this note (and set out in the draft UU submitted on 12 December) the Appellant's position is summarised in Roger Hephher's Rebuttal Proof of Evidence.

3. What are the remaining points of dispute?

- The point of dispute is the application and interpretation of Policy P5(3).

4. Why doesn't the appellant's offer of a modified undertaking satisfy the Council? (Paragraphs 1.9 and 1.13 of Mr Hephher's Rebuttal CD8.45)

- The Appellant's offer does not go far enough to satisfy the requirements of Policy P5(3), because not all of the units are subject to a nominations agreement. In essence, the Appellant's offer bypasses the requirements of Policy P5(2) by allowing an opportunity for the provision of direct lets, and avoids any contribution towards conventional affordable housing.
- The modified undertaking also does not satisfy Policy H15 which requires that the majority of rooms are secured by the nominations agreement. The draft UU only secures nomination rights over the Affordable Student Rent Units (82 units), with the remaining units (151 units) subject to a right of first refusal.
- As explained below, the Council could have assessed the Appellant's modified undertaking and made the necessary planning judgement but was not offered the opportunity to do so.

5. Would each main party's approach be consistent with development plan policy?

- The Council's position is consistent with development plan policy.
- Policy H15 is clear that the majority of units (more than 50%) should be subject to nomination rights and this should include the affordable student units. A nominations agreement must be in place from initial occupation with one or more HEIs to provide housing for its students, and to commit to have such an agreement for as long as the development is used for student accommodation. The Appellant has provided letters of support from LSBU and UoL demonstrating that these HEIs would likely secure nomination rights over the units.
- Policy P5 does not simply restate Policy H15, instead it makes clear that two different affordable housing policy requirements apply to student accommodation:
 - P5(2) applies where a scheme provides an element of direct let and/or an element of nominations rights to determine whether a contribution can be made to conventional affordable housing (subject to viability) along with providing rooms at affordable student rent;

- P5(3) applies where a scheme provides 100% nomination rights over all of the rooms, with a minimum of 35% of those rooms at affordable student rent (subject to viability).
 - The Appellant's position that only the affordable student rent units should be subject to a nomination agreement, and the right of first refusal offer is inconsistent with London Plan because it does not represent the majority of units, and is inconsistent with the Southwark Plan policy because not all of the units are subject to the nominations agreement.
6. If not consistent with development plan policy, what warrants a departure from that policy in this specific circumstance?
- There is no justification for a departure from development plan policy. As explained below, no viability case has been presented to the Council for it to consider whether the Appellant's modified offer is acceptable.
7. Is there consistency between the London Plan and the Southwark Plan on this matter? Which plan takes precedence in this instance if there is a difference in approach?
- Yes, the London Plan and Southwark Plan are consistent on this matter. Both plans are up to date.
 - Any PSBA should secure the majority of units (and all of the affordable units) by a nominations agreement in accordance with Policy H15 to justify the need for PSBA. Without a nominations agreement the development is unacceptable in principle.
 - Policy P5 goes a step further adding affordable housing policy requirements.
 - The Inspector's Report on the Examination of the New Southwark Plan (dated 17 November 2021) confirmed that Policy P5 and Policy H15 are in general conformity and the consistency issue is considered at paragraphs 80 to 82.
 - Policy P5 as originally drafted required all PBSA to provide a contribution to affordable housing. Policy H15 does not have this requirement so Policy P5 was modified by the Inspector (MM30) to clarify that PBSA with nomination rights do not need to provide conventional affordable housing, but should provide a minimum 35% affordable student rooms, subject to viability. MM30 was made to ensure broad conformity with Policy H15 added the words "all of."
 - The Inspector in making MM30 also recognised the Borough's acute housing need and the potential for PBSA built on a speculative basis for market rents (i.e. direct lets) to outbid for suitable sites compared to conventional affordable housing. MM30 modified Policy P5(2) in order to maximise the amount of affordable housing on PBSA with a direct let element.
8. Where does the viability evidence point on this matter? What are the differences between the appeal scheme and the second application in terms of viability?
- The Viability Report concludes that the scheme cannot viably sustain any affordable housing provision, in addition to the 35% affordable student rent. The scheme is viable with all of the student accommodation being subject to a nominations agreement, and with 35% of units being set at an affordable rent. This is the same for the second application.
 - The viability of the scheme was tested on the assumption that "the University of London will have full nominations rights over the whole scheme" (see paragraph 14.1.14) and that such nomination rights will suppress otherwise achievable market rents (paragraph 14.3.3). This is the same for the second application.
 - As explained above, the appeal scheme (and the second application) have been presented as a PBSA scheme with nomination rights to be awarded to UoL and/or LSBU. The Appellant's proposal that the majority of units may be direct-let (by way of the right of first refusal offer) came to light late and only during the s106 negotiations for the appeal. However, the nominations issue itself was raised by the Council's senior officer Yvonne Lewis in December 2021 in correspondence with the Appellant's agent Elizabeth Woodall.

- Ms Lewis asked for more certainty that the appeal scheme would be a 100% nominations scheme (rather than merely the letter of support by LSBU/UoL) because without this certainty the scheme would need to be assessed under the Policy P5(2) requirements on the basis that there is an element of direct-let which would affect the values in the viability appraisal (Core Document 4:00). Ms Lewis also offers to assess the scheme on a “twin track approach” (against both P5(2) and P5(3)) to cover a direct-let situation.
- Ms Woodall in her response confirmed that the scheme is a nominations scheme and offers no suggestion that there is a direct-let element (Core Document 4:01). Ms Woodall also states that “this is exactly the same situation as 313-349 Ilderton Road and the 671-679 Old Kent Road (KFC)” (Core Document 4:03). It is important to note that:
 - 313-349 Ilderton Road contains both private residential housing (100% affordable) and PBSA with all of the units secured by a nominations agreement; and
 - 671-679 Old Kent Road (KFC) was a PBSA with all of the units secured by a nominations agreement.
- The Appellant had an early opportunity in the application process to raise the direct-let element. It is inappropriate to raise it in the s106 negotiations because the relevant policy requirements have not been applied. If the Appellant had accepted Ms Lewis’ offer to proceed on a “twin track” approach, both the P5(2) and P5(3) requirements could have been assessed with the appropriate viability assumptions. In respect of the second application, the scheme has been tested as a 100% nominations scheme and determined to be viable on this basis. The Council was never offered the opportunity to consider both schemes as anything else other than PBSA with 100% nominations rights.
- Mr Hill KC in his opening statement claimed that a nominations agreement over all of the units creates a false market which is unfair on the Appellant because HEIs will determine the rent for the market rent units, affecting the value of the scheme. It is the Council’s position that any argument that the viability of the scheme will be impacted without the right of first refusal offer is purely speculative because the Viability Report assessed the scheme as being a 100% nominations scheme and concluded that it was viable. This was accepted by the Council so viability was never an issue of this appeal (or the second application) until the issue arose in the s106 agreement.

9. What approach is being taken in respect of the second application’s nominations agreement? Does this differ in any way from the appeal scheme’s nominations agreement? If so, why?

- There is no difference and the issue remains outstanding for the second application. A first draft of the s106 for the second application was issued by the Council on 5 October and no further progress has been made.

10. Is there any realistic prospect of the main parties reaching agreement on the nominations agreement? What does this mean for my decision?

- No, the Council, in policy terms, cannot change its position.

11. What are the implications of me agreeing with one side over the other? Is the legal agreement as drafted sufficiently flexible for me to allow the appeal, subject to reaching a decision on which party’s approach to endorse?

- In the event the Inspector accepts the Appellant’s position, and unless such decision states that it is a departure from development plan policy in this individual case only, such decision will have wide ranging ramifications for all other PBSA schemes in the borough. By allowing the Appellant to bypass the P5(2) requirements and not allowing an assessment of whether a contribution to affordable housing can be provided, it will affect housing supply (and the Council’s ability to secure affordable housing to achieve its target) because further PBSA schemes will benefit by putting them in an advantageous position to take up suitable sites over conventional housing.
- The Appellant’s draft UU does not currently allow flexibility to allow the appeal subject to reaching a decision on the nominations point.

12.If I were to find that the appeal was acceptable in all other respects, would the appellant wish to see the appeal allowed on the basis of the Council's preferred nominations agreement?

- For the Appellant.

13.Should two different legal agreements be provided with the parties' alternative approaches to the nominations agreement?

- For the Appellant.