**APP/A5840/W/3303205**

**APPEAL BY TRIBE AVONMOUTH HOUSE LTD.**
**SITE AT AVONMOUTH HOUSE, 6 AVONMOUTH STREET, LONDON SE1 6NX**

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**CLOSING SUBMISSIONS**
**ON BEHALF OF THE LOCAL PLANNING AUTHORITY**

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## Introduction

1. This is an inquiry into an appeal against non-determination of a scheme for a block of student housing (part 2, part 7, part 14 and part 16 storeys) providing 233 bedrooms and some flexible non-residential space (education / employment space or health hub) at Avonmouth Street in the London Borough of Southwark.

2. The Council's case remains that the appeal should be refused because the building fails to respond positively to the existing character and context and would as a result cause harm to the local townscape. The public benefits of the scheme in providing commercial space and residential student housing do not outweigh the harm.

## Townscape

*The Policy Context:*

3. As one would expect, there is strong policy protection for townscape in both Southwark's Local Plan and the London Plan: townscape is a highly significant matter, particularly where a tall building is concerned. A building's impact on townscape will always reach beyond its own site, be long-lasting and irreversible. Townscape harm is never a kind of insubstantial matter, as Mr Hepher would believe, which can be justified on the basis with compliance with other parts of the development plan. If harm is found, it is perfectly capable of outweighing any number of planning benefits, cumulatively.

4. The scheme is contrary to Southwark Plan policies D13 (Design of Places) and D17 (Tall Buildings). It is also contrary to several London Plan policies, including D3 (Optimising Site Capacity) and D9 (Tall Buildings).

5. As a matter of clear and undisputed policy interpretation, in the case of a tall building, it is necessary that it is not simply of average, or even good design. It is required to be "exemplary" (see P17 3(1) and D9.C.C). This is a high hurdle for the Appellant to reach. Similarly, the policies require it to "respond positively" to the existing townscape (P17 2(3) and (6)). The burden, again, is on the scheme actively to do this – not merely to not cause harm (although failing to respond positively will be harmful).

6. In light of the exemplary architectural requirements and positive response required for a tall building, it is no surprise that the policies expect a lot of independent stakeholder engagement to ensure the design is the best it can be: for example, engagement with a Design Review Panel or other peer review (see LP Policy D4.D.2).

7. The Elephant and Castle Supplementary Planning Document is a material consideration and provides a planning framework for the opportunity area, including the appeal site. There is no dispute that a tall building is suitable on the appeal site, but a site's capacity to accept any particular height of tall building will vary. There is also no dispute between the parties that the site is very much on the fringe of the opportunity area and the centre of the Elephant and Castle town centre. It may even be seen as being beyond the town centre, as the framework sees the railway bridge as marking the gateway to the town centre. The location transitions between the town centre, where very tall buildings have been built and are appropriate, and the mainly residential area, the Rockingham Estate, which is of a more mid-rise scale (3-5 storeys). A balance needs to be achieved between the very tall buildings of the town centre and the lower scale of the Rockingham Estate, and indeed the existing streetscape of Newington Causeway as it runs from The Kite building to Borough which is classical in scale. All of this is set out in the SPD (see in particular SPD 17 and 27) and it is also readily apparent on the ground.

*The Judgement to be Reached:*

8. Ultimately, a planning judgement will need to be reached by the Inspector as to whether the 16 storey element of the appeal scheme is too tall and fails to respond positively to the existing townscape. Further to that, a judgement will need to be reached as to whether the impacts are compounded or exaggerated by the architectural treatment of the 'crown' or 'parapet', as Mr Coleman described it.

9. The following points are set out to assist the Inspector to make an informed judgement:

(i) Both parties agree that the existing townscape is not the best. Mr Hepher took it upon himself – without any architectural or urban design qualifications or professional experience – to suggest that subtle, sensitive judgements about height are inappropriate here and, in effect, a poor townscape can cope with something which would be inappropriate in a nicer place. The Council submits that that is a regressive and flawed approach. As Mr Craig said, the fact that there are clear opportunities to improve the townscape at Avonmouth House should not translate into meaning that it does not matter what you put there. Surely, in such a situation, it is all the more important that the resulting design is very high quality; exemplary design can alleviate a fragmented townscape, while the proposed development will only aggravate it. Exemplary design should set a high quality benchmark that encourages others to follow and repair the townscape.

(ii) The judgement must be reached in light of the *existing* local context. The Appellant sought to rely on the potential for future tall building development in the Borough Triangle to suggest we are on the cusp of a change in the local context (although, notably, Ms Lewis accepted in cross-examination that her masterplan proposals she had sketched out (PE Figs 2.3 – 2.5) should be given no weight). There are no planning applications for these buildings and the prospect of them actually coming forward is far too remote to be of any materiality. The 'Tibbald Study' referred to is about co-ordinating large sites in the Elephant and Castle Opportunity Area. It is not a planning document. It is not public and has never been consulted on or put before Members. It is not before the inquiry. Whilst there may be a long-term ambition to regenerate the area further, it is simply not material at this point in time.

(iii) Mr Coleman accepted that there is big difference in streetscape between the buildings from the Kite building and beyond to the Elephant and Castle roundabout and the streetscape of Newington Causeway. The only taller building the Appellant could point to along Newington Causeway - Kings Place - is one which is not yet built, is subject to a non-material amendment application to deal with the phasing, is smaller than the appeal scheme (13 storeys), is situated on a more strategic site on the junction between Borough Road / Newington Causeway and Harper Road, and was only considered acceptable as it provided an uplift in commercial space and a community hub which justified the harm. A reduction in height of the building was sought during the determination of the application from 14 to 13 storeys.

(iv) Mr Coleman also accepted that the appeal site is set back from the strategic road of Newington Causeway in a much quieter area next to the 'oasis of calm' provided by the Newington Park Gardens. He further accepted that the appeal scheme must be read as properly subservient to the Kite and must not compete with it. It should enable the Inner London Crown Court to maintain its gravitas as an important public building. All of these factors dictate the capacity of the appeal site to accept a tall building of 16 storeys.

(v) In terms of the design of the appeal scheme, it has had an unusually low level of scrutiny. That this is acknowledged to be, in part, the fault of the Council does not detract from the point that the Inspector has no independent views on the merits of the design to take into account to inform her judgement. Mr Coleman is not independent. Even if he is, as he says, 'tough on his clients', he was only instructed a mere month before the scheme was submitted to the Council for pre-application advice in essentially the same form as it is in now. He was not involved from the outset of the design formulation. Given the impasse reached with the Council, there would have been nothing to prevent Tribe from taking the scheme to an independent Design Review Panel or other form of peer review in order to seek feedback. They did not, however, chose to do this. The burden of proof is on the Appellant to demonstrate the "exemplary standard" of their design and this may be argued to be of particular importance in a case such as this where the architects have very limited experience of designing tall buildings (the only other building of this, or greater, height put forward as an example of experience by Ms Lewis is Ilderton Wharf

which was being designed by Stitch at around the same time). Stitch is on Southwark's Panel to provide masterplanning services only, not architectural design.

(vi) The building faces the challenge of working well as an intermediate building which is not an iconic building such as the Kite or Eileen House, or the Shard, but is equally not a typical cityscape building of modest size. It does not sit as part of a cluster of existing tall buildings and must stand quite removed from the Elephant and Castle roundabout hub, more as a stand-alone tall building. This is a difficult challenge to get right. The DAS accepted in exploring the Early Massing Options (p. 23) that 20 storeys would be too tall and overbearing for the park setting, and too close in height to the Kite building. All of the other options looked at at that time were a maximum of 14 storeys. However, it was only following TVIA assessments, that the Appellant decided that "around 16 storeys was the acceptable limit in terms of building height" (see text on p. 16). Mr Coleman referred to View 7 (p. 47 of the HTVIA) as having persuaded him that it was acceptable to reach 16 storeys because the building is – just – screened in summer by the park's trees at their current height. There is clearly no margin for any error in this assessment and it is but one viewpoint.

(vii) Ms Lewis said that the building is designed to draw attention to itself and she sought to justify this in townscape terms on the basis that it is marking the entrance to Newington Park Gardens. This is, with respect, a self-serving justification. The Gardens are a neighbourhood park, used predominantly by the residents of the Rockingham Estate or Trinity Church Square. They are low-key and locals will know where they are: they do not need a tall building to find them. The Gardens have a number of entrances and the one next to the appeal site may well be used less frequently than others, given the desire lines, as Mr Craig explained. The other suggestion made by the Appellant was that the tall building is desirable in some way to 'enclose' the park. Again, it is hard to understand why an open space in the midst of a very busy urban area requires closing. What is important is that the park should not be dominated by a block of student housing which is seeking deliberately to draw attention to itself. The Appellant seemed a little unclear as to what the building is trying to achieve – for example, it is not a public building, but the

building is seeking to identify itself and act as a 'marker'; it is trying to be subservient and screened by trees, yet the building has deliberately adopted a distinctive and bright 'crown' and there are suggestions of writing its name up the side. The building fails to have a clear design rationale in relation to its function.

(viii) The HTVIA images are a useful tool but must, of course, be seen as no more than that. The Inspector will be aware that the trees are deciduous and will not screen the building in the winter months; and, at night, the building will be visible even through the leaves. The failure to achieve an appropriate transitioning downwards from the Kite and Eileen House is perhaps most apparent in Viewpoints 8, 9 and 10. In Viewpoint 8, the appeal scheme almost completely blocks the Kite - but not quite - leaving a strange sliver of the other building appearing behind. Without the top two storeys, the relationship would be much more logical. Viewpoint 9 shows the Kite and the appeal scheme appearing at almost the same height, with the sensitive court building in the foreground. Again, absent the 'crown', the relationship between the Kite and the appeal scheme and the strategic importance of the court building would be much improved. Viewpoint 10 shows that Elieen House and the Kite create a neat stepping down effect but that is interrupted somewhat by the appeal scheme which fails to continue along the same gradient. In this way, it fails to respect the heights strategy as set out in the DAS itself in the diagrams on p. 21.

(ix) The overbearing impact on the park and the Rockingham Estate is best shown in Views 2, 3 and 5 and 6. Again, it really is the inclusion of the top two storeys which causes the problem. As Mr Craig said in relation to View 3, a 14 storey scheme might well be seen as being lost in the clouds but it very much is not with the 16 storey element. In View 5, a 16 storey scheme, especially in winter or at night, becomes overwhelming and is not an appropriate scale in relation to a local park. Mr Coleman stated that the impact on the park is the most sensitive matter, in his view.

(x) The design of the 'crown' or 'parapet' appears a controversial feature even within the Appellant's own team, with Mr Hepher saying that he does not personally like the colour, and Mr Coleman apparently also having some reservations about it. It is

agreed that it is desirable for a building to have a 'finish'. However, unlike Stich's elegant, delicate and porous finish for Ilderton Wharf (which incidentally did go through Design Review) (see Ms Lewis' proof at p. 20), the 'crown' is a bulky, solid mass which gives the building a top-heavy appearance. This is no doubt as a result of a practical requirement from the brief to include student bedrooms within it. However, as a result, it has solid walls with no windows on one elevation (see e.g. the images on pp. 47 and 53 of the DAS) and only four small windows on another (see pp. 48 and 55 of the DAS).

(xi) In architectural terms, inevitably a building for student accommodation has to deal sensitively with the challenge of a repetitive grid of small windows (as Mr Coleman said). However, in this case, in relation to the crown, it is simply not architecturally special or elegant. It is poorly proportioned, ugly to look at, and it certainly is not slender. The top two storeys struggle, perhaps because of the brief to include the maximum number of student rooms, to avoid being boxy. The brick colour is a dark aubergine red and there is a strong solidarity to the structure, with the solid parapet and solid panels on the flank. The masonry finish and thick, extended piers, parapet and solid infill panels appear heavy and awkward. It seems to sit oddly off-centre. This is not a matter of simply changing the colour to white and grey. The issue would remain: that is, the rooftop bulk with the brick masonry adding a heaviness to the design. Ultimately, the main problem is that the building is too high. But even if the Inspector were to conclude that the height *per se* is acceptable, the architectural treatment of the crown itself causes townscape harm and is certainly not of "exemplary" design.

*The Fallback Position:*

10. It is highly material that the Appellant has a recent resolution to grant for a 14 storey scheme on the site. There was a suggestion by Mr Hepher that if this had happened earlier, then this appeal may not have been pursued. Perhaps even, had pre-application discussions been more productive, then 14 storeys may well have been where the scheme would have ended up. The Avison Young report for the 14 storey scheme shows that it is viable and Mr Hepher accepted that there was no suggestion that it could not attract investment funding on account of its smaller size. Given that there is an

alternative deliverable scheme which is acceptable in townscape terms should be a matter of significant weight. In other words, the inclusion of the top two storeys is not indispensable to the redevelopment of Avonmouth House: it is simply a case of a developer who wishes for something more commercially attractive.

**S. 106 Agreement Nominations Issue**

11. This issue arose late in the day after the exchange of proofs of evidence when the first draft of the Appellant's UU was presented to the Council (on 30 November 2022). Up until that point, the appeal scheme had always been promoted as delivering all of the student housing via a nominations agreement with one or maybe two HEIs (the University of London and the London South Bank University). This was confirmed in correspondence between the Council and the Appellant; it was also part of the instructions to the viability experts who reviewed the scheme (James R Brown - see 14.1.2 of their Report: "We have assumed the University of London will have Nominations Rights over the whole scheme"); and appears to have been the understanding of the universities themselves (LSBU refer to "affordable rents for students studying in London" and UoL to "appropriate rents").

12. That the scheme was promoted on the basis of all of the rooms being subject to a nominations agreement is consistent with Tribe's own scheme at 671-679 Old Kent Road (KFC site) where the s. 106 agreement stipulates that 100 percent of the rooms will be subject to a nominations agreement. There has been no suggestion by Tribe that that is no longer deliverable and no application has been made to vary the s. 106, despite un-evidenced assertions by Mr Hepher that there are some financial difficulties facing the scheme. It is also consistent with the 14 storey scheme which is, itself, expected to provide for a 100 percent nominations agreement and was reported to committee on that basis (see e.g. paras 30 and 104 of the Committee Report).

13. The Appellant now proposes that only the affordable student housing element will be subject to a nominations agreement (which is 35% of the scheme) and the remaining 65% will be offered to the universities at an open market rent with a first right of refusal. They argue that this is consistent with policy and is essentially the same thing, but adds a touch of 'commercial reality' to the situation.

14. It is simply not the same thing and is not in accordance with policy. To find otherwise would set a dangerous precedent for other schemes in the Borough and enable schemes to bypass the open and transparent process for providing viability evidence to support any departure from providing a contribution to conventional affordable housing, which is much needed in Southwark. There are a number of other schemes upon which this issue depends.

15. The Appellant has no viability evidence to support a departure from policy and it does not present its case as such (although Mr Hepher at one point sought to suggest that the appeal scheme is entirely unviable, that is not the Council's understanding). It must therefore succeed or fail purely on the basis of the interpretation of the relevant Southwark and London Plan policies (P5 and LP H15).

16. Policy P5 is unambiguous. It provides a mandatory requirement (the word 'must') to either (2) provide 35% conventional affordable housing when providing direct lets at market rent subject to viability and 27% of the student rooms at an affordable rent as defined by the Mayor or (3) to provide 35% affordable student rooms and no requirement for conventional affordable housing when "providing all of the student rooms for nominated further and higher education institutions". There is no third way. Where any element of the scheme is direct market let (however small), P5(2) applies and an affordable housing contribution must be made if it viably can be.

17. Policy P5 is consistent with the London Plan Policy H15, although drafted specifically in relation to local needs in Southwark around affordable housing. Even were it not, it post-dates the London Plan by over a year and was drafted in light of it and so it must take precedence as a matter of law (s. 38(5) PCPA 2004).

18. It is implicit in the policy that options (2) and (3) are alternatives but neither should be more or less advantageous than the other. In order to gain the benefit of P5(3) and avoid the affordable housing contribution, the developer must be suffering the 'disbenefit' of having all of their units subject to nominations rights (and 35% being affordable). Implicit within this is the acknowledgement that a nomination agreement will not result in the same market rents as an open market rent. This is no secret and is acknowledged

in the viability reports and by Mr Hepher (who accepted that rents under a nominations agreement will be somewhere between an open market rent and the GLA affordable rent). Whilst there is no express policy desire to 'suppress rents', that is the obvious result of having a monopoly customer, and will have been well in the mind of the policy drafters. The up-side is that the developer has certainty over occupation.

19. The Appellant sought at one point to suggest that universities are themselves disadvantaged by nominations agreements since they may not wish to take up all of the rooms. However, the nominations agreement does not force them to do so and the developer may enter into multiple nominations agreements with different institutions to encompass all of the rooms. There is also the scope for other benefits for the university including input into the features and design of the accommodation which is absent when being offered rooms simply as a first right of refusal. The main point, though, is that absent a nominations agreement, students in London, who do not qualify for the GLA affordable student rooms, are deprived of the opportunity to live in accommodation which is at an appropriate university-level rent.

20. The Appellant's position would result in higher returns than either of the Southwark Plan policy scenarios as a result of the right of refusal being always at an 'open market value'. This is supported by the fact that the less commercially attractive 14 storey scheme was recently assessed in light of the current financial climate (September 2022) by Avison Young on the basis of 65% open market rent levels as being in profit (with a surplus of £1.86m). It is noteworthy that AY only used open market rent levels because they did not have the details of the proposed nomination agreement (not because that was policy compliant) (see p. 25 under the heading 'Student Accommodation' and p. 27 first full paragraph).

21. Ultimately, however, the viability or otherwise of the scheme is irrelevant. All that is relevant is whether the Appellant's proposal complies with Policy P5. It does not, and so, if the appeal is allowed, it should be made to accord with Policy P5 by the selection of the appropriate UU option. (I am closing on the understanding that this is the Appellant's preference if the Inspector agrees with the Council's case on the nominations agreement; and therefore have not dealt with the breach in the planning balance.) If there is a viability difficulty with this, then it will be open to the Appellant

to submit the necessary evidence to the Council in order to seek a deed of variation. That is the proper, open and transparent process which should be followed.

**The Planning Balance**

22. The planning benefits are acknowledged (in particular the provision of student housing and employment floorspace). However, the balance cannot be carried out simply by adding and subtracting numbers in the way Mr Hepher sought to do, which gives an inflated weight to a number of incidental benefits which would be generic to any redevelopment scheme (and his approach has in fact been deprecated by the High Court - see Dignity Funerals Ltd. v. Breckland District Council [2017] EWHC 1492 (Admin) at [68] – [70] where it is said that planning balances should not be approached too mathematically or mechanistically). There is no indication in policy or guidance that this is an appropriate method for reaching planning decisions in the public interest. The proper method is clearly set out in statute in s. 38(6) of the PCPA 2004. The decision should be made in accordance with the development plan unless material considerations indicate otherwise. The development plan and its policies have primacy and development which is in breach of the development plan should not be allowed unless there are good reasons to justify a departure. This is not a 'tilted balance' case.

23. Mr Hepher sought to suggest that even if the development is in breach of the townscape and design policies in the Southwark and London Plans, it should be viewed as being in accordance with the plans. That will be, of course, a matter of judgement looking at the plans and their policies as a whole. However, this is not a case where policies in the plans pull in different directions and so one might excuse a technical breach of one policy in light of the support found in others (see e.g. R v. Rochdale MBC ex p Milne (No 2) [2001] 1 Env LR 22 at [48]). Townscape policies do not pull away from policies which support redevelopment. They acknowledge that sites should be 'optimised' and the best use of land made (and with that delivering on the need to the best extent). However, this is always caveated by the requirement to respond positively to the local context and build something of exemplary design in the case of a tall building. If the scheme does not achieve the latter, then it should be refused in favour of a better scheme.

24. In this case, the better scheme, from a townscape perspective, is already there with a resolution to grant. That fallback, as I have said, is highly material and means that absolutely all of the planning benefits (bar the need met by a very small element - 14 bedrooms - and some minor additional construction economics) can be delivered in an acceptable way.

25. No doubt, the 14 storey scheme will be abandoned if this appeal is allowed and the Elephant and Castle will suffer the parapet looming above the Rockingham Estate, the Newington Park Gardens, the Crown Court, and the area generally for generations. It is acknowledged of course that, in determining the appeal, the Inspector will reach her own judgement as to the ability of the appeal site to accommodate a tall building of this scale and with an architectural feature such as a 'parapet'. However, the Council has (in the end) been fair-minded, realistic and pragmatic and has accepted 14 storeys as being tall, as optimising the site, but not too tall. It is not the case that the addition of the 'parapet' is neither here nor there and no one will care (as Mr Hepher suggested). Sixteen storeys just goes too far. It is contrary to the Plan and is simply bad planning which will have wide-ranging effects and be irreversible. The Inspector is invited to dismiss the appeal to enable the more sensitive – yet viable – scheme to be delivered.

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**21 December 2022**