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URGENT

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By email only: Daniel.Pope@camden.gov.uk

cc.: Planning Committee Members

Our ref: FOR00001
Your ref: 2022/0528/P

28 March 2023

Dear Sir,

RE: request for deferral of decision by Planning Committee / request for refusal of the hybrid detailed and outline planning permission application at 'O2 Masterplan Site, Finchley Road, London, NW3 6LU' (the "Application")

1. We act for the Fortune Green & West Hampstead Neighbourhood Development Forum (the 'NDF') on behalf of a group of local organisations and individuals, including the NDF.
2. We write to urgently draw the Council's attention to fundamental flaws in the decision-making process with regards to the Application and the due consideration of relevant objections.
3. We requested in our letter dated 27 March 2023 that the Committee Meeting (scheduled for 30 March 2022) to decide the Application be deferred until such time as these flaws can be satisfactorily remedied by the Council and the Officer's Report can be rewritten to take into account our client's substantive objection.
4. You responded today advising that there was no cause to defer, so we write again to urge the Planning Committee to defer the decision.
5. We also set out the key flaws we have identified in the Officer's Report ('OR') and, should the Committee choose not to defer the decision, we urge the Committee not to follow the recommendation for approval of the Application, but to instead, refuse it for the reasons set out at the end of this letter.

Background

6. During the consultation period, which ended on 21 March 2023, our client, along with other local community groups, submitted a substantial joint objection, titled

"Representations on behalf of the Confederation of Local Community Groups" (25 July 2022) ("the CLCG Objection").

7. The CLCG Objection was written by an expert planning consultant and raised a substantial number of relevant issues, including but not limited to, land use, design, green space deficiency and heritage issues.
8. The CLCG Objection was received by the Council on 25 July 2022.

Officer's Report

9. The Officer's Report ('OR') was issued on 22 March 2023, just one day after the consultation period closed on 21 March 2023. This raises an obvious issue - particularly given the scale of the proposed scheme and volume of objections - about the feasibility of the Officer to be able to set out fairly in the OR what is necessary for the Planning Committee to carry out their statutory duty under s38(6) of the Planning and Compulsory Purchase Act 2004 to take material considerations (which includes relevant objections) into account in determining planning decisions.
10. Of further concern is that the OR was signed on 17 March 2023. We note from the Council's website that some 77 objections were received between the date on which the OR was signed and the date that the consultation period closed.
11. This presents a serious issue of pre-determination. Having seemingly already written and signed off on the OR before the end of the consultation period, the Officer had clearly closed his mind when making recommendation for the decision and did not take material considerations into account.
12. The OR should be "*...clear and full enough to enable them [the decision-maker] to understand the issues and make up their minds within the limits that the law allows them*"(R(Morge) v Hampshire County Council [2011] 1 WLR 268 at [36]). The OR before the Planning Committee in its present form plainly fails to do this.
13. Indeed, in our view the OR is skewed in favour of the development. For example, in referring at 13.33 to Historic England's consultation response noting the impact on views and stating that the development 'causes undesirable intrusion' but then saying 'they do not explicitly mention harm'. This happens on 4 occasions in the OR. The OR fails to deal with the elephant in the room – the large cluster of tall buildings in an area characterised by low level development and the 5 conservation areas in close proximity. Further, we do not consider that the OR accurately summarises the Historic England consultation response or has actioned that response (copy enclosed).
14. The OR does not adequately take the CLCG Objection into account, either by reference to the objection itself or in dealing with the substance of the objections raised. We deal with each of these issues in turn below.

Relevant objections not dealt with in the OR

15. Under heading 6, "Consultation Summary" within the OR, the Officer writes (at page 105), in relation to our client's objection, "*no specific issues raised*". This is plainly untrue and misleads the Committee. The CLCG letter of objection is attached.

16. The CLCG Objection, in its 30 pages, raises a number of issues which the OR fails to take into account, including by dealing with the substance of the objections elsewhere in the OR, relating to:

a. *Land use*

17. The CLCG Objection identifies (at paras 9-11) a policy conflict between adopted key elements of the Council's development plan and the Application.
18. Camden Local Plan 2017 ('CLP 2017') identifies the O2 car park for "*appropriate town centre mixed use development, including housing, retail, community uses and open space*".
19. The West End Lane to Finchley Road Supplementary Planning Document (the 'SPD'), refers to the land on which the Application site sits as seeking comprehensive redevelopment including residential, retail, leisure, workspace, and community uses.
20. Further, the adopted Fortune Green and West Hampstead Neighbourhood Plan (2015) (the Neighbourhood Plan) also supports similar mixed uses including community uses.
21. The London Plan also identifies the site as a strategic regeneration area combining commercial and residential uses.
22. The Application, however, seeks to regenerate the site almost entirely for residential use, with commercial uses under 11% and community uses comprising just 0.1% of the built development.
23. Whilst the OR (at para 10.17) accepts that there would be a 'significant loss in retail floorspace', it fails to adequately set out for the Committee that this conflicts with each of the policy documents set out above, and fails to take adequate account of this.
24. The OR also sets out that the community space will be reduced from 355sqm to 268sqm (para 10.55 and 10.56) but does not identify this as being in conflict with any policy. This demonstrates that the OR has further failed to take into account relevant local planning policy in making his recommendation for approval.

b. *Design*

25. The CLCG Objection raises important concerns around the proposed design of the development and contends that it is a "*a scheme of overbearing height, mass and form which is alien to its context and built at such an extreme density that its compromised functionality cannot be addressed through the quality of architecture and design*" (para 14).
26. The CLCG Objection refers to the London Plan, CLP 2017, and the Neighbourhood Plan (at para 12) which all prioritise design-led approaches to ensure high quality design that complements and enhances the distinct local character of the area. Policy D1 of the CLP 2017 contains design criteria, and as identified in the CLCG Objection (at para 16), the Application is in conflict with almost all aspects of the development criteria.

27. The CLCG Objection also refers to the pre-application advice on the scheme which recognised these issues with design, describing an 'overbearing and unwelcoming environment'.
28. The OR, in its section on design at para 14.20, identifies that the 'scale of development proposed is significantly greater than that of its immediate context'. However, it fails to demonstrate to the Committee the conflicts with relevant development plan, in particular with the criteria in Policy D1 of the CLP 2017. The OR fails to adequately assess the Application against these criteria.
29. The CLCG Objection further refers the Officer to comparable site data from a GLA Report (at para 20 of the Objection) that shows the extant Application as significantly more dense than any other comparable site size and range. This is not referred to in the OR.
30. The architectural merit of the design, including its relationship within the local context – as raised in the CLCG Objection - is also not taken into account in the OR, as is required under the local development plan.
31. The OR does not acknowledge that under the NPPF (para 134) development that is not well designed should be refused. Despite substantial design concerns raised in hundreds of objections, the pre-application advice, and the Design Review Panel – particularly in relation to massing and density – the OR skates over these concerns and does not engage properly with whether the Application comprises *good* design.
32. To this end, the OR also fails to take into account the following material considerations:
 - a. The Historic England Advice Note 4 of March 2022 on Tall Buildings
 - b. The National Design Guide ("NDG")
 - c. The Guidance Notes for Design Codes
33. Furthermore, the OR appears to acknowledge that the Application includes tall buildings, referring to the impact on daylight and sunlight conditions, but without making any assessment of to what extent the application includes tall buildings and the appropriateness of this design in its context. The only reference in this regard is at para.14.22, which refers to "taller elements" and the "tallest building" being 55m.
34. The Historic England Advice Note 4 states that "*The importance of good design is reinforced through the NDG [National Design Guide] which promotes the creation of high-quality buildings and places.... It also provides guidance on tall buildings, emphasising the importance of design (paragraph 70), location, siting, context, local character and views (paragraph 71)*" (para.2.8, Tall Buildings, Historic England Advice Note 4).
35. The NDG, itself Planning Practice Guidance, is not referred to or considered in the OR. Para.71 of the NDG states "*proposals for tall buildings (and other buildings with a significantly larger scale or bulk than their surroundings) require special consideration. This includes their location and siting; relationship to context; impact on local character, views and sight lines; composition - how they meet the ground and the sky; and environmental impacts, such as sunlight, daylight, overshadowing and wind*". This has not been adequately assessed.

36. Given the huge impact the proposed tall buildings will have on their surroundings, including conservation areas, our clients strongly object to the failure by the Council to require a detailed planning application so that the full impact on heritage assets can be properly assessed – something that it is not possible to do without knowing the detailed form and finishes of the proposed tall buildings.

c. Green / open space deficiency

37. The OR sets out (at para 17.11) the calculations for the proposed open space provision. This indicates that the total open space is less than half of what is required by policy (CLP Policy A2), and that a financial contribution would be implemented to make up the shortfall.
38. It concludes that the proposed open space "*whilst short of the policy requirement is substantial and is of excellent quality*" (para.17.13). This fails to acknowledge the considerable shortfall compared to the policy.
39. Further, it does not undertake any kind of assessment of whether this is acceptable in planning terms, despite material considerations including the Council's Public Open Space Guidance 2021 which states: "*The importance of public open space cannot be exaggerated in an inner London location, where space is limited and open space has to meet a wide range of often competing demands.*" (See also, Policy 17.ii of the Neighbourhood Plan and the fact that the West Hampstead area has been identified as an area deficient in open space).

d. Heritage

40. The OR fails to set out correctly the legal tests on heritage.
41. The Council has to have special regard to the desirability of preserving the building or its setting and give great weight to the harm by virtue of Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Caselaw has established that the duties to have 'special regard' or 'special attention' in sections 66 and 72 mean that 'considerable importance and weight' should be attached to preserving the listed building or preserving and enhancing the conservation area: *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, [2015] 1 WLR 45 at para 29 per Sullivan LJ. This also amounts to a 'strong presumption' against the grant of planning permission: *East Northamptonshire* at para 20, 23, 28. It is an error to treat 'less than substantial harm to the setting of the listed buildings ... as a less than substantial objection to the grant of planning permission': para 29.
42. The NPPF's references to great weight and clear and convincing justification are applications in policy of the sections 66/72 duty and apply to all designated heritage assets. This 'can be a trap for the unwary if taken out of context': *Pugh v Secretary of State for Communities and Local Government* [2015] EWHC 3 (Admin) at para 49 per Gilbert J.
43. The OR also fails to take into account the Historic England Advice Note 4 referred to above.

44. While the OR references various other planning policies (para.13.6), it restricts the scope of the London Plan and the Neighbourhood Plan to "*the importance of character and appearance*". In fact, the London Plan, also specifically focuses on the setting of heritage assets and their appreciation within their surroundings, as well as requiring active management of the cumulative impacts of incremental change (HC1.C). The CLP, meanwhile, specifically states that higher density developments are suitable to the extent that they "*contribute to the character of the area taking into account conservation areas and other heritage assets*" (para.2.53). This assessment is lacking in the OR. Further the CLP, at para.48, refers to high or bulky buildings and explicitly states that "*The Council will therefore not permit development in locations outside conservation areas that it considers would cause harm to the character, appearance or setting of such an area.*" A similar policy is contained at Policy 3.ii of the Neighbourhood Plan: "*proposals which detract from the special character, and/or architectural and/or historic significance and setting of Conservation Areas...will not be supported*".
45. The OR erroneously concludes there is less than substantial harm to the South Hampstead Conservation Area and that this harm is "right at the lower end" (para.13.61), despite acknowledging that "*the development will be highly visible from several views within the Conservation Area. The development introduces a building typology that is very different from the Conservation Area in terms of its scale, height and massing. This alters the character of the conservation area's setting which is suburban in nature albeit with large detached and semi-detached buildings and a spaciousness that allows for significant amounts of greenery.*" (para.13.24) The level of harm to the setting can be seen, in particular, in figure 26 – View 11 and figure 27 – view 12 of the OR.
46. The level of harm is particularly significant given that the Application includes tall buildings. The impact of the tall buildings, including on heritage assets, has not been adequately considered (see above).
47. It is open to the planning committee to disagree with the OR, to come to its own planning judgment and to find there is substantial harm to heritage assets, which in our view, there clearly is.

e. Alternatives

48. Historic England at para 4.13 of HEAN 4 notes that tall buildings are often a policy response to the need to deliver high density development. 'However, it is possible to deliver high density development using low to mid-rise building typologies as an alternative to tall buildings. Exploring how densities can be intensified through 'gentle densification' can help deliver multiple spatial planning objectives i.e. the delivery of housing and good place-shaping while still conserving the historic environment'.
49. Historic England also notes that where EIA is required, as in this case, the EIA Regulations 2017 set out the need for 'the applicant to include in their Environmental Statement a description of the reasonable alternatives studied (for example in terms of development design, technology, location, size and scale) and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects.'
50. The OR fails to examine alternative designs or schemes that might be more sustainable in that they deliver public benefits while avoiding harm to the built environment.

Conclusion

51. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires a determination of planning permission to be made in accordance with the development plan, unless material considerations indicated otherwise. Such material considerations include, *inter alia*, relevant statutory tests, the London Plan, relevant national guidance and the National Planning Policy Framework (NPPF). Material considerations also include relevant objections to the Application.
52. In discharging its legal duties, the Committee cannot justifiably follow the OR's recommendation and grant conditional planning permission in respect of the Application.
53. As set out above, the Application plainly contravenes the local development plan policies as well as national planning policy.
54. We urge the committee to come to its own planning judgment and refuse the Application for the following reasons:
 - a. Land Use - The development would result in an unacceptable mix of land use, with insufficient commercial and community use for this strategic site, in conflict with planning policy;
 - b. Design – The height, massing, form and density of the proposed development does not amount to good design and is inappropriate in its context;
 - c. Open space – The development falls significantly short of the required open space for a development of this size. Given the extent of the shortfall (over half the required amount), in an area that already has an open space deficit, a financial contribution would not be appropriate.
 - d. Heritage – The level of harm on some neighbouring conservation areas, particularly in light of the height and massing of the development, amounts to substantial harm to the significance of designated heritage assets; and the public benefits of the proposal do not outweigh this harm.

Yours faithfully,

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