

BY FAX AND POST – 0207 525 7498

Cllr Kim Humphreys
Chairman
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Dear Sir

POTTERS FIELDS - DECISION OF THE EXECUTIVE COMMITTEE DATED 9TH SEPTEMBER 2003

We act for Berkeley Homes (South East London) Limited ("Berkeley") and are advising in connection with various matters arising in relation to the Potters Field site.

Together with our client, we attended the meeting of the Council's Executive Committee on 9th September 2003. At that meeting the Council resolved to appropriate that part of the site which had been transferred to the Council (by our client) in April this year ("the Council's land").

We sent detailed representations to the Council on 2nd September 2003 (copy enclosed) and also made oral representations at the meeting itself. We are especially concerned that in relation to certain issues officers advised the Executive Committee Members in public in an incomplete manner or in a misguided or obscure way. There are a number of legal issues and matters of fact which required to be properly understood and taken into account by Members if this decision was to have been lawfully taken.

We also consider that the background context should have been properly explained – including such matters as the breach of covenants in relation to use of the land as a result of the David Blaine stunt at the site, which was and is the subject of legal correspondence between your officers and ourselves on behalf of Berkeley. Despite this the Council proceeded to adopt the resolution to appropriate.

One of your Committee Members was also present at that Executive Committee meeting and you are therefore no doubt aware that our client has serious concerns as to the propriety of the Executive Committee's decision and that we have advised our client that it has a number of legal options available to it.

We also advised the Executive Committee, however, that it has always been our client's wish to work with the Council in order to secure an appropriate redevelopment of the Site. In those circumstances, we and our client were pleased to see that this decision has now been called in by the Overview & Scrutiny Committee as we hope that this might provide an opportunity for the Council to step back from the unfortunate decision to appropriate which will, if not withdrawn, lead to considerable expense in terms of legal costs for both parties.

The involvement of your Committee is, therefore, timely. Had the Overview & Scrutiny Committee not intervened, as a result of which the appropriation decision is now in abeyance, our client would have commenced judicial review proceedings in the High Court seeking to have the decision quashed. We expressly reserve their right to do so should it become appropriate in due course.

We appreciate that your principal concerns may relate to the financial risks to which the Council will be exposed as a result of its decision to appropriate. In case it is of assistance to you we set out below our comments on the ramifications of the Council's decision.

Berkeley's position

To place matters in context, however, we thought you might find it helpful to have a summary of what our client's proposals are in relation to the site. Berkeley is proposing a mixed use scheme which, in addition to private housing, will include:

- i. 115 Affordable homes;
- ii. 8122 square metres of cultural uses and 0.596 hectares of publicly accessible space.

Berkeley's application for planning permission relates to a substantial part of the Potters Fields site including the Council's land. Accordingly, Berkeley wishes to work in partnership with the Council to achieve the beneficial regeneration of this part of the Borough. Terms would have to be agreed between Berkeley and the Council to make the Council's land available to Berkeley for the purposes of the scheme and preliminary discussions had been underway for a couple of years before the appropriation decision was made. The possibility of appropriation was never discussed with Berkeley, however, at any time.

Our client had assumed that the Council would wish to secure best value for its land and that in pursuit of this objective it may support a partnership approach with Berkeley.

The Council's position

The Council, by its Planning Committee, has rejected Berkeley's scheme. The grant of planning permission will now be determined at a public inquiry next Spring.

The Council appears wedded to the notion of using the Potters Fields site, including its land, for the purposes of a major cultural use. A fundamental difficulty the Council faces, however, is that this land was transferred to it specifically for the purposes of residential use. This restriction was contained in an express restrictive covenant incorporated in the land transfer which the Council signed as recently as 24 April 2003. At no time during the transaction to take back the relevant land did the Council seek to have the pertinent covenant removed.

The covenant was imposed pursuant to an earlier legal agreement by which the Council also entered into a positive covenant to use its best endeavours to bring forward the residential development of the Council's land. It is common ground that the Council is still bound by this covenant.

The Council has repeatedly sought to take decisions which conflict with these covenants.

As you may be aware the Council purported to adopt a Planning Brief for this site, in April this year, which promoted the use of the site for a major cultural use. Members were not properly advised as to the impact of the restrictive covenant and, following formal notice by our client that they would issue judicial review proceedings, the Council was forced to withdraw the Planning Brief.

The appropriation decision on 9th September 2003 again seeks to circumvent the restrictive covenant albeit by a different legal route. The decision-making was again improper and will be the subject of a judicial review claim if the decision were to become effective. We do not dwell on the legal issues in this letter but simply comment that the basis upon which the officers sought to provide a mathematical analysis as to why this site is no longer required for housing was entirely spurious based, as it was, on numbers of permissions granted rather than the number of actual completions.

When the figures for actual completions are used, as the basis for predicting the provision of housing in the Borough to 2016, it is apparent that Southwark will miss its target by a significant margin. This is quite apart from the lack of any evidence, or justification, for the Council's proposed alternative purpose.

Financial implications

The course the Council now appears intent on pursuing has significant financial implications. Members were not properly advised of these implications and/or failed to have due regard to them. We refer, in particular, to the following:-

- i. The Council has wholly failed to identify what the proposed major cultural user might be and whether such use is necessary and/or achievable. Still less whether the "benefit" of such use would outweigh the community benefits that will be provided by Berkeley's scheme.
- ii. The Council failed to consider the basis upon which such a cultural use would be funded. By this we mean not only the capital costs of constructing a new building but also the on-going funding needed to keep it running. This latter point being exacerbated, of course, by the pressure on many cultural uses now to allow free admission.
- iii. These factors reduce the likelihood of a major cultural user coming forward. All the more so as there is little prospect of any grant funding being available to meet these costs.
- iv. Even if a cultural user were to come forward, the costs involved would inevitably mean that the user would, rather than providing consideration to the Council for the use of its land, more likely be seeking some form of subsidy from the Council to support its use. The Council would plainly not secure best value for its land.
- v. If the Council's land was to be used for purposes in breach of the covenants then Berkeley will be entitled to compensation. The Council failed to give any consideration to the amount of compensation that would be involved. Our client considers that, if it came to it, the compensation payable would involve some millions of pounds.
- vi. No proper consideration was given to the question of who would pay the compensation. The Council appeared to assume that the cost could simply be

passed on to the cultural user. No consideration was, however, given to the fact that grant funding would almost certainly not be available to meet this cost.

- vii. No information was given to Members about the Council's liability in respect of the David Blaine show.

For all these reasons we consider the Council's decision to appropriate the Council's land to be ill advised, improper and unlawful.

If the decision to appropriate were to become effective the resulting judicial review proceedings would lead to further significant liability for the Council. For the avoidance of doubt, we do not limit our client's position in those proceedings to the points made in this letter. If successful, our client will seek its costs which we anticipate will be in excess of £40,000 excluding VAT. This is quite apart from the Council's own legal costs.

If we can be of any further assistance to you prior to your meeting please let us know (the Partners in charge of the matter here for Berkeley are Tim Fogarty and Karen Cooksley).

We would very much like the opportunity to make representations to you in person at your Committee Meeting and to answer any questions which you may have in relation to the matter. Could you please consider whether this would be possible and let us know as a matter of urgency.

Yours faithfully

MASONS