

23 April 2019

**Heythrop College**  
**23-24 Kensington Square**

**in the Royal Borough of Kensington and Chelsea**

**planning application no. PP/18/05313**

**Strategic planning application stage II referral**

Town & Country Planning Act 1990 (as amended); Greater London Authority Acts 1999 and 2007; Town & Country Planning (Mayor of London) Order 2008.

**The proposal**

Reinstatement of three townhouses on Kensington Square, refurbishment of existing college building and demolition of all other buildings on site. Construction of new buildings and erection of a landscaped deck over the adjacent London Underground Line to deliver specialist older persons housing and deliver five additional intermediate residential units.

**The applicant**

The applicant is **Leopard UK Kensington PropCo Ltd** and the architect is **KPF**.

**Key dates**

**Pre-app meeting:** 4 September 2018

**Stage 1 reporting:** 15 October 2018

**Planning committee:** 27 November 2018

**Strategic issues**

The Use Class of the specialist older persons housing element of this proposal is considered to be C3 therefore affordable housing policies apply to this element in addition to three townhouses. The applicant has failed to demonstrate that the scheme would deliver the maximum reasonable amount of affordable housing and the proposals are therefore contrary to London Plan Policy 3.12, draft London Plan Policies H5 and H6 and the Mayor's Affordable Housing and Viability SPG'.

Issues with regard to **climate change** remain outstanding.

Comments with respect to **design, heritage, inclusive design** and **transport** have been appropriately addressed.

**The Council's decision**

In this instance Kensington and Chelsea Council has resolved to grant permission subject to planning conditions and conclusion of a Section 106 legal agreement.

**Recommendation**

That Kensington and Chelsea Council is directed to refuse planning permission under Article 6 of the Mayor of London Order 2008, for the reason set out in paragraph 97 of this report.

## Context

1 On 19 September 2018 the Mayor of London received documents from Kensington and Chelsea Council notifying him of a planning application of potential strategic importance to develop the above site for the development set out above. This was referred to the Mayor under the following categories of the Schedule to the Order 2008:

- Category 1B: Development (other than development which only comprises the provision of houses, flats, or houses and flats) which comprises or includes the erection of a building or buildings – outside Central London and with a total floorspace of more than 15,000 square metres; and
- Category 1C: Development which comprises or includes the erection of a building of one or more of the following descriptions — the building is more than 30 metres high and is outside the City of London.

2 On 15 October 2018 the Mayor considered planning report GLA/4491a/01, and subsequently advised Kensington and Chelsea Council that the application does not comply with the London Plan, for the reasons set out in paragraph 60 of the above-mentioned report. The resolution of those issues could lead to the application becoming compliant with the London Plan. A copy of the above-mentioned report is attached. The essentials of the case with regard to the proposal, the site, case history, strategic planning issues and relevant policies and guidance are as set out therein, unless otherwise stated in this report.

3 Following consideration at planning committee on 27 November 2018 Kensington and Chelsea Council resolved to grant planning permission. The Council advised the Mayor of this decision on 10 April 2019. Under the provisions of Article 5 of the Town & Country Planning (Mayor of London) Order 2008 the Mayor may allow the draft decision to proceed unchanged, direct refusal under Article 6, or issue a direction to the Council under Article 7 that he is to act as the Local Planning Authority for the purposes of determining the application. The Mayor has until 23 April 2019 to notify the Council of his decision and to issue any direction.

4 The Mayor can direct refusal where he considers that to grant permission would be contrary to the London Plan, prejudicial to its implementation or otherwise contrary to good strategic planning in Greater London.

5 The matters specified in article 6(2) of the 2008 Order have been taken into account in the consideration of the exercise of the Mayors powers.

6 The Mayor's decision on this case, and the reasons, will be made available on the GLA's website [www.london.gov.uk](http://www.london.gov.uk).

## Consultation stage issues summary

7 At the consultation stage Kensington and Chelsea Council was advised that the application did not comply with the London Plan for the following reasons:

- **Principle of development:** Provision of specialist older persons housing is strongly supported. As the buildings afford the facilities required for day to day self-contained private domestic existence it is considered that the proposal falls within Use Class C3 of the Town and Country Planning (Use Classes Order) 1987.
- **Affordable housing:** As it is considered that the proposed specialist older persons housing constitutes C3 residential under the Use Classes Order 1987 the Mayor's Housing SPG, draft London Plan and London Plan affordable housing policies apply

therefore, the nil on-site affordable housing provision in relation to this element is unacceptable. The applicant currently proposes five intermediate rent units included as affordable housing but these relate to the three proposed townhouses only. GLA officers are currently robustly interrogating the submitted viability assessment to ensure that the maximum contribution is delivered in accordance with the draft London Plan and the London Plan. Early and late stage review mechanisms must be secured as necessary.

- **Design:** the scheme delivers high quality design and GLA officers welcome amendments to address design concerns raised on the previous application. The affordable block must be revised to incorporate private amenity space.
- **Heritage:** The proposal would not harm the listed buildings on site or the setting of the adjacent listed buildings and would preserve and enhance the character and appearance of the conservation area in which it is located. The refurbishment works to the recreation wing and townhouses is welcomed and will enhance their collective significance and the wider setting of the conservation area. The design of the scheme as a whole is considered to be high quality and sympathetic to the surrounding heritage assets
- **Inclusive design:** The scheme must be revised to incorporate the highest standards of accessibility and inclusive design
- **Energy:** The applicant must implement further passive measures to limit overheating without active cooling. In addition, the applicant must explore the potential for additional measures to deliver further carbon dioxide reductions. Once all opportunities for securing further feasible on-site savings have been exhausted, a carbon offset contribution should be secured to mitigate any residual shortfall.
- **Transport:** the quantum of cycle spaces for staff and visitors and accessible car parking provision for the affordable units must be confirmed. Conditions and Section 106 obligations are required to secure the following; car park management plan; step free access and capacity improvement scheme; delivery and servicing plan; travel plan and construction and logistics plan, London Underground Infrastructure Protection and a development agreement for the deck over build of the London Underground Line.

## Update

8 Since consultation stage various revisions to the application have been submitted and additional information submitted to address concerns raised by GLA and Council officers. These are set out below and discussed in more detail in the relevant sections of this report.

## National planning policy and guidance update

9 On 19 February 2019, the Government published the revised National Planning Policy Framework.

## Officer recommendation – refuse planning permission

10 This report sets out the matters that the Mayor must consider when deciding whether to allow Kensington and Chelsea Council's draft decision to proceed unchanged; direct the Council under Article 6 to refuse the application; or, issue a direction to the Council under Article 7 that he is to act as the Local Planning Authority for the purposes of determining the application and any connected application.

11 Further to the consideration within this report, GLA officers have concluded that the issue raised at consultation stage regarding the unacceptable provision of affordable housing is still outstanding, and that the application does not comply with the NPPF, London Plan and draft London Plan and the Kensington and Chelsea Local Plan.

12 Accordingly, officers consider that to grant permission would be contrary to the London Plan and draft London Plan, would prejudice the implementation of the policies within the London Plan and draft London Plan to deliver affordable housing and would be contrary to good strategic planning in Greater London.

13 It is therefore recommended that the Mayor exercise his powers under Article 6 of the 2008 Order and direct refusal of the application for the following reason:

- Affordable Housing: The Use Class of the specialist older persons housing element of the proposal is considered to be C3 therefore affordable housing policies apply to this element in addition to three townhouses. Five affordable units are included within the proposal however on the basis of the evidence presented, the applicant has failed to demonstrate that the scheme would deliver the maximum reasonable amount of affordable housing and the proposals are therefore contrary to the NPPF, London Plan Policy 3.12, draft London Plan Policies H5 and H6 and the Mayor's Affordable Housing and Viability SPG, and Kensington and Chelsea Local Plan Policy CH 2'
- Section 106: Inadequate provision has been made in the draft s.106 agreement to secure the required affordability levels and delivery of the five affordable units and for viability review mechanisms. The absence of adequate and robust affordable housing clauses within the draft s.106 does not therefore support the delivery of the maximum reasonable amount of affordable housing on the site and is contrary to London Plan Policy 3.12 draft London Plan Policy H6 and the Mayor's Affordable Housing and Viability SPG and Kensington and Chelsea Local Policy CH 2.

14 In addition to the provision of affordable housing, items relating to energy also remain outstanding. Should a revised application be submitted the applicant should address this issue, as discussed below, as well as the comments set out within the GLA consultation stage planning report (ref: GLA/4491a/01).

## **Outstanding issues**

15 Further to the above reason for refusal, an assessment of the outstanding strategic planning issues on this case is set out below. The applicant is strongly advised to have regard to the issues discussed below if a revised application is to be submitted.

## **Principle of development**

16 At consultation stage, the principle of the redevelopment of the site to provide market and affordable housing and specialist older persons housing was supported. The Mayor's Stage 1 report set out that it was considered that as the proposed specialised older persons housing afforded the facilities required for day to day private domestic use, the proposal must be considered as C3 Use under the Use Class Order 1987.

17 Given the evolution of the scheme and the Section 106 negotiations that have been undertaken by Kensington and Chelsea Council following their decision to approve the scheme, GLA officers have robustly assessed the proposal including draft Section 106 clauses against the Use Class Order 1987 and relevant case law and this assessment is set out in further detail below.

## Extra Care Use

18 The Town and Country Planning (Use Classes) Order 1987 sets out that Use Class C2 (Residential Institutions) consist of 'Use for the provision of residential accommodation and care to people in need of care (other than a use within Class C3 (dwelling houses)), use as a hospital or nursing home, use as a residential school, college or training centre'. The Use Class Order 1987 sets out that Use Class C3 (Dwellinghouses) consists of 'Use as a dwellinghouse (whether or not as a sole or main residence) – a) by a single person or by people living together as a family, or b) by not more than 6 residents living together as a single household (including a household where care is provided for residents).

19 Care is defined in the Use Classes Order as '*personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in class C2 also includes the personal care of children and medical care and treatment*'

20 There is considerable case law (including through planning appeals) on the definitions of both Use Classes C2 and C3. There is no government guidance on which use class 'extra care housing' falls into. It is for the decision maker to decide, depending on the individual circumstances of each case, which class a particular use falls into. It is considered that the two central considerations are: i) the physical arrangement of the development and whether it comprises a single planning unit or separate self-contained dwellings; and ii) the way the facility will be used, including the circumstances of the occupiers and the level and nature of care provided.

21 GLA officers have analysed the proposed scheme in light of the draft decision notice and Section 106 to assess whether the scheme would provide residential accommodation for people in need of care because of old age so as to fall within Use Class C2.

### *Physical arrangement of the development*

22 The Government definition of self-containment for the purposes of determining whether a unit should be included in more general housing numbers is where all the rooms (including kitchen, bathroom and toilet) in a household's accommodation are behind a single door which only that household can use. As set out in the Stage 1 report, the proposed specialist older persons housing would meet the DHCLG definition of self-containment as they comprise self-contained units with distinct kitchens, bathrooms, living and bedrooms. The scheme includes a wide range of communal facilities at ground and basement including swimming pool, sauna, exercise rooms, gym, hair salon, cafe/restaurant, library and dog grooming parlour. This is not uncommon in luxury C3 residential developments and it is not considered that these communal facilities detract from the residential accommodation being 'self-contained'.

23 GLA officers have calculated that of the 3,128 sq.m. GIA of ancillary floorspace, 71% of it would be for non-care related elements including the hair salon, cinema and wine room all of which are considered typical of a high end unrestricted residential development. In coming to this conclusion, officers have included the GIA of the accessible swimming pools as while this could be used for therapeutic reasons, its use would not be restricted to this and again this type of facility is typical of high end residential developments. In addition, these calculations do not take into account the 'back of house' which includes refuse, circulation, plant, car and bike parking, and loading as it is considered that this floorspace would be required for both uses. In addition to the above the units will be for sale and owner-occupied, where it is considered that residents would primarily live self-contained lives.

### *How the building will be used*

24 In relation to the level of care, the floorplans indicate that the proposal would include medical service areas including matron's offices, nurses' stations, nurses' storage, treatment rooms, medical waste storage, linen store and hoist stores. Nurses' stations will be located within each of the buildings that contain the extra care units, on all floors from ground to sixth floor level.

25 Following the Stage 1 report and the Council's resolution to grant the scheme a draft Section 106 has been prepared which secures a baseline level of care to be delivered in the scheme based on the applicant's submitted Extra Care Accommodation Operation Policy. The draft Section 106 secures the following restrictions in relation to the level of care:

- Restriction for use as extra care accommodation;
- Restrictions on age (55 -65 (restricted to 10% of residents) and 65 and over for the remaining 90%);
- Restrictions on occupancy in accordance with care assessment and requirement and subscription to at least a minimum care level;
- Restriction on occupancy of extra care homes by anyone not in genuine need of medical care, except for companions living with a person in need of care;
- Requirement for an extra care accommodation management plan [the contents of this document are defined in the Section 106 as setting out how the extra care units will be managed and demonstrates compliance with staff arrangements and staffing ratios as set out in the Council's 'Older People's Housing Design Guidance'.];
- Requirement to appoint a Care Quality Commission regulated health provider; and
- Annual monitoring clause.

26 While the provision of care and support for older persons is supported, particularly as it supports older persons to remain independent for as long as possible, the restrictions offered by the Applicant and secured by the Council above do not secure a genuine level of care. While the level of care proposed by the applicant and secured could potentially provide a high level of care for someone with a medical need, it offers enough flexibility that the minimum level of care would likely consist of a resident signing up to the 2.5 hours weekly care package which equates to less than 30 minutes a day. In addition, it is unclear what the level of care would involve, how individual needs would be assessed and what controls would be in place to deal with situations where an individual's personal care requirement fell below the 2.5 hour minimum.

### *Conclusion*

27 Based on the above, GLA officers conclude that at this time, it has not been demonstrated that the form of development proposed, and its operation, is such that the proposal would fall within the scope of a residential care home under Use Class C2.

28 The next step is to then determine whether the proposal could be considered Use Class C3 or if it could be Sui Generis. Based on the physical characteristics of the scheme in that each individual extra care unit affords the facilities for day to day living and the way in which it is intended to be operated and controlled, it is considered that the development falls within Use Class C3 of the Use Classes Order 1987. In reaching this conclusion, it is noted that Use Class C3 doesn't preclude an element of care being provided.

29 Whilst, the Use Class of each scheme must be considered on its individual merit and cannot be determined by policy, consideration has been given to guidance contained within Policy H15 of the draft London Plan and the Mayor's Housing SPG (paragraph 3.7.4) which seeks to make a clear distinction between C2 and C3 uses in respect of specialist older persons housing. These provide

that sheltered accommodation and extra care accommodation falls within Use Class C3. It should be noted that given the level of consultation responses received on draft Policy H15 and the fact that the draft London Plan has yet to go through examination, limited weight can be afforded to this policy at this stage.

30 As officers have determined the Use Class of the scheme is C3, the housing policies of the London Plan and draft London Plan apply to the scheme. Therefore, in accordance with London Plan Policy 3.12 and Policies H5, H6 and H15 of the draft London Plan, the scheme must deliver affordable housing. This is discussed further below.

## **Affordable Housing**

### Background

31 The application consists of 142 specialist extra care dwellings, three five-bedroom townhouses and a block of five affordable intermediate rent residential units. At Stage 1, the Mayor expressed the view that an affordable housing offer must be made in relation to all residential elements of the scheme and that the applicants viability assessment would be robustly scrutinised to ensure the maximum contribution is secured.

32 As concluded above, the proposed specialist older persons accommodation is considered to fall within Use Class C3. London Plan Policy 3.12 seeks the maximum reasonable amount of affordable housing and Policy H6 of the draft London Plan and the Mayor's Affordable Housing SPG, set out a 'threshold approach' whereby schemes meeting or exceeding a specific threshold of affordable housing of 35% and 50% on public land by habitable room and which meets other criteria are not required to submit viability information to the GLA, nor would the application be subject to a late stage review mechanism. Kensington and Chelsea Local Plan Policy CH2 requires developments to provide affordable housing at 50 per cent by floor area on residential floorspace in excess of 800 sq.m. gross external area. In addition, the policy requires developments to provide affordable housing on site where more than 1,200 sq.m. of residential floorspace is proposed, unless exceptional circumstances existing. The proposal therefore must maximise the delivery of affordable housing and make the most efficient use of available resources to do so.

33 Given the Council's position that the specialist extra care accommodation falls within Use Class C2 of the Use Classes Order, it is understood that Gerald Eve LLP were instructed to ensure the maximum reasonable proportion of affordable housing was delivered in relation to the three five-bedroom townhouses only. The Council reported the affordable housing offer of 5 affordable flats as 54% of the total residential floorspace in excess of 800 sq.m. (it should be noted that offer also represents 35% by hab room).

34 In light of the position set out above, the proportion of affordable housing should be established in relation to the total number of residential units within the scheme which is 150, meaning the proposed level of affordable housing equates to just over 3% by unit.

35 The applicant's viability report prepared by Knight Frank has been subject to independent review on behalf of the Council by Gerald Eve LLP. Both reports considered the viability of the whole of the development. These reports have been scrutinised by GLA officers and were considered to be very high level for such a complex, large scheme. It has therefore not been possible to ascertain from the information provided that the offer of five affordable housing units is the maximum quantum that could be viably supported by the scheme.

36 GLA officers have participated in viability discussions however there remain significant concerns with the applicant's approach to the assessment of the viability of the scheme, which does not comply with the Mayor's Affordable Housing and Viability SPG or draft London Plan Policy H6.

These include the applicant's approach to benchmark land value, gross development value and development costs, details of which are considered below.

#### Viability assessment

37 Paragraph 57 of the National Planning Policy Framework states that the weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. National guidance on viability is set out in Planning Practice Guidance.

38 The Mayor's Affordable Housing and Viability SPG states that schemes which do not meet the Mayor's relevant affordable housing threshold will be assessed under the Viability Tested Route, in order to determine whether additional affordable housing can be provided. The SPG also provides clear guidance on the Mayor's approach to assessing the viability of a development.

39 Both Knight Frank and Gerald Eve have carried out a financial appraisal of the whole of the proposed scheme including the town houses, the affordable units and the Extra-care units, based on current day costs and value and then compared this with the Benchmark Land Value (BLV) of the site. They both conclude that the scheme produces a Residual Land Value which is lower than the BLV and so is not able to support the delivery of additional affordable housing. The advisors do not however agree on the level of deficit - Gerald Eve's view is that this deficit is in the region of £40 million based on current day values which is approximately half that assumed by Knight Frank.

40 Gerald Eve have also modelled a number of growth scenarios and they have applied growth of 3.5% pa to the private residential units and inflation of 2.5% pa to the construction costs (excluding the deck costs) and conclude that the scheme has the potential to become viable throughout the applicants proposed seven year development programme. In other words, with growth, the RLV produced is the same as their proposed BLV. If the costs and values were reviewed and then modelled the whole scheme could potentially breakeven and produce a surplus based on growth.

41 There are a number of areas where the current day cost and value assumptions are not adequately supported and these are set out below.

#### Benchmark land value (BLV)

42 Both assessors have used Existing Use Value (EUV) plus a land owner's premium as the approach to assessing the BLV of the site in accordance with the Mayor's Affordable Housing and Viability SPG and the latest NPPG Viability Guidance issued in July 2018. On the basis that there is a lack of evidence of sales of comparable Use Class C2 properties, which is the assumed existing use of the majority of the site, they have sought evidence from D1 (non-residential institutional use) to arrive at the EUV with Gerald Eve also considering evidence from student housing. The approach to the assessment of EUV by both assessors is very high level and does not take into account the layout and condition of the buildings on site.

43 Knight Frank have relied on evidence from the sale of a number of good quality college buildings that have been acquired by education institutions for use as schools and colleges. It is not apparent that any allowance has been made for the fact that a substantial element of the existing buildings is currently fitted out as low quality student accommodation. Knight Frank arrive at the conclusion that the EUV of the site is c£84.6m but this approach is considered too high level to be accurate when applied to a complex existing use valuation.

44 Gerald Eve take a different more granular approach and arrive at a BLV of c£68m. They have taken an investment approach to valuing the non-residential buildings based on rents of £40-50 psf which they have capitalised at 4.25%. There is little evidence provided to support these figures and it is not clear whether appropriate allowances have been made for voids and/or refurbishment costs. For the halls of residence, they have taken the approach of valuing this element as student housing. This is appropriate but insufficient evidence is provided to support the proposed values.

45 The BLV does not include an assessment of the BLV of the air rights over the station although this is a part of the development site. The cost of acquiring the rights to build on this part of the site are instead included as a development cost based on the price agreed which is not in accordance with national or Mayoral guidance.

46 Knight Frank have not allowed for a premium in arriving at their BLV and Gerald Eve also conclude that in this case the landowner's premium would be nil due to site specific factors such as the presence of Japanese knotweed.

#### Gross development value

47 Knight Frank have prepared a detailed pricing schedule for all the residential units and this has been agreed by Gerald Eve as broadly correct. However, both assessors have under estimated the GDV of the scheme for the following reasons:

- The approach taken to assessing the value of the Extra Care Units is based on comparable evidence from C3 residential schemes in similar locations. However, these schemes do not all offer the additional facilities offered by the Heythrop proposal and the rate of £2,678 psf used is lower than some of the evidence presented. This would seem to be explained to some extent by the fact that the units in this scheme are larger than average one and two bedroom flats in this location (with the additional size not proportionately reflected in overall sales values). However, the council's cost review identified extremely high fit out costs which are not reflected in the values attributed to the development.
- There is no value included for the ancillary space. It is accepted that some parts of the proposal e.g. the pool and the gym are standard for this type of scheme and accounted for within the sales values. However, the cost review undertaken for the council identified that fit out costs for amenity areas are significantly higher than would be expected and so the costs incurred are not justified by the value generated. Furthermore, other parts such as the hair salon will be operated as separate businesses and could generate additional income for the developer which should be capitalised and added to the GDV.

#### Development costs

48 The applicant produced a cost report prepared by Cast but this was only provided in hard copy at a very late stage in the application process. Whilst it does provide a reasonable level of detail, as far as GLA officers are aware it has not been fully reviewed by the borough's cost consultant, Veale & Sanders. Their initial comments, are understood to be based on a meeting with the applicant, indicate that the build costs are substantially above benchmarked rates. The rate for above ground element of the four main blocks range from £6,268 m<sup>2</sup> to £8,176m<sup>2</sup> well above the BCIS Benchmark data. The cost review also identified four comparable schemes where the costs ranged from c£5,400 to £6,300m<sup>3</sup>.

49 Veale & Sanders note some of the reasons for this are:

- The base build costs are very high especially the general fit out costs noting the rate for amenity areas is considerably higher than would be expected for a spa/leisure facility in a 5 star + hotel.
- The allowances for preliminaries, overheads and profits and site abnormals are much higher than would be expected. The combined allowance of 24% for preliminaries and overheads and profits is very high and unacceptable where significant abnormals such as £5 million for the extended programme have also been included.
- The contingency allowance of 7% is above the standard allowance of 5%.

50 Gerald Eve have accepted the costs of the deck at c£50 million and a range of other costs totalling £28.48 million although there is no clear breakdown of these costs in either report. The decking costs would appear to consist mainly of contingency sums. These costs are therefore considered unjustified at this stage without further information.

51 Although Gerald Eve have reduced the applicant's base construction costs by 10% for the purposes of their report, it is likely that the total costs are overstated by more than this amount and a full assessment of the cost plan would be required to arrive at an accurate figure.

#### Affordability of Intermediate Units

52 The section 106 as submitted does not robustly secure the intermediate units as genuinely affordable. For the intermediate rent units to be considered genuinely affordable, draft London Plan Policy H7 and the 2018 AMR requires intermediate rent units to be affordable to those on incomes of up to £60,000. The rent caps for intermediate units as proposed extent up to £85,000. This exceeds the Mayors rent caps. In addition, the s106 is worded in a manner that would enable the applicant to deliver all five intermediate units at the highest income bracket from first let. In addition, the provisions for implementation of the scheme and occupancy are not considered to adequately secure the delivery of the five units.

#### Review mechanisms

53 London Plan Policy 3.12, and the following paragraph 3.75 state that viability re-appraisals may be used to ensure that maximum public benefit is secured over the period of development, and that account needs to be taken of economic uncertainties and in respect of schemes presently anticipated to deliver lower levels of affordable housing. Paragraph 4.4.42 of the Mayor of London's Housing SPG (2012), goes on to states that where schemes are built out in phases, "consideration should be given to a re-appraisal mechanism which specifies the scope of a review of viability for each phase". Both the Affordable Housing and Viability SPG and draft London Plan Policies H5 and H6 set out that proposals that fall short of the relevant threshold level of affordable housing (in this case this would be 35%) both early and late review mechanisms should be secured.

54 The proposal falls short of the threshold set out in the Affordable Housing and Viability SPG and the Draft London Plan. An early viability review is required to determine whether additional affordable housing can be delivered in the event that substantial implementation is not achieved within two years of the grant of permission.

55 For developments that are likely to be completed in the short term, a late stage review would not be consistent with the London Plan; however, the applicant has assumed a seven year development programme, which is long for a scheme of this scale. Over this time there is potential for significant changes in values and costs. On this basis, together with the low level of affordable

housing proposed, a late stage review is justified. A late stage review is also required under Policy H6 of the draft London Plan.

56 Review mechanisms are also supported by the latest national Planning Practice Guidance (paragraph 009) to ensure policy compliance and optimal public benefits.

57 The Council has secured both an early stage and a late stage review (at disposal of 75% of the townhouses) within the s106 agreement; however, the drafting is unclear as to whether both review mechanisms relate to the townhouse element only or the whole scheme. As set out above the entirety of the scheme is considered to fall within Use Class C3 therefore affordable housing review mechanisms must be sought in relation to the entire scheme. As such, it is not considered that the review mechanisms proposed by the applicant would be effective in securing additional affordable housing provision and in ensuring delivery of the maximum affordable housing that can viably be supported.

### Conclusion

58 As discussed above, all residential elements of the proposal are considered to fall within Use Class C3 therefore the applicants affordable housing offer of 3% must be considered in this context. The viability approach applied by both the applicant and the Council's independent assessors is not consistent with the guidance within the Mayor's Affordable Housing and Viability SPG and is not in accordance with National Planning Practice Guidance (particularly with regards to oversailing rights). The applicant's position that the development generates a significant deficit is not considered to be realistic as they would not be incentivised to pursue the development. The Council's conclusion that the scheme can only viably support the five intermediate units proposed arises from the methodology that has been applied is not justified based on the viability information provided. In addition, it is considered that both the applicants submitted financial viability assessment and the Council's independent review are light touch, in adequate and do not contain the detail needed to make a robust judgement of scheme viability. Therefore, GLA officers conclude that as such, the application has not demonstrated that the maximum reasonable amount of affordable housing is achieved in accordance with the NPPF, London Plan Policy 3.12, draft London Plan Policy H6, the Mayor's Affordable Housing & Viability SPG and Kensington and Chelsea Local Plan Policy CH 2.

### **Energy**

59 Limited additional information has been provided since consultation stage and the following items remain outstanding: the applicant has not assessed the scheme against the latest GLA guidance; the design is not anticipated to meet CIBSE recommendations for comfort and further work is required to adopt passive measures to avoid overheating; mechanical cooling is proposed which is not supported as it has not been demonstrated that the cooling demands have been minimised by passive design and alternatives to the proposed Combined Heat and Power system must be explored. As such, the proposals do not comply with London Plan 5.2 and draft London Plan Policy SI2, although on balance GLA officers do not recommend refusal of the application on these grounds as this can be addressed at detailed design stage via a condition. The applicant should have regard to these comments in any appeal or subsequent application

### **Update on other strategic issues**

60 An update on the other strategic issues raised at consultation stage is set out below.

## **Land use**

61 At stage 1, it was not reported that the proposal would result in the loss of a flood lit Multi-Use Games Area (MUGA) which is used by existing students of Heythrop College and the nearby Thomas' School for formal play. London Plan Policy 3.19 'Sports facilities' and Policy S5 of the draft London Plan 'Sports and recreation facilities' set out that proposals which increase or enhance the provision of sports and recreation facilities will be supported; whereas those that result in a net loss of sports and recreation facilities should be resisted. In this instance, given that the pitch is privately owned and not available for wider community use, it is in poor condition and that the proposal includes improvements to public realm including large open spaces, a children's play space and a community hall, on balance, the loss of the MUGA is accepted.

62 As requested in the stage 1 report, the Council have secured the public use of the community hall by Section 106 obligation which also includes the requirement for the submission of a management plan.

## **Residential Quality/Design**

63 At consultation stage, GLA officers acknowledged that the proposal would deliver a high quality-built environment and public realm and has been carefully considered in relation to the surrounding heritage assets.

64 However, concerns were raised regarding the lack of private amenity space on the proposed affordable housing block. It is noted that the units do contain additional internal space in lieu of private external amenity space. The Council have stated in their committee report that given the location of the affordable block and orientation of the building constrain the applicant's ability to provide external amenity space. GLA officers do acknowledge that the building as designed does present challenges to delivering external private amenity space and this is mitigated to an extent by the provision of appropriate additional internal amenity space and the proximity to the new public garden. However, should the scheme be revised the applicant is encouraged to ensure any affordable housing is of the highest quality and meets all residential standards to ensure delivery of a tenure blind development in accordance with paragraph 3.76 of the London Plan and Policy D4 of the draft London Plan.

## **Heritage**

65 As set out in the Stage 1 report and having regard to statutory duty in respect of listed buildings in the Planning (Listed Buildings and Conservation Areas) Act 1990, and the relevant paragraphs in the NPPF in relation to listed buildings and conservation areas. GLA officers are satisfied that the proposal would not harm the listed buildings on site or the setting of the adjacent listed buildings and would preserve and enhance the character and appearance of the conservation area in which it is located. The design of the scheme as a whole is considered to be high quality and sympathetic to the surrounding heritage assets. The proposal therefore accords with Policy 7.8 of the London Plan and Policy HC1 of the draft London Plan

## **Inclusive design**

66 The applicant has responded positively to comments made at consultation stage by amending the design of the pedestrian and vehicular route into the site to address inclusive design concerns. A condition has been recommended by the Council to secure the proposed dwellings deliver the optional accessible housing standards M4(2) or M4(3) contained within Part M of the Building Regulations, in accordance with London Plan requirements. The application therefore accords with London Plan and draft London Plan inclusive design and accessible housing policies.

## **Transport**

67 At consultation stage a number of conditions and section 106 obligations to mitigate the impact of the development, including a financial contribution towards step-free access at High Street Kensington station, a suite of management documents and confirmation of disabled persons parking were requested.

68 During the determination of this application TfL commissioned a feasibility study looking at options for delivering step-free access at High Street Kensington station. The initial outcomes of this exercise suggest an overall cost of £10-15 million. Council have secured a contribution of £4 million towards delivery of a step-free access scheme. This is welcomed as it meets the aspirations of the Mayor's Transport Strategy and adopted and draft London Plan which set out the importance of delivering improved accessibility to the transport network for customers with mobility issues.

69 Whilst the level of parking proposed (0.19 spaces per unit) is in accordance with London Plan Policy 6.13 it should be noted that it is in excess of draft London Plan Policy T6.1 which states that residential development in areas of PTAL 5 and 6 should be car-free with the exception of blue badge parking. Given the extra care nature of the scheme and as majority of the spaces are designated for disabled person on balance the proposed level of car parking is acceptable in this instance, noting that not all the site has a PTAL of 5 or 6. However, no car parking has been provided for the affordable units. A revised scheme must provide blue badge car parking in relation to the affordable element.

70 The long stay cycle parking (142 spaces) meets the standards set out in the draft London Plan for C2 development however this is not reflective of the GLA's position on the Use Class of the scheme. As the development is being considered as C3 land use, the number of long stay cycle parking spaces should be to be increased to 250 spaces to meet draft London Plan standards. Clarification regarding provision of spaces for visitors, staff and the Community Hall was requested at Stage 1 and this has not been provided. It should be included within any revised scheme, in accordance with the standards contained in draft London Plan policy T5.

71 London Underground Infrastructure Protection conditions will need to be attached to any future planning permission on this site. For any deck overbuild forming part of the development of this site, a requirement for the applicant to enter into a Development Agreement with London Underground will need to be secured by section 106 obligation.

72 In addition, it is noted that the Council's Committee report and draft decision notice includes the appropriate conditions to mitigate transport impacts as requested by TfL at Stage 1 consultation, including for: demolition and construction traffic management plans, car park management plan including EVCPs, delivery and servicing plan, mobility scooter and cycle parking and LU Infrastructure Protection. These conditions should similarly be attached if a revised scheme is submitted and subsequently approved.

## **Response to consultation**

### Responses to neighbourhood consultation

73 In addition to inviting comments from statutory consultees and publishing all the relevant documents on the Council's planning register, Kensington and Chelsea Council carried out a public consultation with local residents, businesses and institutions. The Council publicised the application by notifying 606 neighbouring properties, placing site notices and publishing notices in the local press. A total of 183 objections were received, with reasons as summarised below:

- The proposal is not in conformity with Kensington and Chelsea’s SPD for the site;
- The development is not considered to fall within the Use Class C2 nor is it considered to be a social or community use;
- Loss of the existing college;
- Loss of social infrastructure;
- Change of use of the two townhouses does not comply with local policy;
- The housing mix is inappropriate;
- Lack of affordable housing;
- The applicants FVA is inaccurate;
- The reduced floor area of the community hall;
- Loss of the sports pitch;
- The loss of the Dyslexia training centre;
- Need for a GP surgery;
- Lack of need for extra care housing;
- Construction impacts;
- Deck over the London Underground line;
- Car parking;
- Increased pedestrian activity/pedestrian access;
- Impact on the Quiet Streets Cycle Network;
- Delivery of step free access;
- Fire safety;
- Over development, height, scale, massing;
- Heritage impact;
- Architecture/detailing/materials;
- Lack of permeability/public access/open space;
- Opportunity for crime/anti-social behaviour;
- Loss of trees/vegetation;
- Adverse impact on neighbouring properties in terms of sunlight/daylight/overlooking/sense of enclosure/noise;
- Wind impacts;
- Flood risk;
- Energy and water efficiency;
- Air quality and pollution;
- Impact on embassies;
- Lack of public benefit delivered by the scheme;
- Impact on local infrastructure;
- Impact on development potential of adjoining sites;
- Basement;
- Impact on local public house;
- Lack of information included in application; and
- Proposal is not in accordance with the NPPF nor the local development plan including the London Plan and the Consolidated Local Plan.

74 In addition, 24 responses in support of the proposal and three raising general comments relating to the contribution of the scheme to the borough and specific design and traffic issues.

75 The following organisations also issued responses to the consultations:

- **Sport England:** Objected to the scheme due to the loss of the floodlit Multi Use Games Area;
- **Historic England:** No objection subject to conditions;
- **Thames Water:** No objection subject to conditions and informative; and
- **Environment Agency:** No objection.

76 The Mayor also received a direct representation from the Kensington Society who objected to the scheme for the following reasons: the loss of low-value social and community uses and the lack of affordable housing.

77 Having considered the responses to public consultation, and representations submitted to the Mayor of London, GLA officers are satisfied that the statutory and non-statutory responses to the public consultation process do not raise any further material planning issues of strategic importance that have not already been considered in this report, or consultation stage report GLA/4491a/01.

## Draft section 106 legal agreement

78 As part of Kensington and Chelsea Council's draft decision to approve the application, the following draft Section 106 heads of terms are included:

- Public Art Contribution of £175,000 and Public Art Strategy;
- Air Quality Contribution of £145,120;
- Construction Training Contribution of £692,500;
- Employment and Training Contribution of £24,379;
- Carbon Offset Payment of £419,906;
- DTMP assessment fee of £2,800 per plan;
- CTMP assessment fee of £2,800 per plan;
- Travel plan monitoring fee of £1,000 per plan;
- Highways works contribution for repair of surrounding highways network of £100,000;
- Step free access contribution of £4,000,000;
- Dyslexia Teaching Centre contribution of £100,000;
- S106 monitoring fee of £36,587;
- Five intermediate affordable homes to be delivered prior to 50% of occupation of the extra care facility;
- Service charges for affordable homes to be agreed in writing;
- Two stage review mechanism with trigger points set in accordance with the Mayor's Affordable Housing and Viability SPG, capped to a policy compliant contribution based on current development plan policy;
- Permit free nature of all dwellings (extra care, market housing and affordable housing)
- Highways works and highways agreement;
- Adoption of extent of highway to be agreed with Council;
- Not to implement planning permission until development agree with London Underground has been completed;
- Restrictions on extra care facility, including;
  - Limited to Class C2
  - Limited to 'extra care accommodation only'
  - To be occupied by extra care resident and their companion only;
  - Onsite services including 24-hour care and support administered by a trained health care provider, at least one meal a day on site and on site shared communal facilities;

- Health care provider to be regulated by the Care Quality Commission;
- Management plan to be submitted to the Council prior to occupation which demonstrates compliance with staff arrangements and staff ratios set out in RBKC's Older People's Housing Design Guidance; and
- Submit to the Council yearly evidence demonstrating compliance with extra care restrictions.
- Community Hall Management Plan;
- Securing of the proposed cafe as a publicly accessible facility;
- Securing of playspace on-site with details to be submitted to the Council for approval; and
- Securing of public access to and through the site as follows:
  - South end and any future route over the deck as a future public right of way; and
  - Public access from Kensington Square for 364 days a year.

## Equalities

79 London Plan Policy 3.1 seeks to ensure that development proposals protect and enhance facilities and services that meet the need of particular groups and communities and resists their loss without adequate justification or re-provision. In addition, draft London Plan Policy CG1 seeks to support and promote the creation of an inclusive city where all Londoners, regardless of their age, disability, gender, gender identity, marital status, religion, sexual orientation, social class, or whether they are pregnant or have children can share in its prosperity, culture and community, minimising the barriers, challenges and inequalities.

80 The Equality Act 2010 provides that public authorities have due regard to the need to a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act; b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. The protected characteristics set out in the Equality Act are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Equality Act acknowledges that compliance with the duties set out may involve treating some persons more favourably than others, but that this does not permit conduct that would otherwise be prohibited under the Act. In this case age is of particular relevance.

81 It is acknowledged that in some circumstances, older people may choose to seek alternative, more tailored specialist accommodation. This is also a very important element in the suite of accommodation options for older Londoners, and this type of accommodation should be an attractive and viable option/ choice for older Londoners. This scheme has the potential to provide specialist housing for older people who may wish to live in this type of housing. As set out in the land use section of this report and in the stage 1 report, GLA officers are supportive of the delivery of this type of specialist older persons housing however concerns have been raised regarding the lack of affordable housing proposed within the scheme. It is noted that this type of housing should be accessible to all those who wish to access it. It is on this basis that the proposal has been assessed and conclusions reached.

82 Officers are satisfied that the application material has taken into account the equality and human rights issues and have paid due regard to the need to eliminate discrimination, advancing equality of opportunity and fostering good relations between different people, in this case- older people wishing to access age restricted housing.

## Legal considerations

83 Under the arrangements set out in Article 5 of the Town and Country Planning (Mayor of London) Order 2008 the Mayor has the power under Article 6 to direct the local planning authority

to refuse permission for a planning application referred to him under Article 4 of the Order. The Mayor may also leave the decision to the local authority. In directing refusal the Mayor must have regard to the matters set out in Article 6(2) of the Order, including the principal purposes of the Greater London Authority, the effect on health and sustainable development, national policies and international obligations, regional planning guidance, and the use of the River Thames. The Mayor may direct refusal if he considers that to grant permission would be contrary to the London Plan, would prejudice the implementation of the policies within the London Plan or would be contrary to good strategic planning in Greater London.

84 If he decides to direct refusal, the Mayor must set out his reasons, and the local planning authority must issue these with the refusal notice.

### **Officer recommendation – Article 6: Direction that the Mayor refuse planning permission**

85 Article 6 of the Mayor of London Order (2008) states that where the Mayor considers that to grant planning permission would be contrary to the spatial development strategy or prejudicial to its implementation or would otherwise be contrary to good strategic planning in Greater London, he may, within the period specific in article 5(1)(b)(i), direct the local planning authority to refuse the application.

#### The balancing exercise

86 Section 38(6) of the Planning and Compensation Act 2004 requires decisions to be determined in accordance with the development plan unless material considerations indicate otherwise.

87 A significant material consideration is the NPPF. The NPPF requires a planning decision maker to apply the presumption in favour of sustainable development. In light of the Secretary of State's conclusion in the William Sutton Estate appeal decision (APP/K5600/W/17/3177810) and the latest position of the Inspector considering the Council's Local Plan Review, it is considered that the Council cannot currently demonstrate a 5 year housing and land supply. As such, it is concluded that the relevant policies within the Development Plan are out of date and the 'tilted balance' in paragraph 11 of the NPPF is engaged.

88 In these circumstances, the presumption in favour of sustainable development requires the decision maker to approve these development proposals, unless:

- i) The application of policies in this Framework that protect areas or asserts of particular importance provides a clear reason for refusing the development proposed; or
- ii) Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

89 GLA officers give significant weight to the provision of new market and affordable housing, in an area with a pressing housing need, as well as the £4 million contribution to step-free access. Moderate weight is also given to the other public benefits of the scheme including, public realm, public art, environmental contributions, employment opportunities and sustainability/accessibility improvements to the site. Against this, GLA officers give substantial weight to the failure of the scheme to comply with the policy aims to maximise affordable housing, contrary to the development Plan and national policy guidance.

90 As such, whilst GLA officers consider that there are no protective policies which provide a clear reason for refusing the development, the adverse impacts of granting permission would

demonstrably outweigh the benefits. It is therefore concluded that there are no material considerations which indicate that the proposal should be determined other than in accordance with the Development Plan.

### Conclusion

91 As set out above, GLA officers have concluded that to grant permission would be contrary to the London Plan, would prejudice the implementation of the policies within the London Plan to deliver ensure that development provides the maximum reasonable affordable housing as well as to deliver good growth within the Royal Borough of Kensington and Chelsea and would be contrary to good strategic planning in Greater London.

92 The Mayor is therefore recommended to direct refusal under Article 6 of the Order for the reason set out below:

- Affordable Housing: The Use Class of the specialist older persons housing element of the proposal is considered to be C3 therefore affordable housing policies apply to this element in addition to three townhouses. Five affordable units are included within the proposal however on the basis of the evidence presented, the applicant has failed to demonstrate that the scheme would deliver the maximum reasonable amount of affordable housing and the proposals are therefore contrary to the NPPF, London Plan Policy 3.12, draft London Plan Policies H5 and H6 and the Mayor's Affordable Housing and Viability SPG, and Kensington and Chelsea Local Plan Policy CH 2'
- Section 106: Inadequate provision has been made in the draft s.106 agreement to secure the required affordability levels and delivery of the five affordable units and for viability review mechanisms. The absence of adequate and robust affordable housing clauses within the draft s.106 does not therefore support the delivery of the maximum reasonable amount of affordable housing on the site and is contrary to London Plan Policy 3.12 draft London Plan Policy H6 and the Mayor's Affordable Housing and Viability SPG and Kensington and Chelsea Local Policy CH 2.

### **Article 7: Direction that the Mayor is to be the local planning authority**

93 Under Article 7(1) of the 2008 Order the Mayor could take over this application provided the policy tests set out in that Article are met. In this instance, for the reasons detailed above, GLA officers are recommending that the Mayor directs that Kensington and Chelsea Council refuse the application.

### **Financial considerations**

94 Should the Mayor direct refusal, he would be the principal party at any subsequent appeal hearing or public inquiry. Government Planning Practice Guidance emphasises that parties usually pay their own expenses arising from an appeal.

95 Following an inquiry caused by a direction to refuse, costs may be awarded against the Mayor if he has either directed refusal unreasonably; handled a referral from a planning authority unreasonably; or behaved unreasonably during the appeal. A major factor in deciding whether the Mayor has acted unreasonably will be the extent to which he has taken account of established planning policy.

96 Should the Mayor take over the application he would be responsible for holding a representation hearing and negotiating any planning obligation. He would also be responsible for

determining any reserved matters applications (unless he directs the council to do so) and determining any approval of details (unless the council agrees to do so).

## Conclusion

97 Further to the consideration within this report GLA officers have concluded that the proposal fails to demonstrate that the scheme has provided the maximum reasonable amount of affordable housing and does not optimise affordable housing delivery. The Mayor is therefore recommended to direct refusal under Article 6(1)(a) of the Order for the reasons set out below:

- Affordable Housing: The Use Class of the specialist older persons housing element of the proposal is considered to be C3 therefore affordable housing policies apply to this element in addition to three townhouses. Five affordable units are included within the proposal however on the basis of the evidence presented, the applicant has failed to demonstrate that the scheme would deliver the maximum reasonable amount of affordable housing and the proposals are therefore contrary to the NPPF, London Plan Policy 3.12, draft London Plan Policies H5 and H6 and the Mayor's Affordable Housing and Viability SPG, and Kensington and Chelsea Local Plan Policy CH 2'
- Section 106: Inadequate provision has been made in the draft s.106 agreement to secure the required affordability levels and delivery of the five affordable units and for viability review mechanisms. The absence of adequate and robust affordable housing clauses within the draft s.106 does not therefore support the delivery of the maximum reasonable amount of affordable housing on the site and is contrary to London Plan Policy 3.12 draft London Plan Policy H6 and the Mayor's Affordable Housing and Viability SPG and Kensington and Chelsea Local Policy CH 2.

---

for further information, contact the GLA Planning Team:

**Julietta McLoughlin, Chief Planner**

020 7983 4271 email [julietta.mcloughlin@london.gov.uk](mailto:julietta.mcloughlin@london.gov.uk)

**John Finlayson, Head of Development Management**

020 7084 2632 email [john.finlayson@london.gov.uk](mailto:john.finlayson@london.gov.uk)

**Allison Flight, Deputy Head of Development Management**

020 7084 2820 email [Alison.flight@london.gov.uk](mailto:Alison.flight@london.gov.uk)

**Nick Ray, Team Leader – Development Management**

020 7983 4178 email [nick.ray@london.gov.uk](mailto:nick.ray@london.gov.uk)

**Kate Randell, Team Leader – Development Management (Case Officer)**

020 7983 4783 email [kate.randell@london.gov.uk](mailto:kate.randell@london.gov.uk)

---