ADDENDUM 2

RE: GREGSON GREEN COMMUNITY INITIATIVE

ADVICE No.2

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1. I have been provided with a "Further Advice" from Mr Tom Graham dated 14th March 2018. In essence (and I apologise to Mr Graham if I summarise his position incorrectly) Mr Graham does not suggest that there is any legal impediment to putting the community centre and housing in one application, but he expresses the view:

   (a) that as the only connection between them is a "cash nexus" then the community centre offer/payment is not a material consideration in respect of the housing element of the proposal. In this sense he says this is not a true composite scheme; and

   (b) contingent on (a) above that the case is one of "offsite" benefits which should be subject to the full rigour of Regulation 122 of the CIL Regulations.

2. I am concerned that Mr Graham has failed to engage with the case law (and its evolution) which I was at considerable pains to set out in my Advice No.1. He has noted the *Thakenham Village* case, but all he has to say is that the facts of that case are "remote" from the current one. I never suggested the facts were the same, but rather said it was "relevant" in that the principles it expounded had a direct relevance to the present case. Mr Graham at Paragraph 7 notes that it was quite legitimate to place weight on the protection of local jobs as this was a proper planning objective. Is he saying that the provision of community facilities is not a proper planning objective to which weight can attach?

3. The key points in the case law review in my Advice No.1 which merit repetition (and which Mr Graham has not directly engaged with) are as follows:

- So long as a determination is based on planning grounds and not some ulterior motive it will be legally unimpeachable. It is perfectly permissible to take account of the financial realities of any given situation (see *R v. Westminster Council ex p Monahan* [1988] 1 QB p.87). The overall situation here is a planning application for both housing and a community centre and the financial realities of that situation cannot simply be ignored. Neither can the existence of the proposed community centre be ignored when considering the housing element (see below for development of this last point).

- When two elements are joined in a single application it is perfectly permissible to take account of the benefits of one element as offsetting possible planning objections to the other element (see *Derwent Holdings Ltd v. Trafford BC* [2011] EWCA Civ 832 at para.13).

- Economic realities alone can create a mutual dependency between elements of a scheme and it does not matter whether the elements are contained in one or two separate applications (see *R (on the application of Thakenham Village Action Ltd v. Horsham DC* (29.01.14). The ultimate question in each case is whether, in the public interest, permission should be granted. In the *Thakenham* case the protection of jobs was seen as a legitimate planning objective. Plainly the provision of community facilities is a legitimate planning objective that can be taken into account in offsetting any negative aspects of an application.

4. These principles, which I emphasise Mr Graham has not engaged with, were usefully applied in *Amstel Group Corp v. SoSCLG and North Norfolk DC* [2018] EWHC 633 (Admin) (26.03.2018). This postdates Mr Graham's latest Advice and therefore no criticism at all can be made of him in not addressing it. It does, however, in my opinion, illustrate the flaws in his approach:

5. The claimant's planning application was for (i) full planning permission for an initial phase comprising 71 dwellings, new access road, and side roads, water attenuation ponds and drainage works, play areas, landscaping and associated works, and (ii) outline planning permission with all matters reserved for later phases comprising up to 129 dwellings, side road, primary school, land for community resource centre, play areas, water attenuation ponds and drainage works, landscaping and associated works.

The proposal was to build a new school on part of the site. This would replace the existing village school which was located in another part of the village. The Section 106 provided for a free transfer of the land for the school to the Diocesan Board and the payment of an education contribution.

6. One of the Grounds of Challenge was that the Inspector, having decided that the housing proposal did not make a new school necessary, failed to have regard to the public benefit of a new school in assessing the housing element. In this context there was a need to weigh public benefit against less than substantial harm to a heritage asset pursuant to Paragraph 134 NPPF. Mrs Justice Lang said as follows:

> "Regrettably I have concluded that the Inspector fell into error here. On my reading of AD 76, he did correctly weigh in the balance the Claimant's potential contribution to additional school places for the 50 pupils generated by the development, but he did not also weigh in the balance the benefits of a new school, which on the evidence could provide improved and enlarged facilities, thus benefiting existing pupils as well as new ones. At the end of AD 75, he expressly stated that he had not taken the new school into account. I consider that once he had decided that it did not come within regulation 122(2) of the CIL Regulations, he excluded it entirely from consideration, instead of also assessing it as a benefit when applying the test under NPPF 134 at AD 78, and in making his overall assessment at AD 84.
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> 67. The weighing of benefits against harm is quintessentially a planning judgment for the decision-maker. I am not in a position to make the assumption that the outcome would have been the same had the Inspector adopted the correct approach.

> 68. For these reasons, permission is granted on Ground 4. The application under section 288 TCPA 1990 is granted on this ground, and the decision must be quashed."

In other words, even in a case where an offered "benefit" is not CIl compliant providing it is a public benefit it must be taken into account and weighed in the planning balance. While this argument arose in the context of the NPPF Paragraph 134, the point is of general application, ie so long as a benefit is a legitimate planning benefit then it must be weighed in the planning balance. The amount of weight given is, as always, a matter of planning judgment for the decision-maker.

CIL Compliance

7. As is clear from my Advice No.1, in my opinion this proposal is a composite proposal, ie the matters are, unarguably, legally joined in one application and must be considered together. The Section 106 offer should be looked at in this context. Mr Graham seems to suggest that the payment must somehow be looked at as an "offsite" payment. I do not agree, but I cannot see that it makes any difference. In the *Amstel* ibid case, Regulation 122 ibid provides, inter alia:

> "122. Limitation on use of planning obligations
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> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
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> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is –
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> (a) necessary to make the development acceptable in planning terms;
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> (b) directly related to the development; and
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> (c) fairly and reasonably related in scale and kind to the development."

Lang J in *Amstel* ibid reviewed the statutory and PPG advice and then noted with approval as follows:

"62. In *R (Welcome Break GroupLimited) v. Stroud District Council* [2012] EWHC 140 (Admin), Bean J said:

> '48. There is nothing novel in regulation 122 except the fact that it is contained in a statutory instrument. Its wording derives from Departmental Circular 05/05, which in turn was the successor to previous circulars such at 16/91. Circular 16/91 required that the obligation to be imposed as a condition should be "necessary to the grant of permission" or that it "should be relevant to planning and should resolve the planning objections to the development proposal concerned."
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> 49. In the *Tesco* case Lord Hoffmann dealt with a submission by counsel for Tarmac, the developer in competition with Tesco, that Tesco's offer to build a link road if permission were granted was not material within the terms of Circular 16/91 "because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable". Lord Hoffman went on:
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> > 'The test of acceptability or necessity suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is, I suppose, theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of

> State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts.'
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> 50. In my judgment this passage remains good law under the 2010 Regulations. So too does the ratio of the *Tesco* case. An offered planning obligation which has nothing to do with the proposed development apart from the fact that it is offered by the developer is plainly not a material consideration and can only be regarded as an attempt to buy planning permission. However, if it has some connection with the proposed development which is more than *de minimis* then regard must be had to it. The extent, if any, to which it affects the decision is a matter entirely within the discretion of the decision-maker.'"

8. Whether one treats the Section 106 offer in my client's case as an "offsite" or "onsite" offer is neither here nor there. It plainly has a connection with the proposed development which is for housing and a community facility. It is clearly directly related to the development as described in the application itself and it is related in scale and kind, ie it directly addresses the cost of provision of the centre.

9. In conclusion, I am unable to either agree with or even properly understand Mr Graham's position. He appears to be saying that in considering the housing element of the scheme one should entirely ignore the community centre provision. That is frankly irrational. It is part of the same application and offends no legal principle in being joined in the same application. The centre brings with it clear community benefits and the achievement of those benefits is a legitimate planning aim. Clearly it is permissible in the planning balance to weigh those benefits against any harms associated with other aspects of the scheme, namely the housing proposal.

I so advise.

KINGS CHAMBERS
36 Young Street
MANCHESTER
M3 3FT
DX 718188 (MCH 3)

D E MANLEY QC

Leeds and Birmingham

ADDENDUM 2

20th April 2018

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