



Colchester

Colchester Borough Council

PO Box 889, Rowan House, 33 Sheepen Road,
Colchester, CO3 3WG

Commercial Services

Mr Paul Lewis
Pastoral & Closed Churches Secretary
Church Commissioners
Church House
Great Smith Street
London
SW1P 3AZ

Contact: Simon Cairns

Phone: 01206 508650

Fax: (01206) 282598

E-mail: simon.cairns@colchester.gov.uk

Your ref: DCMS Consultation

Our ref: SC/Cons/Birch

Date: 31 January 2014

Dear Mr Lewis

**Mission & Pastoral Measure 2011
Closed Church of St Peter, Birch**

Thank you for your letter dated 13 January 2013. The Council has consulted with the relevant portfolioholder, Councillor Tim Young, and I am writing to set out our current position in this matter.

We are mindful of national policy set out in the National Planning Policy Framework ('the framework') at section 12 and paragraphs 126, 130, 132 and 133, in particular. The Framework reiterates the Government's intention that heritage assets should be conserved so that they can be enjoyed for the quality of life of this and future generations (a core planning principle). Paragraph 132 of the framework confirms that heritage assets are irreplaceable and any harm or loss requires clear and convincing justification and that substantial harm or loss of a grade II listed building should be exceptional. Furthermore, the Church currently makes a substantial positive contribution to the significance of the Birch Conservation Area that would also be substantially impoverished by its loss.

The Council is surprised that the Commissioners have resolved to continue to pursue the demolition of the church when a solution has been identified that can potentially deliver the sustainable re-use of the church. The Commissioners have apparently decided to reject the scheme of re-use identified by the Colchester and North East Essex Trust, in partnership with Mr & Mrs Cottee solely on the grounds of financial viability. The Council submits that this is logically flawed as the issue under consideration should be whether a deliverable scheme of re-use has been identified. In this case, Mr Cottee as a professional employed in the development industry, accepts that the scheme of conversion may not be financially viable at the present time but intends to undertake conversion of the building to a family home. As such, Mr Cottee is not concerned with the scheme delivering financial benefit in the short term as his motivation is not apparently driven by profit.



INVESTORS
IN PEOPLE

The Council submits to the Commissioners that there is not clear and convincing justification to warrant the demolition of this listed building. The re-use of the building is deliverable and consequently the exceptional circumstances required to justify demolition are not present. This is confirmed by Mr and Mrs Cottee's signature of a binding unilateral undertaking under section 106 of the Planning Act. I attach a copy of this signed agreement. The Commissioners will note that this agreement binds Mr and Mrs Cottee to deliver a schedule of intermediate holding repairs within six months of acquisition and to submit applications for planning permission and listed building consent for the conversion of the church to a family dwellinghouse within six months and to thereafter complete the approved scheme within a further two year period. It is the Council's opinion that this binding contractual undertaking by Mr Cottee should sweep away any remaining doubts regarding the deliverability of a scheme of sustainable re-use of the church.

It is for this reason that Colchester Borough Council wishes to sustain its objection to the pastoral measure seeking demolition of the church in these circumstances. We hope that the Commissioners will review their position and decide to work in partnership with Mr Cottee to seek the sustainable re-use of this important heritage asset.

We look forward to receiving the Commissioners' response.

Yours sincerely

Simon Cairns

Simon Cairns
Planning Projects Manager

Enc. Signed Unilateral Undertaking dated 31.01.2014

THIS DEED is made the 31 day of January Two Thousand and Fourteen by:

(2) Gary Mark Cottee and Giuliana Teresa Cottee both of Spring House Ransom Road
Tiptree CO5 0TL ("the Developers")

to

COLCHESTER BOROUGH COUNCIL of Town Hall High Street Colchester Essex CO1 1FR
("the Council")

WHEREAS:

- A. The Council is the Local Planning Authority for the purposes of the 1990 Act for the area within which the Application Site is located and is the relevant Planning Authority by whom the planning obligations contained in this Deed are enforceable
- B. The Church of England Church Commissioners are the proprietors of the freehold title absolute in the Application Site which title is registered at the Land Registry with the Title Number [] and have an interest in the Application Site within the meaning of Section 106 of the 1990 Act
- C. The Developers propose making both a Planning Application and Listed Building Consent Application to the Council subject to their successful acquisition of the said Application Site from the Owners
- D. The planning obligations set out in this Deed have been entered into by the Developers in order to meet specific objections to the Development that without the said planning obligations the development proposed would not be acceptable and accordingly it is agreed the obligations meet the tests set out in Regulation 122 of the Community Infrastructure Regulations 2010
- E. The Developers intend to submit a Planning Application and Listed Building Consent Application to the Council and the Council are minded to support such applications (subject to conditions) **PROVIDED THAT** the Developers first enter into this Deed and covenant in the manner hereinafter appearing
- F. The Council considers it expedient that provision should be made for regulating or facilitating the development or use of the Application Site in the manner hereinafter appearing and the Council considers that entering into this Deed will be of benefit to the public

NOW THIS AGREEMENT WITNESSETH as follows:

1. DEFINITIONS

- 1.1 In this Agreement where the context so admits the following words and expressions shall have the following Meanings:

"1972 Act"

the Local Government Act 1972

"1990 Act"	means the Town and Country Planning Act 1990 as amended by: (a) the Planning and Compensation Act 1991 and (b) the Planning and Compulsory Purchase Act 2004
"Application Plan"	means Plan annexed hereto
"Application Site"	means the land known as Church of Birch St Peter's & St.Paul's Church School Hill Birch Essex CO2 ONA shown edged red on the Application Plan
"Approved Scheme"	means a scheme of works to be submitted by the Developers for approval by the Council
"Commencement of the Development"	means the implementation of the Planning Permission by the carrying out of a material operation described in Section 56 of the 1990 Act and "Commence the Development" and "Commencement" and "Commence" shall mutatis mutandis be construed accordingly PROVIDED THAT for the purposes of this Agreement a material operation shall not be taken to include demolition, archaeological works, works of excavation, site survey, site or soil investigation, preparation, or remediation including import and export of soil if required, the laying out or removal or protection of service installations and drainage systems or the erection of fences or hoardings or temporary site compounds and buildings
"Development"	means the development described in the Planning Application and permitted by the Planning Permission
"Listed Building Consent"	means the listed building consent (with conditions) in the form attached at the Second Schedule in accordance with the Listed Building Consent
"Occupation"	occupation for the purposes permitted by the Planning Permission other than occupation for the construction and fitting out of the Development and shall not include day time occupation by workmen involved in the construction or fitting out of the Development or in so far as such uses are ancillary to the construction and/or fitting out of the Development the use of finished buildings for sales purposes for use as temporary offices or for the storage of plant and materials and "Occupy"

and "Occupied" and "Occupiers" shall *mutatis mutandis* be construed accordingly

"Owners"	means the Church of England Church Commissioners
"Planning Application"	means planning application for the conversion of existing church to create a 1x5 bedroom family dwelling house
"Planning Permission"	means the planning permission (with conditions) in the form attached at the First Schedule in accordance with the Planning Application
"Schedule of Intermediate Repairs"	means an initial list of scheduled works to be approved by the Council and carried out by the Developers in order to prevent deterioration of the Application Site

1.2 Where the context so requires:

- (a) A reference in this Deed to an Act of Parliament or any Order Regulation Statutory Instrument or the like shall include a reference to any amendment or re-enactment of the same
- (b) Words importing the masculine gender include the feminine gender and vice versa. Words in the singular include the plural and vice versa and words importing individuals shall be treated as importing corporations and vice versa
- (c) Any headings or side notes are for ease of reference only and shall not affect the construction of this Agreement

2. INTERPRETATION AND LEGAL EFFECT

2.1 This Deed is made pursuant to Section 106 of the 1990 Act and the covenants contained herein are planning obligations for the purposes of Section 106 of the 1990 Act in respect of which:

- (a) The Owners own the freehold title to the Application Site and the said Application Site is otherwise free from any third party interests and encumbrances other than those described in the aforementioned Title Number
- (b) The Council is the Local Planning Authority entitled to enforce the provisions of this Deed and the covenants contained in this Deed shall be so enforceable
- (c) This Deed is entered into in respect of the Application Site with the intent that subject to clause 2.8 it shall bind the Developers' interest in the Application Site
- (d) Subject to clause 2.8 this Deed shall be binding on all successors and assigns in title of the parties hereto and any persons claiming under or through them

- (e) This Deed has been executed as a Deed and shall be registered by both the Council against the Application Site as a Local Land Charge and entered into the planning register maintained by the Council under the 1990 Act
- 2.2 This Deed is made pursuant to Section 106 of the 1990 Act Section 111 of the 1972 Act and all other powers enabling the parties to enter into such an Agreement and in consideration of the covenants herein contained
- 2.3 Nothing in this Deed is or amounts to or shall be construed as a planning permission or approval
- 2.4 If the Planning Permission shall expire before the Commencement of the Development or shall at any time be revoked or shall at any time be quashed as a result of legal proceedings this Deed shall forthwith determine and cease to have effect but without prejudice to any covenants that arise to be performed before any revocation
- 2.5 Nothing in this Deed, whether express or implied, shall prejudice or affect the rights powers duties and obligations of the Council in the exercise of their respective functions as local authorities and the rights powers duties and obligations of the Council under all public and private statutes byelaws orders and regulations may be fully and effectually exercised in relation to the Application Site or any part of it and any works executed on it as if this Deed had not been executed by the Council
- 2.6 Any approval given by the Council under this Deed or for the purposes of this Deed shall not be deemed to be an approval for any other purpose whatsoever
- 2.7 The Developers hereby agree with the Council that the Application Site will be bound by this Deed and subject to clause 2.8 more particularly covenants to observe and perform the restrictions and obligations contained in this Deed
- 2.8 No person shall be liable for any breach of this Deed when they no longer hold any interest in the Application Site or an interest in that part of the Application Site to which the breach relates
- 2.9 An obligation that prohibits the Developers from allowing any or limited Occupation of the Development until certain events occur shall also be an obligation on the Developers to positively carry out those certain events by no later than the number of Occupations set out therein unless the context otherwise requires
- 2.10 Save in respect of clauses 3.2, none of the obligations in this Deed shall have effect until the Developers have acquired the Application Site from the Owners and have been granted Planning Permission and Listed Building Consent by the Council

3. NOTICES AND COSTS

- 3.1 All Notices given or served or required to be given or served under this Deed shall be given or served as follows:
- (a) by personal delivery by hand (in which case service is immediately effected)

- (b) by first class post (in which case service is effected on the second day after posting)
- (c) by facsimile transmission (in which case service is effected at the time of successful transmission)

3.2 The Developers shall on completion of this Deed pay:

3.2.1 the reasonable and proper legal fees and disbursements of the Council of £1300 (One Thousand Three Hundred Pounds) with regard to the preparation negotiation execution and completion of this Deed

3.2.2 a contribution of £1980 (One Thousand Nine Hundred and Eighty Pounds) towards the Council's administration costs of monitoring the performance of the planning obligations under the terms of this Deed

3.3 The address for service of notices:

3.3.1 to the Council shall be at the Council's address at the head of this Deed and notices shall be marked for the attention of the Council's Section 106 Compliance Officer

3.3.2 to the Developers shall be at the Developers' address at the head of this Deed and notices shall be marked for the attention of Mr Gary Cottee

4. ARBITRATION

4.1 Any dispute or difference between any of the parties to this Deed as to the interpretation of or as to the performance or non-performance of any obligation may be decided by Arbitration under Part I of the Arbitration Act 1996 by a single arbitrator appointed by the parties in dispute. If the parties do not agree on that appointment then the President of the Bar Council of England and Wales may appoint the arbitrator at the request of either party to the dispute

4.2 Before referring any dispute to arbitration under this Deed either party to the dispute may (without obligation) suggest to the other that they voluntarily seek mediation to resolve their differences. If the suggestion is acceptable the parties to the dispute will:

- (a) Apply to the then President of the Law Society of England and Wales to nominate a person of suitable knowledge and experience as the mediator; and
- (b) Pay the costs of nominating the mediator and his fees and expenses as the mediator shall propose at the conclusion of the mediation but in the interim such fees shall be borne equally by the parties in dispute

5. THE DEVELOPERS' COVENANTS

The Developers **HEREBY COVENANT AND UNDERTAKE** with the Council:

5.1 That within six (6) months of acquiring the Application Site from the Owners the Developers shall provide to the Council a Schedule of Intermediate Repairs and shall not allow permit or cause the commencement of the Development until or

unless such Schedule of Intermediate Repairs has been submitted to and approved by the Council and such works shall be implemented by the Developers within two (2) months of the Council approving the Schedule of Intermediate Repairs

5.2 That within six (6) months of acquiring the Application Site from the Owners the Developers shall submit a valid Planning Application and Listed Building Consent Application to the Council for the conversion of the church into a family dwelling house

5.3 That within six (6) months of the Planning Permission and Listed Building Consent being granted the Developers shall commence the implementation of the Approved Scheme

5.4 That the Developers shall complete the Approved Scheme within two (2) years of both Planning Permission and Listed Building Consent being granted

6. GENERAL AND MISCELLANEOUS PROVISIONS

6.1 Any consent agreement or approval required to be given by any party under this Deed shall not be unreasonably withheld or delayed

6.2 Any covenant by the Developers not to do an act or thing shall be deemed to include an obligation to use Reasonable Endeavours not to permit or suffer such act or thing to be done by another person where knowledge of the actions of the other person is reasonably to be inferred

6.3 Any agreement obligation covenant or undertaking contained herein by any of the parties which comprise more than one person or entity shall be joint and several and where any agreement obligation covenant or undertaking is made with or undertaken towards more than one person it shall be construed as having been made with or undertaken towards each such person separately

6.4 If any provision of this Deed is declared by any judicial or other competent authority to be void voidable illegal or otherwise unenforceable the remaining provisions of this Deed shall continue in full force and effect and the parties shall amend that provision in such reasonable manner as achieves the intention of the parties without illegality provided that any party may seek the consent of the other or others to the termination of this Deed on such terms as may in all the circumstances be reasonable if the effect of the foregoing provisions would be to defeat the original intention of the parties

6.5 No variation to this Deed shall be effective unless made by Deed or pursuant to the determination of an application made under Section 106A of the 1990 Act

6.6 The failure by any party to enforce at any time or for any period any one or more of the terms or conditions of this Deed shall not be a waiver of them or of the right at any time subsequently to enforce all terms and conditions of this Deed

6.8 The applicable law for this Deed shall be English law

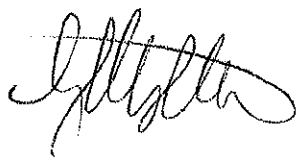
6.9 Without prejudice to the Council's powers under the 1990 Act representatives of the Council may enter upon the Application Site at any reasonable time and upon giving reasonable prior written notice to ascertain whether the terms of this Deed and the terms of the Planning Permission and Listed Building Consent have been complied

with subject always to compliance with any reasonable requirements of the Developers including (but not limited to) health and safety requirements

7. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

7.1 The parties hereto hereby declare and agree that it is not intended that a third party should have the right to enforce any of the terms of this Deed and the provisions of the Contracts (Rights of Third Parties) Act 1999 are hereby excluded

EXECUTED as a DEED by
Gary Mark Cottee
in the presence of:

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Witness Signature: E. V. Emberson

Witness Name: E. EMBERSON

Witness Address: THEODOR
HARDY'S GREEN R2
BIRCH
LANCHESTER
CO. 2 O.P.D.

Witness Occupation: Machinist

SIGNED as a DEED by
Giuliana Teresa Cottee
in the presence of

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Witness Signature: E. V. Emberson

Witness Name: E. EMBERSON

Witness Address: THEODOR
HARDY'S GREEN R2
BIRCH
LANCHESTER
CO. 2 O.P.D.

Witness Occupation: Machinist

First Schedule

Draft Planning Permission