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West Sussex
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8 April 2019

FAO Ms Gemma Penny
Associate
ASB Law LLP

By email

Dear Ms Penny,

We refer to your letter of 29th March 2019 and our initial reply by email of 2nd April 2019. Each of the points detailed in your letter are addressed below :

Investment Committee funding Conditions

The decision making forum charged with interpreting whether the Local Enterprise Partnership's (LEP's) own funding conditions have been met, depends in the first place, upon the nature of those conditions. For the Brighton Valley Gardens Phase 3 project, the LEP Board will make the final decision upon advice from its Investment Committee. The Board will consider whether the funding conditions have been adequately addressed, and their decision will be final. It is expected that the Board will consider this matter later this month, by correspondence.

FOI and ADR

As has already been communicated to your client, the LEP is not bound by the Freedom of Information Act. Your client has made two requests under the Freedom of Information Act, one on the 18th February 2019 and the other on the 18th March via DMH Stallard. In the spirit of openness and transparency, we provided a comprehensive range of relevant documents in response to the later request. With regard to the request of 18th March, we made clear in our response to DMH Stallard, that we were unable to release the information requested therein, as this would cause us to breach the confidentiality obligations we have to a data subject, under the

GDPR. However, again in the spirit of openness, we invited BHCC (the data subject), through a copy of our response, to consider supplying the information requested, directly to your client. You must therefore refer further requests to obtain a copy of the relevant BHCC document, directly to the Council.

You make reference in your letter, to a proposal from your client for a discussion as a means of alternative dispute resolution. We are not aware as to what proposal you are referring to, or do we consider there to be any dispute between Coast to Capital and your client. Your client is entitled to form whatever view it wishes on BHCC's response to our funding conditions. However, under the terms of the local growth deal it is for our Board alone to decide whether the conditions precedent have been met. Our Board has no obligation to take advice from any third party on interpretation of funding conditions, other than from the LEP's accountable body. Also, the LEP cannot enter dialogue with any third party in relation to the terms of funding awards to a grantee. Notwithstanding this, any further responses from the Valley Gardens Forum, will of course be provided to our Board, if receipt is in time for dispatch of papers.

MHCLG National Local Growth Assurance Framework

For clarity, Paragraph 148 of the above states:

148. For project and investment funding the Local Assurance Framework should also include a statement setting out the documents which will be made available to the LEP Board in advance of making a decision to allow them to make an informed assessment of the issues, including (either in full or summary where appropriate):

The LEP confirms that documents as detailed in a-e below (except Mott McDonald report), were provided to all Board members, through our confidential Board member information portal, in advance of the Board's consideration of the Brighton Valley Gardens Phase 3 project. We have attached as requested, each of the documents listed below, except the Mott McDonald report, commissioned by Brighton & Hove City Council (BHCC). You will have to approach the Council to request release of this document, as it was not commissioned by us. With regard to the application business case, we confirm that we have the data subject's (BHCC) consent to release this:

- a. **The application made for funding:** The full Valley Gardens Phase 3 funding application business case, was made available to all Board members prior to the meeting that considered the application.

- b. **An appraisal of the application:** An appraisal of the application was undertaken by LEP staff and summarised within the Board recommendations paper. This was accompanied by a detailed presentation from BHCC, including a question and answer session at the Board meeting. In addition the LEP noted the independent Mott McDonald impact assessment, which also informed the Board report. Following consideration of the above, the Board agreed the recommendations paper, subject to imposition of conditions precedent.
- c. **A view by a legal expert, if required, on legal considerations including, where applicable, the percentage risk of challenge and non-compliance with the proposed course of action and any mitigating factors which may be taken to address this:** The Board were made aware of the representations being made by the Valley Gardens Forum. No legal view was deemed to be required prior to the Board meeting and the LEPS's Accountable Body legal advisor reviewed the Board papers prior and did not feel it necessary to raise any legal issues in advance of, or at the meeting itself. In addition, a verbal summary of the Valley Gardens Forum's comments was also presented to the Board.
- d. **A recommendation as to whether to fund the proposal:** There was a clear recommendation to fund the proposal within the Board paper.
- e. **A recommendation about conditions which should be attached to the proposal:** No recommendations for funding conditions were made prior to the Board meeting as such pre-conditions were not considered necessary by officers. In the usual manner, the Board were invited to consider any conditions that it wanted to be applied, following its proper consideration of the project at the meeting. The Board remitted the task of developing conditions precedent to its Investment Committee, who subsequently formulated these.

The LEP's 22nd January 2019 approval of the above project was properly made. Any future execution of a funding agreement for the project will be in accordance with the relevant assurance requirements, including those of HM Government. We reject any assertion from you or your client that the decision to fund the Brighton Valley Garden Phase 3 project was not taken correctly. You also allege that the LEP Board approval of the above project, on the 22nd January 2019, was inchoate. The Board's requirement to set conditions precedent to the award of funding is a perfectly acceptable response to issues raised at the Board meeting. Such an action to make a conditional funding award is fully within the remit of our Board's powers, under the terms of the local growth deal. Indeed, the

Board is at liberty to apply any conditions, whether pre-conditions or not, to a decision to award funding. In light of the seriousness of this allegation coming directly from asb law, please provide the evidence that you have to back up this claim, within 5 working days from the date of this letter. The LEP takes very seriously any allegations from a practicing solicitor, of breach of assurance process and will take whatever steps it feels necessary to protect its reputation in this regard.

Your client or any other party is of course entitled to take whatever position it deems, in relation to our approval process. However, the LEP is confident that its decisions have been taken properly and we will vigorously defend the LEP's position accordingly, reserving our right to take whatever lawful steps are necessary.

Notwithstanding the above matters, the LEP Board will be invited as a matter of course, to finally confirm its decision to fund the Valley Gardens Phase 3 project, by way of a funding agreement, at the time of considering whether the funding conditions precedent have been met. The Board will take advice on this matter from its Investment Committee who will make recommendations accordingly. The Investment Committee will be furnished with all documents that are to be provided to the Board (see below).

Prior to making their decision, the LEP Board will be provided, once again, with all documents required under paragraph 148 of the National Assurance Framework. This will include any representations previously provided by the Valley Gardens Forum, together with any new representations that may be forthcoming. We will also be submitting your letter of 29th March 2019 and this response as part of the supporting papers.

You ask for comment on the timescale for launch of a judicial review. Of course we cannot give legal advice to you or your client in this matter and you must therefore seek your own counsel on the subject. However, it is clear to the LEP that a judicial review period commences from the point that a funding decision is made. The execution of a funding agreement is not a decision, but the act of implementing a proper decision of the LEP Board. We therefore do not agree that the limitation period commences upon execution of the funding agreement, but upon the confirmation of the decision to fund by the project by the Board.

Yours sincerely

Anthony Middleton
Chief Operating Officer