

For the attention of [REDACTED]  
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By Email [REDACTED]

Our ref: CW18/55914.1 [REDACTED]

Your ref: 55914.1

9 June 2020

When telephoning please ask for: [REDACTED]

Dear [REDACTED]

**Case Reference: NOD-EDB-002**  
**Edinburgh Garden District**  
**West Craigs Limited**

We act on behalf of West Craigs Limited, who participated in the inquiry and hearing sessions in relation to the Garden District planning application (NOD-EDB-002).

West Craigs are the landowners of the majority of Maybury, the largest allocated housing site in Edinburgh (LDP allocation reference HSG19). West Craigs have recently secured planning permission in principle and approval of matters specified in condition for the residential development of their site.

Our client's primary concern during consideration of the Garden District application was the impacts of that development on existing infrastructure and infrastructure proposed to facilitate the delivery of LDP allocated sites.

Having now fully considered the Reporter's Report to the Scottish Ministers, and the Scottish Ministers' Notice of Intention, there are a number of issues which it would be helpful to have clarified.

## 1 THE DRAFT SUPPLEMENTARY GUIDANCE

1.1 At the time of the Garden District inquiry, City of Edinburgh Council's ("CEC") draft 'Supplementary Guidance on Developer Contributions and Infrastructure Delivery' (the "draft SG") was with Scottish Ministers for consideration. The Scottish Ministers appointed a Reporter (Mr David Liddell) to review the draft SG, and prepare a report on its terms. During this time, the draft SG was being actively applied by CEC to planning applications and appeals.

1.2 The Reporter's Report on Garden District was issued to Scottish Ministers on 13 January 2020, at which time the draft SG was still subject to Scottish Ministers' consideration. In the Reporter's Report he noted:

*"The council's draft Supplementary Guidance on Developer Contributions and Infrastructure Delivery specifies the contributions due in respect of education infrastructure. Education Contribution Zones are identified and per house and per flat contributions established. The supplementary guidance **has not yet** been approved by Scottish Ministers."* (Paragraph 5.29) (Emphasis added).

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*“There appears to me to be considerable uncertainty in regard to the council’s aspiration to provide a new non-denominational secondary school in west Edinburgh. That uncertainty is connected to the fact that the council’s supplementary guidance on developer contributions and infrastructure delivery **has not yet been cleared for adoption**. That situation also impacts on the weight which I can ascribe to the level of developer contributions agreed between the council and the applicant.”* (Paragraph 5.75) (Emphasis added)

*“I have also carefully considered the representations of West Craigs in regard to the infrastructure provisions of the heads of terms agreed between the applicant and the council. I am satisfied firstly that those requirements do seek to regulate development of the application site. I take the point in regard to lack of certainty over the level of contributions, given that the relevant supplementary guidance has not yet been cleared for adoption. **It may be that the supplementary guidance is adopted before the conclusion of any legal agreement. In that case the heads of terms would clearly stand to be reconsidered.**”* (Paragraph 8.11) (Emphasis added)

- 1.3 It is clear that the Reporter anticipated that the draft SG would be cleared for adoption by Scottish Ministers and thereafter adopted by CEC either before or after the legal agreement for the Garden District was concluded.
- 1.4 In actual fact, neither of the scenarios contemplated by the Reporter transpired.
- 1.5 After the Reporter had already issued his Report on Garden District to Scottish Ministers, Scottish Ministers directed CEC not to adopt the draft SG (the “Direction”). Scottish Ministers stated that the Direction was given because:
  - (a) It was not demonstrated that the contributions sought through the draft SG, in particular the levels of education and road transport contributions: (i) fairly and reasonably related in scale and kind to the proposed development, and (ii) reflected the actual impacts of, and were proportionate to, the proposed development;
  - (b) The inclusion of details of healthcare actions, contributions and contribution zones within the draft SG did not meet the requirements of Regulation 27(2) of the Town and Country Planning (Development Planning) (Scotland) Regulations 2008. These matters are not expressly identified in a statement contained in the LDP as matters to be dealt with in supplementary guidance; and
  - (c) The draft SG did not provide sufficient certainty that contributions sought on the basis of it would always be used for the purpose for which they were gathered.
- 1.6 The Reporter appointed to review the draft SG identified fundamental issues regarding the draft SG’s compliance with two of the tests for planning obligations set out in Planning Circular 3/2012 ‘Planning Obligations and Good Neighbour Agreements’ (the “Circular”).
- 1.7 Scottish Ministers’ Direction to CEC postdates the Reporter’s Report on Garden District. Self-evidently, the Reporter’s Report on the draft SG which informed the Direction was also not made available until after the Garden District Reporter had already issued his Report to the Scottish Ministers.
- 1.8 The Council and applicants relied on the draft SG for their respective positions on developer contributions.
- 1.9 So far as we are aware, Scottish Ministers did not ask for any submissions on the implications for the Garden District application, including the position of the Council and applicants on developer contributions, in light of its Direction and the Reporters’ Report on the draft SG.
- 1.10 In the first instance please would you confirm if Scottish Ministers had regard to the Direction, and the Reporter’s Report on the draft SG, before issuing the Notice of Intention in relation to Garden District. It

would be helpful if any written material pertaining to any consideration of this issue could also be made available.

- 1.11 We understand that it is CEC's position that, notwithstanding the Direction, Scottish Ministers treated the draft SG as a significant material consideration in the determination of the Garden District application. It is not clear to us how they came to that view.
- 1.12 In light of CEC's stated position, we should also be grateful if you would also please clarify if Scottish Ministers have had any correspondence with CEC on this matter, and whether they have advised CEC that they treated the draft SG as a significant material consideration in the determination of the Garden District application.

## **2 THE GARDEN DISTRICT PLANNING OBLIGATION**

- 2.1 Appendix 8 of the Reporter's Report and Annex 2 of the Notice of Intention set out the heads of terms of the proposed planning obligations to be entered into prior to grant of planning permission for the Garden District (the "HoTs").
- 2.2 Both Appendix 8 and Annex 2 simply duplicate heads of terms as agreed between the Applicant and CEC, and submitted by the Applicant with their closing submissions to the inquiry process on 10 November 2017.
- 2.3 Scottish Ministers' Notice of Intention relies on the Reporter's Report in relation to planning obligations, and there is no obvious further consideration on this issue. The HoTs agreed between the Applicant and CEC, and the Reporter's Report, clearly pre-date the Direction.
- 2.4 While there was some discussion on planning obligations during the inquiry process, this was by necessity general in nature, and of course pre-dated the Direction. The HoTs submitted to the inquiry were also very high level and general in their terms, which is reflected in the Reporter's Report and Notice of Intention.
- 2.5 The details of the planning obligations, particularly in relation to education, will likely have a direct impact on the delivery of LDP allocated housing sites, including the West Craigs site. There are some discrepancies between the Reporter's recommendations on the planning obligations for education, and what was discussed and presented by the Applicant and the Council during the inquiry process. For example, it was the evidence of the Council (adopted by Murray Estates) that no payments were required towards denominational primary schooling, as pupils from the development were not expected to attend a Catholic primary school. However, the Reporter's Report requires (paragraph 5.74) contributions towards denominational primary schooling.
- 2.6 As Scottish Ministers will be aware, where a planning obligation may affect land other than the site to which it relates, the decision-maker is expected to act reasonably and to consult with those affected. See, for example, the case of *R v Lichfield District Council [2001] 3 PLR 33* - in which two parties were promoting development of land within the same area, and both were required to enter into planning agreements to secure the provision of necessary infrastructure. The Council entered into a planning agreement with one of the developers, without the involvement of the other. The Court held that the Council had acted unfairly and unlawfully in failing to involve the landowner in a decision that affected them. This resulted in the planning permission being quashed.
- 2.7 The planning obligations form part of the overall planning permission. Given the interrelationship between delivery of West Craigs (and other LDP allocated sites) and the terms of the Garden District planning obligations, our client has a legitimate and reasonable expectation that they will be consulted on the terms of the planning agreement prior to the grant of planning permission. In light of this, West Craigs should be consulted on the provisions of the draft agreement between CEC and the Applicant.

- 2.8 We should be grateful if you would confirm that you will consult our client on the terms of the planning agreement prior to the issue of planning permission, and that you will instruct CEC and the Applicant to consult our client on the provisions of the draft agreement.



BURGES SALMON LLP

**From:** [REDACTED]  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]  
**Date:** 15 February 2021 15:45:32  
**Attachments:** [REDACTED]

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[REDACTED]

### The Planning Application

-  
There have been a number of changes in the material circumstances surrounding the Garden District application following issue of the Scottish Ministers' Notice of Intention on 30 April 2020.

Our client has written to you directly regarding new information on infrastructure matters which are directly relevant to this application. We have also written to you previously in relation to the Scottish Ministers' consultation on amendments to Scottish Planning Policy.

The position in relation to SPP has clearly now evolved further following issue of the 'Scottish Planning Policy – Finalised Amendments' document and PAN 1/2020 'Assessing the extent of the 5 year supply of effective housing land' on 18 December 2020.

In our email of 23 December we noted that these amendments would appear to be relevant and material to this application, given the recommendation of approval was founded upon paragraph 33 of SPP. The five-year lifespan of the local development plan is also clearly an important consideration. We therefore asked for confirmation as to what steps Scottish Ministers intended to take to obtain submissions from parties on these amendments.

Further to our previous email, we are aware that a series of procedure notices have now been issued in relation to a number of planning appeals (including PPA-390-2060-1, PPA-280-2027-1, PPA-210-2085, and PPA-400-2109).

To make a valid decision, Scottish Ministers must assess the Garden District application against extant planning policy at the point of the decision. Given the scale of this development and in light of the changes made to relevant and material sections of SPP, the amended SPP must be taken into account. Scottish Ministers cannot do so without first giving parties to the inquiry the opportunity to address them on it. To do otherwise, and therefore approve this application on the basis of superseded policy, would be irrational and unreasonable.

We should be grateful if you would confirm if it is Scottish Ministers' intention to issue a procedure notice on this matter prior to determination of the application.

### The Section 75 Agreement

-  
In response to an information request (your reference 202000129996), we have been provided with correspondence that makes clear that the S75 agreement is in circulation between various parties, including parties who did not participate in the planning application process, and did not attend the hearing/inquiry sessions. The applicant's agent has also advised that, once the section 75 agreement is settled, their intention is to move ahead to submitted detailed planning applications as soon as possible. This is extremely concerning to our client, and reinforces the points we have raised with you previously.

The Reporter acknowledged that the potential adverse impacts of the scheme on the availability of infrastructure in West Edinburgh for the delivery of LDP allocated housing sites, including education and transport, could be addressed through the section 75 agreement. At the time when those concerned (including our client) had the opportunity to comment on the sufficiency of the planning obligations there was no detail available, and the section 75 agreement had progressed no further than Heads of Terms.

If those party to the S75 agreement proceed to sign and have it registered against their title, formal legal procedure would be required to amend the terms of the agreement. It is quite clear that the applicant has no intention of sharing the draft section 75 agreement with those affected by its terms. It is also apparent that they wish to move ahead quickly once their version of the section 75 agreement is settled.

The section 75 agreement forms part of the planning permission, and has the potential to impact directly on

our client's development. We have set out previously that *R v Lichfield District Council* demonstrates why our client is entitled to be consulted on the S75 agreement.

I should be grateful if you would come back to us on the outstanding matters set out in my previous correspondence.

Kind regards

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---

From: [REDACTED]

Sent: 23 December 2020 10:29

To: [REDACTED]

Cc: [REDACTED]

**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

[REDACTED]

We first asked for sight of, and consultation with our clients on, the draft S75 agreement on 9 June 2020. We are aware that a draft is in circulation amongst various parties. A key issue in this application was whether it risked prejudicing development of LDP allocated sites through its use of infrastructure, and in particular education infrastructure. The applicant's proposals on this point, as well as the planning authority's own position, are heavily reliant on the terms of the S75 agreement. The precise terms of the agreement, including the applicant's specific obligations to fund or provide infrastructure and the amount of development that is allowed to proceed linked to that infrastructure provision, has a direct and potentially significantly prejudicial impact on development of LDP allocated sites, including our client's development. The acceptability of this proposal, and its compliance with the development plan, in particular LDP policy HOU2, is predicated on the terms of the S75 agreement.

We have set out in very clear terms the legal basis upon why our clients are entitled to be consider (*R v Lichfield District Council*), and the substantive reasons behind that. Scottish Government is clearly failing in its legal obligations as decision-maker in relation to this application, and the failure to provide a substantive response more than 6 months later represents an additional failure. Please confirm that our clients will be consulted on the terms of the section 75 agreement before any decision is issued. If Scottish Government, as decision-maker, intends to refuse our client that opportunity then detailed reasoning in writing for that position is requested.

Separately, we note that Scottish Government has published its finalised amended text for Scottish Planning Policy, together with a new Planning Advice Note 1/2020 'Assessing the extent of the 5 year supply of effective housing land', which are said to come into immediate effect. On that basis these would appear to be material to the Reporter's and Scottish Ministers' assessment of this application, as the basis of the recommendation of approval was founded upon paragraph 33 of SPP. Please confirm what steps Scottish Ministers now intend to take to obtain submissions from the parties on this issue. We have copied this email to Fiona Simpson as we understand she has been responsible for the SPP text and will be able to advise on this point. Our client has also advised Scottish Ministers on various matters material to its decision on this application that have arisen subsequently to either or both the Reporter's report and Scottish Ministers' intentions letter.

Scottish Ministers will be mindful of the comments of the Court in *Grahams the Family Dairy* about not only the requirement on them to have regard to any material change in circumstances, but also to allow parties to make submissions as to the significance of those changes before making their decision.

We look forward to hearing from you.

Kind regards

[REDACTED]

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**From:** [REDACTED]

**Sent:** 10 December 2020 09:22

**To:** [REDACTED]

**Cc:** [REDACTED]

**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

**EXTERNAL EMAIL**

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[REDACTED]

Apologies for the delay in responding. We will endeavour to get back to you on this issue as soon as possible.

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 19 November 2020 17:17  
**To:** [REDACTED]  
**Cc:** [REDACTED] >  
**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

[REDACTED]

I should be grateful if you would come back to us regarding the draft planning obligations for this development.

Kind regards

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**From:** [REDACTED]  
**Sent:** 03 November 2020 15:57  
**To:** [REDACTED]  
[REDACTED] [REDACTED]  
**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

[REDACTED]

I should be grateful if you would come back to us regarding the draft planning obligations for this development.

Kind regards

[REDACTED]

---

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---

**From:** [Redacted]

**Sent:** 19 October 2020 10:33

**To:** [Redacted]

[Redacted]

**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

[Redacted]

Further to our email exchange, I should be grateful if you would come back to us regarding the draft planning obligations for this development. It remains our client's position that they have a legitimate expectation to be consulted on the process.

Kind regards

[Redacted]

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**From:** [REDACTED]

**Sent:** 28 August 2020 12:27

**To:** [REDACTED]  
[REDACTED]

**Subject:** RE: ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

[REDACTED]

Thank you for your email. You will appreciate that given the approach being taken in other applications and appeals we do need to clarify and confirm the position on this application to our clients.

I am taking from your response on the SPP consultation paper, that this is not something which Ministers will be giving any weight in the final determination of this application. If that is not the case, grateful if you could clarify.

We look forward to hearing from you on the draft planning obligations. Our client's position on that is hopefully clear and straightforward.

many thanks

[REDACTED]

---

[REDACTED]

Partner

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**From:** [REDACTED]

**Sent:** 27 August 2020 17:10

**To:** [REDACTED]

**Cc:** [REDACTED]

**Subject:** ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT"

**EXTERNAL EMAIL**

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Dear [REDACTED]

Thank you for your email regarding the current 'Scottish Planning Policy (SPP) and Housing: Technical Consultation Paper' and the 'Edinburgh Garden District' proposal. I apologise for the delay in responding.

I can advise that we are not minded to issue a procedure notice in respect of the Edinburgh Garden District planning application at this time.

We will respond to your other queries regarding the Edinburgh Garden District planning obligation in due course.

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 27 July 2020 11:23  
**To:** [REDACTED]  
[REDACTED]  
**Subject:** RE:

Good morning

Following my previous email, we understand that a number of procedure notices have been issued for planning appeals in relation to the Scottish Government's on-going consultation on amendments to Scottish Planning Policy.

In particular, we are aware of a procedure notice seeking the views of parties on the implications of the consultation being issued in relation to planning appeal PPA-240-2064 (land at North Bank Farm, Bo'ness). A Notice of Intention was issued on 24 March 2020 in relation to that appeal, and it is therefore at the same stage of determination as the Garden District application. This is one of a number of cases where the Reporter appears to have concluded that the consultation is at least potentially capable of being relevant.

I should be grateful if you would advise if a procedure notice seeking views on the consultation is going to be issued in relation to Garden District, and, if so, when. The consultation is of particular relevance to this application, as the basis for the Notice of Intention is predicated on SPP, given the proposed development was found to be very clearly contrary to the development plan. As procedure notices have already been issued in relation to a number of schemes, a prompt response would be appreciated.

I should also be grateful if you would come back to us on the issues raised in our letter as soon as possible.

Kind regards

[REDACTED]

---

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**From:** [REDACTED]

**Sent:** 22 July 2020 13:01

**To:** [REDACTED]

[REDACTED]

**Subject:** ND 1000 METRES NORTH-WEST, SOUTH-WEST & WEST OF HERMISTON JUNCTION, M8 GOGAR STATION ROAD, EDINBURGH, AND KNOWN AS "EDINBURGH GARDEN DISTRICT" [BURGES-WORK.FID9646320]

Good afternoon

Please see the attached letter in relation to the above matter.

Kind regards

[REDACTED]

---

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For the attention of [REDACTED]  
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**By Email** [REDACTED]

Our ref: LR12/CW18/55914.1/REID

Your ref: NOD-EDB-002

12 August 2020

When telephoning please ask for: [REDACTED]

Dear [REDACTED]

**Case reference: NOD-EDB-002**  
**Edinburgh Garden District**  
**West Craigs Limited**

We refer to our letter of 22 July 2020, and emails of 27 July and 3 August 2020, to which we have yet to receive any form of a substantive response. In particular we refer to our request for confirmation as to whether a procedure notice is going to be issued seeking the views of parties on the implications of the Scottish Government's consultation on amendments to Scottish Planning Policy (the "Consultation") on the determination of the Edinburgh Garden District application.

The Consultation proposes the removal of the presumption in favour of development that contributes to sustainable development, and the deletion of paragraph 33 of Scottish Planning Policy, together with any references to development plan policy becoming out of date, either due to age or due to a shortfall in five-year effective housing land supply.

Scottish Ministers' current position in relation to the Edinburgh Garden District planning application, as set out in their Notice of Intention dated 30 April 2020, is based on the presumption and the operation of paragraph 33 of Scottish Planning Policy. As set out in paragraphs 10 – 14 of the Notice of Intention, Ministers agree with their Reporter that paragraph 33 of SPP is engaged because the relevant policies relating to housing in SESplan are considered out of date, partly because SESplan is more than 5 years old. Ministers therefore agree with the Reporter's conclusion that the presumption in favour of development that contributes to sustainable development is a significant material consideration in the determination of this application, and conclude:

*"In summary, while Ministers disagree with the Reporter that the proposal overall complies with the development plan, they do agree with the Reporter that material considerations, specifically the provisions of SPP, indicate that planning permission should be granted. It is considered that on balance the proposal represents a sustainable development and that the benefits of the proposal outweigh any potential negative consequences to the development plan specifically the loss of greenbelt and localised impacts."*

It was common ground between the applicants and Council that City of Edinburgh Council was considered to be maintaining a five year effective housing land supply in terms of the housing land supply figures in SESplan. The suggested deletion of paragraph 33, and the removal of the presumption as a significant material consideration, is therefore clearly relevant in the determination this application given the Scottish Ministers'

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conclusion that the proposed development does not comply with the development plan, but that this is outweighed by operation of paragraph 33.

We are aware of at least seven procedure notices in relation to housing developments, in which the Reporters appointed to those case have asked parties for their views on the implications of the Consultation to those cases. This includes the recovered planning appeal at Campsie Road, Strathblane (your reference PPA-390-2060-1), which is a case to be determined by Ministers.

Thus far you have failed to respond to our request for clarification on whether a procedure notice will be issued in relation to the Edinburgh Garden District application. The question of what is a material consideration in the determination of a planning application is a matter of law, not planning judgment. It is not at all clear to us how Scottish Ministers could come to the view, in isolation, that the Consultation on amendments to Scottish Planning Policy is not a material consideration to this application, given the position taken by your Reporters in other cases, and your own advice that the Consultation *"may be a material consideration in the determination of planning applications and appeals, with the weighting of any material consideration being a matter for the decision maker"*.

Please confirm whether Scottish Ministers intend to issue a procedure notice in relation to the Edinburgh Garden District application seeking views on the implications of the Consultation. If your position is that the Consultation document is not a material consideration as a matter of law we would ask for a detailed explanation as we will need to advise our client on the remedies available to them.

Separately, we should also be grateful if you would provide a substantive response to the issues regarding planning obligations raised in our letter as soon as possible. It is incumbent on Ministers as decision maker in this case to engage with all parties in a reasonable and fair handed manner. Your position that the terms of planning obligations is a matter only for the applicant and local authority is wrong in law and unsustainable.

Yours faithfully

[Redacted signature]

BURGES SALMON LLP

cc. [Redacted] Chief Planner  
cc. [Redacted] Scottish Government