Planning Inspectorate

Appeal Decision

Site visit made on 13 February 2025

by S J Warder BSc(Hons) MA DipUD MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 February 2025

Appeal Ref: APP/E5900/Q/24/3351132
Land at Devon Wharf, Leven Road, Tower Hamlets, London E14 0LL

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 (the Act) against a refusal to discharge modify a planning obligation.
- The appeal is made by Mizen Developments Limited against the decision of the Council of the London Borough of Tower Hamlets.
- The development to which the planning obligation relates is redevelopment of the site comprising the erection of a six and eleven storey building to provide seven affordable units, B1 units and 66 residential units together with car park, walkway and public forecourt.
- The planning obligation, dated 25 June 2010, was made between London Thames Gateway Development Corporation, Chilton Transport (Bow) Limited and The Royal Bank of Scotland PLC.
- The application Ref PA/24/00591, dated 28 March 2024, was refused by notice dated 4 June 2024.
- The application sought to have clause 2 of Schedule 1 of the planning obligation discharged.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. London Thames Gateway Development Corporation (the Corporation) ceased operation in 2011 and its planning functions were taken up by the Council of the London Borough of Tower Hamlets (the Council).

3. Clause 2 of Schedule 1 of the planning obligation requires the payment of a Discounted Standard Charge (DSC). Clause 2.1(a) concerns the payment of 25% of the DSC on implementation of the permission, and has been paid. Clause 2.1(b) requires the payment of the remaining 75% on completion of each residential unit within 20 working days of the end of each quarter (clause 2.2).

4. The appeal building was completed in around 2017 and all of the units occupied. However, no payment has been made under clause 2.1(b) and this is the obligation in dispute. The appellant considers that, as clause 2.1(a) has been fulfilled, it would be simplest to discharge clause 2 entirely.

Main Issue

5. The main issue is whether or not clause 2 of Schedule 1 of the planning obligation continues to serve a useful purpose having regard to the tests set out at s106A(6) of the Act.

Reasons

Useful Purpose?

6. In terms of the purpose of clause 2, the planning obligation defines the DSC as £10,000 per residential unit as set out in the Corporation's Planning Obligations Community Benefit Strategy March 2008. The appellant's Needs Assessment (NA) advises that the Standard Charge was justified as a contribution towards the significant infrastructure needs of the area. The definition of the DSC in the planning obligation goes on to explain that the discounted amount was relevant to the area *'having reached a balance between the costs of infrastructure required in the Corporation's area to support development, the likely scale of the development that will come forward and the level of charge that it is appropriate for developments to meet without stifling development.'*

7. The purpose of the obligation, therefore, was to secure contributions towards the infrastructure needs of the area at a level which would not stifle development. I also note that Schedule 2 of the planning obligation requires the Corporation to use the DSC to secure the provision of the infrastructure in accordance with the Public Sector Investment Plan (PSIP). The appeal submissions do not indicate that the need for the DSC was not properly evidenced or set at an appropriate level at the time the planning obligation was completed. While the then applicant sought to have the affordable housing contribution reduced on viability grounds, there is nothing to suggest that it questioned the second DSC. As such, I consider that it served a useful purpose at that time. The question is whether it continues to do so.

Continued useful purpose?

8. The NA refers to a Council Cabinet Report in January 2007 which recommended adoption of the DSC. It stated that the social infrastructure required to accommodate the impact of the then expected development in the Lower Lea Valley included specified levels of provision for nursery units, primary schools, secondary schools, primary health care and community centres. On that basis, the NA considers whether there is a need to contribute to each of those types of facility based on their capacities within catchment areas defined for the appeal site.

9. Table 5.2 of the NA seeks to demonstrate spare capacity in GP practices in the defined catchment. However, while it shows spare capacity in the St Andrews Health Centre, it does not take into account that the other three facilities are operating over capacity. Overall, the facilities appear to be serving almost 3500 more patients than their nominal capacity.

10. The assessment of community centre capacity relies on a benchmark requirement of 65sqm of space per 1000 persons. This figure is taken from 'AECOM experience in Essex, Kent and Surrey'. However, compared with those counties, Tower Hamlets is a more densely developed area and may well have different demographic and socio-economic characteristics. As a result, it may have a different requirement for community centre floorspace per head of population. Indeed, I note that the Council's Infrastructure Delivery Plan 2023 acknowledges the difficulty in assessing community centre provision quantitatively.

11. The appellant's NA policy review refers to the PSIP in the context of the Corporation's Planning Obligations Community Benefit Strategy (July 2010). It discusses the process for identifying priority projects in the Lower Lea Valley, including stakeholder consultation and the evaluation framework. However, it does not limit its consideration to specific types of infrastructure. As such, the available evidence does not indicate that funding from the DSC was intended to be limited to the types of infrastructure considered in the NA.

12. Further, while any contribution should be directly related to the funding development, and one of the PSIP priorities is that the funded project should be in close proximity to the funding development, another priority refers to '*a shared vision for the future of the area'*. This does not suggest that the projects to be funded were necessarily intended to be confined to the relatively narrowly defined catchments used in the NA.

13. The appellant contends that the impact of the development has been accommodated within the existing capacity of services. However, the existing capacity of services should be seen in the context of the much larger overall provisions for infrastructure funding in the area, as alluded to in the NA. In that context, I consider that the available evidence does not allow a direct correlation to be made between the absence of the second DSC and the claimed sufficient capacity of existing services.

14. The NA policy review also indicates that Policies D.SG5 (Developer Contributions), S.CF1 (Supporting Community Facilities), and D.CF3 (New and Enhanced Community Facilities) of the Council's current Local Plan 2031 (2020) continue to seek contributions to infrastructure from development proposals, either through the Community Infrastructure Levy (CIL) or s106 Agreements. These policies are supported by the Council's Planning Obligations Supplementary Planning Document (2021).

15. The appellant's review of the Council's Infrastructure Funding Statement indicates that there was some £191m in unallocated funds available in 2022/23. However, there is little information on how this relates to planned spending or whether there is currently a similar amount of unallocated funding. Moreover, it is evident that current planning policies continue to support developer contributions to infrastructure provision notwithstanding the reported level of unallocated funding.

16. I have had regard to appeal reference POA-320-2003, Land to the East of Main Street, Newmains, North Lanarkshire. The Inspector in that case noted that the development plan policy required any financial contributions toward education infrastructure to be determined on a case-by-case basis. The contribution sought was for education provision only and appears to have turned on the situation concerning two specific schools. My reasoning above shows that the policy position and the scope of the contribution in dispute in the current appeal are materially different and therefore that the North Lanarkshire decision is distinguishable from this appeal.

17. The appellant contends that payment of the second DSC would render the appeal development unviable and has submitted a Viability Statement in support of its position. One of the aims of the DSC was to set the contribution at a level which did not stifle development. The appeal scheme is complete and occupied and therefore the DSC evidently met that aim in this case. I have already noted that the viability of paying the DSC was not questioned at the time the planning obligation was completed.

18. Whether the scheme has subsequently become unviable due to the second DSC is of limited relevance. If the scheme came forward today or in the recent past, any contribution to infrastructure would likely be secured through the CIL rather than a s106 agreement. There is not substantive evidence to show that the CIL rate is inappropriate and stifling the on-going development of the area.

19. That the appellant has not achieved its expected rate of profit on the development is a commercial matter. It relates to the price that the appellant chose to pay for what was at the time a completed and largely occupied development, when the effects of the 'exceptionally challenging' circumstances of the development had already been dealt with or were reasonably foreseeable. Those circumstances were, therefore, particular to this development and not indicative of the viability position faced by a 'general industry player' in delivering residential development.

20. Taking all these matters into consideration, I consider that the NA does not adequately demonstrate that the funds to be secured through the second DSC are no longer required. Moreover, notwithstanding the overall funding position described by the appellant, there continues to be clear development plan policy support for developer infrastructure contributions, albeit that legislative changes since the appeal planning obligation was completed mean that funds would likely be secured using the CIL rather than s106 agreements. Consequently, I consider that Clause 2 of the obligation continues to serve a useful purpose. It follows that the obligation would not serve that purpose if clause 2 were discharged, as sought by the appellant.

21. In reaching these conclusions I have had regard to the R (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government [2018] EWHC 1794 (Admin) judgement cited by the Council. As the appellant points out, the details of the appeal in that case and the current appeal are different. However, I consider that those differences do not prevent the judgement from providing relevant guidance on the overall approach to addressing the s106A issues in this case.

Other Matters

22. Both parties refer to a dispute over the amount of the Works in Kind cost. Clause 7.4 of the planning obligation requires the Final Works in Kind cost to be credited against the DSC. I note that the final amount has been determined by the High Court in separate proceedings based on the cap and indexation set out in the planning obligation. As such, I do not need to consider the matter further.

23. The originally consented seven Class B1 units were converted to residential use under application reference PA/18/03566. The Council did not seek a DSC payment for this proposal as it fell below the 'major applications' threshold. As such, it is distinguishable from the appeal proposal.

24. The Appellant's NA refers to appeal reference APP/X5210/Q/21/3276844 which concerned the modification of a planning obligation to provide affordable housing in connection with the redevelopment of a site for housing. The appeal was considered at a time when the development had commenced, but work on site had paused because the appellant considered that the scheme had become unviable.

25. That contrasts with the current appeal where the development is complete and occupied. Further, while the Inspector accepted that the scheme was not viable, the appeal was dismissed because it had not been demonstrated that the proposed modification would provide for the maximum reasonable amount of affordable housing in compliance with development plan policies. That is not a matter I am required to consider in this appeal. Consequently, while the cited decision affirms the general proposition that viability matters can be considered in s106B appeals, the circumstances of that appeal were materially different from, and have little bearing on, this case.

Conclusion

26. For the above reasons, and having had regard to all other matters raised, I conclude that the appeal should be dismissed.

Simon Warder

INSPECTOR