TOWER HAMLETS PRIMARY HEALTH CARE TRUST

and

NHS LONDON HEALTHY URBAN DEVELOPMENT UNIT

Re provision of payments for health services in Section 106 agreements

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OPINION

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Introduction

1. We have been asked to advise the Tower Hamlets Primary Care Trust ("the THPCT") and the NHS London Healthy Urban Development Unit ("the NHS HUDU") that is connected therewith. We have been asked to consider the legal position of obtaining, through the use of Section 106 planning obligations, funding from developers for health services.

2. Those instructing us have helpfully set out the background circumstances that have led to the need to seek our advice and have also provided us a copy of their written advice to the THPCT contained in a letter dated 19th October 2007. Save where necessary to assist our analysis, we shall not rehearse in detail the legislative and policy background to the making of such agreements since this is obviously familiar to those for whom this opinion is intended.

3. The concern has arisen on the part of the THPCT following representations made to it by developers' representatives that funding cannot be secured through S.106 agreements where reliance is placed upon a model provided by the NHS HUDU, where policy justification is missing or incomplete and where the funding sought relates to revenue payments.

Legal and policy background

4. The relevant parts of the provisions of S.106 of the *Town and Country Planning Act 1990 (as amended)* are as follows:

> **[106 Planning obligations]**
> **[(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as "a planning obligation"), enforceable to the extent mentioned in subsection (3)-**
> …
> **(d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.**
> **(2) A planning obligation may-**
> …
> **(c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.**
> …] [our emphasis]

5. It can be readily seen, as those instructing us have already advised, that the provisions are widely drafted. The courts have made plain that the planning system is a self-contained code and they will not artificially alter its extent and meaning. One must therefore look with care at the words of the relevant statutory provision.

6. In the case of planning obligations, the ambit of the provisions is plainly and sufficiently wide to lawfully permit payment by developers on a variety of basis that include periodic and future payments based upon a formulaic approach. The limitation in practice that has arisen derives from tests laid down in policy guidance on the use of planning obligations.

7. The relevant advice on the use of planning agreements is contained in ODPM Circular 05/2005 (Planning Obligations). The relevant part of the guidance is contained in Annex B at paragraph B5:

> **The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet all of the following tests. The rest of the guidance in this Circular should be read in the context of these tests, which must be met by all local planning authorities in seeking planning obligations.**
> **A planning obligation must be:**
> **(i) relevant to planning;**
> **(ii) necessary to make the proposed development acceptable in planning terms;**
> **(iii) directly related to the proposed development;**
> **(iv) fairly and reasonably related in scale and kind to the proposed development; and**
> **(v) reasonable in all other respects.**

8. The House of Lords considered the ambit of planning obligations in the well-known case of *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 W.L.R. 759. The challenge arose out of rival schemes being considered for the grant of planning permission and whether the offer to fund a link road by a competitor of Tesco could be taken into account in determining the merits of the rival proposals. The Secretary of State took the reverse position to his inspector and granted the rival scheme of Tesco's competitor, taking into account the link road funding to be provided by way of planning obligation. Tesco challenged that decision and the House of Lords considered the extent to which the agreement in question was a lawful material consideration in the decision-making process. As the learned authors of the Planning Encyclopedia note, the effect of the decision in that case sets a very low threshold for lawfulness (see Vol. 2 para. P106.24). As Lord Keith of Kinkel stated in his speech in the Tesco case (at p. 770):

> **An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has <u>some connection with the proposed development which is not de minimis</u>, then regard must be had to**

> it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy. [our emphasis]

9. In addition, Lord Hoffman added his own analysis to that of the speech of Lord Keith of Kinkel and said (at p.776):

> **Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While rejecting the politics of using planning control to extract benefits for the community at large, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs.** [our emphasis]

Recent decision letters

10. We have been supplied with several recent planning decisions: one given on appeal determined by an inspector and two where the Secretary of State (for Communities and Local Government) herself has recovered jurisdiction. Each of these appeals included the consideration of funding for healthcare. We shall comment briefly on each in turn.

11. The appeal relating to East and West Arbour Streets shows that the policy upon which reliance was made to support funding for healthcare was inadequate. It is significant to note that the inspector expressly endorsed the provision of healthcare as a planning matter (at para. 15).

12. The appeal relating to Leighton Buzzard South likewise expressly concedes that new development can have an impact on healthcare and that this can form the proper basis for a development contribution (at para. 6.49 of the inspector's report). Again, the authority's argument in relation to healthcare foundered on the inadequacy of the policy relied on (at para. 6.53).

13. The facts of the appeal relating to Honeypot Lane included an agreed contribution towards health services (at para. 27(xi) of the inspector's report). The Secretary of State agreed with the inspector's conclusions on the acceptability of a contribution to healthcare (at para. 15 of the Secretary of State's decision letter).

Analysis

14. In our view, the essential point to consider therefore becomes whether the funding being sought relates to an external cost (per Lord Hoffman in the Tesco case) of a proposed development or whether, in contradistinction, the funding is simply sought to be extracted from a developer to benefit the community generally (as disapproved of in the Tesco case). Any addition to the funding of infrastructure and services that are used by the general public as well as, for example, occupants/users of a proposed development, will inevitably benefit the wider community. The difference between what is lawful and what is not will depend upon whether or not the need for the facilities or services sought to be funded by planning agreement derives in a tangible way (even if de minimus – see Lord Keith of Kinkel in the Tesco case) from the impact of the proposed development.

15. In our view the correct approach therefore to considering any financial request from THPCT to a developer for a contribution to the funding of healthcare in its area is to identify whether the need for funding derives from an impact assessed to arise from the development proposed. This proposition might be easily stated but in practice might not be so easy to determine in a case where the funding sought relates to future on-costs of healthcare as opposed to current infrastructure. Nonetheless, we think it should be a relatively straightforward exercise for someone with suitable expertise and experience to calculate the likely

generation of users of healthcare services from a proposed development. This is entirely consistent with the advice in Chapter 7 of *Planning Obligations: Practice Guidance* (July 2006) issued by the DCLG.

16. It will be important that account is be taken of the extent to which those likely users are existing inhabitants of an area and the extent to which they are new users attracted to an area by reason of the new development. This point was specifically mentioned by the inspector in the Arbours Streets appeal (at para. 14 of the decision letter).

17. The funding of healthcare is an on-going matter for a relevant authority such as the THPCT. It must be tempting to seek payments wherever possible to bolster the finitely limited funds of the healthcare system whenever an opportunity arises. Those payments however must be legitimately sought. We do not see anything unlawful in developers being required to add to the funding for healthcare where it is the impact of their developments that gives rise to, or is part of what gives rise to, the need for future services and/or infrastructure. These are clearly external costs and as such are material planning considerations.

18. What is apparent from reading the decision letters and we think must be right as a matter of proper and practical analysis, is that the assessment of the impact of a proposed scheme of development must be seen much more as a science, in the same way that traffic impact analyses and shopping impact assessments are nowadays examined in planning applications and appeals.

Conclusions

19. Accordingly, for the reasons and analysis that we have set out above, we would answer the questions posed in our instructions as follows:

1. Q: *Is seeking the provision of, or payments towards, the cost of physical facilities for the delivery of health services legitimate under section 106 of the Act?*

   A: Yes provided the need for the physical facilities can be directly attributed to the likely impact of occupants/users of the planned development over and above the needs and natural growth of the existing inhabitants of the area.

2. Q: *Is seeking the provision of time limited revenue funding to offset all or some proportion of the cost of health services, that is running costs or labour and supplies, legitimate?*

   A: Yes provided the running costs, labour and supplies can be directly related to the impact of occupants/users of the planned development over and above the needs and natural growth of the existing inhabitants of the area.

3. Q: *Is there is any real or necessary distinction to be made between (i)revenue that is contributions to the running cost of services, (ii) maintenance payments that are for physical facilities and (iii) capital that is the cost of acquiring by lease or the purchase of additional accommodation?*

   A: No provided the funding sought can be justified as relating to the impact of the proposed development in accordance with the answers in 1 and 2 above.

4. Q: *Is it is lawful for a Local Authority to make a distinction between the rules applying to one form of community facility in respect of section 106 and another (in particular by treating revenue support as legitimate for*

public transport or employment training support but excluding it on principle for health services)?

A: Yes if the rules represent a policy position that is sound in terms of its derivation. The essential thing is to identify how an assessed impact of a development proposed will be accommodated within the existing and future infrastructure and services of a local planning authority. Once that impact is identified, any policy should identify how a developer is to contribute to the external cost(s) of a proposed development. The meaning and effect of such policy should be clear and transparent. If there is to be a distinction between contributions for different services, it should be justified by reference to the way those services are and will be provided.

5. Q: *Does the absence of specific reference to the use of the NHS London Healthy Urban Development Unit ("HUDU") model in a policy or SPD, prevent the application of the HUDU model in order to calculate the appropriate scale of a health contribution, otherwise defined as acceptable?*

   A: No provided a sound assessment can be demonstrated for the need for funding arising from a proposed development. If reliance upon the model is made, its robustness should be demonstrated. No doubt account will be taken of any criticisms of its shortcomings identified in planning appeal decisions.

6. Q: *In the absence of an adopted Borough section 106 policy or an adopted SPD, are section 106 contributions for health ruled out?*

   A: No since the principle of funding healthcare provision is, and has been accepted as, a material planning consideration. However, the emphasis of the modern plan-led system and the transparency of policy requirements for any developer mean that guidance

should be produced as soon as possible and as detailed as possible. In the absence of a policy or where policy is insufficiently comprehensive, pre-application discussions with developers should identify as early as possible the need for healthcare funding, the method by which the costs of that need will be determined and the basis for any payment(s) sought.

20. We have tried to advise as comprehensively but succinctly as possible. If we can advise further or amplify anything raised herein, please do not hesitate to contact us. We would be happy to help consider any draft development plan guidance and/or help with any assistance sought from appropriate third party experts.

21. In conclusion, we think that the following points should be borne in mind when seeking to justify funding for healthcare services through the mechanism of planning obligations:

    a. National policy is crystal clear in permitting the THPCT to ask for contributions for health funding;

    b. Those contributions can be more forcefully and readily made in a sound policy context;

    c. Points (a) and (b) are not enough to guarantee delivery of funding alone. Rather:

        i. The need for funding must be evidence-based in its justification, probably supported by appropriate expert evidence; and

        ii. That justification must expressly derive from national planning and development plan policies.

22. We think the essential point to grapple with in any specific application is to identify the incremental change that is likely to occur as a result of a proposed

development and distinguish from that impact what is likely to happen due to the natural changes and increases in population in the relevant area outwith the proposed development. The former should properly be part of the developer's costs (and therefore funding sought using S.106 obligations) whereas the latter will be part of the ongoing infrastructure requirements of the health authority. The mechanism for delivering any funding such as capital or periodic payments and the formula for their calculation will then have to take into account how the impact of the development for which healthcare funding is necessary will occur over time. It may be that the funding for the impact will have to be considered in both capital and revenue terms.

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