
Summary of Proof of Evidence of

David John Whittington

BA (Hons) DipTP MRTPI

Appeal Reference: APP/X5210/Q/21/3276844

Site Address: 100 Avenue Road, London, NW3 3HF

Local Planning Authority: London Borough of Camden

Inquiry Start Date: 9 November 2021

On behalf of Essential Living (Swiss Cottage) Ltd

October 2021

1. Summary

- 1.1. This Summary of Proof of Evidence has been prepared by David Whittington of Savills (UK) Limited ("Savills") on behalf of Essential Living (Swiss Cottage) Limited ("the Appellant"), in support of a Planning Appeal made by the Appellant under section 106B of the Town and Country Planning Act 1990.
- 1.2. It should be read in conjunction with the full Proof of Evidence prepared by the same author.

Core Case of the Appellant

- 1.3. The Appellant's Core Case is set out within their Statement of Case dated May 2021 and in the documents that formed the original application submission to the LPA. In summary:
 - *In accordance with S.106A(6) of the Town and Country Planning Act 1990, the relevant existing planning obligation continues to serve a useful purpose (to secure the maximum reasonable amount of affordable housing from the development) but that purpose would be served equally well if the obligation had effect subject to the modifications specified in the Application;*
 - *That in assessing the modification, it is appropriate to consider matters that are material to the relevant obligation and not simply the obligation itself in isolation. In this case, that means the viability of the scheme in current circumstances and how this impacts upon the deliverability of a comprehensive residential led, mixed-use redevelopment scheme on brownfield land, and*
 - *That the impact of affordable housing provision upon delivery of a development needs to be taken into consideration in assessing whether that provision can be amended. An affordable housing requirement that renders a scheme undeliverable, thereby also risking the full range of other planning benefits arising, does not constitute the maximum reasonable amount of affordable housing from the proposed development. As a result, the obligation is no longer fairly and reasonably related in scale and kind to the development.*

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- 1.4. These matters are expanded upon within both my Proof and the Proof of Evidence prepared by the Appellant's second witness, Mr Gareth Turner also of Savills.

Statement of Common Ground

- 1.5. In addition to the previously agreed Statement of Common Ground ("SoCG") dated 25 August 2021, an addendum Statement of Common Ground dated 18 October 2021 has also now been agreed between the Appellant and the LPA. This has resulted from ongoing discussions between the principal parties to narrow the scope of viability matters that remain as areas of disagreement. Specifically, this addendum SoCG confirms that all technical viability appraisal parameters, inputs and results are now agreed.
- 1.6. This is discussed further within Mr Turner's proof.

Context for Proposing Modification of the Existing S106 Agreement

- 1.7. The proposed modifications to the obligations are proposed to ensure that the approved development can continue to be delivered in changed financial and economic circumstances. Without modification to S106 to amend the quantum of affordable housing units, the scheme is unviable to an extent that will not permit its delivery.
- 1.8. Full details of the viability case are set out within Mr Turner's Proof and appendices plus the addendum Statement of Common Ground dated 18 October 2021. This concludes:
- The proposed modification create a deficit of £56.65m inclusive of a profit allowance of £21.61m. This compares to the existing consent which has a deficit of £70.96m inclusive of a profit allowance at £17.74m.

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- Whilst this is still a technical deficit, this demonstrates an improvement in financial performance from the current consent. The appraisal leads to an increase in net rent at current day by £900K per annum.
- This shows that the existing scheme is not viable and justifies the proposed modification to improve viability and offer improved prospects of delivery.

1.9. The proposed modifications will ensure that the approved development and related environmental, social and economic benefits have materially better prospects of delivery in the changed circumstances. Without amendment, the obligations will not meet their intended purpose to deliver the maximum viable amount of affordable housing since they render the scheme unviable to an extent that will not permit its delivery.

S106A and S106B as Correct Procedural Routes for the Amendment to the Existing S106 Agreement

1.10. Any application to amend existing planning obligations must be made in accordance with Section 106A, subsections (3) and (4), of the Town and Country Planning Act 1990 (as amended). Where the LPA then determines to refuse the application for amendments, Section 106B of the Town and Country Planning Act 1990 (as amended) sets out the circumstances in which an Applicant can submit an Appeal of that refusal to the Secretary of State.

1.11. The statute does not prescribe that a S106A application can only apply to a limited scope or range of types of planning obligations, it is equally applicable to any existing obligation. It is therefore entirely appropriate for this application and Appeal to have been made and assessed in accordance with S106A(6) of the Town and Country Planning Act 1990 (as amended).

1.12. This is set out in more detail at Section 3 of the Appellant's Statement of Case.

Applicability of the S106A Procedure to this Case (detailed further at paragraphs 4.5 – 4.19 of my proof)

- 1.13. The LPA adopts the position that any reduction in the quantum and alteration to the tenure of the affordable housing units secured by the Obligation, means that the purpose of the Obligation would not continue to serve a useful purpose as equally well, if it had effect subject to the modifications specified in the application.
- 1.14. The LPA also appears to adopt the position that the modification of an existing obligation under S106A is considered purely on the *outcome* of the amendment and no account needs to be given to the wider planning context of *why* the modification to the Obligation may be necessary.
- 1.15. It is my opinion that it is entirely reasonable and appropriate to use the provisions of S106A to amend an existing Obligation in this manner.
- 1.16. Simply put, the LPA appears to suggest that, as a matter of principle, a modified obligation cannot serve a useful purpose equally as well if it seeks to reduce the quantum or level of planning gain or the level of benefit *as perceived by the LPA* as being derived from a specific obligation in isolation.
- 1.17. If the LPA is correct on this point there would be no scope for any decision maker (be that an LPA, an Inspector or the Courts) to interrogate, assess and satisfy itself on the underlying justification and material circumstances for a S106A modification.

Whether the planning obligation relating to affordable housing continues to serve a useful purpose (detailed further at paragraphs 4.34 – 4.45 of my proof)

- 1.18. The requirement for any planning obligation is controlled through Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) (“the CIL Regulations”). Even more specifically, Regulation 122(2) of the CIL Regulations states:

A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

1.19. If an obligation no longer meets these tests then favourable consideration must be given to modification to ensure that it can continue to meet the purpose for which it was originally considered as part of the determination of a planning application. The tests of Reg122 do not fall away or be discounted as not applicable in considering S106A.

1.20. The Appellant is not seeking to remove this Obligation but rather modification is sought as to the specific quantum and tenure of affordable housing as they are entitled to do under S106A.

1.21. It is my opinion that the Obligation continues to serve a useful purpose in planning terms, in so far that it requires the provision of affordable housing as a principle of this development in line with Development Plan policy. It therefore currently complies with Regulation 122 (a) and (b).

However, I contend that the specific elements that govern quantum and tenure are no longer fairly and reasonably related in scale and kind to the development, as required by Regulation 122 (c).

Whether the obligation should continue to have effect without modification (detailed further at paragraphs 4.46 – 4.95 of my proof)

1.22. The *raison d'etre* of the application and subsequent Appeal is that the current specified quantum of affordable housing and tenure mix renders the scheme unviable to an extent that will prohibit future delivery of the development.

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- 1.23. Without modification, the Obligation seeks to secure or obligate something that cannot now be delivered due to a material change in circumstance (i.e. development viability). In the simplest terms, the Obligation if unmodified, prevents and inhibits development being delivered.
- 1.24. With this modification, the scheme becomes more financially viable, to an extent that development is more likely to continue and that the development as a whole can be more likely to be delivered to a conclusion.
- 1.25. It is my opinion that the LPA have failed to undertake a balanced or reasoned assessment of the *proposed modification* or the context for the making of that modification. As a result there has been a failure to assess the planning implications of that refusal. It is, in my view, a narrow approach to decision making.

If the obligation serves a useful purpose, whether it would serve that purpose equally well if it was modified as proposed (detailed further at paragraphs 4.96 – 4.107 of my proof)

- 1.26. The purpose of the Obligation is to meet the Development Plan requirement of providing the maximum reasonable amount of affordable housing. The Obligation if modified as proposed by the Appellant would serve the original intended purpose equally well in that it continues to secure the maximum reasonable level of affordable housing from the development.
- 1.27. The Obligation will continue to provide an appropriate mechanism to deliver affordable housing from the site. These mechanisms continue to serve these purposes equally well when modified.
- 1.28. If the Obligation in its current form is inhibiting development then it is no longer meeting the tests under Regulations 122 of the CIL Regulations. The proposed modification addresses this such that an Obligation that is necessary and directly related can also remain fairly and reasonably related in scale and kind to the development given the changed circumstances in which it is now set.

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Conclusions (detailed further at Section 5 of my proof)

- 1.29. There is no question that the obligation continues to serve a useful purpose and no request has been made to remove it in its entirety. The modification requested will simply create a position that allows for markedly improved opportunity for delivery of the approved scheme.
- 1.30. The Appellant has been clear throughout this case that without modification this development will not be able to be brought forward for delivery. The proposed modification addresses that by ensuring markedly improved prospects of delivery than would be the case without amendment.
- 1.31. All obligations to review the viability of the development post-construction also remain in place and unmodified, ensuring that the LPA maintains the opportunity to reassess the final contribution towards affordable housing if the viability of the development improves once construction is completed.
- 1.32. If the Obligation in its unmodified form is inhibiting development then it is no longer meeting the tests under Regulations 122 of the CIL Regulations that all obligations must be a) necessary, b) directly related to the development and c) fairly and reasonably related in scale to the development. Whilst tests a) and b) may still be met, if an obligation is now preventing development coming forward then test c) simply cannot be being met.
- 1.33. The modification that has been proposed simply to enhance the potential to deliver the approved development and its associated planning benefits from this allocated site. It does this without impacting upon the overall purpose of the existing obligation, namely the delivery of affordable housing. This Appeal should therefore be allowed.

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