

**REDEVELOPMENT OF THE TRIANGLE SITE
WITHIN KING'S CROSS OPPORTUNITY AREA**

CLOSING SUBMISSIONS
on behalf of the London Borough of Islington

1. INTRODUCTION – A PARABLE

- 1.1. Doubtless you remember Hans Christian Andersen's tale of The Emperor's New Clothes.¹ The Emperor decided to bespeak a wonderful new suit and engaged the best tailors in the land to design and make it. After much preparation – measurements, consultations, specifications, patterns and so on – he was informed that his outfit was ready to try. It was so splendid, so refined, the tailors said, that only people of similar splendour and refinement would be able to see it. Therefore, when, at each fitting, he failed to detect not only seams, buttonholes and stitching, but even any cloth, buttons and thread, he feared to question because that would have revealed his lack of discernment. And so it went on, with all the royal family, courtiers, advisers, retinue and loyal populace

¹ Keiserens nye Klaeder

keeping silence until, right at the end of the great procession, a little boy, who had not heard about the special nature of the suit, whispered: "*Why is the Emperor not wearing any clothes?*" You know the rest – the cat was out of the bag, and perhaps the consequences are best left to the imagination

- 1.2. Section 1.6 of Lacey's proof is less picturesque, but tells a similar story, with the members of LBI's Planning West Sub Committee and/or Parker cast in the role of the forthright little boy who asked the inconvenient question. The fact that the "*procession*" of the planning application had been going for some time by then, does not undermine the validity of their questioning, any more than it did in the fairy tale.

- 1.3. In Opening, I stressed the importance of asking the right questions in order to determine these appeals. During the inquiry, the questions have been asked and many assertions² made or referred to in response, but no reasoned, clear explanation of the Appellants' AH package and its alleged compliance with policy has emerged. Of course, regeneration of the KCOA as a whole is a splendid project, but its splendour should not be allowed to substitute for a due application of policy and principle. The redeveloped Triangle must be "*decently clad*" in a properly justified scheme.

² Or "*statements without raw data*": Kirby XX (ME).

2. THE ISSUES

2.1. The issues for determination were clearly set out in the Inspector's Pre-Inquiry Briefing Note.³ LBI have not presented evidence on the second of the Inspector's issues, noise. Accordingly these submissions deal with *"the suitability of the AH offer in terms of number, mix, tenure, price/affordability and arrangements for recycling of subsidy."*

2.2. The mechanism for securing AH is the proposed s.106 obligation. Since LBI's refusal to grant planning permission in July 2007, matters have moved on, in that the heads of terms proposed then (which mirrored the s.106 Agreement with LBC for the Main Site) have been worked up into finalised form and a number of changes have been made in response to points identified by LBI and its AH consultant Lacey. The housing issues may now be summarised as follows:

- (1) Quantum - Does the s.106 obligation secure enough AH, either in its Baseline Mix or in the event that the cascade has to be triggered?
- (2) Mix/Tenure - Is the proposed mix of social rented and intermediate AH acceptable?
- (3) Price/Affordability - Related to the tenure/mix question, would the products proposed adequately meet the needs of those eligible for AH?
- (4) Arrangements for - Do the Shared Equity and Right to

³ Sent under cover of PINS letter, 7.02.08.

recycling of
subsidy

Buy Homebuy units proposed in the Appellants' Option A constitute 'AH' for the purposes of PPS3 and/or LBC's RUDP, having regard to:

(a) the limit on the developer's obligation to recycle any staircasing receipts from Shared Equity for a period of 15 years from first occupation of the dwelling; and

(b) the fact that, upon re-sale of a Right to Buy Homebuy unit, the loan is then repaid to the developer free of any obligation to recycle?

- 2.3. The first three questions will involve consideration of development plan policy and evidence of need. The fourth falls to be assessed in the context of PPS3 and its companion document, DAH⁴. In the event that Option B were required by condition rather than A, the fourth issue would fall away, because LBI are content that transfer of the relevant units to an AHP as defined in the AH s.106 Agreement would satisfy the requirements of PPS3: in order to qualify in the tender process, such a body would have to commit itself to recycling subsidy for alternative AH provision in accordance with PPS3.⁵

3. QUESTIONS 1 – 3 : DEVELOPMENT PLAN POLICY

- 3.1. There is agreement as to the relevant policies.⁶ They operate at strategic, Borough and local levels. The KCOA is identified and

⁴ CDs 2.2, 2.3

⁵ Definitions, AH s.106 Agreement, p.3 and Clause 15 Tendering/Procurement, which requires tendering to 'AHPs'.

⁶ SoCG, Section 5, though NB. .Plan has now been adopted in a consolidated version with Alterations: CD3.1 wording of Policies 3A.7 and 3A.8 remains unchanged, but they are now numbered 3A.9 and 3A.10. RJ para numbers have also changed.

promoted at each level for regeneration and redevelopment. Housing and employment are supported. Both generally and specifically, there is unanimity in the various plans as to the approach to AH provision. L.Plan states that:

*"One of the Mayor's strategic objectives is to increase substantially London's supply of AH. This is strategically important to London in order to promote mixed and balanced communities and to redress the affordability issue that underlies the trend towards social polarisation in terms of housing choices and opportunities."*⁷

(emphasis added)

Thus, provision of AH is promoted in the L.Plan as an end in itself – its very presence achieving the kind of community sustainability sought at all levels of policy. Consequently the strategic policy target is that 50% of provision should be affordable, comprised of a 70%/30% mix of social housing/intermediate provision.

- 3.2. Boroughs are to set overall targets in their development plans *"based on an assessment of all housing needs and a realistic assessment of supply"*. LBC have done this, both Borough wide (RUDP Policy H2) and for the KCOA specifically (Policy KC4). The targets are 50% overall and equate to a 70/30% tenure split. It is important to note, with regard to Policy KC4, that its predecessor, Chapter 13 of the 2003 UDP, was the subject of objections by the Appellants during the preparation process. Those objections were resolved, however, Argent being content with the wording which ended up in identical form to KC4. The RUDP went on deposit in

⁷ CD 3.1, para 3.41

June 2004 and was not the subject of representations by the Appellants. Throughout both processes, Robinson was giving them strategic planning advice. This history needs to be borne in mind when assessing the Appellants' arguments as to quantum and mix.

- 3.3. The fate of LBI's Core Strategy reveals the importance which the Mayor attaches not only to overall housing provision, but to AH and the 50% target in particular. At Preferred Options stage, the Mayor's representations objected to a sliding scale between 25 and 50%. Such an approach was said to be unjustified with reference to L.Plan Policy 3A.7⁸ and the L.Plan strategic target of 50%. When consulted on the Submission version of the Core Strategy in March-April 2007, the Mayor "*strongly supported*" the amended Policy CS18 insofar as it now required schemes of 10 or more units to provide 50% AH because "*both the threshold and the quantity of affordable*" were said to "*reflect the aims of the L.Plan*". The reaction to the proposed 60/40 social rented/intermediate split, however, was not favourable:

*"Policy 3A.7⁹ of the L.Plan states that in setting targets the Londonwide objective of a 70:30 split should be taken into account. Islington states that the 60:40 split is necessary to meet the growing demand for low cost home ownership and to help with the viability of schemes to achieve 50% AH. The need for a reduced social rent element to maintain viability at 50% provision is not accepted, as recent schemes have demonstrated and therefore variation from the strategic objective is not fully justified."*¹⁰

⁸ Now 3A.9
⁹ Now 3A.9
¹⁰ CD 5.16, p.8

- 3.4. The Core Strategy was withdrawn in June 2007, owing to non-compliance with L.Plan housing delivery targets. In a GLA press release of 2.8.07, the Mayor castigated LBI stating:

“More affordable homes is a key issue for Londoners ... Islington has put at risk its whole strategy by trying to avoid its responsibilities to adhere to my AH targets ... We look forward to seeing a new draft Core Strategy which properly reflects the agreed L.Plan housing target and which will help the Council to meet its obligations to the Islington families in desperate need of an affordable home.”¹¹

(Emphasis added)

- 3.5. L.Plan Policy 3A.10 enjoins Boroughs to “*seek the maximum reasonable amount of AH when negotiating on individual ... mixed-use schemes*”. They are to have regard to “*their AH targets adopted in line with Policy 3A.9, the need to encourage rather than restrain residential development and the individual circumstances of the site.*” Targets should be applied flexibly, taking account of individual site costs, availability of public subsidy and other scheme requirements.
- 3.6. Saved Policy H14 of LBI’s UDP similarly seeks “*the maximum contribution that each proposal can reasonably make to meeting local housing needs, taking into account the quality of the site, size, location and other relevant land use criteria*”. Policy Imp 18, dealing specifically with the KC area devotes “*special attention*” to ensuring that the local community “*receives a fair share of the benefits*”

¹¹ CD3.11

generated by the redevelopment. The RJ¹² lists AH as one such benefit to be appropriated.

3.7. Whilst none of the development plan policies imposes an absolute requirement of 50% total AH contribution or 70/30% social rent/intermediate mix, the targets are plainly very important considerations in the application of L.Plan and LBI UDP “*maximum reasonable amount*” tests. As the Inspector observed, the policies do not offer precise guidance as to how to weigh the various factors in play, but they do set out matters to be taken into account. Accordingly, it is reasonable to expect evidence (as opposed to assertion) on those matters: in the Inspector’s words, “*I need to know the empirical basis of*” [the Appellants’] “*best or maximum AH offer*”.

3.8. Drawing together the matters referred to in the policy, a list emerges as follows:

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|-------|--|--------------------------------------|
| (i) | Boroughs’ AH targets adopted in line with Policy 3A.9 | (L.Plan 3A.10, LBC, RUDP H2, KC4(b)) |
| (ii) | Local and/or London-wide housing needs | (LBC RUDP KC4(b)) |
| (iii) | Site circumstances/quality of site, size, location | (L.Plan 3A.10) LBI UDP H14 |
| (iv) | Need to encourage rather than restrain residential development/wider regeneration /Mix of uses | (L.Plan 3A.10) |

¹² CD 5.1, 13.6.12

Wider regeneration needs of KC area/other scheme requirements/comprehensive development of related sites	(LBC RUDP KC4(b), H2; L.Plan 3A.10)
Mix of Uses	(LBC RUDP H2)
(v) Economics of provision/economic circumstances/site costs/particular development costs of site	(LBC RUDP, H2, KC4(b), L.Plan 3A.10)
(vi) Other relevant land use criteria/other planning objectives	(LBI UDP 14; LBC RUDP H2)
(vii) Other relevant policies	(LBC RUDP KC4(b))

Evidence on some of these matters was requested by the Inspector in his Pre-Inquiry Briefing and Adjournment Notes.¹³

3.9. (i) **Boroughs' AH Targets adopted in line with Policy 3A.9**

3.9.1. As noted above, targets have been adopted and, in the case of the KCOA – specific ones, reviewed by LBC. LBI have no adopted targets, but the views of the Mayor on that topic have been made clear. For reasons explained by Lacey and Kirby,¹⁴ no SHMA for London has yet been undertaken. The GOL/GLA Joint Statement, dealing with the interim position, records their agreement that the GLHRS satisfies most of the requirements of PPS3. Nothing in the Joint Statement derogates from the targets in L.Plan Policy 3A.9 and that policy has been retained in the latest version of the L.Plan, adopted during the adjournment.

¹³ Op cit and the latter sent under cover of PINS letter, 27.02.08.

¹⁴ Lacey Response to Inspector's Pre-Inquiry Briefing Note and revised draft s.106 Agreement 15 February, Section 8; Kirby Response to Adjournment Note Sections 1.2(a) and (b).

- 3.9.2. On any measure, the AH component in the Appeal scheme falls short of the 50% target. 246 units are proposed, 84 (34%) of which are described as affordable in the Baseline Mix. This provision equates to 26.7% of the overall residential floorspace. If LBI's case on PPS3/recycling is accepted, the total reduces to 60 (24.4%) or 19.7% of floorspace. Expressed as a percentage of the combined Triangle and Main sites, the Baseline Mix figure equates to 42% of total residential units. L.Plan Policy 3A.9 and LBC RUDP policies H2 and KC4(b) do not impose a requirement, but the existence of the target in policy is plainly material and good reasons should be identified for departing from it. L.Plan Policy 3A.10 and LBI's Policy H14, whilst not including targets, enshrine the principle of reasonable maximisation. Again, this formulation implies an evidence based assessment.
- 3.9.3. Similarly, the proposed proportions of social rented and intermediate units do not accord with the L.Plan and LBC RUDP target percentages.
- 3.10. **(ii) Local and/or London-wide Housing Needs**
- 3.10.1. The only empirical data before the Inquiry are contained in the GLHRS and the two Boroughs' Housing Needs Surveys. None of these is up to date, but all reveal substantial levels of AH need. The GLHRS (December 2004) concludes that on any scenario "it is

apparent that there will be a continued need for additional AH, in particular within the social rented sector". Based solely on the criterion of affordability, the overall balance between social, intermediate and market housing for the period 2004-2014 is predicted to lie within a range between 62:26:12. (if house prices sustain an annual increase of 5% with incomes rising at 3% p.a.) and 46:0:54 (house prices static, incomes rising at 3%). It is then noted that *"the L.Plan, with its broader remit to consider sustainable communities, retains (sic) the GLA's overall requirement at 35:15:50 for social, intermediate and market housing respectively."*¹⁵ This final point is important because it demonstrates that in setting the target in Policy 3A.9 for proportions of social rented to intermediate housing, wider planning objectives for achieving sustainable communities have already been taken into account. The deepening scale of the problem is clear from the FALP¹⁶ which demonstrate that the annual shortfall between AH provision and estimated need is now 7-8000, whereas at adoption of the L.Plan in 2004, it was 6-7000 p.a.

- 3.10.2. The position in LBI and LBC reflects the pan-London picture of tremendous need for AH. LBC's Study concludes that the appropriate split is 66%/34%.¹⁷ LBI's Study suggests that, in principle, proportions of social rent to intermediate could be some 45/54%, but on testing the proposition, concludes that intermediate

¹⁵ CD 7.11 paras 33-37.

¹⁶ CD 3.3, paras 3.33, 3.36.

¹⁷ CD4.9 Tab 9.4 – deduced from figures; agreed by Dickinson XX(ME)

housing would be unable to assist the vast majority of those in housing need. The eventual conclusion was c.96/3% social rent to intermediate. Clearly, the Appellants' specific proposal was not tested, so the result cannot simply be translated across, but the work supports the 70/30% policy target in the RUDP of 2006 and reinforces the importance of considering intermediate products in relation to local affordability before reaching the conclusion that all forms of AH within the PPS3 definition will play an equally useful role in meeting needs.

- 3.10.3. As to the application of targets London-wide, Lacey demonstrated¹⁸ that in each of the examples quoted by Dickinson, either special justification had been provided or the schemes involved were estate regeneration projects. The fact that lower provision has been justified and accepted in these instances, and the relatively limited contribution of s.106 obligations to global AH provision,¹⁹ are consistent with the widening nature of the gap observed in the FALP. They serve only to emphasise the importance of maximising AH in accordance with L.Plan and LBI UDP Policy, and at least having clear justification for not meeting London-wide and LBC targets. In the absence of evidence to show that the Boroughs' AH needs will be met in the foreseeable future by means outside the planning system, the stress placed by Dickinson and Robinson on "*all sources of supply*" is of little practical significance.

¹⁸ Response to Inspector's Pre-Inquiry Briefing Note and revised draft s.106 agreement 15 February, Annex 3.

¹⁹ Dickinson main proof p.32, Table 32

3.10.4. There was no other empirical evidence from the Appellants or LBC, either on need for or supply of AH regionally or locally. The Inspector sought clear information in both his Pre-Inquiry and Adjournment notes. In response, Dickinson spoke, at great length, about her and others' perceptions of the existing local populace, their needs and aspirations, as well as the aspirations of housing officers. It became clear, through questioning, that her opinions were not supported by survey or, indeed, any other hard evidence. The only such evidence is contained in the HNS, as explained above, which she did not challenge.²⁰ Kirby said that there had been a meeting at which some existing local public sector tenants spoke, but apparently nobody took minutes or made any other kind of note.²¹ There was no written record of any analysis or requests for particular forms of AH from the housing officers. It emerged in Kirby's Response to the Inspector's Adjournment Note and cross-examination on it that LBC had taken advice from an external AH adviser, principally on affordability, but, Kirby thought, on other issues too. Although there had been some e-mails and two short reports, none was produced in evidence, so these cannot be relied on to back up the quantum or mix proposed. Neither the Triangle nor the Main Site report to LBC's Committee offers a clear

²⁰ XX(ME)
²¹ XX(ME)

justification for failing to meet the policy targets for overall quantum or tenure mix.²²

3.10.5. The only attempt at any reasoned socio-economic analysis of the scheme is contained in section 5 of the ES. Basic data are provided. One of the scenarios tested involved development of the Main Site in the absence of the Triangle.²³ Table 5.4.5 assessed likely socio-economic effects, firstly of the proposal overall (i.e. Main Site with Triangle) and then tested the implications of removing the Triangle. Under the heading "*Housing: Tenure Mix*", moderate benefits (moving to minor if social housing "*over dominant*" (undefined)) are recorded for both parts together, with an assessment of "*No significant difference*" without the Triangle component.

3.10.6. Responses from the Appellants and Kirby to the Inspector's Adjournment Notes~~y~~ refer to the KCOA Planning and Development Brief (December 2003/January 2004) and the Appellants' Regeneration Strategy (April 2004). Neither document contains a reasoned analysis of the quantum or mix of AH. (The latter, Kirby admitted, consisted of "*statements without raw data*"); PB, in RX, took his witness to a paragraph in the Strategy which stated that the Central Impact Zone wards include c.58% of housing in the Social

²² Triangle March 2006 report, paras 1.9.61, 1.9.64 (latter: "*it is felt that a greater number of intermediate homes would assist ...*"). Cross reference to Main Site in 1.9.61: see Kirby Note in response to XX(ME).

²³ CD 1.16, Vol.1, p.1-22, para 1.3.54

rented sector (as at 2003/4). Apparently, this is the high point of reasoned analysis in support of the proposed mix. Both documents, of course, predate adoption of LBC's RUDP (June 2006). The RUDP went on deposit in May 2004 so, as Robinson and Kirby both accepted,²⁴ it would have been appropriate to have pursued any argument that the targets were wrong for material planning reasons in that forum. Reaffirmation of the targets in 2006, however, reduces the weight to be attached to the earlier documents. The Brief, as SPG, could not alter or derogate from the policies of the previous UDP (Chapter 13), much less those of the RUDP.

- 3.10.7. Returning to the relationship of the proposals to evidenced needs, Lacey accepted that the Baseline Mix products, as revised in the January 2008 version of the s.106 Obligation, fall within the PPS3 definition insofar as they are capable of meeting needs not able to be met by the market. The relevant question in the Inspector's Pre-Inquiry Briefing Note, however, is more subtle – *“whether the AH offer will sufficiently meet known local needs within each of the Boroughs concerned, as well as the extent to which it will contribute towards meeting a policy target figure”*. Lacey demonstrated the levels of income required to make use of the Appellants' intermediate products.²⁵ While LBI takes no point on affordability as such, this material is relevant to the question of whether there is

²⁴

XX(ME)

²⁵

Response to Inspector's Pre-Inquiry Briefing Note and revised draft section 106 agreement 15 February, Annex 2. Agreed as accurate by Dickinson: XX(ME).

evidence to justify departing from development plan targets for tenure split. Taken together with analysis of the ability of Intermediate AH to meet needs in LBI's HNS, the position is, at best from the Appellants' point of view, unclear. The policy targets are informed by HNS work in both Boroughs, which included interviews with real people in housing need; they are not merely theoretical. Dickinson produced no statistics as to incomes and the range of other factors necessary in order to judge the validity of her assertions about "*rebalancing*" and "*anchoring*" the community and ticking all the other social policy boxes which she claimed were ticked.

3.11. **(iii) Site Circumstances, Quality of Site, Size, Location**

3.11.1. Clearly, the Appeal Site is constrained in several respects. LBI, however, does not consider that it is unsuitable in principle for residential development, subject to proper control by conditions and sensitive design. In spite of Kirby's²⁶ suggestion that the site would not work well for social rented family housing, some such units are proposed, so he could not say that it was wholly unsuitable. Apparently there is concern that only the most "*vulnerable*" (undefined) non family applicants would qualify for social rent and that this is undesirable, but absolutely no evidence to support the assertion.

²⁶ Hearsay reports of points apparently made by Housing Officers but not committed to paper or even e-mail. No Housing Officer was called to give evidence, nor did they even produce a written statement to the Inquiry

- 3.11.2. Nor is there evidence to support any argument that the physical circumstances of the site predicate or justify AH other than in accordance with policy targets. Dickinson and Robinson confirmed in XX that they did not rely on architectural or other design points to support the offer.
- 3.11.3. Kirby said that it was hoped to create a “buffer” between concentrations of social rented housing on the Bemerton Estate and that proposed on the Main Site. This rationale had not been identified in evidence before. The site visit will reveal that there is, in fact, considerable diversity of housing, as well as an attractive park and the railway line lying between the Triangle Site and the Bemerton Estate.
- 3.12. **(iv) Mix of Uses/Need to encourage rather than restrain Residential Development Wider Regeneration Needs of KC Area/other Scheme Requirements/ Comprehensive Development of related sites**
- 3.12.1. The Appeal proposals comprise *“residential, shopping, food and drink and financial and professional services within the A1, A2, A3 and A4 use classes; a health and fitness centre (Use Class D2) with the potential to incorporate a crèche and community facilities (Use Class D1); amenity and open space; habitat areas; recycling, cycle storage and other ancillary uses; parking; highway works to provide access; and other supporting infrastructure works and facilities.”*²⁷

²⁷

Description of development, Triangle Site Response to Inspector’s Adjournment Note by Argent (King’s Cross) Ltd, London and Continental Railways Ltd and Exel Ltd.

- 3.12.2. It was not suggested that this mix of uses would be incompatible with higher overall levels of AH or a different mix of tenures, nor could it have been. Such an argument would be fundamentally at odds with Government policy, expressed in particular in PPS1 and 3.
- 3.12.3. Kirby referred in RX to initial fears on LBC's part as to the deliverability of regeneration in the KCOA and their early determination to seek mixed use development. He did qualify his remarks by stating that he is not a valuer, but said that he understood commercial development to be more lucrative than housing, though "*this could change*". He regarded achievement of almost 2000 houses on the Main Site as good. LBI does not disagree. To the extent that Kirby might have been seeking to suggest that delivery of these houses would be hindered by more and/or different AH on the Triangle Site, however, there is not a shred of evidence before the inquiry to support such a contention. This topic will be examined in more detail shortly, but it is crucial to bear in mind the fact that the Main Site permission is being implemented and that none of the benefits which it will bring are dependent upon the outcome of this inquiry.²⁸ Any earlier fears on the part of LBC, even if they were justified at the time (which the

²⁸

Robinson XX(ME)

Inquiry neither needs nor has the means to know), are outdated now.

3.12.4. The insistence of the Appellants, LBC and GLA officers that the Appeal proposals must be assessed, and assessed only as part of the wider scheme is, of course, a prerequisite to succeeding in a generalised justification to the effect that the AH package is acceptable, "*based on the planning advantages of the development as a whole*".²⁹ Whilst this might well have been a legitimate and logical approach for LBC/GLA to have adopted at the outset, it is no longer valid now that delivery of the benefits on the Main Site is underway, and in the absence of any evidence to the effect that either the Main Site benefits or redevelopment of the Triangle Site would be threatened by better AH provision on the latter. In view of the reliance placed by the Appellants on support for the Appeal scheme by LBC and the GLA officers, it is important to understand and assess the merits of their stance. LBC properly submitted Kirby for XX but GLA have chosen only to participate from the sidelines. Robinson's statement to the effect that regeneration of the Triangle site relies on delivery of regeneration of the Main Site and its relationship with it is doubtless true, but irrelevant to the free-standing question of the determination of this planning appeal. If there were evidence that development on the Triangle Site was cross funding or otherwise enabling regeneration elsewhere, then

²⁹ Kirby proof para 7.5.14: "*Camden's decision, and my assessment are based on the planning advantages of the development as a whole.*"

the position would be different, but there is not: Robinson expressly disavowed any enabling argument.³⁰

3.13. (v) **Economics of Provision/Economic Circumstances/ Site Costs/Particular Development Costs of the Site**

3.13.1. There is no evidence before the inquiry of any of these matters. Therefore they cannot be taken into account. This point is, of course, related to the previous one. Because the wider regeneration benefits do not depend upon the particular nature of residential development on the Triangle, there is no financial link between the value of the appeal scheme in commercial terms and the wider public interest in those benefits. Therefore there can be no justification of the failure of the appeal AH package to meet targets on the basis of economics. It is odd, therefore, that GLA officers appear to have believed that there was such justification. Asked by the genuinely curious Parker whether the normal procedure – i.e. a Toolkit or equivalent suitable assessment – had been followed, it emerged that they had relied on work by DTZ undertaken prior to March 2006 and supplied by LBC. The full extent of the work has not been disclosed, but it is clear from the summary³¹ that there were several highly relevant limitations. Firstly, DTZ confined themselves to considering the Main Site. Secondly, in spite of early requests for information from the

³⁰ XX(ME). Compare treatment of St Pancras Chambers and the gas holders in the Brief: CD
6.1, para ...; Kirby XX(ME)

³¹ CD

Appellants on a confidential basis,³² they had to factor in assumptions on the crucial issues of land costs/values and development costs. LBC clearly realised, with the inquiry looming, that something had to be attempted to supply the deficiency, hence the second report.³³ This is, at least, directed to the Triangle Site, but DTZ had been given no further information, so their conclusions are as pedestrian as they were initially: the more AH there is, the less profit the developer will make. Neither report transparently explains how the conclusion is reached that c.44% is about the most that the scheme will bear. (Of course, the proportion on the Triangle Site is 34%).

- 3.13.2. Giles Dolphin, in his response³⁴ to the second DTZ report, noted *“that the conclusions reached regarding affordable housing and viability hold true in strategic terms, taking into account other scheme requirements. The updated analysis reaffirms the Mayor’s conclusion ... that the KCC scheme achieves the maximum reasonable amount of AH in accordance with the L.Plan”*. (Emphasis added). Two things emerge clearly from this letter: firstly, GLA officers, like LBC, reached a judgment about compliance based on *“other scheme requirements”*; secondly, they relied on DTZ’s work to justify a conclusion that Policy 3A.9 (now 10) was satisfied insofar as *“the maximum reasonable amount of AH”* had been achieved. The precise considerations which they

³² Robinson XX(ME)

³³ CD 4.7

³⁴ Letter to Kirby, 13.12.07, Lacey Appx 1, p.25

took into account, however, are unclear because to describe the two DTZ reports as “analysis” is an abuse of language; it is noticeable, in this connection, that LBC in its Rule 6 Statement³⁵ and Kirby in his proof³⁶ apparently share LBI’s view as to the limitations of DTZ’s work. (No criticism is made of DTZ, whose credentials are not in doubt; the limitations derive from the Appellants’ refusal to give them the information which they requested). The Appellants’ evidence appears to side with the GLA’s approach,³⁷ while at the same time asserting that such an appraisal was unnecessary. Expressed in terms of Andersen’s story, therefore, the retinue, faced with the million dollar question as to the stuff of the Royal Personage’s clothes, gave different and not entirely consistent answers. KL’s assertion³⁸ that none of this matters would be right if the shortfall in provision and its non compliant composition had been clearly explained by reference to other material considerations and/or if LBC and GLA officers had not lent their support by reference to “other scheme requirements” (now unrelated, in a causative sense) and/or the DTZ work. But, as has been seen, they did think in those terms, and the socio-economic justification to found such thoughts has not been established through evidence. The support of LBC and the GLA’s officers is therefore not the weighty material consideration which

³⁵ Para 6.6: “Council’s conclusion that the proposal accords with the development plan is not dependent upon that model.”

³⁶ Para 7.5.14: DTZ advice “not a substantive element of the justification”.

³⁷ Robinson paras 4.38-4.47

³⁸ By reference in XX of Lacey to the Vauxhall Tower decision, a case on different facts and with a different policy base.

has been claimed. Support is only as strong as the reasoning which underlies it.

3.13.3. It is convenient to deal here with the position of another supporter of the proposals, the HC. Parker and Lacey, very properly, asked the HC a number of succinct questions³⁹ arising out of HC's input to the final LBI committee report. They received an answer which, on the face of it, was clear, stating: "*HC have not met with the LPA or the Appellant to discuss the Triangle Site*". Other answers followed on, to the effect that nothing had been agreed about grant subsidy (recognised on all sides to be necessary for the social rent and key worker sub-market rent units), and that normal HC policy would apply. That policy seeks to utilise HC grant to improve s.106 packages, rather than to subsidise the achievement of baseline offers.

3.13.4. Dickinson responded by producing a note from her client stating that there had in fact been conversations and e-mails between the Appellants and HC covering, amongst other things, details of grant requirements. Faced with such conflicting accounts, and with HC taking no active part in the inquiry, the Inspector concluded that it would be wrong to accord any weight to the evidence emanating from them. It is submitted that this approach must be right. HC's support can be given little, if any weight, in view of their inability to

³⁹ See generally Lacey Appx 3, p.51 for the questions.

explain its basis. Similarly, the position as to deliverability of the s.106 Baseline Mix is not clear. Dickinson relied on interest expressed by RSLs in the Main Site, but none of the letters deals with the Triangle whose development, on any view, will occur in several years' time. The Secretary of State, in the Filton decision,⁴⁰ was not satisfied with an approach which relied upon HC grant to secure the Baseline Mix in the absence of clear evidence that such grant would be forthcoming. The effect of the cascades in the s.106 Agreement is to reduce the social rented element by up to 50% in the event that units cannot be transferred at the minimum transfer price.⁴¹

- 3.13.5. No evidence has been led to explain why the transfer price has been fixed at a level which necessitates the use of grant. In this connection, it may also be relevant that the Appeal Site is owned by the Government. Robinson was unsure of the details, but believed that the final disposal details had not been fixed,⁴² an understanding apparently confirmed in a letter on behalf of DoT.⁴³ Given the high priority placed on AH in current Government policy, it would seem illogical for the developer of this project to be put in a financial position which precluded achievement of development plan targets and national policy objectives for delivery of AH. Because no meaningful financial information has been put into the public

⁴⁰

CD 7.6

⁴¹

"*Transfer price*" is a fixed minimum, but may go up, having regard to site development costs:
Clause

⁴²

XX(ME), X (Insp)

⁴³

Letter 1.02.08, Michael Hurn to Robert Evans

domain, however, the position must be as summarised at the beginning of this section: there is no evidential basis for supporting the Appellants' proposals on economic grounds.

3.14. **(vi) Other relevant Policies**

3.14.1. Compatibility of the Appellants' offer with PPS3/DAH and particularly their definition of AH is a crucial point. In the scheme of these Submissions, it falls to be addressed in the next section under "*Arrangements for Recycling of Subsidy*". If LBI's submissions with regard to Right to Buy Homebuy and Shared Equity are accepted, then the overall offer must be regarded as reduced by 24 units.

3.14.2. Circular 5/05: Planning Obligations advocates "*a transparent system of decision-making on individual applications.*" It is particularly telling that the transparency point is made in the context of the negotiation of planning obligations.⁴⁴

3.15. **(vii) Other relevant Land Use Criteria/other Planning Objectives**

3.16. Delay as a result of refusal has not been seriously advanced as a reason for permitting the Appeal Scheme contrary to policy targets. Such a submission would be misconceived for two reasons. Firstly, the Appellants have never intended to start developing the Triangle

⁴⁴

Site earlier than 5 years after their start on the Main Site.⁴⁵
Secondly, if ~~the appeals were to be called in~~ ^[confirmation that called in] and the Secretary of State were dissatisfied with the AH offer, then it might be possible to deal with the point by means of a fresh s.106 obligation, as in the case of Vauxhall Tower.

4. ARRANGEMENTS FOR THE RECYCLING OF SUBSIDY

4.1. The question here is simple, but important. Do the proposed shared equity and right to buy homebuy units constitute AH for the purposes of PPS3? If not, then the units must be regarded, for planning purposes as "*low cost market housing*", irrespective of any general benefits that they might bring or the way in which they might be viewed for other purposes, such as housing policy. In the analysis required by s.38(6) Planning and Compulsory Purchase Act 2004, other benefits, if relevant to planning, would fall to be considered as other material considerations, but in assessing their contribution against development plan policies for AH., they would not count. The PPS3 definitions are new, replacing more generalised earlier guidance. It may therefore be inferred that the Government attaches importance to these definitions clearly being met.

4.2. PPS3 Annex B requires that AH should:

"include provision for the home to remain at an affordable price for future eligible households or, if

⁴⁵ CD 1.26, para 5.14, confirmed by Robinson XX(ME)

these restrictions are lifted, for the subsidy to be recycled for alternative AH provision."

DAH explains⁴⁶ that, in adopting its definition, the Government "*wishes to ensure that developer contributions are used to help provide genuinely AH for households in need over the long term*". It extends to "*homes owned or managed by private sector bodies and ... provided without Government grant, and new models of AH*".

4.3. It is clear, therefore, that housing must continue to make a contribution to affordable provision for the "*long term*". It may do this, either directly, by remaining accessible to future eligible households (i.e. beyond the first occupier) or indirectly, by means of the private or public element of subsidy being used to provide alternative AH (i.e. housing which, itself, meets the definition including its long term nature). "*Long term*" is not defined in PPS3 or DAH. Dickinson agreed that the periods selected in the s.106 obligation, 5 and 15 years from first occupation, were not "*long term*" when viewed either in the context of the life of a property or average lifespans in this country.

*requiring apply to public
and private sector subsidy*

4.4. There is no dispute but that the effect of the s.106 provisions for the 12 Shared Equity units is that, in the event of a sale beyond the 15 year period, the Appellants or their successors would be completely free to do what they liked with their repaid subsidy. The money

⁴⁶ Annex B, para 34

would re-enter the private sector subject to no constraint whatsoever. The position with regard to right to Buy Homebuy is even less constrained than in the case of the Shared Equity units. Subsidy is comprised of two elements: discount (up to £16,000) and loan. Discount is repayable by the first purchaser if he resells within the first 5 years; the Appellants are obliged to pay any such receipts into a Designated Account for use towards provision of AH locally. The other element, loan, is repayable to the developer on resale; thereafter no obligations attach to the first purchaser, the developer (or successor) or the property. Therefore, at Year 6 both the property and the entire element of subsidy could pass out of the public/assisted housing sector.

- 4.5. Neither Dickinson nor Kirby was able to explain why 15 years was chosen for the Shared Equity units. According to Kirby, the Appellants' initial stance was to offer no recovery period, then going up to 10 years when LBC rightly pointed out that recycling was required in order to conform to PPS3. ^{or its predecessor.} There was then "a negotiation", in which LBC sought 20 years but settled for 15. Apparently none of the reasoning was committed to writing and Kirby could offer no more enlightenment. Dickinson said that there was no functional reason why the period could not have been longer. This reveals the difficulty of approaching the matter on a lowest common denominator basis, rather than one which looks at it from the policy stance of transparency and securing genuinely long

* AH; although ubiquitous it is not a tax. It relates to land.

term provision. In the planning context, one would expect that the obligation should be devised from a property point of view rather than from the perspective either of a developer with a commercial requirement to liberate capital within a fairly short timescale or of a particular individual who is helped onto the ladder of property ownership, but whose departure from the particular property at Year 16 (or Year 6 for Right to Buy Homebuy) means that the element of wider public benefit is then lost. Neither the motive of the developer nor the desire of an occupier to trade up is reprehensible; the point is that planning is concerned with the use and development of land, and the guiding or regulation of that activity in the public interest. LBC's RUDP, although it predates PPS3, recognises the planning principle by defining AH as housing that is, through obligations or conditions, rendered "*permanently affordable*".

- 4.6. Dickinson drew analogies between the Appellants' Right to Buy Homebuy and the Government's New Build Homebuy product. Lacey's 27th March Note describes the features of this and other products (updated to reflect the Budget). As he explains, with the Government's products, all grant is recoverable save in exceptional circumstances. Moneys recovered at any point in the future return to the public sector, either the HC or English Partnerships.
- 4.7. It was also suggested by Dickinson and Kirby that LBC Housing Officers supported the Right to Buy Homebuy product because it

could make available existing social rented units. There was no direct evidence to this effect but the limited nature of the recycling obligations means that the “*double whammy*” allegedly sought would not be achieved. In any event, since the products do not provide for “*long term*” recycling, they do not constitute AH for planning purposes.

5. CONCLUSIONS

- 5.1. A great deal of material has been generated, most of it in connection with the larger scheme on the Main Site which is not now in issue. LBI’s West Area Planning Sub-Committee, far from being “*Wet*” (see typo in KL’s Opening Statement para 7), were actually brave enough to hold up the “*procession*” and ask some basic questions about the particular planning application on the specific site before them. The answers to the housing questions in issue are simple. Insufficient AH units are proposed, the mix/tenure are not acceptable, there is no evidence that they will meet relevant needs and the Shared Equity and Right to Buy Homebuy products proposed in Option A do not satisfy the definition of AH in PPS3/DAH.

- 5.2. No transparent justification has been given for the proposed s.106 Agreement on AH – evaluation of the evidence has revealed that ‘the Emperor has no clothes’. Permission should not be granted on

the basis of the current offer, and the Inspector is asked so to decide or recommend.

MORAG ELLIS QC

ABBREVIATIONS

The use of surnames and initials is not intended as a mark of disrespect.

AH	-	Affordable Housing
AHP	-	Affordable Housing Provider
DAH	-	Delivering Affordable Housing
FALP	-	Further Alterations to the London Plan
GLA	-	Greater London Authority
GLHRS	-	Greater London Housing Requirements Study
GOL	-	Government Office for London
HC	-	Housing Corporation
HNS	-	Housing Needs Survey
KCC	-	King's Cross Central
KCOA	-	King's Cross Opportunity Area
KL	-	Keith Lindblom QC
LBC	-	London Borough of Camden
LBI	-	London Borough of Islington
LPlan	-	London Plan
ME	-	Morag Ellis QC
PB	-	Paul Brown
RJ	-	Reasoned Justification
RSL	-	Registered Social Landlord
RUDP	-	LBC's Replacement Unitary Development Plan
RX	-	Re-examination
SHMA	-	Strategic Housing Market Assessment
SPG	-	Supplementary Planning Guidance
XX	-	Cross Examination