

Affordable Housing and the Islington Triangle

Summary

Argent's revised outline planning application for the Triangle site in Islington and Camden proposes 200 homes. 80 of these (40%) are called 'affordable housing', consisting of 36 social rented units and 44 which are said to be Intermediate Affordable Housing.

The Government's Planning Policy Statement 3 (PPS3) has introduced strict definitions of Intermediate Affordable Housing and the 44 units do not qualify, as described under the Heads of Terms of the proposed section 106 agreement. Even if the affordable housing obligations in the final detailed Section 106 agreement for the Triangle were drawn up in the same way as those for the Main Site in Camden, the units would still not qualify as Intermediate Affordable Housing.

Unless the Triangle section 106 agreement is amended to comply with PPS3 the Argent offer will provide only 18% affordable housing for the site. This problem can be solved. It requires all the affordable housing to meeting the PPS3 definition by making it social rented, by offering other types (in particular Sub-Market Rent Keyworker housing) which do qualify or by changing the subsidy arrangements for the types of Intermediate Affordable Housing currently offered (Shared Equity, Homebuy and Right-to-buy Homebuy). As PPS3 also introduces new requirements to assess housing need, particularly for families with children, older and disabled people, Islington's needs would be better met by increasing the social rented housing content of the scheme.

Background

Argent (King's Cross) Ltd and its partners, LCR and Exel, (called Argent for brevity) have made two outline planning applications for the development at King's Cross. These are for two separate but adjacent sites known as the Main Site and the Triangle. The Main Site is wholly in Camden and was granted planning permission in December 2006. A judicial review of Camden's decision by the King's Cross Railway Lands Group (KXRLG) failed in May 2007 (see Appendix).

The Triangle was considered by Camden's committee in March 2006. They agreed, subject to various contingencies, including a requirement that Islington granted permission 'in the same terms' as the Camden resolution. The Triangle application was considered by Islington's West Area Planning Sub-Committee in April 2006. That Sub-Committee reduced the number of housing units to be provided by the scheme from 246 to 200 and made other changes to the conditions. All these changes created differences from the decision of Camden's Committee taken the previous month.

The Islington Committee asked for its decisions to be reported to Camden for their consideration. Camden officers did not do so. Instead the matter was brought back to the Islington Sub-Committee in February 2007. Argent accepted the reduction in the number of units and made proposals for changes to the proposed conditions to give effect to it. The Sub-Committee was asked to agree to a number of amendments to the conditions.

On intermediate affordable housing the Committee was told 'The number of intermediate units would be 44, as compared with 48' previously and that 'The updated mix would be 26 x shared equity units, 10 x HomeBuy units (no change) and 8 x Right to HomeBuy units (no change). There would no longer be any Shared Ownership or Sub Market Rented units' (Report §4.6). The Sub-Committee was concerned about whether some or all of the intermediate affordable housing still qualified as such in the light of PPS3 and has asked officers for further advice on the point before taking a decision on the revised application.

PPS3 was an issue in the judicial review. Unfortunately the judge was told, incorrectly, there was no material difference between the definition of affordable housing in the draft PPS3 and what was finally published. In addition, the argument put by KXRLG only concerned whether the Intermediate Affordable Housing involved a discount. The question of recycling subsidy was not argued. A fuller discussion of what the case decided is to be found in the Appendix.

Planning Policy Statement 3—Housing

Planning Policy Statement 3 (PPS3) was published in December 2006 together with supporting guidance called *Delivering Affordable Housing*. It defines both affordable housing and intermediate affordable housing.

Affordable housing is:

‘Affordable housing includes social rented and intermediate housing, provided to specified eligible households whose needs are not met by the market. Affordable housing should:

- Meet the needs of eligible households including availability at a cost low enough for them to afford, determined with regard to local incomes and local house prices.
- Include provision for the home to remain at an affordable price for future eligible households or, if these restrictions are lifted, for the subsidy to be recycled for alternative affordable housing provision’.

Intermediate affordable housing is:

‘Housing at prices and rents above those of social rent, but below market price or rents, and which meet the criteria set out above. These can include shared equity products (e.g. HomeBuy), other low cost homes for sale and intermediate rent.’

Delivering Affordable Housing explains that ‘The Government has adopted this definition of affordable housing because it wishes to ensure that developer contributions are used to help provide genuinely affordable housing for households in need **over the long term**’ (§34, emphasis added). After outlining the types of housing between market and social rented housing that can be Intermediate Affordable Housing (§38), it continues by requiring both subsidy and the recycling of that subsidy to meet the requirement for long term provision:

‘39. Homes of any of these types should only be considered intermediate **affordable** housing if they meet the criteria in the definition. If they do not, even if offered at less than market price, they should be considered ‘low cost market housing’, outside the definition of affordable housing. [Emphasis in the original]

‘40. For example, a shared ownership home is likely to be affordable if access is restricted to households from a target group at a price they can afford. The purchaser may staircase out, but **there should be secure arrangements for subsidy to be recycled** to provide more affordable homes or buy back the home if needed. [Emphasis added]

‘41. **Low cost market housing is not** part of the Government’s definition of **affordable housing** although it can play an important role in meeting housing demand. Local authorities should consider the potential to provide low cost market housing as part of their approach to achieving a mix of housing (PPS3, paragraph 26)’. [Emphasis added]

Delivering Affordable Housing also recognises (§§97 to 101) that the subsidy could be provided by the developer without housing grant. It reaffirms that ‘The definition of affordable housing set out above applies to both grant funded and grant free homes’. After noting that the Housing Corporation will ensure that the homes meet the definition of affordable housing where they are funded with housing grant, it continues ‘Where no grant is provided, it will be for the local authority to ensure that these matters are dealt with fully’.

In summary PPS3 requires that the housing must:

- be made available to classes of people who would otherwise have difficulty accessing housing on the open market;
- be subsidised (either by housing grant or by the developer); and
- remain affordable for future occupants or, if it ceases to be affordable, the subsidy must be recycled to make other housing affordable.

The Argent Affordable Housing Offer

Across the whole development (the Main Site and Triangle Site), Argent have proposed a variety of affordable housing. In addition to social rented housing there are five Intermediate Affordable Housing ‘products’ which they have named Shared Ownership, Shared Equity, Key Worker Sub-Market Rented, Homebuy and Right-to-Buy Homebuy.

Each product is described in the Heads of Terms for the Section 106 agreements in the same terms for both sites. Following Camden’s decision on the Main Site in March 2006, negotiations between Camden Council and the developers continued. These finalised the

actual Section 106 agreement, turning the 'Heads of Terms' into a full legal agreement. In this process the offer for Intermediate Affordable Housing was refined by the introduction of some recycling of subsidy. When the full 106 agreement was reported to the Camden Committee in November 2006 the only mention of this was the statement that 'Other measures include how the staircasing receipts on the shared equity are dealt with' (Camden Report, November 2006, §5.11.2).

The Islington Committee was given further information in February 2007 because the Council's Housing Officer had asked for further information:

'4.8 The Council's Housing Officer raised a query regarding the intermediate housing referred to as 'Homebuy' and Argent have provided information on this:

'4.9 "Argent, as Developer, would act as the banker on the 'Homebuy' and 'Right to Buy Homebuy' products. The loans would be provided interest-free. *The average initial equity stake acquired by purchasers of Shared Equity units would be 60%, leaving Argent with an average residual equity stake of 40%. In practice, there would be a range of equity stakes available to purchasers between 30% and 80%, with an element of 'first come first serve.'* To illustrate this, if there were 10 shared equity units available and the first 5 purchasers each acquired 50% stakes, the remaining 5 units would then be made available at 70%, to achieve the 60% average overall. Argent would not be charging any rent on the unsold equity in the 'Homebuy' scheme." [italics added]

'4.10 The Housing Officer advised that they are satisfied with this proposed scheme'.

The quotation from Argent (§4.9) is confusing. The first two sentences refer to the Homebuy products, as does the last. The middle three sentences (highlighted in italics) can only refer to Shared Equity, not Homebuy. This may be merely an editing problem where different parts of a longer response were conflated. If not, it suggests that Argent see Shared Equity as a species of Homebuy and will not be charging rent on the retained equity in this part of the scheme. If that is so, there is an element of **initial** subsidy in the Shared Equity units.

The Intermediate Affordable 'products' in the Argent scheme

(1) Shared Equity: These units are described in Obligation 6(a) of the Islington Heads of Terms:

Shared Equity to be delivered by the Developer on a part equity (i.e. owned) basis with a minimum average equity element of 60% across all first sales, with a minimum equity element of 30% and a maximum equity element of 80% on all first sales, occupiers having the right to staircase up to 100% of the equity.

The Camden s. 106 Agreement fleshes this out and adds provisions about recycling of the staircasing receipts. Section NN §9 (page 179) deals with Shared Equity Staircasing Receipts. It says that:

- Staircasing Receipts are to be held in a 'Designated Account' 'for the purposes of improving the affordability of other 'Intermediate Housing Units' (§9.2); but
- The requirement to recycle these receipts into the Account ceases for each tranche of Shared Equity units **after fifteen years**. The Developer may 'retain these proceeds as capital receipts from the Development' (§9.5(a)) [Emphasis added].

Shared Equity appears to be subsidised (providing it can be confirmed that Staircasing Receipts represent that subsidy) and the subsidy is to be recycled through the 'Designated Account'. However, the time limit on the 'Designated Account' means that subsidy ceases to be recycled. That appears to exclude the housing from the definition of Intermediate Affordable Housing in PPS3.

(2) Shared Ownership: These units are described in Obligation 6(b) of the Islington Heads of Terms:

Shared Ownership provided on a part equity (i.e. owned) part rented housing, with a minimum average equity element of 50% across all first sales, with a minimum equity element of 25% and a maximum equity element of 75% on all first sales, occupiers having the right to staircase up to 100% of the equity.

These are to be delivered by an 'Affordable Housing Provider' (AHP). As such the rental element will be 'affordable' and the AHP will be responsible for recycling the receipts. It therefore qualifies under the definition of Intermediate Affordable Housing in PPS3.

(3) Key Worker Sub-Market Rented: These units are described in Obligation 6(c) of the Islington Heads of Terms:

Key Worker Sub-Market Rented available for rent to Key Workers at a rental benchmarked against competing products in Central London with a discount of up to 20% off Open Market Rent, and an agreed definition of "Key Worker".

The discounted rent ensures that these units qualify under the definition of Intermediate Affordable Housing in PPS3 provided the developer is obliged to keep the units available on the same terms as they tenant changes.

(4) Homebuy: These units are described in Obligation 6(d) of the Islington Heads of Terms:

Homebuy to be delivered by the Developer with an interest free loan of 25% of the Open Market Value (and 30% in the case of the larger 2 bedroom units (61 sq m net)), to be offered to the purchaser by the Developer, with provisions for repayment of the loan on sale (the amount to be repaid being the same percentage of the sale price as the original loan percentage) and removal of restrictions following repayment of the loan.

This product is defined in §5 of the Camden Agreement (page 177). There is initial subsidy: 'the Homebuy loan' (§5.1(a)). §5.1(e) states that 'for the avoidance of doubt', once the loan has been repaid, the unit 'shall no longer be subject to any Affordable Housing obligations'.

The Homebuy scheme involves initial subsidy: an interest-free loan. The loan is to be repaid not as a fixed cash sum but as a percentage of the value of the unit at the time of repayment. The occupier is then free to sell it on the open market. There is no stated obligation on the Developer to recycle the subsidy; indeed, both the Developer and the occupier are freed from any Affordable Housing obligations. The lack of recycling of subsidy means that, as described, these units **do not qualify** under the definition of Intermediate Affordable Housing in PPS3.

(5) Right-to-Buy-Homebuy: These units are described in Obligation 6(d) of the Islington Heads of Terms:

Right-to-Buy-Homebuy to be delivered by the Developer and similar to the Homebuy housing, but available to existing Council tenants eligible to purchase under the Government backed Right to Buy Scheme. An interest free loan of 25% of the Open Market Value (and 30% in the case of the larger 2 bedroom units (61 sq m net)) to be offered to the purchaser by the Developer with provisions for repayment of the loan on sale (the amount to be repaid being the same percentage of the sale price as the original loan percentage) and removal of restrictions following repayment of the loan. Council tenants eligible for Right to Buy can apply for an additional discount equivalent to their Right to Buy discount under the Government Scheme, up to a maximum of £16,000, with provisions for repayment of the discount. The terms for repayment of the discount [are] to mirror those in place under the Government Scheme.

This description provides for a discount, funded by the developer, equivalent to that in the Government Scheme. The actual proposal has been developed further in the negotiations between Camden Council and Argent that led to the Main Site Section 106 Agreement. This Agreement covers the possibility that a purchaser cannot be found within six months for a Right-to-Buy-HomeBuy unit (Section NN, §6.3, page 178). In those circumstances the Developer is allowed to remarket Right-to-Buy-HomeBuy as HomeBuy. (An equivalent provision is included in the Islington Heads of Terms by obligation 24). The Camden Agreement requires that any **Right-to-Buy discounts** that would have been payable to purchasers by the Developer are to be paid into the Shared Equity Staircasing Receipts Designated Account (§10, page 180). It is not clear whether the fifteen year rule that applies to other payments into this Account applies to these payments.

The Camden Agreement also provides for a 'Right to Homebuy loan' under §6.1(b) equivalent to the Homebuy product. §6.1(f) states that 'for the avoidance of doubt', once the loan has been repaid, the unit 'shall no longer be subject to any Affordable Housing obligations'. There is no obligation to recycle the **Right to Homebuy loan** for other affordable housing subsidy.

The Right-to-Buy-Homebuy scheme involves initial subsidy: an interest-free loan. It also attracts a discount equivalent to that provided by the Government scheme. The loan is to be repaid not as a fixed cash sum but as a percentage of the value of the unit at the time of repayment. The occupier is then free to sell it on the open market. If they do sell before the period required to qualify for keeping the discount they may be liable to repay some or all of it. There is no stated obligation on the Developer to recycle the subsidy. There is provision to use the discount as subsidy if it is not used as Right-to-Buy discount. The lack of recycling of subsidy means that, as described, these units **do not qualify** under the definition of Intermediate Affordable Housing in PPS3.

In summary:

- **Shared Ownership (through an ‘Affordable Housing Provider’) and Key Worker Sub-Market Rented clearly qualify as Intermediate Affordable Housing as they are subsidised and the subsidy is recycled into other affordable housing.**
- **Shared Equity and the unpaid Right-to-Buy discounts are recycled but fail to qualify because the subsidy is time limited and not, therefore, properly recycled.**
- **Homebuy and Right-to-Buy-Homebuy fail to qualify because, although there is initial subsidy, it is not recycled.**

The Affordable Housing Offer on the Triangle

The planning application for the Triangle proposes 200 new homes and 40% of these (80) are said to qualify as affordable housing. Of these 80, 36 are to be social rented, which qualify as affordable housing under PPS3. The remaining 44 units are called Intermediate Affordable Housing. They are described as being:

- 26 ‘shared equity’ units,
- 10 ‘HomeBuy’ units, and
- 8 ‘Right-to-buy HomeBuy’ units.

None of them currently qualify as Intermediate Affordable Housing for the reasons set out above.

The Triangle’s affordable housing should be exactly that: affordable housing as defined in PPS3. To comply with Council policies and the London Plan there should be 50% affordable and 70% of that should be social rented: 70 social rented units and 30 intermediate units. The increased emphasis in PPS3 policies on new requirements to assess housing need reinforces the need to provide more social rented housing. Even if Argent cannot be induced to increase the amount of affordable housing, the simplest cure for the problems with the Intermediate Affordable Housing offer is to replace it with social rented housing. Any remaining Intermediate Affordable Housing should be of a type that clearly meets the requirements of PPS3 (Key Worker Sub-Market Rented or Shared Ownership). In the last resort, Argent could be required to change the terms of the defective products so all subsidy is fully recycled.

Appendix: Judicial Review of the Camden decision on the ‘main site’

The King’s Cross Railway Lands Group brought a judicial review of the London borough of Camden’s decision to grant outline planning permission to Argent (King’s Cross) Ltd for the King’s Cross Central main site. The case was heard in the Administrative Court by Mr Justice Sullivan on 24th and 25th May 2007.

Two issues were considered: whether the advice given to the Committee reconsidering the application unduly fettered its discretion to change its earlier decision (Issue 1) and whether the publication of Planning Policy Statement 3 (Housing) after the Committee decision but before the decision letter was issued should have led the officers to return the application to the Committee for further consideration (Issue 2). The application failed on both grounds. Quotations from the judgment in this note are taken from the shorthand writers’ text checked against notes taken at the time and, therefore, may be subject to minor correction.

Issue 1: fettered discretion

Sullivan J. pointed out it was clear law that ‘A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taken considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission’ (p. 10, ll. 12-17). The question to be decided was whether the Committee had not exercised its discretion as a result of officer advice or for some other reason. After looking at the evidence he took the view that members of the Committee ‘were boxed in by their realization of the practical reality that in the absence of any material change of circumstances they would be unable, as a matter of fact (not law) to demonstrate that there was a good planning reason for changing their mind’ (p. 41, ll. 5-8). As Sullivan J. emphasized, he was deciding that, on the particular facts of what happened at that particular meeting of the Camden Committee, the Committee was not ‘boxed in’ by the officer advice.

Issue 2: effect of PPS3

Sullivan J. noted that it was common ground between the parties that, if PPS3 represented a material change of circumstances officers would have an obligation to refer the matter back to the Committee. He stated that the final version of Planning Policy Statement 3 (PPS3) contained a definition of affordable housing and ‘The same definition was contained in the draft PPS3’ (p. 13, l. 17). On this basis he compared the definitions of affordable, intermediate and market housing in the section 106 agreement approved by Camden with the definitions in PPS3 and found that the intermediate housing offered was ‘at a discount’ and therefore qualified. He therefore found there was no material change which should have led officers to refer the matter back to the Committee.

Matters not considered

Unfortunately, the statement that the draft and final definitions of affordable housing in PPS3 are ‘the same’ is incorrect. There is a substantial difference—concerning the recycling of subsidy—which was never put to the judge. As Sullivan J. did not consider the issue, it could not form part of his decision and Islington is therefore entitled to take the question of subsidy recycling into account despite the judgment.

The requirement in the draft PPS3 for subsidy was that ‘Affordable housing should...include provision for the home to remain at an affordable price for future eligible households, or if a home ceases to be affordable, **any subsidy should generally be recycled** for additional affordable housing provision’. [Emphasis added]

The requirement in the final PPS3 for subsidy was that ‘Affordable housing should...include provision for the home to remain at an affordable price for future eligible households or, if these restrictions are lifted, for **the subsidy to be recycled** for alternative affordable housing provision’. [Emphasis added]

The significant change here is the replacement of ‘if a home ceases to be affordable, any subsidy should generally be recycled’ by ‘if these restrictions are lifted, for the subsidy to be recycled’ removing the qualification ‘generally’ from it. From that it can be seen that housing which is initially subsidised but for which the subsidy is not recycled does not qualify as ‘intermediate affordable housing’. This policy change is highly material in considering the planning obligations for the Triangle site.