Planning Inspectorate

Appeal Decision

Hearing held on 10 December 2024

by Zoe Raygen DipURP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 January 2025

Appeal Ref: APP/J0540/Q/24/3345677
Glebe Works, Glebe Court, Fletton, Peterborough, PE2 9NE

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 (as amended) against a refusal to discharge a planning obligation.
- The appeal is made by Mr G Goodwin (Morris Home) against the decision of Peterborough City Council.
- The development to which the planning obligation relates is the construction of 295 residential units, A1 Food Store, and associated infrastructure.
- The planning obligation, dated 25 October 2013, was made between Peterborough City Council and Morris Homes (East Midlands) Limited.
- The application Ref 23/1525/MDOBL, dated 3 November 2023, was refused by notice dated 5 December 2023.
- The application sought to have the planning obligation discharged.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. It was confirmed by the appellant at the hearing that the Statement of Common Ground revision 4 dated December 2024 was agreed.

3. Parties agreed at the Hearing that, given the subject matter of this appeal, I would not need to undertake a site visit in order to make an informed decision. I have proceeded on that basis.

Background and Main Issue

4. Planning permission was granted for the construction of 295 residential units, A1 food store and associated infrastructure at the appeal site in March 2011 subject to a number of conditions (the 2011 permission). Condition 15 stated that the residential units should be constructed to Code Level 6 of the Code for Sustainable Homes which required the homes to be completely net zero. The reason for the condition was identified as "*This is because the planning obligation has been negotiated on this basis, in accordance with Policy IMP1 of the Peterborough Local Plan (First Replacement)".*

5. The condition was imposed in the context that the site was one of two in the country identified as Carbon Challenge sites, an initiative promoted by the Homes and Communities Agency (HCA) on behalf of the Department for Communities and Local Government (the Carbon Challenge initiative), with the aim of supporting the house building industry to acquire the skills and technologies needed to deliver the Government's target at that time that all

new homes would meet Level 6 of the Code for Sustainable Homes by 2016 and this would be translated into legislation.

6. Condition 15 of the 2011 permission was varied pursuant to an application made under s.73 of the Town and Country Planning Act 1990 (the Act) granted on 28 November 2013[1] The varied condition 15 was issued as follows:

With the exception of Issue ID ENE 1 (Category 1: Energy and Carbon Dioxide Emissions) all residential dwellings hereby approved shall be constructed to Code Level 6 of the Code for Sustainable Homes

All residential units hereby approved shall be constructed to the Zero Carbon Homes standard as defined by the following Zero Carbon Hub publications.

1. Defining a Fabric Energy Efficiency Standard (November 2009)

2. Carbon Compliance - Setting an Appropriate Limit for Zero Carbon Homes (February 2011) Allowable Solutions for Tomorrows New Homes (July 2011)

3.40% of the residential units shall be 'affordable' housing as defined in the supporting statement to Policy CS8 in the Peterborough Core Strategy DPD 2011 and shall thereafter be maintained as such.

7. The reason for the condition was:

This is because the planning obligation has been negotiated on this basis, in accordance with Policy CS13 of the Core Strategy 2011.

8. It was confirmed at the hearing that the likely reason for the need to amend the condition was associated with the viability of the development if the requirement in relation to Code 6 for energy and carbon dioxide emissions was to be provided on site.

9. Consequently, an associated planning obligation (the Obligation), signed in 2013, required the payment of an Allowable Solutions Contribution (ASC) to be calculated in accordance with a formula contained within the obligation at three trigger points during the development. The ASC was to be spent by the Council with agreement by the Project Board (defined within the obligation) in accordance with the provision and principles set out in the Zero Carbon Hub Allowable Solutions Report which were to be interpreted to include energy efficiency improvements, on-site energy generation and district heating to either existing dwellings or Communal Buildings.

10. The appellant's application to discharge the requirements of the planning obligation was refused by the Council[2] resulting in this appeal.

11. The powers under S106A and S106B are to modify or discharge planning obligations. In this instance my considerations under the Act are set out in Section 106A (6) (b), namely if the obligation no longer serves a useful purpose, that it shall be discharged.

12. In that context, the main issue is whether the planning obligation continues to serve a useful purpose.

[1] 12/01526/WPP (the 2013 Planning Permission)
[2] 23/1525/MDOBL

Reasons

13. At the Hearing the appellant advised that the 100th dwelling was completed on site on 1 August 2014, the 200th dwelling on the 22 January 2016 and the 290th on 10 August 2016. The appellant is therefore in breach of the Obligation which requires staged payment at these times. The fact that the Council may have known how the development was progressing through Building Control completion records and did not submit an invoice for the relevant amounts until the final trigger point, does not negate the fact that the Obligation requires the appellant to pay the relevant amounts at the three stages of the development.

14. The appellant described the uncertainty at the time of construction of the dwellings as to whether the Government's approach through Carbon Compliance and Allowable Solutions (AS) would go ahead and provide the basis for the revised Building Control Regulations. This led to discussions with the Council as to the future and legitimacy of the payments. There is though nothing substantive before me regarding this.

15. As I have already alluded to the site was one of two in the country identified as Carbon Challenge initiative sites.

16. The Zero Carbon Hub (the ZCH) was established as a public/private partnership in 2008 to support the delivery of zero carbon homes from 2016 and was centrally involved in developing a workable definition for zero carbon homes to become part of the Building Regulations 2016. It was also responsible for developing the concept of AS which were envisaged to account for carbon emissions that were not expected to be abated on site through Carbon Compliance and which would require Building Control approval. The report Allowable Solutions for Tomorrow's New Homes Towards a Workable Framework (the Report) was produced by ZCH to ensure that AS would be operated within a practical framework that would provide verifiable carbon emission savings, encourage innovation and support localism wherever possible.

17. AS was a new concept, and the Report outlines that the developer would make a payment to an AS provider who would take responsibility and liability for ensuring that the AS delivered the required emission reductions. The report makes recommendations to inform Government policy and start further consultation with the industry as it was considered that AS would be a platform for wider engagement with businesses and the community to provide strong connections for the delivery of projects.

18. What the Report makes clear is that it (the Report) is the evidence to support the appropriate development of the main parts of the proposed framework and how it would work for the various parties involved. The expectations were that the developer would make a payment to secure emissions though near site or off site carbon saving projects. There would be the opportunity to aggregate several AS to deliver larger scale carbon emission reduction projects, the AS would be affordable and per unit of carbon would cost, at least initially, less than the Carbon Compliance and that wherever possible AS would be linked with local projects that would bring local benefits.

19. The report outlines ways in which this could be achieved to deliver auditable, tangible, additional cost effective carbon saving projects that contribute to

innovation. There is much discussion about the role of Private Energy Funds and Community Energy Funds should the Local Planning Authority not have established policy or Supplementary Planning Documents regarding the delivery of AS. Furthermore, the establishment of an AS Database and an AS fund holding is mooted as well as grappling with the concept of additionality which it is agreed needs a single clear definition in any framework produced. All in all, in my view, the Report demonstrates that AS was not a straightforward concept, but the Report was sufficiently robust to be taken forward for further consultation with relevant bodies to achieve a final Framework for AS.

20. However, the proposed revisions to the Building Regulations regarding zero carbon homes, including AS was not taken forward by the Government and ZCH was wound down on 31 March 2016 with its formal dissolution at Companies House in September 2024.

21. Hence, the parties entered into the Obligation at a time when the principles of AS and how it would be taken forward to achieve its aim were at an early stage and the principles, while understood, were not established in a finalised Framework for its practical operation. Indeed that was the purpose of the Carbon Initiative Sites to test the challenges of erecting zero carbon homes as an iterative process that evolved over time to inform changes to Building Regulations.

22. Nevertheless, Part 1 of the third schedule of the Obligation provides a clear definition of AS for the specific purposes of the obligation as:

Allowable Solutions Contribution

Means the contributions to be calculated as per the formula in Part 2 below to be spent by the Council with agreement from the Project Board and in accordance with the provision and principles set out in the Zero Carbon Hub Allowable Solutions Report which shall be interpreted to include energy efficiency improvements, on-site energy generation and district heating to either existing dwellings or Communal Buildings.

23. Irrespective of the contents of the Report therefore, for the specific purposes of this obligation the ASC is defined and can be calculated. Furthermore, while the specific projects are not identified, the definition gives a clear interpretation of the types of projects the money should be spent on. In particular on-site energy generation and district heating seem especially straight forward to interpret. This also includes clear advice on the level of CO_2 reduction that should be achieved by the projects.

24. The Project Board is also defined as

Means the Project Board comprising representatives of the Council, Morris Homes and Zero Carbon Hub Limited (Company No.06677029) which shall be set up upon receipt of the first Allowable Solution Contribution payment.

25. There is no provision for alternative members of the Project Board within the definition, or the Obligation, for it to function without one of the three members. Thus the dissolution of ZCH may have implications for the Obligation now.

26. The first contribution should have been made in August 2014 after the completion of the 100th dwelling and followed by the set-up of the Project Board. Neither was done and no convincing explanation as to why the first contribution was not made has been supplied by either party at the Hearing. The ZCH was well established in 2014 and the deed was signed in October 2013. If either party had been aware that AS were not to be taken forward at that point, then they would not have entered into the deed.

27. Furthermore, no substantive evidence has been put forward to me that there was doubt about AS as early as 2014. Indeed, the appellant reports that the Code for Sustainable Homes was withdrawn by the Government in a Written Ministerial Statement dated 25 March 2015. A further Written Ministerial Statement entitled Fixing the Foundations: Creating a More Prosperous Nation was published in July 2015 and stated that "*The government does not intend to proceed with the zero carbon Allowable Solutions offsetting scheme, or the proposed 2016 increase in on-site energy efficiency standards, but will keep energy efficiency standards under review, recognising that existing measures to increase efficiency of new buildings should be allowed to become established*."

28. There was therefore a window in which the Project Board could have been established with the requisite members to ascertain the process by which projects should be agreed in accordance with Part 2 Paragraph 3 (ii) of the obligation.

29. Nevertheless, the Project Board was not established, and the key question now is whether the presence of ZCH on the board is essential to ensure that the ASC can be spent. If it is an essential presence then, in its absence, all the deed would require is the payment of the contribution. It would not be able to be spent by the Council as the approval of projects and process could not be achieved without ZCH. All that would happen would be the Council would need to repay the contribution in 10 years in accordance with the fifth schedule of the obligation. In this scenario the obligation would not continue to serve a useful purpose.

30. In reaching this view I have had specific regard to case law (the Sudbrook case and the Manchester Ship Canal Case) and "Chitty on Contracts" raised by the parties[3] in particular the discussion around whether the term in dispute can be regarded as a non-essential part of the machinery. It is only when the term is considered non-essential can the court intervene. As stated by Lord Fraser "*the true distinction is between those cases where the mode of ascertain the price is an essential term of the contract and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential*."

31. In the Sudbrook case the court's conclusion was on the basis that the valuation provisions could be regarded as non-essential because the fair or reasonable value of the property could be ascertained even if the mechanism in the contract failed.

[3] *Manchester Ship Canal v Environment Agency* [2017] EWHC 1340 (QB) (The Manchester Ship Canal case)
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444 (the Sudbrook case)
Chitty on Contracts 35th Ed

32. Within the Manchester Ship Canal case it was considered that the case was similar to the example given by Lord Fraser; *where an agreement is made to sell at a price to be fixed by a valuer is named, or who by holding some office such as an auditor of a company whose shares are to be valued will have special knowledge relevant to the question of value which may well be described as essential*. Indeed in this case the court found that the express requirement that the site should be agreed between the parties failing which it will be determined by an arbitrator could not be regarded as a non-essential term not least because there is no clarity or certainty as to which site the court would designate on the evidence before it.

33. Taking this case law into account, clearly ZCH were an expert in their field at the time the Obligation was negotiated and signed and were the driving force behind the concept of AS at that time as detailed in the Report. Despite the comments of the appellant, with the passing of time and lack of detailed records, we cannot know the exact reasoning for their inclusion as a member of the Project Board. They would have had the detailed knowledge to ensure that projects complied with the requirements of AS as outlined in the Report in terms of the auditing, additionality requirements and whether the project would deliver additional and verifiable carbon savings to transform the payments from developers into auditable and measurable real carbon saving outcomes.

34. However, the ASC described in the Obligation is not that detailed in the Report. The Obligation has its own definition of the ASC which tells us how the contribution should be calculated. Furthermore, although the definition states it should be spent in accordance with the provisions and principles of the Report, this too is interpreted in the definition and details the types of projects on which the contribution should be spent, including the minimum CO_2 reductions which should be achieved.

35. In the case before me the sum of money is known. Indeed an invoice for £383,268.09 was issued by the Council in 2017 in respect of the total contribution for the site. With interest to be added it was clarified at the Hearing that this figure would now be nearer to £500,000. Clause 2 of Part 3 of Schedule 3 requires the money to be held by the Council, so ZCH expertise is not required in respect of the funding amount or where it would be held.

36. We also know the detail of the projects the money would need to be spent on in accordance with Clause 3 of Part 3 of Schedule 3 of the obligation. I am not convinced that ZCH would be the only body who would be able to ascertain if projects met the requirements of part 3 (iii) on which the money could be spent which would be a fairly standard calculation.

37. Therefore, the only involvement of ZCH would be on agreeing a process by which projects are approved and to provide the approval, neither of which would be particularly onerous, given the context of the detail available in the Obligation and the lack of an agreed Framework being taken forward for AS at the time of signing of the obligation. Even if the Framework had come on board, it is clear from the detailed wording of the obligation that, in this case, the method of funding and how it would be spent may not be in accordance with the Framework. Had the Framework been advanced then obligations would have become more sophisticated to embrace the vision of AS as it evolved.

38. Consequently, due to the specific definitions in the Obligation and the lack of any agreed Framework for taking forward AS, my view is that while it would have been helpful to have ZCH on the Project Board, it was not essential at the time of the negotiation and signing of the obligation for them to be on the Project Board and they are not an essential part of the process for the approval of process and projects on which the contribution could be spent within the terms of this specific Obligation.

39. To my mind, a Project Board comprising suitable persons such as representatives of the Council and Morris Homes would be required to comply with the terms of the Obligation itself in relation to what to spend the contributions on and therefore the expertise of ZCH is not essential for the Project Board. If it was considered that a third party was necessary on the Project Board then the Courts could intervene with a suitable replacement for ZCH given they are not an essential part of it.

40. In this respect then, as I have found that the presence of ZCH is not essential then even though it is no longer in existence, the Project Board could operate in a different way to spend the money from the contribution. As this is my finding then I must conclude that the Obligation continues to serve a useful purpose, namely the spending of the contribution on the specific type of projects named in the definition of the AS.

Conclusion

41. For the reasons above the appeal is dismissed.

Zoe Raygen

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY

Ms Jacqueline Lean Counsel	Instructed by Peterborough City Council Legal Services
Mr Asif Ali	Principal Planning Officer Peterborough City Council
Ms Joanna Turnham	Legal Services, Peterborough City Council

FOR THE APPELLANTS

Mr Paul Tucker Kings Counsel	Instructed by Mr Kit Sorrel FS Legal
Mr Ben Ward	Marrons
Ms Nicola Stanley	FS Legal

DOCUMENTS SUBMITTED AT THE HEARING

1 Manchester Ship Canal v Environment Agency [2017] EWHC 1340 (QB)
2 Manchester Ship Canal v Environment Agency [2017] Summary
3 Chitty on Contracts 35th Ed.
4 Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444

DOCUMENTS SUBMITTED AFTER THE HEARING

1 Written Submissions Morris Homes
2 Written submissions Peterborough City Council