IN THE HIGH COURT OF JUSTICE No. CO-1272-99
IN THE QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

Royal Courts of Justice
Strand
London WC2

Thursday 2nd March, 2000

B e f o r e:

MR. JUSTICE SULLIVAN

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- v -

LONDON BOROUGH OF TOWER HAMLETS
EX PARTE BARRATT HOMES LTD

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(Transcript of the stenograph notes of Smith Bernal International, 180 Fleet Street, London. London W2. Telephone 071-404-1400 Official Shorthand Writers to the Court.)

MR. C LOCKHART-MUMMERY QC, MR. C KATKOWSKI QC AND MR. D KOLINSKI appeared on behalf of the applicant. (Instructed by Winkworth Sherwood.)
MR. C GEORGE QC AND MR. J PEREIRA appeared on behalf of the first respondents. (Instructed by the Legal Deparment, LB Tower Hamlets.)

J U D G M E N T

(AS APPROVED BY THE COURT)

MR. JUSTICE SULLIVAN:

Introduction.

1. In September 1997 the applicant applied for planning permission to redevelop the site of the Electrical Switch House at Aspen Way, London E14, within the Isle of Dogs area in the London Borough of Tower Hamlets (the Council). The site is 1.17 Ha in extent and comprises an electrical transfer station which is due to be decommissioned. The applicant proposes to build 172 flats on the site together with a range of commercial floor space. The site is not allocated for any form of redevelopment in the Council's recently adopted Unitary Development Plan (the Development Plan). Thus if planning permission is granted it would a windfall site for the purposes of housing land availability.

2. The application for planning permission was originally made to the LDDC and was inherited by the Council as local planning authority. Policy HSG 3 in the Development Plan provides as follows:

> "The local planning authority will seek a reasonable provision of affordable housing on large housing development with a capacity of 15 dwellings or more consistent with the merits of each case and the strategic target of 25 per cent affordable housing in policy ST 18 A. The authority will seek to ensure that affordable housing is retained for future occupiers through the use of planning conditions and obligations and/or the involvement of registered social landlords."

3. The strategic policy ST 18 A referred to in HSG 3 states: "To seek a Borough wide average of 25 per cent of the housing target in the form of affordable housing".

4. On the 9th February 2000 the Council adopted draft supplementary planning guidance on affordable housing policy (the SPG). I will turn to the terms of the SPG in due course. Its stated purpose is to help developers of residential schemes in the interpretation and application of the affordable housing policies HSG 3 and ST 18 A in the Development Plan. Subject to the outcome of these proceedings, the Council intends to take the SPG into account in determining the applicant's application for planning permission. The applicant contends that the requirements of the SPG are unlawful and accordingly seek a declaration that it may not be taken into consideration by the Council as a material consideration in determining the application.

5. Permission to apply for judicial review was granted by Keane J on 29th April last year when the Council proposed to apply an interim implementation policy in respect of affordable housing. That interim policy has, since 9th February this year, been superceded by the SPG. On 14th

February Richards J granted the applicant permission to amend its form 86A to refer to the SPG.

The Grounds of Challenge.

6. The applicant contends that the SPG is unlawful and therefore not a material consideration on three grounds:

7. (1) It requires the applicant to make a contribution towards the provision of affordable housing to meet the existing needs of the community even though there is no evidence that the proposed development, as a windfall site, would have an adverse effect on those existing needs.

8. (2) It has the effect of transferring the Council's obligations as a local housing authority to provide affordable housing for those in need of such housing to the applicant.

9. (3) In calculating the amount on the applicant's financial contribution to such needs; the availability of public subsidy is excluded so that the applicant will have to pay the full cost of provision in so far as it cannot be financed by a mortgage raised on the future rents. This notwithstanding the fact that funds may be available by way of social housing grant (SHG) and/or from the private resources of registered social landlords (RSL's) to meet all or part of the shortfall between total cost and the capitalised value of the future rent stream.

10. In their submissions on behalf of the applicant Mr. Lockhart-Mummery QC and Mr. Kathowski QC made it clear that the applicant's principal concern was ground (3) above.

The Need for Affordable Housing in Tower Hamlets.

11. It will be noted that the challenge is to the SPG not to the lawfulness of policies HSG 3 or ST 18 A in the Development Plan. The applicant did not challenge HSG 3 through the Development Plan process; others did. Having considered their objections, the UDP Inspector said in November 1995: "If affordable housing is needed anywhere it is needed in Tower Hamlets". He then in effect endorsed the substance of HSG 3 as then proposed. The wording of the policy as eventually adopted has been revised to take account of subsequent events including in particular the publication of circular 6/98 "Planning and Affordable Housing" published by the Department of Environment, Transport and the Regions.

12. Circular 6/98 advised that a community's need for affordable housing is a material planning consideration. Where there is evidence of a need for affordable housing, local plans should include a policy for seeking an element of such housing on suitable sites. Such policies will be a material consideration in the determination of planning applications. Paragraph 10 sets out criteria which

should be taken into account in assessing "the suitability of sites to be identified in the plan and any sites that may come forward not allocated..." One criterion is size. In inner London, housing developments of 15 or more dwellings or residential sites of 0.5 ha or more are suitable in terms of size.

13. Paragraph 13 of circular 6/98 states:

14. "In some cases the identified need for affordable housing may exceed the total number of affordable homes likely to be achieved from public investment and sites specified in the plan. If so, the plan should include the criteria set out in paragraph 10 above for other sites (so called 'windfall sites') identified for housing after the plan is adopted or approved on which the local planning authority would seek an element of affordable housing".

15. A survey entitled "Housing Needs in Tower Hamlets" was commissioned by the Council from Martin Hamblin Ltd, specialists in the housing field, and was published in September 1998. It estimated that there would be a demand for 16,850 affordable housing units in the Borough over the next 3 years. The survey estimated that a maximum of 13,200 affordable housing units might be made available from a variety of sources including, as a smallest contributor, agreements with developers pursuant to HSG 3. The Council has provided evidence in the form of two witness statements from Mr. Jones MRTPI, service Head for the Built Environment in the Council's Customer Services Directorate. In his view, the figure of 13,200 is likely to be an over-estimate. His evidence is that, even on the most optimistic assumptions, there will be a shortfall of some 3,600 affordable housing over the period 1999 to 2001. Looking ahead to 2016, the housing needs report states that a further 7,560 affordable units will be required. It is Mr. Jones' view that this figure is likely to be an underestimate. On his evidence, "There is a predicted shortfall of affordable housing to meet anticipated needs. Existing and proposed residential developments will not meet this need".

16. The application site is located in the Council's East India Ward. The adjoining ward is the Blackwall Ward. His evidence is that these wards are generally representative of the housing conditions to be found in the Council's area as a whole. Particulars are given of the housing conditions in the two wards, and the conclusion is drawn that "The area in which the application site lies needs the provision of additional affordable housing". The applicants accept that policy HSG 3 applies to all large housing developments as defined in the policy, that is to say to allocated sites as well as windfall sites.

17. Allocated sites in the Development Plan are predicted to yield some 3,000 dwellings by 2004. This may be contrasted with the estimated need for at least 3,600 afford able housing units

between 1999 and 2001. It is clear that even if the full strategic target of 25 per cent affordable housing is achieved on all the large allocated housing sites, provision will still fall far short of estimated need. Although the planning system is the smallest contributor towards meeting the need for affordable housing (the largest sources include regeneration initiatives and the more effective use of empty homes) the Council considers it important that its contribution should be maximised.

The Applicant's Submissions.

18. Although grounds 1 and 2 were not formally abandoned, it is fair to say that they were not pursued by Mr. Lockhart-Mummery or Mr. Kathowski with any marked degree of enthusiasm. In my view the applicant's lack of enthusiasm for grounds 1 and 2 was justified for the following reasons.

19. Ground 1. The applicant does not challenge the lawfulness of either the national policy guidance set out in circular 6/98 or its local application to Tower Hamlets in policies HSG 3 and ST 18 A in the Development Plan; nor does the applicant challenge, at least for the purposes of these proceedings, the evidence as to the need for affordable housing in Tower Hamlets which I have set out above. It accepts that the securing of provision for affordable housing is capable of being a material consideration under section 70(2) of the Town and Country Planning Act 1990. However, it submits that a site specific approach must be adopted and seeks to distinguish between three situations.

20. (1) A development which involves the removal of affordable housing. It is accepted that it may well be appropriate to prevent the loss of, or require replacement of, affordable housing as a scarce resource (see Court of Appeal decision in Mitchell v The Secretary of State for Environment (1994) 2 PLR 23).

21. (2) A site allocated or identified for housing in the Development Plan may be subject to a requirement that an appropriate proportion of affordable housing be provided. It is acknowledged that land is a scarce resource and the local planning authority is entitled to ensure that it is used to meet particularly pressing needs such as those for affordable housing.

22. (3) A windfall site. Where new housing is proposed without there being any direct impact on either existing housing or housing allocations in the Development Plan.

23. The applicant accepts that it may be appropriate to require the provision of an appropriate proportion of affordable housing on windfall sites such as the present application site, but only if there is "an identifiable adverse impact on the existing needs of the community for affordable

housing". It is submitted that two preconditions must be met before a windfall site can be required to contribute to affordable housing.

24. First there must be a need for such housing in the area (see Mitchell). The applicant accepts that there is such a need in Tower Hamlets (see above). Second, it must be established that the development will have an adverse effect on that need. The applicant contends that the loss of an unexpected and therefore unallocated 'bonus' in terms of housing provision does not amount to an adverse effect.

In Mr. Jones' evidence it is said that:

25. "A development such as the applicant's scheme has the inevitable consequence of raising land values and residential property values in the vicinity and, unless accompanied by the provision of affordable housing as a component of the development, renders very difficult the task of meeting local housing needs".

26. The applicant disputes this assertion and relies on a witness statement from Ms Tooke ARICS, a partner in and Head of Residential Development Consulting at Knight Frank. In summary, her evidence is that there is no scope for such an increase in residential value in the East India and Blackwall wards because in the former there is a limited amount of private housing, most of the housing being owned by the Council. Very few of any opportunities for new private housing exists, because most of the remainder of the land is reserved for employment purposes. In the latter ward, because of the scale of recent residential development, there is an extremely limited supply or new opportunities for residential development, but the housing market in the area has now reached maturity after significant rises in property prices between 1995 and 1999.

27. I accept that it may be possible to distinguish between allocated and windfall housing sites in some local authority areas, for example, where the identified need for affordable housing units is relatively small and will be easily met by requiring an appropriate proportion of affordable housing units on allocated sites in the Development Plan. In such cases it may be possible to argue that there is therefore no need to use a windfall site for this purpose and that it will do no harm not to require a proportion of affordable housing on such a 'bonus' site. Much will turn on the policies in the particular Development Plan: how do they deal with the manner in which windfall sites should be used?

28. Such an argument would ignore the other limb of the housing policy which is set out in circular 6/98 and Planning Policy Guidance note number 3 (Housing) which is, "To encourage the

development of mixed and balanced communities in order to avoid areas of social exclusion". The importance of achieving that aim in any particular area is bound to vary from case to case. Setting that aspect of the policy entirely to one side, I do not accept the applicant's proposition that there will be no adverse impact if a windfall site is used for housing without the provision of any affordable housing in Tower Hamlets, in circumstances where it is plain that the allocated housing sites will not be able to meet the identified need for affordable housing in the plan period (see paragraph 13 of circular 6/98 above).

29. In simple terms, the need for affordable housing in Tower Hamlets is so substantial, and the supply of land for new residential development is so constrained, that the need is unlikely to be met even if every potential housing site coming forward, allocated and windfall, makes its appropriate contribution. The shortfall will be even greater if an appropriate contribution is not sought from windfall sites. Moreover, it is necessary to be very cautious when speaking of "the existing needs of the community for affordable housing". The local planning authority is not primarily concerned with maintaining the status quo. It is, by definition, planning for the future needs of the community. Thus the community's "existing" needs for affordable housing will include, over the development plan period, the forecast needs of, for example, those children of existing residents who will be forming new households. In deciding what development may be permitted on windfall sites, a scarce resource in Tower Hamlets as in any other local authority area, such forecast needs must be a relevant planning consideration.

30. On the undisputed evidence as to the housing situation in Tower Hamlets, I am therefore unable to accept the factual premise which underlies ground 1, namely that release of this windfall site without making provision for affordable housing "would have no adverse impact on the existing needs of the community for affordable housing".

31. There is an issue between Mr. Jones and Ms Tooke as to whether further provision of housing on this application site would contribute to the process which is often described as "gentrification". There seems little doubt on the basis of Ms Tooke's evidence that this process has indeed been in operation, at least in the Blackwall Ward, over recent years. This court is not equipped to decide whether that process has now reached maturity or whether the opportunities for new residential development in the East India Ward are so vestigial that gentrification could have no significant impact on house prices there.

32. The Council has been prevented by a stay from determining the applicant's planning application. If, having considered the application, it decides to refuse planning permission on inter

alia this ground, then the applicant will have an opportunity to argue the matters raised in Ms Tooke's witness statement before a Planning Inspector. The Inspector will have the advantage of hearing the witnesses give evidence and be cross-examined and the inestimable advantage of being able to see the site and inspect the surrounding area.

33. In the circumstances I find it unnecessary to refer to the cases cited by the parties in respect of ground 1, or to reach any conclusion in respect of the submissions of Mr. George QC on behalf of the Council that there is no requirement as a matter of law for development to have a specific adverse impact before it can be refused planning permission.

34. Ground 2. The applicant submits that the provision of affordable housing is a function of the Council (see sections 1 and 9 of the Housing Act 1985). The council may not use its powers as local planning authority for an ulterior motive (see per Lord Denning MR in Pyx Granite Co. Ltd. v The Minister of Housing and Local Government (1958) 1 QB 554 at 572). Specifically, the Council may not use its powers as local planning authority to require the applicant to discharge the Council's own functions as housing authority (see the R v Hillingdon London Borough Council ex parte Royco Homes Ltd (1974) 1 QB 1720.)

35. Royco was an extreme case. As Bridge J (as he then was) put it at page 733:

36. "The applicants were effectively being required by the planning conditions in issue to provide a municipal housing estate. The respondent Council could not have gone further towards shifting the burden of providing housing accommodation from itself on to the applicant's shoulders".

37. Mr. George invited me to conclude that Royco does not establish any broad principle and is merely an example of a local planning authority acting Wednesbury unreasonably. Mr. Lockhart-Mummery invited me to conclude that the principle - that the power to determine applications for planning permission cannot be used to transfer public obligations to private developers - remains good law (see Mitchell at page 27D).

38. I find it unnecessary to resolve this difference between Mr. Lockhart-Mummery and Mr. George for the purposes of deciding this particular case. Whether in any particular case a local planning authority, in requiring a developer to incorporate certain buildings or uses within a proposed development, is acting for a proper planning purpose because the buildings or uses are required on that site in order to meet the community's needs for facilities such as affordable housing, or is acting for an ulterior purpose and/or unreasonably because it is trying to force the

developer to make provision for needs which the Council itself should be meeting, must be a question of fact. A perfectly proper planning requirement may be increased so as to become an unreasonable demand and an unlawful shifting of the burden.

39. Royco was very much at the latter end of the spectrum. The applicant accepts that, at least in the case of allocated sites, the policies set out in circular 6/98 and HSG 3 are at the former lawful end of the spectrum. Whilst the Council's statutory powers to provide housing are, broadly speaking, the same under sections 8 and 9 of the 1985 Act as they were under sections 91 and 92 of the Housing Act 1957 (which was referred to by Bridge J in Royco), the factual matrix in which social housing is now provided is entirely different.

40. As Mr. Jones explains, the Council, in common with other local authorities, is no longer engaged to any significant degree in the provision of new social housing. Most new social housing is now provided by registered social landlords (RSLs) with financial assistance from, and subject to the supervision of, the Housing Corporation. The Council, so far as it is able, facilitates that process by allocating about 10 per cent of its HIP allocation for grant aid to RSLs for new build schemes, and by the exercise of its powers as local planning authority. That change of role from the local authority as direct provider to the local authority as facilitator of provision by other agencies (public or private) is found not merely in the housing field, but also in other areas of local authority activity, for example the provision of care for the elderly. Against this factual background, the applicant's acceptance that the application of circular 6/98 and policy HSG 3 to allocated housing sites would not offend against Royco, is plainly correct. Save for the method of calculating the developers' financial contributions to affordable housing which is set out in the SPG, the applicant was unable to identify any material respect in which the SPG departed from the policy guidance which is set out in circular 6/98 and/or HSG 3.

41. For the purposes of ground 2, the applicant sought to distinguish allocated sites and windfall sites on the same basis as set out above under ground 1. It was submitted that the SPG requires the provision of affordable housing on windfall sites, "irrespective of its impact on existing affordable housing needs". For the reasons set out above, in respect of ground 1, such a distinction is not justified on the facts in Tower Hamlets.

42. The SPG goes further than circular 6/98 or HSG 3 in setting out in some detail the financial calculations on which the developers' contribution to affordable housing is to be made. The "mechanics" of these calculations are the subject of ground 3 to which I turn.

43. Ground 3. The SPG was the subject of a report to members by the Council's Head of Built

Environment. The report explained the background and said that the officers adopted a sequential approach to the provision of affordable housing required by policy HSG 3. The first preference was for provision on the site. If that was not possible, a mix of on and off-site provision would be acceptable. Failing that, provision could be made off-site and, as a last resort, payment in lieu (a commuted sum) would be required. The policy in effect seeks a ratio of one affordable housing unit to three private housing units, whether on or off site, partially on or off-site or by commuted sum.

44. The applicants make the point that the basis on which the developers' financial contribution is calculated is the same under all four options. The Council's chief financial officer advised in paragraph 7.2.1 of the report:

45. "There are no direct financial implications arising out of this report, primarily because the Council is seeking, in most normal cases, affordable housing without resource to public subsidy or its own finances if possible. The policy seeks to maximise the number of affordable housing units produced by the private sector and is to be welcomed".

46. In conclusion, it was said in paragraph 11.1 that:

> "The purpose of this report and the attached appendices is to move towards a more consistent approach in order that Members, Officers, RSLs and Developers know what is expected of them and the kind of framework within which they should be working. The adoption of the draft SPG will also assist the public in understanding the approach applicable to planning decisions involving affordable housing provision. The draft SPG will hopefully enable all practitioners to apply the policy consistently whilst utilising the appropriate level of flexibility in each particular case."

47. The SPG is still a draft and will be the subject of a consultation process. It contains a considerable amount of background information relating to housing needs and policies in the Borough. It "seeks to help developers to interpret and apply" policy HSG 3 and ST 18 A. Dealing with what the applicant has described as "the mechanics", the SPG states as follows:

> "5.3.4The amount commuted payments will normally be expected to reflect the form of the finance necessary, i.e. total inclusive development cost, to fund the development of the 33 per cent equivalent of the principal development, minus an allowance for the private finance which will be serviced by the capped rental payments. The assumed development cost necessary to facilitate the notional affordable housing project will be drawn from the annual independently published total cost indicators of the housing corporation.
>
> 5.3.5 The precise sum sought by way of commuted payments will also depend upon the particular circumstances of the case, in particular the particular costs associated with development of the site and its residual planned value.

> 5.4.3 As referred to in paragraph 5.3.4 above, the developer's contribution towards affordable housing will normally be expected to reflect the total cost of the required affordable housing minus the capital element that can be serviced through the rents. In most cases the affordable housing units will contribute to the overall affordable housing provision in the Borough without recourse to public subsidy. However, because the final figure sought by way of developer's contribution will depend upon the merits of the particular case, it may be that part of the overall subsidy for the affordable housing development will come from public funds.
>
> 5.4.4 This approach is in line with housing corporation policy as detailed within circular F242/98 which states: 'The basic objective of developer contributions, whether or not the scheme also receives SHG funding, is to provide additional affordable housing, either directly or by reducing SHG requirement. In some cases where a developer provides affordable housing directly on site for sale to an RSL, the price will be set at the level where no SHG is required. Similarly, where a cash payment is made in lieu of affordable housing, either directly or via the local authority, the subsidy may be sufficient to avoid the need for SHG'."

48. Paragraph 5.8 deals with flexibility in planning policy. In summary, it is stated that "the Council will continue to apply the affordable housing policy to the merits and the circumstances of each planning application". Appendix 1 then sets out the "preferred method of financial calculation".

49. By way of background, it is explained:

> "In terms of the financial arrangements, the Council would wish the developer to provide the required amount of units/habitable rooms at a discount to allow an RSL to produce the affordable housing without external subsidy. The attached table shows the Council's preferred approach for achieving this".

50. Detailed calculations are then set out. The note states that "there is normally no public subsidy used in the production of the units". It would not be helpful to set out the detail of the calculation. In brief, they are based on the premise that the developer will normally be required to pay the full cost of providing the affordable housing minus the mortgage that the RSL would be able to obtain based on a rental stream. Thus the RSL will not have to seek SHG from housing corporation, nor would it have to utilise its own private resources to make up the difference between the total cost and the amount of SHG plus the value of the rental stream.

51. The applicant says that, if (which it disputes) affordable housing was appropriate on its site, it could offer the necessary land free of charge to an RSL and agree with the RSL to construct, or to make a contribution to the cost of construction of the appropriate number of units, leaving the RSL to seek assistance from the housing corporation by way of SHG and, if necessary, to use the RSL's own private resources to make up any difference. This would be in accordance with HSG 3. But the requirements of the SPG go further and, it is submitted, in so doing they are unlawful.

52. Mr. Lockhart-Mummery submitted that making land available and constructing units was attractive to RSLs He pointed to paragraph 5.3 in a report dated 1st December 1997 which had introduced members to the interim policy - the predecessor of the SPG:

> "The Borough has an affordable housing policy as conventional sources of funding for social housing is simply insufficient to meet the cost of meeting the level of need the Borough has. If they did the Borough could not justify its policy because there would be no need for it. The developers have on occasion suggested that if they provide the land for the affordable housing for free, and build the affordable housing at cost, then external public funding such as SHG should pay the remainder of the cost. RSL's have, perhaps not surprisingly, been amenable to this approach, probably because this kind of the deal is very competitive and they are more likely to succeed in gaining housing corporation approval. However, this argument misses the central point. The provision of affordable housing is a planning requirement which the developers are obliged to address. The availability or not of other public subsidy does not alter this point. Indeed the vast majority of SHG allocations are planned years in advance, and are therefore not well placed to help windfall affordable housing projects coming via the planning policy route".

53. Again this background, it was submitted that the SPG was not a material consideration because it failed to meet the first two of the three criteria set out by the House of Lords in Newbury District Council v The Secretary of State for the Environment (1989) AC 578 (see the speeches of Viscount Dilhome at pages 599 to 600 and Lord Scarman at pages 618 to 619). The normal preferred method of calculation did not serve a planning purpose because it did not relate to the character of the use of the land: (see per Lord Scarman at page 670, and Westminster City Council v Great Portland Estates Plc (1985) 1 AC 616); and was not fairly and reasonably related to the proposed development. If and in so far as there was any relationship, it was de minimis and should not be therefore taken into consideration: (see Tesco Stores Limited v The Secretary of State for the Environment (1995) 1 WLR 79 per Lord Keith at page 770).

54. This argument was not foreshadowed in either the original or the amended form 86A. In the applicant's written skeleton argument it was contended that:

55. "The imposition of full funding obligations on a windfall site with no specifically identified adverse impact on the community's need for affordable housing is contrary to the second and third tests of.....the Newbury requirements".

56. In reply, Mr. Kathowski accepted that if it was concluded that the "mechanics" of the SPG met the first two Newbury tests, there was no basis for a challenge, that they failed to meet the third, on the separate ground that they were Wednesbury unreasonable. It is important to appreciate the very limited focus of the challenge under ground 3 as it is now advanced. It is not suggested that the Council are not entitled to publish supplementary planning guidance which explains how policy

HSG 3 will be operated in practice so as to ensure that the aims of the policy are actually delivered on site. Such guidance is likely to be helpful to all those involved in the planning process, not least developers. It is accepted that such supplemental guidance may in principle include guidance as to the "mechanics" of the financial contributions that will normally be expected from developers. As a matter of common sense, that would be an aspect of policy of particular concern to developers.

57. Financial realities are not to be ignored when deciding whether a particular consideration serves a planning purpose and/or relates to a proposed development: (see for example R v South Northamptonshire District Council ex parte Crest Homes Limited (1994) 3 PLR 47, and R v Westminster City Council ex-parte Monahan (1990) 1 QB 87). It is common ground that, without some form of financial assistance from the developers of housing sites, affordable housing is unlikely to be provided in accordance with HSG 3. The sole issue is how much financial assistance can the SPG lawfully require from developers.

58. As I understand the applicant's position, it would not complain if the SPG's preferred method of financial contribution stated that the developer should normally make the site available and make good any shortfall between the cost of providing the units and the sums that could be raised by the RSL from SHG, from its own resources and from the rental stream. The applicant's essential complaint is that the SPG is going further by stating that normally the developer would be expected to place the RSL in a position where it will not need to use its own resources or seek SHG from the housing corporation, and is going beyond the bounds of what may be regarded as achieving a proper planning purpose relating to the character of the use of the land, and beyond the bounds of what may fairly and reasonably relate to any particular development. It is submitted that in seeking to save public subsidy (SHG) the Council is in effect levying an unlawful tax on the applicant: (see The Attorney General v Wilts United Dairies Limited (1922) 28 TLR 781 (HL)).

59. Given the late stage at which this way of putting ground 3 emerged, it is not surprising that there is relatively little evidence dealing with the point. There is no relevant evidence from the applicant. Paragraph 64 of Mr. Jones' evidence is as follows:

60. 64. There are four reasons why the SPG seeks a 100 per cent developer's contribution by way of commuted payment where affordable housing cannot be provided on or off site. First, an affordable housing scheme funded wholly from a developer's contribution can be built out quicker than a scheme which relies upon the need to secure public funding. Second, it avoids private borrowing by the RSL where the level of borrowing will be reflected in the rental levels charged for the development which tends to bring the resulting units outside the grasp of those in affordable

housing need. Third, whilst SHG from a housing corporation is in principle available as a form of public subsidy to RSL's, in practice there is not enough SHG to fund all existing affordable housing projects. The existing projects would themselves be prejudiced were SHG to be channeled towards funding of affordable housing secured pursuant to the SPG. Fourth, the absence of public subsidy enables the affordable housing to be kept as such in perpetuity because the statutory right to buy is normally confined to cases where a scheme has been funded in whole or in part by public (as opposed to private) funds.

61. 65. However, notwithstanding the above, the applicant is wrong to say that the SPG precludes the use of SHG either on its own in conjunction with private funding from a developer. For the reasons given above there is a strong preference for avoiding the use of SHG; as the SPG itself envisages, there may be circumstances in which the developer does not provide a 100 per cent contribution in which case the RSL will provide the remaining element of funding. This could involve the use of SHG."

62. In paragraph 66, Mr. Jones points out that the SPG, as non-statutory supplementary guidance, is of less weight as a planning consideration than the "superior" policies in HSG 3 of the Development Plan and in circular 6/98. In reply, Mr. Kathowski took issue with the four reasons advanced by Mr. Jones. He submitted that in seeking to reduce recourse to SHG, the Council was merely saving national funds which would be available for use nationally, not necessarily in Tower Hamlets. RSLs may be local, national or regional organisations, so saving their funds would not necessarily lead to them being able to provide more affordable housing in Tower Hamlets. Alternative requirements could be devised in agreement with RSL so that they would be obliged to replace affordable housing lost as a result of any exercise of the right to buy, assuming that suitable sites would be become available in Tower Hamlets.

63. These submissions may or may not be well founded. There is simply no evidence before me to underpin them. I have no evidence from the applicants as to the workings in practice of SHG or as to the nature and resources of RSL's operating or likely to operate in Tower Hamlets. I remind myself that it is not for the Council to persuade me that the precise method of preferred calculation (for that is all that is now in issue between the parties) is lawful. It is for the applicant to demonstrate that it is unlawful. That it has failed to do. When dealing with matters which necessarily involve a large measure of planning judgment, the court should be particularly wary of the dangers of proceeding on the basis of counsel's submissions alone without any relevant evidence. There is no evidence before me to cast doubt on the Council's contention that the preferred "mechanics" will produce cheaper (and thus more accessible to the residents of Tower

Hamlets), affordable housing, quicker and, most importantly, without prejudicing existing affordable housing projects. There would be little point in the Council adopting "mechanics" which merely robbed Peter to pay Paul in term of the resources available to RSL's. In the light of the Council's evidence, the applicants have not established that this element of the SHG fails the first two Newbury tests. I would add that even if there was evidence from the applicants disputing the Council's evidence on this aspect of the case, I am not persuaded that it would be appropriate for this court, dealing with an application for judicial review, to resolve such a dispute. That would be a matter pre-eminently within the province of a planning Inspector if planning permission was to be refused.

64. The financial calculation is described in the SPG as a "preferred method". The developer's contribution will "normally" be expected to be based on this preferred method. But the SHG expressly states that the affordable housing policy will be applied to the merits and circumstances of each planning application. I accept the applicant's submission that if a policy is fundamentally unlawful it will not be saved by the insertion of numerous references to 'normally' or to the need to have regard to individual circumstances. The position here is that the policy expressly admits of flexibility. The applicant and the Council are in disagreement as to what the "normal" policy relating to the mechanics of the developers financial contribution should be; what generally applicable policy would best meet the needs of the "normal" case in Tower Hamlets? That disagreement is essentially a factual one involving a substantial measure of planning judgment. To what extent are the contentions set out in Mr. Jones' paragraph 64 justified? If they are justified in "normal cases", to what extent is this site an exceptional case? These are precisely the kind of arguments which can and should be advanced before an Inspector at a planning inquiry if planning permission is refused. If the Council still adheres to its preferred method of calculation, the Secretary of State will then have the benefit of the Inspector's findings of fact as a basis on which he can decide whether the preferred method meets the first and second of the Newbury tests. His decision, on a properly informed factual basis, will then be open to challenge in the High Court if it is contended that he has erred in law.

65. In the circumstances, I find it unnecessary to deal with the broader submissions advanced by Mr. George relating to issues of relevance and materiality.

For the reasons set out above, I do not accept that the SPG is unlawful on any of the three grounds advanced by the applicant. It follows that the application must be dismissed. .

Dismissed with costs.

Permission to appeal refused.