**Appeals by Hodson Developments (Ashford) Limited and others**

**Against the non-determination by Ashford Borough Council and Kent County Council of s 106A applications**

**Appellants’ Submissions on whether viability can be relevant to the determination of section 106A applications and section 106B appeals**

1. These submissions explain why viability may be relevant to the ‘useful purpose’ test in section 106A. It is the response of the Appellants to the ABC Statement of Case para 4.12 to 4.17 and KCC’s Statement of Case para 37 to 51.

*The useful purpose test*

1. On a section 106A application the local planning authority may determine[[1]](#footnote-1):

“(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.”

1. There is no further statutory elucidation of the test. It has been seen as being wide, with the High Court suggesting that the purpose does not have to be a landuse planning purpose.[[2]](#footnote-2) The legislation does not import the legal tests for the determination of planning applications (TCPA s 70(2); PCPA 2004, s 38(6)) or for a planning obligation being a reason for granting planning permission (Community Infrastructure Levy Regulations 2010, reg 122(1)). That means though that ‘useful purpose’ is not constrained by other legislative approaches.
2. If an obligation renders a development incapable of being carried out or completed then the decision maker *may* conclude that it does not serve a useful purpose. The decision maker is entitled to take into account not only the benefits of the obligation being carried out, but the consequences of not being possible to do so and the effect that has on other desirable matters, including whether a planning permission can be carried out. Whether there is a ‘useful purpose’ is to be considered in the round: a payment required by a planning obligation may be used for a beneficial purpose, but if it means the development cannot afford other payments for more important objects then it could be that the requirement is not a useful purpose. If the requirement to make the payment means that the scheme does not proceed, then it could be said not to serve a useful purpose for two reasons: frustrating the scheme is not useful; and the payment would not be made, so the obligation will fail to achieve its purpose.
3. If an obligation (whether alone or in combination with other obligations) means that a scheme is not viable and so will not happen, then the decision maker is entitled to conclude that it does not serve a useful purpose. He is though not obliged to do so. It might be that the obligation is considered to be so important that the scheme should not proceed without it. That though is a matter of judgement.
4. The viability of a scheme, and the effect of an obligation and other obligations on viability, may therefore be relevant to whether an obligation serves a useful purpose.
5. The Councils’ submissions do not engage with the breadth of ‘useful purpose’ and the proposition that preventing approved development from taking place is not a useful purpose.

*Viability and the ability to carry out the approved development generally*

1. The approach above fits neatly into the broader legislative context. Viability is relevant to the terms of any planning conditions or planning obligations whether the scheme could proceed. Planning conditions must not nullify the permission granted[[3]](#footnote-3). It has long been recognised that the viability of a scheme may be relevant to a planning determination.[[4]](#footnote-4) The relevance of financial considerations generally, for example, enabling development, to whether planning permission should be granted is long accepted, see for example, *R v Westminster City Council, ex p Monahan[[5]](#footnote-5)* (the Royal Opera House case).
2. Viability is a component in deciding whether a planning obligation should be required. If an obligation would meet the CIL regulation 122 tests and so be necessary to make a development acceptable, the decision maker can still decide not to require it because the scheme would otherwise be unviable. There is no justification for viability to be relevant to whether a planning obligation is required in the first place but irrelevant (as a matter of law) when the modification or discharge of the obligation is being considered.

*The former section 106BA*

1. The former section 106BA provisions could have little bearing on the meaning of s 106A, since they are no longer part of the law. They could only be relevant if they reflected a consensus view[[6]](#footnote-6) of s 106A and, for present purposes, consistent with the Councils’ cases.
2. Given the limited caselaw on section 106A and the absence of any caselaw on viability and section 106A, section 106BA was not reflecting a settled understanding of the useful purpose test.
3. Section 106BA introduced two elements which were quite different to section 106A:
4. The absence of any minimum time before an application to amend could be made, rather than the five years under s 106A;
5. The introduction of a statutory test where viability *had* to override affordable housing: ‘If the affordable housing requirement means that the development is not economically viable, the authority must deal with the application in accordance with subsection (5) so that the development becomes economically viable,’ (s 106BA(3)(a)). That dealing would involve modifying or removing the affordable housing requirement to ensure viability (see s 106BA(5)).
6. Section 106BA therefore required affordable housing obligations to be discharged if the scheme would not be viable with those obligations or any modification of them. In contrast a decision maker applying the ’useful purpose’ test may conclude that an obligation is so important to the acceptability of the scheme that it must be retained and so serves a useful purpose, even if it renders the scheme unviable and so not likely to happen.

**Richard Harwood KC**

**Jonathan Darby**

**39 Essex Chambers, London**

**23rd December 2024**

1. Town and Country Planning Act 1990, s 106A(6). [↑](#footnote-ref-1)
2. See R (on the application of Renaissance Habitat Ltd) v West Berkshire Council[2011] EWHC 242 (Admin), [2011] JPL 1209 per Ouseley J at para 10, 11; *R (on the application of Mansfield District Council) v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 1794 (Admin), [2019] PTSR 540; the view of the Secretary of State in the now-cancelled Circular 05/05 was that ‘the expression "no longer serves any useful purpose" should be understood in landuse planning terms’ (para A20), but that does not need to be resolved in the present submissions. [↑](#footnote-ref-2)
3. See Kent County Council v Secretary of State for the Environment (1977) 33 P & CR 70. [↑](#footnote-ref-3)
4. See *Sosmo Trust v Secretary of State for the Environment* [1983] JPL 806. [↑](#footnote-ref-4)
5. [1990] 1 QB 87. [↑](#footnote-ref-5)
6. See *R(Hertfordshire County Council) v Secretary of State for Housing, Communities and Local Government (No 1)* [2021] EWHC 1093 (Admin) [2021] 1 WLR 3714 at para 88 (on remote attendance at council meetings). [↑](#footnote-ref-6)