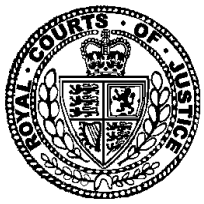

Neutral Citation Number: [2023] EWHC 1737 (Admin)

Case No: CO/1603/2022 AND CO/1594/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 July 2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE KING ON THE APPLICATION OF PEYTON DAVIS	**Claimant**
- and -	
OXFORD CITY COUNCIL	**Defendant**
-and-	
(1) MK DOGAR LIMITED **(2) OXFORDSHIRE CITY HOUSING (DEVELOPMENT) LIMITED** **(3) OXFORDSHIRE COUNTY COUNCIL**	**Interested Parties**

- -
- -

Reuben Taylor KC and Matthew Henderson (instructed by **BDB Pitmans LLP**) for the **Claimant**
Isabella Tafur (instructed by **Oxford City Council**) for the **Defendant**
Killian Garvey (instructed by **DAC Beachcroft LLP for First Interested Party**
The other Interested Parties did not appear and were not represented

Hearing dates: 1 February 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 11 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Julian Knowles:

Introduction

1. These are two conjoined claims for judicial review in which the Claimant challenges two decisions of the Defendant, Oxford City Council (OCC), to grant planning permission.

2. The first decision under challenge in CO/1603/2022 (hereafter, the First Claim) is the Council's decision on 25 March 2022 (the First Permission) to grant planning permission for the development of land at Hill View Farm, Mill Lane, Marston, Oxford (the First Development/the First Site) described as:

> "Demolition of existing buildings and construction of 159 dwellings, associated roads and infrastructure, drainage and landscaping"
>
> .

3. The second decision that is challenged, in CO/1594/2022 (the Second Claim), is the Council's decision, also on 25 March 2022 (the Second Permission), to grant planning permission for the development of land to the west of Mill Lane, Marston, Oxford (the Second Development/Second Site – also known as Almonds Farm) (which is adjacent to the First Site) described as:

> "Erection of 80 residential dwellings (use class C3) formed of 13 one-bedroom apartments and 28 two-, 35 three- and 4 four-bedroom houses with associated public open space, access and landscaping."

4. The two decisions were taken by the Defendant's Head of Planning Services in circumstances I will describe later. They followed resolutions the previous year of the Defendant's Planning Committee to approve the planning applications and to delegate certain matters to the Head of Planning Services, including the decision to issue the planning permissions.

5. By two Orders dated 20 June 2022, Mr Tim Smith (sitting as a Deputy High Court Judge) granted limited permission to proceed with both claims, namely on Grounds 3A and 3B in the First Claim, and Grounds 2A and 2B in the Second Claim. He ordered that the claims be consolidated/joined. In the event, only the Claimant, the Defendant and the First Interested Party (Dogar) (the Interested Party in CO/1603/2022 and the developer of the First Site) appeared at the hearing before me.

6. The grounds of challenge on which permission was granted are closely aligned, if not identical. They are as follows.

7. In the First Claim:

   a. Ground 3A: The Defendant failed to secure that the financial contributions made by the First Interested Party would be used to deliver the necessary and intended

highways and transport improvements. As a result, when the Defendant took those financial contributions into account, it took into account an immaterial consideration (Statement of Facts and Grounds, [3(i)].

b. Ground 3B: the Defendant failed to place the draft of the planning obligation on the planning register, in breach of Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) (the TMPO), and the Claimant was substantially prejudiced by this failure (Ibid, [3(ii)]).

8. The relevant part of Article 40 provides:

> "(2) Each local planning register authority must keep, in two parts, a register ('the register') of every application for planning permission relating to their area.
>
> (3) Part 1 of the register must contain in respect of each such application and any application for approval of reserved matters made in respect of an outline planning permission granted on such an application, made or sent to the local planning register authority and not finally disposed of—
>
> …
>
> (b) a copy (which may be photographic or in electronic form) of any planning obligation or section 278 agreement proposed or entered into in connection with the application;"

9. In the Second Claim the grounds are:

a. Ground 2A: there was a failure by the Defendant to secure necessary transport improvements (Statement of Facts and Grounds, [41] et seq).

b. Ground 2B: breach of Article 40(3)(b) of the DMPO (Ibid, [47] et seq).

Background

The parties

10. The Claimant lives in the village of Old Marston near Oxford, proximate to both Sites. The Claimant submitted detailed objections to both applications which are the subject of the challenged decisions. Those objections were supported by a range of professional reports. As part of the Claimant's objection on transport grounds, the Claimant contended that both developments would not promote safe, convenient and sustainable travel as required by Policy M1 of the Oxford Local Plan..

11. The Defendant is the local planning authority for the area in which both sites are situated.

12. Oxfordshire County Council (the County Council) is the local highways authority for the relevant area.

13. The First Interested Party (Dogar) applied to the Defendant on 30 November 2020 for planning permission for the First Development.

14. Oxford City Housing (Development) Limited (City Housing) is wholly owned by the Defendant. It applied to the Defendant on 29 April 2021 for planning permission for the Second Development.

The First Permission

15. The Defendant's Planning Committee (the Committee) met to consider Dogar's application on 26 May 2021. The Committee was provided with a report on the application from the Defendant's planning officers (OR1).

16. The Executive Summary to OR1 states at [2.7]:

> "The proposals also give priority to cycle access through the site and across the surrounding area. This includes the provision of a new pedestrian/cycle 'greenway' through the centre of the site and enhanced connections to the A40 cycle route to the north and along Mill Lane through the creation of a new cycle street. Financial contributions would also be sought at the request of the County Council towards the upgrade of Back Lane, a local pedestrian route and towards improving local bus services through Old Marston which would be secured through a Section 106 agreement to accord with Policy M1 of the Oxford Local Plan."

17. The First Site is described at OR1, [5.1] – [5.10]. This records *inter alia* that it is 'located on the urban periphery of Oxford'.

18. The final consultation response from the County Council is summarised at OR1, [9.4]. So far as relevant, this states:

> "A revised consultation response was submitted on 26th March 2021 raising no objection to the development. The key points from the consultation response are summarised below:
>
> …
>
> • Cycle street – An updated plan of the Mill Lane cycle street scheme which now includes double yellow lines has been presented. Although it was earlier presumed that the development shall contribute towards an area wide CPZ scheme covering Old Marston, this is no longer the case. Therefore, a proportional contribution shall be sought towards the cycle street scheme only which will be delivered by the County Council.
> • Discussions have been held between the County Council and the applicant's transport consultant on off-site improvements to the walking/cycle route between the development and Marston Ferry Road. This is in recognition that beyond the extent of the proposed cycle street, cyclists would then have to continue along Mill Lane across the s-bend to join Oxford Road en-route to Marston Ferry Road. Oxford Road is notable for "rat runners" from the A40 via Elsfield Road and a combination of street parking along

narrow carriageways would make an uncomfortable environment for active travel especially during peak periods.

- Access to facilities on the other side of Marston Ferry Road is considered to be very important, particularly as they are where the nearest schools and leisure facilities are located. It is recommended that improvements to the Back Lane bridleway (294/8) is a viable option that needs to be delivered jointly by both the allocated SP25 and SP26 developments. Proportional contributions from these sites shall be secured via a s106 obligation towards a scheme that will improve the existing route. This would be of great benefit to residents of the site by increasing accessibility and reducing walking and cycling journey distances and time along a route considered to be relatively safer. […]' (emphasis added)."

19. OR1, [3.1] stated that the Application would be the subject of a legal agreement, (known as a s 106 agreement (of the Town and Country Planning Act 1990)) to cover a range of matters, including: (a) a financial contribution by the developer of £195,183 towards improvement of bus services in Old Marston to provide an enhanced evening and Sunday service; (b) a financial contribution of £13,368 towards installation of premium route pole and timetable cases at bus stops in Elsfield Road, with Real Time Passenger Information screens; (c) a Travel Plan monitoring fee of £1,426; (d) a financial contribution of £250,550 towards implementation of Mill Lane cycle street; and (e) a financial contribution of £57,756.75 towards improvements to Back Lane bridleway. These contributions were discussed in OR1 under the subheading 'Transport' at OR1, [10.93] – [10.132].

20. In summary, in very broad terms, OR1 concluded that these contributions were all necessary to render the Development acceptable and in accordance with Policy M1 of the Oxford Local Plan. For example, OR1 [10.117] stated:

> 'It is recognised that the site lies within a peripheral location in relation to local public transport links and local services and facilities. It is therefore correct that provision is made towards improving the sustainability of the site in line with Policy M1 of the Oxford Local Plan. This includes localised improvements to cycle and pedestrian infrastructure and public transport.'

21. At OR1, [10.118], it was said:

> '[…] improving the frequency of the 14A service which is the dedicated bus route serving Old Marston should be a priority in terms of improving future residents' access to public transport and enhancing the overall sustainability of the site.'

22. At OR1, [10.26]:

> "Officers consider that the addition of the cycle street would be a positive measure, which would improve cycle infrastructure for residents of the new development, in addition to existing residents in Old Marston. The addition

of the cycle street would also serve to reduce vehicles speeds along Mill Lane and increase driver awareness of cyclists. The requested financial contribution would be proportioned to the scale of the development proposed on the application, and a proportionate contribution would also be sought from the development on Land to the West of Mill Lane."

23. And at OR1, [10.131 – 10.132]:

> "Overall officers consider that there would be localised access benefits arising from the upgrade of Back Lane. The resurfacing of the route would provide a useable traffic free route linking the sites at Hill View Farm and Mill Lane, as well as existing housing with the Swan School, St Nicholas School, local services in Marston and further pedestrian and cycle routes beyond, including access into remaining Green Belt land.
>
> Through the design of the development and appropriate planning obligations which would secure the provision of the new cycle street and improvements to existing public rights of way, officers consider that the development would comply with Policy M1 of the Oxford Local Plan."

24. The officers' recommendation to the Planning Committee was for it to delegate authority to the Head of Planning Services to grant planning permission subject to conditions for which authority was delegated. The recommendation was:

> **"1. Recommendation**
>
> 1.1 The Planning Committee is recommended to:
>
> 1.1.1 approve the application for the reasons given in the report and subject to the required planning conditions set out in section 12 of the report and grant planning permission subject to:
>
> - The satisfactory completion of a legal agreement under s 106 of the Town and Country Planning Act 1990 and other enabling powers to secure the planning obligations set out in the recommended heads of terms which are set out in this report; and
>
> 1.1.2 **agree to delegate authority** to the Head of Planning Services to:
>
> - Finalise the recommended conditions as set out in this report including such refinements, amendments, additions and/or deletions as the Head of Planning Services considers reasonably necessary; and
>
> - Finalise the recommended legal agreement under section 106 of the Town and Country Planning Act 1990 and other enabling powers as set out in this report, including refining, adding to, amending and/or

deleting the obligations detailed in the heads of terms set out in this report (including to dovetail with and where appropriate, reinforce the final conditions and informatives to be attached to the planning permission) as the Head of Planning Services considers reasonably necessary

- Complete the section 106 legal agreement referred to above and issue the planning permission."

25. The minutes of the Planning Committee meeting of 26 May 2021 record the Committee's resolution as follows:

> "The Committee asked questions of the officers about the details of the application.
>
> In discussion the Committee considered various issues including: traffic flows, road safety and parking measures; the provision of local and affordable amenities; biodiversity net gain; flooding and surface water drainage.
>
> The Committee explored in some detail the Oxfordshire County Council's proposals for the Mill Lane Cycle street and improvements to Back Lane bridleway which would be secured through the legal agreement. The Committee noted that these were the preferred options and if, as a result of detailed planning, it was established that it was not possible to deliver these specific proposals then alternatives could be considered. Planning Officers and the Planning Lawyer confirmed that it would be possible and reasonable for the section 106 legal agreement to be worded with sufficient flexibility to allow the funding to be re-allocated to alternative schemes which met the aim of improving active travel to and from the development and which provided localised improvements to pedestrian and cycle infrastructure.
>
> In reaching its decision, the Committee considered all the information put before it.
>
> A proposal to defer the application was moved and seconded.
>
> A proposal to approve the officer's recommendation with the wording of the section 106 legal agreement to provide for the Mill Lane Cycle street funding and the Back Lane bridleway improvement funding to be re-allocated if necessary to alternative schemes as referred to above was moved and seconded. This motion was voted on first as an amendment to the proposed deferral.
>
> On being put to the vote this amendment was carried and became the substantive motion before the Committee.

On being put to the vote, the Committee agreed the substantive motion to approve the application, in line with the officer's recommendation, subject to the revision of the wording of the section 106 legal agreement as referred to above.

"**The Oxford City Planning Committee resolved to:**

1. approve the application for the reasons given in the report and subject to the required planning conditions set out in section 12 of the report and grant planning permission subject to:

- The satisfactory completion of a legal agreement under section106 of the Town and Country Planning Act 1990 and other enabling powers to secure the planning obligations set out in the recommended heads of terms which are set out in the report and subject to the amendment detailed above.

2. delegate authority to the Head of Planning Services to:

- Finalise the recommended conditions as set out in the report including such refinements, amendments, additions and/or deletions as the Head of Planning Services considers reasonably necessary; and

- Finalise the recommended legal agreement under section 106 of the Town and Country Planning Act 1990 and other enabling powers as set out in the report, including refining, adding to, amending and/or deleting the obligations detailed in the heads of terms set out in the report and as amended at the committee and referred to above (including to dovetail with and where appropriate, reinforce the final conditions and informatives to be attached to the planning permission) as the Head of Planning Services considers reasonably necessary; and

- Complete the section 106 legal agreement referred to above and issue the planning permission."

26. The Claimant submits on the basis of this material that the Defendant's reasons for granting planning permission included a conclusion that the planning obligation would secure the delivery of the Cycle street and the Back Lane bridleway improvements or the delivery of alternative schemes which meet the aim of improving active travel to and from the proposed development and which delivered localised improvements to pedestrian and cycle infrastructure. It was only the conclusion that improvements would be *delivered* that enabled the Defendant to conclude that the proposed development would accord with Policy M1 of the Local Plan.

27. I will need to say more later about the exact decision taken by the Defendant.

28. On 25 March 2022 the Defendant, the County Council and Dogar executed an agreement (the First s 106 Agreement) pursuant *inter alia* to s 106 of the TCPA 1990.

29. Section 106(1), (2) and (3) provide:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A as "a planning obligation"), enforceable to the extent mentioned in subsection (3) -
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority ... on a specified date or dates or periodically.
>
> …
> (2) A planning obligation may—
>
> (a) be unconditional or subject to conditions;
>
> (b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and
>
> (c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period."
>
> (3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d) -
>
> (a) against the person entering into the obligation; and
>
> (b) against any person deriving title from that person."

30. The key parts of the First s 106 Agreement are as follows.

31. Pursuant to clause 3.2, Dogar covenanted:

> "to observe and perform and cause to be observed and performed the obligations and restrictions contained in Schedules 3 and 4".

32. In turn, pursuant to [2.1] of Sch 3, Dogar covenanted to pay a series of contributions to the County Council as follows:

> "To pay the Highway Infrastructure Improvement Contribution the Public Rights of Way Contribution the Public Transport Infrastructure Contribution the Public Transport Services

> Contribution and the Travel Plan Contribution to the County Council on or before first Occupation of the first Dwelling to be Occupied until the Highway Infrastructure Improvement Contribution the Public Rights of Way Contribution the Public Transport Infrastructure Contribution the Public Transport Services Contribution and the Travel Plan Contribution have been paid to the County Council." [CB/445]

33. The various contributions referred to in this covenant were defined in the preceding paragraphs of Sch 3. The definitions include the purpose to which the contributions are to be put. For example, in [1.1] of Sch 3 the 'Highway Infrastructure Improvement Contribution' is defined as being a contribution 'towards the costs of implementing the Mill Lane cycle street scheme'.

34. The First s 106 Agreement did not contain any covenants on the part of the County Council to carry out the works. However, following the commencement of these proceedings, the Defendant filed an executed deed of variation with its Summary Grounds of Resistance in which the County Council covenanted that it would not apply any of the financial contributions made pursuant to the First s 106 Agreement for any purpose other than the identified purposes, 'or any alternative which achieves similar benefits in such form and at such time as the County Council shall in its discretion decide'.

35. It is the Claimant's case that neither the First s 106 Agreement, nor the deed of variation, were made available in draft form to the public at any stage. The Claimant says he was not aware of its terms prior to its execution and thus was not afforded any opportunity to provide his views on its content. It said this renders the planning decision unlawful. This argument underpins Grounds 2B and 3B.

The Second Permission

36. The Defendant's Planning Committee met to consider the application by City Housing on 12 October 2021. The Committee was provided with a report on the application from one of the Defendant's officers (OR2).

37. The Executive Summary of OR2 considered the sustainability of the Site at [2.5] – [2.6]:

> "2.5. It is accepted that the application site is in a less sustainable location in the city in terms of access to public transport and existing services and facilities.
>
> 2.6. Improving access for future residents to sustainable means of travel is considered important and financial contributions are sought towards increasing the frequency of bus services in Old Marston. Measures to improve access by walking and cycling are also sought, this includes the works to form a cycle street along Mill Lane and contributions sought to improve Back Lane, the existing public right of way leading between Mill Lane and Marston Ferry Road. These measures which would be secured by a Section 106 Agreement would improve the sustainability of access to the site in accordance with Policy M1 of the Oxford Local Plan."

38. The final consultation response from the County Council as local highways authority was summarised at OR2, [9.4]. Its response was similar to the consultation response in OR1. This summary records the request by the County Council for five financial contributions: (a) 'Highway works' contribution for '[the] cost of implementing the proposed Mill Lane cycle street scheme'; (b) 'public transport services' contribution for 'improvement of bus services in Old Marston for an enhanced evening and Sunday service on route 14A for a period of 5 years'; (c) 'Public transport infrastructure' contribution for 'installation of a Premium route pole, flag and timetable case at both stops by St Nicholas Church with Real Time Passenger Information screens'; (d) 'Travel Plan monitoring' contribution; and (e) 'Public Rights of Way' contribution for 'improvements to the Back Lane bridleway .

39. OR2, [3.1], stated that the Application would be subject to a legal agreement (viz, one under s 106) to secure the contributions sought by the County Council. These contributions were also discussed under the subheading 'Transport' at OR2, [10.72] – [10.105].

40. At OR2, [10.74], the location of the Site and its relationship to services and facilities were described:

> "The application site lies in a peripheral location on the edge of the city and is relatively distant from existing services and facilities. The nearest supermarket (Co-operative) is located approximately 1.4km away at the Marston neighbourhood centre at Cherwell Drive. The nearest District Centre is Summertown, which is approximately 3km from the site accounting for hard surfaced walking and cycling routes, reduced to 2km when accounting for existing public rights of way to the south of the site adjacent to the Victoria Arms, leading to Marston Ferry Road, though this route is not properly surfaced."

41. At OR2, [10.93] the need for public transport improvements was recognised:

> "It is recognised that the site lies within a peripheral location in relation to local public transport links and local services and facilities. It is therefore correct that provision is made towards improving the sustainability of the site in line with Policy M1 of the Oxford Local Plan. This includes localised improvements to cycle and pedestrian infrastructure and public transport."

42. The financial contribution towards bus service improvements was discussed at OR2, [10.94]-[10.97}:

> "10.94. The 14A bus service currently serves Old Marston. The nearest bus stops are located around 650 metres from the site entrance on Elsfield Road and provides services to the City Centre and John Radcliffe Hospital. The nearest bus stops on Cherwell Drive benefitting from more frequent service are located 1.2km from the site entrance and it would be less feasible that residents would use the bus stops on Cherwell Drive given this distance. Taking this into consideration improving the frequency of the 14A service which is the dedicated bus route serving Old

> Marston should be a priority in terms of improving future residents' access to public transport and enhancing the overall sustainability of the site. […]
>
> 10.96. Because of the relative inaccessibility of effective public transport services at the site location, a financial contribution is required towards the improvement of bus services in Old Marston. […]
>
> 10.97. […] These contributions shall be secured though a Section 106 Agreement. Securing additional financial contributions towards improving the frequency of bus services into Old Marston would improve the sustainability of access to the site, thereby reducing dependence on private car use in accordance with policy M1 of the Oxford Local Plan and the NPPF [National Planning Policy Framework]."

43. The financial contribution towards the cycle street scheme was discussed at OR2, [10.99]:

> 'Oxfordshire County Council have recommended that Mill Lane should be upgraded to a 'cycle street'. The 'cycle street' would consist of a centralised section of block paving with adjoining cycle lanes in both directions with the intention of reducing vehicle speeds, discouraging overtaking and giving priority to cyclists. A financial contribution of £131,094.40 is sought towards the implementation of the cycle street. An outline design for this was provided alongside the planning application on the adjoining site at Hill View Farm, though the design specifics of the cycle street would be determined by the County Council and the works would be carried out by the County Council, rather than by either developer. […]'

44. The financial contribution towards the improvement of the Back Lane bridleway was discussed at OR2, [10.101] – [10.102]:

> "10.101. … Discussions have taken place with Oxfordshire County Council regarding localised improvements to pedestrian and cycle infrastructure. The County Council have identified a preference for improvement works to Back Lane, a public bridleway (294/8). Back Lane is currently an unsurfaced track which leads from Mill Lane to the south of the S bend to Marston Ferry Road. Back Lane provides a route between Mill Lane and St Nicholas Primary School and the Swan School and offers the opportunity to provide a traffic free route for walkers and cyclists, which links with other pedestrian and cycle routes in the area.
>
> 10.102. The County have suggested that works required to upgrade Back Lane would include vegetation clearance to facilitate machinery access, drainage including the creation and digging out of the current ditch network,

> excavation of path tray and subbase surfacing. The total costs of these improvement works would be £57,756.75. A financial contribution towards these works would be sought through a Section 106 Agreement, this is proportionate to the scale of the proposed development, whilst a contribution would also be sought from the adjoining site."

45. OR2, [10.105] concluded:

> "Through the design of the development and appropriate planning obligations which would secure the provision of the new cycle street and improvements to existing public rights of way, officers consider that the development would comply with Policy M1 of the Oxford Local Plan as the development would through a legal agreement deliver notable improvements to pedestrian, cycle and public transport infrastructure."

46. The officers' recommendation was in materially similar terms to their recommendation for the First Site; I need not set it out. Again, it recommended delegation to the Head of Planning Services.

47. The Planning Committee met on 12 October 2021 to consider this second application. After considering OR2, the Committee resolved to approve the application and thus to grant planning permission for the Second Development (subject to the delegation it set out).

48. The minutes record the Committee's resolution in the following material terms (which are similar to the First Decision):

> "The Committee asked questions of the officers about the details of the application. The Committee noted that this application raised the same issues regarding traffic flows, road safety, parking and cycle paths which had been discussed and debated in relation to a separate, but adjacent, application at the meeting on 26 May 2021.
>
> The Committee indicated that they would like a dialogue to be re-opened with Oxfordshire County Council to explore the possibility of creating access via the A40. Planning Officers explained that such a condition or informative would not be considered reasonable. It was a matter for the City Council to take forward through other channels.
>
> In reaching its decision, the Committee considered all the information put before it. The Committee concluded that, on balance, the public benefits identified in the report outweighed their concerns about the traffic issues.
>
> After debate and on being proposed, seconded and put to the vote, the Committee agreed with the officer's recommendation to approve the application, subject to the provision that the section 106 legal agreement allows

sufficient flexibility for the financial contribution, which was allocated to be spent on improvements to Back Lane to be spent on alternative improvements to other public rights of way or pedestrian and cycle infrastructure in the immediate area where this is considered to be appropriate

The Oxford City Planning Committee resolved to:

1. Approve the application for the reasons given in the report and subject to the required planning conditions set out in section 12 of the report and grant planning permission subject to:

- The satisfactory completion of a legal agreement under section106 of the Town and Country Planning Act 1990 and other enabling powers to secure the planning obligations set out in the recommended heads of terms which are set out in the report and subject to the amendment detailed above regarding funding for enhancements to public rights of way and/or cycle infrastructure in the area.

2. delegate authority to the Head of Planning Services to:

- Finalise the recommended conditions as set out in the report including such refinements, amendments, additions and/or deletions as the Head of Planning Services considers reasonably necessary; and

- Finalise the recommended legal agreement under section 106 of the Town and Country Planning Act 1990 and other enabling powers as set out in the report, including refining, adding to, amending and/or deleting the obligations detailed in the heads of terms set out in this report (including to dovetail with and where appropriate, reinforce the final conditions and informatives to be attached to the planning permission) as the Head of Planning Services considers reasonably necessary; and
- Complete the section 106 legal agreement referred to above and issue the planning permission."

49. The Claimant submits that, again, the Defendant's reasons for granting planning permission included a conclusion that the planning obligation would secure the delivery of the Cycle street and the Back Lane bridleway improvements or the delivery of alternative schemes which meet the aim of improving active travel to and from the proposed development and which delivered localised improvements to pedestrian and cycle infrastructure – and not just the payment of money towards them. It was only the conclusion that improvements would be delivered that enable the Defendant to

conclude that the proposed development would accord with Policy M1 of the Local Plan.

50. On 25 March 2022 the Defendant, the County Council and City Housing executed an agreement (the Second s 106 Agreement). Pursuant to clause 3.1, City Housing covenanted with the County Council, 'to observe and perform and cause to be observed and performed the obligations and restrictions contained in Schedule 2 and Schedule 3'.

51. In turn, pursuant to [1] of Sch 3, City Housing covenanted to pay a series of contributions to the County Council as follows:

> "Not to cause or permit the Occupation of any Dwelling until the Highway Infrastructure Improvement Contribution, the Bus Services Contribution, the Bus Infrastructure Contribution, the Public Rights of Way Contribution and the Travel Plan Monitoring Gee have been paid to the County Council and to pay the Highway Infrastructure Contribution, the Bus Services Contribution, the Bus Infrastructure Contribution, the Public Rights of Way Contribution and the Travel Plan Monitoring Fee to the County Council before first Occupation of any dwelling." [CB/151]

52. The various contributions referred to in this covenant were defined in clause 1.1 of the Second s 106 Agreement. The definitions included the purpose to which the contribution is to be put, aligning with the contributions discussed in OR2.

53. At clause 3.4 of the Second s 106 Agreement the County Council covenanted that 'it will not apply any County Contribution for any purpose other than identified in the definition of the relevant County Contribution or any alternative which achieves similar benefits in such form and at such time as the County Council shall in its discretion decide'. (The inclusion of this clause, which did not appear in the First s 106 Agreement meant that there was no need for a separate deed).

54. At clause 13.1 of the Second s 106 Agreement the County Council covenanted with the Defendant to pursue any default in compliance with the terms of Sch 2 to the Second s 106 Agreement at the request of the Defendant, but subject to a number of provisos, including the absence of disagreement between the County Council and the Defendant as to whether enforcement action should be taken [CB/146].

55. The Second s 106 Agreement of itself was not made available in draft form to the public. Again, this is part of the complaint underpinning Grounds 2B and 3B.

The City Council's planning policy

56. Policy M1 of the Defendant's Local Plan is concerned with prioritising walking, cycling and public transport. Policy M1 expresses its overarching requirement at the outset:

> 'Planning permission will only be granted for development that minimises the need to travel and is laid out and designed in a way that prioritises access by walking, cycling and public transport.' [CB/187 – 189]

57. Policy M1 then goes on to make specific provision for different forms of sustainable travel. This includes a requirement in (b) that:

> "Proposals shall […] make improvements to the pedestrian environment'

and a requirement in (d) that development

> "provides for connected, high quality, convenient and safe (segregated where possible) cycle routes within developments and the wider networks that are permeable and can accommodate the anticipated growth in cycling".

The County Council's evidence

58. The Defendant relies on evidence from Mr Rashid Bbosa, one of the County Council's Senior Transport Planners, in respect of both claims.

59. Mr Bbosa has made two witness statements, one in each claim. His evidence in each is materially similar. He makes clear that the County Council has legally undertaken not to spend the contributions required pursuant to s 106 Agreements 'for any purpose other than those identified in the definition of the relevant contribution or any alternative that achieves similar benefits' (see, eg, witness statement of 27 May 2022 in CO/1592/2022 at [5]).

60. He went on:

> "6. The County Council is not able to go further than this through a s 106 agreement to deliver the works for which contributions are sought. The reason for this is that any capital spend has to go through the County Council's capital programme and the County Council's spending protocol'.

61. He then went on to give further details of the County Council's spending protocol.

Legal framework

Principles on which the Planning Court will act

62. In *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452 Lindblom LJ summarised at [42] the principles on which the court will act when criticism is made of a planning officer's report to committee:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] EGCS 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286,

at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

Material and immaterial considerations in the determination of planning applications

63. Pursuant to s 70(2) TCPA 1990:

> "in dealing with an application for planning permission, … the [local planning] authority shall have regard to […] the provisions of the development plan so far as material to the application […] [and] any other material considerations".

64. On ordinary public law principles, where a decision maker has taken a legally irrelevant factor into account when making his decision, the normal rule is that the decision is liable to be held to be invalid unless the factor play no significant part in the decision-making exercise: *R (FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444 per Lord Neuberger MR at [67]. Demonstrating that the decision should stand in such circumstances is a high bar: ibid at [81].

65. Whether a matter is a material consideration is a question of law: *R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562 at [42].

The Development Management Procedure Order (DMPO)

66. I set out Article 40(3)(b) of the DMPO earlier. In brief, it requires that a draft of any planning obligation must be placed on the planning register so that third parties can comment upon it. An example of such an obligation is a s 106 agreement.

67. In *R (Midcounties Cooperative Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin), Ouseley J held that this provision meant that at least one draft as well as the final version of a planning obligation should be made available on the planning register at [83], [89] – [91]:

> "83. Mr Holgate contended that the District Council failed to comply with its statutory obligation to make available to the claimant, as an objecting member of the public, draft and final versions of the section 106 agreement entered into between it and Tesco/Santon. The statutory requirements are contained in the Town and Country Planning (General Development Procedure) Order 1995 SI 1995/419 as amended. Article 25(3) provides:
>
> "Part 1 of the register shall contain in respect of each such application ...
>
> (b) a copy ... of any planning obligation or section 278 agreement proposed or entered into in connection with the application."
>
> …
>
> 89. Although it is a question of judgment for the local planning authority, I would accept, as to when a new draft requires such public disclosure, no such judgment was exercised here at all. Whilst I can understand how parties engaged in negotiations may find it irritating to receive

comments from an objector on the section 106 agreement which they are endeavouring to negotiate, that does not absolve the District Council from its obligations and is not the spirit in which its statutory obligations should be approached.

90. The section 106 agreement is not a private agreement to be revealed only when it is concluded, any more than conditions are a matter exclusively for private negotiation and debate, to the exclusion of the public. I accept there may be room for debate as to whether every draft needs to be registered for the terms and purpose of the legislation to be complied with, although all significant changes should be. I do not rule out that there may be some parts of the draft which may involve negotiations akin to without prejudice negotiations which for a while it may be legitimate not to publicise. I recognise that a new draft does not come into existence with each change made by an officer for his own internal purposes before it is sent out to the other side, where undoubtedly it would become a new draft. Not every proposed change to a clause may create a new draft, but for all that the judgment which the District Council is required to exercise is one which is intended to enable public participation and comment on a draft before it is set and executed. It is a question of judgment which must be exercised with the purpose of the statute in mind.

91. It is clear here that compliance with the statutory obligation would have required not just the heads of terms, but at least one draft, as well as the final version of the section 106 agreement, to be placed on the register as a means of making it publicly available. In my judgment, the statutory requirements of the GPDO were not met.

…

94. The question of whether what the District Council did or omitted to do involved any procedural unfairness is however closely bound up with the question of whether there was any actual prejudice to the claimant. In the absence of some prejudice, there is in general no procedural unfairness because there is no such concept as a technical breach of natural justice. This was explained, for example, in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1595B to C by Lord Wilberforce. He said:

> ‘The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him

> a remedy in the courts, unless behind it there is something of substance which has been lost by the failure.'"

68. At [116] he concluded:

> "In those circumstances I am satisfied that the claimant has suffered no prejudice at all in the breach of statutory duty and the legitimate expectation created by the Circular, and has suffered no substantive unfairness. Insofar as it becomes a matter of discretion because of the breach of duty rather than an assessment of substantive fairness, I decline in the exercise of my residual discretion to quash the permission. *Midcounties* has not shown that it would have anything to say on the detail of the agreement for consideration by the Council. Quashing the permission for nothing to be reconsidered would be pointless."

69. It is therefore clear that a breach of Article 40(3)(b) will not *of itself* result in a subsequent planning decision being quashed. The claimant is required to show how he was prejudiced by the breach.

Submissions

.

The Claimant's case

70. In relation to Grounds 2A and 3A (alleged failure to secure the necessary transport improvements), the Claimant's argument was, in essence, that the Defendant's officers in the two ORs concluded that financial contributions to *secure* highways and public transports improvements were necessary to make both developments acceptable in planning terms: see, for example, OR1, [2.7], [10.117], [10.119], [10.121], [10.126], [10.131] and [10.132]; and OR2 [2.6], [10.93], [10.95], [10.97], [10.102], [10.103] and [10.105]. Further, the Defendant took those contributions, and their effect once the works for which they were to pay, were carried out into account when granting planning permission, in particular as the basis for concluding that both developments complied with Policy M1 of the Local Plan.

71. It was submitted that neither OR1 nor OR2 considered whether the developments would be acceptable without the delivery of the transport improvements that the financial contributions are to fund. In other words, the argument was that the Planning Committee acted under a misapprehension because it is for the County Council to deliver the works and that has not been secured; pursuant to the s 106 Agreements, only financial contributions have been secured.

72. Accordingly, the Claimant's argument was that (Skeleton Argument, [54]):

> "… the sole basis on which officers recommended approval and on which members granted planning permission in both cases was that the transport improvements would in fact be delivered."

73. This was amplified orally by Mr Taylor KC for the Claimant as follows:

> "The City Council took a decision to grant permission on the basis that we have seen that financial contributions

> would be made and that they would be used to deliver improvements. In essence, because the planning obligations do not include a commit to delivery, it erred in law."

74. The Claimant said it was difficult to see how a commitment to receive monies only (without delivery) could either: (a) reflect the reasoned basis on which he says the Defendant granted planning permission; (b) result in a rational conclusion that Policy M1 would be complied with; or (c) result in a planning obligation which rationally could be considered to be necessary to make the development acceptable in planning terms.

75. The argument was put in various way including, for example, that the Defendant took into account an irrelevant consideration because it assumed that the planning obligation would deliver transport improvements in circumstances where the delivery of the transport improvements had not been secured in any way (because it was for the County Council to deliver the works, over which the Defendant has no control).

76. The payments can be made by the developer, the houses built out and then no transport improvements can come forward, with no means for the Defendant to take enforcement action to require their delivery either on a timescale or at all (Skeleton Argument, [60]).

77. The same factual underpinning was also argued to have led the Council into irrationality (Skeleton Argument, [61]). It was said that it was irrational for the Defendant to grant planning permission on the basis that transport improvements would be delivered without any obligation on any party to deliver them.

78. In summary, therefore, it was argued that the Defendant erred in law in both cases by granting planning permission without ensuring the delivery of the transport improvements on a timescale consistent with the delivery of the housing or at all.

79. In relation to Grounds 2B and 3B (alleged breach of Article 40(3)(b) of the DMPO), the Claimant's argument was straightforward. The Defendant did not publish either of the s 106 Agreements in draft before their execution and grant of planning permission; it therefore failed to comply with the mandatory requirements of Article 40(3)(b); and the grants of planning permission are (and were) accordingly unlawful.

80. The Claimant is said to have been substantially prejudiced by the breach of the DMPO because he was denied the opportunity to comment on the Agreements, for example to comment on the absence of any obligation on the County Council to deliver the necessary improvements.

The Defendant's case

81. In response, Ms Tafur for the Defendant submitted as follows.

82. In relation to Grounds 2A and 3A, the Claimant's argument, in essence, is that the Defendant's reasons for granting permission, as recorded in the ORs, included a conclusion that the planning obligations would 'secure' the delivery of the cycle street on Mill Lane and the improvements to the Back Lane bridleway. She said this amounts to an allegation that the ORs mislead the Planning Committee into believing that the s 106 obligations would secure not only the transport contributions, but also the *delivery* of the transport improvement works.

83. However, Ms Tafur said that given that the Committee delegated authority to the Head of Planning Services in both cases to conclude the s 106 Agreements and to refine, add to, amend or delete the obligations detailed in the heads of terms in the ORs, and it was he who granted planning permission for both Sites on 25 March 2022 having concluded the s 106 agreements, 'it is difficult to see how the argument can be sustained that members determined the application on the basis that the cycle street and bridleway improvements would be secured through the obligations' (Skeleton Argument, [48]).

84. The ORs did not materially mislead members of the committee into believing that the s.106 obligations would secure the delivery of the Mill Lane cycle street or Back Lane bridleway improvement. Rather, they made it clear that the obligations would secure contributions towards certain transport improvements contemplated by the County Council.

85. Ms Tafur put it orally as follows:

> **"**So, far from any suggestion that members only resolve[d] to grant planning permission on the basis that Back Lane and Mill Lane works were carried out, one sees firstly that they sought to include additional flexibility in the obligation to allow those funds to be directed elsewhere and, secondly, that they were content to delegate authority to their officer to add to, amend, refine and delete any of the heads of terms identified in the Officers' Report in any way he considered to be reasonably necessary.
>
> So, in my submission, it is clear from the resolution that members did not grant planning permission only on the proviso that the delivery of the Mill Lane and Back Lane works or alternatives that the delivery would be secured by the s 106 agreement.
>
> …
>
> I say that when the Officers' Reports are read fairly as a whole and with the reasonable benevolence that befits them, it is clear that officers advised members that financial contributions towards certain things would be beneficial and sufficient to overcome any concerns about the sustainability of the sites. "

86. In relation to Grounds 2B and 3B, Ms Tafur said that Defendant complied in substance with article 40(3)(b) of the DMPO by identifying the matters to be secured through the s 106 obligations in the ORs, both of which were published on the Planning Register in advance of the relevant Committee meetings. Furthermore, there is no evidence that the Claimant checked the planning register before planning permission was granted and the submissions that he now claims he would have made would not have affected the Defendant's decision to grant permission. Accordingly, the Claimant has suffered no prejudice. Absent substantial prejudice, no error of law arises *Midcounties* at [94 – 104]).

87. Finally, Ms Tafur relied on s 31(2A) Senior Courts Act 1981 if I were against her on any part of her case (Skeleton Argument, [75]-[77]). She said that even if the

Defendant had not committed any error of law I might identify, the result would have been the same and planning permission still would have been granted for both Sites.

88. This provides:

> "(2A) The High Court -
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

89. She said the 'conduct' complained of is that (a) the Defendant had regard to an immaterial consideration in taking account of the financial contributions without securing the delivery of the transport improvement works; (b) the Defendant acted irrationally in granting permission without securing the delivery of the transport improvement works and (c) the Defendant failed to publish a draft of the s.106 obligations on the Planning Register. The 'outcome' is the grant of planning permission for the developments.

90. She said it was at least highly likely the Defendant would have granted permission, absent the conduct complained of given, for example the acute affordable housing need in Oxford; the developments complied with a host of development plan policies triggering a presumption in favour of development; The Defendant remains satisfied that the transport contributions are material and meet the CIL tests and would reach the same conclusion even if specific regard was had to the fact that the delivery of the transport improvement works by the County Council was not secured; any comments which the Claimant might have made had he seen the draft s 106 Agreements would have made no difference.

The First Interested Party's submissions

91. On behalf of Dogar, Mr Garvey adopted the Defendant's submissions and made a few brief additional points.

92. On Grounds 2A and 3A, he said the Claimant's central argument was that the members of the Planning Committee, who are alleged to have granted planning permission, only did so on the basis that certain infrastructure requirements were to be delivered in respect to highways and public transport improvements.

93. Echoing the Defendant's position, Mr Garvey said that the Claimant's entire argument was flawed because it relies on the point that the members of the Planning Committee granted planning permission, when they did not. The officers' recommendation to the Planning Committee was for them to *delegate authority* to the Head of Planning Services to grant planning permission subject to conditions for which authority was delegated.

94. Mr Garvey put this aspect of his case this way in his Skeleton Argument, [17]-[18]:

> "17. In delegating the power to grant permission to the Head of Planning Services, the Committee were content that Mr Arnold could refine, add to, amend or delete the obligations identified in the heads of terms as he considered reasonably necessary. Thus, far from the members only granting permission on the basis of specific obligations that had to be ensured, members were in fact content to leave the contents of the obligation to Mr Arnold to amend as he saw fit.
>
> 18. Further, as the minutes record, the committee specifically voted on a motion to ensure that the s.106 agreement had sufficient flexibility, such that funding could be re-allocated to alternative schemes. Such a motion, therefore, expressly contemplated certain infrastructure not being forthcoming."

95. In relation to Grounds 2B and 3B Mr Garvey referred me to *R (Police and Crime Commissioner for Leicestershire) v Blaby District Council* [2014] EWHC 1719. In that case Foskett J considered an urgent challenge to the contents of a s 106 agreement. Two of the grounds of challenge were held to be unarguable. One of these was that the planning obligation was not on the planning register (ground 4), contrary to Article 36(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (the predecessor to the DMPO; the language is identical).

96. Foskett J said as follows on the point:

> "81. At all events, Mr Elvin and Mr Goodman seem to me to have the complete answer to this allegation in this case, namely, that there is no evidence or even a claim that the Claimant checked the local planning register before the planning permission was granted and accordingly no prejudice could have arisen. If there was any failure to comply with Article 36(3)(b), it could have had no impact on the outcome of this case."

97. Like Ms Tafur, Mr Garvey also emphasised the absence of evidence that the Claimant ever checked the Planning Register or had any interest in the contents of the two s 106 Agreements. He said there had been no prejudice.

Discussion

Grounds 2A and 3A

98. For the substance of the reasons advanced by the Defendant and the First Interested Party, and the following reasons, I am satisfied that these grounds of challenge must fail.

99. The Claimant alleged in its arguments on these grounds that the Defendant's reasons for granting permission on both applications included a conclusion that the planning obligations contained in the two s 106 Agreements would *secure* the *delivery* of the cycle street on Mill Lane and the improvements to the Back Lane bridleway, as opposed to just financial contributions.

100. I accept, for all of the reasons set out above and the extracts from the ORs, that the need for financial contributions to fund transport improvements for the two developments was at the forefront of consideration during the planning process and formed an important part of the ORs. It seems to me, however, that the key question in relation to the Claimant's submission that 'the sole basis on which officers recommended approval and on which members granted planning permission in both cases was that the transport improvements would in fact be delivered' (Skeleton Argument, [54]) is to look at what the officers *in fact* recommended and what the Planning Committee *in fact* resolved to do on the back of those recommendations, together with what the County Council has undertaken to do.

101. As I have said, the Defendant and First Interested Party put at the heart of their response that the Planning Committee did *not* grant planning permission on the definite basis that the transport works funded under the two s 106 Agreements and specified in the ORs would be carried out. Rather, it delegated authority to take the decision to the Head of Planning Services and authorised him in both cases to refine, add to, amend or delete the obligations detailed in the heads of terms in the ORs and, hence, it contemplated that some work might not be carried out.

102. I set out the officers' Recommendation for the First Site and, as I have said, their Recommendation for the Second Site was in similar terms. I also set out verbatim the Planning Committee's two resolutions.

103. From this process I consider that the Claimant's submissions are unsustainable. It is quite plain that the officers did *not* recommend to the Planning Committee that planning permission be granted on the basis that the suggested improvements in the heads of terms would be secured or delivered, let alone that they would be delivered within a particular time frame. Rather, the officers made a recommendation which, by recommending that authority be delegated to the Head of Planning Services, gave him very broad authority to conclude s 106 agreements in such form as he saw fit, even if that meant departing from the heads of terms in the reports ('refining, adding to, amending and/or deleting the obligations detailed in the heads of terms set out in this report').

104. Whilst the final grant of planning permission was made by the Head of Planning Services for both sites following conclusion of the s 106 agreements, and he signed the relevant permissions, I think the decisions are better viewed as hybrid ones between the Planning Committee and the Head of Planning Services, given the minutes record that they resolved to 'grant planning permission', whilst he finalised the agreements and issued the decisions.

105. But the important point for present purposes is that permission was not expressly granted on the basis of officers' recommendations that the heads of terms would be implemented. They put the form of the s 106 Agreements into the hands of the Head of Planning Services, whom they plainly concluded could be relied upon to conclude and execute them in accordance with their resolution. There is no room for misunderstanding what was being proposed, or what was approved by the Committee, which was (my words) agreement in principle with the details to be worked out.

106. Furthermore, the minutes of both Planning Committees meetings recorded members' discussions as to the flexibility that should be built into the s 106 obligations to ensure that the contributions could – if necessary - be spent instead on alternative improvements to other public rights or way or pedestrian and cycle infrastructure in the area that were determined, at some future date, to be appropriate. I think it is plain that the Committee members understood that the cycle street on Mill Lane and

improvements to Back Lane would not be 'secured' through the s 106 obligations, but rather that the financial contributions could instead be spent on other, as yet undetermined improvements in the vicinity of the sites. Furthermore, at no point were they advised that the commencement or occupation of the development should be prevented until such time as the improvement works had been delivered.

107. The Defendant submitted that in light of the above, and on a fair reading of the ORs, it is clear that they did not materially mislead members into believing that the planning obligations would definitely secure the delivery of the Mill Lane cycle street or Back Lane bridleway improvements. I agree.

108. The Defendant went on to submit, therefore, that there had been no taking into account of an immaterial consideration. It was satisfied that a *contribution* towards various transport improvement works was necessary to make each of the developments acceptable. Contributions were sought on a proportionate basis from each development to ensure that they fairly and reasonably related in scale and kind to the development. The contributions had a real connection with the proposed developments which was not *de minimis,* in light of the sites' location and access to public transport, services and facilities.

109. It is true that at various places in the ORs the word 'secured' was used, and it was also used by the Planning Committee in its decisions. The Claimant emphasised this in, for example, [37] of his Skeleton Argument:

> "The Claimant submits that, again, the City Council's reasons for granting planning permission included a conclusion that the planning obligation would secure the delivery of the Cycle street and the Back Lane bridleway improvements or the delivery of alternative schemes which meet the aim of improving active travel to and from the proposed development and which delivered localised improvements to pedestrian and cycle infrastructure. It was only the conclusion that improvements would be delivered that enable the City Council to conclude that the proposed development would accord with Policy M1 of the Local Plan."

110. This is a reference to, eg, OR1, [10.132]:

> "10.132 Through the design of the development and appropriate planning obligations which would secure the provision of the new cycle street and improvements to the existing public rights of way, officers consider that the development would comply with Policy M1 of the Oxford Local Plan"

111. The Claimant therefore argued that in light of that sentence, Committee members were led to believe, and determined the application on the basis, that the obligations would secure not only the *payment* of the contributions but also the *delivery* of the works. That is an example of the type of hypercritical analysis to officer's reports that the courts have deprecated.

112. Ms Tafur accepted that it might have been better had the word 'secured' not been used. However, she submitted at [52]-[53] of her Skeleton Argument (emphasis as in original):

> "52. The Claimant latches onto a single sentence in the ORs which says that "*Through the design of the development and appropriate planning obligations which would secure the provision of the new cycle street and improvements to the existing public rights of way, officers consider that the development would comply with Policy M1 of the Oxford Local Plan"* (OR 10.105 … and OR 10.132 …. It alleges that in light of that sentence, members were led to believe, and determined the application on the basis that the obligations would secure not only the payment of the contributions but also the delivery of the works (CSA/21 and 37). That is an example of the type of hypercritical analysis to officer's reports that the courts have deprecated
>
> 53. While it may have been preferable for the OR to say that the planning obligations would "*facilitate"* rather than "*secure"* the provision of the new cycle street and improvements to existing public rights of way, when the ORs are read fairly, as a whole and without excessive legalism, it is clear that officers advised members that the developments were acceptable provided they made appropriate contributions towards highway improvement works. They did not say that the works should or would be delivered by a particular trigger point in the development. The payment of contributions towards works which had been identified by the County Council was considered sufficient to address the impacts of the developments."

113. I agree with these passages.

114. Taking a step back and looking at the realities, I regard it as very unlikely that the County Council will not deliver works deemed necessary to fulfil the transport improvements foreshadowed in the ORs. The developers are under legal obligations to pay the relevant financial contributions. The County Council is under legal obligations not to spend those contributions for anything other than the relevant purposes. True, as Mr Bbosa explained, a process has to be gone through to comply with the County Council's financial obligations on capital expenditure, however I regard it as unrealistic that the works will not be carried out in whatever form is finally determined.

115. Ms Tafur put the point orally in the following terms, and I agree:

> "There is no reason, in my submission, to suppose that the County Council would prefer to leave the monies unexpended rather than spending them on appropriate interventions. While it is true that any capital spend has to be approved in accordance with the County's financial protocols, that is entirely unremarkable. Having identified the benefits of the works, carried out the costing and secured the payment of the funds, there is no reason to doubt that the County Council will deliver appropriate interventions and there are mechanisms in place to secure additional funding should that prove necessary, as explained in Mr Bbosa's witness statement."

116. I am not surprised the decisions were taken in the form they were, ie, by the Committee delegating authority to officers for the (complex) details to be worked out later during a subsequent process. I think Ms Tafur was right to say that Grounds 2A and 3A raise an important principle of whether local planning authorities are entitled to take account of contributions towards infrastructure improvements without actually securing the delivery of those works. She said their implications – if correct - were potentially wide-reaching given, for example, that contributions are often sought through s 106 obligations towards a wide variety of infrastructure improvements such as education and healthcare without binding the health or education authority to deliver particular works or restricting development until the works are delivered.

117. The form in which these permissions were granted is far from unusual. As Ouseley J (an extremely experienced planning judge) said in *Midcounties*, [85]:

> "As is commonplace, the actual grant of approval was delegated to an officer upon execution of a satisfactory section 106 agreement, which it was for the officers to negotiate."

118. The Claimant also alleges that in order for the transport contributions to amount to a material consideration which the Defendant was entitled to take into when deciding to grant planning permission, the Defendant was required to secure *both* the payment of the contribution *and* the application of the contributions to deliver the relevant improvement works (see Statements of Facts and Grounds, [42], in relation to the First Permission, and [61] in relation to the Second Permission. I do not agree.

119. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770, Lord Keith said

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not *de minimis*, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy."

See also *R (Wright) v Forest of Dean District Council* [2016] JPL 1234, [34], *per* Dove J.

120. Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (SI 2010/948) provides:

> "(2) Subject to paragraph (2A), a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is -
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development."

121. In *R (Wright)* v *Forest of Dean District Council (Secretary of State for Housing, Communities and Local Government intervening)* [2019] 1 WLR 6562, [32], Lord Sales said:

> "32 In *Newbury* [1981] 1 AC 578, 599–601 Viscount Dilhorne treated the scope of the concept of "material considerations" in section 29(1) of the Town and Country Planning Act 1971 (which corresponds to what is now section 70(2) of the 1990 Act) as the same as the ambit of the power of a local planning authority (in what is now section 70(1)(a) of the 1990 Act) to impose such conditions "as they think fit" on the grant of planning permission. It had been established in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 ("*Pyx Granite*"), *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 ("*Fawcett Properties*") and *Mixnam's Properties Ltd v Chertsey Urban District Council* [1965] AC 735 ("*Mixnam's Properties*") that the power to impose conditions was not unlimited. Viscount Dilhorne referred to the following statement by Lord Denning in *Pyx Granite* at p 572, approved in *Fawcett Properties* and *Mixnam's Properties*:
>
> > "the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."
>
> Viscount Dilhorne referred to other authority as well and set out the *Newbury* criteria as follows [1981] AC 578, 599–600:
>
> > "the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them …"
>
> 33 Lord Edmund-Davies agreed with the speech of Viscount Dilhorne. Lord Fraser of Tullybelton approved the same three-fold test in his speech at pp 607–608, as did Lord Scarman at pp 618–619 and Lord Lane at p 627. The view of the Law Lords was that a condition attached to the grant of planning permission for the change of use of two hangars to use as warehouses on condition that they were removed at the end of a specified period of time did not fairly or reasonably relate to the permitted development and was therefore void."

122. The financial contributions to fund transport infrastructure - by themselves - were plainly capable constituting a material consideration in relation the decision whether to grant the planning applications and satisfied these tests..The need for such contributions had been recognised at all stages during the planning process and they plainly fairly and reasonably had a connection with the developments that was more than *de minimis*. That being the case, the question of weight to attach to them was for the Defendant. Also for the Defendant's planning judgment - reviewable only on an irrationality basis - was the decision whether to actually require delivery of the proposed works, eg, before commencement of development or occupation or via a *Grampian* condition. In my judgment it was lawfully open to the Defendant not to impose one. It was rationally open to the Defendant to find that the payment of proportionate contributions towards highway improvement works was sufficient to address the impacts of the particular developments on walking, cycling and public transport in accordance with policy M1 of the Oxford Local Plan.

123. I accept that in some cases, the delivery of infrastructure may be so critical to the acceptability of a development scheme that the decision-maker will determine that the development should not be commenced or occupied until that infrastructure has been delivered. In other cases, the payment of a contribution towards that infrastructure will suffice without a *Grampian*-style restriction on the development. Ms Tafur pointed out that s 106 obligations quite often make provision for the re-payment of contributions that have not been spent on the infrastructure to which they are directed, thereby contemplating the possibility that the works will not be delivered. An example is *Hampshire County Council v Beazer Homes Ltd* at [2010] EWHC 3095 (Admin), [10] – [13].

124. But as I have said, the Defendant's decision here was rational given the need, in particular, for flexibility. Nor was a *Grampian* style condition suggested in the ORs. That reinforces my conclusion. Moreover, the Defendant plainly did have this matter well in mind because it *did* impose a number of restrictions on the commencement of development, and/or occupation, including in relation to transport. So, for example, [30] of the First Permission granted by the Head of Planning Services stated:

> "30. No dwellings or other buildings shall be occupied until car parking spaces to serve them have been provided in accordance with plans showing parking and the necessary manoeuvring and turning areas which have been previously submitted to and approved in writing by the Local Planning Authority. The car parking shall be retained unobstructed except for the parking and manoeuvring of vehicles at all times thereafter."

125. Overall, I agree with this passage from Ms Tafur's Skeleton Argument, [65]:

> "The City Council's judgment that the payment of financial contributions was sufficient in these cases was exercised rationally in circumstances where: (a) the advice from the highway authority was that the payment of contributions towards certain works was sufficient to overcome their objection, even without a *Grampian*-style restriction on the development; (b) the highway authority specifically requested and costed the improvement works and sought contributions on a proportionate basis from both sites; (c) contributions to cover the costs of the

> improvement works were secured through planning obligations relating to both sites which were executed on the same day and in respect of which planning permission was granted on the same day; (d) the s 106 obligations require the payment of the contributions prior to occupation of the dwellings; (e) The County Council is prevented from expending the contributions on anything other than the purposes identified in the relevant definitions in the s.106 obligations or alternatives which achieve similar benefits".

126. I do not consider the contention that the Defendant acted irrationally to be sustainable. The Claimant has not shown that the Defendant's decisions come close to surpassing the high hurdle of irrationality. Planning decisions are complex and multi-faceted. There is no error of reasoning I can detect which robs the decision of logic: see *Balchin*, [27]. In short, as I have said, the payment of the requisite sums is secured by the s 106 Agreements. The County Council is thus able to enforce their payment. According to the obligations on the County Council, the sums must be spent on transport improvement works either to Mill Lane and Back Lane or alternative schemes that achieve similar benefits.

127. While the County Council is not yet in a position to commit to the transport improvement works, which will have to go through its capital programme and spending protocols, there is no reason to believe that the works that it has or will identify and costed, or alternatives achieving similar benefits, will not be delivered. It was rationally open to the Defendant to conclude that contributions towards those works were sufficient to render the developments acceptable.

128. For these reasons, as I have said, I reject Grounds 2A and 3A.

Grounds 2B and 3B

129. I can take these Grounds much more shortly. I think they must also fail for the following reasons.

130. I quoted *Midcounties* earlier, where there had been a breach of the predecessor statutory provisions to Article 40(3)(b) but Ouseley J nevertheless declined to quash the grant of planning permission for want of prejudice. To the same effect is the *Police and Crime Commissioner* case.

131. In summary, there was substantive compliance with the requirements of Article 40(3)(b) of the DMPO, and no prejudice in any event to the Claimant.

132. First, the substance of the s 106 agreements, as contained in the heads of terms, were placed on the Register via the ORs, which were published there. I think there was thus compliance in substance, if not in form, with the requirement to publish the s 106 Agreements. The ORs explained that certain specified contributions would be sought from the applicants towards transport improvement works. They did not suggest that the works themselves would be delivered by the developer; that they would be delivered by a particular date; or that the development should be prohibited or restricted unless or until the transport works were delivered.

133. Furthermore, as in the *Police and Crime Commissioner* case, there is no evidence that the Claimant checked the Planning Register before planning permission was granted, and the submissions that he now claims he would have made would not have affected

the Defendant to grant permission. That was regarded as a complete answer in that case, and I conclude similarly in the case before me.

134. Next, there are the witness statements of Mr Kemp, one of the Defendant's Principal Planning Officers. He made clear that if the Claimant had asked, he would have been supplied with drafts of the agreements (which, unsurprisingly, were changing frequently during the process of negotiation).

135. In his Skeleton Argument at [66] it is asserted by the Claimant:

> "The Claimant was substantially prejudiced by the breach of the DMPO because he was denied the opportunity to comment on the Agreement, for example to comment on the absence of any obligation on the County Council to deliver the necessary improvements and the absence of an enforcement mechanism for the City Council to ensure that the financial contributions were paid and then used as intended to deliver the improvements on a timescale consistent with the build out of housing. This was particularly the case because the Claimant objected to the Agreement on the basis that the Development did not promote safe, convenient, sustainable travel. This failure deprived the Claimant of the opportunity to comment which is the very purpose of the statutory obligation: this caused an obvious and substantial prejudice.

136. Notwithstanding this assertion, I agree with the Defendant's submission (Skeleton Argument, [73]) that the representations the Claimant now says that he would have made about the absence of any obligation on the County Council to deliver the transport works or the fact that the power to enforce the obligations lay with the County Council would not have affected the Defendant's decisions.

137. The Defendant was aware that there was no mechanism proposed to oblige the County Council to deliver the works nor any restriction on the development until those works were delivered. Regardless of any representations the Claimant may have made, the County Council has confirmed that it could not have committed in the s 106 obligations to the delivery of the transport works in the s 106 Agreements in any event, for the reasons given by Mr Bbosa which I set out earlier.

138. It is obvious that the Defendant is well familiar with the processes required of local authorities in order to secure the approval of projects requiring capital expenditure. Furthermore, it is entirely unremarkable that the payment of contributions to the County Council should be enforceable by the County Council rather than the Defendant, and no reason to suppose that the County Council will fail to enforce those obligations.

139. In light of the above, even if the heads of terms published in the ORs were insufficient to discharge the requirement in Article 40(3)(b), the Claimant has suffered no substantial prejudice and no error of law arises.

140. My rejection of the grounds of challenge makes it unnecessary for me to consider s 31(2A) of the Senior Courts Act 1981.

Conclusion

141. These claims for judicial review are, accordingly, dismissed.