



Appeal Decision

Inquiry held on 13 and 14 February 2024

Site visit made on 15 February 2024

by Jonathan Bore MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02/04/2024

Appeal Ref: APP/C3105/W/23/3329587

OS Parcel 3673 adjoining and west Of 161 Rutten Lane, OX5 1LT, Yarnton, OX5 1LT

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
 - The appeal is made by Merton College, Oxford against Cherwell District Council.
 - The application Ref 21/03522/OUT, is dated 14 October 2021.
 - The development proposed is the erection of up to 540 dwellings (Class C3), up to 9,000sqm GEA of elderly/extra care residential floorspace (Class C2), a Community Home Work Hub (up to 200sqm)(Class E), alongside the creation of two locally equipped areas for play (LEAPs), one neighbourhood equipped area for play (NEAP), up to 1.8 hectares of playing pitches and amenity space for the William Fletcher Primary School, two vehicular access points, green infrastructure, areas of public open space, two community woodland areas, a local nature reserve, footpaths, tree planting, restoration of historic hedgerow, and associated works.
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Decision

1. The appeal is allowed and planning permission is granted for the erection of up to 540 dwellings (Class C3), up to 9,000sqm GEA of elderly/extra care residential floorspace (Class C2), a Community Home Work Hub (up to 200sqm)(Class E), alongside the creation of two locally equipped areas for play (LEAPs), one neighbourhood equipped area for play (NEAP), up to 1.8 hectares of playing pitches and amenity space for the William Fletcher Primary School, two vehicular access points, green infrastructure, areas of public open space, two community woodland areas, a local nature reserve, footpaths, tree planting, restoration of historic hedgerow, and associated works at OS Parcel 3673 adjoining and west Of 161 Rutten Lane, Yarnton, OX5 1LT in accordance with the terms of the application, Ref 21/03522/OUT, dated 14 October 2021, and the plans submitted as amended and listed in condition 3 of this planning permission, subject to the conditions set out in the annex to this decision.

Applications for costs

2. The appellant has made applications for awards of costs against Cherwell District Council and against Oxfordshire County Council. These are the subject of separate decisions.

Background

3. The site is allocated for residential development under Policy PR9 of the Cherwell Local Plan 2011-2031 (Part 1) Partial Review Plan 2020. Along with plans of other Oxfordshire districts, **Cherwell's** Local Plan Partial Review contains housing allocations, including Policy PR9, which are designed to help meet the unmet housing needs of the City of Oxford. The site is allocated for 540 homes. No housing has yet been provided on any of the sites identified in the Local Plan Partial Review 2020, and at the present time the amount of deliverable housing land in the district is just 0.1 years.
4. The planning application is in outline, with all matters reserved except for the principal access points. The site extends to 59.3 hectares and is entirely within the allocated land; a development brief for the site was published in November 2021. The development area of 18 hectares would deliver all 540 dwellings as well as a community home/work hub and elderly/extra care. The remainder of the land would be devoted mostly to green infrastructure of various kinds, including an area for a replacement playing field for William Fletcher Primary School, as set out in the description of development, and as shown on the submitted indicative parameter plans.
5. An environmental statement (ES) was produced in accordance with the 2017 EIA Regulations and an addendum was produced to take into account all new information submitted in connection with the application.
6. Cherwell District Council did not determine the planning application within the appropriate period of time. However, it subsequently indicated that, had it been in a position to decide the application, permission would have been refused for five reasons. These concerned the delivery of informal parkland; ecological mitigation and biodiversity gain; the provision of access to the new playing fields for William Fletcher Primary School; affordable housing; and on-site infrastructure and infrastructure contributions.
7. Revised drawings submitted by the appellant on 13 December 2023 showed some changes to the parameter plans and other material including re-labelling the agricultural land as informal parkland; adjustments to the area of community woodland; a location for the local nature reserve; a revised legacy and stewardship strategy; and intentions regarding a landscape and ecology management plan and a retained agricultural improvements plan. I have accepted these revisions because they do not fundamentally change the nature of the scheme or prejudice the interests of any party, and they were subject to consultation. The full up to date set of drawing numbers on which this decision is based are set out in Condition 3.
8. By the time the Statement of Common Ground was issued on 17 January 2024, a range of matters had been agreed between the appellant and the District Council. These included: the format of the application; the principle of development; housing delivery and quantum; access; arboriculture; overall viability; site parameters including the previously disputed matter of the informal parkland; ecology; education; flood risk and drainage; and highways and transportation. Agreed topic papers were prepared for the inquiry on arboriculture; biodiversity and ecology; education; flood risk; informal parkland; planning policy; transport and viability. Before the inquiry opened, the percentage of affordable housing, and infrastructure contributions, including those relating to strategic highways matters, were also agreed.

9. Cherwell District Council withdrew all the putative reasons for refusal prior to the opening of the inquiry and did not contest any matter at the inquiry. It is agreed by the District Council that, leaving aside the affordable housing requirement, the appeal proposals meet the requirements of Policy PR9, including among other things the housing provision, design, landscaping, wildlife and biodiversity aspects of the scheme; the provision of facilities for formal sports, play areas and allotments to adopted standards within the developable area; the provision of public open green space as informal parkland on 24.8 hectares of land to the west of the residential area and a new local nature reserve accessible to William Fletcher Primary School; the retention of 39.2 hectares of land in agricultural use; and the creation of an area of a community woodland within 7.8 hectares of land to the north-west of the developable area and to the east of Dolton Lane. The revised scheme splits the community woodland into two parts and following the submission of revised drawings the Council no longer raises objection to this aspect of the scheme.
10. Requirement 2 of Policy PR9 seeks 50% affordable housing. The scheme provides 43% affordable housing but the District Council does not raise objection to this; the matter is addressed below in connection with the planning obligation.
11. On the second day of the inquiry, Oxfordshire County Council withdrew its objection to the scheme in respect of the access to the new playing fields, having come to the conclusion that adequate safeguards could be incorporated in the planning obligation under s106. These safeguards are discussed below in connection with the planning obligation.
12. Having regard to all the above, there is now no main issue in dispute between the appellant, the District Council and the County Council in this appeal.
13. However, Yarnton Parish Council, a Rule 6 party, expressed concerns about flood risk. This was not one of the putative reasons for refusal, but the Parish Council presented evidence and spoke at the inquiry on the subject. Flood risk is therefore addressed below.
14. Following the discussion on flood risk, this decision goes on to consider other scheme impacts, the planning obligation and, finally, planning conditions.

Flood risk

15. The developable part of the scheme would occupy the lower slopes of Spring Hill, to the west of Yarnton. The site itself is in Flood Zone 1 in respect of fluvial flood risk, and neither Oxfordshire County Council as the Lead Local Flood Authority nor the Cherwell District Council Drainage Team have objected to the proposal. However, the flood risk assessment has identified a number of localised areas throughout the site that are at medium to high risk of potential surface water flooding. Yarnton Parish Council and its related group the Yarnton Flood Defence Group have recorded frequent flood events in the village, which have been attributed by the Parish Council to surface water runoff from Spring Hill, groundwater, development and road infrastructure, and limited capacity in existing watercourses. Since the scheme would discharge to on-site watercourses and the flow would then pass through and around Yarnton by means of existing watercourses, the Parish Council is concerned about the implications of the scheme for flooding.

16. The surface water drainage system within the development area of the site would be managed to a standard that would limit discharge to the existing QBar rate, the mean annual maximum flow rate, which is a return rate of 1:2.3 years. This would be achieved by cutoff ditches and water storage and flow attenuation measures. These measures are set out in the inquiry documents. Discharge from the system would not exceed this flow rate even in significantly wetter events, up to a maximum of a 1:100 plus climate change event. Also, though not at the QBar rate, measures would be taken to limit runoff from the undeveloped part of the hill to protect the new development from flood risk.
17. The result would be that, leaving aside relatively commonplace runoff events, the surface water drainage proposals would provide protection for the proposed development against all but the most extreme events and, in doing so, would provide more effective attenuation of the flows from the site into the village. The scheme would not make matters worse elsewhere, thus complying with national policy as set out in NPPF paragraph 173, and it would represent an improvement over the existing situation.
18. It would be inappropriate to expect this development on its own, or in conjunction with other developments, to provide a comprehensive solution to surface water management in Yarnton itself. The scheme itself would improve matters, so such an approach would go beyond what is necessary for the development to go ahead. For the same reasons, the Grampian condition suggested by the Parish Council, under which development could not occur until a flood risk strategy for the village had been carried out, would not be fairly and reasonably related to the development. Flood surveying and remediation proposals are matters for the County Council as Lead Local Flood Authority, and such a condition would delay to an unknown date the much-needed provision of new homes on this allocated site pending a strategy to which there is no official commitment.
19. The flood risk assessment was based on modelling as well as on-site investigation; the Parish Council argues that the modelling may not have taken sufficient account of actual on-site conditions such as the potential for groundwater to interfere with surface water storage facilities. To ensure that surface water management in practice meets the design requirements described above, a condition is attached to this permission requiring the implementation (and subsequent management) of detailed phase by phase surface water management schemes. A separate condition requires the recording of the implementation of the drainage and SUDS works for each phase.
20. Discussions between the appellant and Thames Water have led to the development of a foul water drainage strategy which would direct all foul water flows to the Begbroke Pumping Station via two onsite pumping stations. This would avoid discharging into the existing foul sewer network in Yarnton and Begbroke. A condition is attached which links the occupation of the development to the completion of the relevant infrastructure.
21. In conclusion, subject to the attached conditions, the scheme would be acceptable as regards flood risk to prospective occupiers, and it would ameliorate rather than worsen conditions elsewhere. It would also be acceptable in terms of foul water drainage. It would accord with NPPF policy on

planning and flood risk and would comply with requirements 14 and 15 of Local Plan Policy PR9.

Other scheme impacts

22. The Environmental Statement (ES) and addendum, including further information supplied under Regulation 25, have been taken into account in arriving at this appeal decision, and account has been taken of comments from statutory consultation bodies and other representations about the ES and the likely environmental effects of the proposed development. The scheme is supported by a substantial volume of sound evidence on the full range of environmental topics.

Highway network

23. The planning obligation contains a requirement that the development shall not be first occupied until certain highway works have been provided and constructed in accordance with approved plans. These works include access junctions, segregated pedestrian and cycle infrastructure along the A44 at Begbroke Hill, a traffic calming feature on Rutten Lane, a crossing over the Rutten Lane arm of the A44/Rutten Lane roundabout junction, bus stops and crossing facilities, a speed restriction to 40mph on the A44 from Spring Hill to Cassington Road, and a pedestrian and cycle crossing of Godstow Road near the Wolvercote roundabout.
24. Subject the measures set out in the planning obligation, together with those in the construction traffic management plan (CTMP) which is a condition of this permission, the development would not have a severe impact on the adjacent transport network or introduce a significant road safety issue either during the construction phase or the operational phase.

Ecology

25. Ecological survey work has established very limited faunal interest on the site. No European protected species were present except for foraging bats, which would benefit from the substantial enhanced foraging opportunities presented by the scheme. The updated survey work of 2021/22 found that there had been little change.
26. The potential effects of the construction phase would be limited to the disturbance of protected faunal species which would be fully mitigated for through the attached conditions and planning obligation resulting in negligible/non-significant residual effects. The potential effects of the completed development are limited to possible disturbance of roosting bats, but these effects can be fully mitigated for, such that adverse cumulative/in combination operational effects would not occur.
27. A biodiversity net gain (BNG) assessment is included within the signed planning obligation. The metric demonstrates that a 14.46% biodiversity net gain is achieved in habitat units and 14.56% in hedgerow units. The planning obligation requires a habitat management and monitoring plan to be carried out for the whole site and for the reserved matters areas. This would set out the works to be taken on site and within the arable field margin, to demonstrate how BNG will be secured.

28. The planning obligation also requires details of the location of bat, bird, owl and invertebrate boxes and other ecological improvements including hedgehog highways, and the future management of these items. As these are included in the planning obligation there is no need to include them in a condition as suggested by the Council.
29. A requirement for a mitigation strategy for badgers is included as a condition. Further conditions require a scheme for various ecological improvements and a final check for protected species by a suitably qualified ecologist before each development phase.
30. Subject to the obligation and conditions, the construction or operational phases of the development would not contribute to any cumulative or in combination adverse effects on protected species or biodiversity.

Ancient woodland and veteran trees

31. Direct and indirect effects would be negligible with no adverse effects. A condition is attached which seeks the protection of trees, including veteran trees, during the course of construction. The change in land use from intensive **agriculture to unimproved grassland within the veteran trees' biologically active** space would have a substantial beneficial effect. The proposed creation of an additional area of broadleaved woodland contiguous to the woodland block would have long term benefits for the ancient woodland.

Geology, hydrology and contamination

32. The development would contain built in mitigation measures. A condition is attached requiring the submission of a construction environmental management plan (CEMP) to provide appropriate protection during the course of construction. A further condition is attached setting out precautionary measures in the event of land contamination being encountered.

Air quality

33. The CEMP and construction traffic management plan (CTMP) would ensure negligible effects upon air quality during construction and the development in its operational phase would cause no significant effect on local air quality.

Acoustic conditions

34. The design of the development together with the attached acoustic condition would provide good acoustic conditions for existing residents and residents of the new development.

Lighting

35. Construction lighting and permanent lighting would have minimal environmental impacts.

Built heritage, archaeology and the historic landscape

36. The closest listed building to the site is the Grade II listed Spring Hill, which is located approximately 125m west of the site. The building dates to the early 17th Century; it was originally constructed as a farmhouse and has an association with the surrounding agricultural landscape. However, despite its proximity, Spring Hill has limited views of the site due to topography and

intervening vegetation. The proposed retention of historic hedgerow boundaries would maintain limited views toward the building development, and the proposed extension of the existing woodland slightly further to the south would also provide additional screening once established. Thus although the development would encroach on the wider agrarian setting of Spring Hill, the setting of the listed building would be preserved and the development would not harm its significance.

37. Three Grade II listed buildings, Hall Farmhouse and an associated cart shed and barn within its curtilage, lie between 230 metres and 280 metres north of the site. Their architectural and historic interest is derived from the age, rarity and survival of the historic fabric and they also have group value, representing a post-medieval farmstead within the village of Begbroke. The rural character of the setting has been retained despite some recent settlement infill. Hall Farmhouse has some partial inter-visibility with the site but there is no inter-visibility with the cart shed and barn. There would be a view of the construction site and the completed development, and of block planting from Hall Farmhouse. But although the development would encroach on the wider agrarian setting of Hall Farmhouse and its associated buildings, the setting of the listed buildings would be preserved and the development would not harm their significance.
38. As regards archaeology, a programme of desk-based works and a geophysical survey were followed by a programme of archaeological field evaluation, which was carried out in November and December 2021. The latter found two main phases of archaeological activity on the site, consisting of a likely prehistoric phase characterised by dispersed charcoal filled pits, thought to be of Iron Age date, and by a later phase of medieval to post-medieval agricultural activity characterised by ridge and furrow cultivation along with a number of field boundaries. A single possible Roman gully was found. Few finds were recovered from the topsoil or subsoil across the site, indicative of a lack of any concentrated activity. The report, published in January 2022, concluded that the site does not contain significant archaeological deposits. The public benefits of the scheme in terms of the provision of new homes would outweigh the harm to the significance of these heritage assets.
39. As a programme of archaeological investigation has been carried out there is **no need to attach the Council's suggested condition**, but archaeology is made the subject of a watching brief condition.

Landscape and visual impact

40. The scheme would have some significant short term landscape effects and a longer term effect on the Dolton Lane bridleway which would have development nearby. However, extensive planting and landscaping is inherent in the design of the scheme and after a 15 year period of establishment the impact of the scheme would be much reduced, except within the development site itself.

Health impacts

41. The scheme would offer a considerable number of positive health benefits for both occupiers and local residents including good accessibility to facilities, LEAPs and NEAP, the creation of community woodland, and the promotion of sustainable modes of travel. The planning obligation provides for the re-

organisation of Yarnton Health Centre to accommodate the additional demand anticipated from the scheme. The scheme would not have an adverse impact on existing health services or related services and amenities in Yarnton or the surrounding area.

Conclusion

42. Taking into account the ES and all other evidence, the proposed development, during construction and operational phases, with the mitigation measures set out in the planning obligation and conditions, would have acceptable environmental effects.

Planning obligation

Contributions

43. The completed planning obligation, signed by Cherwell District Council, Oxfordshire County Council and Merton College, dated 8 March 2024, contains a range of obligations. It requires contributions towards highways infrastructure, indoor and outdoor sports provision, police infrastructure, the provision of more consulting rooms in Yarnton Health Centre, primary and secondary education, household waste recycling, library facilities, a mobility hub, public transport infrastructure and services, a traffic regulation order, travel plan monitoring and rights of way. The District Council and the County Council have provided sufficient evidence to demonstrate that these provisions are all necessary to meet the needs of the development. They all meet the requirements of the CIL Regulations.

Affordable housing

44. The planning obligation commits the developer to provide no less than 43% affordable housing in accordance with an agreed mix, of which no less than 25% would be First Homes. Policy PR9 requires 50% affordable housing on this site, but the proposed development cannot provide more than 43% because on current calculations it would become unviable, owing among other things to the many other infrastructure requirements. However, the planning obligation includes provisions for a review of viability at two different dates, which would potentially allow for an uplift in the provision of affordable housing should the economics of development change. Taking the plan as a whole, and the circumstances of this case, the provision for affordable housing is acceptable.

Community and green space

45. Matters included in the obligation include the nature reserve land to be provided as part of the development; restrictions over the use of the retained agricultural land; the maintenance of the permissive footpath; play areas; the design and management of the community hub; retained agricultural land improvements; long term stewardship and biodiversity net gain, which is **discussed above under the heading "Other scheme impacts"**. These are all necessary and relevant to the development.

Primary school expansion and access to replacement playing fields

46. Included within the planning obligation is a requirement to contribute towards education. This includes the expansion of the William Fletcher Primary School, which is required to enable the development to go ahead.

47. The expansion necessitates the provision of replacement playing fields, and these would be provided on the appeal site as part of the proposed development in accordance with Policy PR9. The access to the playing field from the school would cross a private drive owned by a third party. Should voluntary negotiations fail to achieve a right of way for the school to cross the drive, the planning obligation provides for developer funding towards compulsory purchase proceedings to the same end.
48. In the event that a suitable access across the drive cannot be achieved, the obligation requires the developer to take certain actions which would facilitate the provision of a pathway from the school to the replacement playing field around the outside of third party land. This would be longer and less convenient for the school than the simple access across the drive, and would involve passing through the Green Belt, but nonetheless it would provide a fallback measure.
49. I have considered all the representations on this issue. There is a clear public interest in facilitating access from the school across the drive to the playing fields, both in terms of educational needs and in terms of enabling the site to deliver much-needed housing and there is a reasonable likelihood that a suitable access will be obtained. If that approach fails, the obligation allows for a suitable fallback. In consequence it is not necessary to attach a Grampian condition to the planning permission which would prevent development from taking place until the pathway has been provided. These aspects of the planning obligation are necessary and meet the tests in the CIL regulations.

Unnecessary provisions

50. Previous draft versions of the planning obligation were discussed at the inquiry. These included requirements for apprenticeships, the funding of a 0.8 FTE community liaison officer, and a contribution towards public art. These are not necessary to mitigate the impact of the development and are not required for the development to take place. They do not meet the requirements of the CIL Regulations and have been excluded from the final planning obligation.

Conditions

51. Conditions are required in respect of the submission of a phasing plan and the submission of related reserved matters.
52. **The Council's suggested innovation strategy is not necessary, but travel plans** and details of the location, layout, appearance and management of parking and the electric vehicle charging points are required in the interests of good site management and sustainable transport.
53. **A condition is required for tree protection, and I have amended the Council's** suggested condition to include veteran trees.
54. Conditions requiring strategic and phased drainage measures are required for the reasons discussed in this decision, together with measures to record the implementation of the measures, including sustainable drainage systems.
55. A noise protection condition is required given the proximity of part of the development to the A44 and the proposed pumping stations. Construction noise impacts are covered in the condition requiring a construction environmental management plan.

56. The submission of construction traffic and construction environmental management plans are required to control the impact of construction on **highways, local residents and the environment; the Council's suggested** condition on footpath protection has been subsumed within the latter.
57. The **Council's suggested archaeological condition is not required given the** findings of both the desktop and on-site studies included in the environmental statement, but a watching brief condition is attached.
58. As regards ecology, the planning obligation requires the achievement of biodiversity net gain and includes the location of bat, bird, owl and invertebrate boxes and any other ecological improvements, including hedgehog highways, and future management and maintenance on any phase of the development. A condition seeking these requirements is therefore unnecessary. However, conditions are attached requiring a mitigation strategy for badgers and a final check for protected species prior to development by a qualified ecologist.
59. A condition is required to address the approach to be taken to unforeseen site contamination.
60. A necessary condition is attached which would prevent the occupation of the development before the completion of the relevant infrastructure for water supply and the disposal of foul water.
61. It is not necessary to attach conditions relating to off-site highway works and the provision of a **residents'** parking zone prior to highway adoption because they would duplicate the contents of the s106 obligation on these subjects.

Conclusion

62. The scheme would provide much needed homes to meet the identified housing needs of the City of Oxford. It is significant that no housing has yet been provided on the sites identified in the Local Plan Partial Review 2020, and that at the present time the amount of deliverable housing land in the district is just 0.1 years, and this adds to the strong weight in favour of this scheme.
63. Subject to the attached conditions and the planning obligation, the scheme would satisfy the requirements of Policy PR9 other than the slightly lower affordable housing provision which is discussed above. It would include appropriate measures to mitigate flood risk, including flood risk beyond the site. The proposal would be in accordance with the development plan as a whole.
64. I have considered all the other matters raised, but they do not alter the balance of my conclusions. For all the reasons given in this decision, I allow the appeal.

Jonathan Bore

INSPECTOR

Annex

Conditions

1. Details of the layout, scale, appearance, access (other than the approved accesses to A44 Woodstock Road and Rutten Lane shown on drawings Parameter Plan - Indicative Movement - DE234_16 - H) and landscaping (including new and/or enhanced footpaths, bridleways and cycle tracks), including the informal parkland, nature reserve and community woodland and including details relating to the layout and landscaping associated with the relevant surface water management scheme (hereafter referred to as the reserved matters) shall be submitted to and approved in writing by the local planning authority before any development takes place and the development shall be carried out as approved.
2. Application for approval of all the reserved matters for each phase of the development shall be made to the local planning authority before the expiration of five years from the date of this permission and the development hereby permitted shall be begun either before the expiration of five years from the date of this permission or before the expiration of two years from the date of approval of the last of the reserved matters to be approved, whichever is the later.
3. Except where otherwise stipulated, the development hereby permitted shall be carried out in general accordance with the following approved plans and documents:
 - Block Plan - DE234 01 - A
 - Location Plan - DE234 02 - A
 - Parameter Plan - Land Use - DE234_14 - J
 - Parameter Plan - Building Heights - DE234_15 - G
 - Parameter Plan - Indicative Movement - DE234_16 - H
 - Parameter Plan - Green Infrastructure - DE234_17 - J
 - Parameter Plan - Density - DE234_18 - A
4. Prior to the commencement of any development, a phasing plan, covering the entire application site (that indicates amongst other things the development parcels for which reserved matters applications will be submitted, in whole or in part) shall be submitted to and approved in writing by the local planning authority. Thereafter the development shall take place in accordance with the approved phasing plan and reserved matters applications shall be submitted in accordance with the approved phasing plan and refer to the phase(s) they relate to, unless agreed in writing by the local planning authority.
5. No development shall commence on a phase identified within an approved phasing plan until full details of the layout, scale, appearance, access and landscaping (hereafter referred to as the reserved matters) of the development proposed to take place within that approved phase have been submitted to and approved in writing by the local planning authority.

6. Details of the location, layout, appearance and management of parking and servicing areas and electric vehicle charging points for each phase of the development shall be submitted to and approved by the local planning authority before the development of that phase is commenced and the approved facilities shall be implemented before the first occupation of the phase and shall be retained in their intended use thereafter.
7. Details of travel plans for the residential part of the development and for the care home shall be submitted to and approved by the local planning authority before, respectively, the occupation of any residential dwelling and the first occupation of the care home. The travel plans shall be implemented in accordance with the approved details.
8. No site clearance, preparatory work or development shall take place until a scheme for the protection of the retained trees and hedgerows (the tree and hedgerow protection plan) and the appropriate working methods (the arboricultural method statement) has been submitted to and approved in writing by the local planning authority. Trees identified as veteran trees as defined in BS 3998 Section 3 - Terms and Definitions shall be the subject of a specific management plan devised by a qualified and competent arboriculturalist. The scheme for the protection of the retained trees and hedgerows shall be carried out as approved. In this condition "retained tree and hedgerow" means an existing tree or hedgerow which is to be retained in accordance with the approved plans and particulars.
9. Prior to the commencement of any development on the site, and prior to the approval of any related reserved matters, a detailed Surface Water Management Scheme for each phase or sub-phase of the development, which shall have taken into account detailed site investigations, shall be submitted to and approved in writing by the local planning authority. The scheme shall be in accordance with the details approved as part of the strategic scheme (Strategic Surface Water Management Scheme) and shall include supporting information as follows.
 - The sustainable urban drainage system (SuDS) hierarchy for discharging surface water drainage should be followed and demonstrated with design plans, details and calculations, all to be cross-referenced.
 - Design calculations for the proposed SuDS features, for all relevant return periods (1 in 1 year, 1 in 30 year and 1 in 100 year + 40% climate change) demonstrating the critical duration used for design.
 - The undertaking of permeability tests to BRE 365 to determine the soakage potential for SuDS of the proposed development.
 - Should infiltration be found unfeasible for SuDS purposes, surface water from the site should be attenuated and discharged to greenfield run-off rates (QBar).
 - For open SuDS features a freeboard or 300mm should be provided above the maximum water level for the critical storm event of 1 in 100 year + 40% climate change.

- A 10% allowance for urban creep for all residential developments should be provided.
- Details of the future maintenance and management of all SuDS features.
- Information on overland flood flow paths and their maintenance should be demonstrated. An exceedance flow route plan for the entire site should be provided with levels to indicate that all surface water falls away from buildings and that exceedance flows are contained within the site boundary.
- Measures to mitigate the risk of surface water run-off polluting waters.

The scheme shall be implemented in accordance with the approved details and timetable.

10. Prior to the first occupation of each phase, a record of the installed SuDS and drainage scheme for that phase shall be submitted to and approved in writing by the local planning authority to include as-built plans, photographs to document each key stage of installation and the completed installation, and the name and contact details of any appointed management company information.
11. Each reserved matters application for each phase of residential development shall include a scheme for protecting the proposed dwellings from traffic noise and from noise from the proposed pumping stations. The submitted scheme shall achieve internal levels of 30dB LAeq (8 hour) and 45dB L_{AmaxF} in all sleeping areas between 2300 hours and 0700 hours with windows shut and other means of ventilation provided. An internal level of 40dB LAeq 1 hour shall be achieved in all other areas of the building and an external level of 50dB LAeq (16 hours) shall be achieved in garden areas and balconies. Any works which form part of the scheme shall be completed in accordance with the approved details before any of the residential units are first occupied.
12. No development shall take place on any phase, including works of site clearance or preparation, until that phase of the site has been checked by a suitably qualified ecologist to ensure that no statutory protected species which would be harmed by the development have moved on to the site since the date previous surveys supporting the application were carried out. Should any protected species be found during this check, details of mitigation measures to prevent their harm shall be submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved mitigation scheme unless otherwise agreed in writing by the local planning authority.
13. Prior to the commencement of the development hereby approved, including any works of site clearance, a mitigation strategy for badgers, which shall include details of a recent survey (no older than six months), whether a development licence is required, and the location and timing of the provision of any mitigation or protective fencing around setts/commuting routes, shall be submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved details.

14. The developer shall afford access at all reasonable times to any archaeologist nominated by the local planning authority and shall allow that person to observe the excavations and record items of interest and finds.
15. Prior to the commencement of any development on the site, a construction traffic management plan (CTMP) shall be submitted to and approved in writing by the local planning authority. The CTMP shall include the following:
- The routing of construction vehicles and management of their movement into and out of the site by a qualified and certificated banksman.
 - Details of times for construction traffic and delivery vehicles, which must be outside network peak and school peak hours.
 - Access arrangements and times of movement of construction vehicles to minimise the impact on the surrounding highway network.
 - Details of wheel cleaning / wash facilities to prevent mud and debris from migrating on to the adjacent highway.
 - Contact details for the site supervisor responsible for on-site works.
 - Parking and travel initiatives for site related worker vehicles.
 - Engagement with local residents and neighbours.

Thereafter the development shall be carried out in accordance with the approved CTMP.

16. No development shall take place (including demolition, ground works and vegetation clearance) until a site wide construction and environmental management plan (CEMP) has been submitted to and agreed in writing by the local planning authority. The CEMP shall include details as follows:
- Practical measures including physical measures and working practices to avoid and reduce impacts during construction including soil and earthworks, dust management and the protection of water resources.
 - Emergency Planning and Incidents response systems, responsible persons and lines of communication.
 - Construction Waste Management.
 - Details of site compounds, offices, temporary protective fencing, exclusion barriers, lighting and warning signs.
 - Mitigation of construction noise, including cumulative impacts with construction work at site PR8 (Begbroke), for existing residents, including new occupants of under-construction and completed phases.
 - A consideration of the interactions when assessing and managing the effects of construction noise
 - The protection of public rights of way during construction.
 - Delivery and construction working hours.
 - Details of site management practices for contractors and visitors.

- Risk assessment of potentially damaging construction activities.

The approved construction environment management plan shall be adhered to throughout the construction period for the development.

17. The development shall not be occupied until:

- all water supply and foul water network upgrades required to accommodate the additional flows from the development have been completed; or
- a development and infrastructure phasing plan has been agreed with the local planning authority to allow development to be occupied.

Where a development and infrastructure phasing plan is agreed, no occupation shall take place other than in accordance with the agreed development and infrastructure phasing plan.

18. If during development contamination not previously identified is found to be present at the site, no further development shall be carried out until further details of a remediation strategy detailing how the unsuspected contamination shall be dealt with has been submitted to and approved in writing by the local planning authority. Thereafter the remediation strategy shall be carried out in accordance with the approved details.

Richborough

APPEARANCES

FOR THE APPELLANT:

Charles Banner KC Instructed by Pinsent Masons

He called:

Alison Caldwell CEng MICE PJA Flood Risk and Drainage Team

(Other witnesses introduced by Mr Banner at the opening of the inquiry were not called.)

FOR THE LOCAL PLANNING AUTHORITY:

Alan Evans of Counsel, instructed by Cherwell DC

He called:

Linda Griffiths Principal Planning Officer, Cherwell DC

Caroline Ford Team Leader, South Area, Cherwell DC

Tony Brummell Drainage Officer, Cherwell DC

Kabier Salam Lead Local Flood Authority, Oxfordshire CC

FOR YARNTON PARISH COUNCIL:

Stephen Smith

David Thornhill

Ian Middleton

FOR OXFORDHIRE COUNTY COUNCIL

Barbara Chillman Pupil Place Planning Manager, Oxfordshire CC

DOCUMENTS

1. Core Documents CD1 to CD11.1
2. **Appellant's** proofs of evidence from Alistair Baxter (Ecology), James Bancroft (Transport), Andy Williams (Design) Robert Davies (Planning), Alison Caldwell (Flood Risk) and Jan Kinsman (Education)
3. Rebuttal proof of evidence from Jan Kinsman dated February 2024
4. Rule 6 Party Statement / proof from Yarnton Parish Council
5. Proof of evidence from Barbara Chillman, Oxfordshire CC
6. Agreed topic papers on arboriculture, biodiversity/ecology, education, flood risk, informal parkland, planning policy, transport and viability
7. Statement of common ground dated 17 January 2024
8. Cherwell DC Compliance Statement in respect of the Planning Obligation, January 2024
9. Cherwell DC Compliance Statement addendum, February 2024, and accompanying information on health and outdoor and indoor sport requirements
10. **Oxfordshire County Council Compliance Statement ...**
11. Scheme amendment re-consultation responses
12. Letter from Gerald Eve to R Saunders, Rutten Lane, January 2024
13. Post consultation letter from Gerald Eve to Cherwell DC dated 2 February 2024
14. Letter from Gerald Eve to Cherwell DC dated 2 February 2024, regarding putative reasons for refusal 1, 2 and 4
15. Updated viability topic paper 8 February 2024
16. Letter from Gowling WLG on behalf of Sanctuary dated 8 February 2024
17. Email from Cherwell District Council dated 9 February 2024 confirming that they will not be contesting reasons 1, 2 and 4 at the Inquiry
18. Updated suggested conditions from the Council dated 15 February 2024
19. Cherwell District Council position on reasons for refusal, 9 February 2024
20. Completed planning obligation dated 8 March 2024

PLANS

- A. Block Plan - DE234 01 - A
- B. Location Plan - DE234 02 - A
- C. Parameter Plan - Land Use - DE234_14 - J
- D. Parameter Plan - Building Heights - DE234_15 - G
- E. Parameter Plan - Indicative Movement - DE234_16 - H
- F. Parameter Plan - Green Infrastructure - DE234_17 - J
- G. Parameter Plan - Density - DE234_18 - A

Richborough



Costs Decision

Inquiry held on 13 and 14 February 2024

Site visit made on 15 February 2024

by Jonathan Bore MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02/04/2024

COSTS DECISION A: application by Merton College, Oxford for a full award of costs against Cherwell District Council in relation to Appeal Ref: APP/C3105/W/23/3329587

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for the erection of up to 540 dwellings (Class C3), up to 9,000sqm GEA of elderly/extra care residential floorspace (Class C2), a community home work hub (up to 200sqm)(Class E), alongside the creation of two locally equipped areas for play, one NEAP, up to 1.8 hectares of playing pitches and amenity space for the William Fletcher Primary School, two vehicular access points, green infrastructure, areas of public open space, two community woodland areas, a local nature reserve, footpaths, tree planting, restoration of historic hedgerow, and associated works on OS Parcel 3673 adjoining and west of 161 Rutten Lane, Yarnton, OX5 1LT.
-

Preliminary matters

1. In addition to the costs application which is the subject of this decision, another costs application was made by Merton College against Oxfordshire County Council. This concerned a request for a strategic infrastructure contribution and access to replacement playing fields for William Fletcher Primary School. This is the subject of Costs Decision B.
2. **In this decision Merton College and its consultant team are referred to as “the applicant”.**

Decision

3. The application for an award of costs is allowed in the terms set out below.

The submissions for Merton College

4. The costs application was submitted in writing.
5. Merton College had entered into a planning performance agreement (PPA) with Cherwell District Council and Oxfordshire County Council on 13 July 2021, and payment of £22,344 was made to the District Council and £48,756 to the County Council. The PPA stated that where unforeseen circumstances meant that the application could not be presented to the District **Council’s planning** committee by April 2022, the agreement would expire. The PPA was not adhered to by either the District or the County Council. No reason was ever provided nor any substantive issues identified.

6. The application was not determined within the statutory deadline, as extended. **The Council's handling of the planning application led the applicant to believe** that there was no prospect of obtaining planning permission within a reasonable period, so an appeal against the **Council's** failure to determine the application was made on 15 September 2023.
7. There were several examples of the slowness and lack of engagement in handling the application. Although viability was identified as a potential issue in March 2022, the District Council did not appoint a viability consultant until October 2022; there were no appropriate handover and transition measures to deal with changes in the case officer, team leader and housing officer, and this contributed to significant delays; repeated requests were made for clarity on affordable housing and mix and the appropriate balance between housing and transportation contributions but a formal response was not issued until 9 March 2022; and **despite the applicant's repeated monthly requests** as to the specification, location and role of the local nature reserve, the District Council did not provide any clarification until the committee report was published in November 2023, after the appeal against non-determination was submitted.
8. Upon notice of the submission of the appeal, the Council argued that an appeal was unnecessary as the Council would be able to grant planning permission at short order; they said that witnesses on architecture and design were not needed and other technical matters on transport, ecology and education could be resolved. However, the report to committee included five putative reasons for refusal, none of which had been adequately discussed with the applicant before the appeal was made or prior to the committee report. The District Council had not sought information on these matters beforehand due to its lack of engagement with the planning application. These matters could have been dealt with by requests for further information and by discussion.
9. During the second appeal case management conference on 31 January 2024 the District Council indicated that the reasons for refusal had been satisfactorily resolved and they did not intend to take an active role in pursuing any of the reasons for refusal at the inquiry, subject to completion of the s106 agreement. This demonstrates that if the Council had engaged properly during the agreed time limit for determining the application, the outstanding issues could have been resolved without the need for the appeal process.
10. Planning Practice Guidance states that if a local planning authority will fail to determine an application within the time limits, it should give the applicant a proper explanation. If an appeal in such cases is allowed the local planning authority may be at risk of an award of costs if there were no substantive reasons to justify delaying the decision and better communication with the applicant would have allowed the appeal to have been avoided altogether. In this case, if the Council had acted reasonably and had determined the application within the agreed statutory deadline the appeal ought not to have been necessary. No explanation has ever been provided as to why a determination was impossible within that timescale.
11. **The Council's unreasonable conduct has caused the** applicant the unnecessary expense of an appeal and a full award of costs is sought against the Council.

The response by Cherwell District Council

12. The response was made in writing.

13. The costs application is not justified and no award of costs should be made against the Council.
14. Planning Practice Guidance states that as a matter of good practice where circumstances allow, costs applications should be made in writing before the inquiry. In this case the written costs application was left until the very last minute. Arguments of unreasonable behaviour by the Council are absent from the applicant's **claim**.
15. The Council held a series of monthly meetings involving the case officer the team leader and senior manager. In August 2022 the previous case officer left. Staff turnover is unavoidable, but the case was transferred to the current case officer and she and the team leader were briefed and worked quickly to become familiar with the application. Monthly meetings continued to be held to resolve issues even though the PPA funding had expired. The Council refutes the applicant's **assertion that there was a lack of engagement and communication**. The second case officer engaged closely with the applicant's team.
16. It was not until February 2022 that the applicant had first identified a viability issue so the issue was not capable of resolution by the time of the expiry of the PPA. **The Council's viability consultant** was appointed in October 2022. It is recognised that there was delay in appointing a viability consultant, but this had to go through the formal procurement process and did not result in delay the determination of the application. The **applicant's first viability assessment** was not submitted until 20 January 2023, and there was no reason why the **assessment should have waited until the appointment of the Council's consultant**.
17. A formal response on affordable housing mix and tenure was provided in March 2022.
18. The Council sent a letter **on 22 September 2022 to the applicant's team highlighting the Council's concerns with the informal parkland and biodiversity net gain**. In December 2022 the applicant made a revised submission which provided information on a number of issues including transport, biodiversity, design, education, flood risk and drainage issues. This was described as a comprehensive addendum application pack. The date of submission of this material made it impossible to determine the application within the timescale envisaged by the PPA. Consultation took place on this until 20 January 2023.
19. The applicant's archaeology work was submitted in early January 2023. In April **2023 the Council's ecologist** raised objections on various matters. A meeting was held in which the applicant confirmed that work was ongoing in respect of viability, ecology and **the County Council's objections**. **On 27 April 2023 a** further letter was issued by the Council to summarise the position on design, viability, transport, drainage, ecology, informal parkland and the s106 obligation. Further information on ecology was submitted in May 2023.
20. It was not for the Council to supply a clarification of the Local Plan requirement for a local nature reserve – it was for the applicant to propose a scheme. A letter was provided by the case officer on 25 July 2023 setting out all outstanding matters including design, informal parkland, biodiversity, viability and transport. Work was still ongoing on transport modelling which had been requested by the County Council; the applicant's **transport response was**

submitted on 6 September 2023 and a further response was submitted on 18 September 2023.

21. The putative reasons for refusal related to matters that the Council had communicated to the applicant's team through the application process and were capable of resolution. There was nothing unreasonable about them and there was no inconsistency between issuing putative reasons for refusal and in stating the issues could be addressed in short order. It was the applicant's decision to appeal against non-determination. It was necessary even during the appeal process for the applicant to take make amendments to the scheme in order to overcome reasonable concerns in relation to its acceptability and participate in joint work to get matters to an acceptable conclusion.
22. It is evident from the putative reasons for refusal that permission would not have been granted even when the appeal was made in September 2023, because there were several issues remaining to be resolved before a grant could have been forthcoming. The scheme amendments made by the applicant thereafter reinforce the point that more was required to meet these legitimate concerns. The amendments may not have been major but they deal with matters that needed to be addressed and have had to be presented across a range of material, including a revised indicative framework plan, a revised land use parameters plan, a revised green infrastructure parameters plan, a new retained agricultural land improvement plan, a revised legacy and stewardship strategy and an updated biodiversity net gain assessment.
23. Moreover, as at the end of March 2023 the objection from Oxfordshire County Council as highway authority still remained and the further transport modelling to be carried jointly by all site promoters first requested by the County Council in June 2022 was yet to be completed. The Council was in no realistic position to grant permission at **this point in the face of the highway authority's** objection, which was not withdrawn until 13th October 2023 after the appeal had been made.
24. The question of the viability of the development raised by putative reason for refusal (4) was also a matter that needed further work to be done at the point when the appeal was made and effort to be put in by both sides thereafter to reach a position satisfactory to all concerned. Similarly, there was no planning obligation (the subject of putative reason for refusal (5)) available to support the proposals when the appeal was made. This too has involved a good deal of **further input to get to the point where the development's impacts have been** properly addressed.
25. The Council therefore disputes that there has been any unreasonable behaviour on its part leading the applicant to incur unnecessary or wasted expense in the appeal process.

Reasons

26. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
27. This is a major claim in respect of a significant scheme and it is necessary to go through the issues in some detail. The source for the chronology and detail

includes the PPA meeting notes, emails, correspondence between the main parties, submissions by both main parties, and all the inquiry evidence.

28. To appreciate the context for the discussion referred to below, is important to establish at the outset:

- the planning application was in outline, with all matters reserved except for the principal access points;
- it concerned the development of 540 homes on a site allocated for 540 homes under Policy PR9 of the Cherwell Local Plan 2011-2031 (Part 1) Partial Review Plan 2020;
- the development plan allocation was made to contribute towards meeting the City of **Oxford's unmet housing needs**;
- the proposal was subject to pre-application discussions;
- the application was dated 8 October 2021 and was validated on 14 October 2021;
- the PPA was dated 13 July 2021 and stated that where unforeseen circumstances meant that the application could not be presented to the **Councils' planning committee by April 2022, it would expire** on 1 May 2022;
- further extensions of time for determining the application were sought by the Council;
- the applicant appealed against non-determination on 15 September 2023.

29. The putative reasons for refusal provide a useful initial basis for this assessment, followed by conclusions as to whether there was unreasonable behaviour that led to unnecessary expense.

Informal parkland and community woodland, ecology, biodiversity and the local nature reserve

30. The first putative reason for refusal stated that the proposal had failed to adequately demonstrate that the public open space would be delivered in the form of an informal parkland. The second putative reason for refusal stated that the scheme had failed to adequately demonstrate that the development would not impact existing flora and fauna, deliver successful ecological mitigation and biodiversity gain, and deliver the local nature reserve which was a requirement of Policy PR9.

31. The applicant had submitted a very large amount of material to support the planning application, as well as producing a comprehensive environmental statement. The applicant's **green** and blue infrastructure plan was provided as part of the information attached to the outline application. It was similar to the plan in the original development framework but differed in certain respects because it located the community woodland in two separate parcels; the area for public open space was different from the 24.8 hectares sought by Policy PR9; and the area of public open space was intended to be managed as a meadow with rotational grazing and controlled rather than general public access.

32. There was little indication from the Council, from the submission of the application in 2021 and throughout most of 2022, that the topics covered in these putative reasons for refusal were a matter of significant concern to the Council. Policy PR9 required that the nature reserve had to be accessible to William Fletcher Primary School, so from the pre-application stage onwards, the applicant quite reasonably sought details from the Council and County Council as to its specification, location and role. After the application was submitted, the need for this information was recorded as an outstanding item at every monthly meeting from October 2021 to July 2022, but the information was not forthcoming from either council.
33. However, in a letter to the applicants on 22 September 2022, the District Council raised a great many issues: community woodland, informal parkland, density, design detail, archaeology, landscape and ecology, health impact and sustainable construction. This was over a year from the signing of the PPA and nearly a year from the date the application was submitted. The Council also emailed the applicant in November 2022 in connection with the informal parkland.
34. The applicant responded by letter on 17 October 2022 and submitted an addendum pack in December 2022 which provided information on transport, green infrastructure and biodiversity, design, education, flood risk and drainage issues.
35. On 27 April 2023 the Council wrote to the applicant to set out what it regarded as outstanding issues following the submission of the addendum pack and subsequent re-consultation. Some of this related to detail in the design and access statement. The letter criticised, or sought more detail over:
- the diversion of a Thames Water pipeline
 - LAPs and LEAPs
 - the robustness of the naturalistic play area
 - the open space schedule and ratio
 - the relationship of open space to wetland
 - cross sections and plans for Dolton Lane and Frogwelldown Lane
 - architectural design principles and ridge heights
 - the balance of hard and soft landscaping
 - widths of verges and frontage planting,
 - the community hub
 - the response to the flood risk objection from the parish councils
 - breeding opportunities for farmland birds
 - the extent and type of the nature reserve and its management and public access

- the management of the meadowland area and whether public access was compatible with farmland birds (notwithstanding that the Council had previously criticised the applicant's **proposal to limit public access**),
 - the number of bat and bird boxes per dwelling
 - green roofs
 - biodiversity net gain and ecological mitigation.
36. The letter stated that the Council was not in a position to take the matter to its planning committee.
37. This list of comments, requests and criticisms came more than 18 months after the submission of the application. The Council argues that the date of submission of **the applicant's** material made it impossible to determine the application within the timescale envisaged by the PPA. But the real cause of the delay was the length of time it had taken for the Council to produce substantive comments on these matters and the absence of meaningful feedback before that point.
38. The applicant responded on 19 May 2023. But the Council wrote to the applicant again on 25 July 2023 concerning the following:
- the nature and future management of the informal parkland and nature reserve
 - the balance between green and blue infrastructure
 - the adequacy of public access to open space
 - built design and materials and other matters of detailed design including the width of green verges and front gardens, the buffer to the A44 and the size of parking courts and the central green
 - aspects of ecology.
39. As with the letter of 27 April 2023, it stated that the Council was not in a position to take the matter to its planning committee.
40. The applicant **again responded to the Council's criticisms** on 4 August 2023. But the Council continued to hold out for responses to this range of requests and criticisms. Many of these should have raised more than a year earlier; many should not have been a stumbling block to granting outline planning permission. The applicant understandably concluded that the application was not likely to be brought to committee within a reasonable time and their appeal in September 2023 was justified.
41. From a reading of the committee report of 2 November 2023, after the submission of the appeal, it is evident **that the Council's main** ongoing concerns were the use and management of the meadowland; the habitats and management of the local nature reserve; the amount of provision per dwelling for bats and birds; and the management and maintenance of hydrological assets. To deal with this, the applicant produced options for the Council which were discussed at a meeting on 6 December 2023.
42. At that point the Council, no longer having responsibility for deciding the application and with an appeal inquiry in prospect, readily moved to resolve

any remaining issues and withdrew its objection on these matters on 13 December 2023. It was agreed that the items of concern to the Council would be covered by the reserved matters conditions and/or the planning obligation, together with a change to the parameter plan. Thus matters were not resolved until more than two years after the date of the application.

43. This was an outline application with all matters reserved except for the site access points, and it was substantially in accordance with Local Plan Policy PR9, for which much ecological survey work had already been undertaken. The applicant had already set out a proposed stewardship and legacy strategy for the site in the Design and Access Statement. A great many of the **Council's** criticisms and requests for further information in respect of the use and management of the green infrastructure were at a level of detail which was unnecessary for the outline application to be determined; and more substantive issues could have been readily resolved in much earlier discussions with the applicant or could have been sought by condition.
44. The alacrity which these matters were eventually dealt with by the Council when faced with the inquiry throws into relief the unreasonably slow and over-zealous approach it had taken until then towards the planning application and the putative reasons for refusal. The applicant was obliged to produce revised documents for consultation and to produce proofs of evidence and topic papers for the inquiry. This all led the applicants to incur unnecessary costs at the appeal stage. None of these matters should have needed to come to appeal.

Access to the replacement school playing field

45. The third putative reason for refusal was that the scheme had failed to secure an appropriate, safe and convenient access from William Fletcher Primary School to the proposed replacement playing fields. This is addressed in Costs Decision B, concerning **Merton College's** application for an award of costs against Oxfordshire County Council.

Viability

46. The fourth putative reason for refusal was that the scheme, when set against the financial viability of the scheme, would fail to provide an adequate level of affordable housing. The policy requirement and the level of affordable housing provision within the planning obligation are addressed in my main decision and are not repeated here.
47. The amount of affordable housing that could be supported by the scheme was closely related to the range of infrastructure and other requirements that were being sought by the Council. Financial viability was identified as a potential issue at the time of the submission of the planning application, in the light of **the County Council's initial request for contributions. Thus** the Council should have been aware at an early stage that it was going to be necessary to appoint viability consultants as a pre-requisite to establishing the relationship between infrastructure costs, affordable housing and viability, in order to agree baseline and methodology with the applicants, and to identify the costs attributable to the individual s106 requirements.
48. In a meeting on 23 December 2021, **the applicant's agents expressed their** concern to the District Council that the Council had not yet clarified its approach to housing mix. There was also a need to establish the framework for

viability, and in particular to clarify whether and how s106 contributions would be pooled or equalised across the allocated sites. These were matters that were relevant to the contents of any planning obligation, including the ability of the scheme to deliver the proportion of affordable housing sought by the policy.

49. These same issues were raised repeatedly by the applicant at monthly meetings. The lack of progress in respect of the terms of the planning obligation and the issue of financial viability were discussed at a meeting on 9 March 2022, when the Council admitted that matters had been severely delayed by non-receipt of the housing officer's comments. **The housing officer's** comments were provided six months after the submission of the planning application.
50. At the March meeting the Council stated that it was going to start the process of appointing the independent viability assessor. But meeting notes throughout much of 2022 demonstrate that the Council made slow progress on this. Emails show that the consultants were not appointed until the end of September 2022 and did not have an initial meeting with the applicant until November 2022, more than a year after the application had been submitted.
51. Once the base assumptions had been established, the applicant quickly produced the financial viability assessment, which was submitted on 20 January 2023. Following Council comments, a revised submission was made in May 2023. The Council sought more information in June 2023 and required a third party review of costs. This was only completed by 10 August 2023 and **the Council's advisor issued an updated report on 31 August 2023. Further** meetings were held and there were outstanding matters remaining in early 2024, including an additional request by the County Council. Agreement was finally reached in January 2024 just prior to the inquiry.
52. Even allowing for the procurement process, the appointment of viability consultants and the process of agreeing costs inputs was extraordinarily protracted. It is no excuse for the Council to argue that the applicant could have produced its own viability study, since the applicant needed to agree the base assumptions ahead of its formal financial viability assessment. If the Council had dealt with the viability issue (and the other matters referred to in this decision) at the appropriate time, the proportion of affordable housing and the **scheme's infrastructure** costs and contributions could have been agreed much earlier in the life of the planning application, and the matter of viability and affordable housing need not have come to an inquiry.

On-site infrastructure and off-site infrastructure contributions

53. The fifth putative reason for refusal was that, in the absence of a satisfactory planning obligation, the local planning authority was not satisfied that the development would provide for appropriate on-site infrastructure or infrastructure contributions towards off-site mitigation.
54. The absence of a planning obligation at the time of the appeal was not the **applicant's fault**. Draft heads of terms had been formulated in September and October 2021 and formed much of the framework for discussion at the monthly meetings. But the applicant experienced severe difficulty in getting concrete responses from both councils on viability and costs. This had a knock-on effect on timescale and hence the ability to finalise the planning obligation. The delay in appointing viability consultants has already been discussed above. Other

factors were the insistence of the County Council on further transport modelling, and the failure of the Council to reach agreement on fair and reasonable contributions for the transport infrastructure.

55. Detailed transport modelling had already been undertaken as part of the Local Plan Partial Review to establish the **transport strategy for meeting Oxford's** unmet housing needs, and an infrastructure delivery plan containing a detailed package of mitigation measures had been included in Appendix 4 of the plan. The applicant and County Council had been party to this work through their involvement in the Local Plan Partial Review. The proposed access strategy for the site was set out in the transport assessment and was submitted as part of the environmental statement.
56. Meeting notes demonstrate that, from October 2021 onwards, **the applicant's** agent had raised the need for a response from the District and County Councils in respect of transport modelling and s106 contributions, and over the following months the applicant made considerable efforts to engage with the councils on this subject. In a meeting in March 2022, by which time the application was already 5 months old, the applicant tried to establish some certainty by seeking confirmation that the current modelling work would allow the application to be determined, since the matters had been identified in the Local Plan examination and the infrastructure delivery plan.
57. In May 2022, when the application was 7 months old, the applicant urgently sought updated figures from the County Council in respect of infrastructure costs. These had not been forthcoming despite the fact that the principle of infrastructure provision had been discussed at the Local Plan examination and that Local Plan Partial Review Appendix 4 contained a comprehensive list of infrastructure requirements. Neither council identified a charging mechanism for the infrastructure contributions that would have assisted with viability discussions, using the costs that were identified in Appendix 4 of the Local Plan. The price per peak hour trip method was suggested in December 2022 but not taken forward by the County Council until October 2023.
58. In June 2022, 8 months after the submission of the application, and despite the extensive modelling and the identification of mitigation measures that had already been carried out, the County Council sought more information on safe and suitable access and various alterations to the highway works. It insisted on further modelling to the road network to demonstrate how the package of mitigation would alleviate the effects and wanted this done in conjunction with the other PR sites. The additional modelling took 21 months to agree with the County Council and ultimately it simply confirmed that the infrastructure work which had previously identified was required.
59. The County Council also requested a significant financial contribution towards infrastructure which had already been constructed or funded through the Oxfordshire Housing Growth Fund Deal. This is dealt with in Costs Decision B, concerning the applicant's **claim** against Oxfordshire County Council.
60. The County Council maintained an objection to the scheme which was not withdrawn until 13th October 2023 after the appeal had been made. The District Council argues that it was in no realistic position to grant permission in **the face of the highway authority's objection**. But this outline application proposed much the same amount of development as the local plan allocation; and the transport effects of the allocated sites had already been considered

through the local plan process and the necessary mitigation measures identified. The insistence by the County Council on re-visiting modelling, the length of time it took to get appropriate input from both councils, and the maintenance of an objection in the face of the agreed planning background were significant causes of delay. The District Council should have taken control of this situation much earlier, particularly given the existence of the PPA, the local plan allocation and the volume of work that had already been carried out. As the local planning authority charged with deciding the application, it should have taken a proportionate and fair approach to any request for further information. The option was there to seek independent advice on this matter. Transportation issues should not have been outstanding at the time the appeal.

Conclusions

61. The application, in outline, concerned the development of 540 homes on a site allocated for 540 homes under Policy PR9 of the Cherwell Local Plan 2011-2031 (Part 1) Partial Review Plan 2020. The policy was specifically dedicated to the development of this site, and it contained a clear set of requirements. In addition, substantial transport modelling had taken place at that stage and a package of transport measures had been identified.
62. The requirements of policy PR9 were expanded upon in the development brief, published in November 2021. This had been produced with joint input from the District and County Councils and Merton College and other stakeholders. The brief set out development parameters for a comprehensive scheme and sought the submission of many specialist documents.
63. There was therefore in existence a thoroughly researched and modelled policy and masterplanning framework, based itself on an examined and adopted local plan, with inputs from relevant stakeholders. The local plan allocation had itself been supported by a range of technical studies, and much of the fundamental work to identify necessary development and infrastructure requirements had already been done. The planning application itself, which was only in outline and differed in no great measure from the terms of the development plan policy and development brief, and contained the same number of homes, was supported by a comprehensive set of studies and evidence and an environmental statement.
64. Against this background, and having signed the PPA, the applicant was entitled to expect the Council to determine the application within the period specified by the PPA. And if that deadline could not be met, it was reasonable for the applicant to expect outstanding matters to be dealt with expeditiously. That did not happen; the process of obtaining relevant information from the Council and agreeing detail with them was laborious and protracted, and the Council was exceedingly late in seeking further information and amendments from the applicant. Despite numerous requests and reminders by the applicant over a long period of time, the Council failed to resolve matters of detail that could and should have been addressed much earlier. And when eventually the Council did send letters setting out its views, it pursued the applicant for an unnecessary and disproportionate amount of additional detail. Almost two years after the first signing of the PPA, the application had still not been determined. It is fully understandable that the applicant exercised its right of appeal against non-determination.

65. As local planning authority, and as a party to the PPA, the District Council had certain responsibilities: firstly to ensure that any request for information by the applicant was met in a timely fashion; secondly that any request from either council to undertake additional work was necessary, proportionate and timely; and thirdly that outstanding matters were resolved within a reasonable period. Some of these concerns originated from other parties including the County Council and specialist consultees, but the District Council did not take adequate control of matters to resolve issues and address delay. A balanced, proportionate and focused approach and better communication with the applicant would have resolved outstanding issues much earlier in the life of the application.
66. It is recognised by all parties that, following the departure of the original case officer, the Council's new case officer worked hard to gain familiarity with the case and was proactive in the monthly meetings. However, the fact that there was staff turnover is not a mitigating factor in respect of the delay suffered by this application. Planning Practice Guidance states that a PPA is a project management tool which the local planning authorities and applicants can use to agree timescales, actions and resources for handling particular applications, and that extra resource provided in this way needs to be used for additional capacity that is required to ensure a timely and effective service.
67. The concerns of the Council set out in the putative reasons for refusal should have been addressed early in the life of the application; some of them, in particular those relating to green infrastructure, could have been dealt with as conditions on a planning permission or as part of a planning obligation. The fact that all the objections were withdrawn by the Council prior to the opening of the inquiry **demonstrates that there was nothing substantive in the Council's** reasons for refusal that could not have been agreed much earlier in the process. As it was, the applicant was forced to address these matters through an appeal, and to produce revised material and re-consult at the appeal stage. It had to produce evidence on the reasons for refusal and, given that this was an appeal against non-determination, it had to produce adequate evidence on all matters relevant to the planning application to enable the decision-maker to reach a decision.
68. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, the behaviour and actions of the Council at the time of the planning application can be taken into account in the consideration of whether or not costs should be awarded. The Council acted unreasonably in its handling of the planning application and the application should not have needed to come to an appeal. The Council delayed development that should clearly have been permitted, failed to produce evidence that substantiated each putative reason for refusal, and issued putative reasons for refusal on grounds that were capable of being dealt with by planning condition or in an obligation. The Council's **unreasonable** behaviour led the applicant to the unnecessary costs of an appeal with the consequent need to maintain an appeal team with legal representation and to produce evidence on a wide range of matters.
69. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred and an award of costs against Cherwell District Council is therefore warranted, covering all the costs relating to the appeal, with the exception of the two matters which are the subject of the costs claim against Oxfordshire County Council.

Costs Order

70. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Cherwell District Council shall pay to Merton College the full costs of the appeal proceedings described in the heading of this decision with the exception of appeal costs relating to the access to the replacement playing fields for William Fletcher Primary School and the strategic highway contribution sought for the Cassington Road to Peartree Interchange works, which are the subject of a separate costs claim; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Merton College, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Jonathan Bore

INSPECTOR

Richborough



Costs Decision

Inquiry held on 13 February 2024

Site visit made on 15 February 2024

by Jonathan Bore MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02/04/2024

COSTS DECISION B: application by Merton College, Oxford for a partial award of costs against Oxfordshire County Council in relation to Appeal Ref: APP/C3105/W/23/3329587

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The appeal was against the failure of Cherwell District Council to issue a notice of their decision within the prescribed period on an application for planning permission for the erection of up to 540 dwellings (Class C3), up to 9,000sqm GEA of elderly/extra care residential floorspace (Class C2), a Community Home Work Hub (up to 200sqm)(Class E), alongside the creation of two locally equipped areas for play, one NEAP, up to 1.8 hectares of playing pitches and amenity space for the William Fletcher Primary School, two vehicular access points, green infrastructure, areas of public open space, two community woodland areas, a local nature reserve, footpaths, tree planting, restoration of historic hedgerow, and associated works on OS Parcel 3673 adjoining and west of 161 Rutten Lane, Yarnton, OX5 1LT.
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Preliminary matters

1. In addition to the costs application which is the subject of this decision, another costs application was made by Merton College against Cherwell District Council. This is the subject of Costs Decision A.
2. In this decision Merton College and its **consultant team are referred to as "the applicant"**.

Decision

3. The application for an award of costs is allowed in the terms set out below.

The submissions for Merton College

4. The costs application was submitted in writing.
 5. Merton College had entered into a planning performance agreement (PPA) with Cherwell District Council and Oxfordshire County Council on 13 July 2021, and payment of £22,344 was made to the District Council and £48,756 to the County Council. The PPA stated that where unforeseen circumstances meant that the application could not be presented to the District **Council's planning** committee by April 2022, the agreement would expire. The PPA was not adhered to by either the District or the County Council.
 6. The application was not determined within the statutory deadline, as extended. **The Council's handling of the planning application led the applicant to believe**
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- that there was no prospect of obtaining planning permission within a **reasonable period, so an appeal against the Council's failure to determine** the application was made on 15 September 2023.
7. Following the submission of the appeal, the Council indicated that had it been in a position to determine the application, it would have been refused for five reasons. The third of these stated that the scheme had failed to secure an appropriate, safe and convenient access from William Fletcher Primary School to the proposed replacement playing fields. The County Council prepared and submitted a proof of evidence from a witness. Cherwell District Council as local planning authority indicated that it did not intend to pursue this reason for refusal, but the County Council unreasonably persisted in its objection, and this delayed the finalisation of the planning obligation to which the County Council are a party. The applicant wasted significant costs in trying to reach an agreement with the County Council on this issue.
 8. Oxfordshire County Council was not a main party to the appeal: it did not apply for Rule 6 status. However, it stepped outside the remit of an interested party in preparing and submitting a proof of evidence relating to the access to the playing fields, an issue that the District Council had not chosen to pursue. In order to defend its position on this matter, the applicant had to submit rebuttal **evidence addressing the point made in the County Council's proof of evidence.**
 9. The applicant also had to spend a significant amount of time addressing the **County Council's request for a** financial contribution towards a strategic infrastructure project which had already been constructed or which had already been committed using money forward funded from the Oxfordshire Housing Growth Fund Deal, namely the highway works on the A44 between Cassington Road and Peartree Interchange. This necessitated significant involvement by **the applicant's transport consultant** and leading Counsel. The applicant had to make an information request to the County Council pursuant to the Environmental Information Regulations 2004 and the Freedom of Information Act 2000 to obtain copies of the relevant agreements relating to the Housing Growth Fund Deal and its funding streams for the infrastructure works and had to follow up those requests. Leading Counsel had to provide an opinion appended to the transport proof of evidence to explain why there was no legal basis for such a contribution.
 10. Neither council has attempted to defend the request for this financial contribution. The acceptance that the contribution was not being pursued was first communicated to the applicant at the case management conference on 31 January 2024 and was only formally notified in writing to the applicant team on 9 February 2024. This led to wasted time and expense defending the applicant's position and producing comprehensive legal submissions, with broader input, in order to address this issue at the inquiry.
 11. **The County Council's** lack of cooperation with other parties and its delay in providing information led to the applicant incurring unnecessary expense in preparing the proof of evidence in relation to education matters, reviewing it and preparing a rebuttal proof of evidence. It also led the applicant to incur unnecessary expense in making its information request to conclude whether the highways contribution sought was in compliance with the CIL Regulations, and preparing the legal submissions relating to the strategic infrastructure.

12. There are therefore exceptional circumstances for an award of costs against the County Council.

The response by Oxfordshire County Council

13. The response was made in writing.
14. As regards the access to the school playing fields, the **County Council's** Pupil Place Manager did not submit a proof of evidence as a main party to the appeal; it produced one to support **the District Council's case**. This is standard practice and it avoided the necessity for the County Council to register as a party to the appeal. The proof of evidence was submitted by the District Council on 17 January 2024 and the County Council was informed on 31 January (following the case management conference) that the District Council was not going to pursue this reason for refusal. The **applicant's rebuttal** statement was requested by the Inspector in the knowledge that the District Council was not pursuing this putative reason for refusal.
15. The solution to the access issue was secured by a planning obligation and it was reasonable for the County Council to have continued to negotiate with the applicant on this point to find an acceptable solution.
16. Extensive discussions had taken place on the matter of the access before during and after the inquiry. Throughout these discussions the County Council had tried to be as flexible as possible, but it is bound by its duty to ensure satisfactory access to education provision for both the residents of the new development and the existing local population.
17. The original access solution set out in the **District Council's** development brief proved not to be deliverable. The alternative involved crossing a driveway to a care home. This involved lengthy discussions with the owners whose terms were unacceptable. The County Council worked with the applicant to assess other alternatives and to find a fallback position.
18. Following a series of meetings and emails between the parties in early January, progress had been made such that the County Council indicated to the applicant that they would be able to advise that the putative reason for refusal had been addressed, subject to final confirmation of triggers, specifications and detailed drafting of a s106 obligation to ensure that the footpath would be delivered in good time with permanent rights of access. But in an email of 2 February 2024 the applicant stated that they could not agree to an obligation requiring delivery of the footpath without the County Council being first required to use CPO powers to seek to acquire permanent access rights across the care home access road. This required a further meeting on 8 February 2024. The applicant's **solicitor** provided further drafting in relation to the playing field access which was received by the County Council on 12 February 2024. The County Council continued to work with the applicant up to and through the inquiry and since the Inquiry solicitors for both parties have spent many hours in discussion to agree drafting.
19. The County Council attended numerous meetings throughout the process and kept the applicant informed. There is no evidence of a lack of cooperation, merely different stances.
20. There are no exceptional circumstances for claiming costs against the County Council. The County Council was not required to apply for Rule 6 status and did

- not step outside the remit of an interested party. The proof of evidence was submitted prior to the withdrawal of the reason for refusal and the rebuttal evidence was required by the Inspector. The applicant would have had to negotiate with the County Council regardless of the appeal because this would have been required for the s106 agreement.
21. As regards the A44 Cassington Road to Peartree Interchange highway works, this scheme has a direct relationship with the development and is critical infrastructure. Policy PR11 of the Local Plan Partial Review states that all sites are required to contribute to the delivery of Local Plan Infrastructure, and where forward funding for infrastructure has been provided, for example from the Oxfordshire Growth Board as part of the Oxfordshire Housing and Growth Deal, all sites are required to contribute to the recovery of these funds as appropriate. The request for a contribution was made in line with this policy.
 22. However, in light of the contributions now agreed toward the Mobility Hub, A44 improvements (north of the Cassington Road junction) and the ongoing viability assessment of the development, a decision was made to withdraw the request to recover the funding used for the recently implemented scheme.
 23. An email requesting further information relating to the Cassington Road to Peartree Interchange contribution request was sent by the applicant on 30 March 2023. Much of the information sought in this email was responded to by email on 14 April 2023, with a follow up email sent on 16 May 2023. No case was made against the contribution request between that point and the email received on Wednesday 10 January 2024. Whilst Freedom of Information requests were made on 16 November 2023 (responded to on 15 December 2023) and 5 January 2024 (responded to on 2 February 2024), County Council officers involved in the negotiation of the s106 agreement were only made aware of a challenge to this contribution via an email to the County Solicitor, which was received on Wednesday 10 January 2024.
 24. The County Council disagrees that the Freedom of Information request was part of the appeal proceedings, and it was unnecessary as the applicant had not approached the County Council to discuss the contribution. The applicant's case against the contribution was set out in the applicant's Transport Proof of Evidence, which the County Council first had sight of on Friday 19 January. The County Council informed the applicant that the request would be withdrawn verbally at a meeting on 2 February 2024 and the District Council confirmed this in writing on 9 February.
 25. The County Council does not agree that the contribution was incorrectly requested. The County Council does not agree that the request should never have been made.

Reasons

26. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

Access to the replacement school playing fields

27. The access to the school playing fields was discussed in meetings from December 2021 onwards and a number of options were considered. The County Council objected at various times to the terms of the proposed licence, which it said could be withdrawn at any time; to the alternative fallback path, which it said was too long and would make it difficult for staff to manage children; and to the use of CPO powers, pointing towards the objection by the owner of the driveway to the use of those powers.
28. However, reasonable and practical ways to resolve this issue, including the use of CPO powers, had been identified and discussed early in the life of the planning application. The applicant devised a sequence of actions for the draft s106 obligation involving the use of CPO powers with the provision of the path as a fallback. The County Council resisted these suggestions over a long period of time, objecting to both the use of CPO powers and the fallback path.
29. Although the matter was cited as a putative reason for refusal, the District Council announced at the second case management conference on 31 January 2024 that it was not going to defend this reason for refusal, on the basis that it considered that the matter had been satisfactorily resolved.
30. The County Council did not attend that meeting but continued to object to the applicant's proposal that the use of CPO powers should be tried first with the alternative path as a fallback. The Inspector therefore pointed out in the subsequent case management conference note that the County Council would need to defend its approach at the inquiry and be subject to questioning, and the applicant would need to be prepared to deal with the matter; hence the production of the **applicant's** rebuttal proof, which was necessary to help the inquiry in the **circumstances of the County Council's continuing resistance**.
31. The County Council produced a proof of evidence. It is of little relevance as to whether it submitted **the proof as part of the Council's case or the County Council's case**. The objection was fundamentally that of the County Council, not the District Council. The s106 agreement could not be finalised until the County Council was prepared to sign it.
32. The County Council did not present evidence verbally at the inquiry, because on the morning of the second day it agreed that the approach which had been advanced by the applicant could be included in the wording of the s106 obligation.
33. The County Council argues that up to that point negotiations had been continuing, and that they were set back by the applicant's insistence that CPO powers should be tried before the fallback path was provided. Yet the eventual solution to which the County Council finally agreed contained the elements, proposed many months earlier, which it had earlier rejected. Whilst negotiations were indeed continuing during the inquiry, this was only necessary because the County Council had unreasonably resisted progress on this matter over many months. The matter should never have had to come to appeal.
34. Whilst it is unusual for costs to be awarded against a third party, the County **Council's** involvement in this matter was pivotal. Its role in education provision made it an important party to the s106 obligation. It bears direct responsibility for the delay on this issue; it was still an outstanding matter at the opening of

the inquiry despite the District Council having withdrawn its objection. It led the applicant to the unnecessary expense of producing evidence for the inquiry, including the rebuttal proof, and having a witness ready together with legal representation.

Contribution towards the Cassington Road to Peartree Interchange highway works

35. Oxfordshire County Council Highways identified a requirement for a financial contribution towards the A44 Highway Works Package 2, Cassington Road to Peartree Interchange. This amounted to £1,762,912. Local Plan Policy PR11 states that where forward funding for infrastructure has been provided, for example from the Oxfordshire Growth Board, all sites are required to contribute towards the recovery of these funds as appropriate.
36. There is no disagreement that the works for which the contribution was sought were a critical piece of infrastructure. But the Central Oxfordshire Travel Plan, which was adopted by the County Council in July 2022, did not state that these works were contingent on Policy PR9 and the other PR housing sites coming forward. The works **formed part of the County Council's wider active mode** strategy and were intended to provide a wider public benefit. They are now in place.
37. The contribution thus sought a payment to the public purse for the funding and construction of works which were not dependent on the development and which had already been funded from the public purse and built. The proposed contribution was immaterial to the planning application and could not be made relevant or lawful by the Local Plan Policy PR11. The works did not therefore have sufficient connection to the proposed development, and the contribution should not have been sought. But the County Council persisted in its request for the contribution. It does not appear to have critically assessed the requirement for the contribution in the light of this background.
38. To find out whether **the County Council's demands for contributions were fairly** and reasonably related to the development, the applicant had to make an information request to the County Council pursuant to the Environmental Information Regulations 2004 and the Freedom of Information Act 2000 to obtain copies of the relevant agreements relating to the Housing Growth Fund Deal and its funding streams for the infrastructure works, and had to follow up those requests. Having obtained that information, it was also necessary for the applicant **to append Counsel's** opinion to the transport proof of evidence to explain why there was no legal basis for such a contribution.
39. Whilst the County Council did not apply for Rule 6 status, it had a pivotal role in these matters and a direct influence over the progress of the application and appeal and the content of the s106 obligation. The District **Council's** approach towards viability, which is common practice, was to take into account all the highways contributions and infrastructure requirements, and to then adjust the level of affordable housing to achieve viability. Thus the **County Council's** requirement for the contribution towards the Cassington Road to Peartree Interchange highway works was directly relevant to the level of affordable housing that could be provided on the site, itself a putative reason for refusal, and was critical to the s106 obligation.
40. **The County Council's behaviour in this respect was unreasonable and led the** applicant to incur the unnecessary expenses of having to produce highways

evidence, with a witness and legal representation; and having to make information requests, and in needing to provide a legal opinion to ensure that the s106 obligation did not contain the unreasonable contribution sought by the County Council. Such expenses would not have been necessary if the County Council had properly assessed whether the contributions which it sought were needed and were fairly and reasonably related to the development.

Conclusion

41. Costs should only be awarded against a third party in exceptional circumstances. In this case those circumstances exist. **The County Council's** position was critical to the progress of the planning application and subsequent appeal because of its role as a main party to the s106 obligation, and it bears full responsibility for the delay and costs incurred in addressing the matters discussed above. The matter of the playing field access was capable of being addressed much earlier as part of the planning application if the County Council had taken a reasonable approach, and should never have had to come to appeal. The County Council did not defend its position at the inquiry. The request for a contribution for the Cassington Road to Peartree Interchange highways works should never have been made. The County Council behaved unreasonably in both respects and caused the applicant to incur unnecessary expense in addressing these issues in respect of legal representation, expert witnesses, the preparation of statements of case, proofs and rebuttals, and in having to seek information and prepare a legal opinion to inform the inquiry. A partial award of costs is therefore warranted.

Costs Order

42. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Oxfordshire County Council shall pay to Merton College, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by the applicant in addressing the matters of the access from William Fletcher Primary School to the proposed replacement playing fields, and the A44 Cassington Road to Peartree Interchange highway works, in respect of legal representation, expert witnesses, the preparation of statements of case, proofs and rebuttals, and in having to seek information and prepare a legal opinion to inform the inquiry; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Oxfordshire County Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Jonathan Bore

INSPECTOR