



Neutral Citation Number: [2025] EWHC 3236 (Admin)

AC-2025-LON-1464

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

Date: 17 December 2025

Before:

Dan Kolinsky KC

(sitting as a Deputy Judge of the High Court)

BETWEEN

THE KING

(on the application of MORRIS HOMES LIMITED)

Claimant

and

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Defendant

and

PETERBOROUGH CITY COUNCIL

Interested Party

Paul Tucker KC and Freddie Humphreys, instructed by FS Litigation Solicitors, for the Claimant.

Riccardo Calzavara, instructed by Government Legal Department, for the Defendant.

Jacqueline Lean and Oladele Osinuga, instructed by Peterborough Legal Services, for the Interested Party.

Hearing date: 25 November 2025

Approved Judgment

This judgment was handed down remotely at 11am on 17 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Dan Kolinsky KC (sitting as a Deputy High Court Judge):

1. The Claimant seeks judicial review of the Defendant's Planning Inspector's decision dated 8 January 2025 dismissing its appeal against the Interested Party's refusal to modify a planning obligation dated 25 October 2013.
2. There are two grounds of challenge. The first ground contends that the Inspector wrongly interpreted the planning obligation. The second ground contends that the Inspector failed to give adequate reasons for her decision.

Background

3. The Claimant is a property developer. The Interested Party is the relevant local planning authority, who I refer to below as "the Council".
4. On 23 March 2011, the Council granted planning permission ("the 2011 Planning Permission") subject to conditions for the construction of 295 residential units, A1 foodstore and associated infrastructure at Glebe Works, Glebe Court, Fletton, Peterborough ("the Site").
5. The Site was one of two sites (nationally) identified as a "Carbon Challenge" site. This was an initiative promoted by the Homes and Communities Agency (HCA) on behalf of the Department for Communities and Local Government which aimed to support the house building industry to deliver the Government's then target that all new homes would meet Level 6 of the Code for Sustainable Homes by 2016 ("Level 6").
6. The 2011 Planning Permission contained a condition (condition 15) which required that "All residential units hereby approved shall be constructed to Code Level 6 of the Code for Sustainable Homes". Level 6 required homes to be built with net zero carbon emissions.
7. Zero Carbon Hub ("ZCH") was a public-private body established in 2008 to address practical barriers to the delivery of zero carbon homes. In 2011 ZCH produced a report entitled "Allowable Solutions for Tomorrow's New Homes: Towards a Workable Future." ("The Report"). The Report introduced the new concept of Allowable Solutions ("AS") discussed further below.

8. The Claimant made an application pursuant to s.73 Town and Country Planning Act 1990 (“the 1990 Act”) for planning permission without compliance with condition 15 of the 2011 Planning Permission. In the course of that application the Claimant (then called Morris Homes (East Midlands) Limited) and the Council negotiated the planning obligation dated 25 October 2013 (“the Obligation”).
9. On 28 November 2013, the Council granted planning permission pursuant to s.73 of the 1990 Act (“the 2013 Planning Permission”). Condition **15** to the 2013 Planning Permission provided that “With the exception of Issue ID ENE 1 (Category 1: Energy and Carbon Dioxide Emissions) all residential dwellings hereby approved shall be constructed to Code Level 6 of the Code for Sustainable Homes”. The essential difference between the 2013 Planning Permission and the 2011 Planning Permission was that the 2013 Planning Permission did not require dwellings to be constructed to achieve net zero. Instead, the Claimant was to contribute financially to off-set the CO₂ expended on-site. The reason for condition 15 of the 2013 Planning Permission cross-referred to the Obligation which was said to have been “negotiated on this basis”.

The Obligation

10. The relevant parts of the Obligation are as follows.
11. Clause 5.1 indicated that the Claimant would comply with the obligations contained in the schedules.
12. Clause 12.1 indicated that contributions were payable on the date they fell due date whether or not any formal demand for payment had been made.
13. Clause 12.4 provided that contributions paid to the Council which had not been spent in a ten-year period would be returned to the person who paid the contribution. Schedule 5 (which is headed the “Council’s obligations”) was to like effect.
14. Schedule 3 is entitled “Allowable Solutions Contribution”. Its provisions are central to the issues in this case. It is in three parts.
15. The first part contains definitions which include the following.

- a. Allowable Solutions Contribution ("ASC") is defined as follows: "Allowable Solutions Contribution" "means the contributions to be calculated as per the formula in Part 2 below to be spent by the Council with agreement from the Project Board and in accordance with the provision and principles set out in the Zero Carbon Hub Allowable Solutions Report which shall be interpreted to include energy efficiency improvements, on-site energy generation and district heating to either existing dwellings or Communal Buildings".
 - b. "*Communal Building*" "means a building used by the community of Peterborough, including but not limited to schools, swimming pools and leisure centres, libraries, village halls, and council buildings (including offices) that are accessible to the public".
 - c. "*Project Board*" "means the project board comprising representatives of the Council Morris Homes and Zero Carbon Hub limited (Company No. 06677029) which shall be set up upon receipt of the first Allowable Solution Contribution payment".
 - d. "*Zero Carbon Hub Allowable Solutions Report*" "means the 'Allowable Solutions for Tomorrows New Homes: Towards a Workable Framework' report dated July 2011 annexed to [the Obligation]". The Report was appended to the Obligation.
16. Part 2 of Schedule 3 set out a methodology for calculating the ASC per dwelling.
17. Part 3 of Schedule 3 is headed "Payment of the Allowable Solutions Contribution".
18. Paragraph 1 sets out a payment schedule with payments falling due prior to occupation of the 100th, 200th, and 290th dwellings.
19. Paragraph 2 provides that the ASC shall be held by the Council until such time as the Project Board approves their release.
20. Paragraph 3 provided as follows.
- The ASC "shall be spent in accordance with the provisions and principles set out in the Zero Carbon Hub Allowable Solutions Report which shall be interpreted to include energy efficiency

improvements, on-site energy generation and district heating to either existing dwellings or Communal Buildings PROVIDED THAT:

- (i) the [ASC] shall only be spent on projects within Peterborough;
- (ii) projects on which the [ASC] are spent shall first be approved by the Project Board in accordance with a process to be agreed by the Project Board;
- (iii) the [ASC] shall only be spent on projects which deliver minimum CO₂ reductions that are at least equivalent to the combined Dwelling Emissions Rates of the particular dwellings to which a given [ASC] payment relates”.

The Current Dispute

21. The 2013 Planning Permission was built out as follows:-

- a. The 100th dwelling was occupied on 1 August 2014
- b. The 200th dwelling was occupied on 22 January 2016.
- c. The 290th dwelling was occupied on 10 August 2016.

22. The Claimant has not paid the ASC.

23. No demands for payment were made by the Council in 2014 or 2016 though, as clause 12.1 of the Obligation makes clear, this was not a pre-requisite for the payments becoming due.

24. In the meantime, on 25 March 2015 a written ministerial statement indicated that “the Government has now withdrawn the Code [for Sustainable Homes], aside from the management of legacy cases”.

25. In July 2015, the government announced in a report entitled “*Fixing the foundations: Creating a more prosperous nation*” that the AS initiative would be abandoned.

26. ZCH ceased trading on 31 March 2016. ZCH was dissolved on 17 September 2024.

27. In October 2017, the Council demanded payment of £383,268.09 in respect of unpaid ASC.

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28. On 3 November 2023, the Claimant made an application pursuant to s.106A of the 1990 Act to discharge the obligations in schedule 3.

29. The Council refused to discharge the Obligation on 5 December 2023.

30. The Claimant made an appeal pursuant to s.106B of the 1990 Act. It contended that: "As [ZCH] has ceased operations, it is not possible to constitute the Project Board as per the requirements of the Obligation. Without the existence of the Project Board, no monies can be dispersed. If such monies were paid, they would simply be held by the Council and they would not be put toward... any useful purpose whatsoever".

31. The Planning Inspector held a hearing on 10 December 2024.

32. At the conclusion of the hearing, at the Inspector's request, the Claimant and the Council each put their legal submissions in writing.

33. The Inspector dismissed the appeal in her decision dated 8 January 2025 ("DL").

34. The Claimant commenced these judicial review proceedings after pre-action correspondence.

35. Permission was refused on the papers by HHJ Kelly, sitting as a Judge of the High Court.

36. Tim Smith (sitting as a Deputy High Court Judge) granted permission to proceed with the judicial review claim at an oral renewal hearing on 8 July 2025. The grounds of challenge were then amended slightly pursuant to the order of the Deputy Judge.

The Report

37. The Report (which was appended to the Obligation) described how AS might function as a framework and be delivered.

38. The foreword (written in July 2011 by ZCH's Chief Executive) indicated ZCH's central involvement in developing a workable definition of net zero carbon homes which was (then) anticipated to be part of Building Regulations in 2016.

39. In the introductory chapter, the purpose of the Report was identified as follows:

“In this Report are presented the main features of the Allowable Solutions framework that has emerged from the Zero Carbon Hub’s exchanges with the industry, non-Government Organisations, Trade Associations and Government officials. It is offered primarily to policy advisors in the Government as a consolidated proposal for future consultation and development. However, a wide range of observers will have an immediate interest in these proposals and any constructive feedback on the ‘workability’ of the proposed framework would be welcomed....”.

40. The Report introduced AS as a “new concept” which “will account for the carbon emissions that are not expected to be abated on site”. It contemplated a process of verification for achieving building control approval. It stressed that the process should work so as not to delay the implementation of development.

41. The consolidated framework presented in the Report (for consultation) was summarised as follows:

“1. A Choice for Local Planning Authorities to develop a policy on Allowable Solutions (Route A).

2. The opportunity, when working to Route A (i.e. to local plans), for housing developers to seek out best value for Allowable Solutions: via Community Energy Fund or by Private contract with a Third Party Provider;

3 The option of purchasing Allowable Solutions from a Private Energy Fund (Route B) when the Local Planning Authority does not have an Allowable Solutions policy;

4 A Verification and Certification Scheme to show that an investment will achieve the required carbon emissions reductions. The scheme will monitor Allowable Solutions delivery and release credits, certificates and funds in a timely way to facilitate Allowable Solutions project development and Building Regulations Approval.

5 A single Allowable Solutions Fund Holding to provide a secure ‘Bank’ for the Allowable Solutions investment flow”.

42. Section 6 of the Report set out eight principles - each of which were explained. These were simplicity, flexibility, transparency, additionality, cost effective CO₂ savings, deliver local CO₂ savings wherever possible, viable pricing and support innovation.

43. Section 11 entitled Consultation and Recommendation identified further consultations that were anticipated before finalising the framework.

44. In submissions before me, the Report was described by Mr Calzavara (who appeared for the Defendant) as a “precursor to a scheme that might later arise”; akin to a green paper. The Claimant’s planning statement (at para 2.16) in support of its application to discharge the Obligation stated: “The 2011 Report itself is clear that it is predominantly a “think piece” and a starting point for further consultation rather than a definitive statement of how a system of AS should operate to deliver off-site carbon reductions”. Both characterisations are apt.

The Inspector’s Decision (“DL”)

45. The Inspector set out relevant background in DL paras 4-10. She defined the main issue as “whether the planning obligation continues to serve a useful purpose”.

46. The Inspector introduced the Report in para 16 of DL. She noted that AS was a new concept (para 17). She referred to the Report’s contents in paras 17-19. She encapsulated the position in DL para 19 as follows: “All in all, in my view, the Report demonstrates that AS was not a straightforward concept, but the Report was sufficiently robust to be taken forward for further consultation with relevant bodies to achieve a final framework for AS”.

47. In para 21 of DL , the Inspector noted:

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

48. She continued (at para 22):

“Nevertheless, Part 1 of the third schedule of the Obligation provides a clear definition of AS for the specific purposes of the obligation” (emphasis added). She then set out the definition of ASC in the Obligation.

49. In para 23 of DL the Inspector stated, “Irrespective of the contents of the Report therefore, for the specific purposes of this obligation the ASC is defined and can be calculated. Furthermore, while the specific projects are not identified, the definition gives a clear interpretation of the types of projects the money should be spent on. In particular on-site energy generation and

district heating seem especially straight forward to interpret. This also includes clear advice on the level of CO₂ reduction that should be achieved by the projects”.

50. Pausing there, it is clear that the Inspector contrasts (a) the emerging and “not straightforward” concept of AS with (b) the more tightly defined concept of ASC within the Obligation.

51. She then reviewed the provisions of the Obligation which addressed the role of the Project Board and stated at para 28-29:

(para 28) “There was therefore a window in which the Project Board could have been established with the requisite members to ascertain the process by which projects should be agreed in accordance [Schedule 3, Part 3] [p]aragraph 3 (ii) of the obligation”.

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

52. Thus, the Inspector identified the critical question as being whether ZCH were essential to the mechanism for approving projects in the Obligation. She considered that the answer to whether the Obligation continued to serve a useful purpose flowed from this.

53. The Inspector then discussed (in DL paras 30-32) the caselaw which is relevant to this question. She referred to the House of Lords in Sudbrook (discussed further below) and the decision of the High Court in Manchester Ship Canal (discussed further below). It is common ground that the Inspector summarised this legal framework accurately.

54. The Inspector then sought to apply that caselaw to the Obligation. I set her reasoning out in paras 33-40 of DL in full:

(para 33) “Taking this case law into account, clearly ZCH were an expert in their field at the time the Obligation was negotiated and signed and were the driving force behind the concept of AS at that time as detailed in the Report. Despite the comments of the appellant, with the passing of time and lack of detailed records, we cannot know the exact reasoning for their inclusion as a member of the Project Board. They would have had the detailed knowledge to ensure that projects complied with the requirements of AS as outlined in the Report in terms of the

auditing, additionality requirements and whether the project would deliver additional and verifiable carbon savings to transform the payments from developers into auditable and measurable real carbon saving outcomes”.

(para 34) “However, the ASC described in the Obligation is not that detailed in the Report. The Obligation has its own definition of the ASC which tells us how the contribution should be calculated. Furthermore, although the definition states it should be spent in accordance with the provisions and principles of the Report, this too is interpreted in the definition and details the types of projects on which the contribution should be spent, including the minimum CO₂ reductions which should be achieved.”

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

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

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

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

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

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

55. The Inspector accordingly dismissed the appeal.

The Statutory Scheme

56. Section 106 of the 1990 Act provides:

“(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as “a planning obligations”), enforceable to the extent mentioned in subsection (3)-

- (a) restricting the development or use of the land in any specified way;
- (b) requiring specified operations or activities to be carried out in, on, under or over the land;
- (c) requiring the land to be used in any specified way; or
- (d) requiring a sum or sums to be paid to the authority...on a specified date or dates or periodically”.

57. For the first five years (referred to as the “relevant period”), a planning obligation can only be varied or discharged by agreement. After five years, if the authority refuses the application to vary, the developer can appeal to the Secretary of State, who can impose a variation or discharge.

58. The current provisions are in ss106A and B of the 1990 Act which provide as follows:

“S106A (1) A Planning obligation may not be modified or discharged except-

- (a) by agreement between the authority by whom the obligation is enforceable and the person or persons against whom the obligation is enforceable; or
- (b) in accordance with this section and section 106B...

.....

(3) A person against whom a planning obligation is enforceable may at any time after the expiry of the relevant period, apply to the local planning authority by whom the obligation is enforceable for the obligation-

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(a) to have effect subject to such modifications as may be specified in the application; or

(b) to be discharged.

.....

(6) Where an application is made to an authority under subsection (3), the authority may determine-

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

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

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

59. Section 106B deals with appeals and provides

"S.106B (4) provides that "sub-sections (6) to (9) of section 106A apply in relation to appeals to the Secretary of State under this section as they apply in relation to applications to authorities under that section..."

Section 106 B(6) provides that the determination of an appeal by the Secretary of State under this section shall be final".

Hence this challenge is brought by judicial review.

Caselaw

60. In determining whether a planning obligation should be discharged, the questions which arise are: What is the current obligation? What purpose does it fulfil? Is it a useful purpose? – see R (Garden and Leisure Group Ltd) v North Somerset Council [2004] 1 P&CR 39 at para 28.

61. Where the machinery agreed upon by parties to a contract is non-essential, the court is empowered to substitute its own machinery. This principle derives from the House of Lords' decision in Sudbrook Trading Estate v Eggleton [1983] AC 444 at 483F-484B.

62. The contract at issue in the Sudbrook case was an option agreement which provided for a price "at such price not being less than £12,000 as may be agreed upon by two valuers one nominated by the lessor and one nominated by the lessee and in default of such agreement by an umpire appointed by the ...valuers". The lessor refused to appoint a valuer. The House of Lords determined that the agreement was for sale at a fair and reasonable price ascertainable by the application of objective standards.

63. Lord Diplock at 478H-479D stated as follows:

“Why should the presence in the option clause of a convenient and sensible machinery for ascertaining what is a fair and reasonable price, which the lessors, in breach of their contractual duty, prevent from operating, deprive the lessees of the only remedy which would result in justice being done to them? It may be that where upon the true construction of the contract the price to be paid is not to be a fair and reasonable one assessed by applying objective standards used by valuers in the exercise of their professional task but a price fixed by a named individual applying such subjective standards as he personally thinks fit, and that individual, without being instigated by either party to the contract of sale, refuses to fix the price or is unable through death or disability to do so, the contract of sale is thereupon determined by frustration. But such is not the present case. In the first place the contract upon its true construction is in my view a contract for sale at a fair and reasonable price assessed by applying objective standards. In the second place the only thing that has prevented the machinery provided by the option clause for ascertaining the fair and reasonable price from operating is the lessors’ own breach of contract in refusing to appoint their valuer. So if the synallagmatic contract created by the exercise of the option were allowed to be treated by the lessors as frustrated the frustration would be self-induced, a circumstance which English law does not allow a party to a contract to rely on to his own advantage. So I see no reason why, because they have broken one contractual obligation the lessors should not be ordered by the court to perform another contractual obligation on their part namely to convey the fee simple in the premises to the lessees against payment of a fair and reasonable price assessed by applying the objective standards to which I have referred”.

64. Lord Fraser at 483G stated:

“The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential.”

On the facts of Sudbrook, Lord Fraser applied that distinction as follows (483G-484A):

“The present case falls, in my opinion, in the latter category. Accordingly when the option was exercised there was constituted a complete contract for sale, and the clause should be construed as meaning that the price was to be a fair price. On the other hand where an agreement is made to sell at a price to be fixed by a valuer who is named, or who, by reason of holding some office such as auditor of a company whose shares are to be valued, will have special knowledge relevant to the question of value, the prescribed mode may well be regarded as essential. Where, as here, the machinery consists of valuers and an umpire, none of whom is named or identified, it is in my opinion unrealistic to regard it as an essential term. If it breaks down there is no reason why the court should not substitute other machinery to carry out the main purpose of ascertaining the price in order that the agreement may be carried out”.

At para 484C, he stated:

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"I prefer to rest my decision on the general principle that, where the machinery is not essential, if it breaks down for any reason the court will substitute its own machinery".

65. Both speeches commanded the support of the majority of the House of Lords.

66. The decision of HHJ Moulder (as she then was) sitting as a High Court Judge in Manchester Ship Canal Company Limited v Environment Agency [2017] EWHC 1340 (QB) involved the application of the principles established in Sudbrook.

67. At issue was whether the Environment Agency was liable to compensate the Claimant for flooding. The relevant provision (clause 4) provided as follows.

"If at any time after the Board have commenced to construct the improvement works the flow of water in the River [Irwell] at a site to be agreed between the Engineer of the Board and the Engineer or determined by arbitration shall in the course of any flood in any one period of twenty-four hours be at the respective rates hereinafter mentioned the Board will pay to the Canal Company for and in respect of each such period compensation at the respective rates hereinafter mentioned...."

(emphasis as set out in the judgment of HHJ Moulder at para 6).

68. No site had been identified by agreement or arbitration. The Claimant argued that the requirement for agreement or arbitration could be regarded as a non-essential part of the machinery and the court could substitute its own decision - relying on Sudbrook (see para 7, issue iii and submissions recorded at para 27).

69. The Court rejected this argument. At para 35, HHJ Moulder held that the Court was not able to determine the mechanism for calculating the compensation in the absence of an agreement in accordance with clause 4. She stated:

"It seems to me that the case of *Sudbrook* and the other valuation cases are very different in that the court's conclusion was on the basis that the valuation provisions could be regarded as non-essential because the fair or reasonable value of the property could be ascertained even if the mechanism in the contract failed. So in *Sudbrook* the court held there was no distinction in practice between an agreement to sell at a fair value without specifying the mode of ascertaining the value, and an agreement to sell at a value to be ascertained by valuers appointed in accordance with the agreement. However in the present case the court is being asked to ascertain the data sources to be used and it is not clear on the facts how such data sources should be identified. In my view the present case is closer to the example given by Lord Fraser where an agreement is made to sell at a price to be fixed by a valuer who is named, or who, by reason of holding some office such as auditor of a company whose shares are to be

valued, will have special knowledge relevant to the question of value, where he expressed the view that the prescribed mode may well be regarded as essential” (emphasis added).

Ground 1

Submissions

70. Mr Tucker KC, who appeared for the Claimant with Mr Freddie Humphreys, put the Manchester Ship Canal case at the forefront of his case.

71. Mr Tucker KC’s argument in essence was as follows. The role of ZCH was essential to the mechanism contained in Schedule 3 of the Obligation. They were the relevant expert body. The definition of ASC required the application of the provisions and principles of the Report. This was complex and expertise was required to fill the gaps. The only expert body was ZCH. Hence, he argued this case was closely analogous to the Manchester Ship Canal. Expertise was required. In the absence of ZCH, there was no relevant expert on the Project Board. Thus, there was failure of an essential mechanism in the Obligation.

72. Mr Tucker KC argued that requiring the payment of contributions to the Council which could not be spent in accordance with the mechanism in Schedule 3 served no useful purpose.

73. Mr Tucker KC submitted that the Inspector had erred in her analysis of the Obligation. Although she had asked the right question, she had come to the wrong conclusion as a matter of contractual interpretation in concluding that ZCH’s involvement on the Project Board was not essential.

74. Mr Tucker KC criticised para 33 of DL in which the Inspector had indicated that “we cannot know the exact reasoning” for ZCH’s inclusion in the Project Board. He said the obvious inference was that they had been included was because they were the relevant expert body.

75. In his oral submissions, Mr Tucker KC took the Court through the Report emphasising the complexity of the framework and gaps within it which, he submitted, required the expertise of ZCH to fill.

76. On behalf of the Secretary of State, Mr Calzavara submitted the question before the Inspector was whether the useful purpose of the Obligation was capable of being achieved.

77. He submitted that the Inspector identified the key question in DL para 29 “whether the presence of ZCH on the [Project Borad] is essential to ensure that the ASC can be spent”.
78. The Inspector then weighed up considerations pointing either way. She highlighted, on one hand, ZCH’s expertise and “central” involvement in the development of AS (see DL para 16 and para 33). On the other hand she noted that the definition of ASC for the purposes of the Obligation was clear; that there was a “clear interpretation of the types of projects the money should be spent on”; that there was “clear advice on the level of CO₂ reduction that should be achieved”; that the sum of money at issue was known; that the “detail of the projects the money would need to be spent on” was known, so that ZCH was not required to ensure that projects were appropriately selected; and that the tasks of “agreeing a process by which projects are approved and to provide the approval” were not onerous and could be progressed without ZCH (See DL paras 22-23 and paras 34-37).
79. The consequence was that “while it would have been helpful to have ZCH on the Project Board, it was not essential at the time of the negotiation and signing of the [O]bligation for them to be on the Project Board and they are not an essential part of the process for the approval of process and projects... within the terms of this specific Obligation”, so that if necessary “the Courts could intervene with a suitable replacement for ZCH”, and the Obligation “continues to serve a useful purpose” (see DL paras 38-40).
80. In essence, Mr Calzavara submitted, the Inspector correctly concluded that the Obligation remained capable of being performed in the absence of ZCH, so that it could not be said that it no longer served a useful purpose.
81. On behalf of the Interested Party, Ms Lean supported the Secretary of State’s position. She stressed that the way in which s.106A(6) worked was that the Obligation should continue to have effect unless it could be demonstrated that it no longer served a useful purpose. She took the Court through the provisions of Schedule 3 in support of her contention that the Claimant’s argument placed too much emphasis on the Report as distinct from the specific requirements for ASC in the Obligation. Ms Lean also relied on the proposition that the Claimant should not benefit from its own breach. Had the Claimant paid on time, the Project Board could have been convened when ZCH still existed.

Discussion (ground 1)

82. Section 106A (6) provides that the Obligation should continue to have effect unless it no longer served a useful purpose. This is judged as at the date of the application for discharge of the Obligation pursuant to s.106A.

83. In this case, there was no dispute that a contribution towards offsetting carbon emissions served a useful purpose.

84. The specific focus of the argument was whether the ASC could be disbursed in the absence of ZCH.

85. The Project Board was not required to be convened until the ASC contribution had been paid (see the definition of Project Board in Schedule 3 of the Obligation). But it then had a role in approving the deployment of the funds.

86. It is common ground that the Project Board as defined under the Obligation included ZCH and that ZCH does not now exist.

87. In his oral and written submissions, Mr Tucker KC stressed that the Obligation as currently drafted could not be performed because ZCH cannot be part of the Project Board.

88. That is correct but it is not conclusive of the question of whether the Obligation continues to serve a useful purpose. That depends on whether, on a proper construction of the Obligation, ZCH's involvement on the Project Board is essential or non-essential - applying the principles set out by the House of Lords in Sudbrook.

89. It is common ground that this question is answered with a focus on the position at the date of the Obligation.

90. Consistent with how the case was argued before the Inspector, the critical question is whether ZCH's presence on the Project Board was essential or non-essential to the mechanism for disbursing ASC under the Obligation.

91. It is correct that the Inspector did not herself have jurisdiction to modify the Obligation. It is also true that no application to substitute the machinery in the Obligation had been made in private law proceedings (as contemplated as possible in respect of the failure of non-essential machinery in Chitty on Contracts, 35th edition para 4-183). Nevertheless, the task for the Inspector was to decide if a contribution which, on its face served a useful purpose, no longer did so because it could not be disbursed. Before she could be satisfied that the ASC contribution did not serve a useful purpose, the Inspector necessarily had to address the question of whether ZCH's involvement on the Project Board was essential.

92. That is what she did, addressing the submissions which had been advanced before her.

93. Mr Tucker KC expressly accepted that the Inspector had appropriately summarised the legal question which arises. I agree that the Inspector asked herself the right question. She set out her answer to it. Mr Tucker KC contends that in so doing she came to the wrong conclusion.

94. Mr Tucker KC's contention to that effect emphasised that ZCH was the relevant expert. He stressed the gaps and complexity in the Report. He highlighted that the definition of ASC refers to the contribution being spent by the Council "with the agreement from the Project Board and in accordance with the provisions and principles set out in [the Report]" and that the same phrase is used in Schedule 3, part 3 para 3. On this foundation, Mr Tucker KC sought to demonstrate in his oral submissions how the Report required expertise to navigate through it. He submitted that none of the principles in the Report were straightforward to apply.

95. Had the Obligation required recourse to the "provisions and principles of the Report" without further refinement, this would have been a powerful argument.

96. But the answer to this argument is that Mr Tucker KC's submissions do not fully reflect the definition of ASC in the Obligation.

97. As the Inspector correctly appreciated, the Obligation contained a focussed definition of ASC. The words which Mr Tucker KC relied on are followed by a tailored application of the principles of AS to this Site namely "which shall be interpreted to include energy efficiency improvements, on-site energy generation and district heating to either existing dwellings or Communal Buildings".

98. Thus, ASC under the Obligation is a bespoke application of the Report to the specific circumstances of the Site. This is understandable because the Report was akin to a green paper/thought piece whereas the ASC contribution in the Obligation needed to be practically workable in this location and in advance of any finalised framework. The Obligation therefore contained specific and tailored guidance as to what offsetting could consist of in the specific circumstances of the Site.

99. The provisos in para 3 of schedule 3 refine the position further.

100. The first proviso states, the ASC contribution shall only be spent on projects within Peterborough. That is clear and a tailored application of the broader concepts of AS in the Report to the specific circumstances of the Site. ASC under the Obligation thus has a specific meaning which is distinct from how AS is approached in the Report.

101. The second proviso is that projects on which the ASC are spent shall first be approved by the Project Board in accordance with a process to be agreed by the Project Board. Mr Tucker KC sought to read into this provision a cross reference to the complicated processes discussed in the Report. In my judgment, this is an incorrect interpretation. The wording of this proviso is clear. As Ms Lean submitted, it does not cross refer to the Report. It anticipates that the Project Board would be convened and would establish its own process for endorsing projects. This requires there to be a mechanism for approval. It does not incorporate any of the processes contemplated in the Report (which serve distinct purposes such as auditing carbon savings for the purpose of securing Building Regulations approval as then contemplated).

102. The third proviso is:

“the [ASC] shall only be spent on projects which deliver minimum CO₂ reductions that are at least equivalent to the combined Dwelling Emissions Rates of the particular dwellings to which a given Allowable Solutions Contribution payment relates”.

103. This proviso similarly does not cross refer to the Report. It relies on calculating the dwelling emission rates. There is no gap in that regard. It is a certain and ascertainable calculation which is defined in Part 2 of Schedule 3 of the Obligation. The third proviso does require working out CO₂ reductions but it does not cross refer to the Report for this. The Inspector's assessment was that this would be “a fairly standard calculation” (see DL at para 36). I agree with that reading of the proviso in the overall context of Schedule 3 of the Obligation.

104. Mr Tucker KC referred to the auditing process in the Report. However, that process was set out for a distinct purpose in the Report (securing Building Regulations approval) and is not incorporated into the specific provisions of the ASC in the Obligation.
105. Mr Tucker KC criticised the Inspector's comment in DL 33 that "we cannot know the exact reasoning" for ZCH's inclusion in the Project Board. However, I consider that this comment was justified as a careful reflection on the gaps in the information available to her. The Inspector certainly had in mind the expertise of ZCH. But she also had in mind the submission made by the Council that part of their role may have been to mediate between Council and the Claimant (see para 10 of the Council's closing submissions to the Inspector). Moreover, as Mr Calzavara pointed out (drawing on a point that the Claimant had made in its submissions to the Inspector), part of the rationale for ZCH's inclusion on the Project Board may have been for their benefit to enable them to gather evidence and gain practical experience to inform their task of finalising the AS framework. Faced with these possibilities, the Inspector's comment in DL para 33 cannot fairly be criticised.
106. The question of whether a contract creates an essential or non-essential mechanism is a mixed question of fact and law.
107. In this case, it is common ground, that the Inspector understood the applicable caselaw.
108. She sought to apply it through a careful evaluation of the factors pertaining to ZCH's involvement. Her decision turned on a correct appreciation of the differences between the inchoate and complex machinery of the Report and the specific tailored, simplified application of this to the Site through the definition of and specific provision for ASC in the Obligation.
109. The Inspector's evaluation was sensitive to this distinction. As she pointed out, the calculation was clear. The types of projects (and I would add permissible location for projects) were identified and the levels of CO₂ reductions required were identified.
110. The Inspector concluded that only a fairly standard calculation was necessary to decide which projects should be approved.
111. This contextual evaluation is, in my judgment, unassailable.

112. The correct legal position flows from it.
113. The position is obviously different from the Manchester Ship Canal case where there was a complete absence of criteria to ascertain the location of the relevant site.
114. It fits much more closely to the example where a price is determined by the application of objective standards (i.e. Lord Diplock's paradigm) than the example given by Lord Fraser in Sudbrook of a valuer with special knowledge such as an auditor of a company whose shares are to be valued. Here, the Obligation is specific as to the types of project which are suitable, the location of those projects and the level of CO₂ savings required to offset the dwelling emissions (which themselves are precisely calculated by the formula within the Obligation). There is no complexity in the need for the Project Board to adopt for itself a process of approving the deployment of funds. In each such respect, Schedule 3 of the Obligation provided clear criteria and guidance (as the Inspector correctly analysed).
115. Despite Mr Tucker KC's submissions, I consider that the situation is far removed from a contract which leaves open the ascertaining of criteria to the subjective choice or expertise of an individual. Mr Tucker KC's argument that there were gaps was based on the Report without sufficient regard to the Inspector's sound evaluation of how the specific definition of ASC in the Obligation markedly reduced those gaps and provided much greater clarity as to what ASC required.
116. Mr Tucker KC's argument in this Court was largely a re-run of points made before the Inspector. Whilst they were attractively and skilfully made, they do not sufficiently recognise the tailored application of the emerging concept of AS in the Obligation (through the tailored and more precisely defined ASC). A complex and uncertain concept was given a specific, directed and much more certain expression through the specific provisions of Schedule 3. The Inspector correctly recognised this and it was central to her cogent analysis as to why the role of ZCH on the Project Board was not essential.
117. In my judgment, the Inspector's decision was one that was legally open to her to make. I reject the Claimant's argument that she erred in her interpretation of the Obligation. Therefore, the Inspector did not err in concluding that the Obligation continued to serve a useful purpose.

118. Ground 1 accordingly fails.

Ground 2 – The Reasons Challenge

119. There is no express statutory duty to give reasons imposed on an Inspector in a decision made on a s.106B appeal. Rule 15 of the Town and Country Planning (Hearings Procedure) (England) Rules 2000/1626 does not apply to appeals under s.106B Town and Country Planning Act 1990. The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992/2832 provide that the local planning authority must give its reasons for dismissing any s.106A application (see rule 6). However, they do not require the appointed person to do the same on a s.106B appeal (see rule 8).

120. The parties agree, for the purposes of this claim, that the Inspector was under a duty to give reasons when determining such an appeal. That consensus is consistent with the observations of the Supreme Court in R (CPRE Kent) v Dover District Council [2018] 1 WLR 108 at para 26 as follows:

"There is no corresponding statutory rule applying to decisions following a written representations appeal. However, it is the practice for a fully reasoned decision to be given. It has been accepted (on behalf of the Secretary of State, and by the Administrative Court) that there is an enforceable duty, said to arise "either from the principles of procedural fairness ... or from the legitimate expectation generated by the Secretary of State's long-established practice ...": Martin v Secretary of State for Communities and Local Government [2015] EWHC 3435 (Admin) at [51] per Lindblom LJ".

121. As to the standard of reasons required, the reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues: St Modwen Developments Ltd v Secretary of State [2018] PTSR 746 at para 6. The applicable principles are summarised in South Bucks DC v Porter (No. 2) [2004] 1 WLR 1953 (HL) at para 36.

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the

main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision”.

122. The Claimant contends that the Inspector did not give adequate reasons for her decision.

123. The argument was put as follows: (1) the Inspector recognised the expertise of ZCH (DL 33) but (2) went on to conclude that she was not convinced that ZCH was the only body who could ascertain if projects met the requirements of part 3 (iii) of Schedule 3 (DL para 35). The Claimant argues that the Inspector gave no reason why ZCH were not the only body who could fulfil their role in the Obligation, nor did she identify the evidence to support such a finding.

124. In my judgment, as the Defendant submitted, the reasons challenge fails to read the Inspector’s decision fairly and as a whole.

125. The Inspector undertook a careful evaluation of the relevant circumstances which included acknowledging the particular expertise of ZCH.

126. The Inspector’s overall reasoning was grounded in the tailored and simplified application of AS through the specific provisions relating to ASC in the Obligation.

127. Her conclusions are readily understandable and flow from a fair reading of DL as a whole. As I have already addressed, the Inspector considered that there was a “clear interpretation of the types of projects the money should be spent on”; that there was “clear advice on the level of CO₂ reduction that should be achieved”; that the sum of money at issue was known; that the “detail of the projects the money would need to be spent on” was known, so that ZCH was not required to ensure that projects were appropriately selected; and that the tasks of “agreeing a process by which projects are approved and to provide the approval” were not onerous and could be progressed without ZCH.

128. Those reasons were legally adequate. Indeed, in my assessment, they were cogent and comprehensive.

129. I therefore reject ground 2.

Other Matters

130. Given the conclusions which I have reached, it is not necessary to deal with the additional point raised by Ms Lean (whether the Claimant would be prevented from relying on its own breach). This was not part of the Inspector's reasoning and so I say nothing further about it.

131. I record my thanks to Counsel for their focussed and helpful written and oral submissions.

Outcome

132. This judicial review claim is dismissed.

Richborough