Neutral Citation Number: [2023] EWHC 1995 (Admin)

Case No: CO/4577/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2023

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE KING (on the application of WORCESTERSHIRE ACUTEHOSPITALS NHS TRUST — **Claimant**

- and –

(1) MALVERN HILLS DISTRICT COUNCIL
(2) WYCHAVON DISTRICT COUNCIL
(3) WORCESTER CITY COUNCIL — **Defendants**

- and -

(1) WORCESTERSHIRE COUNTY COUNCIL
(2) WELBECK STRATEGIC LAND (WORCESTER) LLP
(3) MISTERS BROS LIMITED
(4) DANIEL WALTER ALDERSEY
(5) CHARLOTTE LOUISE ALDERSEY
(6) KAREN JAYNE ALDERSEY
(7) REBECCA WIDDOWSON
(8) MARTIN ARMSDEN THOMAS
(9) ANTHONY NIMROD CHAMPION
(10) COLIN ROBERT ANSTEY
(11) JANE ROZANNE ANSTEY
(12) GRACE MARIA JONES
(13) PRUDENCE LILIAN MARGARET SMEETON
(14) CHARLES PETER RANDALL
(15) SALLY ELIZABETH KING
(16) JAMES ALEXANDER KING
(17) MATTHEW JOHN BRERETON
(18) MARGARET ANN DOVEY
(19) SALLY ANN MORRALL
(20) ALISON LOIS DOVEY

(21) KERRY RUFF
(22) DAVID FRANK SMITH
(23) WELBECK STRATEGIC LAND LLP
(24) DAVID ROGER DARBY
(25) MICHAEL JOHN DARBY
(26) LYNDA MAUREEN DARBY **Interested**
(27) KERRY MISTERS **Parties**

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Paul Cairnes KC and **Ashley Bowes** (instructed by **The Wilkes Partnership LLP)** for the **Claimant**
Hugh Richards and **Sioned Davies** (instructed by **Malvern Hills District Council, Wychavon District Council** and **Worcester City Council**) for the **Defendants**
Zack Simons and Barney McCay (instructed by **Worcestershire County Council**) for the **1st Interested Party**
Saira Kabir Sheikh KC (instructed by **Osborne Clarke UK**) for the **23rd Interested Party**
Interested Parties 2-22 and **24-27** did not appear and were not represented

Hearing dates: 18 and 19 July 2023
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APPROVED JUDGMENT

Mr Justice Holgate:

Factual Background

1. The claimant, the Worcestershire Acute Hospitals NHS Trust ("the Trust"), applies for permission to bring proceedings for judicial review against the three defendants, Malvern Hills District Council ("MHDC"), Wychavon District Council ("WDC") and Worcester City Council ("WCC") in respect of a planning permission granted by MHDC on 26 October 2022. The case is concerned with the legality of the handling by the authorities of the Trust's request for a s.106 contribution from the developer in respect of its services.

2. The Trust is established under s.25 of the National Health Service Act 2006 ("NHSA 2006") as a "NHS provider". It provides acute hospital and specialist health care facilities for nearly 600,000 people living in Worcestershire. It is commissioned to provide services by three clinical commissioning groups ("CCGs"):

    - NHS Redditch and Bromsgrove CCG
    - NHS South Worcestershire CCG
    - NHS Wyne Forest CCG

3. The Trust operates three main hospitals: Alexandra Hospital in Redditch, Kidderminster Hospital and Treatment Centre, and Worcestershire Royal Hospital in Worcester. By the Health and Care Act 2022 CCGs have been replaced by Integrated Care Boards with effect from 1 July 2022. The parties do not suggest that that materially altered the statutory framework or legal principles for the purposes of the present case.

4. In February 2016 the three defendants jointly produced the South Worcestershire Development Plan ("SWDP") to cover the whole of their respective areas. Policy SWDP45 allocated land for six urban extensions to Worcester, of which the largest was SWDP45/1, a site with an area of nearly 250ha, referred to as the Broomhall Community and Norton Barracks Community. It was allocated to provide *inter alia* around 2,600 dwellings and 20ha of employment land.

5. The 1st Interested Party, Worcestershire County Council is the highway and education authority for the area.

6. The 23rd Interested Party, Welbeck Strategic Land LLP ("WSL"), is the developer of the site. As long ago as 29 May 2013 they applied to the three defendants for outline planning permission for a mixed-use development on the site, which falls within the administrative area of each authority. The second and third defendants agreed with MHDC that planning permission should be granted and that MHDC should issue the decision notice on their behalf.

7. The remaining 25 Interested Parties hold interests in different parts of the site.

8. The consideration of the planning application and the negotiations for a planning agreement under s.106 of the Town and Country Planning Act 1990 (covering large scale infrastructure, education facilities and affordable housing) was a complex and lengthy process. Eventually the application was considered by MHDC's Northern Area Planning Committee on 7 March 2018. They passed a resolution authorising the Head of Housing and Planning to grant planning permission subject to the satisfactory completion of a s.106 agreement covering a list of financial contributions and other obligations. The amounts involved had already been explained in the body of the officers' report and set out in Table 2.

9. The planning permission was for *inter alia*:

- a mixed-use development with a local centre
- up to 2,204 dwellings including affordable housing
- up to 14ha of employment land
- a hotel
- elderly persons accommodation
- business uses
- retail uses
- a health facility
- a primary school
- assembly and leisure uses
- outdoor sports and leisure
- open space

10. The Trust did not make any representations in the examination of the SWDP or on the planning application before the resolution of 7 March 2018 was passed. But in January 2019 it made representations to MHDC for the first time in which it asked the defendants to require the developer to make a financial contribution in the s.106 agreement to cover an alleged gap in the Trust's funding for the use of its services by residents of the dwellings who are *new* to the Trust's area. This gap is said to relate solely to the first occupation of a dwelling on the site by such a resident and even then, only to the part of the Trust's financial year from which that occupation begins. The Trust accepts that at the end of that financial year its funding by the CCGs takes into account from then on (but not retrospectively) the residents new to the area who will have moved onto the site in the preceding financial year. So the gap in funding is for the provision of the Trust's services to such persons for up to one year.

11. The Trust said to MHDC that it would not be *fully* funded for those services. The Trust therefore accepted that it will receive *some* funding for the services it

provides to new residents on the site during their first year of occupation. That funding is therefore available to make at least some contribution to the costs of services provided by the Trust to new residents and hence to the alleged funding gap. But the Trust never explained to MHDC how the funding allocated to CCGs for population growth translates, or should be translated, into funding for the Trust, so as to identify the true size of the funding gap it says would exist, if any. At all events, in January 2019 the Trust sought a s.106 contribution of £3,357,949.

12. Around the same time the Trust also sought contributions totalling £4.36m in relation to planning applications for three other substantial urban extensions to Worcester. Those proposals were for 1,400, 965 and 255 new homes.

13. An officers' report was provided to the meeting of MHDC's committee on 14 August 2019. The members were advised that there were ongoing discussions with the Trust on the methodology it had put forward and that officers remained unconvinced that components of the "calculated need" were appropriate or relevant. But in any event, officers advised that the committee needed to reach an overall planning judgment on the planning obligations necessary to make the proposal acceptable in planning terms.

14. Officers said that in order to ensure that the development paid first for essential highway infrastructure and educational facilities, the provision of affordable housing had been reduced from a requirement of 40% to 20% of the total number of units, on the basis of independent advice on viability. Accordingly, the Trust's request could only be accommodated (in whole or in part) at the expense of that infrastructure and affordable housing, which had been judged to be necessary in order to make the proposals acceptable in planning terms. The Trust's request could not be acceded to without disturbing the planning balances and priorities previously reached. The officers advised that the obligations which MHDC had resolved on 7 March 2018 had to be provided for in a s.106 agreement remained necessary in their judgment to make the proposals acceptable and they were of a higher priority. However, because the Trust's request was a major issue which had not previously been considered, it would also have to be referred back to the two other authorities.

15. The three authorities decided that the contributions sought by the Trust on all four sites should not be pursued. They decided that the existing s.106 requirements and contributions were all essential and should be retained.

16. The Trust did not send any further representations to MHDC for 17 months until 14 January 2021. In the meantime planning permissions were granted between November 2019 and April 2020 in respect of the three other proposed urban extensions, without requiring the contributions sought by the Trust. No challenge has been made by the Trust to any of those decisions.

17. The Trust's representations of 14 January 2021 explained in more detail why it sought a s.106 contribution, which was now revised downwards to £1,839,839 It set out the nature and scale of its activities, the numbers of staff employed and the need also to use agency staff. An 85% bed occupancy rate is used as a benchmark for patient safety and to help ensure a timely flow of patients through

the hospital and allocation to the right type of bed spaces for treatment. Operating a hospital above the 85% level involves the risk of delays to patient treatment and sub-optimal care. During 2018/2019 the occupancy rate was 97.3%. The Trust is obliged to treat all patients who arrive at Emergency Departments or are referred by GPs so extra demand can lead to additional delay. Additional demand may result in the Trust having to use agency staff at premium cost.

18. The Trust's representations then explained how CCGs are funded, which includes an allowance for population growth applied to the starting point of the number of people registered with a GP practice in the relevant area. Paragraph 29 of the document stated that the Trust receives two types of payments from CCGs. The first are National Tariff payments for each patient seen or treated. The second are block contract payments to address non-elective admissions, A and E attendances, and same-day emergency care. "Activity levels" for the previous year form the basis for the contractual negotiations with CCGs for the following year. Growth experienced during that following year is "never entirely funded" (para. 30). Still the Trust did not say what proportion is funded and identify the true gap alleged.

19. Under the heading "Direct Impact of the Development and Mitigation Formula" the Trust said that "the new population associated with the proposed development … will impact significantly on service delivery and performance of the Trust until the annual contract refresh includes the activity volumes associated with the population increase" (para.32). The Trust then produced a computation of the contribution sought to provide capacity for maintaining service delivery during the first year of occupation of each dwelling. Essentially, the calculation was an estimate of the cost of the expected levels of activity involved in treating the new residents (paras. 35 to 42 and Appendix 4). As Mr. Cairnes KC confirmed on behalf of the Trust, that exercise calculated the additional *costs* which it is said will be involved in treating new residents; it did not address the *funding* which is available to the Trust's commissioning bodies for population growth in the area.[1]

20. The Trust's representations were focused on persuading the authorities that the contribution it was requesting was necessary to make the development acceptable in planning terms for the purposes of reg.122 of The Community Infrastructure Levy Regulations 2010 (SI 2010 No. 948) ("the CIL Regulations"). The Trust made no representations to challenge the assessment of the defendants that the s.106 requirements previously approved had a higher priority than its request, including the affordable housing element which had been reduced to 20% on viability grounds. The Trust made no request to see the viability assessments which had been provided to the authorities. It made no suggestion that it wished to challenge them.

21. The officers at MHDC took the Trust's request for a s.106 contribution back to committee on 3 November 2021. The officers' report for that meeting is the

[1] I also note that part of the sum sought by the Trust related to treatments which, according to para.29 of its representation, fall outside the block contract arrangements and are dealt with by National Tariff payments (referred to elsewhere as payment by results).

main document which the Trust seeks to criticise. Officers took the trouble to obtain counsel's advice on the issues raised and took great care in the drafting of their report.

22. In the section headed "Analysis", the report focused on the first key issue, namely whether the Trust's request complied with reg.122 of the CIL Regulations. That depended upon whether it was necessary to meet a funding gap. If there was no funding gap, a s.106 requirement that the Trust contribution be paid would render the planning permission unlawful and liable to be quashed. Mr. Cairnes accepted that point on the basis of the principles decided in *R (University Hospitals of Leicester NHS Trust) v Harborough District Council* [2023] EWHC 263 (Admin) (see e.g. [12] to [14] and [136] to [138]).

23. Likewise, it was necessary for the Trust to demonstrate to the defendants how the size of any "first year" funding gap takes into account the funding which is available under the NHS scheme (e.g. for CCGs) for population growth. The officers' report accurately recorded the Trust's position as being that the funding for its services would "not fully fund demand for services associated with population growth arising from new housing development in its first year" (para.3.12). The officers were not satisfied from the information provided by the Trust that there was a funding gap or that the allowance to CCGs for population growth could not address the issue raised by the Trust in the negotiations for block contracts (paras.3.14 to 3.15). The officers also pointed out that in so far as services were paid for in accordance with National Tariff rates (or payment by results), there should be no funding gap (para.3.14). The committee accepted that advice and resolved that the authority was not persuaded that the Trust's request fully met reg.122(2) of the CIL Regulations. In my judgment, if there was no legal flaw in that conclusion, that was sufficient to dispose of the Trust's request for a financial contribution.

24. The officers went on to consider the second key issue. They advised that irrespective of any issues as to whether a funding gap existed, the Trust's request still needed to be considered "in the context of reaching an overall planning judgment over obligations necessary to make these proposals, as part of the South Worcester urban extension … acceptable in planning terms and having regard to the viability and deliverability of the proposals" (para.3.16).

25. At para. 3.23 officers said this:

> "Officers have not requested that negotiations over an accepted viability position is re-opened with the applicant as the three councils have already accepted that the proposals are unable to meet all of the infrastructure requirements that potentially fall to them and accommodating the Trust's request could only be achieved (in whole or part) at the expense of other essential infrastructure or affordable housing considered necessary in the judgement of the local planning authorities to date, to make the proposals acceptable in planning terms. The latest request from the Trust, if acceded to, would necessitate disturbing the planning balances and priorities previously reached."

26. The officers' report posed the second key issue for the committee in para.3.24:

> "Members need to consider whether the request received in January 2021 for £1,839,839.06 for acute healthcare revenue funding is in respect of potential impacts, of a higher priority than the impacts currently proposed to be mitigated by s106 contributions or whether even further reductions in affordable housing delivery should be accepted in order to allow NHS contributions to be made, notwithstanding your officers advice and concerns on compliance with the CIL Regulations, without disturbing the viability of the proposed development and rendering it undeliverable."

27. At para.3.25 the officers advised on the weight to be attached to the s.106 requirements previously approved by the authorities:

> "Notwithstanding the concerns your officers have raised regarding the Trusts request not being CIL Regulation compliant, officers have considered this issue and have concluded:
>
> - Highways infrastructure should continue to be a priority for developer funding as previously agreed because the County Highway Authority has already forward funded elements of off-site highways infrastructure and this is necessary to mitigate the impact of the developments, avoid a severe residual cumulative impact on the road network and comply with specific requirements of SWDP45/1. The urban extensions are not CIL liable other than in respect of retail development.
>
> - Education infrastructure should continue to be a priority for developer funding as previously agreed because the provision of a new primary school is a critical physical element of the urban extension in terms of place making, reducing the need to travel and ensuring compliance with specific requirements of SWDP45/1 and secondary education contributions are required to ensure that the necessary physical infrastructure is in place as houses are occupied and in accordance with the Council's Developer Contributions SPD.
>
> - The need for affordable housing remains acute. The south Worcestershire councils have already accepted a 50% reduction in the level of affordable housing expected on the urban extensions compared to the level referred to in SWDP 45/1 and the level of development that is likely to come forward over the remainder of the plan period (2021 to 2030) is unlikely to satisfy the identified need. Therefore, it is not recommended that affordable housing delivery be reduced below 20%. If

> the Trust's latest request was secured, this could be expected to reduce affordable housing by around 2.5%."

28. The officers returned to the viability issue at para. 3.27:

> "With respect to viability assessment of the above application, although very extensive and comprehensive negotiations took place between the councils and the applicant, it was not possible for the councils and the applicant to agree all inputs to the financial appraisal. However, based on the advice of specialist consultants the councils were satisfied that the proposal could not meet all the financial contributions identified and only 20% affordable housing could be achieved. Whilst the viability assessment has not been reopened, your officers have sought further specialist advice from viability consultants and any increase in residential sales values for example, is expected to be more than off-set by increases in costs, particularly building costs, such that overall viability would not have significantly changed since the committee last considered the application."

29. The officers addressed the importance of the affordable housing provision in paras. 3.30 to 3.38 of their report. House prices in the City of Worcester remain consistently higher than for the West Midlands and are in the upper quartile of values nationally. Taking into account average earnings, Worcester is one of the least affordable places to buy property, both regionally and nationally. Many people on average or lower quartile incomes are also priced out of privately rented accommodation in the City. Accordingly, officers recommended that the affordable housing element should not be reduced below 20% of the total number of dwellings being provided on the site (paras. 3.36 to 3.37).

30. On 26 October 2021 the Solicitors acting for the Trust wrote to MHDC asking them to send a copy of the latest viability assessment, alternatively the conclusions of that assessment. Although the Trust's first representation had been made 2¾ years before, this was the first time that it had asked to see any such viability assessment, although it was obvious e.g. from the officers' report in March 2018, that they had relied upon that material in preparing part of their advice to members.

31. On 28 October 2021 the Trust sent a four-page response to the officers' report which had been published for the meeting on 3 November 2021. The Trust repeated that it had provided detailed evidence on the impact of the development and how that could be mitigated by the financial contribution sought. It took issue with the suggestion in para.3.15 of the officers' report that the ONS projections used for assessing CCG funding included "planned population increases" because those projections are trend-based and are not related to local development policies on housing. This point was addressed in the *Leicester* case (at [61] to [62]) and simply amounts to special pleading. What the Trust still did not address was the key issue raised by its own representations and in the officers' report: how much was allowed in the CCG funding for population growth? The Trust had accepted that it was partly funded for new demand from first year occupation of new housing, but did not identify the amount of that

funding and how it should be applied to the development on the application site. Likewise, the Trust's terse disagreement with the officers' comment on funding by block contracts, "this is factually incorrect", provided no help at all to the defendants.

32. Mr. Cairnes also drew the court's attention to a paragraph on page 2 of the Trust's response document. The Trust said that the officers' assessment that the contribution requested by the Trust would *inter alia* result in other contributions not being possible or having to be significantly reduced was either not based on evidence, or was based on evidence which had not been made available. Two points stand out. First, the Trust never suggested that the authorities had been wrong to treat the s.106 requirements they had already approved as being more important than the contribution sought by the Trust. Second, when MHDC did not provide the information requested the Trust did not pursue the matter at all.

33. MHDC's committee passed the following resolutions on 3 November 2021:

> "2.1 The request for financial contributions towards acute health services in respect of planning application 13/00656/OUT has been considered and noted as something capable of being a relevant material consideration. However, the local planning authority does not agree to secure the contribution as the application has been subject to detailed investigation with respect to viability and the local planning authority is satisfied that the financial requests made by the Worcestershire Acute Hospitals NHS Trust (in whole or part) could only be accommodated through the re-opening of already accepted financial appraisals and at the expense or reduction of the provision of other infrastructure considered critical to the delivery of sustainable development, including the provision of much needed affordable housing.
>
> 2.2 The Council is not persuaded that the Trust's request fully meets the tests set out in Regulation 122(2) of the Community Infrastructure Levy (CIL) Regulations 2010, having regard to the Inspector's decision and Secretary of State decision on the Wolborough Barton, Newton Abbott, Devon appeal decision and the more recent Claphill Lane, Rushwick appeal decision both of which are capable of being a material consideration. Even if the Council was to be persuaded that the request is CIL Regulation 122(2) compliant and/or compliance is confirmed by the Courts, the Council considers that the previously approved s106 Heads of Terms are still the most appropriate in this case and affordable housing should not be reduced below 20%.
>
> 2.3 In accordance with the decisions made by the planning committees at the three south Worcestershire councils in 2019, the section 106 agreement associated with application 13/00656/OUT does not include reference to a Deferred Contingent Obligation review mechanism on the basis that affordable housing provision at 20% is agreed as the maximum

> reasonable level of affordable housing across the whole development, not just the initial phase."

34. Resolution 2.3 is significant. The approved development is large scale and will take many years to be built out. In 2018 the authorities had agreed to accept 20% affordable housing on the first phase of residential development, comprising 487 dwellings. For the remaining phases of the scheme, the level of affordable housing was to be determined through a viability review mechanism ("VRM"), otherwise referred to as the Deferred Contingent Obligation. If in that review the viability of the scheme were to improve, a proportion of the uplift in value would result in a greater level of affordable housing in the subsequent phase. If on the other hand viability were to worsen, the level of affordable housing would be reduced. However, in their report to the committee meeting on 14 August 2019 officers explained that in the light of specialist advice, infrastructure requirements, development values and costs, the authorities should accept that 20% was the maximum reasonable level of affordable housing achievable across the entire scheme (para.3.26). Officers advised that this would have the advantage of providing a much greater level of certainty as well as consistency in the delivery of affordable housing. The three authorities agreed and that position was maintained in the officers' report to the meeting on 3 November 2021.

35. Plainly if the independent experts advising the authorities had thought that viability had improved by 2021, or was likely to do so over the duration of the project, so as to increase the headroom available for affordable housing they would have said so. It is plain from the officers' report that they did not.

36. MHDC's officers considered that the Trust's 2021 representations raised a major issue which needed to be considered by the other two authorities. They did so during October 2021. All three authorities decided against requiring any contribution to the Trust. They were not satisfied that it complied with the CIL Regulations and, in any event, they continued to take the view that greater priority should be given to the s.106 requirements they had previously set.

37. The final s.106 agreement was executed on 12 October 2022 and the planning permission issued on 26 October 2022.

Planning policy background

38. Policy SWDP45 of the development plan provides underpinning for many of the s.106 contributions required by the defendants. Paragraph i states that "the rate of delivery [of the scheme] will be dependent upon the phased implementation of the Worcester Transport Strategy and in particular the dualling of relevant sections of the A4440 Southern Link Road." Paragraph ii requires up to 40% of the housing to be affordable. Paragraph iii requires a Local Centre to be provided incorporating a range of community facilities, including a two-form entry primary school. Paragraph ix requires a site to be provided for travellers. Paragraph x requires contributions to be made to infrastructure, including education, sporting and recreational facilities. Paragraph xi specified other highway infrastructure requirements. The development plan explains that

the authorities' objective is "to create a sustainable, balanced, mix of uses … which is self sufficient in meeting its local needs."

39. The A4440 is an important route lying just to the north of the SWDP45/1 site and running broadly east/west, crossing the River Severn to the west of the site and joining the M5 to the east. The developer is required to fund the dualling of the sections of the A4440 lying to the north of the site. This improvement was included in the list of s.106 requirements approved by the authorities in 2018, 2019, 2021 and ultimately when the planning permission was granted. The Inspector who carried out the examination of the development plan concluded that this and other highway works were necessary to ensure that adequate infrastructure is in place for the development of the site.

40. Ms. Emily Barker, the Head of Planning and Transport Planning at WCC, has made a witness statement. She explains that in order to secure an additional contribution from central government to the costs of the highway works the County Council had to carry out the dualling of the A4440 itself by the end of 2022. In other words it provided some forward funding in advance of receiving the s.106 contribution from the developer.

Grounds of challenge and procedural matters

41. In summary the Trust advanced the following grounds of challenge in the Amended Statement of Facts and Grounds:

Ground 1

The defendants failed to take into account or investigate an obviously material consideration, namely the effects on the provision of other infrastructure and facilities under s.106 if the Trust's request were to be met.

Ground 2

In breach of s.100D of the Local Government Act 1972 MHDC failed to make open to inspection by members of the public the viability assessment referred to in the officers' reports, thereby denying the Trust the opportunity of engaging with the principal reason given by the defendants for rejecting its request, namely that it would affect the viability of the scheme and so result in a reduction in the provision of other infrastructure judged by the defendants to be critical.

Ground 3

The defendants failed to give lawfully adequate reasons as to why the contribution requested by the Trust did not comply with reg.122(2) of the CIL Regulations 2010.

Ground 4

The defendants took into account an irrelevant consideration as a determinative factor when applying reg.122(2) of the CIL Regulations

2010, namely that there would no funding gap if the Trust were to switch to a payment by results method.

Ground 5

The defendant failed to give adequate reasons for departing from certain planning appeal decisions.

Ground 6

There was no evidential basis for the suggestion in the officers' report for the committee meeting held on 3 November 2021 that some new health infrastructure would be secured.

42. On 3 April 2023 Steyn J refused on the papers to grant permission to apply for judicial review in relation to grounds 1, 3, 4, 5 and 6. She adjourned the application for permission in relation to ground 2 to a rolled-up hearing. She would have been prepared to grant permission on ground 2 but for the issue of delay raised by the defendants, WCC and WSL.

43. On 6 April 2023 the Trust renewed its application for permission in relation to grounds 1, 2, 3, 4 and 6. Ground 5 was abandoned.

44. I invited submissions from the parties on the procedure that should be followed. In the interests of justice and the best use of resources, I decided that the hearing of the renewed application for permission and the rolled-up hearing in relation to Ground 2 should take place before the same judge and at the same hearing. However, if leave should be granted on any of the grounds for which permission had been refused on the papers, there would then have to be another hearing. In this particular case I considered that grounds 1, 3, 4 and 6 should also be dealt with on a rolled-up basis and at the same time as ground 2. I so ordered on 21 April 2023. The claimant had not given any indication at that stage that it would be making an application for disclosure.

45. The defendants and WSL filed detailed grounds of resistance on 4 May 2023 and 28 April 2023 respectively.

46. After the rolled-up hearing had been listed for 18 and 19 July 2023, the Trust made an application on 9 June 2023 for specific disclosure of the viability reports referred to in the officers' reports to the committee meetings on 14 August 2019 and 3 November 2021. The Trust made its application solely in relation to ground 1. It says that the application was issued at this time because of certain points in the defendants' detailed grounds of resistance. But that turned out to be no more than a fig leaf for a very late application for disclosure.

47. Although the Trust had asked in its notice that the application for disclosure be dealt with at a hearing, unfortunately it was not listed. In these circumstances the parties agreed that submissions should be made on the application at the beginning of the rolled-up hearing and that the court would announce its decision during the first day of that hearing with reasons to follow in the judgment on the grounds of challenge. After the Trust's substantive submissions

had been completed, I said that the application for disclosure was refused. I give my reasons for that decision under ground 1 below.

48. I will deal with the grounds of challenge in the following order: 3 and 4 (together), 6, 1 and then 2.

Legal principles

Planning obligations

49. Section 106(1) of the TCPA 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 … as " a planning obligation "), enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically."

50. In addition, reg.122 of the CIL Regulations provides:

> "(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development.
>
> (3) In this regulation—
>
> "planning obligation" means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation;

> and "relevant determination" means a determination made on or after 6th April 2010—
>
> (a) under section 70, 76A or 77 of TCPA 1990(1) of an application for planning permission which is not an application to which section 73 of TCPA 1990 applies; or
>
> (b) under section 79 of TCPA 1990(2) of an appeal where the application which gives rise to the appeal is not one to which section 73 of TCPA 1990 applies."

51. It is common ground that for the obligation sought by the Trust to have been material to the determination of the planning application, the defendants had to be satisfied that each of the three tests in reg.122(2) was met. Regulation 122 made the application of those tests, including the necessity test in sub para. (a), a legal requirement, rather than a policy requirement as had previously been the case (*R (Working Title Films Limited) v Westminster City Council* [2017] JPL 173 at [20]; *Good Energy Generation Limited v Secretary of State for Communities and Local Government* [2018] JPL 1248 at [71]-[72] and [75]). The application of each of those tests is a matter of evaluative judgment for the local planning authority, subject only to judicial review applying the *Wednesbury* standard (see e.g. *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417 at [118]; *Working Title Films* at [25]).

Judicial review of the decisions of local planning authorities

52. The principles are well-established and do not need to be rehearsed here. An officer's report should be read and considered in accordance with the principles summarised in *Mansell v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [41] to [42]; *R (Hayes) v Wychavon District Council* [2019] PTSR 1163 at [26] to [27]; and *R (Plant) v Lambeth Borough Council* [2017] PTSR 453 at [66] to [72]. A report should be read with reasonable benevolence and flexibility. It does not have to summarise each and every representation made to the authority. A key consideration is whether the officer's advice was significantly misleading (*R v Selby District Council ex parte Oxton Farms* [2017] PTSR 1103, 1111).

53. In this case the Trust also relies upon the *Tameside* duty of a decision-maker to make relevant inquiries. The principles have recently been summarised in *Suffolk Energy Action SPV Limited v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1796 (Admin) at [65] to [69]. Mr. Cairnes rightly emphasised the second to fourth principles in [70] of *R (Balajigani) v Secretary of State for the Home Department* [2019] 1WLR 4647. It is for the decision-maker and not the court to decide upon "the manner and intensity" of any inquiry subject only to review applying the *Wednesbury* standard. The court should not interfere merely because it considers that further inquiries would have been sensible or desirable. It may only intervene if it concludes that no reasonable authority, possessed of the material that was before the actual decision-maker, could have been satisfied that it had the information necessary for its decision.

Statutory framework for funding NHS services.

54. This was set out in some detail in the *Leicester* case at [43] to [74].

55. A CCG has a duty to arrange for the provision of a range of health services to such extent as it considers necessary to meet the reasonable requirements of "the persons for whom it has responsibility." Essentially those are persons registered with GPs or otherwise "usually residing in the area" of the CCG ([46]). NHS England is responsible for allotting funds each financial year to each CCG towards meeting the expenditure of that group "attributable to the performance by it of its functions in that year." A CCG must then ensure that its expenditure on the performance of its functions does not exceed the amount allotted to it, plus any other sums received by it in that year ([50]).

56. An NHS Trust provides services for the purposes of the heath service. The claimant is one of the providers from whom CCGs obtain services in order to discharge their functions ([52]). CCGs and NHS Trusts negotiate contracts for these purposes ([54] *et seq*). An NHS Trust is obliged to ensure that its revenue is not less than sufficient, taking one financial year with another, to meet its revenue outgoings ([53]).

57. The detailed schemes dealing with different types of funding arrangements are, to say the least, convoluted and lacking in transparency (*Leicester* at [66] to [72]). Even with the assistance in that case of experienced specialist counsel it was impossible to pin down which part of these schemes applied to block contracts. However, Mr Cairnes accepted in *Leicester* that the funding rules do not preclude a CCG and NHS Trust from negotiating a block contract for the next financial year which takes into account population growth, or additional hospital activity resulting from first year occupancy of new development during that financial year ([73]). The Trust in the present case did not adopt any different position. Indeed, the Trust's representations to the defendants proceeded on that basis (see e.g. para.30 of the representations dated 14 January 2021).

Publication and inspection of background papers

58. Section 100D(5) of the Local Government Act 1972 defines what are the background papers for an officer's report to a meeting of a Council:

> "(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report,
>
> but do not include any published works."

59. Section 100D(1) requires a Council's proper officer to list background papers in the report and to make them open for inspection:

> "1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public, or are required by section 100BA(1) or 100C(1A) to be published electronically —
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report,
>
> (b) in relation to a principal council in England, at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council, and
>
> (c) …"

60. Section 100D(3) defines how a background paper may be "open to inspection":

> "(3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy."

61. Section 100D(4) provides that nothing in s.100D requires any document to be included in the list of background papers if it discloses "exempt information". By s.100I, sched.12A defines categories of exempt information in Part I subject to qualifications in Part II.

62. Paragraph 3 of sched.12A defines one of the categories of exempt information:

> "Information relating to the financial or business affairs of any particular person (including the authority holding that information)."

This is qualified by para.10 of sched.12A:

> "Information which—
>
> (a) falls within any of paragraphs 1 to 7 above; and
>
> (b) is not prevented from being exempt by virtue of paragraph 8 or 9 above,
>
> is exempt information if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

63. Section 100E applies ss.100A to 100D to committees and sub-committees of a Council.

64. The 1972 Act does not specify any consequences for failing to comply with s.100D, other than criminal sanctions which may apply in the circumstances set out in s.100H(4).

Grounds 3 and 4

65. Mr. Cairnes said that these two grounds are linked and I agree it is convenient to take them together. They are both concerned with the application of reg.122(2) of the CIL Regulations.

66. Under ground 3 the Trust submits that the defendants gave legally inadequate reasons for rejecting its request. Mr. Cairnes points to resolution 2.2 passed on 3 November 2021 which said that MHDC was not persuaded that the Trust's request "fully meets" the tests in reg.122(2). He says that this language did not identify which of the three limbs of the regulation the authority had in mind or what it was not persuaded about. The Trust claims that it has been left in the dark as to why this issue was decided in the way it was. It is prejudiced by the failure to give adequate reasons because it "cannot assess its prospects of obtaining a contribution towards its service provision on another occasion" (skeleton para.64 relying on *South Bucks District Council v Porter* (No.2) [2004] 1 WLR 1953 at [36]).

67. Under ground 4, the Trust submits that the defendants took into account an irrelevant consideration contained in para. 3.14 of the officers' report to the committee meeting on 3 November 2021. It should be assumed that the members of the committee adopted the reasoning in that report, unless there is some indication to the contrary (*R (CRRE Kent) v Dover District Council* [2018] 1 WLR 108 at [48]). The Trust submits that the determinative and irrelevant factor in the officers' report was that a funding gap would not exist if it switched the contracting arrangements with the CCGs to a payment by results ("PbR") model. But the Trust's response to the officers' report had stated that it had no plans to switch to such a model. The Trust says that the defendants were legally obliged to assess whether there would be a funding gap on the block contract model, not a hypothetical alternative (para.76 of the skeleton).

68. It is necessary to set out para.3.14 of the officers' report and also para.3.15:

> "3.14 The Trust has advanced a methodology for calculating financial contributions towards revenue funding of acute health services. The specifics of the methodology have been the subject of on-going discussion with the Trust and its legal advisers and your officers have remained unconvinced that the Trust has adequately evidenced that all components of the calculated need are appropriate or relevant in formulating a contribution request. With regard to how service providers are funded, the NHS operates a "managed market" with a measure of competition between providers. Pricing of NHS Contracts is governed by rules in Chapter 4 of Health and Social Care Act 2012 and was

> originally a "Payment by Results" (PbR) approach based on the principle that money followed the patient, every patient who attended A & E for example attracted a fee – and the total payable under the CCG/Trust contract was an amalgamation of individual treatment fees. The fees for individual episodes of treatment are set out in the National Tariff. The key point is that for a service provider operating PbR there can, by definition, be no "NHS funding gap" and this immediately calls into question whether a financial contribution under s106 is necessary. It is extremely difficult for a local planning authority to forensically examine and fully understand the funding arrangements for a specific Trust, but your officers are of the view that either a funding gap does not exist or that it only exists because legal requirements and common NHS practice are allowed to part company. If the legal rules are followed, there should be no NHS gap for predictable increases in demand. Arguably there is nothing in planning more predictable than a site specific allocation in an adopted Development Plan.
>
> 3.15 For planned large scale developments:
>
> - CCGs are funded for extra patients arising from predicted population flows because planned population increases are included in ONS projections
>
> - Trusts are funded partly by block payments under CCG/NHSE contracts where the rules require a fair price to be paid for the projected number of patients – so there should be no funding gap
>
> - Extra funds a developer provides may end up reducing the need for central subsidy and not benefit patients at the particular Trust, notwithstanding assurances that the Trust provides regarding monitoring spending of any s106 derived funds."

69. I deal with ground 4 first. The original version of ground 4 contended that it was irrelevant for a planning authority to consider the ability of a NHS Trust to be funded in a different manner so as to eliminate or reduce a funding gap. That contention was rejected in the *Leicester* case and has been deleted from the Statement of Facts and Grounds in this case. The Trust here accepts that unless it could show a funding gap, and indeed the size of that gap, there would be no legal justification for the defendants to require the developer to pay any s.106 contribution to the costs of the Trust's services in order for planning permission to be granted. In those circumstances, a s.106 requirement to make such a contribution would breach reg.122(2) of the CIL Regulations and render the permission unlawful (see the *Leicester* case at [14] to [15] and [134] to [137] and also [140] to [145]).

70. Paragraph 3.14 of the officers' report should not be read in isolation It should be read together with para.3.15 and read in context. It is clear from the opening

of para.3.14 that officers had been seeking to understand from the Trust the methodology it had relied upon. The Trust had not justified all of "the calculated need". Officers plainly had in mind para.(a) of reg.122(2) ("necessary to make the development acceptable in planning terms"). The obvious issue addressed in the report was why should there be a funding gap if population growth is taken into account in CCG funding? The report rightly pointed out that in the case of PbR funding, which complies with the statutory scheme, there is no funding gap. The Trust had not demonstrated why the position should be any different for block contracts. On any fair reading of their report, the officers did not assume that any funding gap could be addressed by switching to a PbR regime instead of block contracts. The defendant did not take into account an irrelevant consideration.

71. It should have been obvious to the Trust that the question it needed to address was why should the negotiations for a block contract not adequately address population growth on, for example, this development site? The Trust's representations on the officers' report (28 October 2021) said in fairly bald terms that para.3.15 of the officers' report was factually incorrect or irrelevant. But it still failed to address the central question. The Trust had accepted that it was partly funded for the population growth the subject of its s.106 request, but did not estimate the extent of that funding and the residual gap (if any). Nor did it explain how those conclusions were arrived at. Indeed, para.3 of the Trust's response on the officers' report was distinctly unhelpful if not misleading. It claimed that "the total available financing at a local system level is based on a comprehensive national funding formula which uses the historic population registered with GPs along with weighting factors to reflect its particular demographic profile/characteristics." That simply ignored the population growth for which NHS funding was provided.

72. There is no explanation as to why the Trust failed to deal with these funding issues in this case. One possible explanation appears from the *Leicester* case. There the same lawyers advising the Trust persisted in maintaining over a similar timescale that issues about the existence or size of a funding gap were not relevant planning considerations for a planning authority to take into account. This point appears to have been pursued by NHS Trusts in a number of planning applications and appeals across the country.

73. As to ground 3, Mr Cairnes said that he relied upon the common law duty to give reasons as explained in the *Dover* case, rather than regulation 24(1)(c)(ii) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No.1824 - the EIA regulations applicable in this case). However, I doubt whether the circumstances here give rise to a common law duty to give reasons. The members did not disagree with the officers' approach and the issue raised by the Trust did not involve public controversy with regard to the proposal (*Dover* at [57]).

74. However, I will assume, without deciding, that there was a duty to give reasons for the decision on reg.122(2) of the CIL Regulations. In my judgment the reasons given were clear and ample. The officers' report rightly had in mind the test in reg.122(2)(a). The Trust accepts that it had to demonstrate the existence and size of a funding gap. The report explained why it had failed to do so. Even

if the Trust did not in fact understand the concern raised in the officers' report at the time, the obvious course would have been for it to write to MHDC to obtain clarification and, if it wished, to make further representations actually addressing the central issue regarding its request. But the Trust did not take that course although there was an obvious opportunity to do so. It is trite law that the resolution passed on 3 November 2021 did not amount to a grant of planning permission. Planning permission is not granted until the formal decision notice is issued. The suggestion the Trust now ma that it has been left in the dark is somewhat disingenuous. It should be obvious to the Trust and its advisers that it has not explained the extent to which NHS funding allowed for population growth addresses the issue regarding the first year of occupancy on a new development site. In essence the claimant's failing here was the same as that of the NHS Trust in the *Leicester* case. The Trust cannot genuinely claim to have suffered any prejudice on this issue. Furthermore, the officers' reasoning does not give rise to a substantial doubt as to whether the defendants' decision was free from any error of public law.

75. Grounds 3 and 4 are unarguable.

76. It follows that the defendants were entitled to conclude that they were not satisfied that the Trust's request was "necessary" for the purposes of reg.122(2) of the CIL Regulations. On that basis, the defendants could not lawfully have required the developer to pay the contribution requested in order to make the proposed development acceptable in planning terms. Irrespective of the sequence in which the committee's resolutions were set out, compliance with regulation 122(2) was a legal test which had to be satisfied before the defendants would even need to consider whether the s.106 requirements already approved by the defendants had a higher priority than the Trust's request, or what the effect of revisiting viability appraisals might be. Accordingly, it follows that the other grounds of challenge fall away. However, the defendants did go on to address those other issues. I will also deal with the remaining grounds of challenge.

Ground 6

77. In para. 3.26 of their report officers said:

> "3.26 With regard to the impact of the development on health-related infrastructure and services, whilst the development may not contribute toward acute healthcare service provision in the way that the Trust would wish, it is important for members to note that the s106 agreement will secure some new healthcare infrastructure, to mitigate some impacts of the development. The s106 legal agreement will secure a serviced plot (subject to an option arrangement between NHS Property Services and the applicant) of 0.4ha to accommodate a four GP practice, to be located within the new Local Centre. Prior to the occupation of the 900th dwelling, a Healthcare contribution of £1,720,000.00 will fall due. This is to fund site acquisition and construction and/or extension, expansion or enhancement of up to ten existing GP surgeries serving the development."

78. The Trust's complaint is that there was "no sufficient evidential basis" (*R (Association of Independent Meat Suppliers) v Food Standards Agency* [2019] PTSR at [8]) for officers to advise in their report to the committee that the contribution of £1.72m would provide premises for a new GP practice (see paras.84 and 88 of the claimant's skeleton).

79. There is no real dispute about how the executed s.106 agreement operates. NHS Property Services has an option to buy a serviced area of land of 0.4ha to accommodate a four GP practice within the new local centre at open market value. In parallel the developer is required to pay £1.72m for "agreed purposes", that is "*towards* the cost of acquiring the healthcare accommodation and installing necessary services and built facilities and/or the improvement of up to ten surgeries in Worcester listed in the agreement." NHS Property Services explained in an email dated 4 February 2014 that the financial contribution would only cover building costs, not the price payable for the serviced plot.

80. The effect of the agreement is clear. The real question is whether the officers' report significantly misled the committee into thinking that the sum to be paid will by itself secure the provision of the new surgery, applying the test in the *Oxton Farms* case (see [52] above). The Trust's criticism relates to the use of the word "secure" in the first and second sentences of para.3.26 of the report and the use of the words "to fund" rather than "towards" in the last sentence of that paragraph.

81. The first sentence of para. 3.26 refers to "some healthcare infrastructure" and is therefore accurate. In the event of NHS Property Services deciding not to exercise the option, the s.106 sum would be spent on existing GP practices, not a new GP practice. In that respect the last sentence of para. 3.26 was correct. The criticism made in the claimant's skeleton is wrong.

82. Otherwise the claimant's criticism is overly forensic and does not accord the usual benevolence which the courts give to the reading of an officer's report. The second and last sentences are not misleading. The second sentence stated that the s.106 agreement would secure a serviced plot, subject to an option agreement. That did not imply that the land would be "free". The last sentence needs to be read in context. It was common ground between the parties that NHS Property Services did not suggest that the contribution was inadequate or that it lacked the funds to pay for the "four GP" site. It did not raise any concern as to whether that facility could be secured or delivered. Indeed, the email from NHS Property Services clearly stated that the figure of £1.72m was the sum it had requested.

83. Ground 6 is unarguable.

Ground 1

A summary of the claimant's submissions

84. In the statement of facts and grounds this ground is put forward in two ways. First, the claimant says that the defendants breached their *Tameside* duty by failing to reopen the viability appraisals and investigate the implications of

reducing other infrastructure contributions. It is said that this was an obviously material consideration because in the report to committee on 3 November 2021 officers accepted that it was necessary to obtain that information in order "to properly examine acceding to the claimant's request" (para.22). But that involves a misreading of the officers' report. The Trust relies on para.3.29 of the officers' report, but that paragraph simply deals with consequences of the committee agreeing to reopen the viability assessments. It did not suggest that this was a matter which should be investigated further in order to decide whether to agree to the Trust's request for a s.106 contribution. Mr. Cairnes abandoned reliance on paras.22 to 25 of the statement of facts and grounds (paras. 48 to 51 and 55 of the skeleton).

85. Accordingly, the Trust now relies solely upon its second way of advancing ground 1 (para.26 of the statement of facts and grounds and paras. 52 to 54 of the skeleton). The Trust submits that the defendants acted with a closed mind. They shut out consideration of the Trust's request by relying upon the viability of the scheme as assessed in the appraisals. That material was "rationally insufficient." The defendant's approach was irrational because the viability appraisals carried out for the meeting on 7 March 2019 were more than 4 years old and out of date by the time planning permission was granted on 26 October 2022. The defendants' detailed grounds of resistance said that the viability of the development was "marginal" or "on the edge" (see also the defendant's skeleton). But there was no way of ascertaining whether that claim was accurate without disclosure of the viability appraisals which the defendants had refused to give. Lastly, even if revisiting the viability assessment did not result in there being any more headroom for additional s.106 contributions, the defendants had not asked other parties to reduce the contributions they had requested so as to accommodate the Trust's request.

86. In relation to the application for disclosure, Mr. Bowes submitted that the defendants resist ground 1 on the basis that, given the viability of the scheme was marginal, it was rational for them not to make further inquiries into the implications of the Trust's request for funding. He says that it is necessary for the Trust to respond to this part of the defendants' pleaded case and, in order to do so, it is necessary to determine whether the viability evidence before them was "rationally sufficient", or whether it rationally supported their decision not to enquire further. Mr. Bowes submits that it is impossible for the court to address that issue without understanding the nature and scope of the viability evidence seen by officers (or by the defendants' advisers) and whether the terms "marginal" and "on the edge" were justified.

87. Mr. Bowes also submitted that whether the viability material rationally justified the defendants' decision not to make further inquiries into the Trust's funding request depends upon a number of factors such as the age of the viability impacts, whether the methodology followed standard practice or planning policy, any omissions, the expertise of those who carried out the assessment, any caveats to their conclusions and "whether the conclusions can fairly be described as "marginal" or "on the edge.""

Legal principles on disclosure

88. In judicial review the test for ordering disclosure is whether it is necessary to resolve the matter fairly and justly (*Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 at [3] and [52]). Where a public authority relies upon a document as significant to its decision, it is ordinarily good practice to exhibit it as primary evidence. Any summary, however conscientiously and skilfully made, may involve distortion. There may, however, be reasons arising, for example, from the confidentiality of material as to why it should not be produced ([4] and [33]). In *R (Jet2.com Limited) v Civil Aviation Authority* Morris J helpfully summarised at [48] a number of principles in the authorities, which I have applied. In general, disclosure applications are exceptional in proceedings for judicial review. The court should guard against fishing expeditions looking for additional grounds of challenge (see *Tweed* at [56]).

89. In addition, the Trust relies upon CPR 31.14 as entitling it to see the viability appraisals referred to in the Detailed Grounds of Resistance. In relation to CPR 31.14 there was no real disagreement between the parties as to the principles to be applied. In *National Crime Agency v Abacha* [2016] 1 WLR 4375 the Court of Appeal held that the mere fact that a document is "mentioned" in one of the documents specified in CPR 31.14 does not automatically entitle the other party to inspect it. The court retains a discretion to refuse inspection ([28]). Second, where CPR 31.14 applies to a document mentioned by a party, other parties ordinarily have a right to inspect because the party who refers to a document does so through choice and the rule aims to put parties on an equal footing in this respect ([29]). However, in the present case the reality is that the defendants have referred to the viability appraisals because they form a relevant part of the reasoning in the officers' reports. They are also the subject specifically of ground 2 in the context of s.100D of the 1972 Act. The defendants could not fail to "mention" the documents.

90. A party may oppose inspection of a document under CPR 31.14 on the grounds that it would be disproportionate to the issues in the case. Here, a court is very likely to have regard to whether inspection is necessary for the fair disposal of the application (*Abacha* at [30]). Although inspection cannot be refused solely on the grounds that the document is confidential, nevertheless confidentiality is a relevant factor in striking a just balance between the competing interests of the parties involved. Again this involves the question whether inspection is necessary for the fair disposal of the application ([31]). There is no freestanding "necessity" test; rather this is a relevant factor in striking a just balance ([32]). In *R v Inland Revenue Commission ex parte Taylor* [1989] 1 All ER 906 the Court of Appeal refused to order inspection in proceedings for judicial review where they judged that to be unnecessary for the fair disposal of the application. But the former RSC specifically required that test be applied. Under the CPR regime that is a relevant consideration rather than a freestanding ground for refusing to order inspection.

91. The starting point is that the Trust has not yet been granted permission to apply for judicial review in relation to ground 1. Mr. Bowes said that if the court refuses the application for permission, then disclosure should not be ordered. He refers to the decision in *R (Waltham Forest London Borough Council and*

others) v Secretary of State for the Environment [2010] EWHC 3358 (Admin) where Langstaff J accepted that in general disclosure is not ordered before a defendant files evidence in reply. In that situation leave will already have been granted. Likewise in *Jet2* the claimant had been granted permission. In the present case the application for permission has been rolled-up. The defendants have filed detailed grounds of resistance but no evidence. However, the fact that the Trust has not yet been granted leave to apply for judicial review on ground 1 is not a bar to the court ordering disclosure. I have considered whether the disclosure sought is necessary in order to determine fairly and justly the arguability of that ground, or whether it would be proportionate to make the order for that purpose.

Discussion

92. At no stage have the members of the planning committee seen a copy of the viability appraisals or any updating of that material. Their knowledge of that material is solely derived from the summaries provided by officers in their reports in 2018, 2019 and 2021. Similarly, the use by the defendants' counsel of terms such as "marginal" and "on the edge of" in the detailed grounds of resistance and skeleton argument is simply their reading of those parts of the officers' reports which summarise the viability material. Counsel have not seen the appraisals themselves.

93. In their report for the meeting on 7 March 2018 the officers carefully assessed the justification for a number of s.106 requirements. They accepted that the first phase of the scheme could only support 20% affordable housing because of requirements for essential infrastructure and viability issues (para.16.4). The new on-site primary school was an essential component of the urban extension together with a contribution for secondary education (paras. 38.3 to 38.4). The justification for requiring contributions to highway infrastructure (including £14.4m for the dualling of the A4440) was set out (paras.41.1 and 41.5). Police services requested a contribution of £607,000 but the defendants decided that that was not necessary to make the development acceptable in planning terms (para.41.10). Instead, the authorities accepted that only a requirement for a police post within the community centre could be justified (para.41.11). Policy SWDP45/1 required the provision of a site for travellers of up to 10 pitches and so the defendants agreed that a s.106 contribution of £0.975m was justified (section 34 and para.41.4). The authorities also agreed that the contribution requested by NHS Property Services towards GP services was required (see paras.39.1 and 41.4 and resolution).

94. The officers' report in 2018 also dealt with viability. The defendants appointed Gerald Eve to assess development viability. They followed RICS guidance. The information supplied by WSL to enable that assessment to be made was commercially sensitive and therefore had not been made public (para.42.1). Gerald Eve had carried out "objective viability testing" of the ability of the development to meet its costs, including planning obligations, whilst ensuring an "appropriate land value" for landowners and a "market risk adjusted return" to the developer (para.42.2). WSL's consultant, Savills, had explained that development viability was adversely affected by abnormal development costs, relatively low density of development, and substantial highways, drainage,

other infrastructure and s.106 costs. The development could not be fully compliant with policy, including the provision of 40% affordable housing, and be viable (para.42.3). That analysis had included sensitivity testing. Gerald Eve carried out their own bespoke sensitivity analysis and advised the defendants in 2018 that they should accept 20% affordable housing for the first phase with a review mechanism for the later phases (para. 42.4), subsequently amended to 20% throughout the whole scheme.

95. In the 2019 and 2021 reports officers considered whether the Trust's request should be given greater priority than any of the matters for which s.106 contributions had been required and whether the 20% level of affordable housing should be reduced further in order to accommodate that request. The clear assessment of the officers, accepted by the committee both in 2019 and 2021, was that the agreed s.106 contributions and affordable housing were necessary to make the development acceptable in planning terms and had greater priority than the Trust's request. That was a matter of planning judgment for the defendants. The Trust has never sought to question that judgment, whether on the merits during the period January 2019 to October 2022, or subsequently in this claim for judicial review.

96. Mr. Cairnes relied upon para.3.18 of the 2019 officers' report for the observation that after extensive discussions the experts for WSL and the defendants had not been able to agree all inputs to the financial appraisals. But that does not assist the Trust. The situation is in no way comparable to the *Dover* case where the Supreme Court indicated that further information should have been identified. There the council's consultants had advised that a large housing scheme should be reduced from 521 to 375 units in order to avoid harm to the landscape, but would remain viable, whereas the developer said that it would be loss-making (para.10). The material before the committee in that case did not enable them to resolve that fundamental issue. Here that kind of problem does not arise because, irrespective of differences on some inputs to the appraisals, the defendants' advisers were satisfied that only 20% affordable housing could be achieved across the whole scheme after having carried out their own sensitivity testing. That was way below the 40% target set by the development plan. In my judgment there was no *Tameside* requirement in this case for the committee to require more information.

97. Similarly there is no merit in the Trust's reliance upon the expressions "marginal" and "on the edge" used by the defendants' counsel to describe viability. It is necessary to understand what they meant by these phrases in context, that is the context of the officers' reports. This is a case were the affordable housing component which it is viable for the scheme to provide is constrained by the cost of essential infrastructure which the defendants have determined must take priority, even over a strong need for affordable housing. As confirmed during the hearing, counsel was referring to the margin governing the level of affordable housing that can be provided. Plainly, he was not referring to a margin between the Trust's request for £1.8m and the costs of essential infrastructure plus 40% affordable housing. He was implying that the appraisals might indicate the availability of some headroom to allow for that request to be accommodated. On the basis of the unambiguous and consistent

advice that the committee was given in 2019 and 2021 there was no legal requirement for them to look at the viability appraisals themselves or to require more information on the so-called margin.

98. The same applies to the point that the inputs used in 2018 had become out of date by 2021 or 2022. The defendants' consultants advised that any increase in property values over the intervening period was more than offset by increases in costs, particularly building costs, such that the overall viability had not changed significantly (2021 report para.3.27).

99. I now draw the strings together. In my judgment ground 1 is completely unarguable.

100. First, the Trust's representations to the defendants failed to persuade them that the contribution requested satisfied regulation 122(2)(a) of the CIL regulations. The Trust failed to address that fundamental issue, for example, in its response dated 28 October 2021 and after the meeting of 3 November 2021. The upshot is that there could not be any legal obligation on the defendants to make further inquiries about the viability appraisals and other s.106 requirements in order to provide funding for a request which would breach reg.122(2)(a) and render the grant of any planning permission unlawful and open to legal challenge. Indeed, to impose such a requirement would itself be irrational. Ground 1 must therefore fail for this reason alone. Furthermore, it follows that the disclosure sought by the Trust is irrelevant, and not merely unnecessary or disproportionate.

101. Second, the Trust has never challenged the assessment by the defendants that the s.106 requirements they approved and the provision of affordable housing were necessary to make the proposed development acceptable and were, in any event, a higher priority than the Trust's request. Likewise the Trust does not bring any challenge to the defendants' decision that the s.106 contributions for essential infrastructure and the 20% level of affordable housing should not be reduced in order to accommodate the Trust's request. These unchallenged, unassailable conclusions could not give rise to any legal obligation on the part of the defendants to re-open the viability appraisals or to seek further information.

102. It is therefore wrong for the Trust to assert that the defendants shut out consideration of its request for a contribution merely by relying upon the viability information they already had.

103. Third, it follows that the Trust must show that it was irrational for the defendants' committees to have relied upon the summary provided in the officers' reports of the advice given by the independent consultants. Ground 1 turns on whether it was irrational for the members not to call for further information on the appraisals, for example, to see whether the development scheme could afford to pay for the contribution requested by the Trust as well as the approved s.106 requirements and policy compliant affordable housing. In my judgment the answer is no for a number of reasons.

104. There is nothing wrong in principle with officers summarising in their report to members technical advice from consultants, whether a noise report or a

development appraisal. There is no obligation requiring such material to be placed before and read by the members of a committee in order for their decision to be lawful. As Baroness Hale stated in *R (Morge) v Hampshire County Council* [2011] PTSR 337 at 36:

> "Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

Similar statements have been made by Sullivan J (as he then was) in *R v Mendip District Council ex parte Fabre* (2000) 80 P&CR 500, 509 and Sales J (as he then was) in *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) at [43].

105. The threshold of irrationality on matters of judgment is a difficult obstacle for a claimant to surmount (*R (Newsmith Stainless Limited) v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126 at [6]. So in *R (Frazer) v East Staffordshire Borough Council* [2010] EWHC 2744 (Admin) Flaux J (as he then was) held that the members had not acted irrationally by failing to consider confidential viability reports before they granted planning permission ([20] and [47] to [49]).

106. As I have said, the *Dover* case was very different from the present case. There the advisers for the developers and the council held diametrically opposed views on the viability of the reduced level of development advised by officers and the members could not properly resolve that critical issue on the material before them. In this case there was no material issue between Savills and Gerald Eve, let alone one which could not rationally be resolved by the members without further information. In their final report officers informed the committee that Gerald Eve advised that there was no scope for the level of affordable housing to be increased above 20%. Indeed, if the Trust's contribution were to be made a s.106 requirement, the level of affordable housing across the scheme would have to be reduced by 2.5% to 17.5% (roughly 55 affordable homes).

107. The Trust did not raise any issue with the defendants which alters the legal analysis. The focus of its representations was on setting out the effect of new first year residents of the development on the Trust's services and an explanation, albeit inadequate, of its funding arrangements. But the Trust never challenged the defendants' prioritisation of s.106 requirements. It did not suggest that if the headroom for future s.106 requirements was greater, then the Trust's request should be preferred to increasing the level of affordable housing up to 40%. It did not suggest that the defendants should revisit the viability of the scheme with their independent advisers to see whether there was far more

headroom than the latter had indicated so as to provide not only 40% affordable housing but also £1.84m towards the funding of the Trust's services.

108. On 26 October 2022 the Trust's solicitors merely asked to see "the latest viability assessment or the conclusions of the viability assessment." But the assessment, or its conclusions, had already been summarised in the officers' reports. The Trust did not indicate what further information it was seeking, for example, in relation to the conclusions of Gerald Eve.

109. Similarly, the representations sent by the Trust's solicitors on 28 October 2021 do not assist the claimant's case. They said that advice in the officers' report that the Trust's request would reduce or make impossible other contributions was an "assertion" that was "not based on evidence and/or the evidence is not available." The bare allegation of assertion was plainly wrong. The officers' report was based upon and summarised the independent, expert appraisal by Gerald Eve. The report was based upon that independent expert advice. Moreover, the officers' advice was specifically focused on the impact that the Trust's contribution would have on the level of affordable housing, for which there was a great need. The Trust did not suggest that the members needed to have more information in order to reach a lawful decision. Furthermore, it did not pursue its dilatory, insubstantial communications, or raise any more focused questions, after the members voted to accept the officers' recommendations and before the permission was granted a year later on 26 October 2022.

110. The disclosure sought is irrelevant as explained in [100] above.

111. Furthermore, the disclosure is unnecessary to address the merits of ground 1 fairly and justly, whether in terms of arguability or substantively. Similarly, it would not be proportionate to order disclosure under CPR 31.14.

112. Mr. Cairnes was careful to respect the distinction between grounds 1 and 2. Ground 1 is not concerned with whether the public or the Trust should have had access themselves to the viability appraisals. That is an issue for ground 2.

113. The disclosure sought and the reasons advanced by Mr. Bowes in support of disclosure do not alter the analysis above as to why ground 1 is unarguable. I have largely dealt with the points summarised in [86] to [87] above. The age of the viability inputs was addressed adequately in the officers' reports and the committee was told that the assessment followed RICS guidance. The list of points in [87] reveals a naked attempt to draw the court into the merits of the appraisal.

114. Furthermore, ground 1 is concerned with whether it was irrational for the members to rely upon the treatment of viability in the officers' reports without seeking further information, applying the principles in *Balajigari*. That issue is to be addressed on the basis of the material before the members. As a matter of principle, it is wrong for the Trust to apply for disclosure of material which was not before the members in order seek to argue that the members acted irrationally in relation to their *Tameside* duty.

115. Accordingly, I conclude that ground 1 is not arguable.

Ground 2

Background papers

116. None of the officers' reports to committee included a list of background papers in accordance with s.100D(1)(a) of the 1972 Act. Ground 2 only relates to material on development viability.

117. It is for the proper officer to decide what documents relating to the subject matter of a report are background papers falling within s.100D(5). Unlike, for example, a decision to exclude the public from a meeting of a committee during an item of business when "exempt information" would be disclosed, there is no need for the identification of background papers to be dealt with by a resolution of that committee. The parties agreed that the same is true for a decision that a document is not to be included in the list of background papers because it contains exempt information (s.100D(4)). That is also a matter for the proper officer.

118. In this case, there is no formal record of any decision by the proper officer and no witness statement has been served. In these circumstances, the parties based their submissions on the contents of the officers' reports. The Trust did not apply for disclosure of any material under ground 2.

119. It is plain that the viability assessments played a significant part in the preparation of the 2018 officers' report. Section 42 of that report relied to a material extent upon the assessments, both by Savills and Gerald Eve. Accordingly, I accept that that material constituted background papers within s.100D(5), subject to whether they included exempt information and so were excluded from being listed in the report by virtue of s.100D(4). If they were to be excluded, they would not need to be made available for inspection by the public under s.100D(1)(b) and (3).

120. Mr. Hugh Richards submitted on behalf of the defendants that the 2018 officers' report plainly identified the existence of viability appraisals by Savills and Gerald Eve and so there had been substantial compliance with s.100D(1)(a) as regards those documents. Thus far I agree with him. The point he makes is not unimportant, because the absence of a list of background papers did not prevent the public from knowing about the existence of the viability appraisals. The Trust and any member of the public could have asked MHDC to see a copy if they so wished. But the defendants do not suggest that they complied with s.100D(1)(b) by making a copy of the documents available for inspection. Accordingly whether or not there was a breach of s.100D turns upon whether the documents contain or disclose exempt information (s.100D(5)). On that matter Mr. Richards adopted the submissions of Ms. Saira Kabir Sheikh KC who appeared on behalf of WSL.

Exempt information

121. The 2018 report stated that WSL had provided information which was commercially sensitive to allow the consultants (i.e. both Savills and Gerald Eve) to undertake their viability assessments. For that reason the material had

not been made public, but the officers added that there was nothing unusual about that approach. They relied upon the then RICS Guidance Note issued in 2012 "Financial Viability in Planning." Paragraph 4.3.1 of that document stated:

> "4.3.1 Pre-application discussions usually proceed on the basis of treating commercial information provided by a developer (applicant) or their consultant as confidential. In order to encourage openness and transparency in the viability process both at pre- and post- application, it is also often the case that the viability reports submitted to a local planning authority are required to be classified as confidential in part or as a whole. This is to encourage the applicant to disclose the maximum amount of information, which can then be reviewed and reported upon. LPAs should therefore be asked to treat and hold this information on a similarly reciprocal basis and respect that disclosure of confidential information could be prejudicial to the developer (applicant) if it were to enter the public domain. Information will usually be disclosed to the LPA adviser but not to the general public as it may be commercially sensitive."

The RICS also recommended that viability reports should contain a request that the document not be disclosed in response to a Freedom of Information request or an Environmental Information request.

122. There is no real dispute that information supplied by WSL and described as confidential fell within para.3 of sched.12A of the 1972 Act and therefore the appraisals using that information contained exempt information subject to the application of para.10 of that schedule. Paragraph 10 required a balance to be drawn between the public interest in maintaining that exemption and the public interest in disclosing the information.

123. The National Planning Policy Framework ("NPPF") and the Planning Practice Guidance ("PPG") were amended in July 2018. From then on national policy has stated that viability studies should be prepared on the basis that they will be made publicly available, save in exceptional circumstances, in which case an executive summary should still be made public. This guidance involved a new approach. The data used in viability appraisals did not have to be specific to the applicant for planning permission or the developer. It should be based on standardised inputs. It therefore need not be commercially sensitive. Previous policy in the NPPF and PPG, current at the time of MHDC's committee meeting on 7 March 2018, did not require viability appraisals to avoid the use of commercially sensitive information and to be made publicly available.

124. Mr. Cairnes placed a great deal of reliance upon the decision of Dove J in *R (Holborn Studios Limited) v London Borough of Hackney* [2021] JPL 17. But it is apparent that the judge's reasoning on the application of s.100D(4) was heavily influenced by, if not dependant upon, the changes to the NPPF and PPG introduced in July 2018 (see [62] to [65]). Indeed, that was the basis upon which the judge distinguished the decision of Patterson J in *R (Perry) v London Borough of Hackney* [2015] JPL 454.

125. In my judgment, the decision in *Holborn Studios*, based upon national policies introduced in July 2018, cannot be used to support the challenge under ground 2 on the application of s.100D(4) and sched.12A to the committee report published in March 2018. Instead, I accept the submission of Ms Kabir Sheikh that the approach taken in *Perry* should be applied.

126. In *Perry* Patterson J relied upon the earlier decision of Ouseley J in *R (Bedford) v London Borough of Islington* [2003] Env. L.R. 22 and upon the RICS Guidance Note to which I have referred to support the conclusion that the developer had submitted commercially sensitive material on a confidential basis (see [46] and [50]). At [79] the judge said this:

> "79. The claimant contends that because there was no decision on balancing the public interest under para.10 of sch.12A the defendant's reliance on the exemption is otiose. That is a wholly unrealistic submission. It is self-evident from the way the defendant treated the documents that its view was that the public interest in maintaining the exemption outweighed the public interest in disclosing it. Paragraph 10 of sch.12A does not require a formal decision to that effect."

127. I agree with Ms. Kabir Sheikh that the reasoning of Patterson J in *Perry* applies equally, if not more so, to the judgment expressed very clearly in para.42.1 of the report for the meeting on 7 March 2018. Reinforced by the express reference to RICS Guidance, the officers plainly struck the balance required by para.10 of sched.12A by treating the public interest in protecting the confidentiality of the commercially sensitive information as being more important than the public interest in having access to that material. It was therefore exempt. This was a judgment for the officer and there is no suggestion of irrationality.

128. I also note that s.100D(4) does not provide for the redaction of confidential information or part disclosure of the remainder of a document (see Stuart-Smith J (as he then was) in *R (CPRE) v Herefordshire Council* [2019] EWHC 3458 (Admin) at [92]). Mr. Cairnes did not suggest otherwise.

129. Accordingly, the appraisals carried out by Savills and Gerald Eve, on the basis of commercially sensitive information supplied by WSL, were exempted by s.100D(4) from being included as background papers in the list required by s.100D(1)(a) of the 1972 Act for the officers' report in March 2018. Consequently there was no obligation on the part of any of the defendants to make a copy available for public inspection under s.100D(1)(b), nor any correlative entitlement on the part of the Trust or any member of the public to have access to the document.

130. Mr. Cairnes rightly pointed out that information falling within any of paras.1 to 7 in sched.12A is exempt if *and so long a*s the public interest in maintaining the exemption outweighs the public interest in disclosing the information. He described this as a continuing obligation on the proper officer. By this I did not understand him to mean that the officer must review his or her initial decision that information is exempt at daily, weekly or other intervals. Parliament would not have imposed such a heavy burden on an authority in relation to many

thousands of background papers. Instead, it seems to me that the words "and so long as" require the proper officer to review the applicability of an exemption for the purposes of the ongoing access obligations in s.100D(1)(b) if, for example, a material change of circumstance should come to his or her attention within the four year period laid down by s.100D(2).

131. By the end of the argument Mr. Cairnes relied upon only two changes in circumstance. First, the NPPF and the PPG were altered in July 2018 so as to require the preparation of viability assessments using standardised inputs, and not commercially sensitive information, so that assessments can be made publicly available. I do not see this as a material change to the basis upon which the exemption decision was taken in March 2018. The position remained that the viability appraisals before the defendants had been based upon commercially sensitive data. Accordingly, the justification for that exemption continued to apply. Theoretically the defendants could have asked for fresh appraisals using standardised inputs in accordance with the new national guidance. But no one suggested at the time that that should be done and no legal challenge has been made complaining of a failure by the defendants to take that step. The Trust did not make that suggestion when it arrived on the scene in January 2019, nor, understandably, has it pursued that point since. The suggestion that the exemption decision in March 2018 had to be reviewed because of the change in national guidance in July 2018 falls flat on its face.

132. The other change relied upon by the Trust was the decision by the defendants in August 2019 that 20% affordable housing was an acceptable level of provision for the whole project, instead of whatever level, higher or lower than 20%, might result from the use of the VRM for phases after phase 1. Quite apart from that issue, I bear in mind that the officers' reports for the meetings on 14 August 2019 and 3 November 2021 were fresh reports to committee triggering freestanding requirements for the proper officer to provide a list of any background papers not containing exempt information for each report.

133. But the officers' report in 2019 was not based upon any new viability appraisal (see e.g. resolution 2.1). The only financial appraisals relied upon for the purposes of dealing with the Trust's late request for a contribution were those upon which the 2018 report had been based. Accordingly, the reasoning in [127] above applies.

134. In para. 3.26 of the 2019 Report the officers said that the defendants' specialist consultants had advised that the substitution of a 20% level of affordable housing for the whole scheme in place of the VRM was justified given the "known" infrastructure demands, development value and costs. So that advice too was based upon the appraisals carried out the previous year, which were exempt under s.100D(4).

135. The officers' report in November 2021 dealt with the Trust's request for a reduced contribution of £1.84m. Paragraph 3.27 made it clear that the viability appraisals had not been reopened. But the defendant's specialist consultants had advised that any increase in, for example, residential sales values, would be more than off-set by increases in costs, particularly building costs, such that the overall viability would not have changed significantly. Here again officers did

not rely upon any new viability appraisal following the approach in PPG guidance introduced in July 2018. The only appraisals relied upon were those upon which the 2018 Report had been based and so the reasoning in [127] above continued to apply to these documents.

136. According to both the Amended Statement of Facts and Grounds and the claimant's skeleton, ground 2 is focused on the viability appraisals produced for the 2018 report and which were not subsequently re-opened. For the reasons set out above, the defendants did not breach their obligations in s.100D(1)(a) or (b) of the 1972 Act in relation to any of the three officers' reports to committee as regards viability assessments.

The legal consequence of a breach of s.100D(1)

137. But what if I had concluded that those materials were not exempt and so the defendants had breached s.100D(1)? The defendants and interested parties submit that any such breach would not invalidate the planning permission unless it had caused the Trust to suffer material prejudice.

138. Section 100D applies to decision-making by Councils and their committees generally and not just to the determination of planning applications. The 1972 Act does not specify the consequences for the validity of any decision taken on the basis of an officer's report where a breach of s.100D occurs.

139. In *R (Joicey) v Northumberland County Council* [2015] PTSR 622 a noise report was not included in the list of background papers accompanying the committee report on a planning application. The document was required to be available for public inspection at least five clear days before the meeting but was not available until the day before the meeting. Cranston J stated that "right to know" provisions relevant to the taking of a decision such as those in the 1972 Act require timely publication, so that members of the public can digest the material and make sensible contributions to the democratic decision-making process. He added that in practice, whether the publication of the information was timely will turn on factors such as its nature (e.g. whether technical or easily digested), the audience for whom it is intended and its bearing on the decision. In that case the publication of a 74 page complex noise report the day before the hearing was not timely. The claimant had not had sufficient time to respond and to make the points that he would have made and so he had suffered prejudice ([48]).

140. In practice the courts consider two related aspects, whether there has been substantial compliance with the legislation and also whether the claimant has suffered material prejudice from any non-compliance. Both issues are fact-sensitive. In *R (Save Warsash and the Western Wards) v Fareham Borough Council* [2021] EWHC 1435 (Admin) Jay J regarded the late publication of "a mass" of additional material on the history of the application site from its owner as a breach. But in *R (Wyatt) v Fareham Borough Council* [2022] Env.L.R.7 the same judge considered the late availability of certain documents to be immaterial, given their nature and the content of the officer's report ([95] to [99]). Similarly, in the *CPRE* case Stuart-Smith J decided that the late availability of certain materials had caused no prejudice or unfairness (see [2019] EWHC 3458 (Admin) at [82] to [89]).

141. The approach taken in these decisions is in line with the principles established in *R v Soneji* [2006] 1 AC 340 and similar authorities. Where legislation lays down a statutory requirement, for example that a particular action be taken, the first question for the court is whether on a proper construction of the legislation Parliament intended that a failure to comply with the requirement should result in the total invalidity of actions which follow, such as a substantive decision. If not, the second question is whether the circumstances of the case indicate that invalidity should be the consequence. That may be affected by whether there has been substantial compliance with the requirement, or whether any non-compliance has caused significant prejudice (see also Bennion, Bailey and Norbury on *Statutory Interpretation* (8th ed) para.9.5.

142. On a true construction of the 1972 Act, I do not think that the effect of a failure to comply with s.100D(1)(a) and/or (b) in relation to an officer's report to a Council or committee renders the subsequent decision taken by that body automatically unlawful or invalid, and therefore liable to be quashed. Instead the legal effect of such a breach will depend upon the circumstances of the case. Cases are likely to fall within a spectrum including failure to comply with the statutory requirements timeously, failure to identify the existence of a background paper and failure or even refusal to make a background paper available at all.

143. Here Mr. Cairnes said that it is an essential part of the Trust's case to link any breach of s.100D to its allegation of procedural unfairness. A claimant must show that any unfairness has caused him to suffer material prejudice (*Hopkins Development Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [45]; *R v Chief Constable of the Thames Valley Police ex parte Cotton* [1990] IRLR 344).

144. In this case there was substantial compliance with s.100D(1)(a). The existence of the 2018 appraisals was clear from the 2018 officers' report. The key issue is whether there was material prejudice in relation to a breach of s.100D(1)(b), the obligation to make a document open to *inspection*, which includes the existence of arrangements for *producing* a document to a member of the public after a *request is made to inspect.*

145. Plainly, it is unnecessary for a request to see a document to have been made for a breach of s.100D(1)(b) to have occurred. On the other hand, when it comes to material prejudice, a person who was aware of a reference in a committee report to a background paper but who has never shown or had any interest in inspecting the document is unlikely to get very far in a claim for judicial review.

146. The present case is very unusual. The Trust did not engage with the planning application before the main decision-making in March 2018. For a public body wishing to obtain a s.106 contribution that is most unusual and contrasts with the approach taken in this case by NHS Property Services and other public bodies. When the Trust became involved in 2019, it asked for contributions in respect of four large sites. Between 2019 and 2020 three sites were granted permission with only 20% affordable housing and no contributions for the Trust. The Trust made no criticism or challenge in respect of those decisions. It showed no interest at all in any viability issue on the SWDP45/1 site between

January 2019 and October 2021. It then asked to see the *latest* viability report, indicating that, even then, it had not engaged properly with the officers' three reports. It was clear from those documents that the only appraisals had been prepared in 2018 and had not been updated. MHDC did not reply to the request but the Trust did not raise the matter again during the next 12 months before the permission was issued. There is no evidence explaining these long periods of disinterest and delay. The last gap between October 2021 and October 2022 is particularly striking. The Trust had referred to viability issues for the first time and had an opportunity to take the matter further if it thought that worthwhile. It did nothing. An authority could reasonably have taken the view that the Trust was not pursuing the point, just as it had decided to raise no issue over the absence of s.106 contributions in relation to the three other urban extensions which had been granted permission between 2019 and 2020. Viewed overall I am not persuaded that the Trust has suffered material prejudice.

147. There is one further, separate matter which plainly shows that the Trust has suffered no prejudice, but I think that should be addressed below under s.31(3C) to (3E) of the Senior Courts Act 1981.

Delay

148. The Trust relies upon the principle in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1WLR 1593 and submits that time ran from the date of the planning permission and not some earlier date. The defendants and interested parties argue that time should run from various earlier dates related to any breach of s.100D as a freestanding basis for seeking judicial review. If the effect of a breach of s.100D is to vitiate the related committee resolution (or in this case planning permission) because of, for example, procedural unfairness, I do not see how *Burkett* can be distinguished. In the present case the planning permission is not vitiated, but the court did not receive sufficiently full argument to justify taking the step of distinguishing *Burkett*. I am not prepared to refuse leave in relation to ground 2 on the basis of delay.

Section 31(3C) to (3E) of the Senior Courts Act 1981

149. I turn to consider s.31(3C) to (3E). The court in Joicey, having decided that the claimant had been prejudiced by the breach of s.100D, went on to apply the test in *Simplex (GE) Holdings Limited v Secretary of State for the Environment* [2017] PTSR 1041, that is whether the defendant's decision would inevitably have been the same if there had been no breach of s.100D. However, in 2015 the *Simplex* test was replaced in proceedings for judicial review by the test in s.31(2C) and (2D) for the permission stage. The question is whether it is highly likely that the outcome for the applicant would not have been substantially different if the defendants had complied with s.100D.

150. For these purposes I will approach this issue on an assumption, contrary to my earlier decision, that the defendants should have provided the 2018 viability appraisals and any subsequent advice from their experts. The short point is that none of that material, by its very nature would have been relevant to satisfying the defendants that the contribution requested by the Trust complied with reg.122(2)(a) of the CIL Regulations. For that reason it would have been

unlawful for the defendants to decide to grant planning permission subject to a s.106 agreement which required the payment of that contribution (see above).

151. It is therefore highly likely that the outcome for the Trust would have been the same. Indeed, that inevitably had to be the outcome on the conclusions reached in the officers report in 2021 that the Trust had not satisfied the authorities that the test in reg.122(2)(a) was met. The Trust has not identified any reason of exceptional public interest under s.31(3E) and I see none. Accordingly, leave to argue ground 2 must also be refused under s.31(3D) of the 1981 Act.

Conclusion

152. Ground 2 is unarguable on three independent bases: (a) the relevant material contained exempt information and therefore no breach of s.100D(1) occurred (b) even if there was such a breach, the Trust suffered no material prejudice and so the grant of planning permission was not unlawful or invalid and (c) in any event, leave must be refused under s.31(3D) of the 1981 Act.

Conclusion

153. The renewed application for permission to apply for judicial review of the planning permission granted on 26 October is refused in relation to all the remaining grounds of challenge, that is grounds 1, 2, 3, 4 and 6.