Neutral Citation Number: [2014] EWHC 1719 (Admin)

Case No: CO/831/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
Priory Courts
Birmingham

Date: 27/05/2014

Before :

MR JUSTICE FOSKETT

- -

Between :

The Queen (on the application of The Police and Crime Commissioner for Leicestershire)	**Claimant**
- and -	
Blaby District Council	**Defendant**
-and-	
(1) Hallam Land Management Limited **(2) David Wilson Homes Limited** **(3) Davidsons Developments Limited** **(4) BDW Trading Limited** **(5) Leicestershire County Council** **(6) Martin Frank Spokes** **(7) Richard Thomas Spokes** **(8) Helen Joans Jones** **(9) Frances Alison Mark Hicks** **(10) The Trustees of the Will Trusts of Eric Roderick Brook Drummond**	**Interested Parties**

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Jenny Wigley and Thea Osmund-Smith (instructed by **East Midlands Police Legal Services**) for the **Claimant**

David Elvin QC (instructed by **Marrons Shakespeare LLP**) for the **Defendant**
Charles Banner (instructed by **King Wood & Mallesons SJ Berwin LLP**) for **Interested Parties 1-4 & 10**
Alex Goodman (instructed by **Legal Services of Leicestershire County Council**) for **Interested Party (5)**

Hearing date: 21 May 2014

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Approved Judgment

Mr Justice Foskett:

Introduction

1. This case concerns a substantial development called the "New Lubbesthorpe" scheme to the south west of Leicester for which the Defendant, as local planning authority for the district, resolved on 1 November 2012 to grant planning permission subject to certain conditions and to the conclusion of a suitable agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act") between certain parties.

2. The section 106 agreement was concluded on 13 January 2014 and outline planning permission was granted on 14 January 2014.

3. The Claimant's Claim Form seeking judicial review of the grant of planning permission was issued on 24 February 2014. The focus of the proposed challenge is upon the effect and implications of the section 106 agreement so far as the Claimant is concerned. The section 106 agreement provides for its own termination if the planning permission is quashed (see paragraph 17.7 of the agreement).

4. On 21 March 2014 Hickinbottom J ordered that the application for permission to apply for judicial review be heard on 21 May 2014 on a "rolled-up" basis and gave various directions. On 16 April he gave the Claimant permission to amend his grounds. He was of the view that the resolution of the claim required expedition. The urgency arises because the funding of £5 million from the Department of Transport (derived from what are known as "Pinch Point monies" under the Department's scheme to assist funding highways infrastructure) for the M1 motorway bridge required to implement the scheme may be at risk if not spent before 31 March 2015. Plans are already in place for the temporary closure of the M1 on Christmas Day 2014 to lower the main bridge span into place (see paragraphs 6 and 7 below).

5. The hearing did indeed take place on 21 May and all Counsel completed their submissions within the day.

6. Because of the urgency, this judgment has been prepared in a little over 24 hours after the conclusion of the hearing, is inevitably shorter than might otherwise have been the case and has not received the refinement it might have received if there had been longer to prepare it. Inevitably, I have had to focus on those aspects of the argument that, in my view, represent the strongest grounds for claiming the relief sought rather than dealing with all matters raised.

The nature of the development

7. The outline planning application submitted in February 2011 was for -

> "… 4,250 dwellings, a mixed use district centre and two mixed use local centres featuring a supermarket, retail, commercial, employment, leisure, health, community and residential uses, non-residential institutions including a secondary school, primary schools and nurseries, an employment site of 21 hectares, open spaces, woodlands, new access points and associated facilities and infrastructure, and detailed proposals

> for two new road bridges over the M1 motorway and M69 motorway, and two road access points from Beggars Lane and new accesses from Meridian Way, Chapel Green/Baines Lane and Leicester Lane."

8. The site for the development is open and undeveloped land stretching over 394 hectares and is separated from Leicester by the M1 motorway. This explains the need for one of the two road bridges referred to in the outline application and to which reference was made in paragraph 4 above. The bridge is undoubtedly a key component in making this development possible.

9. According to the witness statement dated 13 March 2014 of Ms Lynne Stinson, a Project Manager within the Environment and Transport Department of the 5th Interested Party (Leicestershire County Council), the development will generate £159 million of investment in new infrastructure, buildings and new parks and other open spaces and approximately 1530 full-time equivalent jobs. It will, according to her statement, provide a significant proportion of the new housing identified in the Defendant's Core Strategy (as amended) as needed in the district in the period to 2029.

10. Whether those claims are justified is not a matter for the court, but the fact that they are made in those terms indicates the scale of the proposed development. The aerial photographs demonstrate the substantial area of land involved and Miss Jenny Wigley, who appeared with Miss Thea Osmund-Smith for the Claimant, described the development as a "new town" which seems an appropriate description. It will take many years to complete if it proceeds. The identities of some of the Interested Parties will give an indication of the commercial interests at stake.

The concerns of the Claimant

11. It is obvious that a development of the nature described would place additional and increased burdens on local health, education and other services including the police force. The focus of this case is upon the effect upon the local police force. If it sought to shoulder those additional and increased burdens without the necessary equipment (including vehicles and radio transmitters/receivers for emergency communications) and premises, it would plainly not be in the public interest and would not be consistent with a policy that encourages "sustainable development": see, for example, paragraphs 17 of 79 of the National Planning Policy Framework ('NPPF'). It is that that leads to the Claimant's interest in these matters.

12. Needless to say, the Claimant does not challenge the principle of the proposed development, nor is the potential amount of the provision of funding for police services by the developers in issue, but the concerns that have led to this application derive from what Miss Wigley submits is (i) an alleged inadequate provision of certain aspects of such funding at appropriate times during the course of the development and (ii) a lack of a clear commitment in the section 106 agreement (to which the Claimant is not a party) that anything will in fact be paid by the developers for premises required by the police in order to serve the community created by the development.

13. The need to provide funding for police resources had, of course, been identified during the discussions leading to the grant of planning permission and, as I have indicated, agreement was reached on the amount that would be required and met by the developers. However, the Claimant contends that there were procedural deficiencies in the final stages of that process that left the police out of the relevant negotiations and ought to lead to the planning permission being quashed or that the result, so far as the funding of police resources is concerned, was irrational and should, accordingly, be quashed on that basis also. The focus, as I have said, is on when certain features of the funding should, in effect, come on-stream during the development and whether there is a sufficiently clear commitment as to funding for police premises.

14. When the resolution for the grant of planning permission was passed on 1 November 2012, the resolution contained the following provision:

> "That planning application 11/0100/1/OX be referred to the Secretary of State as a departure under the Town and Country Planning (Consultation) (England) Direction 2009 as the application proposal is a departure to the Blaby District Local Plan (1999).
>
> That consequent upon the Secretary of State deciding not to intervene planning permission be granted subject to:
>
> The applicants entering into an agreement pursuant to Section 106 of the Town and Country Planning Act 1990 to secure the following:
>
> …
>
> - All CIL compliant capital infrastructures for Policing necessitated by the development and including officer equipment, communications, CCTV, vehicles and premises, the precise terms of this contribution to be settled by further negotiation."

15. The reference to "CIL compliant capital infrastructures" related to the funding of police requirements through a planning obligation under section 106 of the 1990 Act, which in order to be "CIL compliant" must meet the tests specified in Regulation 122(2) of the Community Infrastructure Levy ('CIL') Regulations 2010. Those tests require that the sums are –

> "(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."

16. The relevance of the CIL tests will be apparent in due course.

17. The parties to the section 106 agreement concluded on 13 January 2014 were the Defendant, the County Council (the highway and education authority for the area), the Second, Fourth and Sixth-Tenth Interested Parties (collectively known as "the owner") and the First and Third Interested Parties (the beneficiaries of certain charges and options for the site). The agreement runs to over 170 pages including appendices and contains extremely detailed provisions concerning the way in which the development would proceed.

18. The provision that has given rise to the concerns of the Claimant is at paragraph 2 of Schedule 3 to the Agreement which reads as follows:

> "2.1 The Owner shall pay to the District Council the Police Service Equipment Contribution no later than Occupation of 2,600 Dwellings and shall not Occupy more than 2,600 Dwellings until it has paid the Police Service Equipment Contribution to the District Council.
>
> 2.2 (Subject to the Owner and the District Council at that time agreeing or it having been determined in accordance with clause 23 that the contribution is necessary and if so its appropriate level having regard to the progress of the Development and the availability of Police Service facilities within the area and the appropriate relevant policy guidance at the time) the Owner shall pay the Police Service Premises Contribution to the District Council no later than the Occupation of 3,750 Dwellings and shall not Occupy more than 3,750 Dwellings until it has paid the Police Service Premises Contribution."

19. The Police Service Equipment Contribution referred to in paragraph 2.1 is defined elsewhere in the agreement as "the sum of £536,834 towards police equipment" and the Police Service Premises Contribution referred to in paragraph 2.2 is defined as "a sum not to exceed £1,089,660 towards the acquisition of premises or extension to existing premises such sum to be ascertained in accordance with [paragraph 2.2] of the Third Schedule. Those sums are, of course, to be paid by the "owner" (in effect, the developers) to the Defendant which would then be responsible for paying them over to the Claimant. Reference to Clause 23 is to a provision entitled "Dispute Provisions" that provide for reference to an independent expert in the event of disputes arising under the agreement. That procedure would, of course, only be available to a party to the agreement which the Claimant was not. It should also be noted that the possibility of the police (or any other non-party) relying on the Contracts (Rights of Third Parties) Act 1999 was excluded by clause 17.2 of the agreement.

20. Whilst the figures referred to in relation to equipment and premises costs did reflect figures that had been discussed and agreed between the Claimant and the Defendant, the terms of paragraphs 2.1 and 2.2 as to the circumstances in which those sums would be paid had not been the subject of express agreement and, the Claimant would argue, resulted from an inadequate process of engagement by the Defendant with the issues affecting the services that the Claimant would be required to provide and led to provisions that are irrational.

21. So far as the Police Service Equipment Contribution is concerned, Miss Wigley contends that it is irrational that it should be paid only when 2,600 homes are occupied because the contribution sought and agreed was calculated on the basis of 4,250 homes being constructed (each of which would contribute rateably to costs of the additional demand on policing infrastructure) and yet 2,600 homes would have to policed without any additional resources to do so before the payment was received. There would be several thousand residents *in situ* before the police received any contribution towards the equipment recognized as necessary to fulfill its tasks. In her Skeleton Argument she asserts that an analogous position in the education sphere would be asking hundreds of pupils generated by the development to wait a decade before providing them with somewhere to study.

22. In relation to the Police Service Premises Contribution, which is required to provide accommodation for the additional staff said to be required to deal with the policing issues of the development, the trigger provided in the agreement, subject to the terms set out in parentheses at the beginning of paragraph 2.2, is that it may be necessary to await the construction and occupation of 3,750 homes before any prospect of payment materializes. Miss Wigley submits that it cannot rationally be suggested that over £1 million towards additional police premises should be paid by the developers only when the final 500 homes in the development remain to be constructed. She says that an element of need for such services arises from the occupation of the first home, if not before, and she also raises the spectre of the real possibility that at that stage in the development no further homes will be built, the result being that the developers will avoid a liability to contribute to policing costs that will have been required from a much earlier stage and which the police, in order to fulfill their public role, will have to have met from other sources prior thereto. She also submits that the prefatory words in parentheses at the beginning of paragraph 2.2 mean (a) that the payment of any sum is contingent on agreement as to its necessity between the owner (as defined: see paragraph 17 above) and the Defendant and (b) that the level of any payment, even if agreed in principle, is uncertain and would be capped at the figure specified. In terms of the financing of premises pending receipt of such sum as may be paid under this provision, she says in view of the uncertainties that there would be no realistic prospect of borrowing against the commitment provided by the section 106 agreement.

23. She contrasts the provisions of the section 106 agreement relating to the police with the health care provision that affords an absolute commitment to pay the first of two sums agreed as necessary to expand an existing health centre on the occupation of no more than 150 houses and the second on the occupation of no more than 250 houses. Equally, funds for an onsite health centre are to be released on the occupation of 900 houses.

24. Those submissions are made by way of comment on the terms of paragraphs 2.1 and 2.2 as they stand. I will return to those submissions after dealing with the history that led to their formulation in those terms. That history is of importance to the way it is contended that public law grounds exist for the court to interfere in the way Miss Wigley submits is appropriate.

The background to the terms of the section 106 agreement affecting the police

25. It is first necessary to re-trace steps briefly to the resolution passed on 1 November 2012 (see paragraph 14 above).

26. As indicated above, this development proposal had been in gestation for a number of years before the resolution was passed. The police were involved in the negotiations prior thereto. The background from the perspectives of the parties involved is set out in the various witness statements and I need not deal with that background in detail. During the period of two years or so prior to November 2012 the view was taken by those representing the development interests in the site (and supported, at least to some extent, by the Defendant) that the sums sought by the police to be included as sums for which the developers should be liable were not CIL compliant (see paragraph 15 above). Sums in excess of £3 million were being sought. It seems that the view of the developers was that "an on-site police facility within the local community building would be more appropriate, relevant and beneficial to future residents" than what the police had in mind that stage. I need not go into details for present purposes, but that position obtained throughout 2012 and was reflected in the viability report prepared by DTZ on 20 September 2012 which was submitted as evidence to the Examination in Public session on 10 October 2012. It contained no allowance for contributions to police funding, but merely contained reference to the provision of community buildings on site to include a police presence.

27. In the run up to the planning committee meeting on 1 November 2012 there was something of an impasse, the Claimant maintaining the position that something over £3 million was required as the police contribution and the developers and the Defendant maintaining the position that this was excessive and not CIL compliant. Against that background the Claimant maintained an objection to any resolution in favour of the grant of planning permission. That impasse was resolved on the day of the meeting in a flurry of e-mails between the Claimant's Finance Director and the Deputy Chief Executive of the Defendant in which the formula that became reflected in the resolution (the material parts of which are set out in paragraph 14 above) was agreed. The Deputy Chief Executive of the Defendant acknowledged that the intention behind the words was that "this is all up for negotiation in the future".

28. That then is how matters were resolved at that stage. There was then a period during which it was necessary for the application to be considered by the Secretary of State. Discussions between the various parties were not actively renewed until the Secretary of State had indicated that he did not intend to call in the application. By the time that further discussions commenced in about March/April 2013, the potential of Pinch Point funding for the M1 bridge was "on the cards" and an application for such funding had been submitted to the Department of Transport.

29. On 10 April 2013 Mr Andrew Senior, the Lubbesthorpe project manager for the Defendant, told Mr Michael Lambert, the Growth and Design Officer employed by the Claimant, that "viability work" was continuing and that it would "inform the section 106 negotiations especially levels of affordable housing." He told him that the section 106 agreement was being negotiated and that the level of affordable housing had been changed from that originally contemplated. He referred to the bid for Pinch Point funding and said that, if successful, it would "free up the developers' funds" and help to deliver, amongst other things, the early completion of the "east-west spine road". It is clear that there remained differences about the police funding. By an e-mail of 22 August 2013, following a meeting a few days earlier, Mr Senior offered

some thoughts on how the Claimant might set out its case for a police contribution. It reflected on the approach to deciding on the level of policing necessary and how the appropriate infrastructure was identified, particularly how it would "relate directly" to the development (cf. CIL requirement (b)). He cited as an example the issue of a police car that would spend some time at the development site and some time elsewhere and raised the question of apportionment. It was plainly designed to be (and I am sure was taken as) a helpful contribution to the discussions.

30. The e-mail contained this paragraph to which Mr David Elvin QC, for the Defendant, drew attention as part of his response to the Claimant's arguments:

> "The final element would be how any contribution was to be phased, for smaller developments this would not be much of an issue, given that Lubbesthorpe would potentially have a 20 year delivery time the phasing of contributions would need to be established. I would suggest this was done, as with other services, on the basis of thresholds which identify when any existing capacity is used to trigger the extra resources, clearly once a trigger is reached a range of infrastructure would be required. There would be a range of triggers across the period of the building."

31. Mr Lambert responded to that in a lengthy e-mail of 4 September 2013. I need not quote it all, but Miss Wigley referred to the following paragraph:

> "**Viability.** We need to be guided by you on this however we remain concerned that policing attracts fair and reasonable consideration on a par with other services if the development cannot afford the infrastructure it will need. We have heard about your successes in attracting growth funds for road infrastructure and welcome these. We need to see please how this will reduce pressure on other necessary infrastructures and so we again ask for an up to date overview of this particularly if decisions have to be made about what will be delivered in relation to policing and other necessary infrastructures."

32. Mr Senior acknowledged receipt of the lengthy e-mail and commented that the approach was "sound" but emphasised that his comments should not be taken to imply the support of the Defendant for any particular bid. Mr Lambert shortly afterwards asked for Mr Senior's "guidance on viability" given the external funding for the road that was then on offer. Mr Senior's reply was that it had not to-date been the claim of the applicants that "overall the scheme is unviable", but he drew attention to the fact that they had pointed out that there is "a cost of up front infrastructure to be delivered which affects cash flow especially in Phase 1." He said that over the life of the scheme "the additional funding will improve the overall viability of the scheme" and suggested that the Claimant prepare its bid and the issue of viability could be addressed if it was raised in due course.

33. Mr Lambert had been working up a new bid which was sent to the Defendant by means of a letter under cover of an e-mail of 27 September. I need not try to summarise it save to say that the total sum sought was just over £1.79 million, a

substantial reduction from the original bid. Notwithstanding that, Mr Senior challenged a number of the items comprising the list constituting the bid as not being CIL compliant. One such element was the element for "additional premises" which, he argued, had not been "fully justified", but may be "capable of being supported" as the development proceeds. He suggested a review formula that would include discussions between the developers, the Defendant and the Claimant.

34. Mr Lambert responded to that in detail by an e-mail of 15 October 2013. Again, I need not deal with that in detail, but the paragraph dealing with the proposed review clause should be noted:

> "We accept the need for review clauses but this cannot be to the extent that there is no commitment or quantum at the outset when [planning permission] is issued and we cannot accept that the owner or the [the local planning authority] will be determining what we need. Neither are responsible for delivering policing. We are, and know what we need. You are supposed to be planning at outline not putting if off. Imagine the response if this was the review mechanism for schools or health or anything else i.e. wait till schools are overcrowded or people can't access health to provide premises essential for delivery. That is not the approach of [the National Planning Policy Framework]."

35. A meeting took place on 23 October, attended *inter alia*, by Mr Rob Back, the Planning and Economic Development Group Manager of the Defendant. He wrote to Mr Lambert on 24 October in which he acknowledged that some of the items sought were now accepted as meeting the CIL tests, but still maintaining that some did not, or were not sufficiently evidenced for that purpose. The letter contained this paragraph towards its conclusion:

> "You have also explained that the police would be happy to work with the developer to agree a phased contribution to the costs above in line with the rate of development on the site. This approach could be significant to assisting the developers cash flow and we will explore this with them in more detail. We would be grateful if you could confirm that this approach may be appropriate to all elements of the police infrastructure related to the site."

36. Mr Lambert replied by letter of 28 October acknowledging that he appreciated that the Defendant was attempting to conclude the section 106 Agreement as soon as possible and that there was "a sense of urgency". The paragraph dealing with the possible phasing of the police contribution reads as follows:

> "There are two elements to phasing. First what we will need and when, and we have looked at this before for you. Indeed what I attach in relation to vehicles demonstrates this to an extent. As I said at our meeting we need to sit down and work through this. Second our willingness and goodwill to borrow against the Section 106 contract. The latter depends on the

> contractual commitment, which we have asked for and haven't seen, and our goodwill. Our goodwill erodes the more our fully justified request is dismissed and changes offered without good reason."

37. There was a meeting on 31 October attended by Mr Back and others from the Defendant and Mr Lambert and the Finance Officer of the Claimant. Mr Back refers to it in his witness statement, but Mr Lambert does not. Mr Back says this about what was said:

> "… we confirmed that the … developers consortium was not claiming that the development was financially unviable and that the role of financial appraisal in relation to [the development] was limited to phasing and deliverability. In response it was explained by Mr Lambert that the police had the ability to borrow against a Section 106 obligation in order to enable the timely delivery of infrastructure."

38. The following day (1 November) Mr Senior sent an e-mail to Mr Lambert summarising the items that the Defendant considered should be included in the section 106 Agreement in relation to police funding. In fact a good deal of the bid previously made (see paragraph 33 above) was agreed, including the additional premises contribution in the sum previously claimed. There were some reductions in the bids for start up equipment, vehicles and Automatic Number Plate Recognition, but the list was as follows:

> "Items for inclusion in the agreement

Start-up equipment	£71,388
Vehicles 3 off	£47,415
Additional radio transmitter	£350,000
Additional radio call capacity	£7,650
PND additions	£4,887
Additional call handling	£10,115
ANPR 4 off	£32,888
Mobile CCTV	£4,500
Hub equipment	£8,000
Total	£536,843

> Trigger points for these items need to be agreed, usually based on number of occupations."

39. That list was on a document attached to the e-mail and the balance of the document, which related to the premises element of the police contribution, read as follows:

> "Extensions to existing premises to a maximum of £1,089,660
>
> A review of the need for extensions to existing premises at the commencement of Phase 3 (or other agreed trigger point)
>
> Agreed funds to be paid in the flowing stages
>
> 10% within 2 weeks of notice from the police confirming that are proceedings with extensions
>
> 10% within 2 weeks of agreed design stage
>
> 40% within 2 weeks of the issue of tender for the construction contract
>
> 40% within 3 months of commencement of construction."

40. Mr Senior said that he had "included trigger points which you may wish to amend, but not for the equipment which I will need you to supply."

41. Mr Lambert replied to this e-mail on 7 November 2013 stating the following at the outset:

> "The main issue for us in this is the lack of developer commitment to premises …. I am afraid what is proposed virtually removes the covenant as far as our premises are concerned and having successfully made the case for this to your satisfaction, i.e. that what we seek will be necessary when this development is built, we can't then move away from this and come back to the developer at future points to make the case afresh."

42. The e-mail continued with various suggestions based upon the premise that the developers commit to funding part of what the police needed as a covenant in the section 106 agreement and the review mechanism to apply to the rest. The suggestion, on this basis, was that the Claimant would build to accommodate 14 staff to serve the development and would "aim to start the project at the 1200 trigger".

43. This e-mail was forwarded by Mr Senior to Mr Paul Burton, a Director of the 1st Interested Party, on 11 November who replied in the following terms:

> "We discussed on Friday the terms you believe to have some weight under the CIL requirements. We reached agreement on those contributions following our discussion about the payment timing and the review of the premises. It appears that this compromise to move matters forward is not being accepted by

> Michael Lambert and there may still be a risk of him JR proceedings.
>
> As you know, my view and the view of the other consortium members is that these requests are unreasonable and I find it amazing that the Lubbesthorpe scheme will generate the need for 14 staff. I would like to discuss tomorrow the possibility of the Police continuing to argue their case, potentially to the courts and whether we can secure an agreement from them that if they accept your proposals that they will agree to not to take the point any further. If not, I am not sure there is much advantage to the consortium to accept terms that they wholeheartedly disagree with. Something to discuss tomorrow with the solicitors."

44. That e-mail referred to a meeting that had been held on 8 November and one to be held the following day which Mr Burton attended with a good number of others, including Mr Senior and Mr Back of the Defendant, at which the outstanding issues concerning the section 106 agreement were discussed and resolved.

45. I think I should record what each of those who attended says about those meetings because it would appear that it was the combined effect of those meetings that constituted the "decision" about the section 106 agreement that underlies the Claimant's challenge in these proceedings.

46. Mr Senior said this:

> "41. On 8 November 2013 a meeting was held between the Council and the development consortium the outcome of which was summarised in an email from Paul Burton of the consortium on 11 November …. The discussion referred to in the e-mail considered two issues; first the cash flow of the scheme and the cost of the infrastructure to be provided in phase 1 and secondly how the police request which the Council felt should be given some weight could be supported. It was proposed all the items except premises could come forward at the end of phase 2. The premises could then be subject to a review as part of a viability review at the beginning of phase 3. This review would consider whether the provision of affordable housing could be increased towards the Council's aspiration of 25% across the whole site, the Council having accepted a reduction in affordable housing percentage to help facilitate the development. If the need for [police] premises was agreed at the time of the review, this would be funded.
>
> 42. On 12 November 2013, a meeting was held between the Council and solicitors representing the County Council, and development consortium respectively. At that meeting it was agreed to incorporate the above proposals into the Section 106 Agreement. The discussion at the meeting took into account the issues of viability, compliance by the requests with the CIL

> Regulations and the decision to accept the proposal resulted from a balanced judgement as to how to deliver as much of the police request as possible, albeit not within the time scales that they had requested, and at the same time deliver a viable development."

47. Mr Back said this:

> "14. On 12th November 2013 the Council organised a meeting with representatives of the Lubbesthorpe Consortium, Leicestershire County Council and legal representatives from each of the above. This meeting considered all elements of the … S106 agreement including the proposed policing contribution. At the meeting Council officers explained that we accepted that some elements of the request made by [the police] were compliant with the relevant Community Infrastructure Regulations. At this time, the developer consortium did not agree with the Council's position but Council officers were able to negotiate a favourable position for [the police] partly due to the need to achieve a completed agreement in order to realise the M1 bridge Pinch Point funding. The financial pressures on the early phases of the development and the overall priorities for Lubbesthorpe were discussed as a result of which it was agreed that the policing contributions would need to be triggered from the end of the second phase of the development. At the end of this meeting all parties agreed that further substantive changes to the agreement would be minimised in order to commence the complex process of completing the agreement with all parties.
>
> 15. In the context of the meeting described above it became clear that we ought to communicate the end of the negotiation process, particularly as it was clear that some service providers would not be receiving everything that they had requested, and/or that monies would be provided at a date other than that requested. On this basis I wrote to [the police] on 18th November to confirm that the position we had communicated at an earlier stage of the process (1st November 2013) was the Council's final position on this matter …. I note with some surprise that [the police] claim not to have received this letter. Whilst this is unfortunate, I take some comfort in the fact that the letter only reiterated the Council's already communicated position in any event.
>
> 16. It is entirely understood and appreciated that the … S106 agreement is not a facsimile of the contribution request submitted on behalf of [the police]; it is worth emphasising that the Council was fully aware of this situation when the application was reported to the Development Control Committee for determination and remained the case at the point the agreement was completed. … the Report to Committee …

> states "It will noted that the request for funding from the Police has only been agreed to in part". This report and the associated recommendation and resolution should have clearly set the expectations of [the police] in this matter. As the detail of the [the police] request was examined over the course of the following months there were multiple communications … between the Council and [the police] that made it abundantly clear that the Council did not accept the full extent of the [police] request. There could have been no expectation on the part of [the police] of any other conclusion."

48. Mr Burton said this:

> "26. The meeting on 12 November … was called to finalise the outstanding issues in the s.106 agreement and it was critical to the delivery of the M1 bridge. The structure and timing of at least two highways contributions were discussed and resolved at this meeting …. Both contributions were pushed back in the programme of delivery works to secure a contribution. There has been no suggestion by the local highways authority that this was inappropriate ….
>
> 27. I recall at the November 12th meeting that there was specific discussion about the outstanding requests for contributions on the part of the Leicester City Council and the Claimant. These two issues, in my mind, were very similar in nature in that I did not see a clear link between the requests and the acceptability in planning terms of the Scheme.
>
> 28. In relation to the contributions sought by the Claimant, the key points of the discussion were the relevance of these contributions to the Scheme, their negative effect on the precarious cash-flow position of the project in the early phases and on the overall viability, and the now urgent need to bring s.106 negotiations to a conclusion so as to secure planning permission in the light of the funding position in relation to the M1 bridge …. There was debate as to the level and timing of the various contributions leading to the provisions that were ultimately documented in the s.106 agreement.
>
> 29. The outcome of this discussion was that significant contribution would be made to the Police (notwithstanding my significant reservations as to their CIL compliance) on the proviso that it did not add to the existing very heavy burden of the already agreed financial contributions and infrastructure obligations to be undertaken at the early stage of the development, so as not to risk the viability or deliverability of the scheme. This was entirely consistent with other decisions taken that day, on both highways and the bus station ….

> 30. I recall the Defendant's officers being comfortable with the eventual position reached on not just the Claimants' obligations but also the overall package of planning obligations that were discussed."

49. On 15 November 2013, Mr Lambert e-mailed Mr Senior saying that he had not heard from him and expressing concern about the "premises commitment and whether what we suggest will be included in the agreement." If it was to be included then he would, he said, "come back on vehicles and training and triggers", but if not he would need to take advice on the next steps. He emphasised that the issue was "fundamental" for the Claimant.

50. Mr Senior replied later that day saying that "[we] have not finished the final wording but there is provision for premises and I will get back to you early next week with the wording." Mr Lambert replied shortly afterwards and again stressing the importance of the premises element of the contribution being "triggered and paid for in Phase 1" of the development. He said he could provide the triggers for the other items "pretty quickly".

51. The reality, of course, is that the decisions had been made by then.

52. An odd feature of this case is that the letter written by Mr Back to the Claimant's Finance Director dated 18 November 2013 (to which he referred in his witness statement) explaining the position was never received by the Claimant. Everyone accepts that was so and so do I: indeed there are communications from Mr Lambert to Mr Senior and others thereafter that would, in the ordinary course, have referred to the letter had it been received. The letter does, however, reflect a relatively contemporaneous justification for the decision reached and it is worth quoting the substantive paragraphs:

> "As you will be aware from our e-mail of 1 November, we set out the contributions which we support and when these will be triggered. Following negotiations with the applicant, it has been agreed that the £536,834 will be paid at the end of the second phase of development. The agreement will contain a commitment towards premises and a payment up to a maximum of £1,089,660 towards the premises that are agreed following a review of the needs of the police at the time.
>
> I am aware that these contributions and the associated triggers do not match those requested by your organisation however please be assured that we have sought to achieve the best result for Lubbesthorpe and the wider community. The trigger points have been agreed with the applicants in the light of the full range of contributions that have been sought and the Council have sought to balance all of the infrastructure and funding requirements associated with this complex development.
>
> We have previously explained the urgency and timescales involved with this matter and we have today agreed with the developer that no further changes to agreement will be sought.

> To make further changes would potentially jeopardise the funding of the M1 bridge and would potentially impact the viability and deliverability of the whole development."

53. Because this was not received, so far as the Claimant as concerned, there were no further communications from the Defendant on the section 106 agreement until it was sent in its concluded form under cover of an e-mail dated 29 January 2014.

The legal arguments

54. Before turning to the legal arguments, I should highlight a fact that Miss Wigley emphasises, namely, that there had never been any suggestion that the scheme was not viable, even before the £5 million of Department of Transport money became available. Mr Elvin and Mr Alex Goodman (for the 5th Interested Party) do not dispute that, but emphasise that it has always been the position of the development consortium that cash flow, particularly in the early stages of the development was a major issue.

55. I will address each of the Grounds advanced by Miss Wigley.

Ground 1

56. This is formulated as follows:

> "The Council erred in failing to include provisions with the section 106 agreement to secure adequate and timely contributions towards policing so as to properly mitigate the adverse impact of the development. The Council also erred in failing to have regard to whether the section 106 agreement was adequate to achieve the necessary and required mitigation when it granted planning permission; the Agreement is fundamentally flawed and fails to achieve what is necessary to make the development acceptable in planning terms. No reasons have been given for the actions taken by the Council in respect of the Police contribution and why it has been dealt with differently to other contributions, and accordingly, the Council have acted irrationally."

57. Miss Wigley says that the Defendant having agreed the principle of the police contribution, the legitimacy of the contributions vis-á-vis the CIL tests and the figures referred to in paragraphs 38 and 39 above, its task as planning authority, in accordance with the resolution of 1 November 2012, was to enter into a section 106 agreement "to secure" the provisions identified in the resolution which, of course, included the provisions concerning the police contribution. For the reasons summarised in paragraphs 20-24 above, she submits that, irrationally, this has not been achieved in relation to the premises contribution (because of the lack of commitment and the uncertainties) and neither has it been achieved in relation to the equipment contribution because rationally-derived trigger-points have not been identified. As to the latter (whilst it might also go to Ground 3), the submission is that the Defendant needed information from the police to enable it to define those trigger-points and failed to obtain it. She also submits, on the basis of what has been revealed

of the decision-making process leading to the section 106 agreement, that the necessary balancing exercise was neither rational nor fair.

58. Whilst she put the matter in a number of ways, the summary I have given above reflects the substance of this argument. She recognises the high threshold there is in this context for establishing such a ground of challenge: see, e.g., *R (Newsmith Stainless Ltd) v Secretary of State for the Environment* [2001] EWHC Admin 74, Sullivan J, as he then was, at [8].

59. Mr Elvin contends that the argument comes perilously close to a simple submission that the Defendant should have accepted the Claimant's approach and that no other rational course existed. That, he submits, is not sufficient and amounts to nothing more than a challenge to the planning merits of the considerations leading to the section 106 Agreement. He says that the evidence of those present at the meeting of 12 November 2013 demonstrates that those participating were aware of the Claimant's position, that it was taken into account along with the position of others and an assessment made of what was reasonable in the light of the cash flow issues that faced those endeavouring to put together the final, effective package of provisions to be incorporated in the section 106 Agreement. A planning judgment was reached that earlier trigger points for the financial contributions were not required to make the development acceptable and a material consideration was also not risking the timely delivery of the development itself.

60. Mr Goodman supports this approach and, in his Skeleton Argument, sought to characterise the argument that the decision was Wednesbury unreasonable and "hopelessly unarguable" and amounted to nothing more than "an impermissible quibble" about the merits of one relatively small factor within a very complex and far reaching decision."

61. I do not, with respect, agree that the challenge mounted by the Claimant in this case can be characterised as a quibble about a minor factor. Those who, in due course, purchase properties on this development, who bring up children there and who wish to go about their daily life in a safe environment, will want to know that the police service can operate efficiently and effectively in the area. That would plainly be the "consumer view" of the issue. The providers of the service (namely, the Claimant) have statutory responsibilities to carry out and, as the witness statement of the Chief Constable makes clear, that itself can be a difficult objective to achieve in these financially difficult times. Although the sums at stake for the police contributions will be small in comparison to the huge sums that will be required to complete the development, the sums are large from the point of view of the police.

62. I am inclined to the view that if a survey of local opinion was taken, concerns would be expressed if it were thought that the developers were not going to provide the police with a sufficient contribution to its funding requirements to meet the demands of policing the new area: lawlessness in one area can have effects in another nearby area. Miss Wigley, in my judgment, makes some entirely fair points about the actual terms of the section 106 Agreement so far as they affect the Claimant.

63. However, the issue is whether the strength of the argument to that effect surmounts the very high threshold for establishing irrationality in the sense required for the challenge to be successful. I am unable to accept that they do cross this threshold.

Whilst I can understand that the Claimant may feel that its approach has simply been rejected by the developers because it is inconvenient and that its persistence has been an irritant, the evidence does suggest that the Defendant has considered the matter properly and has reached a rational and sustainable conclusion even if it is not one with which everyone would agree.

Ground 2

64. This is formulated thus:

> "In all circumstances, given the size and significance of the development, and the failure to secure appropriate mitigation of the impact of the development, it was incumbent upon the Officers to either return to matter to Committee for determination or articulate their reasons for accepting the Agreement in the terms they did. In the absence of any reasons, the inference is that the Council have acted irrationally."

65. As articulated orally by Miss Wigley, this was effectively a restatement of the proposition that the planning committee had directed the officers to negotiate a section 106 agreement that secured CIL compliant police contributions (see paragraph 57 above) and that they had not done so. This should, she submits, have resulted in the matter being referred back to the planning committee. As she put it in the Skeleton Argument, having regard to the wording of the committee resolution and, in particular, the way in which the "premises contribution" was to be dealt with under the section 106 agreement, it was incumbent on the officers to report back to the members their inability to act in accordance with the resolution and to explain their proposed alternative course. She submits that it cannot be said with any certainty that the members would have been satisfied with the proposed course of action.

66. The well-known case of *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370 was referred to in this context as was the observation of the Court of Appeal in *R. (Dry) v West Oxfordshire DC* [2011] 1 P. & C.R. 16 at [16].

67. I do not really feel that this ground adds anything in real terms to the first ground (or indeed to Ground 3 that I will consider below). It does seem to me that Mr Elvin was right to submit that the resolution required the section 106 agreement to embrace "all CIL Compliant capital infrastructures for Policing", that "the precise terms of this contribution [are] to be settled by further negotiation" and that this makes it clear that the committee envisaged that the further negotiations on this matter would be undertaken by the officers.

68. That, as it seems to me, is sufficient to dispose of this argument. In any event, in the particular circumstances of this case, whilst some questions might have been raised by members about the terms concerning the police contributions, it is fanciful to suggest that a scheme such as this would have foundered on such an issue. Given the new funding stream constituted by the Pinch Point funding, a resolution to defer the grant of permission pending further negotiations would, to my mind, have been so unlikely as to be a consideration that can safely be disregarded.

Ground 3

69. This is formulated thus:

> "Furthermore, arising out of the correspondence, contact and agreement with the Council in this matter, the Police had a legitimate expectation that the Council would consult them on the level of and timing of the delivery of the contribution and that the outcome of those discussions would be represented in the Agreement."

70. The foundation for this argument is the sequence of correspondence, meetings and other communications in the period running up to November 2013 to which I have referred above (see paragraphs 28-43 above).

71. There is, of course, a good deal of authority on the issue of legitimate expectation. I am quite prepared to accept for present purposes that a course of dealing between two parties in the kind of context with which this case is concerned can in some circumstances give rise to a legitimate expectation that some particular process will be followed by the public authority the subject of the challenged decision before the decision is taken. The course of dealing can be on such a basis that the necessarily "clear and unambiguous" representation upon which such an expectation is based may arise.

72. Did anything of that nature arise in this case? I do not think so. What one can see from the communications to which I have referred is a pattern of negotiation, in effect between the Claimant and the developers with the Defendant as the intermediary, where no unequivocal representation was made by the Defendant that could have led to an expectation that it would be consulted "on the level of and timing of the delivery of the contribution". That having been said, however, there can be little doubt that the Defendant was aware of the Claimant's view on the timing of the premises contribution which, in one sense, was the most significant part of what was required by way of infrastructure funding. The equipment contribution was discussed and the police could have given "chapter and verse" on that if they had chosen to do so prior to the final discussions between the Defendant and the developers. However, I do not see any basis for a specific obligation on the Defendant's part to inquire about that.

73. There is no evidence to suggest that the way in which the Claimant's position was handled during the prolonged negotiations towards the section 106 agreement was markedly different from that of the other parties who also engaged in the process whatever the ultimate outcome may have been. It seems to me that the accommodating approach of Mr Senior from August 2013 onwards was simply born of a desire to facilitate a smoothing of the passage towards a resolution of the impasse that otherwise existed and that it would be wrong to read it in any other way.

74. It seems to me that there was, at least initially, a difference of view about the approach to how the police contribution should be calculated (one apparently shared by others around the country at the time). That there was a revision of the approach during the negotiations is plain. That may have been aided by the decision in the Jelson Homes appeal to which Miss Wigley drew my attention. At all events, as it seems to me, there was nothing in what occurred during the various communications

that could reasonably have led the police to believe that it would be consulted on the specific terms of the section 106 agreement. As Mr Elvin submitted, the Claimant did make representations which the evidence suggests were considered. That, in my judgment, is as far as any legitimate expectation could take the Claimant.

Ground 4

75. This was added by a late amendment for which leave was granted by Hickinbottom J. As formulated it is as follows:

> "The Council has breached Article 36 of the Town and Country Planning (Development Management Procedure) (England) Order 2010."

76. The acronym 'DMPO' is applied to this order.

77. The contention is that that Article 36(3)(b) required the "travelling draft" of the section 106 agreement to be placed on the local planning register and that the Defendant's failure to do so invalidates the planning permission.

78. Article 36(3) is as follows:

> (3) Part 1 of the register shall contain in respect of each such application and any application for approval of reserved matters made in respect of an outline planning permission granted on such an application, made or sent to the local planning register authority and not finally disposed of—
>
> (a) a copy (which may be photographic or in electronic form) of the application together with any accompanying plans and drawings;
>
> (b) a copy (which may be photographic or in electronic form) of any planning obligation or section 278 agreement proposed or entered into in connection with the application;
>
> (c) a copy (which may be photographic or in electronic form) of any other planning obligation or section 278 agreement entered into in respect of the land the subject of the application which the applicant considers relevant; and
>
> (d) particulars of any modification to any planning obligation or section 278 agreement.

79. This follows Article 36(2) which provides that "each local planning register authority shall keep, in [two] parts, a register of every application for planning permission relating to their area".

80. Whilst I have had very little opportunity to give this issue mature consideration, I find it difficult to find within Article 36(3)(b) an obligation that "travelling drafts" of a section 106 agreement should be placed on the register. Mr Goodman submitted that Article 36 is not intended to require that every iteration of a document "under

construction" by negotiation must be put on the planning register and I am inclined to agree that that is so.

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

82. The evidential basis for the contention about the lack of material on the register is a witness statement of Rebecca Philips, a solicitor with the Derbyshire Constabulary, who made certain requests and enquiries of the Defendant's planning office. However, there is a factual issue joined by virtue of Mr Senior's second witness statement when he says that the various drafts of the section 106 agreements in question were available for inspection in hard form in the Council's files on request. I cannot resolve any issues of fact on this application and, in any event for the reasons I have given, it is unnecessary to do so.

Conclusion

83. I have not been able to cover every nuance of the arguments advanced. However, I am of the view that the grounds of challenge to the grant of planning permission do not succeed.

84. I repeat that, looked at objectively, there are features of the way the police contribution in this case was dealt with in the section 106 agreement that are not very satisfactory and, as I have said, some legitimate criticisms seem to me to be open to the formulation of the trigger mechanism. I rather suspect that, irrespective of the outcome of this case, the issue of the timing of the police contributions will have to be re-visited before the development proceeds too far to ensure that those who are considering purchasing properties on the development will have the reassurance that it will be properly and efficiently policed. However, that does not amount to, or evidence the need for, a conclusion at this stage that what was agreed between the Defendant and the developers was irrational or that there was anything unfair about the way the Defendant dealt with the issue.

85. The case was dealt with as a "rolled up" hearing. Mr Elvin is quite right to say that a claimant in such a situation should not be given permission to apply for judicial review "just because everyone is present at the hearing". A "rolled up" hearing is often directed when there is a need for expedition and that is plainly why Hickinbottom J directed such a hearing in this case. The other aspect to the position advanced by Mr Elvin is that merely because a claimant loses at a "rolled up" hearing does not mean that permission to apply for judicial review should not be granted.

86. If this case had not been as urgent as it is and a judge had applied his or her mind to the usual considerations at the permission stage, I believe the Claimant would probably have overcome the relatively low threshold of "arguability" on Grounds 1 and 3, but not on grounds 2 and 4. Accordingly, I grant permission on Grounds 1 and 3, although I dismiss the substantive claims, but I refuse permission to apply for judicial review on Grounds 2 and 4.

87. I would express my appreciation to all Counsel for their assistance, both in their oral submissions and in writing.

Permission to appeal

88. Because of the urgency and because of my non-availability in the next few weeks, it was agreed at the conclusion of the hearing that I should assume that any losing party would wish me to consider the issue of permission to appeal. It would be convenient for me to do so here.

89. This arises in relation to grounds 1 and 3 (because I have refused permission on grounds 2 and 4 and the normal route is a direct application to the Court of Appeal in relation to such grounds). Whilst I have treated grounds 1 and 3 as having crossed the arguability threshold for the purposes of permission to apply for judicial review, having heard the full argument I was satisfied that the grounds should not succeed. I am of the view that there is no realistic prospect of success on an appeal if pursued and, accordingly, I refuse permission to appeal.

90. Again, it was agreed by all parties that I should exercise my power effectively to foreshorten any period for seeking permission to appeal from the Court of Appeal. I will direct that any Appeal Notice seeking permission to appeal must be lodged within 7 days of the hand down of this judgment, that the notice must be served on all other parties and that an application in writing for an expedited consideration of the issue of permission to appeal must be made by the Claimant. It would, of course, be open to the other parties to make representations on this issue if so advised.

91. Arrangements will have been made for the final form of this judgment to be handed down on my behalf by a judge sitting in Birmingham during the week beginning 26 May and the 7-day period will commence on that day.