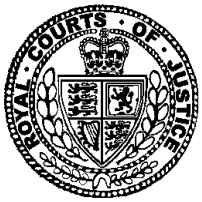

Neutral Citation Number: [2018] EWHC 1794 (Admin)

Case No: CO/330/2018

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

Cardiff Civil and Family Justice Centre
Cardiff, CF10 1ET

Date: 13/07/2018

Before:

MR JUSTICE GARNHAM

- -

Between:

The Queen on the application of Mansfield District Council	**Claimant**
- and -	
Secretary of State for Housing, Communities and Local Government	**Defendant**
-and-	
Mr J A Clark	**Interested Party**

Mr Mitchell (instructed by **Mansfield District Council Principal Solicitor**) for the **Claimant**
Mr Stedman Jones (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 7th June 2018

- -

Approved Judgment

Mr Justice Garnham:

Introduction

1. Mansfield District Council ("the District Council" or "the Council") is the local planning authority for Forest Town, Mansfield. On 14 December 2017, a Planning Inspector, appointed by the Secretary of State for Housing, Communities and Local Government, allowed an appeal, brought by Mr John Clark, against the District Council, for failing to determine that a planning obligation should be discharged. That planning obligation relates to development on land at Clipstone Road East and Crown Farm Way, Forest Town. The District Council now seeks judicial review of the Inspector's decision.

2. Mansfield District Council were represented before me by Mr Jonathan Mitchell; the Secretary of State by Mr Daniel Stedman Jones. The Interested Party, Mr Clark, was not represented at the hearing of this judicial review but detailed summary grounds, resisting the application, was produced on his behalf by Paul Brown QC. I am grateful to all Counsel for their assistance.

The Facts

3. On 2 September 1998, the District Council granted permission for a mixed employment and residential development on the site at Clipstone Road East. On 23 December 1998, the Council agreed to carry out highway works to facilitate the development. In an agreement, made pursuant to Section 106 of the Town and Country Planning Act 1990 (the "TCPA") and Section 278 of the Highways Act 1980, Mr Clark agreed to pay 75% of the cost of those works. All works were carried out by the District Council and the sum said to be owed by Mr Clark was £459,346.85.

4. The development for which permission was granted in September 1998 has not taken place. However, on 9 December 2008, the Council granted a further planning permission and entered into a Section 106 agreement with Mr Clark to pay the same sum.

5. On 1 April 2010, Mr Clark made applications for planning permission for 215 dwellings on the site. That application was refused by the Council. However, permission was granted by the Secretary of State on 10 May 2011. In the meantime, Mr Clark had entered into a further Section 106 agreement associated with that application by which he undertook to pay the £459,346.85. Of that sum £160,000 has since been paid, leaving an outstanding balance of £299,346.85. There has, to date, been no development on the site.

6. It is common ground between the parties that the effect of each successive s106 agreement was to extinguish the pre-existing s106 liability.

7. On 27 July 2016, Mr Clark applied to the Council for modification of the planning obligation, so as to release him from the obligation to pay the outstanding balance. The Council having not determined that application, Mr Clark, appealed to the Secretary of State. The Secretary of State appointed Zoe Raygen DIP URP MRTPI as an Inspector to conduct the appeal under the written representations procedure

8. There was the usual exchange of written representaitons prior to the appeal. On 4 September 2017 Ms Raygen conducted a site visit. On16 November 2017, some four weeks before her decision, the Council wrote an email to the Inspector which included the following:

> "If you are unable to access transcripts directly, 3 additional cases have also been provided that may assist you as detailed below. The Council is not seeking to introduce new evidence at this stage but assist you in providing access to case transcripts which you are likely to identify as warranting consideration.
>
> A copy of the case transcript referred to in the Planning Encyclopaedia at para P106A.06 (set out below) has been included (as it was envisaged that with no access to transcripts you may need to consider this as part of your deliberations),
>
> An application to discharge an obligation will only be successful where the obligation no longer serves a useful purpose. This is not a high test. In Batchelor Enterprises (above) it was common ground between the parties, and Sullivan J. appears to have accepted, that a useful purpose in this context meant a useful planning purpose. In *R (on the application of Renaissance Habitat Ltd) v West Berkshire DC* [2011] J.P.L. 1209 Ouseley J. cast some doubt on this and expressed a reluctance to narrow the range of public interest purposes that an obligation may serve to purely planning purpose, and was reluctant to enable debate as to whether a purpose served was indeed a planning purpose. However, in practice it seems unlikely that this debate will arise given the obligations within an obligation will ordinarily relate at least to a planning purpose.
>
> The Renaissance Habitat case was the key case cited in *R (The Garden & Leisure Group Ltd) v N Somerset Council* [2003] EWHC 1605 (Admin) where is was accepted (para 28) that the correct approach to considering an application under section 106A of the 1990 Act was to ask four essential questions (highlighted in the transcript). A copy of this transcript has also been provided and if it assists the Council's response to those questions is outlined below for information (this simply summarises the Council's case).
>
> i) The current obligation is to pay the balance of the sum of £459,346.85, which fell due on 3rd August 2016.
>
> ii) The purpose of the obligation is to reimburse the Council for part of the expenditure it incurred for the benefit of the applicant in the construction of the new road. It gives effect to the "historic financial arrangement" between the Council and the applicant.

> iii) That is a useful purpose. Local Authorities are short of money.
>
> iv) The proposed modification would destroy that purpose. It would leave the Council without the money."

The Appeal Decision

9. The decision of Ms Raygen is contained in a document, dated 14 December 2017. That Decision Letter confirms that the appeal was made, under Section 106B of the TCPA, against the failure to determine that the planning obligation should be discharged. It confirms that the planning obligation made between the Council and Mr Clarke (and his wife) was dated 3 February 2011. Ms Raygen allowed the appeal. She concluded that the planning obligation in relation to the contribution to the highways costs no longer served a useful purpose and should be discharged.

10. The whole of the appeal decision warrants careful reading. However, for the present purposes, the following paragraphs are especially material:

> "9. However, part 1 of the Second Schedule of the S106 agreement requires the payment of a highway contribution of £459,346.85 within a specified timescale only partly related to the provision of the houses granted permission on the site. The sum of £100,000 was due to be paid on the date falling in one year after the date of the agreement. The appellant confirms that this amount has been paid to the Council, together with a further £60,000 at the time of the completion of a health centre on part of the site. The balance of £299,346.85 is due to be paid on the earliest of the three alternative dates. These are firstly, 14 days after the completion of a sale of the whole or of two or more acres of the site, secondly, the date of completion of 50% by number of the dwellings authorised to be constructed by the planning permission and thirdly, the date of expiry of the period of five years and six months from the date of the S106 agreement.
>
> 10. As development has not started on site, and the land has not been sold, the balance of the highway contribution fell due for payment on 3 August 2016.
>
> 11. The main issue is therefore whether the planning obligation regarding the contribution to the highway costs still serves a useful purpose.
>
> Reasons
>
> The Council refer me to a judgment (*Tesco Stores Ltd v SSE and others*) which it considers demonstrates that once an obligation becomes binding it cannot be challenged on the grounds that it lacks sufficient relationship with the proposed development. However the quoted passage relates to the

> granting of planning permission, and once permission has been granted whether this decision may be challenged on the basis that the s106 obligation is not sufficiently connected with the proposed development. This is somewhat different to the case before me to discharge a planning obligation…
>
> 17. In this instance though, the Secretary of State did consider the obligation at appeal and found that the obligation in respect of the highway contribution was not necessary. I concur with this view. The payment related to a historic financial agreement between the parties at the time the road was constructed. It is therefore not necessary for the road to be constructed to make the residential development acceptable…
>
> 19. At the time, the appeal site could not have been developed had the road not been constructed. However, the road has now been in place for a significant number of years. Therefore, a payment required towards the highway costs of constructing the road, in any subsequent S106 obligation, would not in my opinion be directly related to the development proposed at the time. This, together with the road not being necessary to make the residential development acceptable means that the obligation does not continue to serve a useful purpose in this respect."

The Statutory Regime

11. Section 106 of the TCPA 1990 provides as material:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A to 106C 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 (or, in a case where section 2E applies, to the Greater London Authority) on a specified date or dates or periodically...
>
> (2) A planning obligation may
>
> (a) be unconditional or subject to conditions;

(b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and

(c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)

(a) against the person entering into the obligation; and

(b) against any person deriving title from that person.

12. Section 106A provides as material:

(1) A planning obligation may not be modified or discharged except…

(b) in accordance with

(i) this section and section 106B …

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

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

(b) to be discharged…

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

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

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

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

13. Regulation 16 of Town and Planning (Written Representations Procedure) (England) Regulations 2009 provides:

> "(1) The Secretary of State may proceed to a decision on an appeal taking into account only such written representations as have been sent within the relevant time limits…
>
> (3) In this regulation *"relevant time limits"* means the time limits prescribed by these Regulations, or where the Secretary of State has exercised the power under regulation 17, any later time limit."

14. Regulation 17 provides:

> "The Secretary of State may in a particular case give directions setting later time limits than those prescribed by these Regulations."

The Competing Arguments

15. Mr Mitchell argued that the Inspector failed properly to apply Section 106A in considering the appeal. He referred to the decision of Richards J in *R (The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin) and contended that the Inspector was obliged to, but did not, work through each of the questions set out by Richards J at paragraph 28 (see paragraph 28 below).

16. Mr Mitchell contended, that having accurately identified the main issue in paragraph 11 of her decision, the Inspector failed to address the obvious purpose of the obligation, namely to recover public funds. He acknowledged that written submissions provided to the Inspector by the Council were "opaque" in the way they dealt with this matter, but he said, first, that this was a matter of law which the Inspector was obliged to consider in any event, and second, that the Council's essential case had been set out in the email to the Inspectorate dated 17 November 2017, some four weeks before the Inspector's decision. That email, he said, neatly encapsulated the point.

17. Mr Mitchell acknowledged that there was some debate in the authorities as to whether the "purpose served" must be a planning purpose. He referred in particular to two decisions referred to in the email, namely that of Sullivan J (as he then was) in *R (Batchelor Enterprises Ltd) v North Dorset District Council* [2003] EWHC 3006 (Admin) and Ouseley J in *R (Renaissance Habitat Ltd) v West Berkshire District Council* [2011] EWHC 242 (Admin). He invited me to follow the latter decision.

18. Mr Mitchell argues that the Inspector applied the wrong test in paragraphs 14-18 of the decision, in particular, in paragraph 17-19 because, he said, what mattered in this context was not whether the obligation was necessary but whether it served a useful purpose. He said she erred in focusing on the narrow question whether the obligation was sufficiently related to the planning permission concerned; she failed to consider more widely whether the obligation continued to serve a useful purpose, and so fell into error and reached the wrong decision.

19. In response, Mr Stedman Jones, contended that the Claimant's argument amounted to an impermissible attack on the planning judgment of the Inspector. He argued that

Ms Raygen was entitled to conclude that the obligation no longer served a useful purpose and was not directly related to the development proposed at the time. He said that she was responding in the decision to the issues raised by the parties. He said the Inspector was correct to emphasise that the obligation was not directly related to the development proposed as part of the 2010 planning application. He said that the Inspector's approach accords with the subsequent guidance given by the Supreme Court in *Elsick Development Company Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UK SC 66. Allowing the appeal, he argued, was the only conclusion that the Inspector could properly reach.

20. Mr Stedman Jones argued that the Claimant in the present proceedings was seeking to advance a different case from that before the Inspector on the appeal. He points out that the email containing the passage at [15] above, included the observation "the Council is not seeking to introduce new evidence at this stage but (to) assist you". He said the Inspector reached a proper planning judgment based on the material placed before her within the appeal time scales, in accordance with the principle set out in *West v First Secretary of State* [2005] EWHC 729 (Admin) and Regulation 16 of Town and Planning (Written Representations Procedure) (England) Regulations 2009.

21. Mr Stedman Jones reminded me that I had a residual discretion to refuse relief in cases where the Claimant only has itself to blame for any error of law which is found established.

Discussion

The Procedural Objection

22. The evidence put before the Inspector by the District Council was plainly deficient. What was to be their primary case before me featured nowhere at all in the formal case presented to Ms Raygen. And Mr Mitchell's concession that the Council's case was "vague" on this topic greatly understates the position. When the argument was properly set out, in the email of 2017, it was late and introduced by weasel words to the effect that the Council was not seeking to introduce new evidence but to assist the Inspector by providing relevant transcripts.

23. Neither Counsel was able to provide me with the timetable imposed for the provision of material in the appeal. But it is properly accepted by Mr Mitchell that the email was substantially outside that timetable. Accordingly, the Council were in breach of the 2009 regulations and the Secretary of State would ordinarily be entitled to proceed to a decision without having regard to the late material.

24. However, as Richards J observed in *West v First Secretary of State* [2005] EWHC 729 (Admin);

> "44 In reaching his decision on the basis of the parties' written representations, the inspector is subject to the inquisitorial burden referred to in *Dyason* and must subject the material before him to rigorous examination. As Pill LJ observed, "[w]hatever procedure is followed, the strength of a case can be

> determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case". In general, however, that process does not require anything beyond proper consideration of the material put forward by the parties.
>
> 45 There will be exceptional cases where, on the particular facts, fairness requires the inspector to do something more, for example by requesting further information or by departing from the written procedure and holding an oral hearing. The Regulations can accommodate such cases without difficulty."

25. Given the inadequate way the case was prepared by the Council, it is impossible not to have considerable sympathy for the Inspector. She directed much of her decision to points advanced by Counsel which, ultimately, were of little significance and was not given much assistance from the Council on the ones which, it turns out, really mattered.

26. However, as Mr Mitchell rightly submitted, the Inspector is obliged to apply the law and the point, on which he now relies, is a point of law. Furthermore, the point was raised squarely in the email of 17 November 2017, some four weeks before the Inspector's decision. It would have been open to the Secretary of State to extend time to make representations under Regulation 17. In those circumstances, in my judgment, it would not be appropriate to decide this challenge, on the basis of a (potentially) mistaken appreciation of the law when the real issue had been brought to the Inspector's attention.

27. The fact that the Council is very substantially responsible for the Inspector proceeding without having the central issue properly drawn to her attention is something to which I would have regard on costs, should that become relevant.

The Proper Test

28. As is common ground before me, the correct approach to considering an application under Section 106A is that articulated by Richards J in *R (The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin). He said at paragraph 28 that in addressing an application under section 106A

> "there are four essential questions to be considered: what is the current obligation? what purpose does it fulfil? is it a useful purpose? and if so, would the obligation serve that purpose equally well if it had effect subject to the proposed modifications? Mr Elvin lays stress on the words "equally well" and describes them as ordinary English words importing a principle of equivalence. Section 106A involves a precise and specific statutory test and does not bring in the full range of planning considerations involved for example in an ordinary decision on the grant or refusal of planning permission."

29. In my judgment, it is clear, that the Planning Inspector identified the correct obligation (see paragraph 9 of her decision) and the central question, namely, did the

obligation serve a useful purpose. However, she did not expressly consider what purpose it was asserted the obligation served. Had she done so, in my view, she would have been bound to conclude that that purpose was to enable the Council to recover some of the costs of the original highway works which had been carried out by the Council in connection with the 2010 application and agreement. Releasing the Appellant from that obligation would undermine that purpose. The question therefore should have been whether that purpose was one falling within Section 106A.

Proper purpose

30. It is to be noted that subsection 6 of Section 106A does not delimit the characteristics of the purpose which might be "useful"; there is no express limitation to "planning purposes" and it is not immediately obvious why it should be so limited. As Richards J observed in the last sentence of paragraph 28, citied above, Section 106A does not bring in the full range of planning considerations involved in an ordinary decision on the grant or refusal of planning permission.

31. As noted above, the issue as to whether the expression "a useful purpose" should be read as a "useful planning purpose" has been the subject of differing opinions by two first instance judges with enormous experience of planning law.

32. In *Batchelor Enterprises Ltd* Sullivan J (as he then was) was considering a Section 106A application. At paragraph 26, the Judge noted an agreement between the parties about the proper constriction of Section 106A. He said;

> "It is common ground between the parties that, just as a section 106 obligation may be entered into by a local planning authority only if it is for a planning purpose: see *Tesco Stores Limited v Secretary of State for the Environment and Others [1995] 2 All ER 636* , per Lord Keith at page 464 b to e, and Lord Hoffman at page 656 c to d; so paragraph (b) in sub-section 106A(6) should be read as providing that a local planning authority may determine "if the obligation no longer serves a useful (planning) purpose that it shall be discharged". This accords with the policy guidance contained in paragraph C6 of Circular 1/97 Planning Obligations. That paragraph says in part:
>
> "The department considers that the expression 'no longer serves any useful purpose' should be understood, in land-use planning terms. Thus, if an obligations only remaining purpose is to meet some non-planning objective it will generally be reasonable to discharge it."
>
> The relevant part of paragraph C4 dealing with the significance of the five-year period is set out in the legal report to the Committee: see above."

33. He went on in paragraph 29:

> "It is accepted that the question to be considered by the local planning authority in each case is the same: does the obligation still serve a useful planning purpose? Since the court in judicial review proceedings may not substitute its own answer to that question for that of the local planning authority, the question in relation to an application for judicial review in respect of a local authority's decision under section 106A(1)(a) is whether a reasonable local planning authority could have concluded that the obligation still served a useful planning purpose."

34. That approach was considered by Ouseley J in *Renaissance Habitat Ltd*. He said at paragraphs 10-11:

> "10. It was not disputed, at least for these purposes, that s106A(6)(b) and (c) meant that the authority could discharge or vary the agreement if it no longer served a useful "planning" purpose, or could serve it equally well in a different form. That word, submitted Mr Harwood, was necessarily implied since the agreement could only be made in the first place for a planning purpose, which is correct, and could only be enforced by a public body acting for a public purpose under the Planning Acts. It was not exercising some private power or purely contractual power. Sullivan J had so held in R (Batchelor Enterprises Ltd) v North Dorset District Council [2003] EWHC Admin 3006 .
>
> 11. I am prepared for present purposes to accept that point, but I note that "planning", the word implied, very broad though it is, may lead to a debate about what constitutes a planning consideration for these purposes as opposed to some other useful public purpose which could be pigeonholed under some other head, or even a private purpose such as the protection of private views, which may show the implied restriction to be unjustified. Sullivan J also relied on Ministerial guidance which in fact contradicts this interpolation since it said that an agreement should *"normally"*, rather than *"always"*, be discharged when there is no planning purpose to be served by its continuance.

35. Ouseley J went on to observe that, both before and immediately after *Batchelor*, the learned editors of the Planning Encyclopedia said that no planning purpose was necessary to make good a claim of useful purpose. The authors of the Encyclopaedia now, simply note the difference of opinions on the issue suggested in these two cases.

36. I am not, strictly speaking, bound by either of these decisions; they are decisions of judges of equivalent jurisdiction. But given, in particular, the enormous experience in planning law of both judges, I give particular weight to their opinions. I note, however, that Sullivan J was proceeding on the basis of agreement between the parties before him on this question, rather than having heard argument on the point. I note also that Ouseley J's views were obiter and that on the facts of the case before him he adopted the approach favoured by Sullivan J. In the end, however, I must form my

own conclusions. In my view, the approach of Ouseley J in paragraph 11 of his judgment is to be preferred.

37. Four considerations lead me to that view. First, the statute itself contains no qualification to the expression of "useful purpose". Second, the practitioner's text, the Planning Encyclopaedia, suggested no such qualification. Third, as, Ouseley J noted, reading-in the word "planning" invites debate about what constitutes a planning consideration in this context, and therefore leads to uncertainty.

38. Fourth, and perhaps most importantly, I see no reason why, as a matter of principle, the precise character of the useful purpose served by the obligation should determine whether or not the authority has the power to discharge it. The critical question is whether the objection serves some useful function, the absence of which makes the maintenance of the obligation pointless. It follows, in my judgment, that the question for the Inspector here was whether the obligation served any useful purpose, not any useful *planning* purpose.

39. In the 'Reasons' section of her decision, the Inspector dealt, primarily and understandably, with the arguments advanced before her. She was, in my view, plainly right to conclude that the decision in *Tesco Stores Ltd v Secretary of State for Environment* [1995] (1 WLR 759) does not extinguish or limit the right to make an application under Section 106A. But that says nothing about the question of "useful purpose".

40. She was also right to treat, as of no significance, the Council's complaint about the time available to consider the Interested Party's application. But again, that is not important here. In my judgment, the fact that the payment towards the costs of construction of the road would not meet the test imposed by the Community Infrastructure Levy Regulations 2010 is also nothing to the point. Similarly, the fact that payment relating to historic financial agreement "is not necessary" for the purpose of the residential development proposed here is not determinative of the question whether the maintenance of the obligation served a useful purpose.

41. If it is right that the proper construction of Section 106 does not require the implication of the word "planning", then the Inspector's views about the case of *R v Plymouth City Council ex parte Plymouth and South Devon Co-operative Society* and *Good v Epping Forest District Council* are of no significance to the point now in issue.

42. The crucial paragraph of the Inspector's reasoning is paragraph 19. The Inspector rightly observed that the construction of the road was critical to the development of the site originally and that the road had been in place for many years. It could fairly be said that the payment of the highway costs would not directly be related to the present development because the road was already present, and for the same reason, that the building of the road was not necessary to make the development acceptable.

43. But the failure of the Inspector to identify the benefit that maintenance of the obligation would achieve meant that none of those observations went to the crucial issue. In those circumstances, despite my recognition of the difficulty the Inspector faced because of the poor manner in which the Council presented its case to her, it seems to me that she fell into error. This was an error of law, not a matter of planning

judgment. She failed to identify the useful purpose that the obligation served and to consider whether that purpose remained extant.

Aberdeen v Elsick

44. Mr Stedman Jones, for the Secretary of State and, in writing, Mr Brown for the Interested Party, sought to save the Inspector's conclusions by reference to the subsequent decision of *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [2017] UKSC 66. There the Supreme Court was concerned with the question whether a local planning authority could lawfully adopt a policy which required developers to enter planning obligations to make contributions to a fund to be spent on infrastructure, including "*interventions at places where a particular development has only a trivial impact*" (paragraph 1 of the judgment of Lord Hodge).

45. At paragraph 41-43, Lord Hodge said this;

> "41 Similarly, a planning authority may contract for the payment of financial contributions towards, for example, educational facilities, healthcare facilities, sewerage or waste and re-cycling: requiring a development to contribute to, or meet, its own external costs in terms of infrastructure involves regulating the development of the land which is burdened by the obligation. The financial contribution can be applied towards infrastructure necessitated by the cumulative effects of various developments, so long as the land which is subject to the planning obligation contributes to that cumulative effect and thereby creates a sufficient relationship between the obligation in question and the land so that one can fairly speak of the obligation as regulating the development of the land."
>
> 42 In each of the examples in paras 38-41 above the restriction or regulation serves a purpose in relation to the development or use of the burdened site. In this appeal a question of principle arises: can a restriction or regulation of a site be imposed in the form of a negative suspensive planning obligation, analogous to the negative suspensive planning condition in the *Grampian Regional Council* case, for a purpose which does not relate to the development or use of the site? In particular, is it lawful by planning obligation to restrict the commencement of the development of a site until the developer undertakes to make a financial contribution towards infrastructure which is unconnected to the development of the site? Alternatively, is it lawful to require contributions towards such infrastructure in a planning obligation which does not restrict the development of the site by means of a negative suspensive obligation?
>
> 43 The answer to each question is no. Dealing first with the latter question, a planning obligation which required a developer to contribute to infrastructure unconnected with its development lbut did not make the payment of the contribution

> a pre-condition of development of the site would not fall within section 75 as it would neither restrict nor regulate the development or use of the site. …

46. He went on at paragraph 44:

> "A planning obligation, which required as a pre-condition for commencing development that a developer pay a financial contribution for a purpose which did not relate to the burdened land, could be said to restrict the development of the site, but it would also be unlawful. Were such a restriction lawful, a planning authority could use a planning obligation in the context of an application for planning permission to extract from a developer benefits for the community which were wholly unconnected with the proposed development, thereby undermining the obligation on the planning authority to determine the application on its merits. Similarly, a developer could seek to obtain a planning permission by unilaterally undertaking a planning obligation not to develop its site until it had funded extraneous infrastructure or other community facilities unconnected with its development. This could amount to the buying and selling of a planning permission. Section 75 , when interpreted in its statutory context, contains an implicit limitation on the purposes of a negative suspensive planning obligation, namely that the restriction must serve a purpose in relation to the development or use of the burdened site. An ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice. It is that implicit restriction which makes it both ultra vires and also unreasonable in the *Wednesbury* sense for a planning authority to use planning obligations for such an ulterior purpose."

47. The Defendant and Interested Party argued that the reasoning in *Aberdeen* is directly applicable in the present case. They say that the obligation here is totally unconnected with the development. They say that the Inspector who granted permission for residential development on the site specifically concluded that the highway contribution was not necessary to make the development acceptable in planning terms. They say that, applying paragraphs 43 and 44 of Lord Hodge's judgment in *Aberdeen*, the obligation in the present case to pay the highway contribution was unlawful and therefore unenforceable. They say that, if it was unenforceable, then it could not logically serve a useful purpose.

48. There are a number of difficulties with that argument, in my judgment. First, it cannot be said that the obligation here is "totally unconnected with" the development here, in the way the developments contemplated in *Aberdeen* were. It is true the connection was historical but none the less it was real and substantial. Second, although it is true that the highway contribution was not necessary in the present case to make the development acceptable, that is not the test under Section 106A.

49. Third, it seems to me open to doubt whether the obligation in the present case was unlawful ab initio given that it was not wholly unconnected. But even if it was, the obligation arose in 2011 and was not challenged until the present proceedings. As Lord Hoffmann held in the *Tesco* case at paragraph 49:

> "of course it is normal for a planning obligation to be undertaken or offered in connection with an application for planning permission and to be expressed as conditional upon the grant of permission. But once the condition has been satisfied, the planning obligation becomes binding and cannot be challenged by the developer or his successor in title, on the ground that, it lacked a sufficient nexus with the proposed development."

Accordingly, even if it might have been argued in 2011 that this obligation was unlawful, it could not have been challenged at the time these proceedings were commenced.

Conclusion

50. In my judgment, the sole test for Section 106A, is the words of the statute, and arguments advanced by analogy with other areas of planning law are only of marginal assistance.

51. Here, there is an obvious purpose in enforcing the obligation, namely to recover expenses incurred by the local planning authority in building the road which made the site a candidate for development in the first place. That is a useful purpose because public money expended to facilitate the development should be recovered where possible.

52. In addition, there is a substantial public purpose in encouraging co-operation between local planning authorities and local development. The Council constructed the road in order to enable development. The Council agreed not to enforce the obligation when new proposals were formulated, but instead agreed to transfer that obligation to later applications. It did so to assist the developers and encourage appropriate development. Were the developers able to escape the obligation now, simply because the Council, in a spirit of co-operation, had so delayed enforcement would in my judgment do a considerable disservice to the public interest.

53. I would add that if I am wrong about the meaning of "useful purpose", and the word "planning" is to be read in, then for the reasons given in the preceding paragraphs, this was, in my judgment, a useful planning purpose.

54. In those circumstances, in my judgment, the decision of the planning Inspector cannot stand and must be quashed. I will hear Counsel on the detailed terms of the order required.