

Case Name: *Davis, R (On the Application Of) v Oxford City Council* [2023] EWHC 1737 (Admin) (11 July 2023)

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Commentary:

Conjoined claims for judicial review of the decisions by Oxford City Council (the Council) to grant planning permission for two neighbouring residential developments were dismissed on both grounds. The two grounds of challenge concerned the section 106 agreements entered into in connection with the developments. The first ground concerned whether the s106 should have secured delivery of the relevant highway works by the County Council in addition to securing the financial contributions from the developer and the second ground concerned the apparent failure of the Council to place a draft of the planning obligation on the planning register, in breach of Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

In respect of the first ground, the section 106 agreements did secure the payment of contributions to be paid to the County Council in respect of certain highway improvements. The purposes of each contribution was included in the definitions. The County Council also covenanted that it would not apply any of the financial contributions for any purpose other than the identified purposes, 'or any alternative which achieves similar benefits in such form and at such time as the County Council shall in its discretion decide'. (For one of the developments, this covenant was included in a deed of variation to the original s106 which was filed with the Summary Grounds of Resistance while the other s106 agreement already contained the same covenant). There was no covenant on the part of the County Council in either s106 agreement to carry out the works, nor any kind of Grampian restriction on the development.

The Council's planning committee had agreed with the officer's recommendation to approve the application, subject to the provision that "the section 106 legal agreement allows sufficient flexibility for the financial contribution, which was allocated to be spent on improvements to Back Lane to be spent on alternative improvements to other public rights of way or pedestrian and cycle infrastructure in the immediate area where this is considered to be appropriate" and subject to a section 106 agreement to "secure the planning obligations set out in the recommended heads of terms which are set out in the report and subject to the amendment detailed above regarding funding for enhancements to public rights of way and/or cycle infrastructure in the area". Authority was delegated to the Head of Planning Services to finalise the recommended section 106 agreement "including refining, adding to, amending and/or deleting the obligations detailed in the heads of terms set out in this report (including to dovetail with and where appropriate, reinforce the final conditions and informatives to be attached to the planning permission) as the Head of Planning Services considers reasonably necessary".

The Claimant's case was that the Officer's Report in each case concluded that financial contributions to secure highways and public transports improvements were necessary to make both developments acceptable in planning terms and that the Council had taken the contributions along with the effect of the works for which the contributions were to pay into account when granting planning permission, in particular as the basis for concluding that both developments complied with Policy M1 of the Local Plan. However, the delivery of the works was not secured because it was for the County Council to deliver the works, and the Council has no control over the County Council's delivery of the highway works.

This ground was dismissed. It was held that the officers did not recommend to the Planning Committee that planning permission be granted on the basis that the suggested improvements in the heads of terms would be secured or delivered, let alone that they would be delivered within a particular time frame. Rather, the officers made a recommendation which, by recommending that authority be delegated to the Head of Planning Services, gave him very broad authority to conclude s 106 agreements in such form as he saw fit, even if that meant departing from the heads of terms in the reports. Although the OR did in one passage refer to the highway works being "secured", it was held that when the ORs are read fairly, as a whole and without excessive legalism, it is clear that officers advised members that the developments were acceptable provided they made appropriate contributions towards highway improvement works. They did not say that the works should or would be delivered by a particular trigger point in the development. The payment of contributions towards works which had been identified by the County Council was considered sufficient to address the impacts of the developments.

As to whether the transport contributions could amount to a material consideration without the application of the contribution to deliver the relevant works being secured in the s106, it was held that the financial contributions to fund transport infrastructure - by themselves - were plainly capable constituting a material consideration in relation the decision whether to grant the planning applications and satisfied the relevant tests (as set out in CIL Reg 122, Tesco Stores and Newbury). The judge held that the need for such contributions had been recognised at all stages during the planning process and they plainly fairly and reasonably had a connection with the developments that was more than de minimis. However, the question of weight to attach to them was for the Council and it was also for the Council's planning judgment (reviewable only on an irrationality basis) whether to actually require delivery of the proposed works, eg, before commencement of development or occupation or via a Grampian condition. The judge held that it was lawfully open to the Council not to impose one. It was rationally open to the Council to find that the payment of proportionate contributions towards highway improvement works was sufficient to address the impacts of the particular developments on walking, cycling and public transport in accordance with policy M1 of the Oxford Local Plan. While the County Council was not yet in a position to commit to

the transport improvement works, which have to go through its capital programme and spending protocols, there was no reason to believe that the works that it has or will identify and costed, or alternatives achieving similar benefits, will not be delivered. It was therefore rationally open to the Council to conclude that contributions towards those works were sufficient to render the developments acceptable.

The judge did accept that in some cases, the delivery of infrastructure may be so critical to the acceptability of a development scheme that the decision-maker will determine that the development should not be commenced or occupied until that infrastructure has been delivered while in other cases, the payment of a contribution towards that infrastructure will suffice.

In respect of compliance with Article 40(3)(b), the decision of Ousley J in R (Midcounties Cooperative Ltd) v Wyre Forest DC [2009] EWHC 964 (Admin) was cited. In this decision it was held that the DMPO requires that at least one draft as well as the final version of a planning obligation should be made available on the planning register. However, a breach of Article 40(3)(b) will not of itself result in a subsequent planning decision being quashed as the claimant is also required to show how he was prejudiced by the breach.

This ground of challenge failed firstly because the court held that the requirement was complied with in substance since the ORs containing the heads of terms which set out the substance of the s106 obligations were published on the Council's planning register. In addition, the claimant could not demonstrate prejudice because there was no evidence that the Claimant had checked the register before planning permission was granted and the submissions that the Claimant claimed that they would have made would not have affected the Council's decision in any event since the Council was aware that there was no mechanism proposed to oblige the County Council to deliver the works and no restrictions on the development.

Case summary prepared by Susannah Herbert