DPI/Z4718/21/6
Draft order NATTTRAN/Y&H/S247/4337

Town & Country Planning Act 1990 – section 247

Proposed stopping up of highway at Holmfirth footpath 60, Wolfstones Road, Holmfirth, West Yorkshire, HD9 3UU

CLOSING SUBMISSIONS OF KIRKLEES MBC (OBJECTOR)

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1. These are the closing submissions of Kirklees MBC which is both the Local Highways Authority and an objector to the application. As noted in opening, it is for the Applicant to demonstrate that the legal tests for the making of a s.247 order are satisfied. The Council submits that not only are the tests not satisfied, but in his application the Applicant has been failed by insufficient evidence and submissions which could not meet the tests.

2. The Council will not in closing address the more tendentious parts of Applicant's case. Comments upon individual's motives will not be explored.

3. In opening I addressed the scope of the Council's objection and refuted the Applicant's contention that officers were in some way acting beyond authority. I will not repeat those submissions but the point is maintained.

4. The test to be applied under s.247 was considered in Vasiliou (with reference to the previous provision under the 1971 Act). The equivalent test under s.257 was considered by the Court in Network Rail and it is submitted is applicable under s.247 in this case.

5. In Vasiliou v Secretary of State for Transport [1991] All ER 77 the question for the decision-maker was held to be "whether the disadvantages and losses, if any, flowing directly from the closure order are of such significance that he ought to refuse to make the closure order".

6. The Court of Appeal has recently confirmed[1] that there is a two stage test involved in considering whether to confirm a s257 order:

    a. The making of the Order has to be necessary in order to allow development which has planning permission to go ahead ("the necessity test"); and

    b. The merits of the order should be considered so as to properly recognise that the confirmation of a s257 order is discretionary ("the merits test").

7. The Council relies upon Holgate J's helpful summary at para.49 of the Network Rail judgement.

    "In summary, it was decided in Vasiliou that: -

    (i) The Secretary of State cannot make an order under section 247 or confirm an order under section 257 **unless satisfied that a planning permission exists** (or under sections 253 or 257(1A) will be granted) **for development and that it is necessary to authorise the stopping up** (or diversion) **of the public right of way by the order so as to enable that**

[1] *R (Network Rail Infrastructure Limited) v Secretary of State for the Environment, Food and Rural Affairs* [2018] EWCA Civ 2069 [Document 22 appended to Paddico's Statement of Case].

development to take place in accordance with that permission (see also language to the same effect in section 259(1A)(b));

(ii) But even **if the Secretary of State is so satisfied**, he is not obliged to confirm the order; **he has a discretion as to whether to confirm the order** and therefore may refuse to do so;

(iii) In the exercise of that discretion **the Secretary of State is obliged to take into account any significant disadvantages or losses flowing directly from the stopping up order which have been raised,** either **for the public generally** or for those individuals whose actionable rights of access would be extinguished by the order. In such a case **the Secretary of State must also take into account any countervailing advantages to the public or those individuals, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such disadvantages or losses are of such significance or seriousness that he should refuse to make the order.**

(iv) The confirmation **procedure for the stopping up order does not provide an opportunity to re-open the merits of the planning authority's decision to grant planning permission**, or the degree of importance in planning terms to the development going ahead according to that decision.

As a form of shorthand **it is convenient to refer to** the test in (i) above as **a "necessity" test and** the test in (iii) above as **a "merits" test." (emphasis added)**

Order Plan - insufficiency

8. Sir, you highlighted on day 1 that the Order Plan (CD.3.1.2) (as originally drawn for the Applicant by Mr Earnshaw) places the line of Footpath 60 to be stopped up in the middle of the lane that runs through the Wolfstones Heights Farm buildings. However, the Applicant has made clear in submissions, and in his conduct in delineating what he considers to be the width of the footpath on the ground, that he considers the line of footpath 60 to be at the northern side of the lane, flush to the ~~dwelling known as~~building

line of Wolfstones Heights. Mr Earnshaw's response to this clear contradiction between the Applicant's submissions and his submitted plan was simply to say 'I'll draw another'.

9. Despite his claimed wide expertise across many areas Mr Earnshaw misunderstands the import of this inaccurate plan. The Order Plan does not record the line of footpath 60 which the Applicant himself is promoting for closure. There is, as elsewhere in the Applicant's submissions, a contradiction and one that cannot be corrected with hastily amended plan. I would note Sir that despite his contention Mr Earnshaw has done nothing since day 1 of the Inquiry to fix the plan despite claiming he can[2]. As of the writing of this Closing in December 2021 nothing has been done to remedy this fundamental issue with the application. Indeed, the Council submits that there is no way to remedy this insufficient plan within this inquiry process.

10. The Council would note that since this is a decision of the Secretary of State in spite of the clear shortcomings within the application plan the Inspector will need to engage with the consideration of the merits of the application even if satisfied of these failures in the application plan.

Planning benefits

11. The Secretary of State will need to understand the extent of interference between the planning permission which the Applicant seeks to implement and the current line of the footpath. That is, to understand the planning benefit arising from the degree of interference with the footpath which the Applicant seeks. On the first day of the inquiry, Sir, you explored in detail with Mr Earnshaw the parts of the relevant permissions which conflict with the current footpath. Frankly, the benefits are paltry.

12. According to Mr Earnshaw the diversion of the Footpath will allow for the excavation of the garage, the creation of 2no. parking spaces, the erection of retaining wall that will obstruct the Footpath, and the building of a **second** staircase to the Applicant's terrace above the garage. That is, the Applicant's terrace will not be bereft of purpose

[2] It is understood that on 28th December 2021 Mr Earnshaw wrote to the programme officer and the SoS's case officer to provide an amended plan and make submissions on the issue of the order plan and on the Council's draft closings.

if the order is not made, it will still have an access. The applicant requires a second access.

13. In his evidence Mr Earnshaw attempted to introduce a disbenefit or risk into the balance. He noted that users of the current Footpath line will encounter traffic within the Applicant's curtilage. He specifically noted the manoeuvring of horse and race car trailers. The line of the current Footpath will have interactions with domestic traffic (that is the case along many historic PROWs) but the manoeuvring of traffic within a domestic curtilage cannot be equated to interaction with free flowing traffic on the public highway. Mr Appleton noted that the diversion would eliminate vehicle/pedestrian conflict in the Applicant's 'complex'. When I asked him what data for such conflict he relied upon he laughed at the idea of gathering such data. If the point does not merit gathering data then I would submit the point does not merit much consideration.

14. The development, it should be noted, is of purely private benefit. It benefits one private dwelling. It does not provide a wider public or societal benefit, for instance by way of housing provision or some infrastructure. The Applicant relies upon the diversion itself as a benefit (indeed you will see reference to double benefits in the Applicant's closing). Whether the diversion is beneficial is a subjective judgement to be made in this process. Witnesses have spoken of it as aesthetically pleasing or pleasant. Mr Leader, to the contrary, has commented that it is somewhat of a confection: an out of place walking experience in this locality. Whilst there has been evidence as to it having a superior surface to the existing line, it should be noted that the other benefits of the diversion are not guaranteed by this order: the benches are not within the order, the quaint fencing is not, neither is the current view and the mise-en-scene of the field adjoining. In considering the benefits of the scheme the Secretary of State should be clear on the limits to those benefits.

15. The Applicant has made much comment on the layout of the alternative line under the order and of the amenity it provides with benches and a created view. Indeed, it has been a key point in the evidence of many of the witnesses who have spoken in support of the application. The Council has noted repeatedly, in questioning those witnesses, that those amenity features are not the subject of the order and are in no way guaranteed

by it. Further, the Council would note that those 'benefits'[3] of the alternative route are not part of the planning permission which requires the order: there are not advantages of the development (see Network Rail). Since they are in no way guaranteed by the order and are not advantages of the development they cannot tell within the merits test.

16. The planning benefits which can be delivered through the making of this order must be understood as the relevant background against which the impact of the proposed order is measured. The applicant will say that the amenity impacts are low, or that the highways evidence demonstrates low risks arising from the diversion. Even if it is considered that the disbenefits arising from the proposed order are slight (whilst it would be accepted that risks are low it is not considered that the disbenefits to users of the Footpath are slight) they must be weighed against the very limited development impaired by the Footpath.

The Applicant's highways evidence

17. The Council has not tendered a highways engineer to give evidence. The Council does not contend that substantial highways risk arises from the proposed diversion of the Footpath. The Council accepts the accident data compiled by the Applicant. The Council simply contends that increased interaction of Footpath users with traffic on Wolfstones Road (by the addition of 118m of roadside walking on 2 out of 3 routes) is a disbenefit and source of risk to user safety. On the current Footpath line the user has the potential of conflict over Wolfstones Road in crossing to the Trig Point of say 4-6m. With the stopping up and diversion that potential for conflict is along 124m: a distance 20 times greater. Mr Appleton has stated the risk to be 'negligible' (XIC by NS).

18. The Council again notes that burden is upon the Applicant to satisfy the Secretary of State that the proposed order meets the legal tests. In that context the Council has sought to test the Applicant's highways evidence and submits that the Applicant has failed to provide sufficient evidence to satisfy the Secretary of State that the merits test is met.

[3] Which are inherently subjective

19. The Applicant's highways evidence is based upon data provided by Paragon with the evidence given by Mr Appleton of Via Solutions. The diversion route moves the terminus of footpath 60 118m north of the current end point. The effect of the diversion is that to reach the current terminus' junction with Wolfstones Road the user of a diverted footpath 60 would have to walk the two other sides of a triangle – the line of the diverted footpath 60 north-westwards and then 118m southwards along Wolfstones Road. An user of footpath 60 who wishes to reach the Trig point (westwards) or Upperthong (southwards) must therefore journey an additional 118m along Wolfstones Road (either within the carriageway or along the verge. The Applicant's case is that Wolfstones Road is lightly trafficked by cars, cyclists, riders and walkers and as such the risks arising from the increased interaction of walkers diverted along that 118m is very low. Indeed, the Applicant has demonstrated the absence of accidents on Wolfstones Road in more than 20 years.

20. I would note the changing evidence of Mr Appleton in regard to the highways safety effects of the Order. In XIC Mr Appleton resisted Mr Scanlon's attempts to have him characterise the overall safety effects of the order as 'advantageous'. Mr Appleton maintains the effect is minimal but would not, at that stage, be pushed by his own advocate into compromising his opinion. You will recall this passage of XIC Sir as you had to interrupt it when Mr Scanlon would not relent from seeking an answer contrary to Mr Appleton's clear evidence. However Sir, on day 2 Mr Appleton in answering questions from you (when you sought to clarify his frankly evasive answers) settled upon a neutral as safe position.

21. Frankly, Mr Appleton's evidence was characterised by an evasiveness. An unwillingness to engage with topics where the data he relies upon is insufficient or does not serve his case (the quality of and the results of user counts for instance) and a tendency to restate his case, with every answer, rather than answer questions directly. In this context Mr Scanlon petty barbs about 'long cross examination' are hardly piercing: Mr Appleton's approach to answering questions said almost as much about his case and his evidence itself.

22. The Applicant's approach to the data provided has been less than comprehensive. Mr Appleton agreed that summer surveys would have been preferable (in XIC) but in fact

only one survey was even close to being at that time of year (surveys Nov/Dec 2017, Feb/Mar 2019, Sept 2019, Oct 2020). With the coming of the pandemic in 2020 Mr Appleton considered that surveys would be affected. How the pandemic would skew results is unclear: if use patterns have changed then they have changed.

23. Mr Appleton maintained that the season of surveys would not affect speed data gathered. However, as noted in XX of Mr Appleton, the Paragon speed data was gathered on at least one day with the risk of ice (0-2 degrees centigrade) (30/11/17 survey) and one day with snow (17/03/19 survey).

24. Whilst the speed surveys of Wolfstones Road show low speeds the Applicant's own highways documentation (Paragon 3.1.17) notes that by the time of the most recent survey (Oct 2020) the road had been resurfaced and there was a concomitant increase in speeds that could be observed.

25. There is only one streetlight on this section of road. There is a streetlight where the Footpath meets Wolfstones Road. This is a feature of the streetscene which had eluded Mr Appleton till raised in XX.

26. Sir, you will recall the Applicant's evidence on visibility where the current Footpath meets Wolfstones Road and where the diversion meets Wolfstones Road. The Council considers the visibility to generally comparable and therefore that this is not a significant point between the parties. The Applicant maintains there is a significant improvement in visibility with the diversion. Indeed, in XIC Mr Appleton told Mr Scanlon that improved visibility was the 'main advantage' of the diverted route.

27. How is this point proven? Mr Appleton raised it in the witness box and sought to 'demonstrate' it with reference to his own 'out of the box' review of the point on Google. No plans, drawings or illustrations were relied upon. No data was provided to the inquiry. It was simply asserted on the back of a 'Google' (verb). The Council considers the point is not significant but that what it demonstrates about the Applicant's approach is significant: the Applicant seeks to have a public right of way stopped up and to persuade the Secretary of State. Yet, again, the Applicant's approach is slipshod and unconvincing. If the point matters (if it is the 'main advantage') then the Applicant

should prove it not simply assert out of thin air. The 'Google I did at home' would not pass muster for a third party objector's evidence, it is not sufficient for an applicant to rely upon it.

28. Beyond this walkers' visibility evidence, the Applicant's case is even thinner. No evidence of driver visibility has been provided. Whilst the Applicant maintains the carriageway has sufficient space and overrunning is not a risk their experts have not deigned to provide any plans to illustrate this. There are no swept path analyses provided for vehicles using this road. In R-XIC Mr Appleton said that these pieces of data might be 'desirable' but not essential. As I noted in XX, this is the Applicant's application, their case to prove. Mr Appleton's evidence was to address highway safety but did nothing to address those components of highways safety.

Discounting walking groups

29. Despite clear evidence that there is a culture of walking groups in the area the Applicant's highways team chose to discount such groups in their counts. A number of witnesses referred to walking in the area in groups: walking in regularly convened friendship groups ('Whatsapp walkers') and as part of scheduled walking events (memorial walks and walking clubs). Holmfirth Walkers are Welcome (Mr Payne) confirmed that the group has a regularly programme of monthly walks (and pre-pandemic a Festival of Walking) which includes use of the Footpath. Mr Payne pointed out that group user of the Footpath makes the diversion more worrisome since the ability to use the verge as a refuge from traffic would not apply to group users on Wolfstones Road. Mrs Wimpney (supporter) was very clear about her own social walking in friendship groups.

30. In the data provided by the Applicant (Paragon para.3.2.6 and Appx C) walkers are discounted simply because they were part of a memorial walk. This was written off as a 'one off' event even though in fact it is apparent that such groups are regularly out and about in the area. Mr Appleton confirmed that his contention that only 1/3 of walkers went to the 'Trig Point' was based on excluding group walkers[4]. When asked

[4] In R-XIC Mr Appleton advised that the inclusion of the memorial walkers would see 42% of users going to the Trig Point rather than 1/3. He stated that 42% was 'not really' significant as it was less than ½.

whether it was appropriate to discount such groups Mr Appleton said that it was a good thing that the surveys even acknowledged them. It seemed to be that Mr Appleton was saying we should be grateful that professional highways consultants bothered to provide the data with the group included.

31. The Applicant's counts are limited in the times of day they were carried out. The surveys took place between 0800 and 1600 on weekdays missing the PM peak. Third parties addressing the inquiry have referred to this area as containing 'dormitory villages' with residents commuting out of the area. The weekday surveys would not catch the commuter out to walk their dog early or late in the day. Weekend days were also only surveyed 0800-1600. Multiple witnesses spoke to their use of the route early in the morning and in the evening. Indeed, the applicant's own daughter is out running in the area at 0430 in the morning[5]. And she is not alone, her clear evidence was that she encounters other runners out at 0530 in the morning. She also cycles, and this again, she does in the evening after the Applicant's surveys would have finished (1700-1730). Further she spoke to her use of the Footpath with her children at the weekend (at around 1700-1730) when, again, the Applicant's data would not capture such user. She said she would be out walking twice on the weekend. She noted that at the weekends she would see all sorts of users of the highway network in the area of the Footpath: walkers, cyclists, horseriders, and a 'scattering of cars'.

32. The Holmfirth Harriers running club was represented by Mr Sizer. Mr Sizer told the inquiry ~~He noted~~ that the club's objection was formally minuted. He described the club's activities. The club has 500 members with its clubhouse 3 miles away in Honley. The club organises runs from its clubhouse on Tuesdays and Thursdays and usually sends out 6 groups of an evening with 15 runners in each on pre-set routes from which variation is unlikely. Since the pandemic these runs have had staggered start times from 1815 to 1900 and vary in duration from 45mins to 2hrs of running. The Footpath is on its regularly used routes and the point where the Footpath meets Wolfstones Road is a regrouping point for runners. The normal route for such groups is up to Wolfstones across the fields and then southwards. The northward route involves too much time on roads to the next nearest footpath (HOL/57). Mr Sizer considered that greater safety

[5] She gave evidence that she is out between 0430 and 0600 and if she runs in the evening it is after 1800.

concerns arise with group runs as they occupy more space and are more likely to interact with traffic. The Applicant's counts would not capture the user.

33. Surveys were carried out in the colder months though in XIC Mr Appleton stated summer surveys would have been preferable. As you noted, Sir, this is a tourist area, a place of resort and leisure use. In that context the failure to carry out counts in warmer months runs the very real risk of missing significant user. Indeed, as you noted in questioning Mr Appleton in detail, the count carried out in September 2019 at the waning of the summer months seemed to indicate a greater level of use distinct from that captured in the winter surveys.

The 'Trig Point'

34. The 'Trig Point' and the route to it from Wolfstones Road is not a Public Right of Way. It is a permissive path. It is in the ownership of the Holme Valley Land Charity which is under the control of the Holme Valley Parish Council. Mr Cropper (supporter) gave clear evidence of his involvement[6] with the charity and its work to rationalise its portfolio of property (largely bequests of land). That rationalisation has seen pieces of land sold off where small 'bits and pieces' had been left to the charity. He was clear that the land upon which the Trig Point lies was kept and was indeed improved during his time (through the addition of seating provision at the viewpoint). Signs were erected to protect the charity's interests. He is no longer on the PC and therefore not on the charity board of trustees but was clear that he saw no reason for the Trig Point land to pass out of public ownership. The Applicant's advocate has continually pushed the risk that the Trig Point land will be closed off from public use. The Applicant's own witness has confirmed that whilst possible that is very unlikely. Mr Leader for PNFS (see below) noted that the PC has been supportive of walking initiatives and even funded the production of a 'Holmfirth Walkers are Welcome' leaflet.

Mr Greenwood

[6] He was chair of the PC and ex officio of the HVLC.

35. Mr Greenwood objects to the stopping up of the Footpath. He does not object to the diversion, indeed he welcomes it and enjoys it. His preference would be for both to exist (that, we are told, will not happen). He endorses the current route as a safe and less worrisome way to reach the Trig Point, specifically when he had young children. He was clear that he would want to avoid walking on Wolfstones Road with children and valued the Footpath's current line for only requiring a short crossing of the road to reach the Trig Point. He considers that the diversion and need to walk a section of Wolfstones Road leads to a 'slight increase' in risk. When pressed to quantify risk in XX Mr Greenwood noted that 2/3 of potential routes increase in risk as walkers westwards and southwards will have increased time next to the carriageway and only those going northwards will see a decrease in time next to traffic.

36. He noted that supporters seem to address the benefits of the cross country part of the diversion and its amenity but not consider or engage with the safety impacts of stopping up the Footpath. I would note that of course with the current parallel existence of both lines of the Footpath the safety issue has not yet become manifest for supporters or objectors to experience: no one yet **has** to use the 118m diversion along Wolfstones Road as long as the current line of the Footpath is open.

Mr Paxman

37. Mr Paxman (supporter) spoke to his preference for the diversion route and his pleasure in walking in the area. He grew up in the Holme Valley and has returned to live here. He walks seven days a week with his dog: between 0600-0700 on weekdays and before 0900 on the weekends. This user would not have been captured by the Applicant's counts. Whilst he acknowledged that the landscaping on the diversion is not protected he hoped it would remain and that the view would remain. Of course, the Council would note that the view is not 'protected' and the needs of the landowner to farm his land or plant trees upon it cannot be precluded by the order.

Mr Leader (PNFS)

38. Mr Leader gave evidence to the inquiry on behalf of the Peak and Northern Footpath Society. He was clear that the PNFS do not always object to diversions but in this case saw little or no public benefit in the diversion. He considers that the current route 'oozes' Yorkshire character with its passage through the curtilage of the buildings and

the straight line route to the Trig Point. Walking close to buildings like this is characteristic of walking in the area, he considered the diversion's post and rail fence was 'incongruous' at 300m elevation in Yorkshire. He considered that the diversion breaks up the 'connectivity of flow' of the route and 'fragments' the network. Mr Leader gave his opinion as to the historical context of the Footpath and what considered was the likely historical use of such high routes. It is his opinion that the route is at least 200 years old.

S.106 – verge amendment

39. The Council does not consider that the proposed Unilateral Undertaking would make the application acceptable. Further, the Council has not been provided with sufficient detail to have any confidence in the proposed verge improvements. The Council has made clear that since it will not be party to the s.106 it will not draft the undertaking in consort with the Applicant's advisors. It was made clear that the Council will consider the s.106 ahead of the closing of this inquiry so that it can confirm its position but it will not be drawn into an agreement by stealth whereby it drafts the detail of the Applicant's proposal.

40. The Council requested sight of the draft s.106 ahead of preparing this closing. What was provided on 2nd December 2021 remained a draft without any plans or highway sectional plans or other illustrations of what the Applicant would propose. A narrative schedule to the proposed s.106 described a verge treatment but no costing has been prepared to which the Council could respond nor have plans of the verge treatment or drainage proposals been produced for the Council's comment.

41. The Applicant's proposals are insufficiently detailed to provide any confidence in the proposed verge changes and the Council has confirmed through a delegated decision (made by the Strategic Director, Environment & Climate Change since the Applicant's draft missed the relevant Committee deadline) that the Council would not apply funds provided under the s.106 to amend the verge.

42. The Council has not been provided with sufficient information to be confident that proposals to amend the verge would make its user safer or better. The Council has not been provided with information to be confident that amendments to the verge would

result in a highway as safe as currently and free from drainage issues. This is all the more surprising when one considers the significant amount of time the Applicant has had since the inquiry originally sat in which to formulate and provide detailed proposals.

43. The Council will not apply the offered monies for such an uncertain scheme. On that basis the Applicant's Unilateral Undertaking should be of no significance to the Secretary of State: it is nebulous and no confidence can be had in it and it will not be implemented by the Council in any event.

Conclusion

44. The Applicant has not satisfied the tests under s.247. The necessity test is met. The merits test is not. The Council requests that the Secretary of State does not make the applied for order.

Post Script

45. The Council has only commented upon the Applicant's closing where it appears that factual dispute exists. Similarly, the Council has amended this closing where a factual error has been brought to the attention of the Council's advocate. This has been on the basis that it was understood that the mutual exchange of closings was to seek to agree the facts of evidence given rather than to draft submissions *at* the other party's submissions. The Council has based this approach upon para.3 of the Inspector's note of 31st August 2021:

> '… I expect them to make **every effort** to reach agreement that the closing submissions accurately reflect what was said and happened at the Inquiry'. (emphasis in the original)

46. The Applicant does not agree that this is the correct understanding of the Inspector's prescribed process. Therefore Applicant's comments upon the Council's closing submissions have gone further and have made repeated requests for redrafts of the

Council's submissions as well as raising a few points of contention as to the factual evidence given.

47. The Council has confirmed to the Applicant that it will seek clarification from the Inspector as to the correct understanding of the prescribed process. However, the Applicant has stated that in any event they will resist any subsequent comment by the Council beyond these closings. Therefore, despite the apparent meaning of the 31st August note, the Council will briefly comment upon the Applicant's submissions to protect its position.

Mr Earnshaw

48. The Council understands that Mr Earnshaw submitted a written representation to the Programme Officer and DfT on 28th December 2021. The Council received documentation from the Applicant's advocate. Given the date of Mr Earnshaw's submissions it has not been possible for the Council's advocate to take instructions on those submissions which are in the form of both a plan and written arguments as to the import of the plan and the content of the Council's closing submissions.

49. With regard to the plan, the Council would note that its submission, either now at this late stage or even after day 1 of the inquiry, cannot remedy the problem facing the Applicant's case as outlined earlier in this closing. The Order plan which has been the subject of advertisement and consultation and by which the Secretary of State would make the applied for order **does not** reflect the Applicant's case.

The Unilateral Undertaking

50. The Council has sought to comment on the UU as submitted at the time of these finalised closings. As noted above, the Applicant's process has been to submit the barest of information as to its proposed verge solution and seek that the Council work to complete the **Applicant's** unilateral undertaking.

51. It understood that the Applicant will seek to carry out further work to the UU prior to the inquiry resuming. No further comment can be made upon it in this closing since it has not occurred yet.

Case law

52. In closing the Applicant's advocate has promoted an interpretation of Holgate J's judgement in Network Rail that was not delineated in opening or raised at any other point in the inquiry process either orally or in writing. Specifically, the Applicant's interpretation is predicated upon a close reading paragraph 49(ii) of the judgement. In particular Mr Scanlon places great reliance upon the phrase 'significant disadvantage' and his definition of 'significant' as 'very important'. Because Mr Scanlon says that the correct synonym for 'significant' is 'very important' then that is what Holgate J must have meant and therefore the judgement must be read with that meaning.

53. Briefly, the Council would make two points:

a. Judgements are not to be read and every word parsed as if one was reading statute or a contractual agreement. This approach to textual analysis is inappropriate and to be resisted. Indeed, if the words used in Holgate J's discussion of the test were to be elevated to be read as statutory language, one might expect them to be discussed in terms in the subsequent Court of Appeal judgement[7]. They were not. In upholding Holgate J the Court of Appeal described the relevant test thus:

> '12. In the light of relevant authority, it was agreed before us that the provisions of sections 257 and 259 of the 1990 Act, under which the Secretary of State has a discretion to confirm or not to confirm a lawfully made stopping-up order, oblige him to decide whether the stopping-up or diversion is necessary to enable the development to proceed and whether, on its merits, the order should be confirmed, an exercise that will involve a consideration of the public interest in the order being confirmed or not. Holgate J. referred to these two questions as, respectively, the "necessity test" and the "merits test" (in paragraph 49 of his judgment)'.

Holgate J in the High Court is good authority with a helpful discussion of the exercise in which the Secretary of State is engaged, but it is not authority for the interpretation Mr Scanlon relies upon, and the Court of Appeal's judgement confirms this.

b. In any event there are a number of synonyms for 'significant', including 'not insignificant'. If the Secretary of State makes the judgement that a disadvantage

[7] [2018] EWCA Civ 2069

is not insignificant or is worthy of attention (noting Mr Scanlon's closing) then that is sufficient. It does not need some enhanced relevance as 'very important'.

c. The judgement of Holgate J does not require some tilted balance where the disadvantages of the order outweigh the advantages by an enhanced margin. That interpretation would needlessly infringe upon the Secretary of State's discretion to make a judgement in the circumstances of the case as reported by the Inspector. Frankly, this is a case in which neither the disadvantages or the advantages are dramatic. The disadvantages in this case are of significance and though not 'matters of life and death' they do outweigh the claimed advantages.

ANTHONY GILL

KINGS CHAMBERS

~~16th~~ 31st DECEMBER 2021

MANCHESTER, LEEDS, AND BIRMINGHAM

R. (on the application of Network Rail Infrastructure Ltd.) v Secretary of State for Environment, Food and Rural Affairs

Court
Court of Appeal (Civil Division)

Judgment Date
21 September 2018

Case No: C1/2017/2665

Court of Appeal (Civil Division)

[2018] EWCA Civ 2069, 2018 WL 04567180

Before: Lord Justice Lewison Lord Justice Lindblom and Lord Justice Flaux

Date: 21 September 2018

On Appeal from the Administrative Court Planning Court

Mr Justice Holgate

[2017] EWHC 2259 (Admin)

Hearing date: 19 June 2018

Representation

Mr Tim Buley (instructed by The Government Legal Department) for the Appellant.
Mr Juan Lopez (instructed by Womble Bond Dickinson (UK) LLP) for the Respondent.

Judgment Approved

Lord Justice Lindblom:

Introduction

1. Did a planning condition prevent a stopping-up order being confirmed by the Secretary of State for Environment, Food and Rural Affairs under section 259 of the Town and Country Planning Act 1990 because it contemplated the development going ahead even if the order was not confirmed? That is the basic question in this appeal.

2. With permission granted by Lewison L.J. on 3 November 2017, the appellant, the Secretary of State, appeals against the order of Holgate J., dated 8 September 2017, upholding a claim for judicial review by the respondent, Network Rail Infrastructure Ltd., in which it challenged an inspector's decision, in a decision letter dated 4 January 2017, refusing to confirm the Eden District Council Public Path Stopping Up Order (No. 1) 2015 Cross Croft, Appleby (footpath 303028) ("the Order").

3. The Order had been made by Eden District Council, the local planning authority, on 22 April 2015. In making the Order the council had stated itself to be satisfied that it was necessary to stop up the footpath to enable development to be carried out in accordance with a planning permission it had granted for the construction of 142 dwellings on land adjacent to Cross Croft in Appleby. The site of the development lies to the south-west of the Settle to Carlisle railway line, a short distance to the south of Appleby station. The developer, and applicant for planning permission, is Story Homes Ltd..

4. The relevant planning permission, granted on 9 March 2016, was subject to a condition – condition 13 – restricting development to no more than 64 specified dwellings unless the circumstances in either of two "exceptions" should occur. The first "exception" was that a stopping-up order – diverting the footpath, stopping it up to prevent access to a railway crossing, and re-routing it to the north-east – had been made and confirmed. The second was that the Secretary of State did not confirm the Order.

5. Objections were made to the Order. An inquiry was duly held, on 29 November 2016. On a preliminary issue, the inspector concluded that condition 13 permitted the whole development to be carried out, regardless of whether the Order was confirmed, and therefore that it could not be necessary to divert the footpath to enable development to be carried out.

6. Holgate J. quashed the inspector's decision, on the basis that the inspector had misunderstood the true relationship between condition 13 and the provisions in sections 257 and 259 of the 1990 Act and had failed to address the questions he was obliged to consider under those provisions.

The issue in the appeal

7. The main issue in the appeal is whether, contrary to the judge's conclusion, the inspector's decision was a lawful exercise of his statutory power under section 259 of the 1990 Act, because condition 13, properly construed, negated the requirement that the confirmation of the Order was "necessary … in order to enable the development to be carried out … in accordance with the permission".

8. In its respondent's notice, Network Rail contends, first, that the inspector acted in breach of natural justice and unfairly in reaching his decision solely on the preliminary issue, without hearing the evidence on railway safety; and secondly, that he ought to have considered the case for confirmation on its merits, and that his decision was irrational. Those issues, as the parties agree, hang on the outcome of the main issue in the appeal.

The statutory powers

9. Section 257 of the 1990 Act provides:

"(1) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath … if they are satisfied that it is necessary to do so in order to enable development to be carried out –

(a) in accordance with planning permission granted under Part III …

…

(1A) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath … if they are satisfied that –

(a) an application for planning permission in respect of development has been made under Part [III] , and

(b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.

(2) An order under this section may, if the competent authority are satisfied that it should do so, provide –

(a) for the creation of an alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use;

…

…

(4) In this section "competent authority" means –

(a) in the case of development authorised by a planning permission, the local planning authority who granted the permission …

…".

10. Section 259 provides:

"(1) An order made under section 257 … shall not take effect unless confirmed by the appropriate national authority or unless confirmed, as an unopposed order, by the authority who made it.

(1A) An order under section 257(1A) may not be confirmed unless the appropriate national authority or (as the case may be) the authority is satisfied –

(a) that planning permission in respect of the development has been granted, and

(b) it is necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission.

(2) The appropriate national authority shall not confirm any order under section 257(1) … unless satisfied as to every matter as to which the authority making the order are required under section 257 … to be satisfied."

…

(5) The appropriate national authority, for the purposes of this section, is –

(a) in relation to England, the Secretary of State …

…".

11. Powers for the stopping-up and diversion of highways are also contained in Part VIII of the Highways Act 1980 . Sections 118A and 119A of the 1980 Act provide, respectively, for the stopping-up and diversion of footpaths crossing railways. Section 119A provides for the making of a "rail crossing diversion order" by a council "where it appears to a council expedient in the interests of the safety of members of the public using it or likely to use it that a footpath … in their area which crosses a

railway, otherwise than by tunnel or bridge, should be diverted …" (subsection (1)). The Secretary of State must not confirm a rail crossing diversion order, and a council must not confirm such an order as an unopposed order, unless satisfied that it is "expedient to do so having regard to all the circumstances", including "(a) whether it is reasonably practicable to make the crossing safe for use by the public …" (subsection (4)).

12. In the light of relevant authority, it was agreed before us that the provisions of sections 257 and 259 of the 1990 Act, under which the Secretary of State has a discretion to confirm or not to confirm a lawfully made stopping-up order, oblige him to decide whether the stopping-up or diversion is necessary to enable the development to proceed and whether, on its merits, the order should be confirmed, an exercise that will involve a consideration of the public interest in the order being confirmed or not. Holgate J. referred to these two questions as, respectively, the "necessity test" and the "merits test" (in paragraph 49 of his judgment).

13. It was also common ground, and I accept, that the requirement of "necessity" for the making and confirmation of an order under sections 257 and 259 may be satisfied by the existence of either a physical or a legal obstacle to the development proceeding. A physical obstacle would be, for example, some practical impediment to the development proceeding – typically, a footpath running across a development site that would make it impossible for the proposed development to be carried out without its being stopped-up or diverted. A legal obstacle could be a "Grampian", or negative, condition preventing the development being carried out, in whole or in part, until an order stopping-up or diverting a footpath had been made and confirmed, and the footpath had then been stopped-up or diverted (see the speech of Lord Keith of Kinkel in *Grampian Regional Council v City of Aberdeen District Council (1984) 47 P. & C.R. 633* , at p.637).

14. In *Vasiliou v Secretary of State for Transport (1991) 61 P. & C.R. 507* , a case concerning the scope and operation of the provisions then in section 209 and 215 of the Town and Country Planning Act 1971 , Nicholls L.J., as he then was, observed (on p.510) that "when determining which matters may properly be taken into account on an application for planning permission or an application for an order stopping up a highway, it is important to have in mind the different functions of a planning permission and of a stopping up order". As he said (on p.512):

> "These sections confer a discretionary power on the Minister. He cannot make the order unless he is satisfied that this is necessary in order to enable the development in question to proceed. But even when he is satisfied that the order is necessary for this purpose he retains a discretion; he may still refuse to make an order. …".

15. Nicholls L.J. rejected the concept that there was "no overlap between matters which can properly be considered by the planning authority on the one hand and those which can properly be considered by the Secretary of State for Transport on the other hand" (p.514). He went on to say (on p.515) that "[a] pre-requisite to an order being made … is the existence of a planning permission for the development in question", that "the … power to make a closure order arises only where the local planning authority, or the Secretary of State for the Environment, has determined that there is no sound planning objection to the proposed development", and it is on this basis that the Secretary of State for Transport "must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order". The weighing of disadvantages and losses, "either (a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up …" is "a matter for his judgment". As Nicholls L.J. emphasized (ibid.):

> "… In reaching his decision he will, of course, also take into account any advantages under heads (a) or (b) flowing directly from a closure order: for example, the new road layout may have highway safety advantages."

16. The thrust of those observations was reflected in the Government's advice, under the heading "The making of an order", in paragraph 7.15 of Rights of Way Circular 1/09 issued by the Department for Environment, Food and Rural Affairs in October 2009:

> "7.15 The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order."

Condition 13

17. The factual background was described by Holgate J. (in paragraphs 14 to 19 of his judgment). He referred to the series of planning permissions granted for the proposed development. I need not repeat the full narrative here.

18. In response to consultation on Story Homes' proposed development, representations were made by Network Rail, and others, raising concerns about the possibility that the increased use of the existing railway crossing would make accidents more likely. Those concerns led the council, when granting planning permission, to impose conditions in "Grampian" – or negative – form, to restrict the implementation of the development until a footpath diversion order had been made and confirmed.

19. On 30 July 2013 the council granted planning permission (on application no.11/0989). Condition 14 on that planning permission stated:

> "14) No development hereby approved shall take place beyond plots 1-22 and 133-142 [32 plots] until a footpath diversion order has been made and confirmed. The order shall incorporate the diversion of the [existing] footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle-Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane. The footpath shall be fully completed, including lighting, and made available prior to the occupancy of plots 23-132.
>
> Reason – In the interests of procedural correctness. To support Local Transport Plan Policy LD5, LD7 and LD8 and Structure Plan Policies T25, T27 and L53."

20. On 13 March 2014 the council granted planning permission on an application under section 73 of the 1990 Act (application no.13/0969), for the variation of a single condition, condition 2, on the permission granted on 30 July 2013. On 13 May 2015 the council granted planning permission on an application under section 73 (application no.14/0594) for the variation of the permission granted on 13 March 2014, and the removal of three conditions, one of which was condition 14. Condition 13 on this permission was in the same terms as the previous condition 14, but the reason given for its imposition was different:

> "…
>
> Reason – To ensure that the proposed development does not have an unacceptable impact on highway safety. To support Local Transport Plan Policy LD5, LD7 and LD8, Structure Plan Policies T25, T27 and L53 and Eden Core Strategy Policies CS5 and CS18 and the NPPF."

21. On 9 March 2016 the council granted planning permission on a further application under section 73 (application no.15/1097) for a variation to condition 13 on the permission granted on 13 May 2015. Condition 13 now stated:

"13) No development hereby approved shall take place beyond plots 1-22, 49-53, 87-95, 73-74, 98-113 and 133-142 [64 plots] unless any of the following exceptions occur:

i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle-Settle public railway crossing [from the] site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane, [has] been made and confirmed by the LPA or the Secretary of State, or

ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point i) does not confirm the order;

Upon any confirmed diversion and stopping up order coming into force, the new footpath route shall be fully completed including lighting and made available prior to the occupation of units 39-48 and 126-132 [17 plots].

Reason – To overcome adjacent public highway safety conflict. To support Local Transport Plan Policy LD5, LD7 and LD8, Structure Plan Policies T25, T27 and L53 and Eden Core Strategy Policies CS5 and CS18 and the NPPF."

The Order

22. The Order stated that it was made by the council under section 257 of the 1990 Act because the council was "satisfied that it is necessary to stop up the footpath to which this Order relates in order to enable development to be carried out in accordance with planning permission granted under Part III of [the 1990 Act] by [the council] namely: Planning Permission numbers 11/0989 and 14/0594 for the erection of 142 dwellings … at land off Cross Croft/Back Lane, Appleby". It provided for the stopping-up of the existing footpath and the creation of a replacement footpath, whose route was described in Part 2 , "Description of site of alternative footpath". The "Plan" attached to the Order showed the "Existing Route to be Stopped-Up", including the existing railway crossing, and the "Alternative Route to be Provided", which would run along the eastern boundary of the development site to a bridge across the railway.

The inspector's decision

23. At the inquiry into the Order, the inspector invited submissions on the preliminary issue raised by objectors: whether, given the terms of condition 13 on the planning permission of 9 March 2016, the Order was legally incapable of being confirmed, because "[the] effect of the "exception" described in ii) of condition 13… being that closure of the path across the railway is not necessary to enable the development [to] be carried out; [and] consequently, the order does not meet the statutory criteria of section 257 of the 1990 Act and could not be confirmed" (paragraph 9 of the decision letter). He decided that preliminary issue without hearing any evidence. He found that the development being carried out was that for which planning permission had been granted on 9 March 2016 (paragraph 12). He concluded that the Order had been "validly made" (paragraph 16), and that "… the Order has to be considered in the light of the current permission being implemented and the conditions which govern that development" (paragraph 18).

24. He determined the preliminary issue in this way (in paragraphs 20 to 23):

"20. The test to be applied under section 257 of the 1990 Act is whether it is necessary to divert the footpath at issue in order to allow development to take place in accordance with the planning permission granted. The development permitted under 15/1097 is in progress but has not been completed. The diversion of the path is not necessary to allow the physical construction of houses on the site to be carried out as the majority of the path at issue is outwith the boundary of the development.

21. If it is not necessary to allow physical construction to take place on site, the question arises therefore as to whether it is necessary to divert the path in order to satisfy condition 13 of 15/1097? Reading the condition, it would appear not; the second part of the condition would permit the full development of the site if the order was not confirmed.

22. In contrast to condition 13 attached to 14/0594 which would have prevented the development of more than 32 houses if the Order was not confirmed, condition 13 of 15/1097 permits the whole development of 142 houses to be carried out irrespective of whether the Order is or is not confirmed. If the full development of the site can be carried out without the Order being confirmed, it cannot be necessary to divert the footpath in order for development to be carried out.

23. I concur with the objectors that, in the light of the terms of the condition attached to the planning permission being implemented the Order fails the statutory test for confirmation."

His "Conclusion", therefore, was that "as the diversion of the footpath is not necessary to allow development to take place, the Order should not be confirmed" (paragraph 24), and his "Formal decision" was that he did "not confirm the Order" (paragraph 25).

The judgment of Holgate J.

25. Holgate J. observed (in paragraph 50 of his judgment) that in *Vasiliou* the Court of Appeal did not decide that "… the decision-maker must treat the necessity test as an initial hurdle to be satisfied once and for all before the merits test may lawfully be considered, or that there is no overlap in the application of these two tests", and "… the language of [the 1990 Act] does not lend any support to [this] suggestion"; and (in paragraph 51) that *Vasiliou* "does not provide any support for the contention that, as a matter of law, the necessity test cannot be satisfied where a ["Grampian"] condition provides for the restriction on development to be lifted in the event of a decision not to confirm the order". The word "necessary" in section 257(1) of the 1990 Act, he said, "does not mean "essential" or "indispensable", but instead means "required in the circumstances of the case" …" (paragraph 53).

26. The judge described the argument accepted by the inspector as rendering condition 13 "effectively defunct". In his view, the "correct approach" was "to seek to give effect to condition 13, rather than no effect, in so far as its language permits and subject to any construction being compatible with section 257 and the decision in [*Vasiliou*]" (paragraph 63). The inspector had misinterpreted the condition and its relationship with the power in section 257 . The language used in it "simply provides for what is authorised, and in one scenario required, according to the outcome of the decision on whether the Order should be confirmed", but "it does not purport to render the Order incapable of confirmation". This much was "plain from exception (i)" (paragraph 66). That "exception", said the judge, "satisfies the necessity test in [*Vasiliou*]", and "cannot be satisfied, and the restriction to 64 houses lifted, unless the merits test is also satisfied" (paragraph 67).

27. The crucial part of Holgate J.'s reasoning is in paragraph 68 of his judgment, where he said:

"68. One of the flaws in the Inspector's interpretation, and the [Secretary of State's] argument, is that it involves reading exception (ii) [in condition 13] in isolation from exception (i), in effect as a freestanding provision. It is not. Exception (ii) refers to the consideration by the Secretary of State of "a lawfully made stopping up order as aforementioned *in point (i)* " (my emphasis). That language makes it perfectly plain that exception (ii) is coupled together with exception (i) and is to be read consistently with it. Both exceptions envisage that the embargo on carrying out the residual part of the development necessitates the making and consideration of a stopping up order under section 257 to divert the

footpath in the manner described. The prohibition on the carrying out of the residual part of the development makes the stopping up order necessary. Thus, the necessity test in [*Vasiliou*] is satisfied in both cases. Both exceptions (i) and (ii) then go on to deal with the effect of the decision as to whether the section 257 order should be confirmed. This involves the application of the merits test in [*Vasiliou*]. The two exceptions differ in that exception (i) deals with the situation where the merits test is satisfied and the order is confirmed, whereas exception (ii) deals with the situation where the merits test is not satisfied and the section 257 order is not confirmed. Consistent with that straightforward and natural meaning of condition 13 in the 2016 permission, exception (ii) refers to the Secretary of State's "consideration" of the order. Thus, an essential difference between the two exceptions is that they address opposite sides of the same coin, the outcome of applying the merits test in [*Vasiliou*], in accordance with the clear objective of the developer in making, and EDC in granting, the section 73 application. The other key difference is that where the order is confirmed, exception (i) in condition 13 *also prohibits* the occupation of the residual 78 houses *until the order comes into force and the diverted footpath route is made available for use* ."

28. The judge therefore identified (in paragraph 69) "three fatal flaws" in paragraphs 22 to 24 of the inspector's decision letter. The three flaws were these:

"69. …

(i) The Inspector's interpretation [of condition 13] fails to give any effect to exception (i) at all. He failed to recognise that it is a ["Grampian"] restriction which not only satisfies the necessity test under section 257 , but in this case also engages the merits test, and imposes the further protection that the diversion must be brought into effect before the residual … homes may be occupied. Of course, if the stopping up order *passes* the merits test it follows that the confirmation of the order is still necessary (and its subsequent implementation) to enable the entire development to proceed. Both the necessity test and the merits test are considered alongside each other.

(ii) Reading condition 13 in 15/1097 as a whole, the ["Grampian"] restraint on carrying out the residual development continues to make the stopping up order necessary until at least the outcome of the merits test is known, and either exception (i) or exception (ii) can be applied. If the merits test is not satisfied, the order cannot be confirmed for that reason and at that point, but not before, the order ceases to be necessary to enable the residual development to be carried out *in accordance with the permission.* Thus, under both exceptions (i) and (ii) the necessity test and the merits test are considered alongside each other.

(iii) Condition 13 does *not* allow the whole scheme to be carried out on the basis that there is no need for the decision-maker to consider the merits test at all, because the stopping up order under section 257 fails the necessity test in [*Vasiliou*] in any event. The draftsman did not manage to create a legally effective exception (i) which satisfies the necessity test in [*Vasiliou*] only to negate his efforts by the mere addition of exception (ii). The Inspector's construction of condition 13 begs the very question which it was designed to test, namely whether the stopping up order would be confirmed after applying the merits test as well as the necessity test. Condition 13 cannot sensibly be interpreted as meaning that the stopping up order was not necessary at all or under any circumstances, or that the whole development could be carried out irrespective of whether the Order was confirmed or not."

Because of his "misinterpretation of the condition and its legal relationship with the use of the power in section 257 ", the inspector had "brought the inquiry abruptly to a halt and … did not embark upon any hearing or determination of the merits test in [*Vasiliou*] as … he ought to have done".

29. Under "exception" ii), said the judge (in paragraph 70), the "prohibition on carrying out the residual part of the development remains in force, and the stopping up order is necessary to overcome that prohibition and enable that development to proceed, unless and until it is decided that the arguments against the proposed stopping up and diversion outweigh those in favour (including the importance of that development)". In his view, this analysis was "entirely consistent with sections 257 and 259 , which empower the making and confirmation of an order which is necessary to enable development to be carried out *in accordance with the relevant permission* , whether the conditions of that permission include

a simple form of ["Grampian"] restriction as in the case of exception (i), or go on to lift that restriction in the event of the order not being confirmed, as in exception (ii)".

Was the inspector's decision unlawful?

30. For the Secretary of State, Mr Tim Buley submitted that the judge's analysis was wrong. The inspector's conclusions in paragraphs 20 to 23 of his decision letter were correct, and his decision not to confirm the Order lawful. In this case, Mr Buley submitted, the only relevant potential obstacle to the progress of the development was condition 13 on the planning permission granted on 9 March 2016. If, under that condition, the development would be able to proceed without the stopping-up and diversion of the footpath, the tests for confirmation could not be met. The critical question for the inspector, therefore, was what would happen if, as "exception" ii) in condition 13 envisages, he refused to confirm the Order – with the consequence that the footpath would not be diverted. As the answer to this question was that his refusal to confirm the Order would not prevent the development from proceeding in accordance with the planning permission, including condition 13, he could only conclude that the requirements for confirmation were not satisfied. Condition 13 did not stand in the way of the development being carried out, in full, if the Order was not confirmed. Inevitably, therefore, the "necessity test" in section 259 was never going to be met – no matter when it came to be applied. The inspector was bound to refuse to confirm the Order, regardless of any view he might have taken of its substantive merits had he gone on to consider them. This being so, no purpose would have been served by his hearing the parties' evidence at the inquiry. He made no error of law in deciding as he did.

31. Mr Buley also contended that the more appropriate statutory procedure in this case was the procedure for a rail crossing diversion order under section 119A of the 1980 Act, whose provisions are tailored for the diversion of footpaths crossing railway lines. If that procedure had been used here, he submitted, the difficulty that has arisen over the interaction between condition 13 and sections 257 and 259 of the 1990 Act would have been avoided.

32. Mr Juan Lopez, for Network Rail, supported Holgate J.'s reasoning and conclusions. The judge's understanding of the word "necessary" in section 257(1) as meaning "required in the circumstances of the case" was, he submitted, correct. Condition 13, properly understood, looked to the Secretary of State to apply both the "necessity test" and the "merits test", and enabled him to conclude that it was appropriate on the merits and consequently necessary for the diversion of the footpath to be authorized and completed before the whole development could proceed "in accordance with the [planning] permission", and to decide, therefore, that the Order must be confirmed – as provided for in "exception" i). Otherwise, the condition would be otiose. In exercising his statutory discretion, the inspector could not lawfully avoid grappling with the considerations for and against the Order being confirmed, including the potential disadvantage and inconvenience to the public if the footpath were diverted, balanced against Network Rail's concerns on railway safety. He had to decide whether the public interest in the Order being confirmed was outweighed by the public interest in its not being confirmed.

33. As to Mr Buley's suggestion that the appropriate procedure here would have been under section 119A of the 1980 Act, Mr Lopez submitted that condition 13 did not provide for that procedure, but for a "footpath and stopping up order" under sections 257 and 259 of the 1990 Act to be made by the council and confirmed, or not confirmed, in that statutory process. In any event, he submitted, whether or not the section 119A procedure might have been appropriate here, there was nothing inappropriate in the council having proceeded as it did.

34. As Mr Lopez accepted, the respondent's notice adds nothing significant to his main argument. If that argument is right, it follows that the inspector wrongly refrained from considering the evidence before him, and, in doing so, he would have been acting in breach of natural justice and unfairly, and unreasonably in the "Wednesbury" sense. If, on the other hand, his approach was correct, there would have been no need for him to consider the evidence, no breach of natural justice or unfairness, and no "Wednesbury" unreasonableness.

35. I cannot accept the argument advanced by Mr Buley. In my view the judge's analysis was, in substance, correct.

36. The logic of Mr Buley's submissions is basically this. The so-called "necessity test" is, as he put it, the "threshold question" to be considered when a confirmation decision is being made under section 259 , and the so-called "merits test" the "second question" – though, he submitted, the "necessity test" must be satisfied at the end of the process, and throughout, rather than merely treated as a preliminary step before consideration of the "merits test". Either way, however, condition 13 on the March 2016 planning permission renders the consideration of a lawfully made stopping-up order on its merits a pointless exercise, because it expressly allows for the development to proceed even if the order is not confirmed. A "Grampian" condition framed in this way contains an insurmountable barrier to confirmation, for the "necessity test" is never going to be met.

37. The difficulty with this argument, in my view, is that it involves a misinterpretation of condition 13 and a misunderstanding of its relationship with the provisions of sections 257 and 259 .

38. The principles relevant to the interpretation of planning conditions are well established. In *Fawcett Properties Ltd. v Buckinghamshire County Council [1961] A.C. 636* , Lord Denning said (on p.678) said it was "the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them", adding that "this applies to conditions in planning permissions as well as to other documents".

39. That observation of Lord Denning was cited in *Trump International Golf Club Scotland Ltd. v Scottish Ministers [2016] 1 W.L.R. 85* , both by Lord Hodge (in paragraph 27 of his judgment) and by Lord Carnwath (in paragraphs 58 and 66 of his). Lord Hodge referred to *R. v Ashford Borough Council, ex parte Shepway District Council [1999] P.L.C.R. 12* and *Carter Commercial Developments Ltd. v Secretary of State for Transport, Local Government and the Regions [2003] J.P.L. 1048* , and went on to say this (at paragraph 34):

> "34. When the court is concerned with the interpretation of words in a condition in a public document such as a [consent under section 36 of the Electricity Act 1989], it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. …."

Lord Carnwath, agreeing with Lord Hodge, said (at paragraph 66):

> "66. … I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was how it was regarded by Lord Denning in the *Fawcett* case …. Any such document of course must be interpreted in its particular legal and factual context. … There are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission …."

40. It seems consistent with those statements of basic principle that, when one is construing a condition imposed by a local planning authority on a grant of planning permission, one should avoid, if one can, a construction that defeats the obvious purpose of the condition, and seek to give it the effect it was plainly meant to have. Otherwise, not only will the condition be deprived of its intended effect as a restriction or control on the grant, but the authority's decision to approve the development may itself be cast into doubt.

41. Condition 13 does not, in my opinion, allow for any dispute as to its purpose and intended effect.

42. The condition is in typical "Grampian" form. Its point and purpose are evident both in its own terms and in the "Reason" for its imposition. It partly restricts the progress – both construction and occupation – of the development permitted by making it depend on events yet to occur through a further statutory process – the process for the making and confirmation of a "footpath diversion and stopping up order", and on a decision being made, one way or the other, in the course of that process. And the "Reason" for the condition explains why: "[to] overcome adjacent public highway safety conflict", and to support the policies of the Local Transport Plan and of the development plan to which it refers.

43. The intended effect of the condition is also quite clear. The condition does nothing to prevent the 64 specified plots being developed in accordance with the planning permission before the further statutory process, under sections 257 and 259 of the 1990 Act, is undertaken, andsubject to compliance with the other conditions imposed – none of which are relevant here. But it does prevent any further development beyond those 64 plots unless one of the two specified "exceptions" has occurred. The use of the word "exceptions" here may be thought slightly odd. But the meaning is perfectly clear. The two "exceptions" are the two alternative outcomes to the performance of the statutory process for the making and confirmation of a stopping-up order whose content is defined in "exception" i). The condition makes it impossible for the 65th and remaining plots to be developed until one or other of those two outcomes has occurred at the end of that statutory process, in a decision by the council or the Secretary of State to confirm or not to confirm the Order. And "[upon] any confirmed diversion and stopping up order coming into force", it also precludes the occupation of the 17 further specified "units" – namely "units 39-48 and 126-132" – until the diversion of the footpath has been put into effect and the new route made available for use.

44. Essential to understanding how condition 13 regulates the carrying-out of the development is to recognize that it contains not merely one "Grampian" restriction, but two. These two controls operate together, in sequence. Both entail the performance of the statutory process under sections 257 and 259 . The first "Grampian" restriction applies to the construction of dwellings on the 78 plots beyond the 64 specified in the condition. None of those "units" can be built until the statutory process has been fully performed and its result is known. Under the restriction on construction the development of those particular "units" must await the outcome of the statutory process – either the confirmation or the non-confirmation of the "footpath diversion and stopping up order". The second and additional "Grampian" restriction is different. It bites on the occupation of the 17 specified "units". And it depends upon the outcome of the statutory process – that is, whether the stopping-up order has been confirmed – "exception" i) – or not – "exception" ii). Under this restriction – the "other key difference" to which the judge referred – the occupation of all 142 dwellings for which the planning permission was granted is only possible in the stipulated circumstances. The restriction cannot work unless the statutory process is performed. And it is engaged if, but only if, the outcome of the process is that the order has been confirmed. If the order is not confirmed, the limitation on the particular "units" in the development that may be occupied is not activated. But if the order is confirmed and comes into force, it is. In that event, the development may only be fully occupied when the "new footpath route" has been completed and is capable of being used by members of the public, including those who will live in the new dwellings on the site. Under this second "Grampian" restriction, therefore, there are two distinctly different consequences according to the two possible outcomes of the statutory process.

45. All of this emerges on a straightforward reading of the condition. Nothing has to be implied, nor is there any need to look at extraneous documents or material.

46. That "exceptions" i) and ii) require the statutory process under sections 257 and 259 to be performed in full is, I think, clear. Compliance with both of the two "Grampian" restrictions in the condition can only be achieved when that has been done. As the judge observed (in paragraph 68 of his judgment), both exceptions envisage that the embargo on carrying out the residual part of the development necessitates the making and consideration of a stopping-up order. Because this prohibition on the carrying out of the residual part of the development makes the stopping-up order necessary, the "necessity test" is,

as he said, "satisfied in both cases". As he also said, both "exceptions" deal with the effect of the decision as to whether the Order should be confirmed, and "[this] involves the application of the merits test" (ibid.). If the "merits test" is satisfied, the confirmation of the Order, under "exception" i) is still necessary to enable the entire development to proceed. If, however, the "merits test" is not satisfied, the Order cannot be confirmed for that reason, and at that point, but not before, it ceases to be necessary to enable the residual development to be carried out in accordance with the permission. Thus, for both exceptions, the two tests are, as the judge put it, "considered alongside each other" (paragraph 69). Which of the two "exceptions" applies, and which of the alternative consequences of those two "exceptions" arises, will only become apparent once the process is complete and a decision has been made.

47. "Exception" ii) refers to the "consideration" of the stopping-up order referred to in "exception" i), once lawfully made. Either alternative will be, and can only be, the result of that "consideration". Whether it is "necessary" to authorize the stopping-up or diversion of the footpath "in order to enable the development to be carried out in accordance with [the] planning permission" depends on the outcome of a substantive consideration of the stopping-up order itself on its merits, including, in particular, the implications for public safety – whether, in the balance of all relevant considerations, the need "[to] overcome adjacent public highway safety conflict" should prevail. It will become "necessary" to authorize the Order, in that statutory sense, if the decision-maker, having considered the order on its merits, concludes that it ought to be confirmed.

48. There is no basis for taking the concept of "consideration" in condition 13 to mean anything less than a complete assessment of the need for the Order to be confirmed, in accordance with the statutory scheme. In that assessment, as the judge recognized, the "necessity test" and the "merits test" are applied in conjunction with each other. The parameters for it are firmly set by the condition itself. Under the condition, the opportunity to assess the cases for and against the confirmation of an order incorporating the defined stopping-up and re-routing of the existing footpath is given to the decision-maker in the statutory process, in this instance an inspector appointed by the Secretary of State, before the development can proceed beyond the 64 specified plots. The inspector must make his decision at that stage, having in mind the "Grampian" restrictions on construction and occupation provided in the condition. In the light of those restrictions, he must consider whether the development should be permitted to progress further without a confirmed order in place, given the increase in use of the existing "Carlisle-Settle public railway crossing" that would be likely to come about if it did. In deciding whether or not the Order ought to be confirmed, he must ultimately judge for himself whether in all the circumstances it is "necessary" to authorize the stopping-up and diversion of the footpath to enable the development of 142 dwellings approved by the planning permission to proceed subject to the "Grampian" restriction applicable in the event of an order being confirmed and coming into force – and thus, in that respect, "in accordance with the permission" as the statute provides. If he concludes that this is "necessary", he confirms the Order. He does so knowing two things: first, that in accordance with the condition, the whole development can now go forward, but that it will only do so with a confirmed stopping-up order in place; and also, secondly, that the development can only be occupied in its entirety once "the new footpath route" has been "fully completed". If, on the other hand, he concludes that it is not "necessary" to authorize the stopping-up, he does not confirm the Order, and the consequences then are quite different: first, that the development can proceed without a confirmed order in place, and secondly, that it can also be occupied to its full extent without further restriction under the condition. That, in my view, is how the "Grampian" restrictions in the condition operate in synergy with the statutory provisions.

49. Understood in this way, the provisions of condition 13 are entirely consistent with, and respect, the statutory scheme for the making and confirmation of a stopping-up order. They do not pre-empt that process, or dictate its result. They acknowledge that it involves a determination being made on the confirmation of the Order as a distinct exercise of statutory discretion, separate from, and in addition to, the determination of an application for planning permission. The scope of that exercise is not controversial. It was thoroughly considered and explained by this court in *Vasiliou* (see paragraphs 14 and 15 above). We do not need to add to that explanation, or venture into any further discussion of the "necessity test" and the "merits test" as components of the decision-maker's discretionary jurisdiction under section 259 .

50. Under the condition, properly construed, the decision-maker charged with determining whether or not a lawfully made stopping-up order ought to be confirmed – here the Secretary of State through his inspector – is required to consider the necessity for the stopping-up or diversion to be authorized, in the manner described, to enable the development to be carried

out "in accordance with" the planning permission, having had regard to the possible advantages and disadvantages of this being done. Condition 13 does not break the integrity of that process, or intrude upon it. The condition expressly contemplates the possibility of the decision-maker confirming the Order, which must involve his being satisfied that it is, in the words of section 259(1A)(b) , "necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission". Inherent in the condition, therefore, is the need for that process to be gone through fully, and the decision-maker's statutory discretion exercised freely in applying both the "merits test" and the "necessity test".

51. The correct analysis here, therefore, is that it is for the decision-maker in the stopping-up order process to decide whether both tests are met or not. This part of the statutory process is left exclusively where it belongs, with the decision-maker in that statutory process. It is not predetermined by condition 13. If, having fully applied both the "merits test" and the "necessity test" in the course of his consideration of the stopping-up order, the decision-maker concludes that the confirmation of the Order is justified, the condition does not debar him from making that decision. In that event the confirmation of the Order will have become "necessary" through the operation of condition 13, in accordance with the terms of the condition and the reason for its imposition, and thus in accordance with the planning permission itself. The potential necessity for the Order to be confirmed, authorizing the stopping-up or diversion, and the need for that question to be addressed and resolved by the decision-maker under section 259 , is thus intrinsic to the condition. The condition does not make confirmation unnecessary simply by spelling out the possible outcomes of the statutory process in which necessity has to be considered.

52. This analysis does not ignore the "necessity test". On the contrary, it gives that test its proper role in the statutory process. It recognizes that, when he is considering whether the stopping-up order should be confirmed under section 259 , the decision-maker must apply the "necessity test" himself in the light of his conclusions on the "merits test", and that this is what condition 13 both allows and expects him to do. Under the condition the application of both tests is indispensable, and there are two possible scenarios – either that they are satisfied or that they are not, each with consequences of its own.

53. For at least three reasons, in my view, the interpretation of condition 13 urged upon us by Mr Buley, and rejected by the judge, cannot be right.

54. In the first place, it requires one to accept that condition 13 predetermines the outcome of the very statutory process for which it provides, by detaching the "necessity test" from the "merits test", reading the condition as having, effectively, forestalled the performance of the decision-maker's task under section 259 , and thus making the outcome an automatic refusal to confirm the Order. This is to assume that the council misunderstood the statutory process for the confirmation of a stopping-up order, or that it unintentionally frustrated that process and with it the operation of the "Grampian" restrictions in the condition by framing the condition to anticipate each of the two possible outcomes the process could have. In effect, therefore, when determining the application for planning permission as local planning authority, the council would have had taken upon itself, and performed, the statutory role of decision-maker in that distinct and separate statutory process. It would have decided, before that statutory process had even begun, that it was not "necessary" to authorize the stopping-up and diversion of the footpath to which the condition refers, and therefore that the Order should not be confirmed.

55. Secondly, simply as a matter of construction, this understanding of condition 13 does not work. It overlooks the fact that the condition provides expressly for a stopping-up order being made, for the possibility of that order being confirmed, and for the particular consequences of that decision, which it would have had no need to do if the Order could never be confirmed in any event. This introduces into the condition a contradiction that Mr Buley's argument cannot avoid and does not explain.

56. Thirdly, therefore, a consequence of Mr Buley's interpretation of condition 13 is that the condition becomes self-defeating, and the statutory process in sections 257 and 259 of the 1990 Act ineffective. As the judge recognized, it reads the condition as negating the "consideration of a lawfully made stopping up order" to which it refers, whereby the decision-maker establishes for himself, on the evidence before him, whether it is "necessary to authorise the stopping up or diversion in order to enable

the development to be carried out in accordance with the permission". On Mr Buley's construction of the condition, this would always be a futile endeavour – because the condition does not impede all 142 dwellings being built whether or not a stopping-up order is confirmed. So, it is said, the "necessity test" will invariably be failed. The "consideration" of the Order would then be short-circuited, with the unavoidable result that confirmation is refused, however strong the case for it may be on the merits. The condition would be rendered redundant – in the judge's words "effectively defunct" – and therefore unreasonable too. In effect, the council would have set up the statutory process to fail. And in doing so it would have nullified the "Grampian" restrictions it had imposed to control the carrying-out of the development under the planning permission. This is not merely an unattractive conclusion, but also, in my view, mistaken.

57. It seems to me, therefore, that the judge was right to conclude as he did. The inspector's approach was in error, and his decision unlawful.

58. That is enough to dispose of the appeal. So there is no need to consider the submissions Mr Lopez based on the respondent's notice.

59. Finally, I should add this. Mr Buley may have been right to submit that in the circumstances here a more appropriate means of achieving the diversion of the footpath would have been the procedure for a "rail crossing diversion order" in section 119A of the Highways Act 1980 . But this does not mean that the council was wrong to provide as it did in condition 13 for the process under sections 257 and 259 of the 1990 Act.

Conclusion

60. I would therefore dismiss the appeal, and uphold the judge's order.

Lord Justice Flaux

61. Although I see the force of Lewison LJ's contrary views, I agree with Lindblom LJ that the appeal should be dismissed for the reasons he gives in his judgment. I find the three reasons he gives at [54]-[56], as to why the appellant's construction of condition 13 cannot be correct, particularly compelling.

Lord Justice Lewison

62. I have read the judgment of Lindblom LJ in draft, and I agree with much of what he says. Specifically:

i) I agree that the correct approach to the interpretation of planning permissions is as set out by the Supreme Court in *Trump* .
ii) I agree that, in accordance with normal principles of interpretation, one should try to validate a provision if possible; and that an interpretation should not defeat the purpose of the provision, unless no other interpretation is possible.
iii) I agree that the purpose of condition 13 was to overcome the council's concerns about highway safety.
iv) I agree that the council envisaged that there would be a full consideration of both the necessity and the merits of a stopping up order.

63. The overall purpose of condition 13 seems to me to have been to leave the ultimate question whether the highway should be stopped up to the Secretary of State.

64. But the question for me is: did the council exercise the appropriate statutory power in making the stopping up order under section 257 , which then required confirmation under section 259 ? The planning authority cannot by means of a condition confer on the Secretary of State a statutory jurisdiction that he does not have. Whether section 257 was the appropriate statutory power seems to me to be a question of construction of the *statute* ; not a question of construction of the *condition* . On that question I respectfully disagree with Lindblom and Flaux LJJ. Since I am in the minority, I will state my reasons shortly.

65. Mr Buley did not suggest that under section 259 the "necessity test" was a prior ("threshold") or overriding test to which the "merits test" was secondary and subordinate. As I understood his submission it was that the necessity test must be satisfied at some stage, whether it is considered before, after, or in conjunction with the merits test. That that is so is, in my judgment, plain both from the words of the section and also from *Vassiliou* : (see per Nicholls LJ at 512). Indeed, the necessity test is the only test for which sections 257 and 259 explicitly provide. The merits test arises only because the sections do not compel stopping up merely because it is necessary to enable development to go ahead. So I agree with Mr Buley that the necessity test must be satisfied at some stage.

66. It seems to me that Mr Buley's submission can be tested in this way. Suppose that on consideration of the merits, an inspector decided that the council's concerns about highway safety were misplaced. He would refuse to confirm the order. But in that event the development could go ahead. There would have turned out to be no necessity for the stopping up order to be made. Suppose that, on the merits, an inspector decided that although the council's concerns about highway safety were justified, there were so many countervailing considerations that the order should not be confirmed. In that event the development could also go ahead. So again it would have turned out that there was no necessity for the stopping up order. Suppose, on the contrary, that the inspector decided that on the merits it would be desirable for the highway to be stopped up and re-routed. What is it in those circumstances that makes it *necessary* for that to be done in order to allow the development to proceed? I cannot see anything. We have seen that in the previous two hypothetical scenarios refusal of confirmation did not prevent the development. Nor would it in the third. Accordingly, I agree with Mr Buley that the logical conundrum is inescapable. Whichever way the inspector decides the merits test it is never *necessary* to stop up the highway under section 259 in order for the development to proceed. That being so, there is no point in his embarking on that exercise.

67. However, I must stress that I do not consider that this conclusion would invalidate either the condition or the grant of planning permission. Condition 13 does not tie itself to the exercise of any particular statutory power to stop up highways. As Lindblom LJ has said, section 119A contains a specific power to divert a footpath crossing a railway. That section does not contain the necessity test that is inherent in section 259 . So what has gone wrong is not the imposition of condition 13, or the way in which it is expressed, but the statutory method chosen by the council to attempt to implement it. That is a purely procedural question. The council can still obtain its objective of leaving the decision to the Secretary of State. It simply needs to choose a different route by which to bring the matter to his attention.

68. I would have allowed the appeal.

Scottish Widows plc, Scottish Widows Unit Funds Ltd, Aegon UK Property Fund Ltd v Cherwell District Council v LXP RP (Banbury) Ltd, Prodrive Holdings Ltd, Prodrive Motorsport Ltd, Hundred Percent Properties Ltd, Mr David Richards

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
17 December 2013

Case No: CO/2572/2013

CO/2675/2013

High Court of Justice Queen's Bench Division Administrative Court

[2013] EWHC 3968 (Admin), 2013 WL 6536582

Before: The Honourable Mr Justice Burnett

Date: Tuesday 17th December 2013

Representation

Jeremy Cahill QC and James Corbet Burcher (instructed by Dundas and Wilson LLP) for the First and Second Claimants.
Paul Tucker QC and Anthony Gill (instructed by Nabarro LLP) for the Third Claimant.
James Findlay QC and Hugh Flanagan (instructed by Cherwell District Council) for the Defendant.
Christopher Katkowski QC and Graeme Keen (instructed by Marrons Solicitors) for the First Interested Party.

Judgment

The Hon Mr Justice Burnett:

1. On 18 December 2012 the defendant, Cherwell District Council, granted planning permission to the first interested party ("LXB Properties") for the redevelopment of a site known as "Banbury Gateway". Existing buildings were to be demolished and a retail park built to include flagship stores for Marks & Spencer and Next, together with smaller shops and three associated restaurants and cafes. The site is immediately adjacent to the M40 at its Banbury junction. The site is currently occupied by the Prodrive group of companies ("Prodrive") but it is too small for their needs. They have contracted to buy another larger site in Banbury, known as the Hella Site, and have obtained planning permission to build new premises. They are doing so with a view to a substantial expansion of their activities, with increased employment for local people. LXB Properties own both sites. The two developments are commercially linked. Subject to the grant of planning permission on the Gateway site, Prodrive are obliged to give vacant possession and purchase the alternative site. Prodrive have consistently explained that they need more space for expansion and would like to achieve it in Banbury where many of their current employees live. The redevelopment of the existing (Gateway) site is essential for financial reasons to enable the construction of new premises at the alternative site.

2. These two claims for judicial review are brought by the Scottish Widows plc group ("Scottish Widows") and Aegon UK Property Fund Limited ("Aegon"). Scottish Widows are the long leaseholder of the Castle Quay Shopping Centre in Banbury. Their entirely legitimate commercial concern is that business may be sucked away from the town centre should the

development of Banbury Gateway go ahead. Aegon owns the Banbury Cross Retail Park on the northern edge of Banbury town centre and have similar legitimate commercial concerns.

3. These claims come before me as rolled-up applications for permission to apply for judicial review pursuant to the order of Hickinbottom J of 29 May 2013. The grounds advanced collectively by the claimants may be summarised in this way:

i) The Council failed to understand and apply the 'sequential test' and the possibility of 'disaggregating' the development by recognising that aspects of it could be accommodated in the town centre, in accordance with PPS4 and the National Planning Policy Framework ["NPPF"];
ii) The Council's conclusion that the development would not damage the vitality and viability of Banbury town centre was incorrect and not open to it on the evidence available;
iii) The summary reasons given for the grant of planning permission were inadequate as regards both (i) and (ii);
iv) The Council failed to secure section 106 agreements which obliged Marks & Spencer to maintain their town centre store for at least five years after opening one at Banbury Gateway, and Prodrive to maintain their operation at the Hella site for an unspecified period. This was unlawful because:

a) The Council's planning committee based its decision to grant planning permission on the basis that such agreements would be executed (delegating authority to the Chairman and officials); and
b) The only proper conclusion was that such agreements were 'necessary' and it was therefore *Wednesbury* unreasonable not to insist upon them.

4. I grant permission, but for reasons which follow the claims will be dismissed.

5. Whilst a very substantial volume of factual material was placed before the court the surrounding facts can be summarised relatively briefly to enable the legal contentions to be understood. LXB Properties well recognised that it was necessary to deal with the sequential test, disaggregation and the impact of their proposed development upon Banbury town centre as part of their application. To that end they instructed White Young Green ("WYG") to provide their expert opinion on all material planning issues. The Council instructed CBRE to review the work undertaken by WYG and advise on the same issues. Scottish Widows instructed Turleys and Aegon instructed Savills. WYG concluded that the sequential test was satisfied, that disaggregation was not feasible and that the impact on Banbury town centre was not such as to put the proposal in conflict with applicable planning policy. To a greater or lesser extent CBRE, Turleys and Savill disagreed with the conclusions reached by WYG.

6. The Planning Committee met to consider the application on 22 March 2012. A detailed and comprehensive report was prepared by Jane Dunkin on behalf of the Council's Head of Public Protection and Development Management ["HPPDM"]. It is accepted by all parties that the report was an impressive piece of work that set out the competing views of the experts. The conclusions of CBRE were summarised. Their overall conclusion was that the sequential test was not satisfied and that whilst the impact on the town centre "may not be significant", the proposed development would jeopardise investment in two town sites (Bolton Road and Canalside). The report noted that either of these points "would justify refusal of the application" (paras 3.17 and 3.17.1). The report identified a series of "key issues" which included, amongst much else, "Sequential Assessment and Retail Impact".

7. Section 5.5 of the report dealt with the sequential test and retail impact. It was noted that because the site was an out of town centre location and not allocated for retail development,

"PPS4 requires the applicant to demonstrate that there are no sequentially available sites that are available, suitable and viable, and that there would be no significant adverse impacts, in terms of impact on centres and in terms of wider environmental, economic and regeneration impacts. The applicant has produced a Retail Assessment and an Addendum to that Assessment to address these matters. They are available to view via the Council's website."

8. What then followed was an analysis of the competing views of WYG and CBRE. In summary:

i) WYG considered the availability of Banbury sites as alternatives for some or all the retail floor space proposed for Banbury Gateway. CBRE initially considered that Bicester and Kidlington should be considered, but accepted the explanation of WYG why that was inappropriate (subject to disaggregating some of the proposed development) (5.5.3).
ii) WYG argued that a critical mass of development was needed at Banbury Gateway, in other words that by disaggregating and requiring some of the retail space to be located in the town centre, the development would not be commercially attractive. CBRE disagreed. They and HPPDM thought there was scope to locate some of the smaller retail units on sequentially preferable sites. There was a question whether the restaurant units could be located elsewhere, but CBRE agreed that possibility was not a sound reason to dismiss the whole development. The report noted that "if it *is* considered reasonable to disaggregate some of the units … CBRE considers there is a case for widening the search area to … Bicester and Kidlington." (5.5.4)
iii) The availability of sequentially available sites was assessed by WYG in the short to medium term, that is three to five years. The criterion is whether a site is available now or within a reasonable time. They considered that a relatively short timescale was necessary because of 'retail leakage' from Banbury, of which CBRE were unconvinced. WYG thought there was an urgent need to improve Banbury's overall market share. CBRE disagreed and so concluded that the search for alternative sites, for the purposes of the sequential test and disaggregation, should encompass a longer timescale (5.5.5.i and ii).
iv) CBRE thought that the Bolton Road site would be available in the long term and should be not be discounted for the purposes of this aspect of the application. They agreed with WYG that Bolton Road could not accommodate the whole development but CBRE considered that some of the retail space could be located within Bolton Road. They concluded that WYG "had not done enough to render this site unsuitable for consideration" and that Bolton Road was "available, suitable and viable and as such they are not satisfied that the site is not sequentially preferable, i.e. capable of taking some of the development proposal at the application site." HPPDM agreed. Policy EC17 of PPS4 specified that unless there was compliance with the sequential approach permission should be refused. Both CBRE and the Head of Planning advised that planning permission should be refused on this ground alone. (5.5.5.iii – vii).
v) They agreed with WYG that the Canalside site was not sequentially available.
vi) If, contrary to the views of CBRE and the HPPDM, the sequential test was satisfied, the Committee would need to move on to consider the impact of the proposal on the town centre. The report continued

> "PPS4 states that if it is considered that the proposed development would have a significant adverse retail impact the application must be refused. If however it is considered that the impacts would not be significant, the application must be determined taking account of the positive and negative impacts and any other material considerations." (5.6.2)

vii) CBRE considered that WYG had not provided sufficient material in support of their conclusion that the impact on the town centre trade would be "only" 3.4%. They wished to know more about who was likely to take up the smaller units, eight in number, in the proposed development in addition to Marks & Spencer and Next in the flagship stores. They accepted that "comparison" shopping trips were likely to be diverted to Banbury from other towns (that is shopping by going in and out of a number of different shops looking for a particular type of item) and also that the new flagship stores would be a draw. Nonetheless, CBRE thought that the impact on the town centre had been underestimated. (5.6.3 and 5.6.4)
viii) CBRE agreed that the most significant diversions of trade would come from out of centre locations so there would be no immediate significant impact upon the overall vitality and viability of the town centre. They were concerned about the long term future of the Marks & Spencer and Next stores in the town centre. Next had committed to the town centre until the expiry of its current lease, in 2016 and Marks & Spencer had provided a letter of comfort stating that they would remain in the town centre. But there was no formal obligation upon either to remain there. CBRE was concerned that because the flagship store (designed to cover the entire range of Marks & Spencer stock) would include a food hall, that would discourage trips to the centre of Banbury. (5.6.5)
ix) CBRE and WYG disagreed about the impact of the proposal on future plans to develop the Bolton Road area of Banbury, because the long term aim is to attract large retail units there, to complement smaller units. CBRE was concerned about investor confidence in the town centre, particularly if the future of Marks & Spencer and Next was uncertain. Overall, CBRE considered that there was "a strong possibility that the proposal will hinder the delivery of the scheme at Bolton Road" (5.6.6)

x) CBRE stated that no account had been taken of job losses in the town centre, but recognised that the overall impact of the proposal would be likely to increase employment in Banbury. (5.7)

9. I shall set out Jane Dunkin's conclusion on these aspects of the application for planning permission in full:

"5.5.8 Conclusion on Sequential Assessment and Town Centre Impacts

5.5.8.i The proposed development does not accord with Policy EC17 of PPS4 as WYG has not demonstrated compliance with the requirements of the sequential approach for the following reasons:

- There is no convincing argument that some of the A1 [1] units could not be disaggregated
- Banbury's market share does not need to be urgently improved therefore the Bolton Road site must be considered as an available site
- The Bolton Road site is sequentially preferable and could accommodate some larger A1 units alongside a convenience goods retail offer

[HPPDM] agrees with these conclusions and therefore, based on the advice in accordance with Policy EC17, planning permission should be refused solely on these grounds.

5.5.8.ii Notwithstanding the above conclusions, the proposal would have significant impacts upon the town centre as set out below:

- Banbury Gateway would exist as a standalone destination due to the presence of A3 [2] units and a food hall therefore discouraging linked trips to the town centre
- Even is M&S and Next agree to retain a presence in the town centre this could only be secured over a short time period. Their loss would reduce investor confidence in the town centre
- The proposal would hinder the delivery of the Bolton Road site thereby negatively impacting upon planned investment

[HPPDM] considers that these impacts would be significant and as such the application does not accord with policy EC16 and PPS4."

10. Legal agreements under section 106 of the Town and Country Planning Act 1990 were mentioned in various places in the report. It was envisaged that a section 106 agreement would be needed to secure a substantial contribution towards public art, transport services and the like. In paragraph 5.18 Jane Dunkin returned to the content of any section 106 agreement:

"As the application is recommended for refusal a s106 agreement is not required. If the recommendation is not accepted however, an agreement would be needed to secure the highway infrastructure contributions, security CCTV, public art a shuttle bus, the retention of M&S in the town centre and the retention of Prodrive in Banbury."

11. In conclusion, Jane Dunkin reiterated that she was not satisfied that the development could not be disaggregated. It was also her view that the development would have a significant impact on Banbury town centre. Additionally, she considered that the design and layout was of poor quality. All other matters had been satisfactorily addressed. She brought her thoughts together in paragraph 5.19.6:

> "For the reasons given the application is considered to be unacceptable in planning terms as it does not demonstrate compliance with the sequential approach and would have significant impacts upon Banbury Town Centre and planned investment, furthermore the application is considered to be unacceptable by virtue of its design and layout. However, members are reminded of the context of the application as set out in para 5.1 of this report which is that Prodrive wish to move to the Hella site. This is clearly a finely balanced judgement however the recommendation is one of refusal for the reasons set out below."

Those draft reasons for refusal clothed these conclusions in the language of planning policies.

12. There was an extensive discussion amongst the members of the Planning Committee before they voted on the proposal. They also heard from representatives of all the parties now before the court. On behalf of the claimants, both Mr Cahill QC and Mr Tucker QC developed arguments in their written material, by reference to transcripts of the meeting, which sought to analyse comments made by various councillors with a view to demonstrating that they individually and collectively misunderstood the principles applicable to the decision (despite the clarity of the report and underlying documentation). There was criticism of the observations of some of the councillors regarding the sequential test. That said, the motion eventually moved upon which the councillors voted was for:

> "… approval subject to further conditions delegated to officers in consultation with the Chairman based on a balanced view that the application meets the requirements of the sequential approach laid out in PPS4…"

The councillor who moved the motion methodically went through both the sequential test and town centre impact in his observations.

13. The motion was carried by 11 votes to 2, with two abstentions.

14. The planning permission was eventually granted on 18 December 2012. Article 31(1)(a) of the Town and Country Planning (Development Management Procedures) (England) Order 2010 required Council to give summary reasons for the grant of planning permission. With effect from 25 June 2013 article 31 was amended so that there is no longer any statutory obligation to give reasons. These were the summary reasons which accompanied the Notice of Decision:

> "The Council, as local planning authority, has determined this application in accordance with the development plan unless material considerations indicated otherwise. The development represents investment in Banbury which is considered to be economically important and is acceptable on its planning merits. It would not result in an unacceptable loss of existing employment land, would protect the vitality and viability of Banbury Town Centre and would not result in unacceptable transport impact or be a risk to highway safety. The development is considered to be acceptable in terms of its landscape impact, design and layout and its subsequent impact upon residential, visual and public amenity and would not result in causing harm to the existing public right of way which crosses the site, public safety, biodiversity, ecology, trees, air quality or archaeology. Furthermore, the development would not be at risk from land contamination or significantly contribute to flood risk or climate change. As such the proposal is in accordance with [19] Policies … of the South East Plan 2009, [14] Policies … of the Cherwell Local Plan and Government guidance contained within the National Planning Policy Framework. For the reasons given above and having regard to all other matters raised including third party representations, the Council considers that the application should be approved and planning permission granted subject to appropriate conditions, set out above."

The Notice of Decision had recited the details of those conditions and the section 106 agreement. There is no reference in these summary reasons to PPS4. That is because it had been superseded by NPPF, which was referred to, shortly after the meeting of the Planning Committee in March 2012.

15. It has been common ground that such differences as there are between PPS4 and NPPF as regards the sequential test and disaggregation were immaterial to the question whether planning permission should be granted. But the change of applicable policy meant that the decision had to return to the Planning Committee for further consideration. On 24 May 2012 the Planning Committee considered a report from HPPDM inviting members to reconsider a number of decisions which had been governed by planning statements and guidance recently superseded by NPPF. The recommendation was that the earlier decision should be affirmed because NPPF did not have a "significant bearing" on what had gone before. However, the importance of the process was that the report reprised the "key issues" that had arisen in connection with the application and distilled the effect of the Committee's earlier conclusion. Among the key issues identified were "sequential assessment and retail impact". The report noted

> "Members accepted the retail sequential and impact tests that were carried out in association with the development and did not consider that it would have an impact upon existing and planned town centre investment and would encourage linked trips to the centre via the proposed shuttle bus. Members therefore concluded that the development would not have an impact upon the vitality and viability of Banbury Town Centre which accords with guidance on ensuring the vitality of town centres contained within the NPPF."

HPPDM (to whom delegated authority had been given) advised that it was still appropriate to seek a section 106 agreement with the developer, to which both Cherwell District Council and Oxfordshire County Council would be party.

16. The Committee re-affirmed its earlier decision, and delegated to HPPDM the drafting of the statutory summary reasons.

Grounds 1 and 2: The Sequential Test/Disaggregation; The Impact Test

17. The claimants did not submit that the only lawful outcome of this application for planning permission was refusal. However, they submitted that on the material before them the only conclusion which the Planning Committee could come to on the sequential test was that the applicants, through WYG, had failed to demonstrate that it was met. Additionally, they submitted that the Council misunderstood or failed to apply the sequential test. In support of that second submission they pointed to observations made by individual councillors in the course of debate which, it was suggested, show a misunderstanding of the sequential test.

18. The core submission of the claimants on ground 2, as with ground 1, was that on the material available to them the only conclusion which the Planning Committee could come to was that there would be significant damage to the vitality and viability of the town centre were the application for planning permission to be granted.

19. The sequential test was *considered by the Supreme Court in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13* . The wider importance of the case is to establish that the interpretation of policy is a matter for the court. The sequential test may be summarised as requiring that preference should be given to town centre sites, where sites or buildings *suitable* for conversion are available, followed by edge-of-centre sites, and only then to out-of-centre sites in locations. Much of the debate before the Supreme Court centred on what was meant by "suitable" in this context. Lord Reed stated:

> "24. I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the appellants' primary contention is that the word "suitable"…[means] "suitable for meeting identified deficiencies in retail provision in the area", whereas the respondents proceeded on the basis of the construction placed upon the word by the Director of City Development, namely "suitable for the development proposed by the applicant". I accept, subject to a qualification which I shall shortly explain, that the Director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.
>
> 25. First, that interpretation appears to me to be the natural reading of the policies in question. … Read short, Retailing Policy 4 of the structure plan states that proposals for new or expanded out of centre retail developments will only be

acceptable where it can be established that a number of criteria are satisfied, the first of which is that "no suitable site is available" in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word "suitable", in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out of centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

26. Secondly, the interpretation favoured by the appellants appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a "suitable" site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping provision which cannot be met in a sequentially preferable location. If "suitable" meant "suitable for meeting identified deficiencies in retail provision", as the appellants contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

27. Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out in para 6 above. They provide further support for the respondents' interpretation of the policies. Paragraph 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Paragraph 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

28. I said earlier that it was necessary to qualify the statement that the Director and the respondents proceeded, and were correct to proceed, on the basis that "suitable" meant "suitable for the development proposed by the applicant". As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc and Redcar and Cleveland BC [1998] JPL 23* , 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable."

20. The claimants' criticism based upon comments made by individual committee members was pressed only *sotto voce* in oral argument for two reasons. The first was practical and the second legal. The practical reason was that a number of those who voted made no observations at all, and others made no observations on this aspect of the application. Others addressed the matter with obvious understanding of the concept, especially Councillor Mallon, who took a leading part in the debate.

21. The legal reason stemmed from the consistent approach in authority that caution is required when trying to extract from a general discussion the reasoning of a corporate body; and that what is said in debate does not necessarily reflect the views

of an individual at the time that he votes *R v Poole ex parte Beebee [1991] 2 PLR 27* at 31. The claimant relied upon *R v Exeter City Council Ex parte J.L. Thomas &Co. Ltd [1991] 1 QB 471* at 483 — 484 in support of the proposition that it is permissible to look at the general tenor of the transcript to detect whether the councillors have misunderstood the policy they are applying. But one must be cautious of attributing too much significance to the speeches of only a few of the voting majority –as Simon Brown J (as he then was) said in Exeter City Council echoing R v London County Council [1951] 2 KB 471 per Buckley and Pickford LJJ at 489.

22. The insuperable problem which the claimants have in this case of making anything of the comments made by the councillors on this ground (and indeed the next) is that the material issue was stated with clarity in the Report and set out in the experts' reports from WYG and CBRE. Furthermore, there were contributions from professionals at the meeting itself directed towards the issue. Contrast that with the position that obtained in *R (Lanner Parish Council) v Cornwall County Council [2013] EWCA Civ 1290* , where the report from officials demonstrated a misunderstanding of the relevant policy which was reflected in the minutes and committee discussion.

23. I am entirely unpersuaded that the Planning Committee misunderstood the sequential test. The question is whether, as the claimants submitted, the material before the Planning Committee was such that they could not properly be satisfied that the sequential test was met.

24. There was a strong view held by CBRE and agreed by HPPDM that the applicants had failed to demonstrate that the sequential test was met. However, on no fair reading of the Report could it be suggested that HPPDM considered that there was only one answer to the question whether the sequential test had been met. Neither can it be said that CBRE expressed themselves in a way which suggested that there was only one answer. CBRE addressed their conclusions to the officials and commented

> "If, however, officers are content that the sequential approach has been satisfied and the adverse impacts will not be significant, the positive and adverse impacts of the scheme will need to be weighed against one another."

25. Thus, as this comment makes clear, there was room for two views about whether the sequential test was met and also on the question whether the development would have a significant adverse impact on the town centre.

26. It was for HPPDM to advise upon, but for the Planning Committee to decide, the question. HPPDM and officials were entitled to their own view of the strength of the competing contentions of the experts, but it was for the Planning Committee to evaluate that evidence and make its own planning judgement bringing its local knowledge to bear. Detailed criticism of aspects of the work undertaken by WYG carry the claimants nowhere in the absence of a convincing submission that there was no basis upon which the Planning Committee could properly and rationally conclude that the sequential test was met. That provides a very high hurdle. It suggests that despite all the work done by WYG, for the very purpose of demonstrating that the sequential test was met, not only had they failed to do so (as a matter of legitimate difference of opinion), but that they were so far from doing so that their evidence, professional opinions and conclusions were, for these purposes, worthless. It suggests that CBRE were wrong to work on the basis that there was room for two views and it also suggests that HPPDM was wrong to recognise in the Report that the Planning Committee had a choice on this issue.

27. The claimants make the case that WYG had not gone far enough to demonstrate that the sequential test was satisfied. To my mind they fail to recognise the central feature of the proposed development, namely the need for a critical mass of shops and supporting catering facilities, which cannot be delivered elsewhere in the medium term. But that is to enter into the merits, which is not the function of the court. The factual question for the Planning Committee was one which called for evaluation of conflicting evidence and opinion and the exercise of planning judgment by the Planning Committee. From the

mass of material placed before them, its members were entitled to conclude that the applicants had surmounted this particular hurdle by demonstrating that the sequential test was met.

28. The same considerations apply to the issue relating to the impact of the new development on Banbury town centre, which is the subject matter of ground two. The issue was intimately connected with the question whether Marks & Spencer and Next would maintain their town centre stores for the periods in respect of which they gave assurances — Next until the expiry of its current lease in 2016 and Marks & Spencer for much longer. The Planning Committee was entitled to take those public assurances into account. The impact on the town centre would depend not only on that, but also on the extent to which shopping trips currently destined for the town centre would be diverted to the Banbury Gateway, and on the extent to which new business would be brought to Banbury town centre as a result of shopping journeys generated by the development. Retail experts can bring their considerable experience to bear to provide estimates based, in particular, on impacts measured in comparable situations. It is not a science. It is suggested by the claimants that WYG significantly under-estimated the adverse impacts. That conclusion was reflected in the advice given by HPPDM that

> "the development would have a significant impact on Banbury due to the establishment of a stand alone site that would not encourage linked trips and the high probability that the anchor store of M&S and Next in the town centre would not remain in the medium term."

29. It was HPPDM's view that the development would discourage town centre trips, reduce investor confidence in the town centre and thus significantly affect its vitality and viability. The minutes of the March 2012 Planning Committee meeting show that members had in mind that the development "could have a positive impact on the town centre." In this they were disagreeing with the conclusions of HPPDM and CBRE. The claimants submitted that there was no adequate engagement by councillors on the issues raised by HPPDM. They also submitted that the way in which this issue was summarised in the report for the meeting on 24 May was no more than officials trying to make sense of the nonsensical. Further, that the final reasons, which suggest that the development would "protect the vitality and viability of Banbury town centre", were bizarre.

30. PPS4 and NPPF contain policies to refuse proposals which would be likely to have "a significant adverse impact" upon the town centre. Retail impact was one of the main topics covered in the expert evidence before the Planning Committee, as well as in the report from HPPDM. The policy was identified. It is impossible to conclude that the members of the Planning Committee failed to understand the material policy. The question whether there was, or was not, likely to be a significant adverse impact on the town centre was one of planning judgment based upon the material before the committee and their local knowledge. The distillation of the reasoning of the majority of the members found in the report for the meeting on 24 May 2012 reflects the necessary implications of the majority's conclusion in March 2012 with some permissible gloss gleaned from the discussion. There is no indication that when faced with those reasons in May 2012 the members of the committee expressed any disagreement with them as an accurate reflection of what had been decided, and why.

31. The claimants submitted that the use of the word "protect" in the minutes which accompanied the planning permission on December 2012 in relation to the vitality and viability of the town centre was perverse, given the evidence of adverse impact before the Planning Committee. They suggested that it amounted to a conclusion that the impact would be positive.

32. The planning judgement which the committee was called upon to make related to a significant adverse impact. The report for the meeting in May expressed the conclusion relating to town centre impact by adverting to three features. First, members did not consider that the development would have an impact upon existing and planned town centre investment. Secondly, it would encourage linked trips to the centre via the proposed shuttle bus. Thirdly, members therefore concluded that the development would not have an impact upon the vitality and viability of Banbury town centre. It was noted that, as a result, the development accorded with guidance relating to the vitality of town centres contained within the NPPF.

33. I accept that "protect" is not an obvious word to have chosen to convey the meaning wrapped up in those three points and the general sense that the Planning Committee did not consider that there would be a significant adverse impact. Nonetheless, that is what the word was designed to convey. "Protect" does not mean "positively enhance", as the claimants suggested. Its natural meaning in this context is that the development would preserve the town centre from attack or not lead to its depredation. Its use does not suggest any legal error on the part of the committee.

Ground 3: The Reasons Challenge

34. The claimants submitted that the summary reasons given by the Council were inadequate. Mr Findlay QC, for the Council, noted that Aegon did not appear to be suggesting that the reasons were inadequate. Mr Tucker was able to point to a sentence in Aegon's grounds which makes a passing reference to the summary reasons but, that said, this was Scottish Widows' argument rather than Aegon's. Mr Cahill focused on the absence of explicit mention of the sequential test in the summary reasons quoted above, and submitted that the general reference to NPPF (which preserves that test) was not good enough, at least in a context where the members had disagreed with the advice they received from officials. In reply, he did not press his argument that the summary reasons in relation to the impact on Banbury town centre were inadequate given the express reference to "vitality and viability". He submitted that the more detailed reasons in the report prepared by HPPDM for the meeting on 24 May were of no account, despite the decision being re-affirmed and thus (it might be thought) the committee having given the clearest of indications that it was content with them.

35. The effect of Mr Cahill's submission is that the summary reasons should have said in terms that the view of WYG on the sequential test had been accepted.

36. The argument was founded upon the proposition that by contrast with cases in which the committee adopted the recommendation of officials where there would rarely be any need to say more than they agreed, there was a legal obligation on members to say more when they disagreed. Mr Cahill relied upon the observations of Sullivan LJ in *Siraj v Kirklees Metropolitan Council [2010] EWCA Civ 1286* at paragraph [15]:

> "When considering the adequacy of summary reasons for a grant of planning permission, *it is necessary to have regard to the surrounding circumstances,* precisely because the reasons are an attempt to summarise the outcome of what has been a more extensive decision making process. For example, a fuller summary of the reasons for granting planning permission *may well be necessary* where the members have granted planning permission contrary to an officer's recommendation. In those circumstances, a member of the public with an interest in challenging the lawfulness of planning permission *will not necessarily* be able to ascertain from the officer's report whether, in granting the planning permission, the members correctly interpreted the local policies and took all relevant matters into account and disregarded irrelevant matters." (emphasis added)

The learned Lord Justice went on to draw the contrast with cases in which the members had endorsed the reasoning contained within the report.

37. In *R (Telford Trustee No. 1 Ltd and another) v Telford and Wrekin Council [2011] EWCA Civ 896* between [14] and [26], Richards LJ reviewed the law relating to summary reasons. He noted that the planning officer's report was addressed to an informed readership and endorsed (as had Sullivan LJ in Siraj) that regard should be had to factors identified by Sir Michael Harrison in R (Ling (Bridlington) Ltd) v East Riding of Yorkshire [2006] EWHC 1604 (Admin). These included:

i) The statutory obligation does not extend to giving reasons for rejecting objections that had been raised to the grant of planning permission;
ii) There is no obligation to give reasons for reasons.

38. Mr Cahill submitted that the effect of these authorities was to impose an obligation to give fuller reasons where the advice of officials was not accepted, and in this case the Council had not done so. In my judgment it is clear from the language used by Sullivan LJ that he was not seeking to apply a universally applicable gloss to the statutory requirement to give summary reasons but rather, in a carefully caveated statement, noted that the circumstances he identified may require more by way of explanation. The purpose of summary reasons is to enable those concerned about the application to understand why it had been granted in the context of the surrounding circumstances.

39. In this case the report from HPPDM made clear that there was a profound disagreement between WYG and CRBE about whether the sequential test was satisfied and also on the question whether there would be a significant adverse impact on Banbury town centre. Officials preferred the views of CBRE (which were supported by Turleys and Savills) but recognised that members might take a different view. In granting permission the natural inference was that the members were satisfied on those counts, as they were on the myriad of technical issues about which there was no controversy and also (contrary to the view of officials) that they did not share the concern regarding the aesthetics of the development. The report prepared for the meeting on 24 May explicitly stated those conclusions. The draft reasons were published on 15 June 2012 in substantially the same form as they emerged in December. Neither of these claimants, nor anyone else for that matter, made any suggestion that they were inadequate or left any doubt about the underlying resolution of the points in issue. In my judgment the reference in the summary reasons to compliance with NPPF was more than enough, in the context of the very detailed exposition of the conflicting views in the report for the meeting in March and the clear reasons found in the report for the May meeting, to enable all concerned to understand why the permission had been granted. The summary reasons were not legally wanting.

40. There is one final observation on the question of reasons. Even had I been satisfied that the reasons were legally flawed on grounds of inadequacy, I would not have quashed the grant of planning permission. This is a case where such a failure could have been adequately met by requiring further reasons to be given: R (TWS) v Manchester City Council [2013] EWHC 55 (Admin) at [132]; R (Mid-Counties Co-operative Ltd) v Wyre Forest District Council [2009] EWHC 964 (Admin) at [191]. The reason why that course was followed in those cases is all the stronger now that there is no statutory obligation to give summary reasons at all.

Ground 4: The Section 106 Agreement

41. The claimants contend that the planning permission should be quashed because of the failure of the Council to secure a section 106 agreement which tied Prodrive to its new site for a finite (but unspecified period) and also obliged Marks & Spencer to retain its town centre store for a finite period of perhaps five years. So far as Marks & Spencer was concerned, Mr Cahill points to the terms of a section 106 agreement referred to in R (Zurich Assurance Ltd t/a Threadneedle Property Investments Ltd) v North Lincolnshire Council [2012] EWHC 3798 (Admin) whereby the developer agreed not to let a unit to a particular tenant without having secured a covenant from the prospective tenant that it would maintain its existing town centre store for five years. Both Mr Cahill and Mr Tucker submitted that something similar might have been devised to tie Prodrive to its new site for the same period, although no worked example was provided.

42. The Section 106 agreement required of the developers in this case contained no such provisions. The claimants put their argument on this ground in two ways. First, they submitted that the resolution of the Planning Committee in March 2012 required such an agreement to be entered into as a condition of the grant of planning permission. Secondly, they submitted that it was irrational not to require commitments of this nature which bound Prodrive and Marks & Spencer respectively.

43. I deal with the first argument shortly. The resolution of the Committee on 22 March, re-affirmed on 24 May, delegated all matters relating to the section 106 agreement to HPPDM in consultation with the Chairman. The Planning Committee was not prescriptive about its content. In my judgment, this argument misunderstands the nature of the decision made by the Planning Committee. The grant of planning permission was not conditional upon any particular content of the section 106

agreement. The claimants are right to observe that officials advised that the agreement should contain such conditions (see paragraph 10 above). But the resolution recorded in the minutes was that the application:

> "be approved subject to a legal agreement and appropriate conditions and that authority be delegated to [HPPDM], in consultation with the Chairman, to negotiate the legal agreement and conditions."

44. As the resolution makes clear, the Planning Committee did not prescribe the nature of the conditions which should attach to the planning permission, nor did it specify any particular content for the section 106 agreement.

45. So far as the second argument is concerned, on 19 March 2012 Marks & Spencer's Head of Property had written to the Chairman of the Planning Committee explaining that the town centre store was held in part subject to a lease until 2027 and in part freehold. He explained that the company could have broken the lease but had not done so. It was now legally committed to the leasehold element of its store and to its town centre store which it saw as complementary (and not in competition with) the proposed new store. He reiterated an earlier offer to sign a commitment to maintain the town centre store for five years from the opening of the new store. At the meeting on 22 March 2012 a representative of Marks & Spencer made a public statement to the same effect. Although the argument advanced under section 106 has not been developed by reference to Next, that company had indicated publicly that it would keep its town centre store at least until the expiry of its current lease in March 2016. In correspondence exchanged before the Planning Committee meeting, officials had mooted the possibility of a requirement to tie Next to the town centre, but it did not find its way into the report.

46. Prodrive gave written and oral assurances that they would locate their (expanded) business at the Hella site if planning permission were granted at the old site. In a letter written on 12 March 2012 Prodrive said:

> "I believe you are aware that we have an Agreement with the developers LXB whereby post approval of Banbury Gate, we will be required to sell the existing site to LXB and re-invest the funds in acquiring and refurbishing the former Hella premises from LXB thus satisfying our growth requirements for the business in Banbury.
>
> To make this very clear, and so there is no misunderstanding, we are contracted to buy the Hella site, which will then become the new headquarters for Prodrive. Should the Council require further comfort, I wanted you to know that Prodrive would be prepared to enter into a unilateral undertaking confirming our commitment to remain an integral part of the fabric of Banbury, the detail of which can be documented post Planning Committee decision."

That unilateral undertaking was reoffered before the meeting of the Planning Committee. It was not mentioned in the report. A representative of Prodrive spoke at the meeting and expressed his disappointment at its absence from the report and stated publicly that Prodrive would be prepared to be bound by a section 106 agreement.

47. Confusion had arisen in the pre-action protocol letters and the claimants' pleadings relating to the position of Prodrive. Arguments were formulated on the basis that the development of Banbury Gateway was for technical planning purposes "enabling development" linked to the development of the Hella site. It was not. Those arguments were not pressed orally.

48. The evidence of how the section 106 agreement ended up in its final form is found in a short statement from Nigel Bell, a solicitor employed by the Council. The section 106 agreement covered all of the technical matters identified in the report from HPPDM. No point arises in respect of any of them. A number of conditions were attached to the planning permission expressly to safeguard the vitality and viability of the town centre. Similarly, no issue arises with respect to them. Mr Bell explains that after the March meeting he gave thought to whether the section 106 agreement might seek to bind the anchor stores (Marks & Spencer and Next) and Prodrive, respectively to the town centre and to the Hella site. He noted that neither

Marks & Spencer nor Next had an interest in the Banbury Gateway site and more generally, that he considered that there would be "difficulties in the practicability and enforceability of such obligations which in this case made them undesirable."

49. Mr Findlay prayed in aid the decision of the *House of Lords in Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] A.C. 1* in which the sound basis of the settled practice of the court not to grant a mandatory injunction requiring the carrying on of a business was affirmed. In an orthodox commercial environment of the sort encountered in that case, namely a 35 year lease with a clause requiring a store to be open during the ordinary hours of business, the landlord would be entitled to damages for breach of the covenant, but not an injunction to enforce it. It seems to me that Mr Bell was right to doubt the enforceability of the sort of covenant referred to in Zurich Assurance . The Council would not have a direct right to enforce it; the developers might have little interest in doing so; were they to try (on this hypothesis to force a town centre shop to be kept open) authority would at the least be a hindrance; and there would be no obvious right to damages, because the developer would suffer no loss as a result of the town centre store closing. So far as Prodrive was concerned they described a legal agreement which committed them to buy and develop the Hella site. The claimants object that the agreement was never provided by Prodrive to the Council (or more widely disclosed) but there is no reason to doubt that the letter from which I have quoted accurately set out their legal obligations.

50. An agreement between Prodrive and the Council, or covenants with LXB properties, might well have run into similar difficulties as those identified in Co-operative Insurance .

51. I do not doubt the ingenuity of lawyers to draft agreements which on paper would achieve the aim of tying Marks & Spencer to the town centre for five years, and Prodrive to the Hella site. The claimants did not suggest a formula which could have done the same with respect to Next beyond the expiry of their current lease. There would be obvious difficulties in insisting that they renew an expiring lease. Be that as it may, Mr Bell's doubts about the wisdom of a section 106 agreement seeking to achieve these aims were soundly based.

52. Both Mr Findlay and Mr Katkowski described the challenge to the absence of a section 106 agreement dealing with these matters as a pure *Wednesbury* irrationality challenge. That characterisation is correct. Mr Cahill submitted that the nature of this development was such that it was necessary to secure these aims through a section 106 agreement. In my judgment that argument founders for a number of reasons. First, it was clearly a material consideration for the Planning Committee that Marks & Spencer and Prodrive (and indeed Next) had unequivocally and publicly committed themselves in the ways described. As I have noted, the Planning Committee did not make it a condition of the grant of planning permission that those public assurances were translated into legal obligations. That approach cannot fairly be described as irrational. The Committee was entitled to place reliance on such assurances. Secondly, whilst HPPDM and the Chairman of the Committee could not have been criticised had they sought to include these matters in a section 106 agreement, they were entitled to conclude that the practicability and enforceability problems identified by Mr Bell were such as to make it undesirable.

53. Were Marks & Spencer, Next or Prodrive to resile from their public statements they would no doubt pay a commercial price; and the members of the Planning Committee might pay a political price. But I am unable to accept that the absence of a legal commitment in a section 106 agreement was unlawful for the purposes of granting planning permission.

Conclusion

54. None of the grounds advanced by the claimants succeeds. In those circumstances the claims for judicial review are dismissed.

Footnotes

1 The small retail units
2 Restaurants etc.

SECRETARY OF STATE FOR TRANSPORT
DEPARTMENT FOR TRANSPORT

APPLICATION BY MR. RICHARD BUTTERFIELD FOR AN ORDER UNDER 247 TOWN AND COUNTRY PLANNING ACT 1990

ORDER REF: NATTRAN/Y&H/ S247/4337

IN RELATION TO LAND AT WOLFSTONE HEIGHTS FARM CONCERNING THE STOPPING UP AND DIVERSION OF PART OF HOLMIRTH FOOTPATH 60

PUBLIC INQUIRY (VIRTUAL EVENT)

COMMENCED ON 24TH AUGUST 2021 AND ADJOURNED 27TH AUGUST 2021

FINAL COMMENTS ON RESPECTIVE CLOSING SUBMISSIONS

Applicant Response to Closing Submissions by Mr. Gill on Behalf of the Council (as Objector)

Paragraph No.	Comment on Council Closing behalf of Applicant		Response on behalf of Council to Comment by Applicant
N/A	The Council's comment opposite is noted, but in the Applicant's submission not relevant or applicable.		**The Council will only comment in detail where the parties disagree as to the evidence given, ie what witnesses said in giving evidence. The Council does not agree with the Applicant's submissions and silence as to the Applicant's criticisms is not to be taken as a concession. The Council will not misuse this process to make submissions.** The above comment in bold was provided with the first draft of comments on 24/12/21. It was omitted by the Applicant from the first draft of this combined document. It is a clear caveat that silence does not amount to acceptance of a

			submission. Where the Applicant claims that silence equates to acceptance the Inspector is respectfully referred back to this comment.
2	"tendentious" – no examples or evidence are provided, so the Council was invited to either elaborate or withdraw this.		No, this is a submission not a reporting of factual evidence. Whilst the Applicant may disagree with a submission it is not for the Applicant's advisors to rewrite the Council's closing
8	Mr. Earnshaw has never used the words: "flush" to the building line, but the situation on the ground is different in any event. It is perhaps flush to a building line, but the actual building line in part is a raised bed and bin store area, so there is a short area before it meets the wall of the actual dwelling or its newer outbuildings. The building line referred to is not in fact the building line of Wolfstones Heights, but the old raised plant beds (which were and are in the ownership of Wolfstone Heights Farm, not Wolfstone Heights), which is identified in further information from Mr. Earnshaw's correspondence dated 28th December 2021. Further, it is contended that the Plan as modified by the DfT can be construed as "in the middle" of the old driveway. Mr. Earnshaw in XX and IXQ said that it was simply down to one thing: "scale". Although noted in single and not double inverted commas, Mr. Earnshaw maintained the "scale" point and has never said to the Inquiry during examination or otherwise, 'I'll just draw another'. This we submit is a misrepresentation. There is not such a contradiction as stated and should be removed. **NB.** Mr. Earnshaw has since written to the Inspector (via the Programme Officer) in correspondence dated 28th December 2021 on this perceived issue and the Inspector is referred to this. The Council has elected not to engage or respond to this, save by reference only to acknowledge the existence of this in a footnote. This is viewed as acquiescence of the position, otherwise the Council would have requested Mr. Earnshaw be re-examined on this point.		Flush is not in quotation marks – it has therefore not been suggested the specific words 'flush to the dwelling' were used. Flush to the building line is acceptable to the Council. Mr Earnshaw did say he could just draw another plan, a note was made. The Council submits there is a contradiction. That is the Council's submission and this process is not for the Applicant to rewrite submissions it does not like. The NB post dates the drafting of the Council's comments.

	This is now a matter for the Inspector. However, please do also see comments in relation to paragraphs 48 and 49, below.		
9	Mr. Gill in his Closing has stated that Mr. Earnshaw has claimed wide expertise across many areas. This is not accurate and a misrepresentation of the position. It is stated that "the Council submits that there is no way to remedy this insufficient plan within this Inquiry process." Even if this situation is not applicable or relevant, we submit that Mr. Gill knows that this statement is not correct in law or in fact and that both the Inspector and indeed SoS does have such powers to make minor alterations and indeed if need be, to cause a further Inquiry day (or time) to re-examine this specified position. We invite Mr. Gill to remove what he knows or should know is inaccurate. **NB.** Mr. Earnshaw has since written to the Inspector (via the Programme Officer) in correspondence dated 28th December 2021 on this perceived issue and the Inspector is referred to this. The Council has elected not to engage or respond to this, save by reference only to acknowledge the existence of this in a footnote. This is viewed as acquiescence of the position, otherwise the Council would have requested Mr. Earnshaw be re-examined on this point. This is now a matter for the Inspector. However, please do also see comments in relation to paragraphs 48 and 49, below.		The order line has been advertised and the inquiry has proceeded on this basis. If the order line under the Applicant's case is not as the order plan shows it then the Applicant will need to remedy that. As a matter of fact, the Council considers that the Inspector was entirely right to raise the issue as the order plan submitted by the Applicant and then put forward in the order does not reflect the Applicant's submissions. If the Applicant proposes a new order plan which reflects the Applicant's case then that will require readvertising for the public and is not a 'minor alteration' in the Council's submission. This would require either an extended prolongation of this inquiry with multiple extra sitting days or another inquiry.
11	*"On the first day of the inquiry, Sir, you explored in detail with Mr Earnshaw the parts of the relevant permissions which conflict with the current footpath. Frankly, the benefits are paltry."*		No. The Inspector did not call the diversion route a double benefit – the Inspector was clarifying a witness' evidence. The Inspector has been punctilious in not making any findings during his inquiry process before reporting.

	The Inspector did indeed explore the benefits, but the Inspector was clear in correcting Mr. Gill that all aspects of the development are part of the planning permissions, even later referring (albeit in terms of clarification and obviously not statement) to the diversion route as a form of **"double benefit**". We invite the removal of this reference as it is not a representation of events.		
12	**"**The applicant requires a second access." – this is a not-so-subtle attempt to revisit the merits of planning permissions granted. In any event, access from the southernmost side to the terrace, from the existing garden at Wolfstone Heights Farm following the proposed movement of the current wall is a key part of the design envisaged and permitted by the planning permission, as explained by Mr. Earnshaw in IXQ (which in fairness did interject on Mr. Gill's XX). Mr. Gill and the Council know full well that the process is not an opportunity to revisit the planning permissions granted or their merits. This should be removed in the applicant's view as it is a blatant attempt to revisit the permissions. We invite removal of this reference.		No, it is not. It is a submission on the Inspector's discretionary merits test process. It is not for the Applicant to rewrite another party's submissions which it does not agree with.
13	Mr. Earnshaw used the example of the horse trailer, but also used the example of where the final order is not made, there would be simple vehicular conflict between pedestrians and users of the driveway, compared with the diversion route. Consider including the latter or removing the reference altogether. Again, this feeds into the narrative of attempting to revisit the merits of the planning permissions already granted and part-implemented.		No, these are the Council's submissions. It is not for the Applicant to rewrite submissions it does not like.
14	It is inaccurate to state that there is 'no societal benefit' and this is certainly not the evidence falling out of the examination of witnesses at the Inquiry. Please see Applicant Closing and refer to all Applicant-witness evidence. Whether or not something is a subjective judgement		Submissions are a combination of fact and opinion. That the Applicant acknowledges that this is opinion shows that the comment by the Applicant is otiose.

	is ultimately a matter for the Inspector in his deliberations based on evidence and application of the law. This paragraph is in large part opinion and not fact.		
20	This is not an accurate representation of the questioning (EiC) of Mr. Appleton. My apparent 'relentlessness' in EiC of Mr. Appleton (which one must accept would be a strange feature in itself of EiC) mis-characterises the examination and omits key information elicited from Mr. Appleton during EiC and IXQ. Please refer to Applicant Closing in this respect.		The Council makes its submissions on the manner in which Mr Scanlon sought to go behind the witness' evidence. It is for the Council to make its submissions. It is not for the Applicant to rewrite submissions it does not like.
21	No examples are provided. Please either consider removing the allegation of Mr. Appleton being evasive, or alternatively provide specific examples. This is an accusation, so we invite the Council to either back it up against specific evidence or events at the Inquiry, or remove such a reference.		This is the Council's submission.
28	The Council through Mr. Gill states at **Paragraph 17** that: *"The Council does not contend that substantial highways risk arises from the proposed diversion of the Footpath. The Council accepts the accident data compiled by the Applicant."* However, at Paragraph 28 then attacks the applicant's evidence on safety. Either one or the other is the position, but not both. This however feeds into and reinforces the clear contradiction and confusion surrounding the Council's evidence.		The Council accepts the Applicant's highways accident data – this is one piece of highways evidence, ie the lack of accidents on this section of road. That does not prevent the Council passing comment on other data gathered or other areas of highways impact data not gathered.
33	Mr. Appleton did not say at any point of examination that summer surveys would have been "preferable". This is inaccurate. The situation is as described in Applicant Closing. Consider revising because this is not an accurate portrayal of the actual event and evidence elicited.		The Council's note disagrees. Where there is disagreement the Council is happy to rely upon the Inspector's note.

34	Specifically Footnote 5 – Mr. Cropper was Chairman of the Holme Valley Land Charity and was a Member of the Holme Valley Parish Council, both until early-mid 2019. Also, Mr. Cropper has not ever in any part of his examination used the words: "very unlikely" on the prospect of the Trig Point land being sold off or otherwise ceasing to be for public use/benefit. Please consider removing this inaccurate reference which did not occur.		The Council's note is that Mr Cropper did state this. The Council does not dispute the ownership details and that the land is not PROW. Nor is it disputed that the HVLC has acted to protect its positions as a landowner. However, the Council's note is that Mr Cropper nonetheless thought it 'very unlikely' the land would be closed to the public. In any event the phrase is not in direct quotation marks. Where there is disagreement the Council is entirely happy to rely upon the Inspector's note.
37	Whilst this user would not have been captured by the Applicant's survey counts walking at certain hours, this does not mean that he always walks in those hours. In any event, following Mr. Gill's line, this is in fact further evidence of use of the diversion route outside of the survey hours, meaning on this basis usage of the diversion route is even higher than surveys suggest. The same obviously applies to other users that may not have been 'caught' in the survey data. We have no note or recollection of examination on this point and shall therefore defer to the Inspector's notes and recollections.		This is exactly when says he walks, ie it was his evidence of when he walks and not other times.
39-43	The Applicant remains very confused as to what the Council's position actually is here, even following examination of Mr. Champion. We await further comment and feedback from Mrs. Haigh before commenting further. Please refer to Applicant Closing.		
45-47	Mr. Gill makes this point on the part of the Council, but then does exactly the same himself on behalf of the Council in this 'Post-Script' section of the Council's Closing. In any event, this is now irrelevant. Mr. Gill and Mr. Scanlon both agree that where this Inquiry is concerned, there is no statutory or regulatory process governing such a rule for the purposes of this Inquiry (this would include the Highways		The Post Script exists purely because of the Applicant's advocate's threat. There is no statutory procedure but the Inspector set out a process he wishes followed and it is that which the Council has tried to follow. The parties disagree what the Inspector intended in his note.

	Inquires Procedure Rules 1994, which in any event does not govern this Inquiry, has no such rules on exchange and workings on Closings, ansd which the Programme Officer has used as a guideline only). We are therefore entirely reliant on the Inspector's 'Inquiry Note 1', dated 31st August 2021. The Inspector's Inquiry Note 1 was clearly put in place to curtail prospective interruption and challenge from either party during the course of closing on the final day to be re-convened. We are agreeing submissions and modifying accordingly, as Mr. Gill has done 'Post-Script' (sent to the Applicant only on the morning of 31st December 2021) and which we have commented on. Where the Inspector intended something different, then he would clearly have stated this. The Inspector's intention was simply to manage the situation by ensuring that the Closing session would be a shorter and less adversarial affair than it otherwise might be. Nothing more. How Closings are administered and finally generated was and is clearly not a concern for the Inspector, otherwise he would have stated this in Inquiry Note 1. The Inspector simply wants to know where, on the final day of submission (being 31st December 2021), there is outstanding disagreement as to fact. This document does just that. Where Mr. Gill has worked on a different basis, that is a matter for he and the Council. That is not a matter for the Inspector or the Applicant. Multiple rounds of exchanges were arranged prior to submission of initial drafts. Whilst there was slippage in these timescales due to unforeseen childcare arrangements (on both sides), child illnesses and Mr. Scanlon's Covid-19 illness, Mr. Gill has had ample opportunity to modify his Closing and has even been invited by Mr. Scanlon to do so. He appears to have taken this up now with his Closing 'Post-Script'.		The Council is drafting this response to round 4 of Mr Scanlon's comments on the afternoon of 31st December 2021. Mr Scanlon has this morning informed the Council that he intends to make a further set of response thereafter – a fifth round of comments. Mr Scanlon states that a series of exchanges were proposed. In his email of 16/11/21 he proposed exchange of closings on 17/12/21 – this occurred with the Council's being sent that evening after Mr Scanlon said he would try to send something that night. Mr Scanlon's draft closing was sent after it was chased on the morning of the 20th December. Comments were exchanged on each first draft by the 24th – this was also proposed in the email of 16/11/21 Mr Scanlon's email of 16/11/21 then referred to a 'hopefully final exchange' by 30/12/21. It is not understood how it has come to be that there are now five rounds of comments being made by the Applicant.

	Mr. Gill, as he has been encouraged to do in multiple correspondence between us, has added to his Closing by included his 'Post-Script' analysis, so complaint would again seem that this is entirely irrelevant now. Any attempt to add further information in Closing (save for matters of the UU, as this is the subject of discussion at the reconvened Inquiry day in any event (see also below), will be strongly resisted and we submit should not be entertained by the Inspector.		
48	This is noted, but in fairness (in fact to Mr. Gill, if nothing else), the Council has known since 31st August 2021 that the deadline for submission of Closings is 31st December 2021. Given subsequent exchanges between the Council and the Applicant representatives, it was equally likely that we would be in a position of going down to the proverbial wire and that instructions would be required on certain items during the Christmas and New Year week leading up to Friday 31st December 2021. Where the Council has not made management or contingency arrangements for Mr. Gill to be able to obtain instructions over this period, then that is a matter for the Council and not the Applicant or the Secretary of State Inspector. We would in fact question, where Mr. Earnshaw's evidence and subsequent correspondence is concerned, whether Mr. Gill would in fact need instructions to be able to respond on the part of the Council. Overall, we therefore submit that Mr. Gill has stated his position in Closing. The Applicant will resist any attempt to expand on its Closings following submission on 31st December 2021.		The Council could not expect that a witness to the inquiry would submit representations to the Inspector in the week between Christmas and New Year. These submissions from Mr Earnshaw include a new plan and written submissions amounting to new evidence on his part and submissions written against the Council's closing. The Council's position as to the likely effectiveness of a new plan was made in the earliest draft of closings. It is not possible to make submissions on new written evidence and submissions by Mr Earnshaw without instructions. It is also noted that it is not for witnesses to draft their own submissions on the meaning of evidence or against the submissions of another party.
49	These are not the facts falling from evidence at the Inquiry. Moreover, this is not at all what Mr. Earnshaw's correspondence of 28th December 2021 says.		The submission in para.49 has been made in earlier drafts and therefore is with instructions.

	Whilst it is accepted that this is to some extent simply submission, this is a complete mischaracterisation of Mr. Earnshaw's evidence and Mr. Earnshaw's subsequent correspondence, which he has offered again to be re-examined upon, but it is noteworthy that the Council has elected not to insist upon this, which goes to acquiescence in the Applicant's view. Again, as in 48 above, where Mr. Gill is speculating because he does not have instructions, is not a matter for the Applicant or the Inspector. Management arrangements and contingencies should have been made by the Council and it is in the Applicant's view wrong for Mr. Gill to attempt to hide behind lack of instructions, much as though he himself can only state the facts. On this occasion, the facts demonstrate the lack of management and organisation on the part of his client, which should not be an issue for the Applicant adhering to the requested deadline for submission of Closings, nor the Inspector in considering Closings.		
50	This is a misrepresentation of the position and does not reflect arrangements and multiple correspondence between the Applicant and the Council.		
52-53	Whilst it is accepted that these are submissions on the part of the Council, we would simply add that this 'Post-Script' information is in direct response to the Applicant Closing. Again, the Council cannot complain about exchanges of Closings, with edits and additions following such exchanges and then do the same itself. Its complaint in this respect (paragraph 45-48) is therefore redundant.		The Post Script is produced in specific response to the threats of the Applicant's advocate to resist any comment on the evolving submissions of the Applicant.

Council Response to Closing Submissions by NSCL on behalf of Applicant

Paragraph No.	Comment on Applicant Closing on behalf of the Council		Response on behalf of Applicant to Comment by Council
10	The Applicant never pursued this interpretation of the judgement in opening or any other submission prior to closing. The Council will not comment on the Applicant's interpretation of case law as part of this process. This interpretation was not raised until now and so it would inappropriate to redraft the Council's closing to address an interpretation that it would not have been aware of in the normal inquiry process in circumstances where the Applicant would have raised this interpretation of case law after the Council had already formally closed. The Council will not redraft its closings to address the Applicant's closings in this manner as it would be the same breach of process that the Applicant repeatedly makes in its closings.		We are not saying that it did. This is for the purposes of Closing, setting the detailed context of the legal tests that underpin this application and therefore this Inquiry. The Council is free and is indeed invited to state a contrary position in its Closing; i.e. this is the Council's view of what this means as opposed to the Applicant's. It is in any event not an interpretation of Judgment, but pointing out the language used in reasonable everyday understanding of those words. No 'breach of process' is occurring. There is no such a 'process' governing this Inquiry. This Section 247 Application and subsequent Inquiry is run free of such Rules, save that it is loosely aligned to only the extent that it can be under the Highways Inquiries (Procedure Rules 1994), which incidentally do not align to this Inquiry The Council is invited to add to or otherwise edits its Closings accordingly. The 1994 Rules contain no such 'process' or other restrictions for Closings. By way of reminder, the Inspector has asked parties to agree Closings but provided no form; simply that it needs to be highlighted on submitting by 31st December where the parties disagree on facts. It is hopeless to suggest that an applicant would somehow not respond and deviate from Closing script where a point of contention is raised during the Council's or any other party's Closing. Perfectly normal. In any event the Council has opportunity to respond here and before final submission, the same as the Applicant. Where the Council disagrees, it can state so and put an alternative in its Closing if it so wishes. Where the Council does or does not add to or edit its Closing, is a matter for it. There are no restrictions in this process or complaints from the Applicant in this respect. That is entirely a matter for the Council.
16	Parts of this have been written following receipt of the Council's draft closing. This is a breach of the specified procedure. In light of Mr		Incidentally the Council's Draft Closing was not submitted until 22:22 on Friday evening, over ten hours after the initial 'deadline'. The 'Skeleton' had to be

	Scanlon's inability to exchange by Friday 17th December the Council expected him to have produced his closing draft prior to reading the Council's closing. The exchange of closings is to allow for disputes of fact as to the evidence to be resolved not to allow redrafting of arguments. However limited Mr Scanlon's experience, this is not acceptable conduct. The Council would note that Mr Scanlon sent a draft of his closings at 1631 on 17/12. In his email Mr Scanlon described these submissions as 'a mostly completed skeleton draft Closing'. Mr Gill has not opened this draft and does not know its content. The Council has proceeded to consider only the final draft circulated by Mr Scanlon on 20/12. 'I do not understand what the Council's fundamental objection actually is' – the Council does not agree that this was said by the Inspector. However, since this is alleged to the be the Inspector's own words, the Council will rely on the Inspector's notes and recollection.		submitted by noon by the Applicant for reasons explained and it was clear in the covering email that the Council should not send its Draft Closing if it was not comfortable to do so in the absence of the Applicant's substantial Draft Closing. The same point as above is reiterated. The Applicant in final Closing, where in a more usual way these would not have been exchanged, would ordinarily respond to points raised in the Council's or other objector's Closing (for example, breaking off during reading and stating that the opposite point is noted and this addresses the point, or here is why we disagree). In any event, no such 'procedure' governs. The Inspector has introduced a requirement anticipating disagreement; not a 'procedure' governing what is an is not permitted or otherwise in a Closing Statement. The reasons for lateness have been clearly explained (a combination of urgent childcare and Covid-19; and childcare was also incidentally Counsel's excuse for lateness in prearranged response). The arrangements for exchanged have slipped by a few days as a result. The Council has every right to modify its Closing Submissions following seeing the Applicant's Draft Closing and associated comments/initial feedback already sent separately. The Inspector clearly (in fact very clearly) used the words: '*I do not understand what the Council's fundamental objection is'*. It is very memorable, because only seconds later what we now know to be Ms. Haigh was identified passing a note to Mr. Champion.
25	NS "During XX Mr Payne would not say whether he used the proposed diversion route. Council's notes read: NS "Have you used the diversion?" DP "Used with a friend not part of the group"		No recollection of this, but will defer to the Inspector's notes. Where this is the case, then it adds to the confusion as to the status of Mr. Payne and his alleged 'organisation'. The question in XX was whether he used the diversion route, not had he ever used it.

54	The Council does not agree that either Mr Leader or Mr Champion said the impact was 'neutral'. Both Mr Champion and Mr Leader indicated that it was not the loss of the direct route per se, but the extent of the deviation from it and the breaking of the flow of the route that was significant. They both agreed that diversion on to another route with a different termination point *might* be acceptable.		Not agreed. This is not correct in our submission and following reference again to notes. There can be no such thing as indication in a direct XX question, as Counsel is well-aware. On revisiting notes there is no question that both parties have referred to the impact on PROW network as "neutral". The point on deviation from the present legal route (the breaking of the straight line, as has been put in applicant closing) was an additional crucial admission/acknowledgement, clearly made by both Mr. Leader and Mr. Champion in XX, which the Applicant and the Council agree on.
57	The Council did not XX on this point. This line of questioning was all from the Inspector.		Not agreed. The Inspector intervened on the Council's XX on this issue.
59	The drafting of this closing subsequent to the provision of the Council's draft is a breach of the specified protocol and unacceptable. Drafts were to be exchanged to ventilate disputes of fact not to allow the Applicant to redraft their closings in light of the Council's closings.		Which specified protocol? There is no such protocol in these proceedings nor any statement or instruction from the Inspector during or post-adjournment of the Inquiry. This is nothing untoward; simply responding in Closing to what is alleged by an objector in their Closing. Any disagreement is what this exercise is for, to assist the Inspector where facts are disputed.
60	This is not the place to comment on the Applicant's misinterpretation of the Council's case. The Council would emphasise with regard to this paragraph that it does not agree with this characterisation of its argument. Again this redrafting of the Applicant's closing in light of the preview of the Council's closing that Mr Scanlon had is inappropriate and should be ignored.		This is noted but not agreed. Again, on the latter point, this is responding to the Objector's Closing. This is no breach of any rules or guidance or instruction from the Inspector.
62	This is a misstatement of the case put in the Council's closing. If the Applicant had observed the process envisaged with simultaneous exchange of drafts then this misstatement would not have been made, it should be ignored.		Noted but not agreed. There is nothing wrong with this and does not breach any rules, guidance or instructions.
64	The Council will not comment on the Applicant's interpretation of case law as part of this process. This interpretation was not raised until now		It is Closing. Please feel free to respond before final agreement and submission. The Council is invited to and indeed should. Where it does not, that is a matter

	and so it would inappropriate to redraft the Council's closing to address an interpretation that it would not have been aware of in the normal inquiry process in circumstances where the Applicant would have raised this interpretation of case law after the Council had already formally closed. The Council will not redraft its closings to address the Applicant's closings in this manner as it would be the same breach of process that the Applicant repeatedly makes in its closings.		and a choice for the Council. In any event the same comments as above apply; this is giving words their reasonable everyday meaning.
66	The Council will not comment on the Applicant's interpretation of case law as part of this process. This interpretation was not raised until now and so it would inappropriate to redraft the Council's closing to address an interpretation that it would not have been aware of in the normal inquiry process in circumstances where the Applicant would have raised this interpretation of case law after the Council had already formally closed. The Council will not redraft its closings to address the Applicant's closings in this manner as it would be the same breach of process that the Applicant repeatedly makes in its closings.		Not agreed. On the contrary, it is entirely appropriate for the Council to modify its Closings should it so wish during these exchanges. The reference is in any event not in response to the Council's Closing, but a point to address the application of clear case law where the Council as objector chooses not to.
67	The Inspector's interventions as to the accuracy of the Order Plan had nothing to do with the DMMO application. The Applicant has misunderstood the import of the evidence on this issue.		Not agreed and not at all. The Inspector was clearly querying whether the DMMO had any implication and thereby affect on this Order at that time during the Inquiry. The Inspector's final position on this did not happen until the final day of the Inquiry.
68	Re Insp's questions on accuracy of the plan. NS states "Mr Earnshaw answered the position in one word "scale" and says not disputed. Council's notes read differently: Insp queries - location of 1.2 metre path – does not appear to be on the northern side but in the middle RE Drawing very difficult to do – very small scale not easy to do Insp Saying on the northern side but the plan doesn't say that"		Not agreed. There is no certainly no recollection of such an exchange, but in any event, Mr. Earnshaw has written to the Inspector on this issue in correspondence dated 28th December 2021 and offered himself for further examination on this point.

	RE Approximately Insp Does not say approximately RE scale Insp Yes 1:1250 difficult at that scale RE Can we agree on the north side? Insp For you to tell me – happy for you to tell me that North side but the plan you submitted shows somewhere else. RE Do it again for you Insp Been public consultation – not saying more or less. RE Doesn't the statement say where it is Insp You are the witness NS Will cover in re-examination.		
70	The DMMO has nothing to do with this evidence. This evidence relates to the accuracy of the Order Plan to this application upon which this inquiry has proceeded. There is no evidence on this issue which should be excluded.		We are pleased that the Council agrees that DMMO has nothing to do with this evidence. However, this is stating facts of Mr. Earnshaw responding to IXQ
79	Again, Mr Scanlon's closings rely upon drafting carried out in spite of the provision for simultaneous closings. Mr Scanlon's personal circumstances having been excused it is not acceptable to use a preview of the Council's closings to redraft/draft his closings. This conduct is unacceptable.		As further above. The Applicant sees no need to cover this further.
82	Mr Walker would be difficult to call as a witness as he does not work for the Council.		This is new information, if indeed it is correct. However, paragraph 82 does reference: *"…or another safety engineer representative…".* Otherwise, no comment.
87	In response to the Inspector's questions Mr Appleton accepted that norm of lower summer traffic was not applicable in a tourist area, ie where the traffic goes during the summer holidays. This evidence has been omitted by the Applicant here.		The Council's assertion is not agreed and this did not occur. This is the Applicant's submission.

91	The quotation relates to speeds only, not speed and traffic/pedestrian counts. Mr Appleton made a number of concessions on pedestrian counts – principally to the Inspector.		Not agreed. The quote relates to that but his evidence leading to that quote in his Proof did not. Explanations in IXQ did not and do not amount to 'concessions'. This is clearly not the case.
110	Inappropriate reference to Council's closing again, see previous.		See above. Nothing to add.
117	Inappropriate reference to Council's closing again, see previous.		See above. Nothing to add
119	Inappropriate reference to Council's closing again, see previous.		See above. Nothing further to add.
120	Inappropriate reference to Council's closing again, see previous.		See above. Nothing further to add.
145	Mrs Cronie was not asked this in XX.		Not agreed. Mrs. Cronie was asked in XX according to Applicant notes, because Mr. Gill actually remarked that he was enquiring due to his own alleged lack of knowledge, as he was 'not a keen runner' himself according to his statement position prior to the relevant question in XX.
163	The Inspector did not request Mr Sizer to produce any further documentation.		Not agreed. Mr. Sizer was clearly asked in IXQ and XX and he volunteered this information stating that he had a minute and authorisation in writing from the Holmfirth Harrier's Committee that when asked in XX if he could provide he answered that he would.
215	The Council's advocate made his position clear at the time.		And what…? This should be in the Council's Closing and it is invited to include it appropriately. Where it is not, that is a matter for the Council.
216	Here an 'inference' in 214 is being made into an outright accusation. The witness confirmed in his evidence that he had not been prompted in any way by Mrs Haigh. It was made clear that Mrs Haigh was trying to pass a document referred to in questioning as the witness did not have it in front of him. This would not be uncommon in an in person inquiry. Mr Champion		And what…? In any event it is not an outright accusation and remains an inference, therefore being a point of concern to be engaged with. This should be in the Council's Closing and it is invited to include it appropriately. Where it is not, that is a matter for the Council.

	confirmed in evidence, that in any event, he did not see what Mrs Haigh was trying to pass him as he was addressing the camera.		
222	Mr Champion conceded that Mr Cheetham was 'principally' the author of the SoC. Mr Champion maintained that the 257 report was produced by the officer body – 'report of the officer body that had a recommendation with a caveat'. In Mr Scanlon's next question Mr Scanlon said 'Mr Cheetham's recommendation'.		Not agreed. He did no such thing. On XX Mr. Champion clearly stated that Mr. Cheetham was the author of the report, notwithstanding the 'officer body' claim.
223	The officer body is more than Mr Cheetham and Mr Champion.		And what…? This is hopeless as a result of the above. Mr. Champion under pressure of quite reasonable XX notified the Inquiry that Mr. Cheetham was the author of the report.
225	Mr Cheetham was not available to be the Council's witness.		And what…?
228	Mr Gill cited Scottish Widows v Cherwell. BeeBee is cited within that judgement but Mr Gill did not refer to the judgement in BeeBee.		Noted, but the Applicant recollection was the two cases separately, so I shall leave as per my notes and recollections. The difference or effect is relatively neutral in this case and so we are content to rely on Inspector notes.
232	The Council does not have any record of Mr Champion accepting this.		He certainly did state and acknowledge this in XX. In fairness he could not have done any other due to his earlier answers in XX and what logically followed.
246	The Council does not accept this as a correct record of Mr Champion's evidence. See above.		Noted, but not agreed. Most certainly Mr. Champion did very clearly state this in XX.
252-259	It is understood that this is not to be the subject of closings.		Noted and it is understood why this would be raised. However, this is not quite agreed as accurate. It is restating this position that it is not to be taken into account in terms of width, but that alignment may be an issue according to the Council and the Inspector. Mr. Earnshaw's communication may conclude this and the Council may wish to comment further in Closing.

			However, it is also clear that where this is the case, several aspects of the Council's PoE should be removed or considered redundant in that scenario and hence why they are specifically covered.
261	Inappropriate reference to Council's closings. See previous.		See above. No further comment is required in relation to the reference to Council's Closings. However, the Applicant would wish to add in particular here, that the Applicant has been waiting for feedback from the Council in order to advance matters forward. The Council has chosen to provide feedback to this point only through its Draft Closing. However, further correspondence has been received from Ms. Haigh on 23rd December following internal dialogue. As a point of assistance: the Council seems to be working on the basis that the s.106 UU must be submitted on the 31st December. This is not correct. The draft (albeit substantial form) UU must be submitted two weeks before the Inquiry reconvenes and is then discussed at the reconvened Inquiry before Closing. It is then executed, if applicable, two weeks after the Inquiry is closed. The Council may as a result wish to review its position on the s.106 UU.
275	Mr Scanlon examined extensively on the Applicant closing the footpath during the pandemic. There was extensive examination on text messages relating to the closure. The Council has not made submissions on closure but as a matter of fact Mr Scanlon has examined in evidence establishing that the footpath being closed in the recent past. He now declares evidence he examined in to be a 'myth'.		And what…? Not understood.
291	I did not XX on those witnesses' use of the Trig Point.		Not agreed. This does not accord with Applicant recollections or notes and there was XX on direction and destination.
319	Reiteration of interpretation of case law not made in any previous document before the inquiry. The Council will not comment on this		Not agreed. There is no such a process. See also above. The Council is still invited to put an alternative position in its Closing if it finds that reference to

	interpretation in this document as it would be a breach of the process set out.		the words (reasonable understanding of everyday use of the words) are somehow wrong. Mr. Gill has in any event done this in 'Post Script' in his final Closings, so the point is academic and now inconsequential anyway.
319-321	Reiteration of interpretation of case law not made in any previous document before the inquiry. The Council will not comment on this interpretation in this document as it would be a breach of the process set out.		Not agreed. There is no such a process. See also above. The Council is still invited to put an alternative position in its Closing if it finds that reference to the words (reasonable understanding of everyday use of the words) are somehow wrong. Mr. Gill has in any event done this in 'Post Script' in his final Closings, so the point is academic and now inconsequential anyway.