Neutral Citation Number: [2026] EWHC 263 (Admin)

Case No: AC-2025-MAN-000342 & 343

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

Manchester Civil Justice Centre
Bridge Street
M60 9DJ

Date: 18th February 2026

Before :

MR JUSTICE KIMBLIN

- -

Between :

LANCASTER CITY COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
- and -	
(2) L&W WILSON (HIGHAM) LIMITED	

- -
- -

Killian Garvey (instructed by **The Solicitor to Lancaster City Council**) for the **Claimant**
Jack Smyth (instructed by **GLD**) for the **First Defendant**
Constanze Bell (instructed by **Walton and Co) for the Second Defendant**

Hearing dates: 27th January 2026

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Approved Judgment

This judgment was handed down remotely at 10:30am on Wednesday 18 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Kimblin:

Introduction

1. The Second Defendant ('Wilson') appealed against the Claimant City Council's ('the Council') decision to refuse planning permission for 24 dwellings and associated development at Cockerham, in Lancashire.

2. The First Defendant appointed an Inspector. The issue before the Inspector was whether to amend Condition 11 on a permission which the Council granted on 26th January 2024 (referred to as 'the Amended Permission' because there had been an earlier permission from 2021: 'the Original Permission'). The application was pursuant to s.73 of the Town and Country Planning Act 1990 ('the 1990 Act'), namely to undertake development without compliance with a condition on a planning permission. That application, if granted, would give rise to a new planning permission and the effect of the change to Condition 11 would be that all 24 dwellings would be open market dwellings, unconstrained as to ownership and occupancy as affordable housing. The underlying issue was the financial viability of the scheme.

3. The Inspector allowed the appeal by decision dated 25th June 2025 ('the Decision'), after a hearing and site visit on 7th May 2025.

4. The three Main Issues in the appeal were recorded in the Decision as:

    a. whether the proposed wording of Condition 11 is reasonable and necessary;
    b. whether a s.73 application is an appropriate means to alter the level of affordable housing previously secured; and
    c. whether the proposal could make provision for affordable housing, having regard to viability.

5. The Inspector was provided with a Deed of Variation ('DoV'). It was signed by all parties to the DoV including the Council and Wilson.

6. Wilson applied for its costs of the appeal, against the Council. By a second decision dated 25th June 2025 ('the Costs Decision'), the Inspector allowed the costs application. He ordered the Council to pay Wilson's costs, limited to those costs incurred in finalising the draft unilateral undertaking after the submission of the appeal and prior to 14 April 2025, and in producing evidence to address the first two main issues of the appeal.

7. The Council now applies to quash both of those decisions and does so with permission to proceed granted on 2nd October 2025 by HHJ Stephen Davies, sitting as a Judge of the High Court. On 2nd December 2025, Karen Ridge, sitting as a Deputy High Court Judge, granted permission for further evidence to be admitted.

8. Mr Killian Garvey, who was not instructed and did not appear at the Hearing before the Inspector, advances the Council's case via one ground, namely that the Inspector erred in his approach to the s106 agreement and its variation. By the conclusion of his submissions, Mr Garvey had developed the point in these ways. The Inspector erred in that an application to vary a s.106 agreement is determined through the

statutory test within s.106A(6) of the1990 Act which includes consideration of whether the obligation serves a useful purpose, whereas the Inspector applied a different statutory test. Further, an application had not been made to the Council to vary the obligation, and there was no such appeal before the Inspector. Planning obligations can only be varied by agreement within the first 5 years of them being entered into – but the Council did not agree to variation of the obligation. The Inspector misunderstood the Council's position. The Council did not agree to the DoV. In signing the DoV it did not weaken its primary position and case. The Inspector treated the DoV as a material consideration in favour of the grant of permission, and that was a further error.

9. Mr Jack Smyth, who appears on behalf of the Secretary of State, agrees that if the Inspector was obliged to apply the tests under s.106A(6) of the 1990 Act, there was an error of law. But he submits that the premise of the Council's case is incorrect. He submits that the DoV was agreed by the Council without prejudice to its case that the requirement for affordable housing should not be amended. The Inspector was entitled to proceed on this basis. Mr Smyth's fallback position is that if there was an error, relief should be refused on a *Simplex* basis.

10. Ms Constanze Bell, who appeared at the Hearing before the Inspector and in these proceedings, adopts the position of the Secretary of State. She draws further attention to the facts and events during the appeal.

11. The issues for the court are therefore:

> **[1]** Did the Inspector misapply any legal test in respect of varying the controls on affordable housing provision?
> **[2]** Did the Inspector misunderstand the Council's case and incorrectly take the signed DoV as a concession?
> **[3]** Did the Inspector err in having regard to the DoV?

12. This judgment follows these headings:

The Planning Background

13. On 19th October 2021, the Claimant granted the Original Permission for:

> *"Outline application for the erection of up to 24 dwellings (C3) and provision of new vehicular access, and pedestrian access to Willey Lane"*

14. On the same day, a s.106 agreement ('the Original Agreement') was entered into by the Claimant and others in respect to the Site. The Original Agreement's Third Schedule included provisions on Affordable Housing, including:

> *"1.9 That from the date on which the Council approves the Affordable Housing Scheme, the land upon which the Affordable Housing Units are to be provided shall only be used for Affordable Housing"*

15. '*Affordable Housing'* has the meaning '*in the National Planning Policy Framework (NPPF) February 2019 (as may be updated or replaced from time to time) that will be available to persons who cannot afford to rent or buy'.*

16. I also note Clause 10.7 which is commonplace in such agreements and provides as follows:

> *"Nothing in this Agreement shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted (whether or not on appeal) after the date of this Agreement."*

17. The Original Permission was varied, pursuant to s.73 of the 1990 Act ('the Varied Permission'). As I indicated above, the Original Agreement was varied on 26th January 2024 pursuant to s.106A of the 1990 Act ('the Principal Agreement'). The result was that the Principal Agreement changed the terms within the Original Agreement in respect of affordable housing. It tied itself to the Varied Permission.

18. Condition 11 of the Varied Permission required housing types, standards and floor plans to be in accordance with approved plans and for housing mix to be in accordance with an approved Accommodation Schedule. On 8th July 2024, Wilson's s.73 application to vary Condition 11 was validated. The Council refused the application on 27th September 2024, for these reasons:

> *"The proposal to vary condition 11 has no bearing over the control of affordable housing as part of the permission 23/00750/VCN, but would present conflicting information with the planning obligations secured through the legal agreement at the site within the completed section 106 agreement attached to this development, which are necessary to make the development acceptable in planning terms. The proposals fail to meet the requirements of Section 4 of the National Planning Policy Framework, in particular paragraphs 55, 56 and 57."*

19. As I have indicated, Wilson appealed to the Secretary of State who appointed an Inspector to determine the appeal. The mode of determination of the appeal was the hearing procedure.

20. A DoV was submitted to the Inspector, dated 29th May 2025, signed by all parties who had an interest. The purpose of the DoV was to vary the Principal Agreement. Recital G provides:

> *"The parties have agreed to vary the Principal Agreement in accordance with this Deed.*

> *3.1 This Deed is supplemental to the Principal Agreement and relates to and binds the Site and is made pursuant to the provisions of sections 106 and 106A of the Act and section 111 and 120 of the Local Government Act 1972 …*
>
> *3.3 This Deed varies the Principal Agreement and shall be binding on the Site provided that no person shall be liable for any breach of any covenant or obligation contained in the Principal Agreement as varied by this Deed …"*

21. Clause 4.1.1 of the DoV provided:

> *"If the appeal is allowed and the Section 73 Permission granted then the Principal Agreement shall be varied in the manner set out in the Schedule with effect from the date of the Section 73 Permission AND FOR THE AVOIDANCE OF DOUBT if the appeal is allowed the Secondary Education Contribution (as defined in the Principal Agreement) is NIL contribution."*

22. Clause 4.1.3 of the DoV provided:

> *"If the Appeal is dismissed, then this Deed shall determine absolutely and shall have no further force or effect and the Principal Agreement shall remain in full force and effect."*

23. Accordingly, the DoV only took effect if the Inspector allowed the appeal.

The Appeal and the Decisions

24. The parties have each filed witness statements to explain the preparatory steps in the appeal, the way in which the Main Issues were identified and the course of the Hearing. There is broad agreement as between the accounts of the witnesses, with differences of emphasis. I find that the factual background to the appeal was as follows, so far as is relevant to the issues.

Preparation for the Hearing

25. Mr Wyatt is an Associate Planner, instructed by Wilson in respect of the appeal. He explains that Wilson initially intended to rely on a unilateral undertaking. However, the Council instructed solicitors, Trowers, who preferred an agreement to a unilateral undertaking:

> *"Having had a quick review of the UU I think it would be best to seek an extension and then agree a DOV because at present the UU is inadequate and leaves the site being bound by both the obligations under the original s106 (as varied) but also the UU, which is confusing and I would anticipate this would cause issues in the future with onward sales, lenders etc given there are conflicting obligations."*

26. The resultant DoV was the Council's solicitor's and Principal Planning Officer's preference.

27. The Council's Statement of Case made clear that it contested the notion that the Council agreed to the variation of the Principal Agreement. As Mr Potts, Manager of the Council's Development Management Team explains in his witness statement,

the DoV was agreed on a without prejudice basis, as is commonplace for appeals of this nature. Mr Garvey took me carefully and thoroughly through the appeal materials and made that point good, including by reference to Mr Clement's witness statement (Principal Planning Officer). It was abundantly clear that the Council resisted the proposed change to the provision of affordable housing. The Council resisted this outcome by reference to the procedural mechanism, the planning merits and as to viability. Its engagement with the DoV was not a concession and was without prejudice to its case.

28. Rules 11(4) and (5) of the Town and Country Planning (Hearings Procedure)(England) Rules 2000 provide for the Inspector to state the Main Issues. The Inspector took the helpful course of providing a note in advance of the hearing which, amongst other procedural arrangements, included his draft of the Main Issues. At that stage the Inspector had included an item asking *"whether a section 73 application could modify a condition which would result in the condition being contrary to an existing legal agreement?"* Wilson wrote to the Inspector in response to suggest an alternative formulation. The Council did not respond. The Inspector amended his draft Main Issue to read *"Whether a section 73 application is an appropriate means to reduce the level of affordable housing previously secured?"*.

29. The finalised Agenda for the Hearing included the item 'Obligation' which evidently included reference to the DoV.

30. The Inspector also took the trouble to engage with the parties' Statement of Common Ground. He was asked for an extension of time for the submission of the Statement of Common Ground and legal agreement, but he only granted that extension after he had asked the Council to provide an update on the progress of the evidence and identification of issues on viability. The Council provided an update and the Inspector extended time for provision of both documents.

31. The Inspector expressly referred to the 'Procedural Guide: Planning Appeals'. This is a document which the Inspectorate produce and maintain. It is a user-friendly compilation of procedural rules, good practice guidance and statements of Inspectors' expectations of the parties in assisting them in the efficient determination of appeals. It sets a deadline for the receipt of planning obligations so that an Inspector and the public have an opportunity to consider the document and its implications in advance of the appeal event, whether that be a hearing or a public inquiry. The importance of providing such access to the draft agreement is clear from article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 which requires the publication of a proposed or agreed planning obligation on the planning register to enable members of the public to know the terms of the planning obligation and to comment: *R(Greenfields (IOW) Ltd) v Isle of Wight Council* [2025] EWCA Civ 488 per Lewis LJ, with whom Singh LJ agreed.

The Hearing

32. Mr Wyatt's evidence is that the Inspector asked for comments on his revised Agenda. The Council did not make any comments on the Inspector's Main Issues nor the Agenda more generally.

33. The discussion at the Hearing turned to the DoV. The Inspector understood the pre-hearing correspondence to indicate that the Council agreed to the DoV, and at no stage did the Council say otherwise. Wilson and the Council agreed to provide the Inspector with a signed version of the DoV shortly after the Hearing, and they did so.

The Decision on the Appeal

34. After setting out the Main Issues, the structure of the Decision was firstly to consider Condition 11, secondly to consider whether s.73 of the 1990 Act was an appropriate means to alter the levels of affordable housing, thirdly to reach conclusions on viability and lastly to turn to some 'Other Matters', of which the DoV was one. The Inspector then concluded by granting planning permission, subject to 19 conditions.

35. In refusing planning permission, the Council stated that Condition 11 did not control affordable housing provision (paragraph 18 above). Wilson sought a revision to Condition 11 to refer to a revised Accommodation Schedule such that it only referred to open market dwellings, and not affordable housing. The Inspector concluded at his paragraph 10:

> *"Condition 11 attached to the Amended Permission specifies that the housing mix shall be implemented in accordance with the approved Accommodation Schedule, amongst other matters. The reason given for Condition 11 was to ensure that the proposal conforms with the Council's Strategic Housing Market Assessment and that a proportion of the homes are adaptable and accessible. Neither Condition 11 nor the reason for it, make explicit reference to affordable housing. As such, whether Condition 11 controls the provision of affordable housing or not, is dependent on whether it forms part of the housing mix as specified within the approved Accommodation Schedule."*

36. The Inspector reviewed the relevant development plan policies and the 'Meeting Housing Need' Supplementary Planning Document. He concluded that Condition 11 did control affordable housing provision. At paragraph 12 he said:

> *"The final column of both the approved and revised schedules concerns housing tenure. Therefore, to accord with the housing mix specified within the schedules, the proposal must accord with the details specified within the final column. Consequently, the condition does control the provision of affordable housing to some extent. Albeit a planning obligation would be necessary to ensure that the affordable housing is delivered at an appropriate time and retained in perpetuity."*

37. In his oral submissions, Mr Garvey criticised the last sentence of paragraph 12. He submitted that the Inspector omitted to record that there was already a s106 obligation which binds the land, namely the Principal Agreement. I do not accept this submission. Read fairly and as a whole, the decision makes clear that the Inspector had the Principal Agreement very much in mind. For example, in paragraph 14, which I set out below, the Inspector refers to *'the planning obligation secured*' which is an express reference to the extant obligation; the Principal

Agreement. Moreover, he repeatedly refers to Principal Agreement and its variation. On this topic, the Inspector concluded, at his paragraphs 14 and 15:

> *"The reason for refusal indicates that the proposal to vary Condition 11 has no bearing over the control of affordable housing, but it would present conflicting information with the planning obligations secured. I will return later to consider the status of the existing planning obligation in the event that a new permission is granted. Nonetheless, working on the assumption that the obligation would still be enforceable, the proposed wording of Condition 11 would only conflict with the obligation if it controlled the provision of affordable housing. This adds further weight to my consideration that affordable housing forms part of the housing mix.*
>
> *I conclude that the proposed wording of Condition 11 is reasonable and necessary for the reasons given on the Amended Permission and to provide some control in relation to the provision of affordable housing."*

38. These paragraphs and their conclusion are not challenged in this Claim.

39. Next, the Inspector came to consider the scope of the appeal before him, under s.73 of the 1990 Act. He explained [paragraphs 17 and 18]:

> *"Section 73(2) of The Town and Country Planning Act 1990 (TCPA) confirms that if a local planning authority decide that planning permission should be granted subject to conditions differing from a previous permission, they shall grant a new permission subject to such conditions. In that scenario, two permissions would exist and either could be implemented.*
>
> *Planning obligations are freestanding legal instruments that do not form part of a planning permission. They do not automatically apply to a new permission unless they have been specifically drafted to do so. The existing planning obligation does not include a clause which would mean that it would apply to any subsequent permission granted following a Section 73 application."*

40. Interposing there, the Inspector was evidently correct in that regard, and he could have gone further because Clause 10.7 of the Principal Agreement provided that *"Nothing in this Agreement shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted (whether or not on appeal) after the date of this agreement.* This standard text is in the same terms as that considered in *Norfolk Homes Ltd* at [97-101]. The protection afforded only applies where the obligation and permission are mutually incompatible. I have not heard submissions as to whether the permissions are mutually incompatible in this case and, because of the other conclusions I have reached, it is unnecessary for me to decide whether they are. In any event, the Inspector then concluded on this topic [paragraph 21]:

> *"In these circumstances a Section 73 application would be an appropriate means to alter the level of affordable housing previously secured. It would not lead to a contradiction between the operative part of the permission and conditions, it would amend the condition which partly controls the delivery of*

affordable housing, and it would lead to an assessment on whether an obligation relating to the provision of affordable housing is required."

41. Again, these paragraphs and their conclusion are not challenged in this Claim save that Mr Garvey submits that the last clause of paragraph 21 omits to make clear that there is already an obligation in force by reason of the Principal Agreement. I have already rejected that same submission in respect of paragraph 12 of the Decision.

42. In respect of viability, the competing positions were [paragraph 22]:

"The appellant contends that if affordable housing is provided at the level previously agreed they would make a loss on the development, and if the proposal was entirely open market housing, they would make a return of 1.53%. The Council contends that the appellant would make a return of 1.52%, if they provide affordable housing at the level previously agreed, and 10.22% if the development was entirely open market housing."

43. The Inspector found that, on any basis, this was less that the 15-20% developer return which was advised in the National Planning Practice Guidance (Viability, Paragraph: 018 Reference ID: 10-018-20190509). He went on to find that there was a real prospect that the proposal would not be completed if the affordable housing obligation was not removed. That would be harmful to the character and appearance of the village, he found, and he gave that harm substantial weight. There would still be significant benefits in removing the obligation to provide affordable housing absent the viability case. He concluded [paragraph 33]:

"I conclude that the proposal could not make provision for the level of affordable housing previously secured, having regard to viability. Therefore, a lack of an obligation to provide affordable housing would comply with DMDPD Policy DM3, for the reasons given above. The proposal would also be in accordance with the Viability Protocol Supplementary Document 11 where it indicates that when a developer seeks to reduce contributions on a site they are developing, the viability assessment must re-assess the whole site and include actual build and sales costs."

44. Once again, these paragraphs and their conclusion are not directly challenged in this Claim. Rather, the Council's main complaint is in respect of the Inspector's conclusions on the DoV [paragraphs 34 and 35]:

"The parties have submitted a Deed of Variation (DoV), dated 29 May 2025, which would only come into effect if planning permission were granted. The DoV varies the Principal Agreement, which comprises of the original agreement as varied by the previous DoV, dated 26 January 2024. Upon review of the submitted DoV I find it to be effective and legally sound.

The amended Principal Agreement would require the payment of an Open Space contribution and concerns the provision and ongoing management and maintenance of the 'Common Parts' of the appeal proposal. The parties consider these obligations to be necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind to the development. There is no evidence before me to

come to an alternative conclusion. I therefore conclude that the DoV, dated 29 May 2025, would accord with the tests set out within Regulation 122 of the CIL Regs and paragraphs 56 and 58 of the Framework."

45. Mr Garvey submits that the Inspector erred in finding the DoV to be effective and legally sound: the Council did not agree to the removal of the obligation to remove the affordable housing contribution, he submits.

The Decision on Costs

46. Mr Garvey does not challenge the Costs Decision on any ground which is independent of the challenge to the substantive decision. However, he does rely upon certain of the Inspector's conclusions in the Costs Decision in support of his argument more generally.

47. On the application for costs on substantive grounds, i.e. the application on the basis that it was unreasonable to have refused permission for the reasons given, the Inspector commenced his reasons in this way [paragraph 9]:

"The Council did not seek to argue that the planning obligation would still be enforceable if a new permission was granted. Furthermore, it did not dispute that a new permission would be granted, if a Section 73 application was approved. Also, the Council contended that the final column of both the approved and revised Accommodation Schedule is superfluous, and that Condition 11 does not control the provision of affordable housing. With this in mind, it is unclear why the Council concluded that the proposed wording of Condition 11 would be contrary to the secured planning obligation."

48. This records that the Council conceded that the Principal Agreement was not enforceable if the appeal was allowed. This was not the Council's position in this claim. I return to the relevance of that difference in position, below.

49. The Inspector then criticised the Council's reliance on the tests in s106A of the 1990 Act (paragraphs 12-14):

"In light of the submitted evidence, the Council has not explained why it still considers that the proposal should be assessed against the tests specified within Section 106A. Moreover, within its Costs Rebuttal where it considers the relevance of the Balborough Links appeal, the Council now appear to accept that there is not a requirement to assess the removal of an obligation against these tests, in this instance.

It was therefore unreasonable for the Council to conclude that the proposed wording of Condition 11 would be contrary to the secured planning obligation. Consequently, it was also unreasonable for the Council to not assess whether planning obligations were required as part of the planning application and to not assess the need for a planning obligation afresh, rather than against the tests specified within Section 106A.

I acknowledge that the Council did not engage with the applicant over viability matters during the planning application. Albeit no draft agreement or deed of

variation was submitted with the application. As above, and in accordance with my decision I consider that the Council should have determined it was possible to amend Condition 11 and then it should have reassessed the need for a planning obligation as part of the determination of the planning application. Established case law indicates that the planning merits on whether a Section 106 obligation should be entered following the determination of a Section 73 application is a contemporaneous decision."

50. The thrust of this reasoning, therefore, is that the Council unreasonably concluded that Condition 11 did not bear on the affordable housing requirement. That infected the Council's conclusion on the need for an obligation to secure affordable housing was unnecessary in this case, or as the Inspector put it (paragraphs 19 and 20):

"I consider that the Council acted unreasonably in seeking to defend the first two main issues, in light of established case law and with regard to its position on Condition 11 and the enforceability of the planning obligation. However, the Council did not act unreasonably when undertaking an assessment of the viability of the proposal. Consequently, the applicant has incurred unnecessary and wasted expense in producing evidence to address the first two main issues of the appeal.

Overall, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the work undertaken to finalise the draft UU after the submission of the appeal and prior to 14 April 2025, and to produce evidence to address the first two main issues of the appeal, a partial award of costs is therefore warranted."

Legal Framework

The Relevant Statutory Provisions

51. S.106A of the Act states:

(1) A planning obligation may not be modified or discharged except—
(a) by agreement between [the appropriate authority (see subsection (11))] and the person or persons against whom the obligation is enforceable ; or
(b) in accordance with [— (i)] this section and section 106B[, or (ii) sections 106BA and 106BC.]

(2) A planning obligation may—
(c) be unconditional or subject to conditions;
(d) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and
(e) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

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

(f) to have effect subject to such modifications as may be specified in the application; or
(g) to be discharged.

(4) In subsection (3) "the relevant period" *means—*
(a) such period as may be prescribed; or
(b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.
...
(6) Where an application is made to an authority under subsection (3), the authority may determine—
(a) that the planning obligation shall continue to have effect without modification;
(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or
(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

52. In summary, s.106A(1)(a) provides for the modification or discharge of a planning obligation by agreement between the authority and the person(s) against whom the obligation is enforceable. If agreement cannot be reached, s.106A(3) entitles such persons, after five years have lapsed since the obligation was entered into, to apply to the authority for it to be discharged or for it to have effect subject to such modifications as specified in the application. S.106A(6) provides the test for considering an application, namely the useful purpose test.

53. Section 106B provides for the right of appeal against the refusal of an application under s.106A(6).

Case Law

54. The relationship between planning obligations and planning permissions granted pursuant to s.73 was examined by Holgate J (as he then was) in *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265 (QB).

55. *Norfolk Homes Ltd* was a case in which three permissions (granted in 2012, 2013 and 2015) were extant at the time that reserved matters were approved. None of the permissions had been implemented. Norfolk Homes Ltd applied to the court for a declaration that the obligation entered into in 2012 did not attach to the 2013 and 2015 permissions. In the course of deciding that issue, the court examined the relationship between permissions and agreements, holding:

i. A deed pursuant to s.106 is an agreement which is to be interpreted objectively as a matter of law;
ii. The parties' thinking and intentions are irrelevant to the interpretative exercise;
iii. A s.106 agreement is a free-standing legal instrument, independent of a planning permission, though a planning authority may, and typically does, require its execution before a decision notice issued;

iv. A s.106 agreement remains a free-standing legal instrument even though it may impose obligations in relation to development carried out under such a permission;
v. When considering a s.73 application, the decision maker may consider whether to enter into a s106 agreement which is appropriate to the circumstances and terms of the new permission;
vi. Likewise, any existing obligation may be varied or discharged;
vii. But s.73 is not a power which enables the variation or discharge of an obligation made under s106;
viii. The power to vary or amend is under s.106A, and s.106B on appeal;
ix. If a permission is granted on application under s.73, there is no assumption in the legislation that any pre-existing planning obligation will apply to that permission, or to development carried out under that permission. Instead, that is a matter left to be addressed by the parties before the s.73 permission is granted, and, if there is an issue, then potentially by an Inspector dealing with an appeal.

56. In considering an application under s.106A, there are four essential questions: i) What is the current obligation?; ii) What purpose does it fulfil?; iii) Is it a useful purpose?, and; iv) If so, would the obligation serve that purpose equally well if it had effect subject to the proposed modifications? (*R (Garden and Leisure Group Ltd) v North Somerset Council* [2004] 1 P&CR 39 at [28] per Richards J).

Discussion

First Issue: did the Inspector misapply any legal tests?

57. Mr Garvey submits that the Inspector erred in finding the DoV to be legally sound, when it was not because it varied the Principal Agreement outside of the statutory scheme.

58. As Mr Smyth submits, it is a matter of fact that the Council signed the DoV. That was in accordance with s.106A(1)(a) and (2) of the 1990 Act. There was no application made by Wilson under s.106A(3). In my judgment, the Inspector had to engage with the appeal which was before him and proceed step-wise through the issues as they presented themselves. That is what he did.

59. Firstly, he analysed the Amended Permission. He concluded that Condition 11 did control affordable housing and so an application for planning permission without compliance with that condition was capable of resulting in a new permission which did not require affordable housing to be provided. That conclusion is not one which the Council argues to be in error, and in my judgment that concession is correctly made.

60. Secondly, the Inspector turned to submissions which had been made to him on the operation of s.73 of the 1990 Act and the need or otherwise for an application under s.106A of the 1990 Act, to vary the Principal Agreement. At his paragraph 21, the Inspector reached a carefully expressed conclusion on those arguments. He explained that in the circumstances which he had to address, s.73 would be an appropriate means to alter the levels of affordable housing previously secured. His conclusion was clear that Condition 11 partly controlled the delivery of affordable

housing but would also lead to an assessment on whether an obligation relating to affordable housing was required.

61. This conclusion contained no legal error. The Inspector was alive to the decision which he had to make in respect of the variation of Condition 11 and its relationship with an obligation.

62. Thirdly, when the Inspector came to make his decision, he had a signed and effective DoV before him which addressed the circumstances as he found them. He considered the merits of the viability evidence and arguments, the relevant development plan policy, national policy and the material considerations which existed at the site and its location. His planning balance indicated the grant of planning permission with no requirement for affordable housing. That analysis and conclusion contains no legal error, and none is suggested.

63. Therefore, the Inspector had a valid application and appeal before him which, on the facts, merited variation of the conditional requirement for affordable housing and a DoV which addressed the contingent issue, if it arose, of the Principal Agreement.

64. There may be cases in which there is no relevant planning condition which controls affordable housing provision and the entire set of controls is to be found in a legal agreement. That is not this case. The relevant powers to amend a legal agreement in such circumstances are set out above and it is unnecessary to this judgment to say more about them. This judgment does not decide that a s.73 route will be effective or appropriate in every case.

65. In this case, the Inspector did not misapply any legal test. To the contrary, he applied the correct approach and correctly rejected the Council's submissions as to the need to apply under s.106A of the 1990 Act.

Second Issue: did the Inspector misunderstand the Council's case?

66. Mr Garvey submitted that the Inspector's misunderstanding as to the basis on which the Council signed the DoV was the point which was central to the Council's case.

67. I have found that the appeal proceeded normally and in accordance with usual practice, including as provided for in the Inspectorate's Procedural Guide. As Mr Garvey explained with force and clarity, the Council repeated its opposition to the variation of the affordable housing contribution at all available opportunities. It was clear from the written materials provided by the Council to the Inspector. It was also clear from Wilson's case because Wilson sought to show why the Council was wrong on the merits and also asserted that the Council's position was unreasonable. In my judgment, the evidence is clear that the Council opposed the proposed change and the Inspector fully understood that the Council remained unmoved in that position throughout.

68. As the Inspector observed in his witness statement, clauses which limit a legal agreement's effectiveness to only the scenario in which the appeal is allowed are clauses which are found in most legal agreements which are seen at appeals. This is the type of background material which the court will presume to be familiar to an expert tribunal unless there are grounds for an alternative conclusion. But in this

case, the Inspector expressly recorded that the DoV would only come into effect if he granted planning permission. In my judgment, the Inspector both knew the strength of the Council's opposition to the variation and understood that the DoV was provided to him on a contingent basis, without prejudice to the Council's clear and consistently held position.

69. Mr Garvey made passing reference to paragraph 12 of the Costs Decision and its reference to the Council's submissions on an appeal decision (Balborough). It was submitted that the Inspector wrongly took the Council as conceding its position on s.106A. I do not accept that as a correct reading of the Costs Decision, when read in context with the Council's submissions which did, correctly, point out that the Balborough appeal decision was a s.106B appeal. The Council was justifying its reliance on this appeal decision on the basis that the decision was relevant to the viability argument.

70. I have not been persuaded that the Decision or the Costs Decision, nor the totality of their reasoning discloses any misunderstanding of the Council's case. There is no part of either decision which records an error of understanding of that sort. The Inspector's statement that the DoV is effective and legally sound is accurate. It is also consistent with the fact that the parties had each signed it, incorporated a recital that they agreed and did so with the benefit of specialist legal advice. The Council's officers said nothing to the Inspector to indicate the contrary.

71. Ms Bell characterised the Council's case as *l'espirit d'escalier*: the Council was rather overwhelmed at the appeal and regretted its position later. Mr Smyth made a similar point, cautioning against the dangers of hindsight, though he too would have used the French reference if he had thought of it earlier.

72. Put another way, the Council is now raising a point which it had the opportunity to raise at the hearing. I accept Mr Smyth's and Ms Bell's submissions in this regard. The court should be slow to accept a new point which could have been raised but which was not raised before the Inspector, or not made clear when the opportunity was there to be taken: *West v First Secretary of State* [2005] EWHC 729 (Admin), per Richards J, [42]*; Mead Realisations Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin) per Holgate J (as he then was) [182]. As recorded at paragraph 9 of the Costs Decision, the Council did not argue that the Principal Agreement would still be enforceable if a new permission was granted (see paragraph 47 above). On that basis, a DoV was needed if the appeal was allowed. That is what the Council's solicitors understood and that is why they took part in the drafting and execution of the DoV. In my judgment, the Council's dissatisfaction with the outcome is of its own making and originates in misconceptions about the controls on affordable housing for this particular site. It is the sort of after-the-event complaint which the court will not admit.

73. Nevertheless, and notwithstanding Mr Garvey's helpful submissions, I have concluded that the Inspector proceeded on a correct and clear understanding of the Council's position, and without error.

74. I have not addressed the scenario in which the Inspector was not provided with a signed DoV which would bring an extant legal agreement into line with his conclusions on the planning merits. That scenario did not arise on the facts of this

case and would require analysis of the reasonableness of a local authority taking such an approach and the impact in the particular case of standard clauses such as clause 10.7 (at paragraph 16 above, and see *Norfolk Homes* at [97-101]).

Third Issue: did the Inspector err in having regard to the DoV?

75. The DoV had the effect of removing the requirement for affordable housing from the Principal Agreement. This is therefore not a case in which the Inspector had to decide whether, in respect of affordable housing, the obligation met the tests in Regulation 122 of the Community Infrastructure Regulations 2010, as amended, nor the broadly equivalent policy tests in the National Planning Policy Framework at paragraphs 56 and 58. On the basis of the Inspector's findings and conclusions, there was no affordable housing to be taken into account.

76. Therefore, the sense in which this issue is raised is different to that in which it more frequently appears in appeals and in the Planning Court. In this case, the Council contends that the DoV does not overcome the Principal Agreement. Mr Garvey emphasised that the Principal Agreement binds the land and the Varied Permission had been implemented. He contended that the Principal Agreement remained in operation and the DoV did not, and could not, change that position, on the facts of this case.

77. I refer to my conclusions on the second issue (paragraphs 61-62) and the fact that there was a signed DoV before the Inspector. In those circumstances, Mr Garvey's submissions on the third issue are not sustainable because the effect of the DoV was to vary the Principal Agreement such that no affordable housing was required. As I have recorded at paragraph 74, there was an alternative scenario which could have played out in the appeal whereby there was no signed DoV before the Inspector, but that is of no assistance to the Council in the present circumstances, because it agreed the DoV.

78. The Inspector did not err in having regard to the DoV.

Conclusion

79. Ground 1 fails, the Defendant's *Simplex* argument on relief does not arise, and the claim for statutory review is dismissed.

80. I am grateful to all Counsel for their contributions to an efficient hearing.