Neutral Citation Number: [2019] EWHC 1736 (Admin)

Case No: CO/5094/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2019

Before:

SIR DUNCAN OUSELEY,
sitting as a High Court Judge

Between :

MANOR OAK HOMES LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	
AYLESBURY VALE DISTRICT COUNCIL	**Interested Party**

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Paul Tucker QC and Sarah Reid (instructed by **Shakespeare Martineau**) for the **Claimant**
Hugh Flanagan (instructed by **GLD**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing dates: 6 June 2019
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Approved Judgment

Sir Duncan Ouseley, sitting as a High Court Judge:

1. This appeal under s288 of the Town and Country Planning Act 1990 concerns the approach which an Inspector should adopt to the granting of planning permission where highway infrastructure, necessary to make the development acceptable, depends in part on contributions from other developments, as yet without permission or contributions secured by agreement. It arose here in the context of an agreement on highways issues between the developer, highway authority and development control authority, which all three regarded as sufficient to dispose of the highways objection. The Inspector did not accept that agreement as sufficient to deal with the highways issue because of the other as yet unsecured contributions.

2. Manor Oak Homes Ltd, the developer and Claimant, appealed to the Secretary of State for Housing, Communities and Local Government, the Defendant, from the non-determination by the Aylesbury Vale District Council, the District Council, of its application for planning permission to build 375 homes on land off Wendover Road, Stoke Mandeville, in Buckinghamshire. Buckinghamshire County Council, BCC, is the highway authority. A Planning Inspector dismissed the appeal after a one day hearing. The Claimant now appeals that decision.

3. Mr Tucker QC's submissions for the developer are all addressed to how the Inspector approached the probability of necessary highway improvements actually being brought about, and the possibility that they might not be. First, she had required "certainty" but there was no legal or policy requirement for certainty; something less sufficed. Second, there was no evidence which could reasonably support her conclusion that it was "unknown or unlikely" whether the other contributing schemes would come forward. Third, her reasons for departing from the views of the highway authority and planning authority were legally inadequate, to the developer's prejudice. Mr Tucker in his Skeleton Argument trailed a natural justice argument, but this was not a formal ground of challenge, and was treated as a supporting point to the prejudice alleged in his reasons ground.

The Decision Letter

4. The District Council's putative reasons for refusal had included the effect of the proposal on highway capacity and safety, but by the time of the hearing, that had ceased to be a main issue between the main parties, as a result of an agreement reached after prolonged discussions between the developer and BCC in particular, for contributions towards highway improvements. As anticipated, this found formal expression after the hearing in an agreement under s106 of the 1990 Act, which the Inspector was sent and took into account. In DL 28, she referred to this Deed of Undertaking, DoU, as providing for the financial contributions for "junction improvements at Wendover Road/Station Road, [J2] and Station Road/Risborough Road/Lower Road [J3]… and towards the South East Aylesbury Link Road [related to J8, Walton Street Gyratory], [which] are reasonable and necessary to mitigate the impacts from the development on the transport network and for highway safety reasons." (I have added the Junction numbers and names for ease of later reference; I have also referred only to the improvements where an issue arose because of the contributions required from other development schemes.)

5. The main issues at the Inquiry concerned what may broadly be termed the impact of the proposal on the character and appearance of the area, and the appropriateness of contributions sought for various facilities, other than the highway improvements. The impact on the highway network was dealt with under the heading "Other matters".

6. Thereunder, the Inspector explained that the developer had provided three Transport Assessments, TAs; in 2017, revised in February and again importantly in July 2018, to take into account concerns expressed by the District Council following consultation with BCC. BCC had indicated that the July 2018 revision and the mitigation measures it contained had addressed its concerns in respect of the proposal upon highway capacity and safety. She added, [DL31]: "Local residents do not however share the views of the Council in this regard."

7. She accepted the view of BCC, contrary to that of local residents, that J1, whereby the proposal accessed the highway network, would be satisfactory; DL 32. The July 2018 TA had assessed 9 key junctions for the impact of this proposal along with other "developments that would be likely to occur in the locality." Of these junctions, 3 would require improvement works to accommodate the appeal proposal, towards which the developer had agreed to pay a contribution, as set out in the DoU. These were what the TA termed J2, J3 and J4. In fact, the developer was bearing the whole cost of J4. The other 6 junctions did not require improvement works, including J8, the Walton Street Gyratory, either because they could cope any way or, as would be the case with J8, the situation would improve and vehicle numbers would be reduced once the South East Aylesbury Link Road, SEALR, and two other link roads were connected; DL 34. The DoU provided for a £1.22m contribution to the SEALR.

8. In DL35, the Inspector concluded: "In the absence of substantive evidence to demonstrate otherwise, I am satisfied that, subject to the mitigation measures being implemented as set out in the TA, that the proposal would not have an adverse effect upon the function and safety of the highway network."

9. She continued:

> "36. However, the funding of the mitigation measures proposed is dependent on other development schemes in the area contributing to them, along with the appeal proposal; not all of which have yet received planning permission. In the event that one or more of the schemes contributing to these works does not receive planning permission and/or is not delivered, it would be unlikely that the funding for the mitigation would be realised. As such, on the evidence before me, there is no certainty at this stage, that the mitigation works proposed would be implemented.
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> 37. I acknowledge that the approach taken in the TA was supported by the Highway Authority. However, in the absence of a scenario assessing the impact of vehicle movements that would result from the proposed development on the transport network in isolation, I cannot be certain that there would be no unacceptable impact on highway safety that the residual

> cumulative impact would not be severe, if the identified mitigation measures were not implemented.
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> 38. In light of the above, I am unable to conclude whether traffic associated with the proposal could be safely accommodated on the transport network as required by the Framework, or indeed make an assessment of what the residual cumulative impact of the proposal would be. In reaching this view, I am mindful that the proposal would improve [various transport facilities]. However these matters do not outweigh my concerns in this regard."

10. Mr Tucker QC submitted that the Inspector in DL36 was not referring to the way in which the effects on J8 would be alleviated, that is by the SEALR rather than junction improvement as such. That is wrong. True, she identified the three junction improvements in DL 34, but she then went on to deal with the other road improvements which solve the problem at J8. There is no reason to read DL36 as suddenly limited to only some of the improvements to which the developer had agreed to contribute and to which other developers were expected to contribute. The status of the SEALR was touched on at the hearing, as I come to later.

11. In DL45, she had set against the benefits of the proposal, the substantial harm which would be caused to the character and appearance of the area. "Further harm could be caused because there is no certainty that the proposal could take place without having a severe adverse impact on the transport network in terms of capacity, congestion and highway safety." She continued in DL47 that, even if the housing requirements had tilted the balance towards the grant of permission, "the harm that would be caused to the character and appearance of the area and the uncertainty over the proposal's impact on the transport network would, in any event, significantly and demonstrably outweigh the benefits of the proposal, when assessed against the Framework taken as a whole."

Discretion

12. It is convenient to deal with discretion here. Mr Flanagan, for the Secretary of State, relied on those paragraphs to argue that, even if the Inspector had erred in law on the highways issue, she would still have dismissed the appeal; the decision should therefore not be quashed in the exercise of my residual discretion. He submitted that the impact on the character and appearance of the area was of itself judged by the Inspector to be a separate and sufficient reason for dismissing the appeal.

13. Mr Flanagan has to show that the outcome would inevitably have been the same, even if the Inspector had erred on highways. That means that he has to show that the Inspector in fact concluded that the impact on the character and appearance of the area was, by itself, a sufficient basis for dismissing the appeal. She does not say so. She runs the two reasons together in DL 47. It is at least uncertain that they were each separately sufficient to dismiss the appeal. Her language is not so damning of this impact either that it impels the inference that she had actually found it a sufficient reason alone for dismissing the appeal, but simply did not say so. In my judgment, it is far from adequately clear that the landscape impact was judged to be a sufficient reason by itself for dismissing the appeal.

The development of BCC's position and the evidence at the hearing

14. The various grounds require a certain amount of background to be set out. The initial TA, and its February 2018 first revision, dealt with the impact of the proposal alone. The BCC response to that in April 2018, to which Mr Flanagan took me, shows two points. First, BCC did not accept that the developer's highways consultant's work on J2 and J3 was adequate to show that the proposal by itself would be acceptable with works it alone would finance. The modelling work on J8 was also inconsistent with BCC's model. BCC's then stance is important because it shows that, if the schemes to which the developer agreed to contribute in the DoU were not forthcoming, there was no agreed fall-back position to cover the impact of this proposal by itself. It is not clear whether those documents were before the Inspector, but even if they were not, they show that BCC would have maintained its objection to the proposal if the developer had persisted in its contention that the proposal was acceptable even if the schemes, towards which it agreed to contribute, did not come forward. This would have become a major issue, and one not likely have been resolved within the one-day hearing; the hearing would have taken on a quite different complexion. I emphasise that, because Mr Tucker said that the developer's highways consultant did not attend the hearing because, in circumstances to which I shall come, the main parties had reached agreement on the issue. In reality, the developer had nailed its colours to the position agreed with BCC; the DoU therefore had to be shown to be adequate, rather than unnecessary.

15. Second, and this would have been clear to the Inspector from other documents which were before her, the response of BCC to the problems it identified was to require the developer to bring forward a scheme and assessments for junction mitigation works which were consistent with mitigation measures "agreed" (J2) or "proposed" (J3) in connection with development proposed at Hampden Fields for 3000 houses, in the vicinity of the appeal site. For J8, the modelling for this site had to be consistent and cumulative with that used for the assessment of the proposals at Hampden Fields and another site, called Woodlands. So, the requirement for this change of approach, considering the proposal's highways impact cumulatively with and not in isolation from other developments and the mitigation proposals developed for them, came from BCC's requirements. That is what the developer then provided in the third version of the TA in July 2018.

16. Attached to the Statement of Common Ground was BCC's 2 August 2018 response to this revised version of the TA. The mitigation measures were now consistent with those measures for the same junctions "being secured from other sites." Contributions of 50 percent to works at J2 and J3 were required, with the Hampden Fields development contributing the rest; this amounted to some £179000. J1 required no works, and the developer would pay for all the works at J4. The solution for J8 was not works to the junction itself but its relief through other works, the SEALR. BCC's answer said that "The Council is progressing with its proposals for [SEALR]". This would create links with two other new link roads which, when all modelled together, "resolves the unacceptable impacts of this development on the gyratory and as such a contribution towards that scheme on a basis consistent with the contributions being secured from Hampden Fields and Woodlands is required"; £1.22m. The various scenarios modelled did not show the true impacts of this development on its own, because the particular scenario required for that, (cumulative without development

3a/4) had not been run, "the comparisons presented…with the improvements offered do allow us to conclude our assessment, provided that the applicants agree to the proportionate contributions to each of the cumulative highway works identified."

17. In summary, said this response: "The impact of the scheme is considered to be acceptable only with mitigation measures including junction improvements at [J2 and J3 and J8]…." The required contributions were set out, with a specific reference to the contribution to "the Council's SEALR scheme in order to mitigate impacts of the sensitive Walton Gyratory." Subject to a s106 agreement to secure the various contributions, BCC had "no objection" to the scheme.

18. The Statement of Common Ground between the developer and the District Council, so useful in delineating issues, and avoiding unnecessary time and cost being spent on what is agreed, reflects that. "Both parties along with the Highways Authority [BCC] have worked together to resolve the outstanding highways matters." It noted that "subject to agreement on the proposed mitigation package being secured via a s106 Agreement, the Highway Authority no longer object to the appeal proposal on highway grounds." The second putative reason for refusal was therefore not pursued.

19. The concluded s106 agreement, or DoU, was sent to the Inspector after the conclusion of the hearing; a draft was available at the hearing. The relevant contributions to direct junction improvements were to be paid before development commenced; the SEALR contribution was to be paid before the first occupation of the 300th dwelling from the site. I note that any part of the contribution which was not spent on the improvement to which it related within 10 years of the date of payment, was to be repaid.

20. The highways and other contributions were the subject of a statement of compliance with the Community Infrastructure Levy Regulations SI 2010/948. All the highways obligations were described as necessary, directly related to the development, and as fair and reasonable. Reasons for those conclusions were given in the statement, including that they were proportionate responses to the impacts. The contributions thus accorded with reg 122, which meant that they could be reasons for the grant of permission, although they were in fact treated by the Inspector as neutral. Fewer than five schemes were involved in the pooling of contributions to the various schemes, and so reg.123 was not contravened, which would have meant that they were not to be regarded as reasons for the grant of permission.

21. Although the Inspector does not refer to the status of the Hampden Fields scheme in her DL, the evidence of the developer's planning consultant to me was that BCC witnesses explained to her that the Hamden Fields proposal had been the subject of a resolution by the District Council to grant permission, and that it was likely to come forward. It featured in housing land availability evidence put forward by the District Council as a site deliverable in the next five years, approved for the grant of permission subject to a s106 agreement. The developer's planning witness at the hearing, Mr Vashi of Strutt and Parker, gave evidence in a witness statement to me that it was agreed between him and the District Council at the hearing or earlier and reflected in the housing studies, that it would be *likely* to start delivering by 2021; (his word, my emphasis).

22. No questions were asked at the hearing about the likelihood of the other sites coming forward, or challenging what he said, nor about the problems which might be created for the acceptability of this development, were they not to do so. nor whether he had any thoughts about how such a problem might be overcome, whether by provision in the DoU or condition or otherwise.

23. The Inspector provided her notes of the hearing, with a witness statement, which was particularly helpful in drawing attention to the highways evidence of the local residents, and the response of the BCC witness. He explained that the Hampden Fields and Woodlands sites were included in the traffic modelling, and emphasised that the proposal was acceptable subject to the agreed mitigating measures and contributions. As I have said, the developer did not have its highways consultant at the hearing since there were no issues relating to highways between the developer and the authorities.

24. Mr Yerby, one of the residents, who played a leading role in this evidence, commented that if any of the roads did not come forward in the 3-year period, there would be significant harm. BCC commented that there had been various changes since an appeal on Hampden Fields had been dismissed; this included funding for the SEA link roads and a Cabinet decision to provide them, and resolutions to grant permission at Hampden Fields and Woodlands. There was a link road strategy to accommodate them.

25. The Inspector records an abbreviated version of a curious exchange in which she asked the BCC witness "If any of other schemes didn't come forward what would effect be of appeal proposal?" The reply is noted: "Link Road would resolve issue on Station Road roundabout." Her witness statement draws attention to this but does not explain it further. The "other schemes" appear to be the other contributory development schemes. The answer is what is curious and, as there was no follow up, makes me wonder if it was accurately recorded. The Link Road appears to be the SEALR. That, it appears from the answer, would come forward anyway, according to BCC, because it would resolve an issue even if there were no other contributions. The issue which the witness is noted as saying the SEALR would thus resolve, however, is not the J8 gyratory, but Station Road roundabout. Both J2 and J3 include Station Road, but the SEALR does not address them; it addresses instead the J8 Gyratory, which does not include Station Road.

26. The Inspector did not deal with the probabilities of or any impediments to Hampden Fields coming forward. Nor did she deal with the status of the SEALR or its timetable, which was by far the largest element in the agreed highways contribution. It is unclear whether she had the officers' report from the District Council which led to the resolution in around October 2017, to grant permission subject to a s106 agreement for the Hampden Fields proposal. This contains references to the SEALR and other link roads. It stated that the SEALR had been included in the cumulative impact assessments as [9.81] "the County Council have committed to its delivery following a Cabinet Member for Transportation Decision on 24 July 2017 which approved the progression of the [SEALR] project as a high priority, including further business case work, preliminary design and preparation of a planning application. [9.82] the project is subject to a tight delivery deadline due to the need to align with construction of the A4010 Realignment by HS2." Some early works had already progressed, but the HS2 works on the Stoke Mandeville Bypass programmed for

2020, meant that the County Council intended "to ensure that the construction of the SEALR is undertaken to a timetable to ensure that it is open at the same time." This would precede the years assessed by Hampden Fields and Woodlands sites which had both agreed to "make significant financial contributions towards the SEALR scheme to assist in its delivery…."

Ground 1: certainty

27. Mr Tucker pointed to the Inspector's frequent use of the word "certainty" in dealing with the highways issue; she must have meant what she said. She erroneously had required *certainty* that the other contributing schemes would come forward.

28. I do not accept Mr Tucker's contention that the Inspector has adopted an unduly high standard for judging what risk should be run that the highway improvements would not be forthcoming.

29. There is no policy statement, whether in the Framework, NPPF, or in Government guidance on planning obligations of 2016, or anywhere else, which guides an Inspector or local authority as to the level of certainty required of a measure of mitigation before it is relevant or acceptable in rationally disposing of the objection to which it is directed. I was shown nothing to suggest a special regime for pooled schemes, where more than one contributor is required before the mitigation jointly to be paid for is acceptable or disposes of the objection. There is no statutory provision, or case law which I was shown, which embodied a test or showed that her approach was unlawful. This is simply a question of how an Inspector, who finds that an adverse impact is of sufficient weight to lead to a refusal of permission, on its own or with other issues, should approach the possibility that the mechanisms to remove the objection might not be in place as required to prevent that adverse impact.

30. The Inspector did not reject the effectiveness of the measures towards which the DoU contributions would be paid, along with the other contributions, in resolving the highway issues; in this respect she accepted the BCC contentions and not those of the residents. All sides were agreed that the highway measures to which the contributions provided for in the DoU would be paid were necessary. The DoU contributions would not of themselves solve all the problems. At J2 and J3, and in the relief of J8 by the SEALR, contributions from other development sites were required.

31. The obvious next question was: what would happen if those other contributions did not become payable because the other developments were not permitted, or built so as to trigger their payment? The DoU provided no answer to that; no part of the development was contingent on any of the highway improvements being built; there was merely a requirement that the contributions be paid, with the conventional provision that it they were not spent on the project towards which they were paid within ten years, they would be returned. That would apply even if the joint improvements were not constructed because the other developments had not proceeded, but the Manor Oak site was fully developed. There was no agreed solution to the highway problems created by this development on its own; that was not how the discussions had proceeded. The developer did not become entangled with the other developments simply because that was a neater or, to BCC, preferable solution to the problems of the Manor Oak site or to the likely problems with the likely development of all three sites. It agreed to the approach for the sake of reaching

an agreement, disposing of the issue between the main parties. That was the stance they all took.

32. The only answer to the question of what would happen if the other contributions were not forthcoming would be that the agreed necessary solution to the problems would not occur, and there would be an unresolved highways objection to the problems of the Manor Oak site developed on its own, which the developer had not pursued for good reason. The Inspector did not need to pursue the degree of that unmitigated impact in the light of the agreement reached, and in the absence of the developer putting it forward as an acceptable alternative.

33. In my judgment, although "certainty" may cover varying degrees of certainty, the sense in which the Inspector used it here, and deliberately so, was that the achievement of the necessary highway infrastructure for the development to be acceptable, had to be beyond sensible doubt, and not simply more likely than not or probable or even very probable or highly likely. I accept Mr Flanagan's contention that she was not setting some unlawfully high or unattainable standard. As he pointed out, it was the case of all parties that these various improvements were necessary for this development to proceed acceptably. It is a commonplace in planning that the commencement of development or the occupation of more than a certain number of houses is prevented by a "Grampian" condition so that the adverse impact will not occur before the necessary mitigating measures are in place. The same principle features commonly enough in s106 agreements, which can be enforced by injunction. If no such arrangements are in place, the Inspector is entitled to conclude as a matter of planning judgment that the development should not be permitted to proceed because of the risk that the adverse impacts could occur without necessary mitigation. Mr Flanagan pointed to [109] of the Framework, the NPPF: development should only be refused on highway safety grounds if the impact was "unacceptable", or if "the residual cumulative impacts on the road network would be severe." That was a proper policy basis upon which to seek certainty that those impacts would not occur, rather than to risk that they might.

34. That is what the Inspector concluded. It was not an unlawful approach. She was not obliged to apply a different and lower standard, by statute, policy or case law. It was a matter for her planning judgment about the necessity of the highway network improvements and the impact of this development without them. But the need was agreed, and the impact without them, objectionable.

35. Mr Tucker relied on reg. 123 of the CIL Regulations as showing that pooled contributions from up to four developers could satisfy the tests, which I have referred to earlier in reg.122, which enable such contributions to be a reason for granting permission. The obligations have to be necessary, directly related to the development, and fair and reasonable. But, he submitted, it was very unlikely that all the agreements for the pooled contributions from separate permitted developments would be agreed at the same time, rather than in a sequence as each development received planning permission. It followed that Parliament had accepted that necessary mitigation could be provided for lawfully and sufficiently through an agreement which did not provide certainty that the measures would be constructed or constructed at any particular time, or at all.

36. I do not accept that argument. Mr Tucker's argument is a somewhat oblique approach to the true issue. The CIL Regulations are concerned with what is required before an obligation can be a reason for granting permission. The Regulations do not purport to set out any statutory test for the degree of certainty or probability which the Inspector must or must not seek before accepting an obligation as sufficient to overcome an objection to development. There is nothing in the Regulations which requires an obligation, unilateral or agreed, to be treated as satisfactorily disposing of the issue to which it is directed, or which prevents an Inspector treating uncertainties over the prospect of the necessary infrastructure being built, as a reason for refusal. There is nothing which suggests that pooled arrangements need contain no contingency provisions relating each development to the provision of the total contributions. It is not at issue but that pooled contributions may be lawful, material, and a reason for granting permission. She did not treat pooled contributions as irrelevant. She looked at the prospect of their being forthcoming.

37. I do not say that it would have been unlawful for her to have assessed the probability of the mitigating measures being in place, and to have concluded that the risk of their not being in place at all or when needed was sufficiently small, when measured against the impacts on the highway network which the development would create, and the benefits of the development, for permission to have been granted. The DoU was a material consideration, whatever its status as CIL compliant; see *H J Banks v SSCLG* [2018] EWHC 3141, [56-60]. She considered it but rejected it as inadequately certain. That was matter of her planning judgment. This leads into Ground 2, which is very closely related.

Ground 2: the evidence that the other contributory schemes would come forward.

38. The Inspector reached a judgment first, about the need for the highway works, which was not at issue, then second, about the likelihood of their coming forth without the other contributory schemes, which was also not at issue before her, and third about the prospect of the contributory schemes themselves coming forward. That is where ground two comes in: the evidence about the probability of the other contributory schemes coming forward or rather as Mr Tucker put it, the absence of evidence that it was unlikely or uncertain that the other schemes would not come forward.

39. She did not find that it was unlikely that the proposed mitigation would come forward; she found that it was unlikely, *if* the other contributory schemes did not come forward. That latter point was not an issue before her, and trailed before me only as something which the developer might have covered if it had been alerted to the Inspector's thinking, but that goes too far down the unpromising and unpleaded fairness ground.

40. I accept that all three main parties agreed that the arrangements in the DoU would be a sufficient basis upon which the Inspector should regard the highways objection as resolved. Indeed, they were regarded as compliant with CIL reg 122, which meant they could be regarded as a reason for the grant of permission. The Inspector had evidence that the District Council had resolved to grant planning permission for the Hampden Fields development but the actual grant awaited conclusion of the s106

agreement; this came from both District Council and BCC. She also had evidence, at least from BCC that the same applied to the Woodlands site. The sites were included in the District Council's housing land availability studies which mean that the Council was satisfied that there was clear evidence that completions would be likely to begin within five years, as Mr Vashi stated in his evidence to the Court. This, submitted Mr Tucker, amounted to a basis upon which the Inspector ought to have concluded that there was a high probability that the necessary schemes would be in place, and ought to have been satisfied that that was a sufficient basis for granting permission. This evidence, he submitted, had been ignored. She had no basis upon which to conclude as she did. I was also told that there was a resolution to grant permission for the SEALR but that no statutory orders had yet been made.

41. I do not accept Mr Vashi's comment in his evidence to the Court that there was no evidence before the Inspector to suggest that there were any impediments to delivery "that indicated that Hampden Fields might be unlikely to come forward for development, contrary to the agreed position of the parties." This is more a submission, wrong at that, about the state of the evidence. It was also inappropriately put forward as something that the Secretary of State had not taken issue with in the Inspector's evidence and therefore should be taken to have accepted. Where a major development has yet to receive planning permission, where the s106 agreement has yet to be concluded, and the sites are treated as *likely* to be delivered by housing land availability studies, as Mr Vashi said, there is no certainty and no more than a probability that they will come forward. That is all that the Inspector is saying. "Might be unlikely to come forward" represents no known test, and is not the language of the parties or of the Inspector; rather it recasts her thinking, which, as ground 1 was at pains to emphasise, was that the sites were not certain to come forward, and no one, least of all Mr Vashi, said that they were.

42. Her conclusion is consistent with her accepting the evidence she had about the prospect of the other sites coming forward with a suitable s106 agreement in place. There was no permission for either, and no s106 agreement had been concluded in respect of them, over a considerable period of time. It is obvious that, however probable it was that the two sites would be permitted with suitable agreements, there was scope for neither to come forward, or to come forward for a while. Indeed, the very terms of the DoU reflect that possibility, in providing for a repayment of monies not spent on their intended object in ten years. She clearly judged that that was not a risk which should be run in respect of the highways impact of the Manor Oak development.

43. I cannot conclude, in the light of the way in which the Inspector expressed herself, that she ignored the evidence of the status of the two sites, still less that she ignored the evidence that the three main parties were agreed that the DoU was sufficient to resolve the objection. But she was not obliged to accept it. She was entitled to accept the evidence of the BCC that the various schemes were necessary to mitigate adequately the impacts of the development on the highway network. She was then entitled to say that it was not certain that they would be built in time or at all. By that, she clearly means that her judgment was that the development would be unacceptable were it to occur without the mitigating highway measures, and she saw no reason why such a risk should be run. The fact that the BCC, in agreement with the District Council and developer, regarded the highways objection as overcome did not bind

her to accept the risk that the highway improvements might not come about. She did raise the issue with BCC as it was an issue which local residents were pressing.

44. Mr Tucker cited a number of authorities which spelled out how valuable the Statement of Common Ground was, including *R (Poole) v SSCLG* [2008] EWHC 676 (Admin), Sullivan J; but none suggest that the Inspector is bound by them, still less where the agreement does not address the issue of how likely it is that the sites would come forward, and the steps which were outstanding before they could do so were obvious. The BCC highways objection was simply withdrawn. As I have said, Mr Tucker was not putting forward a natural justice point, as can sometimes arise where an Inspector does not accept the agreed conclusions of the main parties in the light of concerns by local residents, or of their own. Mr Flanagan in riposte referred me to *Hopkins Developments Ltd v SSCLG* [2014] PTSR 1145, Court of Appeal, in which Jackson LJ at 62, set out certain "principles", one of which was that, although the main parties might be in agreement, they should deal with issues in dispute between them and residents, until told by the Inspector that they need go no further. I am not sure how far that observation in particular can be taken, or to what issue it was actually addressed, unless it be that the main parties cannot complain of unfairness if they fail to deal with a case successfully made by interested parties, which they ought to have appreciated would arise. The Inspector may not be in a position sensibly to be definite about her or his views during a hearing. And undermining the Statement of Common Ground risks creating problems for evidence preparation and adjournments. Handling these issues is best left for one's sense of fairness in individual cases.

45. However, the important point here is that the Inspector is not bound by that Statement or agreement, and how she treats a departure from it or from what the main parties expected from it, namely that highways impact would not be a basis for refusal, is a matter of the evidence base she has, her reasoning and fairness. Here, it all goes back to the same point: she was not satisfied, on a simple basis which was there for all to see, that the necessary improvements would be in place. The prospects of other housing developments coming forward would not usually have been a matter for highway authority evidence, although it could express itself as satisfied that the degree of risk of them not doing was one it was prepared to take. In effect that appears to have been its position. But there was also no doubt that its position also was that, were the risk to be realised, the effect would be unacceptable. She was not prepared to accept the degree of risk for the degree of harm; that is for her planning judgment. It would be for the developer to pursue a new contention that the development could be made acceptable without one or more of the improvements, or that a DoU with different obligations and contributions would suffice. But those issues were not pursued, for understandable reasons.

Ground 3: reasons

46. This challenges the adequacy of the Inspector's reasons for departing from the agreed views of BCC, District Council and developer as to the adequacy of the obligations of the DoU to provide for the necessary infrastructure. Again, there is in reality a considerable degree of overlap with the earlier grounds.

47. Mr Tucker submitted that, if the Inspector had considered the evidence about the prospects of the other contributory sites coming forward, no reason had been given by her for rejecting it. Had she given proper reasons, the developer would know what he

now had to do to redress the position, whether by offering adjustments of the conditions, DoU or even offering more money; the sums for J2 and J3 were relatively small. It was only Hampden Fields' additional contribution which was required for J2 and J3. A larger sum for the SEALR could have been considered. This too shaded into his shadowy natural justice point; her concerns had not been raised with the three main parties. More could have been said, and in particular about the status of the SEALR itself, where there was or may have been some evidence before her that BCC was proceeding with it anyway. This assumes that the officer's report to the District Council on the Hampden Fields site was before her, as set out earlier, or that the curious answer about the effect of the SEALR was properly understood but misrecorded, or clarified as might have been expected.

48. I am not persuaded that there is any deficiency in the reasoning of the Inspector. There is no basis for supposing that she did not accept the evidence about the status of the other sites, or did not accept that BCC regarded the prospect of the development of the other two sites, along with s106 agreements as sufficiently certain for it, and the District Council, to withdraw its highways objection in the light of the DoU. No elaborate reasoning was necessary for her conclusion. She simply did not regard those factors as sufficient to persuade her that the necessary highway infrastructure would be in place to cope with the traffic impact of the development. That was sufficient. She did not need to go through specific clauses, nor to deal with possible ways in which certainty might be achieved. The developer knows, anyway, what it has to do to achieve a planning permission: provide certainty, whether by negative condition, phasing or contingency provision, or increased contributions, or in some other way. So there is no prejudice in this case, anyway.

49. I am not prepared to conclude on the evidence that there was any deficiency in reasoning arising out of the status of the SEALR. I do not know if the District Council officer's report on Hampden Fields was before her, nor what if anything she made of the BCC witness answer about the SEALR and junctions other than J8. This was the costliest item of highway infrastructure, yet some of that evidence could show that its construction was not dependant on developer contributions at all. This point was not raised at the hearing, nor subsequently with sufficient clarity to show any error of law in the DL. That is not to say that it might not also become relevant to the provision of certainty on any further application for planning permission.

50. Mr Tucker submitted in his Skeleton Argument that especially cogent reasons were required to take a contrary view to that agreed with a statutory body with particular responsibilities for the function at issue, such as a highways authority. He did not press this orally. However, the Inspector did not depart from any technical or expert view of the highway authority. In fact, she accepted that part of its opinion, contrary to what the local residents were saying. It could not be an expert on housing schemes receiving planning permission, and the Inspector had the agreed position of the District Council and developer that the other sites were "likely" to come forward within the five-year period.

51. There was some discussion before me about the authorities which deprecate contentions that Inspectors have to come up with suggestions of their own for solving problems which they consider exist, rather than it being for the parties to do so. But that is more in the context of a fairness argument which does not arise. Certainly it cannot be contended that here, the Inspector should herself have devised conditions or

draft obligations to overcome her concerns. The developer might have done so had it realised what would happen, but that is not the point of the challenge. It had sufficient notice of the residents' concern, but may have taken the understandable view that its wiser course would be to stand by a position agreed at no little cost.

Conclusion

52. For those reasons, this application is dismissed.