Neutral Citation Number: [2021] EWCA Civ 827

Case No: C1/2020/0447

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE DOVE
[2019] EWHC 3575 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE BAKER
and
LORD JUSTICE LEWIS

- -

Between:

R. (on the application of Jerry Flynn)	**Appellant**
- and –	
(1) The London Borough of Southwark Council	**Respondents**
- and –	
(2) Elephant and Castle Properties Co. Ltd.	

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- -

David Wolfe Q.C. and **Sarah Sackman** (instructed by **Public Interest Law Centre**) for the **Appellant**
Daniel Kolinsky Q.C. (instructed by **Legal Services Department of the London Borough of Southwark Council**) for the **First Respondent**
Russell Harris Q.C. , Stephen Whale and **Nicholle Kingsley** (instructed by **Pinsent Masons LLP**) for the **Second Respondent**

Hearing dates : 16 and 17 March 2021

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Approved Judgment

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed not before 3pm Friday 28 May 2021"

The Senior President of Tribunals:

Introduction

1. What was the effect of a planning committee's resolution to grant planning permission for a major mixed-use development, subject to the applicant entering into "an appropriate legal agreement" under section 106 of the Town and Country Planning Act 1990, which would, among other things, secure the provision of affordable housing? That question arises in this appeal. It does not present any new point of law.

2. With permission granted by Lewison L.J., the appellant, Jerry Flynn, appeals against the order of Dove J., dated 20 December 2019, dismissing his claim for judicial review of the planning permission granted by the first respondent, the London Borough of Southwark Council, on 10 January 2019, for the redevelopment of the Elephant and Castle shopping centre and the site of the London College of Communication by a large scheme of mixed uses proposed by the second respondent, Elephant and Castle Properties Co. Ltd.. Mr Flynn is a member of the 35% Campaign, a group committed to ensuring the delivery of 35% of new housing development as affordable housing. The 35% Campaign objected to the proposals.

3. The site lies within the Elephant and Castle Opportunity Area. It is in two parts, the "west site" and the "east site". The development is one of the biggest projects of regeneration in Southwark. It involves the construction of several new buildings, the highest rising to 35 storeys, and the remodelling of the London Underground station. A large part of it would be housing – 979 residential units. As the Director of Planning said in his report to the council's Planning Committee for its meeting on 3 July 2018, it "would be delivered in two broad phases over approximately nine and a half years", and it was intended that "work on the east site would start first" (paragraph 38). The Opportunity Area was "undergoing a period of significant transformation …", and this was "the last piece in the puzzle, with the east site particularly pivotal given its location at a transport hub" (paragraph 785).

4. The application for planning permission was submitted on 31 October 2016, and was first considered by the Planning Committee in January 2018. When it came back to the committee in July 2018, with a revised offer of affordable housing, the members accepted the officer's recommendation that planning permission be granted, subject to conditions and "an appropriate legal agreement" being entered into.

5. Mr Flynn's challenge was on three main grounds, all concerning the affordable housing secured under the section 106 agreement entered into by the council and Elephant and Castle Properties on 10 January 2019, and amended on 9 July 2019. The judge was persuaded that the grounds were arguable, but not that the claim should succeed.

The issues in the appeal

6. In the six grounds in the appellant's notice three main issues are raised. First, did the judge fall into error in his approach to the "vires" of the section 106 agreement? This divides

into two sub-issues: whether the judge applied the wrong test for ascertaining the scope of the committee's delegation to the Director of Planning (ground 1), and whether the section 106 agreement departed from the committee's resolution and was ultra vires (ground 2). Secondly, did the judge err in his approach to the lawfulness of the arrangements for the "build to sell" fall-back position on the west site – by holding that the section 106 agreement lawfully gave effect to the "viability review mechanism" (ground 3), and in failing to recognise material differences between "social rented" and "social rent equivalent" accommodation (ground 6). And thirdly, was he wrong to conclude that the committee was not materially misled by what it was told about the availability of grant funding from the Greater London Authority ("the GLA") (ground 4), and, if so, did he exercise his "discretion" under section 31(2A) of the Senior Courts Act 1981 impermissibly (ground 5)?

Affordable housing policy

7. Policy 3.10 of the London Plan (March 2016) defined "affordable housing" as "… social rented, affordable rented and intermediate housing (see para 3.61), provided to eligible households whose needs are not met by the market". The supporting text in paragraph 3.61 stated that "[within] this overarching definition":

> "…
>
> social rented housing should meet the criteria outlined in Policy 3.10 and be owned by local authorities or private registered providers, for which guideline target rents are determined through the national rent regime. It may also be owned by other persons and provided under equivalent rental arrangements to the above, as agreed with the local authority or with the Mayor.
>
> affordable rented housing should meet the criteria outlined in Policy 3.10 and be let by local authorities or private registered providers of social housing to households who are eligible for social rented housing. …
>
> intermediate housing should meet the criteria outlined in Policy 3.10 and be homes available for sale or rent at a cost above social rent, but below market levels. …".

8. Policy 3.12 indicated the approach to negotiating the provision of affordable housing in individual schemes:

> "A The maximum reasonable amount of affordable housing should be sought when negotiating on individual private residential and mixed use schemes …
>
> …
>
> B Negotiations on sites should take account of their individual circumstances including development viability, the availability of

> public subsidy, the implications of phased development including provisions for re-appraising the viability of schemes prior to implementation … and other scheme requirements".

9. Strategic Policy 6 of the council's Core Strategy (2011) said the council's approach is that "[development] will provide homes including social rented, intermediate and private for people on a wide range of incomes", and:

> "Development should provide as much affordable housing as is reasonably possible whilst also meeting the needs for other types of development and encouraging mixed communities".

This would be done by "… [requiring] as much affordable housing on developments of 10 or more units as is financially viable …". Paragraph 5.60 of the explanatory text said the council's "required split between social rented and intermediate housing is being saved in Policy 4.4 of the [Saved] Southwark Plan …". Policy 4.4 of the Saved Southwark Plan (2007) said the council "will seek to secure", within the Elephant and Castle Opportunity Area, "at least 35% of all new housing as affordable housing …", with a tenure mix of 50% social rented and 50% intermediate housing.

10. So far as is relevant here, draft policy P4, "Private rented homes", of the New Southwark Plan Proposed Submission Version (December 2017) required "affordable homes" in "developments providing more than 100 homes" to be provided "in accordance with … Table 3, subject to viability …". Table 3, "Affordable housing requirement option on qualifying private rented homes scheme", indicated a "minimum of 35%" affordable homes, comprising a "minimum of 12% (34%)" to be "Social rent equivalent", a "minimum of 18% (52%)" to be "Affordable rent capped at London Living Rent equivalent", and a "minimum of 5% (14%)" to be "Affordable rent for household incomes between £60,000 and £90,000 per year".

The affordable housing offer before the Planning Committee

11. The affordable housing offer on which the Director of Planning based his advice to the committee when it met on 3 July 2018 was for 330 affordable housing units – 35% when calculated by habitable rooms. It was composed of 35.1% (38.1% habitable rooms) social rent (116 units), 16.1% (14.7% habitable rooms) London Living Rent (53 units), and 48.8% (47.2% habitable rooms) Discounted Market Rent (161 units).
12. The amount of affordable housing proposed had been increased following correspondence with the GLA. In a letter to Elephant and Castle Properties' affiliate, T3 Residential Ltd., dated 14 June 2018, the GLA said:

> "Thank you for … the submission of your Investment Partner Qualification (IPQ) application. A more thorough assessment needs to be carried out, including a review of the financial information by the GLA's finance team.
>
> Following an initial review … , I can confirm that T3 Residential Limited would be eligible to become an Investment Partner once the more detailed assessment has been carried out and any

clarifications addressed. As an Investment Partner with the GLA T3 Residential Limited would be eligible to apply for grant funding from the Mayor's Affordable Homes Programme.

Subject to successful registration of T3 Residential Limited with the Regulator of Social Housing and the full assessment of your IPQ application, the GLA would welcome a bid for grant funding from the Mayor's Affordable Homes Programme to support the development of 330 affordable housing dwellings at Elephant and Castle[: …] 116 social rent dwellings … and … 214 affordable homes".

13. Elephant and Castle Properties' planning consultant, DP9, wrote to the council on 15 June 2018, stating:

> "…
>
> Discussions with the Greater London Authority ("GLA") have progressed positively since February 2018, and we are pleased to confirm an in-principle agreement from the GLA to provide grant funding towards the proposed scheme. As evidenced by the enclosed GLA letter dated 14th June 2018 (Appendix 1), the Applicant's affiliated company, T3 Residential Limited, is eligible to become an Investment Partner and eligible to apply for grant funding from the Mayor's Affordable Homes Programme, a bid for which has been welcomed and will follow in due course.
>
> The grant funding enables the delivery of a further 42 Social Rent homes on the West Site (Plot W3 Building 3) which means 116 Social Rent homes are now proposed in total. … For the avoidance of doubt, the Applicant is now able to commit unconditionally to this affordable housing offer.
>
> …".

In Appendix 3 to the letter the further revised affordable housing offer was explained:

> "The Applicant has maintained the offer of 35% affordable housing (calculated by habitable room) but reprovisioned the tenure splits.
>
> This means the number of social rented homes increases from 33 to 116, assisted by securing grant funding from the GLA. The intention has been to provide larger family units for the Social Rented homes. The Social Rented homes will now be owned and managed by Southwark Council or a Registered Provider.
>
> …".

The officer's report to the Planning Committee on 3 July 2018

14. In his report for the meeting of the committee on 3 July 2018, parts of which he italicised, the Director of Planning said, under the heading "Overall affordable housing offer (east and west sites combined)" (in paragraphs 363 and 364):

> *"363. Whilst the proposal would comply with the policy requirement to provide a minimum of 35% affordable housing by habitable room, … it would not comply with the adopted core strategy policy which requires the affordable housing to be a 50/50 split between social rented and intermediate units. It would also not comply with emerging policy P4 because, whilst the social rented units would just exceed the minimum requirement, there would be too much Discount Market Rent and too little London Living Rent.*
>
> *364. The affordable housing proposed would also not be evenly distributed across both sites, with the social rented units all being delivered on the west site. The s106 agreement would therefore stipulate that if the development on the west site has not substantially commenced within 10 years of the east site commencing, the land and sum of money sufficient for construction and completion of the social rented units would be transferred to the council, to deliver the social rented units."*

15. The officer considered the "Fall-back position", in which, apart from the mansion blocks, the west site would be delivered as "build to sell" units (in paragraphs 365 to 367):

> *"365. The applicant also wishes to retain a fall-back position whereby the west site could be delivered as traditional build-to-sell units. The exception to this would be the social rented units in the mansion blocks which would be delivered in any event. The developer would notify the council of the intention to develop the west site as build to sell, and the affordable housing requirement for this would be for 50% social rented and 50% intermediate. Some of the west site's social rented units would already be secured in the mansion blocks, albeit 38% rather than the 50% requirement, therefore a review mechanism would be required.*
>
> 366. The proposal is to provide 35% affordable housing based on habitable rooms but amounting to 330 units (165 on each of the east and west sites). On the east site this would be provided as London Living Rent: 25% and Discount Market Rent (DMR): 75%. On the west site provision would be: Social Rent 45%, LLR 33% and DMR 22%. The Social Rented units would be operated by a Registered Provider or the council with standard Social rented terms. …
>
> 367. All affordable housing would be provided 'in perpetuity' as confirmed in the Affordable Housing Statement addendum July 2017."

and (in paragraphs 370 to 372):

> "370. The proposal as amended meets the policy requirement of 35%.
>
> 371. In contrast to the original submission the revised proposal includes the provision of traditional Social Rented housing – 116 units which would be located on the west site within 3 Mansion blocks. This amounts to 38% of the affordable which set against policy SP6 is below the required 50%. In relation to the east site the rental levels do not conform to the distribution requirement set out in emerging policy P4. The proposal reflects GLA grant funding, recently confirmed, which has facilitated an increase in the number of social rented units from 74 to 116.
>
> 372. The revised tenure split on the west site substantially meets the policy requirements set out in SP6 as social rented accommodation is now provided. However on the east site the distribution of rental levels does not conform to either emerging policy P4 or the Mayor's preference for a majority of rents at London Living rent levels but not in excess i.e. not in the £60,000-£90,000 household income bracket."

16. Having given a simple breakdown of the affordable housing proposed, in percentages (in paragraph 387), the officer said (in paragraphs 388 and 389):

> "388. This fails to meet the requirements of the emerging policy tenure split requirements. The applicant has sought to ensure that a minimum of 35% policy compliant affordable is provided but for viability reasons it is submitted that the tenure split as proposed by emerging policy P4 cannot be met. The applicant states that adhering to the proposed P4 tenure split would result in a reduction in the overall quantum of affordable housing based on viability. …
>
> 389. The above analysis therefore indicates that, subject to consideration of viability, there would be a material conflict with the development plan in respect of the form and mix of the affordable housing offer. *However, it is of note that the main improvement that arises from the revised proposal is the provision of social rented accommodation to be operated by the council or a RSL. The tenure split breakdown is also out of step with the expectations in the emerging policy*."

17. Under the heading "Viability", the officer concluded (in paragraph 398):

> "398. Officers are satisfied in the light of the viability testing outlined above that the Applicant's affordable housing offer (coupled with the securing of an appropriate review mechanism – see below) represents the maximum reasonable affordable housing

provision taking account of the need for the council to apply its affordable housing requirements with some appropriate flexibility in accordance with the Mayor's emphasis in the London Plan to ensure that the scheme as a whole is deliverable. … ."

18. On the proposed "Viability review", he advised (in paragraphs 402 to 405):

> "402. In view of the fact that the affordable housing provides a compliant quantum of 35% but has a non-compliant tenure split, and in line with the council's Development Viability SPD, a viability review (VR) would be required. This is to ensure that if the economic circumstances of the scheme change in the future an improved tenure split can be achieved in order to be more closely if not fully compliant with policy. The detailed requirements for the viability reviews will be secured within the S106 legal agreement.
>
> 403. *As with any development of this nature a viability review will be triggered in the event that development has not substantially commenced within 36 months of the grant of planning permission. This is 12 months longer than the norm to allow for the extended clearance and preparatory works that a scheme of this scale entails. In these circumstances 36 months is considered to be justified. There will be a post implementation review for each site to be undertaken at 75% occupancy. Any uplift, at 50% to the council, would be applied to adjust rental levels downwards towards meeting the distribution set out in emerging policy P4.*
>
> 404. *In the event that the West site is delivered as open market for sale the review will need to take into account the policy requirement for a different tenure split of 50:50 social rented and intermediate. In addition it should be noted that regardless of whether the west site comes forward as build for sale, or if for any reason the development stalled and ultimately failed to proceed, the applicant has confirmed that the social rented units will be delivered. This will be secured with the legal agreement.*
>
> 405. The council's Development Viability SPD suggests that the apportionment of any uplift would be based on a 50:50 split. Any uplift above the agreed IRR … would be applied to increase the percentage of affordable units at the social rent equivalent and London Living rent equivalent units with the aim of getting closer to a policy compliant level."

19. The officer's "Conclusion on affordable housing" was this:

> "415. …. Notwithstanding the extent to which the affordable housing provision is contrary to some elements of the development plan notably the Core Strategy, officers are satisfied that the provision, as revised, is the maximum reasonable and that it is in

> overall conformity with the development plan taking account of scheme viability."

20. Before the meeting, the Director of Planning prepared two addendum reports – Addendum No.1 and Addendum No.2 – updating and amending the main report. In Addendum No.1, he said this about the viability review (in paragraphs 11 and 16):

> "11. Viability review of applicant's revised offer – GVA which is advising the Council on the viability of the proposed development has confirmed that the applicant's revised affordable housing offer, which includes an agreement in principle for grant funding from the GLA, is the maximum that the development can reasonably support. GVA has also confirmed that the provision of grant funding would not increase the developer's profit in comparison with the earlier affordable housing offer which included 74 social rented units.
>
> …
>
> 16. Viability of a build-to-sell scheme on the west site – The applicant's revised affordable offer includes a fall-back position where the units on the west site could be developed as build-to-sell. Viability information has been submitted to appraise this option, which has been reviewed by GVA on behalf of the Council. GVA have advised that at the present day this would be less viable than the proposed build-to-sell [which, as the parties agree, should have been "build-to-rent"] scheme, and a review mechanism would be required in order to capture any uplift in value. It is noted however, that the applicant's intention is to develop both sites as build-to-rent."

21. The officer noted comments that had been made by the 35% Campaign, including that it "[welcomed] additional social rented units", that the "affordable housing tenure split [did] not comply with the Core Strategy or emerging policy P4", and that it "[requested] confirmation that the latest affordable housing offer would be delivered even if grant funding could not be secured" (paragraph 22). In response, the officer said (in paragraph 23):

> "23. Officer response – these comments are largely considered within the affordable housing section of the report at paragraphs 348-415 … There is an agreement in principle for grant funding from the GLA of £11.24m towards affordable housing. The applicant has committed to providing the level of affordable housing set out in the latest offer, and including 116 social rented units, and this would be secured in the s106 agreement. If the social rented units were owned and managed by a Registered Provider they would offer secure tenancies, which would be secured through the s106 agreement."

22. Those comments were amplified in Addendum No.2 (paragraph 14):

"14. …

Officer response [to the additional objection from the 35% Campaign] – … Addendum Report 1 considers viability for a build-to-sell scenario on the west site which would be a fall-back position in any event, and the social rented units would be protected. The applicant's proposal and clear intention is to develop the west site for PRS but has indicated a possible if unlikely scenario whereby it would be developed for sale. This would trigger a slightly different affordable housing requirement. The S106 legal agreement will set out how this would be addressed should it arise and ensure that the requisite affordable housing provision would be secured. The committee is entitled to consider the application on that basis."

The resolution

23. The resolution stated:

"RESOLVED:

1. That planning permission be granted, subject to conditions and the applicant entering into an appropriate legal agreement, and subject to referral to the Mayor of London, notifying the Secretary of State, and subject to a decision from Historic England not to list the shopping centre.

2. …

3. That following the issuing of the permission, the Director of Planning place a statement on the Statutory Register pursuant to Regulation 24 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 which contains the information required by Regulation 21, and that for the purposes of Regulation 24(1)(c) the main reasons and considerations on which the planning committee's decision is based are as set out as in the report.

4. In the event that the requirements of (a) are not met by 18 December 2018 that the Director of Planning be authorised to refuse planning permission, if appropriate, for the reasons set out at paragraph 757 of the report.

5. That ward councillors would be consulted on a developed draft of the section 106 agreement.

…".

The negotiation

24. Evidence about the negotiation of the section 106 agreement, including relevant correspondence, was before the judge in the witness statement of the council's Head of Regeneration and Development Team in Legal Services, Mr Gorst (at paragraphs 11 to 14).

25. On 1 November 2018 the council's Senior Planning Lawyer, Ms Hussain, said in an email to Elephant and Castle Properties' solicitor that the council "[had] to secure delivery of the Social Rented Units on the West Site in order to give effect to [the] Planning Committee's resolution to grant". She identified four possible situations in which the council would need to have the relevant land transferred to it. She said that "[failure] to secure transfer of the Social Rented Units in the above scenarios would put the Council in breach of paragraphs 364, 365 and 404 of the officer's report and would therefore require the Council to refer the matter back to the Planning Committee, or failing that, would run the risk of a potential judicial review challenge". The council therefore required Elephant and Castle Properties "to accept an obligation to transfer the land to the Council together with the construction and demolition costs in the above four scenarios".

26. In an email dated 20 November 2018 Ms Hussain said the council "cannot accept an agreement which fails to secure an option where the construction costs will be paid by the Developer". To do so "would be contrary to paragraph 364 [of the Director of Planning's report]". The parties eventually agreed on the appropriate options to ensure delivery of the social rented units. In one of them the council, or the registered provider, would be granted a long leasehold interest to enable it to construct the social rented units itself, together with the "Net SR Construction Costs". In another option, the sum of £1 would be paid, with the cost of constructing the social rented units being reflected by the value of the non-residential floorspace transferred at nil value. In an email dated 27 November 2018 Ms Hussain said "a fall-back position with no dowry payment might be perceived as a conflict with paragraph 364 of the PC Report". The final draft of the agreement was sent to ward councillors on 29 November 2018.

The section 106 agreement

27. In the section 106 agreement, under the heading "Transfer of Land for Social Rented Units", paragraphs 3.1.1 and 3.1.2 in Part 1, "Affordable Housing & Open Market Build to Rent", of Schedule 3, "West Site Obligations", states that paragraphs 3.2 to 3.9 would only apply in the event that either "3.1.1 the West Site has not been Substantially Commenced within 10 years following the Development being Implemented on the East Site" or "3.1.2 following Substantial Commencement on the West Site there is a continuous period of inactivity on the West Site for more than six consecutive months". Paragraph 3.5 states:

> "3.5 In the event that the Developer notifies the Council pursuant to paragraph 3.4 above that Option 1 does not apply, the Council shall determine which of either Option 2 or Option 3 applies:
>
> 3.5.1 Option 1

(a) the Developer to construct, or procure the construction of the Social Rented Units and, on Completion, transfer the Completed Social Rented Units to a Registered Provider or the Council.

3.5.2 Option 2

(a) the grant by the Developer to the Council or a Registered Provider the Long Leasehold Interest in the land required for the construction of the Social Rented Units as shown edged red on the plan attached at Appendix 15 in order for the Council or Registered Provider to construct and Complete the Social Rented Units and non-residential floorspace in the same Building(s) as the Social Rented Units; and

(b) the Developer to pay to the Council or Registered Provider the Net SR Construction Costs in accordance with paragraph 3.7 below; or

3.5.3 Option 3

(a) the grant by the Developer to the Council or a Registered Provider the Long Leasehold Interest in the land required for the construction of the Social Rented Units as shown edged red on the plan attached at Appendix 15 in order for the Council or Registered Provider to construct and Complete the Social Rented Units and non-residential floorspace in the same Building(s) as the Social Rented Units, with a payment to the Council or Registered Provider of £1, the cost of constructing the Social Rented Units being reflected by the value of the non-residential floorspace transferred at nil value.

…

3.7 Only in the event of, and following, the grant of the Long Leasehold Interest pursuant to paragraph 3.5.2 above, the Developer shall pay to the Council or Registered Provider (as applicable) the Net SR Construction Costs …".

28. Under the heading "Open Market Build to Rent", paragraph 6.1 in Part 1 states:

"6.1 No later than … three … months prior to Implementation of the West Site to notify the Council whether the Open Market Build to Rent Units – West Site will be provided as Open Market Build to Rent Units or Open Market for Sale Units."

29. Part 3, "Viability", contains provisions for viability reviews. The recital states:

"…

> The Developer has offered 35% Affordable Housing but with a mix non-consistent with the emerging Policy P4 in the New Southwark Plan, on the basis that the Application Viability Appraisal produces an outturn IRR below the Target Return and in order to provide "traditional" Social Rented Units as requested by the Council rather than social rent equivalent Build to Rent Units.
>
> … It has been agreed that any surplus above the Target return on any Viability Review will be shared on a 50/50 basis with the portion attributable to the Council translated into Additional Affordable Housing to deliver a mix more consistent with emerging Policy P4 in the New Southwark Plan. The overall provision of Affordable Housing will remain at 35%. It should be recognised however that Policy P4 cannot be fully complied with given the delivery at the Council's request for social rented homes on the site rather than social rent equivalent and that the affordable housing component comprises 38% social rented homes which is higher than the 34% social rent equivalent required under Policy P4.
>
> …"

30. Under the heading "Viability Review 3 Trigger", paragraph 2.1 in Part 3 states:

> "2.1 In the event that Viability Review 2 results in the Development meeting the Affordable Housing Cap, Viability Review 3 will not be required unless the Developer has served notice … that the Open Market Build to Rent Units – West Site will be delivered as Open Market for Sale Units and not as Open Market Build to Rent Units."

The provisions for "Viability Review 3" include these, in paragraphs 4 and 5:

> "4 Assessment of Development Viability Information
>
> …
>
> 4.2 In the case of a Viability Review, the Council shall assess any submitted Development Viability Information and assess whether in its view Additional Affordable Housing is required to be delivered where the Viability Review shows the Target Return has been exceeded.
>
> …
>
> 5 Delivery of Additional Affordable Housing
>
> 4.1 Where it is determined … that Additional Affordable Housing is required pursuant to a Viability Review the Developer shall provide such Additional Affordable Housing as soon as reasonably practicable and subject to paragraph 5.2 in any event

following the expiry of the second tenancy term after Viability Review 3 has been completed.

4.2 Where the Developer and the Council agree that the Additional Affordable Housing cannot be provided either as a result of a lack of vacant properties on the West Site or as a result that there has been no change in eligibility for tenants which would allow additional reductions in rent charged, the Developer shall pay to the Council the difference between the rent which has been charged and the rent which should have been charged following the provision of the Additional Affordable Housing until the Additional Affordable Housing is provided in accordance with paragraph 5.1.

4.3 The Parties agree that the terms of Schedule [3] (Affordable Housing) shall apply mutatis mutandis to the provision of any Additional Affordable Housing."

31. In the definitions in clause 1 of the section 106 agreement, "Affordable Housing Cap" means "35 per cent by Habitable Room of the Residential Units within the Development with a tenure split of: … (iv) 50 per cent Social Rented Housing Habitable Rooms and 50 per cent Intermediate Housing Habitable Rooms, plus 15 additional Social Rent Equivalent Habitable Rooms, where the West Site provides Open Market for Sale Units"; "Net SR Construction Costs" means "the difference between the Social Rented Construction Costs and the total value of the Social Rented Units and non-residential element within the same Building(s) as the Social Rented Units, to be agreed between the parties or determined …"; "Social Rented Construction Costs" means "the cost of constructing (including any demolition required to construct and associated professional fees) 116 Social Rented Units and any non-residential units forming part of the same block as the Social Rented Units"; and "Social Rented Units" means "the 116 Affordable Housing Units (22 x 1 bed and 66 x 2 bed and 28 x 3 bed being 450 Habitable Rooms) … to be provided as Social Rented Housing on the West Site whether or not the Open Market Build to Rent Units – West Site will be provided as Open Market Build to Rent or as Open Market for Sale Units …".

32. The definitions of "Social Rented Housing" and "Social Rent Equivalent Housing" are:

> ""Social Rented Housing" means housing owned and let by local authorities and Registered Providers for which guideline target rents are determined through the national rent regime … "

and

> ""Social Rent Equivalent Housing" means Affordable Housing where maximum weekly rents are set at £155 per 1-bed, £182 per 2-bed, £216 per 3-bed (Index Linked at CPI +1%) on an assured shorthold tenancy for a period of three years with tenant-only break and let to eligible households being those:

- on the Council's social housing waiting list and in accordance with the Council's standard nominations protocol for social rented units;

- with no track record of antisocial behaviour or failure to pay rent;

- with satisfactory references".

33. In the definition of "Viability Review", each of the two viability reviews relating to the East Site is defined as meaning "the upwards only review of the Development" at the relevant review date. "Viability Review 3" means "the upwards only review of the financial viability of the West Site at Review 3 Date to determine whether Additional Affordable Housing can be provided on the West Site as part of the Development".

34. The section 106 agreement was subsequently amended by a deed of variation, executed on 9 July 2019, which changed the definition of "Additional Affordable Housing" to be consistent with the definition of "Affordable Housing Cap". Thus "Additional Affordable Housing" means the "provision of additional Affordable Housing up to a maximum of the Affordable Housing Cap …", and specifically:

> "…
>
> - where the West Site provides Open Market for Sale Units, up to a maximum of 15 additional Social Rent Equivalent habitable rooms to be provided on the West Site with a commensurate decrease in the number of intermediate Housing habitable rooms".

Did the judge err in his approach to the "vires" of the section 106 agreement (grounds 1 and 2)?

35. Dove J. accepted that "the authority of the officers was not limitless, notwithstanding the superficially open-ended phrase in the actual resolution in respect of "entering into an appropriate legal agreement"". The question of what was "appropriate", he said, "has to be understood by reference to the contents of the officers' report and the advice that the members had received and upon which they based their resolution to grant permission". This question had to be approached "without undue legalistic [rigour] and bearing its purpose carefully in mind". It was "necessary to consider whether what has been achieved in the section 106 obligation [amounts] to a material and significant departure from the principles of the necessary contributions set out in the committee report and endorsed by members …" (paragraph 49 of the judgment).

36. The judge was satisfied that the mechanisms in the second and third options would enable the construction of the social rented units, which was "the clear objective of paragraph 364 of the officer's report" (paragraph 62). Paragraph 364 was "not written with a view to strictly prescribing how the section 106 obligation was to be structured, but rather to set out the purpose which would need to be reflected and secured in the mechanisms contained within the section 106 obligation". It was "directed to ensuring that if those obligations relating to non-delivery of affordable housing were triggered … [the council]

would be provided with the wherewithal, both in terms of land and money or value, to ensure that the social rented units were nonetheless delivered". The "practical reality" of delivering the social rented units in a mixed-use block had to be grappled with. In the judge's view it was "perfectly plain that the provisions … ultimately arrived at reflect the purpose and intention of paragraph 364 of the officers' report …" (paragraph 63). He therefore did not accept Mr Flynn's contention that the section 106 obligation was outside the delegation (paragraph 64). The section 106 agreement was "seeking to address scenarios which might emerge many years after the obligation had been entered into". The conclusion that the second and third options would ensure delivery of the affordable housing "required the exercise of professional development valuation judgment" (paragraph 65). The "key issue" addressed by the advice in paragraph 364 was "ensuring that in the event of failure of provision by [Elephant and Castle Properties] … adequate funding would be available to the [council] to deliver the social rented units" (paragraph 66).

37. For Mr Flynn, Mr David Wolfe Q.C. submitted that the judge's approach to ascertaining the scope of the members' delegation to the Director of Planning was wrong. He had treated this exercise as if it went to the reasons for the decision rather than its legal meaning and effect – a quite different question. The language used in paragraph 364 of the officer's report to express what the members expected, which said what the section 106 agreement "would … stipulate", was clear. But the judge's approach was to adopt a "benevolent reading" of the report, seeking to discern its "intended purpose", and concluding that if the section 106 agreement did not "significantly depart" from that "intended purpose" it would be within the scope of the delegation (paragraphs 49 and 63 of the judgment). No support exists for such a broad and uncertain approach. Delegations should be interpreted in a conventional way, as a matter of law, to establish what the members decided, not why they decided it (see the judgment of Lord Hodge in *Trump International Golf Club Scotland Ltd. v The Scottish Ministers* [2015] UKSC 74, [2016] 1 W.L.R. 85, at paragraphs 33 to 35, and 66). Adopting that approach here, one can only conclude, submitted Mr Wolfe, that the provisions in the section 106 agreement for securing the delivery of "social housing" departed from the mechanism stipulated in the officer's report.

38. Mr Wolfe stressed the word "stipulate" in paragraph 364 of the report, which, he submitted, introduced a legally enforceable requirement for the transfer to the council of both land and money to provide for the delivery of the social rented accommodation. Only this would fulfil the obligation imposed on the officers by the report as part of the "instrument of delegation". On the judge's own approach, the section 106 agreement was a "material and significant" departure from the committee's delegation, because it failed to secure the provision of "the land and sum of money" from Elephant and Castle Properties to the council, which is what the committee had decided the section 106 agreement was to "stipulate".

39. I cannot accept Mr Wolfe's argument, either on the judge's approach to the scope of delegation or on the consistency of the section 106 agreement with the advice in paragraph 364 of the officer's report. As was submitted by Mr Daniel Kolinsky Q.C. for the council and Mr Russell Harris Q.C. for Elephant and Castle Properties, it does not reflect the true sense of the committee's resolution, read together with the Director of Planning's report, and the scope of the delegation to officers to negotiate and conclude the terms of "an appropriate legal agreement". The judge's essential conclusions on the question of "vires"

were, I think, correct. The instrument of delegation was the committee's resolution, not the officer's report or specific passages in it. The section 106 agreement was properly authorised by the committee's resolution, and not ultra vires. It was not irrational or otherwise unlawful for the council to enter into an agreement in that form, or to grant planning permission having done so.

40. There is nothing unusual in a local planning authority, when determining a planning application for a major scheme of urban regeneration, or even a proposal much less ambitious than that, to proceed as the council did in this case, delegating development control functions to a committee or to planning officers (see the judgment of Auld L.J. in *R. (on the application of Springhall) v The London Borough of Richmond Upon Thames* [2006] EWCA Civ 19, [2007] 1 P. & C.R. 30, at paragraph 34; cf. the judgment of Pill L.J. in *R. (on the application of Carlton-Conway) v London Borough of Harrow* [2002] EWCA Civ 927, [2002] 3 P.L.R 77, at paragraph 21). Delegation to officers is frequent where a committee is satisfied that planning permission ought to be granted, provided that the developer enters into a section 106 planning obligation making suitable arrangements for the provision of necessary infrastructure or, as here, the delivery of affordable housing of the requisite amount and tenure. This will sometimes be done while negotiations between developer and officers are still at an early stage, and a draft section 106 agreement is yet to be prepared and discussed.

41. We are not faced with any novel issue of law. As with "public documents" of various kinds, an objective and realistic approach should be taken to understanding a planning committee's decision as recorded in the minutes of the meeting at which it was made. Familiar principles of construction apply (see Fordham's "Judicial Review Handbook" (seventh edition), at paragraph 16.4.6, "Interpretation a question for the Court: other instruments/public documents"). The court will look for the members' intention as it appears from the words of the resolution. To grasp the meaning and effect of a committee's resolution to grant planning permission, one must read it in a straightforward way, keeping in mind the relevant context. Part of the context may be an officer's report recommending the grant of planning permission, and it can generally be assumed that if the members have accepted such a recommendation they will have done so following the officer's advice (see *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, [2017] 1 W.L.R. 411, at paragraph 7; and *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2019] P.T.S.R. 1452, at paragraph 42(2)). This does not mean, however, that the officer's report, or any part of it, is automatically incorporated into the members' resolution. Express words would be needed for that.

42. Approached in this way, the Planning Committee's resolution of 3 July 2018 is not difficult to understand. It is in clear terms. The delegation is broadly framed. It handed to the council's officers responsibility for obtaining the requisite section 106 agreement, and to do so within the timescale set. It tasked officers with the negotiation of "an appropriate legal agreement". If the negotiation did not yield what the officers considered an "appropriate" agreement, the Director of Planning was authorised to issue a refusal of planning permission. But the resolution did not require the legal agreement to be on terms specified or indicated by particular paragraphs in the officer's report. And it did not require the application to be brought back to the committee for further consideration in the light of the draft section 106 agreement in its final, agreed form, to enable the members to see whether a particular provision had been inserted.

43. The resolution looked only for "an" appropriate section 106 agreement, not "the" or "the most" appropriate agreement. It allowed for the possibility that there were several forms in which the agreement could be "appropriate". It did not prescribe any particular provisions that would have to be included to make it so. It left the officers to decide, in their own discretion, in what form the agreement would be "appropriate". And as Mr Harris submitted, "appropriateness", here at least, is not a hard-edged concept. Paragraph 1 of the resolution effectively required the officers to use their own professional judgment, a classic exercise of planning and valuation judgment, in considering whether the content of the agreement and its drafting were "appropriate" – and not merely, of course, in the arrangements put in place for the provision of affordable housing.

44. But this process was not wholly unrestrained. Paragraph 3 of the resolution confirmed, in accordance with regulation 24 of the 2011 regulations, that the "main reasons and considerations" on which the committee's decision was based were "as set out in [the Director of Planning's] report". Paragraph 4 set the deadline for negotiations – 18 December 2018, which was five months after the date of the resolution. And paragraph 5 provided for consultation of ward councillors on a "developed draft" of the section 106 agreement. The officers were thus given ample time to negotiate an "appropriate" agreement, and the ward councillors an opportunity to consider it. For a development of this scale and complexity, that is what one might expect.

45. There is no attack on the lawfulness of the delegation itself. The point in dispute concerns its scope. It goes to the relationship between the Planning Committee's resolution and the relevant advice in the Director of Planning's report. The question for the court is how the advice given in the report bears on the delegation of authority to the officers to negotiate an "appropriate legal agreement". And the focus here is on a single sentence of a single paragraph – the second sentence of paragraph 364.

46. What then is the relationship between the resolution and the Director of Planning's report? The resolution mentions the report in paragraph 3, confirming it as the source of the "main reasons and considerations" for the committee's decision. It does not, however, incorporate the report or any of its content, nor does it refer to any passages of the officer's assessment. It does not provide, through the officer's report, a detailed template for the agreement, or dictate how the negotiation must be conducted. It does not reserve to the committee a supervisory role in that process.

47. As Mr Kolinsky and Mr Harris submitted, if the committee had wanted to include any of the content of the officer's report in its resolution, or in its delegation to officers, it could easily have done so, either by reference, identifying individual sections or paragraphs of the report, or by quoting the relevant text. It could have picked out elements of the officer's advice as laying down parameters for the negotiation of the section 106 agreement or indicating how its main provisions were to be formulated. But it did not. There is no indication that the report was intended by the members to be part of the "instrument of delegation".

48. It was implicit in the resolution that the concept of "an appropriate legal agreement" was not unlimited, but had to be understood in the light of the Director of Planning's report. That is common ground. Under the resolution the report was to inform the officers' exercise of their professional judgment on the appropriateness of the agreement, but not to predetermine that exercise of judgment. The advice itself is not prescriptive. It is the kind

of advice one expects to find in such a report. And as the judge said, the report is not to be read with "undue legalistic [rigour]", but – in the way this court suggested in *Mansell* (at paragraph 42) – "with reasonable benevolence, and bearing in mind that [it is] written for councillors with local knowledge", a principle not confined merely to cases where an error in the officer's advice is alleged.

49. In effect, the resolution expected the officers to apply their own judgment, assisted by the advice they themselves had given to the members in the Director of Planning's report. The report contains the guidance they were to apply in negotiating an "appropriate" section 106 agreement, as well as being a record of the "main reasons and considerations" behind the committee's decision. It aids an understanding of what an "appropriate" legal agreement would be. But it does not elevate the report, or any part of it, to the status and significance of an "instrument of delegation". The delegation rested in the resolution itself, and only there.

50. To be clear, therefore, paragraph 364 of the officer's report was not, as Mr Wolfe argued, part of the "instrument of delegation". It was not adopted as such in the committee's resolution. It was one element of the guidance the officers were expected to have in mind when negotiating the section 106 agreement. It explained the purpose of including in the agreement a provision to cater for a possible future event. I agree with the judge's conclusions to this effect.

51. The matter dealt with in paragraph 364 was the need to ensure that the 116 units of social rented accommodation proposed for the west site would be delivered. Those 116 dwellings were going to be provided in a single block – block W3 – which was to be in mixed use, with non-residential uses on the lower floors and residential above. The officer's advice stated an objective, which was to ensure that the affordable housing would still be delivered if Elephant and Castle Properties did not do so. This was to be achieved by a suitable provision in the section 106 agreement. However, the officer did not formulate a legally enforceable obligation capable of being lifted into the agreement itself.

52. The basis of the officer's advice was that the east site was going to be developed first, and a mechanism was required to ensure the social rented housing on the west site would not be lost or unduly delayed if, after 10 years had passed, the development of the west site had not begun. The mechanism foreseen was that the section 106 agreement "would … stipulate that" in those circumstances "the land and sum of money sufficient for construction and completion of the social rented units would be transferred to the council, to deliver the social rented units". But the advice in paragraph 364 did not address the fact that delivering the social rented housing in a mixed-use block would depend on realising the value of the non-residential uses, nor anticipate how this was actually to be achieved in the section 106 agreement.

53. In my view Mr Wolfe's suggested interpretation of paragraph 364 reads more into it than is there. The officer did not point to an appropriate means of accounting for the value of the non-residential uses in block W3 if the council had to deliver the social rented accommodation itself. Nor did he say that the section 106 agreement would specify the payment to the council of an amount of money equating to the total cost of the "construction and completion" of the social rented units, or a particular fraction of that cost, or any particular sum. He merely said the agreement would "stipulate" the transfer to the council of "the land and sum of money sufficient" for this purpose. How large a "sum

of money" he did not say. This remained a matter to be worked out in negotiating the agreement.

54. The contemporaneous correspondence and the successive drafts of the section 106 agreement show that the council's planning officers and its solicitor, Ms Hussain, had the advice in paragraphs 364, 365 and 404 of the report well in mind when negotiating with Elephant and Castle Properties. In the emails sent to Elephant and Castle Properties' solicitor by Ms Hussain in November 2018 she referred several times to paragraph 364 of the report. She made it plain that the council would insist, as indeed it did, on the agreement containing provisions to deal with the eventuality of the social rented units not being delivered on the west site within 10 years of work beginning on the east site and the council having to take control of their delivery.

55. In the section 106 agreement, provisions were put in place to cover the different circumstances that might come about. These were consistent with the advice in paragraph 364 of the report, and achieved the objective expressed there – to secure the delivery of affordable housing on the west site if it had not been provided by the trigger date. They were reasonably flexible, allowing the council to take up either the second or the third option. As the judge put it, they confronted the "practical reality" of delivering affordable housing in a mixed-use block. And they did not go beyond the scope of the delegation in the committee's resolution.

56. The third option ensures that, should the need arise, the council would be able to deliver the social rented units itself. It provides for the value of the non-residential uses in the mixed-use block to be transferred to the council at no cost, with the express purpose of that value being relied upon to fund the construction of the social rented units. It requires the grant to the council (or a registered provider) of a long leasehold interest in "the land required" for their construction, for the council (or registered provider) "to construct and Complete the Social Rented Units and non-residential floorspace in the same Building(s) … , with a payment to the Council or Registered Provider of £1, the cost of constructing the Social Rented Units being reflected by the value of the non-residential floorspace transferred at nil value" ("Option 3" in paragraph 3.5.3 in Part 1 of Schedule 3 to the section 106 agreement). This arrangement is faithful to the advice in paragraph 364 of the officer's report. It involves both a transfer of the relevant land and an actual payment of money, the sum of £1, together with the value of the non-residential uses, which – as the council and Elephant and Castle Properties recognised when negotiating the agreement – represents a financial contribution sufficient to meet the cost of constructing and completing the social rented units.

57. There is, in my view, no force in the submission that the absence of a requirement for "up-front funding" of the construction costs of the development is a fatal shortcoming, and a breach of the officers' delegated authority. The approach taken by the officers accorded with the advice in the Director of Planning's report, and was squarely within their delegated authority.

58. It is wrong to contend that the phrase "sum of money sufficient for construction and completion of the social rented units" in paragraph 364 connotes a requirement for the council to receive the whole cost of constructing the social rented units, as well as the land. The concept of a "sufficient" sum is that it will be enough to achieve the relevant purpose, which is the delivery of the social rented units, not a windfall profit for the

council. As Mr Kolinsky and Mr Harris pointed out, the notion that the council was entitled to receive not only the relevant land but also the entirety of the construction costs would be hard to reconcile with regulation 122(2) of the Community Infrastructure Levy Regulations 2010. The council would have been receiving at nil cost an asset worth more than £50 million at the time of the committee's resolution, but deliberately disregarding this value and at the same time seeking "up-front costs" of about £40 million. That is not what is said, or implied, in paragraph 364.

59. Nothing in the officer's advice in paragraph 364, or in principle, stood in the way of a negotiated arrangement in which, if the council did have to step in and provide the social rented units on the west site itself, the value of the non-residential elements in the mixed-use block, rather than an actual payment of money to finance the construction of the social rented units, would serve to fund their delivery. As the judge said, the selection of an appropriate mechanism to achieve this under the section 106 agreement was a matter of judgment for the officers. The exercise of judgment was lawful, and within the ambit of the Director of Planning's advice. Under the arrangement agreed, the sufficiency of any payment of money, whatever it was, depended on the value of the non-residential uses in the mixed-use block, the value of the units retained, and the cost of delivering the social rented accommodation. Paragraph 364 does not state, or suggest, otherwise.

60. The "stipulation" referred to in paragraph 364 – that "the land and sum of money sufficient for construction and completion of the social rented units would be transferred to the council to deliver the social rented units" – was given effect in the section 106 agreement. The idea of "sufficiency" here relates not only to the "sum of money" but also the "land". The officer's advice did not prescribe a requirement that the land, with the benefit of planning permission for its development, was to be transferred to the council at nil cost, nor did it preclude such a requirement or suggest it would be inappropriate. It did not prevent the transfer of the land being part of the default mechanism for the delivery of the affordable housing, and the council receiving its inherent value as a very substantial asset, and at nil cost. There was no suggestion that the transfer of the land at nil cost, and its consequences, would have to be put to one side when the council was considering whether it would have "sufficient" land and money to construct and complete the social rented units. That would have been artificial and unjustified.

61. Finally, I see no substance in Mr Wolfe's criticism of the assumption underlying the second and third options in paragraph 3.5 of Part 1 of Schedule 3 to the section 106 agreement – that the value of the development would not drop below its 2019 level. This was not a legal error. It was a straightforward and lawful exercise of judgment by the officers, and nowhere near irrational. The assumption was reasonably open to them. As the judge said, the agreement was providing for scenarios that might emerge a long time after it had been entered into. Unsurprisingly, it had been assumed that values would rise in the construction period. It was not submitted in the court below that this was an inappropriate basis on which to enter into the agreement. Nor can that realistically be suggested now.

62. In short, as Mr Kolinsky and Mr Harris submitted, there was nothing irrational in the officers' professional judgment that the arrangements in the section 106 agreement would ensure the delivery of the proposed affordable housing as paragraph 364 of the Director of Planning's report expected, and that they were in this respect "appropriate". The submission that the agreement, or the planning permission, was "ultra vires" is mistaken.

63. In my view the council's officers were not obliged to take the application back to the Planning Committee once the section 106 agreement had been drafted (see *R. (on the application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] 1 P. & C.R. 19, at paragraphs 122 to 125). The officers had done everything required of them by the committee's resolution at its meeting on 3 July 2018. They had negotiated on the council's behalf "an appropriate legal agreement", which secured the delivery of the proposed affordable housing in compliance with the relevant advice in the Director of Planning's report and without exceeding the scope of the delegation. There was no need to go back to the committee. Its work was done.

Did the judge err in holding that the arrangements for the "build to sell" fall-back were lawful (grounds 3 and 6)?

64. Both grounds 3 and 6 concern the "fall-back" situation that would arise if "build to sell" units, rather than the intended "build to rent", were to be developed on the west site. This was described by the Director of Planning in paragraph 14 of Addendum No.2 as a "possible if unlikely scenario". But it required a mechanism for review, to ensure that the provision of affordable housing would still be acceptable in the light of relevant policy. Ground 3, like grounds 1 and 2, goes to the "vires" of the section 106 agreement. Ground 6 concerns the allegedly material differences between "social rented" and "social rent equivalent" units.

65. As described in paragraph 365 of the officer's report, the arrangement was expected to be that Elephant and Castle Properties would notify the council of its intention to develop the west site with build to sell accommodation, and "the affordable housing requirement for this would be for 50% social rented and 50% intermediate", that "[some] of the west site's social rented units would already be secured in the mansion blocks, albeit 38% rather than the 50% requirement," and so "a review mechanism would be required"; and in paragraph 404, that the viability review would "need to take into account the policy requirement for a different tenure split of 50:50 social rented and intermediate". The officer acknowledged in paragraph 16 of Addendum No.1 that "build to sell" was, at that time, less viable than "build to rent", but a "review mechanism would be required to capture any uplift in value"; and in paragraph 14 of Addendum No.2, in response to the 35% Campaign, that "build to sell" would produce a "slightly different affordable housing requirement", the section 106 agreement would "set out how this would be addressed should it arise and ensure that the requisite affordable housing provision would be secured", and the committee was "entitled to consider the application on that basis".

66. The section 106 agreement, with the subsequent deed of variation, includes an effective review mechanism. It provides for a "50:50" tenure split, in accordance with the definition of the "Affordable Housing Cap". The provisions in Part 3 of Schedule 3 to the agreement are designed to reflect any uplift in the developer's profit if the "build to sell" option were adopted. If there were such a rise in developer's profit, the council would decide whether any additional social rent equivalent habitable rooms were required (paragraph 4.2). The deed of variation makes it clear that the number of additional habitable rooms would be a maximum of 15.

67. In assessing the lawfulness of this approach, the judge concentrated on the advice in paragraphs 365 and 404 of the officer's report, paragraph 16 of Addendum No.1, and paragraph 14 of Addendum No.2. He observed that the report "did not contain any detailed prescription as to how the review was to be undertaken … or what the detailed uplift in affordable housing provision required might be, both in terms of quantum and also tenure type". It had also "left open how … the detailed calculation of the additional housing requirement was to be achieved". This made Mr Flynn's "task in seeking to demonstrate that what has been agreed exceeds the authority given by members to officers particularly difficult, if not impossible". The officers were "clearly left with a discretion as to the detailed mechanism for and product of the review" (paragraph 68).

68. The judge saw "nothing unlawful about the use of the emerging policy P4 in the calculation … undertaken for these purposes". This was an appropriate policy to apply to "build to rent schemes". It was "legitimate" to use it "to determine the number of habitable rooms of social rented accommodation on the west [site] attributable to meeting affordable housing requirements under the east site which would have been built out as build to rent accommodation under this scenario". The number of habitable rooms of social rented accommodation on the west site attributable to meeting affordable housing requirements on the east site, which would "need to be ringfenced from the calculation of affordable housing requirements required by the west site development itself" was 192. The judge set out the calculation, which resulted in the figure of 15 additional habitable rooms of social rent equivalent accommodation (paragraph 69). Rejecting criticism of the "ringfencing", he said he was "satisfied that the approach taken and the calculation [were] entirely rational and appropriate". They flowed from "the acknowledgment that some of the east site's social rented units were to be provided in any event on the west site and could not therefore be properly attributable to the west site itself as an affordable housing requirement". Once this was understood, the calculation was "perfectly coherent", and "entirely consistent with the material contained in the officers' report" (paragraph 70).

69. Mr Wolfe submitted that the obligation in the section 106 agreement that would apply if the west site were developed with "build to sell" housing did not give effect to what the committee had decided in the light of paragraphs 365 and 404 of the officer's report. The officers had not been given discretion to decide afresh, as a matter of their own planning judgment, the appropriate tenure split of any future uplift in affordable housing. The scope of the delegation on the tenure split to be achieved by the review mechanism was set at "50:50 social rented and intermediate". The judge's calculation was flawed. The correct figure – not applying policy P4, which had no part to play here – would have been 49 habitable rooms, not 15.

70. Again, I cannot accept Mr Wolfe's submissions. Dove J. was, I think, right to conclude that the section 106 agreement, as amended by the deed of variation, did not exceed the officers' delegated authority in securing an appropriate provision of affordable housing if the west site were to be developed for "build to sell" units. It was not irrational, or unlawful in any other way, for the council to enter into the agreement as drafted and to grant planning permission having done so.

71. In my view the judge's analysis here was correct. I agree with his conclusions on the logic and lawfulness of the approach adopted in providing an appropriate review mechanism in the section 106 agreement, which gave effect to the concept referred to in paragraph 365 of the officer's report. As he said, the officer's advice did not set out the approach to be

taken to the review, or fix the amount and tenure of the affordable housing; it left these things to be dealt with in the agreement. His calculation leading to the figure of 15 habitable rooms of "social rent equivalent" accommodation cannot be faulted. He was right to find that the relevant provisions of the agreement properly applied the tenure split of "50:50" social rented and intermediate to the "build for sale" housing contemplated on the west site, excluding from the calculation the social rented accommodation on the east site.

72. The tenure split was appropriately achieved. For this to be done, as the judge recognised, it was necessary to take into account the social rented units that would be provided on the west site, as part of the affordable housing in the scheme as a whole. He referred to this exercise as the "ringfencing" of 192 habitable rooms. Having allowed for the social rented units attributable to the development already carried out on the east site, the section 106 agreement secured a tenure split of "50:50" for the development on the west site. The deed of variation corrected the omission of the 15 habitable rooms of social rent equivalent accommodation from the definition of "Additional Affordable Housing".

73. As Mr Kolinsky told us, in this situation the 1,754 habitable rooms of "build to sell" accommodation on the west site would comprise 1,304 in towers and 450 in mansion blocks. The east site would have been developed as "build to rent" accommodation, providing 1,604 habitable rooms, of which 1,050 would be "Market Housing", 128 "London Living Rent" and 426 "Discount Market Rent", but no social rented units – because the required social rented accommodation was expected to be provided on the west site. So 192 habitable rooms, 12% of the total of 1,604 habitable rooms on the east site, would be required to meet the unmet expectation for affordable housing. This would accord with draft policy P4 of the New Southwark Plan, which sought 35% affordable housing with a "34:66" tenure split, comprising a minimum of 12% "Social rent equivalent", 18% "Affordable rent capped at London Living Rent equivalent" and 5% "Affordable rent for household incomes between £60,000 and £90,000 per year". Strategic Policy 6 of the Core Strategy – with its requirement of 35% affordable housing and a tenure split of "50:50" – would then apply to 1,562 habitable rooms on the west site (the total of 1,754 less the 192 attributable to the development on the east site), resulting in 547 habitable rooms (35% of 1,562), of which, subject to viability, 273 habitable rooms were required to be social rent accommodation (50% of 547). With a capacity of 258 in the mansion blocks (450 minus 192), a shortfall of 15 habitable rooms of social rent equivalent accommodation would result.

74. That was the calculation set out by the judge. It seems clear that he grasped the necessary arithmetic, based as it was on the required "50:50" tenure split for a "build to sell" development on the west site, with the requisite adjustment for the social rented units attributable to development on the east site.

75. And in any event the judge's essential conclusions here were, in my view, right. The arrangements for the "fall-back" situation in the section 106 agreement, including the review mechanism, were appropriate and lawful. It cannot be said that they were irrational. Nor are they inconsistent with the officers' relevant advice to the members, or beyond the scope of the delegation in the committee's resolution.

76. The dispute on ground 6 arises because the additional 15 habitable rooms – three or four units, we were told – could not be fitted into a mansion block on the west site, and would

have to be provided as "social rent equivalent" accommodation. The complaint is that the judge failed to understand significant differences between "social rent equivalent" and "social rented" accommodation – as he put it, "whether they are to be provided in perpetuity, their rent levels, the security of tenure provided and the extent to which they are monitored" (paragraph 71).

77. Written submissions were made to him after the hearing in which the differences were discussed. Under the relevant definitions in the section 106 agreement, "social rent equivalent" accommodation, unlike "social rented", is not owned and let by a local authority or a "Registered Provider". On the submissions made to him, the judge was "satisfied that … the differences are not material". The "quality of tenure" enjoyed by tenants in social rent equivalent properties was, he said, "as the nomenclature suggests, equivalent to those in social rented properties". The "important point" was "that the requirement of the officers' report was a review in terms of affordable housing, and whether the additional habitable rooms were to be provided as social rented or social rent equivalent accommodation was not identified as being in any way a critical point upon which the delegation to the officers of authority to enter into the section 106 obligation turned". Whatever might be the "nuanced differences", this was "not identified as a key requirement in relation to the review mechanism contemplated were the developer to take up the fall-back scenario" (paragraph 72).

78. Mr Wolfe submitted that the judge erred in holding that the differences between "social rent equivalent" accommodation and "social rented", which was not included in the viability review mechanism, were "not material". They were "material". They were enough to invalidate the section 106 agreement and the planning permission itself.

79. I disagree. I think the judge was right to conclude that although "social rented" housing and "social rent equivalent" were not the same, there was no significant difference between them, at least in the circumstances of this case. As the submissions of Elephant and Castle Properties emphasised, the differences in terms of rent and management are not significant. The rent levels seem broadly comparable. And although the management regime would not be the same, the arrangements for monitoring and oversight are not markedly dissimilar. In both types of accommodation, security of tenure continues "in perpetuity". In my view the judge's description of the differences as "nuanced" and unrelated to any "key requirement" of the review mechanism was apt. In this sense, they were not "material". In both fact and name, the two types of accommodation were "equivalent". In any event it was certainly not beyond the range of reasonable judgment for the officers to take that view.

80. A relevant factor here, as Mr Kolinsky submitted, was the very small number of habitable rooms, and dwellings, that would be provided as social rent equivalent accommodation in the "fall-back" situation – which would be only a tiny proportion of the affordable housing in the development. The judge would have been aware of this when considering whether the differences between the two types of accommodation could realistically be seen as negating the advice given to the members on the review mechanism, invalidating the delegation, and undermining the lawfulness of the section 106 agreement and the planning permission.

81. None of the advice in the Director of Planning's report and the two addendum reports suggests that the officers' view would have been different had they assumed that a very

small number of units of "social rent equivalent" accommodation would have to be delivered under the review mechanism – because space could not be found for the additional habitable rooms required to meet the policy requirement for "social rented" accommodation in the block where such accommodation was going to be provided. It was open to the officers to negotiate the arrangements they did. There was nothing to prevent them from accepting the review mechanism that ultimately appeared in the section 106 agreement, with the commitment to provide the 15 habitable rooms of "social rent equivalent" accommodation if Elephant and Castle Properties chose to develop "build to sell" units on the west site and a viability review was triggered. And it was not irrational, or otherwise unlawful, for the council to enter into an agreement containing that mechanism.

Did the judge err in concluding that the committee was not materially misled about GLA grant funding, and did he exercise his "discretion" impermissibly (grounds 4 and 5)?

82. Dove J. was unimpressed by the submission that the committee was materially misled by the officer's reference to "agreement in principle for grant funding from the GLA" in paragraphs 11 and 23 of Addendum No.1. The phrase "agreement in principle", in his view, "accurately reflected the position as it had been described to [the council] by [Elephant and Castle Properties'] planning consultant on [15 June 2018]". He said "the key point" was that "members were clearly advised that [Elephant and Castle Properties] was committed to providing the 116 social rented units via the section 106 obligation, without that being in any way conditional upon grant funding being secured" (paragraph 53). He concluded that, "when read as a whole[,] the material before members did not suggest that grant funding had been confirmed and therefore the error of fact contended for by [Mr Flynn] does not arise". So "the first element of the test set out in [paragraph 66 of Carnwath L.J.'s judgment in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] Q.B. 1044] [was] not satisfied". There was "no mistake as to an existing fact in terms of whether or not grant funding had been secured from the GLA for the affordable housing" (paragraph 54).

83. On the duty in section 31(2A) of the Senior Courts Act, the judge concluded that although Mr Flynn could say that Elephant and Castle Properties "had continued to improve its offer in respect of social rented units after [the council's] independent consultants had concluded that the scheme was bearing as much affordable housing as was viable", it was "at least highly likely that no further affordable housing would have been offered … , and that [the council] would have taken the same course … and accepted the affordable housing solution which incorporated 116 social rented units, and proceeded to grant planning permission on the same basis, or alternatively the matter would have proceeded to appeal". If he had been persuaded that there was an error of law of the kind alleged, he would have "exercised [his] discretion to decline to quash the planning permission" (paragraph 57).

84. Mr Wolfe submitted that the officer's advice to the committee that Elephant and Castle Properties had secured an "agreement in principle" with the GLA for funding the provision of social housing was materially misleading, or an error of fact. The judge was wrong to conclude as he did. And he was also wrong to find that, irrespective of whether the committee was misled on the availability of GLA grant funding, it was "highly likely" that the decision would have been the same. This, submitted Mr Wolfe, involved an

evaluation by the judge himself of the planning merits, and his own speculation, which is not permissible under section 31(2A).

85. I cannot accept those submissions. The relevant law is well established. As this court has emphasised – in *Mansell* (at paragraph 42(3)) – planning officers' reports must be read fairly, and as a whole, to establish whether the officer has "materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made". The word "materially" in this context means that, "but for the flawed advice … , the committee's decision would or might have been different". Such cases would include those where an officer has "inadvertently led a committee astray by making some significant error of fact". Applying that approach in this case, the court should in my view conclude that, when the Planning Committee resolved on 3 July 2018 to approve the proposed development, it had not been "materially misled" by what the officers had said to it about the GLA's position on grant funding. There was, in this sense, no "significant error of fact".

86. It is conceded by the council that the last sentence of paragraph 371 of the officer's report, stating that "[the] proposal reflects GLA grant funding, recently confirmed, which has facilitated an increase in the number of social rented units from 74 to 116" was incorrect, because the GLA had not, in fact, confirmed grant funding. Had this advice been left as it stood, it would have been misleading. Whether it would have been materially misleading is another question. But it was not left as it stood. If one takes the officer's advice on this matter as a whole, a different picture emerges. In Addendum No.1 the officers said there was "an agreement in principle for grant funding from the GLA" (paragraph 11). And in response to the 35% Campaign's representation requesting "confirmation that the latest affordable housing offer would be delivered even if grant funding could not be secured", the members were told not only that there was "an agreement in principle for grant funding from the GLA of £11.24m towards affordable housing", but also, crucially, that "[the] applicant has committed to providing the level of affordable housing set out in the latest offer, and including 116 social rented units, and this would be secured in the s.106 agreement".

87. To describe the GLA's position in the relevant correspondence as "agreement in principle for grant funding" seems an overstatement. It would have been more accurate to say that, in principle, the GLA had identified no obstacle to grant funding, and no reason to think it would be withheld. In its letter of 14 June 2018 to T3 Residential Ltd., it had said a "more thorough assessment" would be necessary, including a "review of the financial information by [its] finance team". However, it had acknowledged that T3 Residential Ltd. "would be eligible to become an Investment Partner [with it] once the more detailed assessment [had] been carried out and any clarifications addressed", and, as an Investment Partner, "would be eligible to apply for grant funding from the Mayor's Affordable Homes Programme". It had also confirmed that if T3 Residential Ltd. were registered with the Regulator of Social Housing and if the IPQ application was fully assessed, it "would welcome a bid for grant funding …".

88. But when the committee met on 3 July 2018 the members were left in no doubt on the basic question, to which, understandably, the 35% Campaign wanted an answer. That basic question was not whether grant funding had already been secured. It was whether the proposed affordable housing would still be delivered even if grant funding could not be secured. At this stage, the members were clearly not being advised that grant funding had

already been secured, or that it definitely would be. They were only being told that there was "agreement in principle" for it – which left open the possibility of its being refused. And if this was to make too much of what the GLA had said in the relevant correspondence, it was not, in my view, materially misleading. It did not misrepresent the fact that grant funding had not been secured. It could not be read as meaning that the GLA had already agreed to provide £11.24 million of grant funding, or indeed any grant funding. The judge was, therefore, right to conclude that the "mistake of fact" for which Mr Flynn contended had not been made. There was no such error, and there were, therefore, no consequences of any such error.

89. That, however, is not the critical thing. What mattered most, as the judge recognised, was that, in the correspondence culminating in the letter of 15 June 2018, Elephant and Castle Properties had put forward its affordable housing offer on the basis that it was not contingent on GLA grant funding. It was committed to providing 116 units of social rented accommodation, regardless of grant funding being secured – at its own risk that this might not happen. The advice given to the members on this point did not suggest otherwise, and was not incorrect. There was no reason for the committee to misunderstand the true position. In paragraph 53 of his judgment, the judge was not stating his own view that there had been an "agreement in principle". He was noting what DP9 had said in the letter of 15 June 2018, before stating what he saw, rightly, as the "key point": that the members were "clearly advised" of Elephant and Castle Properties' commitment to providing the 116 social rented units whether or not grant funding was obtained.

90. All this must be seen in the broader context of the advice the officer gave to the members on the confidence they could have in the affordable housing, and in particular the 116 units of social rented accommodation, being delivered.

91. It was made plain to the committee, in paragraph 11 of Addendum No.1, that the revised affordable housing offer, with grant funding, was "the maximum that the development can reasonably support", and that the provision of grant funding "would not increase the developer's profit in comparison with the earlier affordable housing offer which included 74 social rented units". This was the overriding point in the Director of Planning's relevant advice. As policy required, the "maximum reasonable" provision of affordable housing was proposed. In that proposal it was assumed that grant would be available, and the viability of the development had been assessed on that basis. But the affordable housing would have to be delivered, at Elephant and Castle Properties' risk as developer, even if grant were not available. This was the thrust of the officer's advice on the affordable housing offer and Elephant and Castle Properties' commitment to it. And as Mr Kolinsky also submitted, given that viability had been assessed on the assumption that grant would be available, there was no justification in policy, or in good sense, for the council to require more affordable housing than was in fact proposed. Without grant, the viability of the development and its ability to deliver the proposed affordable housing would have been less robust, not more so.

92. The fact that Elephant and Castle Properties' affordable housing offer had evolved in the period before the committee considered the application for planning permission on 3 July 2018 has no bearing on this analysis. That the affordable housing offer was, by then, "the maximum reasonable affordable housing provision" is clearly acknowledged in paragraph 398 of the Director of Planning's report. This conclusion was based on the work done by GVA, who were advising the council on viability. It is not attacked in Mr Flynn's claim.

In effect, the advice the council had was that it should not, and under relevant policy could not, seek more affordable housing than was ultimately proposed.

93. It follows, as the judge concluded, that the appeal should fail on ground 4. The committee's decision to grant planning permission was not based on a mistake of fact, and the members were not materially misled by the advice they received.

94. That renders ground 5 academic. However, it may be sensible to indicate my view on that ground. I can do so briefly. The principles on which the court will act in performing its duty under section 31(2A) of the Senior Courts Act, in the sphere of planning law, are clear (see the judgment of this court in *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] P.T.S.R. 1446, at paragraphs 267 to 273). In this case, as Mr Kolinsky pointed out, the expert valuation evidence, taking account of grant, was itself unchallenged and remains uncontentious. On the strength of that expert evidence, the committee was advised, and evidently accepted, that the "maximum reasonable" provision of affordable housing was proposed. It could not plausibly be suggested that more affordable housing, or more social rented accommodation, could have been required. To reach this conclusion, the judge did not have to speculate, or trespass into the planning merits. In the circumstances, if he had accepted that the committee was misled by what it was told about grant funding, I think he would have been entitled to conclude that the decision would nevertheless have been the same. He was, in my view, right to find that it was "at least highly likely" that the affordable housing offer would not have been improved, and that the council would still have granted planning permission for the proposed development. Had it been necessary to do so, therefore, I would have held that his conclusion on "discretion" was sound.

Conclusion

95. For the reasons I have given, I would dismiss this appeal.

Lord Justice Baker

96. I agree.

Lord Justice Lewis

97. I also agree.