IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
PLANNING COURT

Claim ref:
AC/2023/CDF/000108

B E T W E E N :

THE KING (on the application of
GREENFIELDS (IOW) LIMITED)

Claimant

-and-

THE ISLE OF WIGHT COUNCIL

Defendant

-and-

WESTRIDGE VILLAGE LTD

Interested Party

STATEMENT OF FACTS AND GROUNDS

References to the Claim Bundle take the format CB/Tab/Page

A. Introduction and Summary

1. This is an application for judicial review of the Defendant's decision on 4 August 2023 to grant planning permission under reference 20/01061/FUL ("the **Permission**") [CB/6/1071] by the Defendant for a large housing development on a greenfield, agricultural land at Land south of Appley Road, north of Bullen Road and east of Hope Road (West Acre Park), Ryde, Isle of Wight ("the **Site**").

2. In summary the Claimant challenges the decision to grant the permission on the following grounds:

    (1) Ground 1: The Council's conduct in determining to grant planning permission was unlawful. In particular, the conduct of the meeting of the Defendant's Committee on 27 July 2021 was procedurally improper and/or unfair. This vitiated the decision to grant planning permission.

(2) Ground 2: The grant of the Permission is vitiated by the appearance of bias on the part of Cllr Brodie and/or the exercise of his functions for an improper purpose.

(3) Ground 3: The Defendant acted unlawfully in failing to publish a draft planning obligation on its planning register; and in failing to publish a completed planning obligation, contrary to Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) Order 2015.

(4) Ground 4: The Defendant acted unlawfully in failing to having regard to regulation 122 CIL regulations 2010 and nevertheless relying, in granting the Permission, on the making of a financial contribution towards highways improvements; and/or unlawfully deferred consideration of whether or not the financial contribution towards highways improvements complied with regulation 122 CIL Regulations until after the grant of the Permission.

(5) Ground 5: The Defendant took into account an immaterial consideration, and/or acted irrationally and/or was materially misled by officers in relying on financial contribution towards inchoate highways improvement proposals as mitigating an identified adverse impact of the development.

B. Facts

Site and context

3. The Site, plans of which are at [CB/8/1520-1522] comprises some 38.16ha of agricultural land located to the west of Ryde, including some farm buildings, until recently in use as a dairy farm.

4. This area is projected to receive significant development in the short and medium-terms. The following sites in the vicinity have consent:

(1) Pennyfeathers;
(2) Hope Road (Phase 1) (adjoining Site to the west);
(3) Rosemary Vineyard, Ashey Road;

(4) Harcourt Sands, Upton Road; and

(5) Ryde Business Park, Nicholson Road.

<u>Application for planning permission</u>

5. The Pennyfeathers development will be of particular relevance in what follows. This scheme was granted outline planning permission in September 2017 under reference P/01456/14, for development including the erection of 904 dwellings on greenfield land c.600m to the southwest of the Site [CB/8/1523]. Pennyfeathers was granted permission *inter alia* on the basis that:

> "The proposed development includes substantial highway improvement works to ensure that the potential traffic which would be generated by the resultant housing and commercial land could be accommodated within the wider network".[1]

6. An application made by the Interested Party and validated on 28 July 2020 ("the **Application**") sought planning permission for development on the Site in the following terms:

> "Demolition of agricultural buildings and the garage to No 125 Marlborough Road; Proposed development consisting of 473 new dwellings (single and two storey dwellings (inclusive of 35% affordable housing) and inclusive of the conversion of the Coach House into pair of semi-detached dwellings; (leading to a net gain of 472 dwellings), single storey café and two storey doctors surgery and B1 office space with associated site infrastructure (inclusive of roads, parking, photovoltaic pergolas, garages, bin and bikes stores, below ground foul waste pump, electric substations, surface water detention basins and swales, landscape and ecological mitigations and net biodiversity enhancements); Proposed vehicular accesses off Bullen Road and Appley Road; Proposed public open spaces, Suitable Alternative Natural Greenspace and Allotments; Proposed three public rights of way; Proposed access, parking and turning for No 125 Marlborough Road and associated highways improvements."

[1] Officer's Report, paragraph 7.6; cf paragraphs 6.42-6.43. This document is not included in the bundle but can be provided if required.

7. The development was 'EIA Development' requiring assessment under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the **2017 Regulations**").

8. The Application was controversial and elicited significant opposition. A petition urging the Defendant not to grant planning permission had received 4, 732 signatures by July 2021. In addition, c.600 individual consultation responses were submitted by members of the public objecting to the Application on various grounds, notwithstanding that the Application was submitted at the height of the COVID-19 pandemic and the first national lockdown.

<u>Determination of the Application</u>

9. The history of the determination of the Application is somewhat convoluted and controversial. The Claimant has prepared a separate Chronology [CB/1/61] to assist the Court in understanding what follows.

July 2021

10. The Ward Member for Ryde Appley and Elmfield, which covers the Site, Cllr Michael Lilley, submitted a number of objections to the Application. In May 2021 following local elections, Cllr Lilley was elected Chair of the Defendant's Planning Committee ("the **Committee**"). Given his objections and his desire to speak against the Application as Ward Councillor, Cllr Lilley "followed the Isle of Wight protocol" of recusing himself as a member of the Planning Committee to enable him to speak on behalf of his constituents in a prescribed six-minute slot. It was anticipated therefore that the Vice-Chair of the Committee, Cllr Geoff Brodie, would chair this item of business when it eventually came before the Committee.

11. The Application was scheduled to be considered by the Committee on 27 July 2021.

12. An Officer's Report ("**OR**") was published in which officers recommended that the Committee resolve to grant planning permission [CB/3/318].

13. In the week prior to the consideration of the Application, Cllr Brodie contacted other members of the Committee who he considered were likely to vote against the Application, inviting them to express a view on the Application, suggesting that they had predetermined the Application, and encouraging them to step aside from the Committee for that meeting.

(1) Cllr Jarman's evidence [CB/2/137] is that in the week prior to the scheduled Committee, Cllr Brodie approached him three times. Each time, Cllr Brodie asserted that Cllr Jarman had predetermined the Application and that "he believed that my attendance at the site visit and at the respective PC meeting would expose the IWC to damaging and expensive legal action should the application be refused". Cllr Brodie also provided to Cllr Jarman summaries of how he considered other members would vote. Notwithstanding this pressure, Cllr Jarman declined to recuse himself from the meeting, "having concluded that I was predisposed generally regarding greenfield developments and that I was not predetermined on this specific application".

(2) Cllr Adams' evidence [CB/2/103] is that, in a like manner, Cllr Brodie contacted him by telephone and "kept telling me, very forcefully, [that] he believed I was predetermined and could cost the council lots of money in legal fees". Under this pressure and what he terms "manipulation", Cllr Adams decided not to attend the meeting.

14. On 23 July 2021 at a visit by the Committee to the Site prior to the scheduled meeting:

(1) Cllr Brodie prevented Cllr Jarman from asking questions of officers, contrary to the established practice on such visits [CB/2/137];

(2) Cllr Brodie spoke to various members of the Committee, reiterating his attempts to have them excuse themselves [CB/2/137];

(3) After Cllr Matthew Price had to leave the site visit some twenty minutes early., Cllr Brodie informed him that as a consequence he was disqualified from sitting on the Committee when it considered the Application or vote on it [CB/2/192]; [CB/2/200].

15. Cllr Vanessa Churchman's evidence [CB/2/102] is that she twice contacted Cllr Brodie in advance of the scheduled Committee meeting asking to address the Committee in respect of the Application. Her evidence is that first "he refused me permission on the basis that the site is not in my ward" and then he "point blank said 'no' unless I 'could support the application'".

16. On the day of the meeting, 29 July 2021 at 12:40pm (only three hours before the commencement of the scheduled meeting), the Defendant's monitoring officer, Mr Christopher Potter, wrote to Cllr Lilley informing him that "you cannot attend in person nor can you attend remotely the Planning Committee due to your acknowledged predetermination and therefore you cannot participate" [CB/2/149]. Cllr Lilley strenuously disagreed with this decision, but stated in reply that "I feel I have no other option [but] to accept your ruling at this late stage" [CB/2/148].

27 July 2021 Committee meeting

17. The Application came before the Committee on 27 July 2021 at 4pm. As a result of Cllr Brodie's endeavours and Mr Potter's decisions:

    (1) Cllr Lilley and Cllr Adams did not attend the meeting at all;

    (2) Cllr Price attended the meeting was barred from participating; and

    (3) Cllr Lilley and Cllr Churchman were not permitted to address the Committee.

18. As the transcript of the meeting shows, deliberations over the Application were prolonged and detailed. The Committee rejected a resolution to approve officer's recommendation and grant the Application by four votes to three, with one abstention (Transcript 76-81 [CB/2/230]).

19. Cllr Drew and Cllr Critchison then moved to refuse the Application (Transcript 82 [CB/2/230]). A prolonged discussion then ensued whilst members explained why they wished to refuse the Application, and officers repeatedly came back rejecting those reasons as appropriate. At one point, Ms Wilkinson advised that "We're looking for an extraordinary reason to refuse it and I think Members must keep that in mind" (Transcript 98 [CB/2/237]. After a break, this process continued. Cllr Jarman's evidence [CB/2/139] is that either Cllr Brodie:

    > "or the planning officers then dismissed [our objections] one by one as irrelevant or insubstantial. Chair Cllr Brodie's manner were very direct and interpreted as threatening. He made belittling remarks regard the attempt and specific dismissive comments about Councillors present, myself included."

20. Mr Simon Cooke's impression of the meeting [CB/2/115], having attended the meeting as a Ryde Town Council member, was that the officers used language which was "increasingly intimidating, with phrases such as "very concerning", "very dangerous"… she was using scary language repeatedly. The delivery of her advice went way beyond robust advice". Mr Cooke's recollection was that Cllr Brodie acted in a way which was intimidating, belittled his colleagues, and was "insulting and disrespectful", which "added to the overwhelming feeling of intimidation which had accompanied the debate".

21. A motion to refuse the Application because it "would result in the loss of an area of north-eastern pasture land and a historic landscape which would have an impact on the heritage and culture of the area contrary to DM11" was then proposed (Transcript 130-131 [CB/2/243], and the vote was tied. Cllr Brodie as acting Chair of the Committee had a casting vote, resulting in the motion falling (Transcript 147-148 [CB/2/245]).

22. At 7:02pm, it was pointed out to Cllr Brodie that the scheduled three-hour time limit for the meeting had expired, the meeting having been scheduled to commence at 4pm. Cllr Brodie then said (Transcript 150 [CB/2/245]):

    "We have to have an extension of the time allowed because we are up to the three hours. Can I suggest that we extend the time for up to a maximum of 30 minutes? Okay? Is that - is everybody okay, all right? Thank you."

23. Cllr Critchison indicated her dissent as she needed to leave for another appointment, but her concerns were rejected by Cllr Brodie, who stated that "if you want to vote you will have to stay" (Transcript 150-154 [CB/2/245]; Jarman p. 4 [CB/2/140]; Cooke paragraph 21 [CB/2/118]).

24. No motion to extend the meeting was proposed, or seconded, nor was it voted upon.

25. Following this exchange, Cllr Oliver immediately proposed a second motion to *approve* the Application, which Cllr Brodie amended to make reference to 71% of the affordable housing being rather than 70%. A vote immediately followed on the motion which was approved by four votes to two, with two abstentions, and Cllr Brodie closed the meeting [CB/2/245-6].

Aftermath of 27 July 2021Committee meeting

26. Following the meeting, 30 July 2021 [CB/2/154] and 2 August 2021 [CB/2/160], Cllr Lilley raised a number of concerns about its conduct with Mr Potter, including: his exclusion from the meeting; the absence of a formal resolution to extend the meeting; and what he saw as the inappropriate conduct of officers. He requested that the matter be subject to a "cooling-off period" prior to the issuance of any decision notice, and it be referred back to the Committee.

27. On 6 August, Mr Potter replied, accepting that a vote was required to extend the length of a meeting [CB/2/157]:

> "Part 4B rule 6 of the council's constitution sets out the relevant rule for the duration of meetings. It states: 'With the exception of Full Council, all meetings will end after three hours of the advertised start time unless at least half the members in attendance vote to extend the meeting. Any remaining items of business, at the chairman's discretion, will either be referred to an extraordinary meeting or the next ordinary meeting, or will otherwise fall for not being considered'. PART 48 - Duration of Meetings.pdf (moderngov.co.uk). That procedural rule specifically refers to a 'vote'. The purpose of the rule is to ensure that the consent of at least half of the members in attendance is required to extend the time of any particular committee meeting so that the meeting can continue beyond that time limit."

28. Mr Potter's view was however that the meeting had ended before the expiry of the three-hour limit so the question of an extension was moot. Mr Potter did not consider there was merit in Cllr Lilley's other complaints.

29. In a subsequent email however on 11 August 2021 [CB/2/161], Mr Potter's position changed. Far from requiring a vote, his view was now that "the time extension had already been granted through affirmation" notwithstanding Cllr Critchison's objection, which he considered to have been made after the time extension had already been decided.

30. Mr Potter's position was repeated to other councillors who had made similar complaints (e.g. [CB/2/175]).

31. On 3 August 2021, the Claimant wrote to the Defendant, identifying similar concerns with the conduct of the meeting [CB/9/1553]. This was responded to curtly on 21 September 2021 with a blanket denial of any procedural irregularity [CB/9/1555].

32. There were also a number of complaints about the draft minutes of the 27 July meeting when they were published [CB/2/169]. For example, the draft minutes suggested that indeed a motion had been proposed and seconded for the extension of the meeting, which had demonstrably not taken place. Mr Potter advised Cllr Medland that, notwithstanding that he had been on the Committee for that business, there was no mechanism through which he was entitled to comment upon the draft minutes [CB/2/170-174].

24 August 2021

33. At the next meeting of the Committee, the first item on the agenda was the approval of the minutes of the last meeting. A contemporaneous note of this meeting from Cllr Jarman is at [CB/2/164-165].

34. Cllr Jarman proposed a motion to defer the consideration of the approval of the minutes in the light of pending legal proceedings, which motion was seconded. Cllr Lilley left the chair and Cllr Brodie replaced him, although some councillors, in particular Cllr Adams, questioned why this had to be the case.

35. Cllr Brodie then proceeded:

    (1) To refuse to put Cllr Jarman's motion to a vote; and

    (2) To order Cllr Adams to leave the chamber and, when he refused, to propose a motion to exclude him from the meeting entirely – this motion did not reach a vote as it was not seconded.

36. A number of members therefore, including Cllrs Jarman and Adams, left the chamber and refused to participate further in the meeting. A motion to approve the minutes was then passed in their absence.

Growing calls for reconsideration

37. There continued to be significant correspondence between members and between members and officers.

38. Cllr Lilley submitted a complaint as to Cllr Brodie's use of insulting and inappropriate language about him (referring to his as a "liar", "coward" and "pathetic") [CB/3/918] cf [CB/2/166], but Mr Potter did not consider that the Defendant had sufficient resources to investigate it on the grounds that "it is not in the public interest to spend further public money to look into this matter" [CB/2/185].

39. Eventually by November 2021, even Cllr Brodie recognised that the 27 July 2021 meeting was flawed. In an email on 25 November 2021 to the Defendant's Chief Executive, he stated as follows [CB/191-192]:

> "It is clear to me that some of the Monitoring Officer's advice provided to members of the committee was either inaccurate or excessive:
>
> 1. Cllr Lilley had the full right to represent his residents in person at the committee as the local councillor. Instead he was advised by the Monitoring Officer not to, as doing so would put at risk the defence of any refusal decision. I was part of that exchange with you over the weekend of 23-25 July. Although it was Cllr Lilley's decision not to attend, he clearly felt immense pressure and little option.
>
> 2. With the confirmation of the Monitoring Officer's team Cllr Price, a Committee member, was prevented by me from either participating or voting on the application as he had not attended the entirety of the prolonged and then 'compulsory' site visit. As required by our Constitution. We have since learnt from Mr Potter that site visits cannot be compulsory if a councillor can confirm, perhaps in a court of law, sufficient relevant knowledge of the site. Something Cllr Price is adamant he could do.
> I now consider that we need to allow Cllr Lilley to re-consider his nonattendance. And to allow Cllr Price to fully participate and vote. Given the refusal vote at committee was only lost on my casting vote it is clear that the loss of a committee member without justification was crucial."

40. The Application was not however referred back to the Committee at this stage.

41. Motions were then submitted to the Committee on 25 January 2022 and again on 1 March 2022 asking that it be given the opportunity to reconsider the Application. The January motion was not put to the Committee. The Committee could not consider the 1 March motion due to disruption from Cllr Brodie, which resulted in the adjournment of the meeting (Cooke paragraphs 22-33 [CB/2/119]). The motion was then considered at a meeting of the Committee on 29 March 2022, where it was rejected [CB/4/967-968].

42. In advance of the 29 March 2022 meeting, Cllr Spink, a member of the Committee who had raised concerns about the 27 July meeting, was contacted by the leader of the Conservative Party Group within the Defendant. He was informed that he should allow himself to the substituted for another councillor and not take part on in the Committee meeting, otherwise he would be removed from his place on another of the Defendant's committees [CB/2/128, 132-136]]. Cllr Spink refused to be substituted and voted in favour of the motion, the other Conservative councillors voting against. The Claimant's understanding is that this was a whipped vote and proceeds on that basis absent any denial by the Council.

43. For the 29 March 2022 Committee meeting, a report from the Chief Executive of the Defendant was also tabled, which stated that "officers do not consider it appropriate to exercise the delegation granted to them by the Planning Committee in July 2021" (paragraph 5 [CB/4/959]) and sought a resolution confirming that the decision notice could be issued on the Application. Interestingly, the report confirmed at paragraph 12 that at this stage "the section 106 agreement has now been agreed in line with the requirements of the Planning Committee's decision in July 2021 and is in the process of being signed" (paragraph 12 [CB/4/960]). No draft planning obligations was placed on this planning register at this time (or at all). Because the motion to reconsider the Application was rejected, the Chief Executive withdrew his report and motion [CB/4/970].

Habitats Regulation reconsideration

44. Finally, in June 2022, Natural England wrote to the Defendant, informing it that, contrary to the assessments already undertaken, the Application if granted permission would result in the loss of a classified site (reference IOW46) within the Solent Wader and Brent Goose Strategy,

comprising some 11.7ha in the north of the Site fronting Calthorpe Road. This land provides habitat for curlew [CB/5/1052-55]. The Defendant took the view (correctly and as urged by the Claimant) that this was a material change in circumstances that required further consideration by the Committee.

45. The Application initially came back to Committee on 21 March 2023, but the matter was deferred. It was then considered as a meeting on 25 April 2023 with a report from officers with the following recommendation: "To agree to amended heads of terms to the legal agreement, to include mitigation land for curlew habitat and enhancement and mitigation strategy" [CB/5/1057]. Paragraph 1.12 of the report [CB/5/1061] reiterated that the Application was being returned:

> "for consideration of the revised habitat enhancement and mitigation works to compensate for the loss of curlew habitat and the associated required change to the heads of terms listed within the previous recommendation".

46. Moreover, paragraph 3.2 of the report advised that: "It is the opinion of officers that no other material matters have changed to justify any other elements of the permission being reconsidered." [CB/10/62]

47. At the meeting, the temporary Chair, Cllr Stuart managed the meeting so that the issue of appropriateness of the mitigation for curlew habitat, the subject of the officer's recommendation, was focussed upon.

48. The debate was exclusively related to the satisfactory nature or otherwise of the proposed mitigation. A motion not to follow the officer's recommendation on the grounds that the mitigation package was inadequate was rejected by six votes to five (Transcript 202.-216 [CB/2/312]). A subsequent motion to "approve the conditional recommendation of Officers" (Transcript 217 [CB/2/312]) was then put without further debate and carried by six votes to five, at which point the item on the agenda was concluded [CB/2/314].

Grant of Permission

49. The Permission was subsequently granted on 4 August 2023 [CB/6/1071], and the decision notice was placed on the planning register. No draft or concluded section 106 planning

obligation was placed on the planning register at any point until after the receipt of the Claimant's pre-action letter [CB/2/197].

Transport and highways

Applicable policy

50. Policy SP7 of the Isle of Wight Core Strategy (March 2012) which forms part of the applicable development plan provides:

> "Development proposals should not negatively impact on the Island's Strategic Road Network (as shown on the Key Diagram), nor on the capacity of lower level roads to support the proposed development. If negative impacts are identified, appropriate mitigation measures are expected."

51. The development would have three points of access: from Bullen Road to the south, Appley Road to the north, and via Hope Road to the Marlborough Road to the west.

Transport Assessment

52. A 'Transport Assessment' ("**TA**") was prepared and submitted as Appendix 7.1 to Chapter 7 of the Environmental Statement [CB/7/1378].

53. The TA identified that there were two local junctions which would experience adverse effects from the additional traffic generated by the development:

    (1) The four-way junction at Westridge Cross (the junction of the A3055, Marlborough Road; Bullen Road; A3055, Brading Road; and the Great Preston Road) (referred to as "Junction 4" in the TA); and

    (2) The junction of Smallbrook Lane and Great Preston Road (referred to as "Junction 5" in the TA), located approximately 170m west of Junction 4.

54. In respect of Junction 4, the TA found that the junction would operate with spare capacity having regard to future consented developments *only* if the Pennyfeathers development was delivered and provided proposed junction improvements (Table 5.27 and paragraph 5.81

[CB/7/1454]). Those junction improvements appear to be required to be delivered prior to the occupation of 260th dwelling on the Pennyfeathers site (paragraph 5.46 [CB/7/1446]). If those improvements were *not* delivered however, Junction 4 would operate over capacity at both morning and evening peaks, causing significant queuing and disruption (Table 5.35 and paragraph 5.100 [CB/7/1458-9]).

55. In respect of Junction 5, the TA stated that the junction would operate over capacity in all scenarios. Although the Pennyfeathers scheme proposed some improvements to the junction, even with those improvements the junction would operate over capacity with "excessive queuing" even *before* the Application development traffic was factored in (see Tables 5.15 [CB/7/1446] and 5.21 [CB/7/1450] and paragraphs 5.82 [CB/7/1454] and 7.17-7.18 [CB/1468]). The exact extent of the impact was not modelled further "as this would simply increase the extent of queuing and delay at the junction". However, the TA made clear that improvements would need to be made to the junction before any significant increase in traffic due to the Application development and other development (paragraph 7.25 [CB/7/1469]).

56. The TA recognised that there were what the authors termed "concerns relating to the deliverability of the Pennyfeathers Scheme, along with its associated infrastructure (paragraphs 5.56 [CB/7/1448] and 5.96 [CB/7/1458]).

57. The TA also considered "work completed by WYG (on behalf of [the Defendant]) [which] identified an alternative solution" for Junction 4 (paragraph 7.6 [CB/7/1466]; paragraph 5.103 [CB/7/1459]; Appendix T [CB/7/1481-1484]). This work appears to have resulted in a report in March 2018, but only a single drawing showing a proposed layout is contained at Appendix T. The TA considered that Junction 4 with the benefit of "the proposed WYG Westridge Cross improvement scheme would operate close to its operational capacity during the PM peak period" when the Application development was factored in (paragraph 7.8 [CB/7/1467]).

58. The TA accordingly proposed its own schemes for each of the junctions:

    (1) For Junction 4, a scheme of improvements in Drawing 5622.033A (paragraphs 7.9ff) which would provide "marginal widening of Great Preston Road and Marlborough Road" (paragraph 7.9 [CB/7/1467]; and

(2) For Junction 5, a scheme in Drawing 5622.012F for the installation of a mini-roundabout at the junction (paragraph 7.16ff [CB/7/1468]).

Consultation

59. A number of consultees raised concerns about the highways and transport implications of the Application.

60. Island Roads, the statutory highways consultee, in a consultation response dated 4 September 2020 [CB/7/1485], highlighted the TA's recognition that without the Pennyfeathers highways improvements, both Junction 4 and Junction 5 would exceed operation capacity in the PM peak with the addition of the development traffic [CB/7/1500]. Island Roads then identified the following issues with proposed solutions:

> "In seeking to address the capacity issues identified at the 'Westridge Cross' junction reference is made to the inclusion of junction improvement works associated with the Nicholson Road development and those as developed on behalf of the IOWC by WYG. However, these works rely on third party land that fall outside of the control of both the applicant and the Local Authority and also show elements of the junction to be nearing capacity with the inclusion of the development. As a result junction improvements in the form of Drawing No, 5622.033A are proposed. However as with the WYG proposal these works rely on third party land and this office therefore questions and seeks a response from the LPA as to how their deliverability could be guaranteed. It is also noted that paragraphs 7.13 – 7.14 make reference to the 'Westridge Cross' junction existing layout and that as detailed on Drawing No, 5622.033A to provide capacity for up to 400 of the 475 proposed dwellings. This office seeks further information as to how this figure has been concluded".

61. This concern about the reliance on third party land and the adverse implications for the deliverability of any proposed improvements was reiterated by Island Roads on 22 December 2020 [CB/7/1512]. Island Roads went on to note the following development in the applicant's position:

> "while this application includes for indicative junction improvement works, the applicant proposes that a financial contribution towards junction improvements be made mindful that

the Local Authority is currently in the process of reviewing the junctions in question in order to bring forward wider network improvements."

62. On 4 January 2021, Cllr Lilley raised formal objections to the Application on highways grounds [CB/7/1513]. He noted the development -

> "is over reliant on other developments with outline planning permission such as Pennyfeathers, going forward and land availability to undertake improvements on Westridge Junction which in the case of Westridge Garage is not available. This affects the Bullen Road access to the site.

63. He went on to state that in his view:

> "The proposals for road access to this development proposal is fraught with ifs and buts and totally speculative. It is totally in my view undeliverable and putting any Island Road recommendations into conditions such as done in the case of Nicolson Road would be highly controversial and irresponsible as they would be unachievable."

Officer's Report

64. In July 2021, the OR had considered concerns as to "Capacity/ Traffic Impact" at paragraph 6.147-6.152 [CB/3/368-9]. The primary reasoning is as follows:

> "6.150. […] The LPA is conscious that there are a number of other housing developments either consented or proposed in close proximity to the application site and that each of these would result in impacts to various junctions within eastern Ryde. Each development proposes slightly different highway improvement schemes to address their own impacts on the highway network and when these would be delivered, would depend on the phasing of those developments. There is a concern that if this is not managed properly it could result in an incoherent range of works to the highway network. As a result, the Council, in its roles of Highways Authority and Planning Authority, has recently commissioned consultants to undertake a review of junction improvement options for junctions within the Ryde East area, in order to bring about a coherent range

of highway improvement schemes to junctions that . would be affected by future developments.

6.151. The aim is therefore for the Council to adopt suitable junction designs and then lead on the delivery of coherent and holistic junction improvement schemes at an appropriate time. These works would be funded by s. 106 monies that have already been collected and future contributions/ direct works from nearby proposed developments. The Highway Authority has confirmed that the review is scheduled to be completed in Autumn 2021. The outcome of the review would allow the Council to select suitable junction designs that would mitigate the impacts of new developments in the area.

6.152. As the above approach has been taken in the determination of other applications in the vicinity of this site, it would be unreasonable to take a different approach in respect of this application. It is therefore recommended that a contribution is sought in respect of these wider network improvements, for the Council to use to implement these works, when required."

65. Officer's advice was therefore that members should grant the Application on the basis of the making of a financial contribution towards junction improvements, coordinated by the Defendant, resulting from an ongoing review which would report in the autumn of 2021, after which time the Defendant would "select suitable junction designs that would mitigate the impacts of new developments in the area".

66. At paragraph 7.6 of the OR [CB/3/383], under the title "Conclusion and Planning Balance", officers advised that the following should be given weight:

"The scheme would provide or contribute towards enhancements to the local highway infrastructure to ensure that the additional traffic resulting from the development would not have an impact on highway safety.

67. The following is therefore apparent:

(1) The OR in July 2021 suggested that there was an ongoing package of work on junction capacity mitigations. No material appeared in the background papers included in the agenda pack related to the review, nor any junction designs.

(2) The Defendant did not include in that pack nor publish at any time a draft section 106 planning obligation containing provision for such a contribution;

(3) The OR did not contain any information as to how a financial contribution from the Interested Party contained in such an obligation could be calculated;

(4) The OR did not consider whether or not such a financial obligation complied with regulation 122 CIL Regulations;

(5) Officers nevertheless advised members that the contribution should be taken into account as a factor weighing in favour of the grant of planning permission.

Post-OR developments

68. Following the publication of the OR, on 27 July 2021, planning agents for the developers of the Pennyfeathers development wrote to the Defendant, querying the existence of any documents relating to alleged "review of junction improvement options for junctions within the Ryde East area", and asserting that "the awaiting Highway Report, being used to assist the determination of a planning application, is worrying as no other party, including the public, has seen this it all" [CB/7/1516]. The letter went on to highlight that the author's clients had not given consent for any of its land to be used for the provision of additional highways mitigations arising from the development, and that

> "1. Planning permission should not require the consent of third parties.
> 2. Planning contributions should not be simply collected for a scheme unless there is clear scheme in place (which will of course requires [sic] public consultation"

69. This letter and its contentions were not the subject of any further advice from officers to the Committee.

70. During the meeting on 27 July 2021, members of the Committee were clearly concerned about the issue of transport impacts and traffic capacity (see Cllr Brading at Transcript 20 [CB/2/216] and Cllr Jarman at Transcript [CB/2/234]). Ms Sarah Wilkinson advised members of the Committee on these points as follows:

> "In relation to the Westridge Cross [i.e Junction 4] elements that you asked, the application itself doesn't propose any physical works to Westridge Cross. It proposes to contribute towards enhancements to those crossroads as part of a kind of combination of contributions from multiple developments within the area of the site. The same approach was taken for the recently approved Nicholson Road development where that scheme would also contribute towards enhancements to that junction. The enhancements would include effectively a widening of two arms of that junction to mean that they can take full capacity. Mem - Councillors will know, when driving down there at the moment, there is - although there may be two lanes, they are narrower than standard and the enhancements would allow for a widening of that" (Transcript at 25. [CB/2/217])

> "In terms of cars on the network, the - not only do you have a submission from Island Roads that it's satisfied that it - subject to the conditions and the 106 agreement, it won't have an impact on the network in relation to traffic generation […]" (Transcript at 90. [CB/2/232]); and

> "In terms of the comments in relation to Island Roads, concerns over the capacity of the network, as I've previously said, Island Roads haven't objected subject to the conditions and the terms of the legal agreement, that there is an impact on the network, providing those things can be achieved. Officers are stating that through the legal agreement and through conditions those things can be achieved" (Transcript at 98. [CB/2/235])

Further developments in 2023

71. Some time later, on 21 April 2023, the Defendant refused an application for the approval of reserved matters in relation to the Pennyfeathers development (ref 20/02159/ARM) (Witness statement of Phil Jordan, paragraph 9 [CB/2/70]; decision notice at [CB/8/1533]). That application was submitted after the statutory three-year deadline for the submission of

applications for reserved matters, but with the benefit of COVID-era legislation extending times for the making of such applications. The Pennyfeathers developer is, however, now well out of time to submit any further application therefore and, notwithstanding the making of an appeal, the starting point is that the Pennyfeathers permission is time-expired.

72. When the Application came back to Committee in April 2023, as set out above officers advised that there were no other material changes in circumstances other than the curlew issue. In particular Officers did not:

    (1) Draw the Committee's attention to the refusal of the Pennyfeathers reserved matters application and the highways implications of the non-delivery of that scheme; nor

    (2) Provide any further information or details as to the Defendant's alleged review of junction design which ostensibly would have been completed in autumn 2021.

Pre-action disclosure

73. In its pre-action letter [CB/9/1604] the Claimant requested at paragraph 56 that the Defendant provide:

    > "a. The completed section 106 agreement relied upon by the Council in granting permission; and
    >
    > b. Any report or work product arising from the alleged "review of junction improvement options for junctions within the Ryde East area"."

74. In respect of the former request, the section 106 agreement disclosed provides at Schedule 1 (page 21) [CB/6/1104] for the making of a "Highways Improvement Contribution".

75. That contribution is payable in four equal instalments prior to the occupation of each successive 100 dwellings. The "Highways Improvement Contribution" is defined as follows [CB/6/1102]:

    > "A financial contribution of Four Hundred and Six Thousand Three Hundred and Fifty-Nine Pounds (£406,359) to be used by the Council towards:

- Improvements to the junction of Great Preston Road and Smallbrook Land;
- Improvements to the Westridge Cross junction; and/or
- Such other highway improvement as the Council as statutory highway authority deem necessary as a result of the Development

provided that such improvements are compliant with Regulation 122 of the Community Infrastructure Regulations 2010 [sic]"

76. In respect of the latter request, the only document provided by the Defendant was a report entitled "Isle of Wight Junction Assessment and Design Junction Feasibility Study – Marlborough Road / Great Preston Road" dated March 2018 [CB/7/1319] cf email at [CB/9/1613-4] ("Junction Assessment"). This appears to be the full document, Appendix B of which appeared in Appendix T to the TA (see above paragraph 57).

77. The Junction Assessment is a (somewhat dated) document with significant limitations:

    (1) It considers Junction 4 only;

    (2) It does not appear to model junction capacity to accommodate future proximate development. Rather, it applies a generic growth factor for the Isle of Wight area as a whole (paragraph 3.12 [CB/7/1335]). The TA at paragraph 5.33 and Table 5-10 shows that the increase in traffic movements attributable to the consented developments in the vicinity of the site significant *exceeds* the equivalent growth factors [CB/7/1442].

    (3) Although it sets out an indicative scheme for the improvement of the junction, it qualifies that scheme as follows (paragraph 3.9 [CB/7/1334]):

    > "In terms of a proposed scheme for the junction, a proposed indicative junction design has been tested and it has been noted that due to space constraints at the junction, there is little that can be done in regards to physical improvements without the acquisition of land along the northern side of Great Preston Road. A design has been developed with this land acquisition which involves the widening of Great Preston Road to two lanes, allowing for a designated lane for right-turners."

78. No documents have been disclosed by the Defendant which relate to:

    (1) any review of junction design and capacity dating from after March 2018 (or in particular from or after autumn 2021 as referred to the OR) have been disclosed;

    (2) any decisions taken by the Defendant consequent to such a review, including any financial or delivery commitments, or to the compulsory purchase of the land required to delivery highway improvements at Junction 4;

    (3) any consideration of Junction 5 whatsoever.

<u>The Defendant's Constitution</u>

79. At the time of the 27 July 2021 Committee, the applicable constitution, adopted by the Defendant under section 37 Local Government Act 2000, was that dated 18 November 2020 ("the **Constitution**"). That this was the Constitution in force at the time of the meeting was confirmed by the Defendant in correspondence with Cllr Jarman, who, on having requested a copy of "the up to date constitution" on 23 August 2021 was provided with that dated 18 November 2020 [CB/2/177].

80. Part 4B of the Constitution contains the "Procedure rules governing how Full Council, Cabinet, Committees, Sub-Committees and Boards operate" ("Committee Procedure Rules"). In relation to duration of meetings, Rule 6 provided: [CB/3/766]:

> "With the exception of Full Council, all meetings will end after three hours of the advertised start time unless at least half the members in attendance vote to extend the meeting.
>
> Any remaining items of business, at the chairman's discretion, will either be referred to an extraordinary meeting or the next ordinary meeting, or will otherwise fall for not being considered."

81. Rule 10 of the Committee Procedure Rules required [CB/3/770] that:

"Votes on all matters other than budget setting and council tax will be by a show of hands or, if there is no dissent, by affirmation of the meeting, unless four members present at the meeting demand, before the vote is taken, that a named vote be taken. A named vote shall not be made on procedural decisions."

82. In respect of rights of councillors to speak at meetings, Rule 11 [CB/3/770] provides"

"Any member of the council may attend any meeting of a committee, including those parts of the meeting from which the public and press are excluded. They do not have a right to vote or move a motion or amendment, but may speak with the consent of the chairman (such consent to be sought before the meeting and should not normally be withheld)."

83. The 'Code of practice for members and officers dealing with planning matters' ("Code of Practice") incorporated into the Constitution [CB/3/835] provided in respect of members who represent wards affected by a planning application as follows (p.188 [CB/3/839]):

"Any local member who is not a member of the Planning Committee is entitled to attend and speak in relation to any item on the agenda with direct impact on their electoral division, so long as they have given prior notice before the start of the meeting to Democratic Services of their wish to do so.

Where a local member has requested the item be considered by the Planning Committee and that item is reported to the Planning Committee, it is anticipated that the local member will attend the meeting or make alternative arrangements for their representation at the meeting by an adjoining division member, political group leader or by provision of a short written statement, which may be read by the chairman. A local member can speak for five minutes at the end of public speaking unless the chairman agrees otherwise.

Members of the Planning Committee who are determining applications that are within their electoral division should, by local convention, declare the fact and nature of the impact on their electoral division as a personal interest and may speak but will not vote on the issue. This convention is encouraged in order to protect the Planning Committee from the perception that decisions are being taken on the basis of local opposition or support rather than material planning considerations. It also protects against the perception that those

areas that are represented by a local member who sits on Planning Committee have a disproportionate influence on the planning processes."

84. In respect of party whipping of the Committee, the Code of Practice provided (p. 190[CB/3/841]:

> "The use of party political whips in development management decisions would demonstrate a predetermined position and could also be maladministration. Whipping must not therefore take place.
>
> Individual members should reach their own conclusions on planning matters rather than follow the lead of another member. However, the views of other members of the committee, where they are relevant, can be one of the factors taken into account in taking a decision."

C. <u>Ground 1: Procedural Impropriety</u>

85. The Council's conduct in determining to grant planning permission was unlawful. In particular, the conduct of the meeting of the Defendant's Committee on 27 July 2021 was procedurally improper and/or unfair. This vitiated the decision to grant planning permission.

Legal principles

86. The exercise of a decision-making function in breach of a local authority's constitution established under section 37 Local Government Act 2000 is unlawful (*R (Domb) v Hammersmith & Fulham LBC* [2009] LGR 340 and *R (Bridgerow Ltd) v Cheshire West and Chester Borough Council* [2015] PTSR 91). Such a constitution must be interpreted objectively according to the natural and ordinary meaning of the words used in context and according to common sense (*R (Blacker) v Chelmsford City Council* [2021] EWHC 3285 (Admin) at [38]).

87. Where a councillor on a planning committee is unable to or does not attend a site visit, "it must be for the individual member to decide whether, on the facts, the fact that he has not been to the site should disqualify him" from participating in the determination of an application for planning permission (*R (Ware) v Neath Port Talbot Council* [2007] EWHC 913 (Admin); [2007] J.P.L. 1615 at [38]). This principle was not disputed by Mummery LJ when the case

came before the Court of Appeal, although the Court allowed the appeal on other grounds. ([2007] EWCA Civ 1359; [2008] J.P.L. 854).

Submissions

88. The 27 July 2021 meeting was unlawful in three distinct ways:

(1) *First*, contrary to the principle in *Ware*, Cllr Price was prohibited from participating in the meeting by Cllr Brodie. It is apparent that the Defendant accepts this principle applies to members of the Committee from advice given to members on 21 September 2021 in respect of another application [CB/2/162], where Mr Potter having cited *Ware*, states:

> "It is a matter of judgment for each councillor if they feel that they have sufficient relevant information to make a decision. If a councillor has insufficient relevant knowledge at the time of the decision-making, the councillor should not participate.
> Ultimately, the democratic right of an elected councillor needs to be safeguarded against unwarranted restrictions on their ability to discharge their democratic role."

Cllr Price's exclusion was unlawful: he was not asked whether or not he considered that he had sufficient relevant knowledge to determine the Application. Indeed, it is highly likely that he *did* have such knowledge, given that he had in fact attended the majority of site visit but had left twenty minutes before other members. The effect of Cllr Price's exclusion was that he was prevented from participating in the Committee meeting including by voting on a motion which was otherwise tied and in respect of which Cllr Brodie therefore had a casting vote.

(2) *Second*, Cllr Lilley was unlawfully excluded from attending the 27 July 2021 at all. He had stepped aside from chairing the meeting and voting on the Application, wholly in line with paragraph 28 of the Code of Practice set out above. That paragraph is however express that such a councillor may speak in respect of an Application, as a ward member who is not a member of the Committee may. In an email sent at 12.40 on 27 July 2021 he was told that he "cannot attend in person nor

can [he] attend remotely the Planning Committee due to [his] acknowledged predetermination, and therefore [he] cannot participate" [CB/2/149].[2] Cllr Geoff Brodie (the Vice-Chair) of the Planning Committee who sat as chair on 27 July 2021) was aware of this decision by "after lunch" that day. Mr Potter's decision to exclude Cllr Lilley appears to have been based upon his (obviously incorrect) view that Cllr Lilley had a personal interest in the decision. This is confirmed by an email of 6 November [CB/2/181], in which the Chief Executive sought to defend this decision with reference to the decision in *Richardson v North Yorkshire CC* [2003] EWCA Civ 1860 and the Appendix 1 to the Local Government Association's Probity in Planning document. Both *Richardson* and the part of Appendix 1 referred to concern circumstances where a member has a personal (and therefore prejudicial) interest in the outcome of a planning application, i.e. an interest affecting his/her personal or financial position (or that of a relative or friend) to a greater extent than other inhabitants of the authority's area:

a. In *Richardson* the point was that the member in question (and his property) were going to be directly affected by the development proposed (see [55]). That has nothing to do with circumstances where a member wishes to represent his constituents as ward councillor before the Committee, and accordingly the Defendant misdirected itself in law in excluding Cllr Lilley.

b. The established position in the Constitution and Code of Practice (see above) is clear that any member can attend any meeting of a committee, even one of which he is a member; the ward member "is entitled to attend and speak in relation to any item on the agenda with direct impact on their electoral division"; and members of the Committee who are determining applications without their electoral division "may speak but will not vote on the issue". The exclusion of Cllr Lilley contravened these provisions of the Constitution and was accordingly unlawful.

(3) *Third*, the 27 July 2021 meeting exceeded the mandatory three-hour period set out in the Constitution; the vote on the second (unsuccessful) motion was only complete

[2] That email was signed off "solicitor" rather than "Chris P" the latter style being Mr Potter's usual signoff.

after the expiry of that period; and the third motion, to approve the Application, was only proposed and voted on after the expiry of that period. That was unlawful:

a. Rule 6 of the Committee Procedure Rules within the Constitution as it stood at the time is clear that "all meetings will end after three hours of the advertised start time unless at least half the members in attendance vote to extend the meeting": that is, there must be a resolution to extent time upon which members vote. The effect of Rule 10 of the Committee Procedure Rules is that such a vote must be taken by show of hands unless there is no dissent. In this case:

    i. Cllr Brodie did not seek to extend the duration of the meeting until *after* the elapsation of the three-hour time limit;
    ii. No motion to extend was proposed, or seconded;
    iii. There was no vote as required by the Constitution.

   The transcript makes clear that Cllr Brodie merely suggested an extension of 30 minutes, before saying "is that – is everybody okay, all right/ Thank you." One councillor, Cllr Critchison, requested to leave but was told she could not, indicating dissent.

b. In correspondence with Cllr Lilley and others, Mr Potter has suggested that "the time extension had already been granted through affirmation" by the time of the consideration of the third motion. However, it is quite plain that Cllr Critchison dissented: she did not want to the meeting to continue as she needed to leave. There can be not resolution by affirmation if there was dissent.

Accordingly, the 27 July 2021 Committee meeting ended at 7pm and was not extended, meaning that the third motion, to approve the Application, was proposed and voted on in breach of the Constitution.

89. These errors in the conduct of the 27 July 2021 Committee meeting are sufficient to vitiate the resolution to approve the Application passed at that meeting.

90. The Council's PAP Response to the Ground at paras.12 – 16 [CB/9/1623] contains no substantive answer to these points.

91. It is of no avail to the Council to argue in the face of these errors (some of which appear to have been admitted albeit that has not been clarified as it should have been in the Council's PAP Response) that in the Committee meeting on 25 April 2023 (some two years later), a further resolution purporting to authorise the issuing of the permission was passed:

    (1) *First*, that meeting did not entail any substantive reconsideration of the Application. The debate was solely focussed on the issue of curlew mitigation. This is all the more surprising since there were some new members on the Committee by then.

    (2) *Second*, the resolution passed on the end of the April 2023 meeting was to "approve the conditional recommendation of officers". That recommendation was to "agree to amended heads of terms to the legal agreement, to include mitigation land for curlew habitat and enhancement and mitigation strategy" and extended no further than this. It did not amount to a re-endorsement of the Application as a whole.

    (3) *Third*, the members of the Committee were expressly instructed that the existence of the previous resolution (July 2021) to grant permission was a material consideration which they needed to take into account [CB/2/194-195]. That was a material misdirection. In taking into account a resolution which was (and which it was appear was known to be) unlawful, members had regard to immaterial considerations and/or acted irrationally. In simple terms, reliance upon a previous resolution which was (and it would appear was known to be) unlawful. This inevitably has the effect of tainting the decision taken at the 23 April 2023 meeting.

    (4) *Fourth*, the issuance of the Permission was undertaken under delegated powers pursuant to the Committee's resolution on the third motion at the meeting of 27 July 2021. That meeting was seriously flawed, in the three ways outlined above. Accordingly, the grant of the Permission must be quashed.

(5) *Fifth,* the House of Lords made clear in *Burkett v LBHF* [2002] UKHL 23 that the time for challenging a grant of permission ran from the date of the decision notice rather than the date of the resolution, but that the legality of the resolution(s) upon which that grant was based could be challenged in such proceedings.

92. For all these reasons, Ground 1 is at least arguable and permission for judicial review should be granted on this ground.

D. <u>Ground 2: Apparent Bias/ Impropriety</u>

93. The grant of the Permission is vitiated by the appearance of bias on the part of Cllr Brodie and/or the exercise of his functions for an improper purpose.

Legal principles

94. The test for apparent bias is well established; namely whether the relevant circumstances "would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased" (*R (United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* [2019] EWHC 409 (Admin) per Lord Burnett CJ at [36] with reference to the well-known judgment of Lord Hope in *Porter v Magill* [2001] UKHL 68, [2002] 2 AC 357, at [103]).

95. Answering this question involves a two-stage process (*Bubbles & Wine v Lusha* [2018] EWCA Civ 468 at [17] per Legatt LJ (as was)):

    (1) Ascertaining all the relevant circumstances; and

    (2) Asking whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility of bias.

96. Where a public authority or decision-maker's action is motivated by an improper purpose (i.e. one which is impermissible having regard to the power being exercised or statutory scheme) and a decision is "materially influenced" by that improper purpose (even if it not the sole

purpose to the action), it will be quashable (*R (Inner London Education Authority ex parte Westminster City Council* [1986] 1 WLR 28 at 49H.

Submissions

97. The conduct of Cllr Brodie, who played a pivotal role in the determination of the Application, was such as to give rise to the appearance of bias.

98. The relevant circumstances are as follows:

(1) On his own admission, Cllr Brodie played an active part on 23-27 July 2021 in Cllr Lilley being removed from voting but also attending and speaking at the 27 July 2021 Committee meeting [CB/2/192], a decision ultimately communicated to Cllr Lilley by Mr Potter;

(2) In the week prior to the 27 July 2021 Committee meeting, Cllr Brodie sought actively to exclude others whom he regarded as likely to be predisposed against the Application from the Committee meeting in July 2021, or to encourage them, by exerting pressure upon them, to exclude themselves, including Cllr Lilley, Cllr Adams, and Cllr Jarman;

(3) Cllr Brodie refused Cllr Churchman permission to speak at the meeting unless she spoke in favour of the Application;

(4) Cllr Brodie decided (unlawfully) that Cllr Price had disqualified himself from deliberating on the Application by leaving the Site visit early;

(5) Throughout the 27 July 2021 meeting, Cllr Brodie was personally very forceful in his speak, belittling and (on other councillors' evidence) intimidating other members of the Committee;

(6) It was Cllr Brodie who took the decision to extend time in a manner which did not accord with the Council's constitution then in force, and in the face of a request by one member of the Committee to leave;

(7) At the subsequent meeting on 24 August 2021, Cllr Brodie refused to put to a vote a point of order resolution proposed by Cllr Jarman as to the approval of the minutes of the 27 July 2021 meeting in the light of the defects in the conduct of that meeting;

(8) At the 24 August 2021 meeting, Cllr Brodie also sought (unsuccessfully) to have Cllr Adams, who was critical of the conduct of the 27 July 2021 meeting, ejected;

(9) At a meeting on 1 March 2022 at which a motion to recall the Application to the Committee was to be considered, Cllr Brodie was so disruptive and rude to Cllr Lilley (then in the chair) that the meeting had to be adjourned and the motion deferred.

(10) Cllr Brodie's general approach to the Application and his regular use of belittling or otherwise intimidating language both in Committee and outside it.

99. Turning to the second stage of the test; namely whether the circumstances identified above would lead a fair-minded and informed observer to conclude there was a real possibility of bias, the answer is clear. Cllr Brodie's conduct over a period of years in relation to this Application has the appearance of a systematic attempt to hamper the presentation of objections to the Application and to influence the final voting pattern of members of the Committee in favour of the Application.

100. Having obtained the recusal of Cllr Lilley from his role as Chair of the Committee, Cllr Brodie, as Vice-Chair, had a crucial role in the determination of the Application, in particular in chairing the 27 July 2021 meeting, and the portion of the 28 August 2021 meeting relating to the minutes of the July meeting. In the capacity of Chair he had a casting vote on the second (purported) resolution at the 27 July 2021 meeting which, absent his casting vote, would have refused the Application (he himself recognised his pivotal role in this respect in his 25 November 2021 email [CB/2/192]). His participation in the determination of the application continued up to and including the Committee meeting on 25 April 2023 and tainted all relevant decisions of the Committee.

101. Further, or alternatively, the inference to be drawn from the foregoing is that Cllr Brodie and/or others were influenced by an improper motive; namely political gain, damage to the reputation

of other councillors and/or the prevention of those predisposed not to grant planning permission from attending or voting at the meeting.

E. <u>Ground 3: The Section 106 Planning Obligation</u>

102. The Defendant acted unlawfully in failing to publish a draft planning obligation on its planning register; and in failing to publish a completed planning obligation.

Legal principles

103. Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) Order 2015 ("**DMPO**") requires that the local planning authority must maintain a planning register which includes "a copy (which may be photographic or in electronic form) of any planning obligation or section 278 agreement proposed or entered into in connection with the application".

104. In *Midcounties Cooperative*, Ousley J held that compliance with this statutory obligation required the publication not just of the heads of terms of a proposed section 106 agreement, but at least one draft, as well as the final version of the section 106 agreement, on the register as a means of making it publicly available for a proper period (at least a few days). (at [91]). The purpose of the duty under what is now article 40(3)(b) is to enable meaningful public consultation to take place on the terms of a proposed obligation (at [87]).

Submissions

105. The Defendant plainly acted in breach of the statutory duty in article 40(3)(b) DMPO. The first time at which any section 106 agreement, whether in draft or final form, was published on the Defendant's planning register was after the Claimant sent its pre-action letter highlighting the breach and requesting provision of the relevant documents on 29 August 2023 [CB/9/1596]. Although the Permission was issued on 4 August 2023, on 28 August 2023 no section 106 planning obligation was available on the planning register [CB/2/197, 315].

106. This breach of statutory duty is flagrant, given that the Defendant's Chief Executive had stated as early as March 2022 that "the section 106 agreement has now been agreed in line with the requirements of the Planning Committee's decision in July 2021 and is in the process of being signed" (paragraph 12 [CB/4/960]). There is no conceivable reason why the Defendant could not have published a draft of the obligation at this stage to enable public comment, some 19

months before the grant of the Permission. In respect of the additional matter of curlew mitigation, Ms Wilkinson made clear at the Committee meeting on 25 April 2023 that there was a draft section 106 obligation in hand which officers considered dealt with the issue and provided an oral summary of its provisions (Transcript 131 [CB/2/297]). There is no reason why such a draft could not have been published.

107. Where such a breach of statutory duty is made out, it is for the Defendant to show why the Court should not grant relief (*Midcounties* at [98]). The assertion that the Claimant and other objectors were not prejudiced by the failure to publish a copy of the planning obligation is untenable. It was not anticipated that the Defendant would grant permission unless and until a final draft of the planning obligation had been published in accordance with the Council's statutory duty. Had the agreement which has now been provided been published, the Claimant would have wished to comment upon it. To give just one example, officers had advised the Committee that land relied upon as ecological mitigation would be transferred to the RSPB and another non-profit/ charitable organisation. That is not what the obligation secures. Rather, the planning obligation allows for the land to be transferred to the management company for the development, and does not specify a sum for the maintenance of that land upon transfer, or for the provision in the transfer for a reasonable sum for the maintenance of that land.

108. This ground is at least arguable and should be granted permission for judicial review.

F. Ground 4: CIL Regulation 122

109. The Defendant acted unlawfully in failing to having regard to regulation 122 CIL regulations 2010 and nevertheless relying, in granting the Permission, on the making of a financial contribution towards highways improvements; and/or unlawfully deferred consideration of whether or not the financial contribution towards highways improvements complied with regulation 122 CIL Regulations until after the grant of the Permission.

Legal principles

110. Under section 106(1)(d) TCPA, a person with an interest in the land may enter into an obligation, enforceable against any person deriving title from that person, requiring inter alia a sum or sums to be paid to the local planning authority.

111. Regulation 122 of the 2010 Regulations provides:

> "(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development.
>
> (3) In this regulation—
>
> "planning obligation" means a planning obligation under section 106 of TCPA 1990…"

Submissions

112. In this case, a financial "Highways Improvement Contribution" secured by way of a section 106 obligation was plainly a "reason for granting planning permission": it was cited in OR paragraph 7.6 as such, as the contribution would "to ensure that the additional traffic resulting from the development would not have an impact on highway safety."

113. There is no indication however that the Defendant considered whether or not the Highways Improvement Contribution complied with regulation 122 prior to granting the Permission. There was no consideration of the three questions in the OR; no justification was or has been provided for the sum in question; nor has any scheme of works for the spending of those monies, to which the Defendant is committed and which is deliverable, been expressly identified at any stage.

114. Indeed, it is plain from the wording of the section 106 agreement that the Defendant has expressly *not yet* satisfied itself of the compliance of the Highways Improvement Contribution with regulation 122. The definition of Highways Improvement Contribution includes the following proviso: "provided that such improvements are compliant" with regulation 122. If the Defendant has satisfied itself that the sum in question was in fact (i) necessary; (ii) directly related to the development; and (iii) fairly and reasonably related in scale and kind to the development, then no such proviso would be required.

115. Far from properly considering the questions it was required to prior to granting the Permission in reliance on the Highways Improvement Contribution, the Defendant failed to consider them at all and rather unlawfully deferred consideration of compliance with regulation 122 until an

indeterminate future date, whenever it sought to enforce compliance with the section 106 agreement.

116. This ground is arguable and permission for judicial review should be granted on this ground.

G. Ground 5: Highways Improvement Mitigation

117. The Defendant took into account an immaterial consideration, and/or acted irrationally and/or was materially misled by officers in relying on financial contribution towards inchoate highways improvement proposals as mitigating an identified adverse impact of the development.

118. The OR advised the Committee that the Highways Improvement Contribution would address any impacts created by the development on the highways network, and in particular the identified capacity issues at Junctions 4 and 5, and this advice was repeated orally by officers at the 27 July 2021 meeting. This advice was based on the apparent existence of an ongoing "review of junction improvement options for junctions within the Ryde East area, in order to bring about a coherent range of highway improvement schemes to junctions that would be affected by future developments", which review, Committee members were told, would report in autumn 2021.

119. It is quite clear however that at the time of the OR, at the time of the 27 July 2021 meeting, and at the time the Permission was issued, the alleged 'review' had not reported. When requested to provide any document or work product resulting from such a review, the Defendant was unable to do so. The only document that was disclosed was the Junction Assessment from 2018.

120. No clear scheme for either Junction 4 or 5 deliverable by the Defendant and capable of accommodating the additional traffic arising from the Application was or has been identified:

    (1) The Junction Assessment in respect of Junction 4:

        i. Relies on the compulsory purchase of third party land and there is no evidence that the Defendant has any intention to acquire the land in question;

ii. Was identified as being inadequate in any event by the TA, which proposed an alternative scheme of improvements;

(2) There is no evidence that the Defendant has considered delivering any scheme of improvement whatsoever, however inchoate, in respect of Junction 5.

(3) There is no evidence post-dating the Junction Assessment that has been provided to the Claimant (as requested) that the Defendant intends to or is able to deliver any improvements to either junction;

(4) There is no published basis upon which the Defendant could conclude that the sum of £406,359 would in fact contribute in a proportionate way to any specific scheme for the mitigation of the traffic impacts of the development – the sum, so far as is discernible from documents in the public domain or otherwise available to the Claimant, is arbitrary and has no connection to the inchoate Junction 4 scheme or any Junction 5 scheme.

121. Accordingly, assuming (for the purposes of this claim only and without prejudice to the Claimant's position on any redetermination) that the conclusions of the TA are robust, and acknowledging that the Pennyfeathers development is highly unlikely to deliver any improvements to either junction, there is a wholly unmitigated adverse impact on highway capacity resulting from traffic flows from the Application development.

122. Officers failed to draw any of these matters to the Committee's attention, including when it had the opportunity to do so in April 2023 (at which point they were at the very least matters requiring to be reconsidered by the committee in accordance with the decision in *R. (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370).

123. The Council therefore erred in law in failing to have regard to a material consideration, having regard to an immaterial consideration, or concluding that the Application complied with Policy SP7 and/or that any adverse impacts on the local highway network could be mitigated by means of the Highways Improvement Contribution in circumstances where there was simply no rational basis for doing so.

124. This ground, again, is arguable and justifies the grant of permission for judicial review.

H. Application for Disclosure

125. As a public authority, the Defendant is under a duty of candour and must make full and frank disclosure of any and all documents relevant to the grounds set out above (see *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 per Sir John Donaldson at 945G). That duty applies at all stages of a judicial review claim.

126. The duty to which the Defendant is subject is a high duty placed on public authorities to assist the court by providing full and accurate explanations of the relevant facts and, so far as they are not apparent from contemporaneous documents which have been disclosed, the reasoning behind the decision. The explanation provided under the duty of candour must not be selective. A public authority is under a duty to identify and draw to the Court's attention "the good, the bad and the ugly". It must not mislead the court by omission or non-disclosure (*R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1812 at [17- 23]).

127. Although formal disclosure of documents is not ordinarily required in judicial review proceedings, it will be regarded as necessary if a party raises a factual issue of sufficient substance to lead the court to conclude that it may be unable to resolve the issue without discovery of documents bearing on the issue one way or the other (*R (Jet2.com Limited) v Civil Aviation Authority* [2018] EWHC 3364 (Admin) at. [48(8)]).

128. Purpose and intention are matters of inference to be drawn from primary facts. On these issues, the Court will be required to reach a conclusion on inferential fact drawn from all the relevant circumstances. Questions of purpose, motive, or foreseeability of consequences may involve drawing fine lines of distinction. In such a case nuances of meaning, nuggets of information or expressions of opinion may well be important (*Jet2.com* at [58]).

129. In this case, the purpose and intention behind the decisions to exclude Councillors from attending the Committee meeting on 27 July 2023 and/or behind seeking to persuade them not to attend, and the inferences to be drawn from those interactions, are questions of fact and require full disclosure of documents.

130. The Claimant first made these points and sought disclosure of the following classes of documents in its initial pre-action letter on 9 December 2021 at paragraph 43-48 [CB/9/1564-5]:

"within 21 days of the date of this letter of any and all documents (including (without prejudice to the foregoing), letters, faxes, emails, memos, and file notes) pertaining:

a. To Cllr Lilley's involvement in determining the application.
b. To Cllr Price's involvement in determining the application.
c. To the procedure to be adopted at the Committee Meeting
d. To Cllr Brodie's involvement (in any way) with the application, including (without prejudice to the generality of the foregoing) any communications between Cllr Brodie and the Applicant for planning permission and/or Chris Potter.
e. Mr Chris Potter's involvement (in any way) with the application including any correspondence between Cllr Brodie and Chris Potter.
f. To the determination of the application in any way."

131. Accordingly, the Defendant has been on notice of the Claimant's approach to and request for disclosure for twenty months. No response was received to the Claimant's first pre-action letter or request for disclosure.

132. This request was repeated in the Claimant's second pre-action letter date 29 August 2023 at paragraphs 53-55 [CB/9/1603].

133. On 11 September 2023, the Claimant received a response by email from the Defendant [CB/9/1618] in which it:

(1) Did not contest any of the points of principle identified above and in the Claimant's pre-action letters;

(2) Refused disclosure of any documents "to or from the council's Monitoring Officer, Deputy Monitoring Officer, or Legal Services" on the grounds that they are subject to legal professional privilege;

(3) On the grounds that the request had resulted in the identification of a "a significant number of documents that might fall to be considered", requested that the Claimant "consider narrowing your request to those points that you say are salient to the matter at hand"; and

(4) Asserted that no disclosure would be forthcoming in time for the Claimant to inspect any document before issuing the claimant, as "Consideration of such a large number of documents will take some time and disclosure is unlikely to be before the end of this week in any event."

134. The Defendant's approach is unsatisfactory in a number of ways:

(1) *First*, as set out above, the Defendant has been on notice of these requests for documents for a significant period of time and has had ample time to conduct searches to identify relevant documents prior to the service of the Claimant's second pre-action letter.

(2) *Second*, the Claimant has already identified specific issues in respect of which disclosure is sought (see (a)-(e) at paragraph 130 above), as well as seeking, in line with Jet2 cited above, disclosure of all relevant documents to the Application ((f) at paragraph 130 above). Even were the Defendant's concerns justified about the scale of material identified in searches pursuant to (f), there is no reason why it could not have provided the disclosure sought in respect of the specific issues.

(3) *Third*, legal professional privilege is a privilege from *inspection* and not from *disclosure*. Accordingly, documents which are relevant and are not being provided for inspection on the grounds of asserted legal professional or litigation privilege should be identified but redacted so as to explain whether legal professional or litigation privilege applies.

135. Due to the Defendant's approach, the Claimant has been hampered in the preparation of these pleadings.

136. Accordingly, the Claimant applies for an order from the Court for the disclosure by the Defendant of the classes of documents identified above at paragraph 113, including the disclosure of documents over which any privilege is asserted, if necessary in a separate schedule.

137. In addition, the Claimant puts the Council on notice that it may seek the permission of the Court to amend this Statement of Facts and Grounds including by the addition of new grounds in the light of the disclosure provided.

I. Aarhus Costs Protection

138. This is an Aarhus Convention Claim as defined in CPR Rule 45.41. The Claimant is a member of the public and seeks to challenge the legality of any decision, act or omission of a body exercising public functions within the terms of article 9(3) Aarhus Convention ("other acts or omissions which contravene provisions of national law relating to the environment"). Adopting the broad approach to the concept "relating to the environment" by reference to the definition of "environmental information" in the Convention, approved in *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539 at [11]-[18], administrative measures likely to affect the "state of the land" are to be considered environmental for these purposes and the grant or refusal of planning permission on this site is a measure likely to affect the state of the land.

139. The Claimant has filed a witness statement exhibiting a statement of financial resources [CB/1/63] in accordance with CPR Part 45.42(1)(b). As such, the Claimant submits that the cost caps in CPR Rule 45.43 apply to limit its adverse costs liability to £10,000, and that of the Defendant to £35,000.

J. Relief

140. For these reasons, the Claimant requests that the Court:

(1) Determine that CPR Part 45.32 applies to this claim and that the Claimant's liability to costs is limited to £10,000;
(2) Make an order for disclosure in the terms set out above;
(3) Grant permission for judicial review;
(4) Quash the Permission; and
(5) Award the Claimant its costs of and incidental to the claim, subject to the Aarhus cap of £35,000.

CHARLES STREETEN
BRENDAN BRETT

FTB

14 September 2023
[Updated with references 18 September 2023]

SUGGESTED READING

Witness Statements [CB/2/70-141]]

Claimant's Letter Before Action [CB/9/1596]

Defendant's Response to the Claimant's Letter Before Action [CB/9/1622]

Officer's Report dated 27 July 2021 [CB/3/318]

Officer's Report dated 25 April 2023 [CB/5/971]

Schedule 1 to the main planning obligation dated 4 August 2023 [CB/6/1101