High Court rules that S106 monitoring and administration fees are unlawful

Oxfordshire CC v Secretary of State for Communities and Local Government [2015] EWHC 186 (Admin).

The High Court held recently that a planning inspector had not misinterpreted regulation 122 of the CIL Regulations 2010 nor had he acted unreasonably in determining that a local planning authority was not entitled to fees of £3750 for administering/monitoring planning obligations in a S106 agreement. The obligations of the routine application were based on a standardised table and the administration/monitoring costs were calculated as a percentage of the other contributions rather than reflecting an assessment of the work actually required to administer or monitor the obligations.

The local authority believed the planning inspector had misinterpreted the 'necessity' test in Regulation 122 and therefore applied to have his decision overturned. They believe he had made an irrational decision in finding that although some planning obligations were necessary (to make the development acceptable in planning terms), monitoring of the obligations was not.

The application was refused by the High Court on the grounds that the TCPA 1990, the Planning Act 2008, the CIL Regulations, the NPPF and the NPPG do not allow authorities to claim administration/monitoring fees as part of planning obligations as this is part of their functions as a local planning authority. However, provisions are made within the legislation for payment of fees for planning applications, discharges of condition etc.

From this, it is clear that unless there are exceptional circumstances, routine requests for standardised administration and monitoring fees may fall foul of the statutory tests.

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Neutral Citation Number: [2015] EWHC 186 (Admin)

Case No: CO/4757/2014

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Tuesday, 3rd February 2015

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

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Between:

OXFORDSHIRE COUNTY COUNCIL **Claimant**

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(2) CALA MANAGEMENT LIMITED

(3) WILLIAM ROGER FREEMAN

(4) ROSS WILLIAM FREEMAN

(5) JULIAN JAMES FREEMAN

(6) CHERWELL DISTRICT COUNCIL **Defendants**

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Nathalie Lieven QC and Andrew Parkinson (instructed by **Oxfordshire County Council Legal Services**) for the **Claimant**
Richard Kimblin (instructed by **The Treasury Solicitor**) for the **First Defendant**
The **Second, Third, Fourth, Fifth and Sixth Defendants** did not appear and were not represented

Hearing dates: 22nd January 2015

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Judgment

Mrs Justice Lang:

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision, dated 3rd September 2014, of an Inspector (S.R.G. Baird), appointed by the First Defendant, in which he held that the administration fees claimed by the Claimant did not comply with regulation 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations").
2. At the commencement of the hearing, the Defendant objected to the admissibility of the witness statement of Mr Cox, the Claimant's Infrastructure Funding Manager, in so far as it put forward grounds in support of payment of the administration fee which had not been presented to the Inspector. By consent, it was agreed that paragraphs 5, 7 – 13, 16 and 18 would be excluded. I ruled that I would take into account the contents of paragraph 6 in relation to ground 1 (whether the test in regulation 122 was met) but not ground 2 (the reasons challenge).

Facts

3. On 28th June 2013, the Second Defendant applied to Cherwell District Council for planning permission for 26 residential units at a site off Banbury Road, Adderbury, Oxfordshire. The application fell within the administrative area of the Claimant. The application was refused by Cherwell District Council on 4th October 2013.

4. There were six reasons for refusal. The sixth reason for refusal stated that in the absence of a satisfactory planning obligation, Cherwell District Council could not be satisfied that necessary infrastructure would be provided.
5. The Second Defendant appealed against this refusal under section 78 TCPA 1990. The appeal was heard by Inquiry held on 29th July 2014. By this stage, the number of proposed units had been reduced to 25.
6. During the course of the appeal, it was agreed that that the sixth reason for refusal could be resolved by the Second Defendant (and other interested parties) entering into an agreement under section 106 TCPA 1990.
7. On 28th July 2014, a section 106 agreement was agreed between the Claimant, Cherwell District Council, the Second Defendant and the Third, Fourth, and Fifth Defendants (who are the owners of the Site). This Agreement included contributions towards education (£239,548), libraries (£6,715), waste management (£5,056), museums (£359), adult learning (£800), day care (£5,500), public transport (£25,000) and administration/monitoring (£3,750) required by the Claimant, and further contributions required by Cherwell District Council (including a monitoring fee of £3,000).
8. Cherwell District Council was satisfied that the sixth reason for refusal was resolved by the terms of the agreement.
9. The Agreement also included a "blue pencil clause" at clause 3.2 which enabled the Inspector to strike out contributions that did not meet the tests for planning obligations set out at regulation 122 of the CIL Regulations. The clause read as follows:

> "If the Planning Inspector, in this Decision Letter, concludes that any of the planning obligations set out in the Deed are incompatible with any one of the tests for planning obligations set out at Regulation 122 of the CIL Regulations, and accordingly attached no weight to that obligation in determining the appeal then the relevant obligation shall, from the date of the decision letter, cease to have effect and the Owner and the Developer shall be under no obligation to comply with them."

10. In his decision letter, dated 3rd September 2014, the Inspector considered whether each planning obligation met the tests in regulation 122 of the CIL Regulations. He found that the contributions sought by the Claimant towards education and libraries, and by the District Council towards public open space, and affordable housing were necessary to make the development acceptable in planning terms. However, he considered that the contributions relating to waste, adult learning, museums, day care, refuse bins and monitoring and administration fees did not meet the required tests. In relation to the monitoring/administration fees claimed, he concluded, in paragraph 38:

> "With regard to…the payment of monitoring fees…the payment of a monitoring/administration fee [is] not necessary to make the development acceptable in planning terms."

11. In consequence, pursuant to clause 3.2 of the Agreement, the Claimant is unable to enforce payment of the monitoring/administration fee. Cherwell District Council is in the same position in respect of its monitoring fee.

Legal and policy framework

12. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.
13. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety. The exercise of planning judgment and the weighing of the various issues are entirely matters for that decision-maker and not for the Court. See *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26.
14. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) TCPA 1990. The National Policy Planning Framework ("NPPF") is a material consideration for these purposes.
15. Section 106(1) TCPA 1990, as amended, provides:

> "Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (… "planning obligation") enforceable to the extent mentioned in subsection (3) -

a) restricting the development or use of the land in any specified way;
b) requiring specified operations or activities to be carried out in, on, under or over the land;
c) requiring the land to be used in any specified way; or
d) requiring a sum or sums to be paid to the authority … on a specified date or date or periodically."

16. By subsection (3), a planning obligation is enforceable by the authority identified in the section 106 deed, in accordance with subsection (9)(d). Subsection (5) provides that a restriction or requirement imposed under a planning obligation is enforceable by injunction. The local authority also has power, under subsection (6) to enforce the obligation by entering the land and carrying out the operation and recovering the cost of doing so from the person against whom the obligation is enforceable.

17. The CIL Regulations were made pursuant to section 205(1) Planning Act 2008. The major part of the CIL Regulations introduced a fixed infrastructure levy on new developments, payable to local planning authorities, which had not been implemented by Cherwell District Council at the material time. Subsection 205(2) provided:

"In making the regulations, the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable. "

18. Regulation 122 of the CIL Regulations provides as follows:

"122. Limitation on use of planning obligations
(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 and includes a proposed planning obligation; and
"relevant determination" means a determination made on or after 6th April 2010—
(a) under section 70, 73, 76A or 77 of TCPA 1990 of an application for planning permission; or
(b) under section 79 of TCPA 1990 of an appeal."

19. The National Planning Policy Framework provides:

"Planning conditions and obligations:
203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.
204. Planning obligations should only be sought where they meet all of the following tests:
● necessary to make the development acceptable in planning terms;
● directly related to the development; and
● fairly and reasonably related in scale and kind to the development.
205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.
206. Planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects."

20. The Planning Practice Guidance states:

> "Planning obligations mitigate the impact of unacceptable development to make it acceptable in planning terms. Obligations should meet the tests that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. These tests are set out as statutory tests in the Community Infrastructure Levy Regulations 2010 and as policy tests in the National Planning Policy Framework."

Case law on the CIL Regulations

21. In *R (Welcome Break Group Limited) v Stroud District Council* [2012] EWHC 140 (Admin), Bean J. said:

> "48 There is nothing novel in regulation 122 except the fact that it is contained in a statutory instrument. Its wording derives from Departmental Circular 05/05, which in turn was the successor to previous circulars such as 16/91. Circular 16/91 required that the obligation to be imposed as a condition should be "necessary to the grant of permission" or that it "should be relevant to planning and should resolve the planning objections to the development proposal concerned."
>
> 49 In the Tesco case Lord Hoffmann dealt with a submission by counsel for Tarmac, the developer in competition with Tesco, that Tesco's offer to build a link road if permission were granted was not material within the terms of Circular 16/91 "because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable". Lord Hoffmann went on:
>
> > "The test of acceptability or necessity suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is, I suppose, theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts."
>
> 50 In my judgment this passage remains good law under the 2010 Regulations. So too does the ratio of the Tesco case. An offered planning obligation which has nothing to do with the proposed development apart from the fact that it is offered by the developer is plainly not a material consideration and can only be regarded as an attempt to buy planning permission. However, if it has some connection with the proposed development which is more than *de minimis* then regard must be had to it. The extent, if any, to which it affects the decision is a matter entirely within the discretion of the decision-maker."

22. I have been assisted by Lord Hoffmann's account in *Tesco Stores Ltd v Secretary of State for the Environment & Ors* [1995] 1 WLR 759, at 771D – 783E, of the earlier policy and case law in relation to planning conditions and obligations, whilst bearing in mind the significant changes to

the legislative framework over the years. As Richards LJ said in *R (Hampton Bishop PC) v Herefordshire Council* [2014] EWCA Civ 878, at [46], "[r]egulation 122 can be seen as part of a codification of principles developed in the case law".

23. In *Persimmon Homes North Midlands v Secretary of State for Communities and Local Government* [2011] EWHC 3931, the High Court upheld the decision of an Inspector who dismissed an application for planning permission for 200 dwellings on the basis that it was not possible to determine whether the section 106 obligations complied with the CIL Regulations. The application site was located within a wider area allocated for a sustainable urban extension. The infrastructure requirements of this wider extension were in the process of being determined through an emerging area action plan.

24. HHJ Purle Q.C, sitting as a Deputy High Court Judge, held that a narrow approach to regulation 122 should not be adopted (at 21). He said, at [13]:

> "… there was ample reason for the Inspector to conclude that the impact on the sustainable urban extension overall requires other infrastructure matters to be addressed, such as the wider highway network, educational facilities and improved utility services … It seems to me that those requirements could properly be said to be directly attributable, though not exclusively so, to amongst other factors the proposed development by this developer, and that some contribution to those requirements was therefore necessary to make the development acceptable in planning terms."

25. In *R (Hampton Bishop PC) v Herefordshire Council* [2013] EWHC 3947, Hickinbottom J cited *Persimmon Homes* and said, at [37]:

> "what is "necessary" for the purposes of regulation 122 is defined in terms of what is required "to make the development acceptable in planning terms"; and, therefore, a simple "but for" test is inadequate. What is acceptable in planning terms is dependant upon a complex web of policies and other material considerations, and a series of planning judgments."

Hickinbottom J's decision was upheld by the Court of Appeal (see paragraph 22 above).

Submissions

26. The Claimant submitted that the Inspector erred in his approach to regulation 122 by misinterpreting the "necessity" test and he made an irrational decision in finding that, although the obligations were necessary, monitoring of the obligations was not. He also took into account an immaterial consideration, namely, whether the administration and monitoring of the planning obligations was one of the normal functions of the Claimant. Finally, he did not comply with the duty to give adequate reasons.

27. In response, the Defendant submitted that the test in regulation 122(2)(a) – "necessary to make the development acceptable in planning terms" – relates to the impact of the development on the character of the land, not with planning fees. The Claimant was seeking validation for the universal application of fees in every case where there is a planning obligation to be monitored. There is no provision for this in the TCPA 1990 or the CIL Regulations 2010, just as there is no provision for payment of fees for the monitoring of planning conditions. Fees are prescribed for specific decisions e.g. planning applications, reserved matters and discharge of conditions. The monitoring of planning obligations is part of the Claimant's statutory functions. There may be exceptional cases where a monitoring fee is justified; that will be a matter of assessment and a planning judgment in each individual case. As to reasons, the Claimant knew from the discussion at the hearing, and the previous appeal decision in *Bloxham*, why it lost on this point, and so it was not prejudiced.

Conclusions

(1) The administration/monitoring fee

28. The starting point is section 106 TCPA 1990 (as amended) which expressly provides for the payment of sums to the local planning authority, in subsection 1(d). It does not require that any such financial payment should be incidental to a use of the land provided for under sub-paragraphs (a) to (c).

29. However, the CIL Regulations limit the wide powers in subsection 106(1). In my judgment, it is significant that regulation 122 is headed "Limitation on the use of planning obligations", signalling that its purpose is to restrict the use of planning obligations to prevent inappropriate or improper use of them by developers and local authorities. Similar constraints were previously included in

planning policy and guidance. However, there is a distinction in that Regulation 122 must be adhered to. It is a statutory requirement, not a policy which can be departed from for good reason, nor guidance which has to be considered, but not necessarily followed.

30. Subsection (1)(d) of section 106 TCPA 1990 only authorises payments to "the authority". As a matter of statutory construction, it seems to me that "the authority" is intended to refer to the "local planning authority" in whose area the land is situated, as referred to at the beginning of subsection (1).

31. Subsection (9) requires the section 106 deed to identify "the local planning authority by whom the obligation is enforceable" pursuant to subsection (3). Subsection (5) provides that a restriction or requirement imposed under a planning obligation is enforceable by injunction. The authority also has power, under subsection (6) to enforce the obligation by entering the land and carrying out the operation and recovering the cost of doing so from the person against whom the obligation is enforceable

32. Ms Lieven QC submitted in her oral submissions (not her written ones) that the Claimant's administration and monitoring charges were not incurred as part of its functions as a planning authority, pointing out that Cherwell District Council was the planning authority, not the Claimant. It is certainly correct that Cherwell District Council had statutory responsibility for determining the planning application and enforcing planning requirements. However, the Claimant was a local planning authority for the purposes of section 106. If it was not, then it would not have been authorised to receive financial payments under subsection (1).

33. The parties believed that the Claimant was to be treated as a local planning authority for the purpose of section 106, and this was accepted by the Inspector. The first recital to the section 106 Agreement stated:

> "The Council and the County Council are Local Planning Authorities for the purposes of section 106 of the Act for the area in which the Land is situated."

34. The Claimant was thus identified in the deed as a local planning authority, pursuant to subsection (9), and so had powers of enforcement, under subsections (3), (5) and (6), in respect of planning obligations owing to it.

35. The Agreement went on to make provision for financial payments to the County Council in Schedule 3, in respect of public transport, adult day care, household waste, education, libraries and museums. These payments were payable prior to the commencement of development. Schedule 3 also made provision for "a County Council Administration Fee" to be paid within 7 days of the grant of planning permission. The interpretation and definition recital provided:

> "County Council Administration Fee" means the sum of £3,750 … as a contribution towards the costs of the County Council in administering the payments made pursuant to Schedule 3 of this deed. Provided that the County Council Administration Fee shall be adjusted in accordance with the increase in the PUBSEC Index…."

36. In its 'Statement of Justification for Oxfordshire County Council's Planning Obligations', the Claimant explained the reason for the contribution sought:

> "4.29 **Administration:** OCC are seeking a contribution of £3,750 for the administration and monitoring of the Section 106 agreement. In order to secure the delivery of the various infrastructure improvement, to meet the needs arising from development growth, OCC needs to monitor the various Section 106 planning obligations to ensure that these are complied with. This is an extra burden placed on the authority for each planning obligation. This is an extra burden placed on the authority for each planning obligation. OCC has therefore, developed a sophisticated recording and accounting system to ensure that each separate financial contribution, as set out in all S106 legal agreements, is logged using a unique reference number. Systematic cross-referencing enables the uses and purposes of each contribution to be clearly identified and tracked throughout the lifetime of the agreement."

37. Mr Cox's witness statement described how the administration and monitoring tasks are carried out by a Planning Obligations Team within the Council, who are responsible for some 70 to 100 planning obligations a year. Payments to the Council amounted to about £10 million per year. The cumulative effect of administering and monitoring each of these individual obligations is a burden on the Claimant.

38. At the hearing, when asked how much work would realistically be involved in administering the limited obligations in this case, Ms Lieven QC submitted that costs incurred in seeking to enforce planning obligations ought also to be considered as part of the task of administration and monitoring.

39. The Claimant submitted that administration and monitoring of planning obligations is an essential requirement under section 106 TCPA 1990. The Claimant referred to Annex B of "Circular 05/05: Planning Obligations" (now superseded) which stated, at B50:

> "Once planning obligations have been agreed, it is important that they are implemented or enforced in an efficient and transparent way, in order to ensure that contributions are spent on their intended purpose and that the associated development contributes to the sustainability of the area. This will require monitoring by local planning authorities, which in turn may involve joint-working by different parts of the authority. The use of standardised systems is recommended, for example, IT databases, in order to ensure that information on the implementation of planning obligations is readily available to the local authority, developer and members of the public."

40. The Planning Obligations: Practice Guidance of July 2006 went into considerable detail about the type of charges which could be made under planning obligations and how they ought to be calculated. In chapter 10, headed "Implementing Obligations", it referenced paragraph B50 of the Circular and stated:

> "In order to ensure that agreed planning obligations are implemented effectively and contribute towards sustainable development, it is essential that LPAs put systems in place to be able to monitor the time and efficient delivery of obligations, and any enforcement action where necessary."

41. However, nowhere in this lengthy Guidance is there any indication that the planning authorities could or should charge the cost of administration and monitoring to the developer as part of a planning obligation. Paragraph 10.9 advised the local authority "to ensure that they have sufficient resources in place to operate and manage the [monitoring] system over time to ensure information is kept up to date and that staff are provided with the necessary skills to manage it effectively". It seems to me that the Circular and the Guidance envisaged that the cost of essential administration, monitoring and enforcement would be met out of the authority's own budget, not by charging the developer. An authority is able to incur expenditure incidental to its functions under section 106 by virtue of section 111 of the Local Government Act 1972.

42. The enforcement provisions in subsections (5) and (6) of section 106 TCPA 1990 indicate that Parliament intended the authority to recoup any enforcement costs from the developer. If the authority successfully applied for an injunction under subsection (5), the court would usually award it the costs of doing so. If the authority had to enter the land to implement an obligation, subsection (6) enabled it to recover the cost of doing so from the developer.

43. Reflecting the approach taken in section 106, clause 13.2 of the Agreement in this case provided that the developer:

> "will reimburse the Council and the County Council in respect of all legal and administrative costs reasonably and properly incurred in connection with the enforcement of any of the provisions in the Deed should the need for enforcement arise in the reasonable opinion of the Council or the County Council."

44. The Claimant has drawn up a set of standardised charges in a document headed 'S106 Administration & Monitoring Fees'. The fee is calculated as a percentage (on a sliding scale) of the value of the financial contribution the developer is required to make. This is how the proposed fee of £3,750 was arrived at in this case. As it is a standardised fee, payable in advance of the commencement of the development, it does not reflect any assessment of the amount of work which the Council may have to carry out to administer, monitor and enforce the obligation in the particular case.

45. There is nothing in the wording of the TCPA 1990, the Planning Act 2008, the CIL Regulations, the NPPF or the Guidance which suggests that authorities could or should claim administration and monitoring fees as part of planning obligations. It is significant that, in relation to the Community Infrastructure Levy, regulation 61 CIL Regulations expressly provides that an authority may apply CIL payments levied for infrastructure purposes, to defray the administrative expenses

it has incurred. No such express provision was made under regulation 122 in respect of planning obligations.

46. By section 303 TCPA 1990, the Secretary of State has a broad power to make provision for the payment of fees for the discharge of local planning authority functions. He has made regulations which prescribe fees for matters such as planning permission applications, reserved matters and discharge of conditions. It is significant that he has decided not to make provision for the payment of fees for the administration and monitoring of section 106 Agreements.

47. The Defendant conceded that, given the general nature of the tests in regulation 122, it was possible that an Inspector, in the exercise of his planning judgment, might conclude that administration and monitoring fees satisfied those tests, but such cases were likely to be exceptional. Mr Kimblin gave these examples in his skeleton argument:

> "26…. A very large development, perhaps in a small authority, might require exceptional recruitment to management obligations. A very large minerals development in a sensitive location might be such an example, or a nationally significant piece of transport or energy infrastructure might be another. It would be a matter of assessment in a particular case."

48. Before the Inspector, it was not suggested by the Claimant that this was anything other than a routine case. The Inspector was aware from the Claimant's Justification Statement and Statement of Case that it incurred costs in administering and monitoring all its planning obligations. The developer submitted that these costs did not meet the requirements of regulation 122 CIL Regulations and drew the Inspector's attention to three other recent appeal decisions in which the Secretary of State's inspectors had rejected the Claimant's contention that they could come within regulation 122.

49. In the *Bloxham* appeal (APP/C3105/A/13/2189896), the Inspector said:

> "190. … While I accept that both Councils incur costs in relation to the agreement, this is one of their functions, and I cannot see that the payment of an admin/monitoring fee is necessary to make the development acceptable in planning terms….For this reason I consider that the required contributions do not accord with the required tests and cannot be taken into account in any decision to grant planning permission."

50. In the *Bloxham* appeal, the Inspector also rejected the authority's claim for the cost of two Council officers to manage the landscape contract for open space and play areas, saying:

> "189. Whilst at first sight it may seem reasonable to add a further 10% for management costs, it occurs to me that the two officers are already being paid by the Council and further management costs will only come about if extra officers are needed. This has not been demonstrated and therefore whilst I accept that the commuted maintenance sums themselves are in alignment with the relevant tests, the addition of the extra 10% is not and cannot be taken into account in any decision to grant planning permission."

51. It was accepted by both parties in the case before me that the Inspector must have applied the reasoning in the *Bloxham* case in concluding that the payment of a monitoring/administration fee was not necessary to make the development acceptable in planning terms, because monitoring and administration was part of the Claimant's functions, as this was the only argument presented to him.

52. The test in sub-paragraph 2(a) of regulation 122 of the CIL Regulations – "necessary to make the development acceptable in planning terms" – imposes a high threshold because the planning obligation has to be "necessary", not merely desirable. It requires an assessment as to what is, or is not, acceptable in planning terms, which is quintessentially a matter of planning judgment. The phrase "planning terms" is not defined, but it is well-established that a planning purpose is concerned with the development and use of the land (*R v Westminster Council ex parte Monahan* [1990] 1 QB 87, per Kerr LJ at 112C – H). As Hickinbottom J said in *Hampton Bishop*, "[w]hat is acceptable in planning terms is dependant upon a complex web of policies and other material considerations, and a series of planning judgments."

53. In my judgment, it is part of the Claimant's functions as a local planning authority to administer, monitor and enforce planning obligations in section 106 agreements made TCPA 1990. Although the planning obligations here related to non-planning functions (education and libraries), the Claimant was exercising its planning functions when addressing the impact of the proposed

development on the need for public services in the local community. In my judgment, the Inspector was entitled to conclude that the costs of administration and monitoring would be included in the Claimant's resources and budget for the discharge of its functions under section 106 TCPA 1990. How those costs would be met was plainly a relevant consideration in deciding whether or not a contribution to those costs was needed, in order to make the development acceptable.

54. This was a routine planning application for a relatively small development in which the Claimant was seeking a fee based on its standardised table of fees rather than any individualised assessment of special costs liable to be incurred for this particular development. The only allowable contributions (education and library services) did not require ongoing management or maintenance; they were single payments, to be made prior to the commencement of development. The Inspector would have been aware that the Agreement provided for the Claimant to recoup any enforcement costs from the developer in the event of non-payment. In these circumstances, I consider that the Inspector was entitled to conclude that a contribution to the administration and monitoring costs was not "necessary" to make the development acceptable in planning terms.

55. Moreover, just because the Claimant's administration and monitoring role related to matters to which the developer was required to contribute, it did not follow that the Inspector had to reach the same conclusion in respect of the administration and monitoring costs. He was entitled to conclude that the increase in the number of residents did make it necessary for the developer to contribute to the additional costs of provision of local education and library services, in order for the development to be acceptable in planning terms, and that the development would then be acceptable in planning terms, even though the Claimant (not the developer) would have to bear the relatively minor administration and monitoring costs which would be incurred as part of its functions as a planning authority. This was an exercise of planning judgment on his part.

56. In my view, his decision does not disclose any error of law: he did not misinterpret the legal test, nor did he act irrationally.

(2) Reasons

57. The Inspector was under a statutory duty to give reasons for his decision under Rule 19 of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000.

58. The standard of reasons required was set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

59. The Inspector summarised the tests to be applied in regulation 122 and the NPPF paragraph 204 in paragraph 36. He then went through each of the contributions requested and considered whether they met these tests. He set out his conclusion that the administration/monitoring fees were not necessary to make the development acceptable in planning terms, without elaborating upon the submission made to him by the developer. Therefore his reasoning would not have

been apparent to a reader who was not a party to the appeal. But his reasoning was known to the Claimant, for the reason set out in the Claimant's skeleton argument:

> "25. Since these appeal decisions were the only basis on which the Second Defendant argued that the monitoring fee did not meet the CIL tests, it is safe to assume that the Inspector took this decision, and its reasoning, into account in reaching his finding on the monitoring fee."

60. The Defendant's understanding of the reasons for the Inspector's decision accords with that of the Claimant.

61. By section 288(5)(b) TCPA 1990, the High Court may only quash a decision if satisfied that "the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it". Lord Brown said in the *South Bucks* case:

> "A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

62. The Claimant has not been prejudiced by the paucity of the Inspector's reasoning. This was a short and discrete point and it was obvious to all parties what the basis of the Inspector's reasoning was. The Claimant had sufficient understanding of the reasons for the decision to enable it to decide whether or not to apply to the High Court and to present a fully-argued application.

63. For the reasons set out above, the Claimant's application is dismissed.