



Neutral Citation Number: [2021] EWHC 2750 (Admin)

Case No: CO/1014/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

Between :

Stonewater (2) Limited Claimant

- and -

Wealden District Council Defendant

-and-

Secretary of State for Housing, Communities and Interested Party
Local Government

Charles Banner QC (instructed by **Clarke Willmott LLP**) for the **Claimant**
Tim Buley QC (instructed by Legal Services Department, Wealden District Council) for the
Defendant
Ben Du Feu (instructed by Government Legal Department) for the **Interested Party** (written
submissions)

Hearing dates: 09/09/2021

Approved Judgment

The Hon. Mrs Justice Thornton DBE :

Introduction

1. The Claimant, one of the UK’s leading providers of social housing, challenges the decision by the Defendant Council to refuse its application for social housing relief under the Community Infrastructure Levy Regulations 2010 (SI2010/948) (“the CIL Regulations”), in relation to a residential development scheme of 169 houses. The effect of the decision is to make the Claimant liable for a levy in excess of £3 million which, it is said, renders the development scheme unviable.
2. The grounds of challenge are that:
 - (a) the Council erred in law by requiring a planning obligation as a pre-requisite to the grant of social housing relief under conditions 2 and 3 of Regulation 49(1) CIL Regulations. A planning obligation is a legal obligation entered into for the purpose of mitigating the impacts of a development proposal. In this case the obligation was entered into pursuant to section 106 Town and Country Planning Act 1990 (TCPA);
 - (b) the Council erred in law by treating the terms of the planning obligation between the Claimant and Council as relevant to whether or not social housing relief should be granted and/or by concluding that the agreement limited the amount of affordable housing which could be provided; and
 - (c) the Council took into account an immaterial consideration by having regard to the extent to which the refusal of social housing relief would allow it to collect more of the levy and/or the Council took its decision for an improper purpose, namely to obtain additional money under the levy.
3. The Council’s case is that it was entirely rational and wholly unsurprising for it to reject the Claimant’s application for relief. Insufficient evidence had been provided that all the dwellings in the proposed development qualified for relief in circumstances where the planning permission and section 106 agreement only permitted 35% of the dwellings as affordable housing. The Council had received no submissions in favour of exercising its planning judgment as to the pre-cursor question of whether to permit more affordable housing and was therefore not satisfied that it should do so. Unless and until the Council decided to approve 100% affordable housing, it could not be satisfied that all of the dwellings would qualify for relief.
4. In its early stages, the claim appeared to raise the following issues:
 - (a) Construction of the CIL Regulations; in particular;
 - i) whether the provision of social housing relief is mandatory or discretionary under the CIL Regulations; and

ii) whether a section 106 agreement is a pre-requisite to the grant of social housing relief under conditions 2 and 3 in Regulation 49(1) of the CIL Regulations.

(b) Construction of the section 106 agreement between the Council and Claimant. In particular, does it control the amount of affordable housing that can come forward pursuant to the planning permission and cap the amount at 35% of the dwellings in the development.

(c) The proper reading of the Council's decision letter dated 5 February 2021.

5. In light of the issue of interpretation of the CIL Regulations, the Secretary of State for Housing, Communities and Local Government was joined as an Interested Party at the Court's request and directed to produce written submissions to assist the Court. The Secretary of State's submissions were limited to the interpretation of the Regulations and did not extend to the facts and circumstances of this claim.
6. By the time of the hearing, construction of the CIL Regulations was, in all material respects, common ground. The Claimant and Defendant agreed that construction of the section 106 agreement was the key issue in the claim. The Council accepted that its decision should be quashed if the Court found against it on construction of the section 106 agreement. The Claimant contended that, it was apparent the Council had proceeded on a flawed understanding that a section 106 agreement was a threshold requirement for the grant of social housing relief. This remained as a freestanding ground of claim, even if the Court finds against it on the proper interpretation of the section 106 agreement.

The Legal Framework

The Community Infrastructure Regulations 2010

7. The Community Infrastructure Levy (referred to as 'CIL') is a levy, the purpose of which is to ensure that the costs incurred by public authorities in supporting the development of an area can be funded by the owners or developers of land without rendering development of the area unviable. It is intended to be fairer, quicker, more certain and more transparent than the previous system of contributions collected via planning obligations under section 106 of the Town and Country Planning Act 1990. More development now contributes to infrastructure. It is a set charge payable at a defined point. It aims to minimise the administrative burden on collecting authorities.
8. CIL is provided for by section 205 of the Planning Act 2008 and the CIL Regulations. The description of the CIL scheme that follows is non-exhaustive, including only matters that are material to determination of the issues in this case.
9. Each local planning authority is a charging authority for the purpose of CIL. Charging authorities may charge CIL in respect of development of land in their area. A charging

authority is also the Collecting Authority for its area (section 206 of the Act and Regulation 10).

10. CIL is payable on “chargeable developments”, which means a development for which planning permission has been granted (Regulation 9). CIL is payable either by a person who has assumed liability to pay, or if no one has assumed liability, by either the owner or developer of land (see section 208 of the Act; and Regulations 31 and 33).
11. Where a person has assumed liability to pay CIL, that person becomes liable to pay the levy on ‘commencement of the chargeable development’ (Regulation 31(3)). A chargeable development is to be treated as commencing on the earliest date on which any material operation begins to be carried out on the relevant land (Regulation 7).
12. The Collecting Authority must calculate the amount of CIL payable in respect of a chargeable development in accordance with a formula set out in Schedule 1 of the Regulations. The amount is determined on the basis of charging schedules issued by charging authorities (Section 211 of the Act; Regulation 40).
13. The Regulations provide for a series of notices to be served:
 - (a) *Liability Notice*: As soon as practicable after the day on which planning permission first permits development, a charging authority must issue and serve a Liability Notice on a person who has assumed liability to pay CIL (Regulation 65(1)). The Liability Notice is required, amongst other matters, to describe the chargeable development (65(2)(b)) and state the chargeable amount (65(2)(d)).
 - (b) *Commencement Notice*: After the Liability Notice has been issued, any person intending to commence work on a chargeable development must submit a Commencement Notice to the charging authority. This notice is required, amongst other matters, to identify the relevant Liability Notice and the intended commencement date of the chargeable development (Regulation 67).
 - (c) *Demand Notice*: Following receipt of a Commencement Notice the charging authority must serve a Demand Notice “on each person liable to pay an amount of CIL in respect of a chargeable development”. The Demand Notice must state the intended commencement date; the amount payable and the day on which payment of the amount is due. (Regulation 69(1)).
14. Regulation 70 provides for the payment periods for CIL. The consequences of non-payment are explained in Regulation 70(8).

Social housing relief

15. Part 6 of the Regulations makes provisions for a number of exemptions and reliefs which may be applied to reduce or extinguish the chargeable amount. Some of these exemptions and reliefs are mandatory, others are discretionary. Pursuant to Regulations 49; 49C and 50 – 54, provision is made for relief from the levy, for the provision of social housing.
16. Eligibility for social housing relief is dependent on the chargeable development satisfying Regulation 49(1) which provides:

(1) A chargeable development which comprises or is to comprise qualifying dwellings or qualifying communal development (in whole or in part) is eligible for relief from liability to CIL.

(underlining is the Court’s emphasis).

17. Pursuant to Regulation 49(2), a “*qualifying dwelling*” is a dwelling which satisfies at least one of six specified conditions (contained in reg. 49(3) – (7B)). The Claimant’s application relied on the second and third conditions, contained in reg. 49(4) – (6) as follows:

(4) Condition 2 is that all of the following criteria are met—

(a) the dwelling is occupied in accordance with shared ownership arrangements within the meaning of section 70(4) of the Housing and Regeneration Act 2008;

(b) the percentage of the value of the dwelling paid as a premium on the day on which a lease is granted under the shared ownership arrangement does not exceed 75 per cent of the market value (where the market value at any time is the price which the dwelling might reasonably be expected to fetch if sold at that time on the open market);

(c) on the day on which a lease is granted under the shared ownership arrangements, the annual rent payable is not more than three per cent of the value of the unsold interest; and

(d) in any given year the annual rent payable does not increase by more than the percentage increase in the retail prices index for the year to September immediately preceding the anniversary of the day on which the lease was granted plus 0.5 per cent.

(5) Condition 3 is that, in England—

(a) the dwelling is let by a private registered provider of social housing on one of the following—

(i) an assured tenancy (including an assured shorthold tenancy);

(ii) an assured agricultural occupancy;

(iii) an arrangement that would be an assured tenancy or an assured agricultural occupancy but for paragraph 12(1)(h) or 12ZA of Schedule 1 to the Housing Act 1988;

(iv) a demoted tenancy; and

(b) one of the criteria described in paragraph (6) is met.

(6) The criteria are—

(a) the rent is—

(i) subject to the national rent regime, and

(ii) regulated under a standard controlling rent set by the Regulator of Social Housing under section 194 of the Housing and Regeneration Act 2008;

(b) the rent is—

(i) not subject to the national rent regime;

(ii) not regulated under a standard controlling rents set by the Regulator of Social Housing under section 194 of the Housing and Regeneration Act 2008; and

(iii) no more than 80 per cent of market rent ...

18. Pursuant to Regulation 50 of the Regulations, the amount of social housing relief for which a chargeable development is eligible (known as the “qualifying amount”) must be calculated in accordance with paragraph 6 of Schedule 1 to the Regulations.

Procedure for claiming or withdrawing social housing relief

19. A person wishing to benefit from social housing relief must submit a claim for relief to the collecting authority in accordance with Regulation 51 which provides in material respects (underlining is the Court’s emphasis):

(3) The claim must—

(a) be submitted to the collecting authority in writing on a form published by the Secretary of State (or a form to substantially the same effect);

(b) subject to paragraph (4A), be received by the collecting authority before commencement of the chargeable development;

(c) include the particulars specified or referred to in the form; and

(d) be accompanied by—

(i) a relief assessment, and

(ii) evidence that the chargeable development qualifies for social housing relief (by reference to the conditions mentioned in regulation 49, the criteria mentioned in regulation 49A(2) or regulation 49C).

...

(5) As soon as practicable after receiving a valid claim for social housing relief, the collecting authority must notify the claimant in writing of—

(a) its decision on the claim and the reasons for the decision; and

(b) if relief is granted, the qualifying amount, and provide an explanation of the requirements of regulation 67(1) ...

20. Pursuant to Regulation 53 of the Regulations, provision is made for the withdrawal of social housing relief “whenever a disqualifying event occurs before the end of the clawback period in respect of a chargeable development for which social housing relief has been granted”. Further, “[a] disqualifying event is any change in relation to a qualifying dwelling or qualifying communal development such that it ceases to be a qualifying dwelling or qualifying communal development”. CIL is payable to the collecting authority after a disqualifying event.
21. Pursuant to Regulation 54 of the Regulations, a collecting authority may serve an information notice on a person claiming social housing relief requiring the provision of information, documents or materials to assist the collecting authority in determining the extent of social housing relief.

Planning obligations

22. Section 106 of the Town and Country Planning Act 1990 provides, in so far as relevant:

“(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and [sections 106A to

106C] as “a planning obligation”), enforceable to the extent mentioned in subsection (3)—

(a) restricting the development or use of the land in any specified way;

...

(1A) ...

(2) A planning obligation may—

(a) be unconditional or subject to conditions;

(b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and

...

(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—

(a) against the person entering into the obligation; and

(b) against any person deriving title from that person.

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

[...]

(9) A planning obligation may not be entered into except by an instrument executed as a deed ...

23. Section 106 obligations are frequently required by planning authorities as an important adjunct to the exercise of their development control functions. For example, in order to make a proposal for development acceptable, and thus to enable planning permission to be granted, an authority may require a financial contribution to be made. The authority may impose a requirement not only for the erection of affordable housing, but also its provision or transfer to a “registered provider”. Matters such as these are dealt with through s.106 obligations rather than conditions. However, by definition, a s.106 obligation is a freestanding legal instrument. It does not form part of the planning permission. Section 106A(1) provides that a s.106 obligation may not be modified or discharged except (a) with the agreement of the planning authority by which the obligation is enforceable and the person or persons against whom it is enforceable or

(b) in accordance with ss.106A and B or ss.106BA and 106 BC (*Norfolk Homes Ltd v North Norfolk District Council* [2021] PTSR 863 §49 & 50 (Holgate J))

Factual Background

24. The Claimant, Stonewater, is a not-for-profit registered provider of affordable housing and has registered charitable societies status. It is one of nine entities within the Stonewater Group. The Stonewater Group is one of the United Kingdom's leading providers of social housing, managing around 32,000 homes in England and providing a variety of affordable properties and tenures. Any profits must be reapplied for the purpose of furthering its charitable objectives. It is on the preferred development partner lists of a number of local planning authorities across England. It has partnered with the Defendant Council since approximately 2001, delivering approximately 166 new affordable homes within the Council's area during that time.
25. The Council is both the local planning authority for the purposes of the Town and Country Planning Act 1990 and the collecting authority for the purposes of the CIL Regulations in respect of its administrative area.
26. The Claimant regularly acquires sites which are subject to a section 106 agreement which secure a low or policy compliant level (35%) of affordable housing, with a view to increasing affordable housing delivery to 100%. The Court was told that this is not unusual, and the Claimant is not alone in doing so. Grants from Homes England are based on the principle that registered social housing providers provide additional affordable housing over and above the levels secured in planning obligations.
27. When the Claimant first became involved with the site at Oaklands, Ersham Road in Hailsham the site already had outline planning permission for a residential development together with an accompanying section 106 agreement. The outline permission and subsequent reserved matters approval had been obtained by M5 Oaklands Limited. The Council, together with East Sussex County Council, the then landowner (AJ Paice), and MS Oaklands Limited had entered into an agreement pursuant to section 106 Town and Country Planning Act to secure a number of matters as planning obligations, including the provision of affordable housing (agreement dated 27 May 2020).
28. By a decision notice dated 29 May 2020, the Council (as local planning authority) granted planning permission for the site as follows:

“residential development of 169 dwellings including enhanced junction and access arrangements at Ersham Road/Coldthorn Lane, 35% affordable housing and play areas”.
29. On 29 May 2020, the Council (in its role as collecting authority for the purposes of the CIL Regulations) issued a liability notice pursuant to Regulation 65 of the Regulations. The Liability Notice calculated the amount of CIL due for the Chargeable Development in the sum £3,066,009. This calculation did not take account of any reliefs or exemptions. The description of the development was “residential development of 169

dwellings including enhanced junction and access arrangements; 35% affordable housing and play areas.”

30. The Claimant purchased the Site from the owner, Mr Paice, on 8 September 2020 and stepped into his shoes for the purposes of the section 106 agreement. The Claimant immediately applied for social housing relief (on 9/9/20) for all 169 units in the development, stating on the application form that:

“All 169 dwellings will be delivered for social housing. 98 for Social Rent and 71 for Shared Ownership. Once completed the homes will be owned and managed by Stonewater Ltd, a registered provider of social housing”.

31. The Claimant subsequently became concerned by the delay in the Council processing its application and its apparent hesitancy in granting the relief. By letter dated 26 October 2020, its solicitors wrote to the Council:

“We are aware that the Council is yet to process the application...and is currently obtaining Counsel’s opinion as to how to proceed with the application in light of the fact that relief would be applicable to all of the units. This is causing significant delays in Stonewater being able to commence development...We have therefore been asked to set out the position to the Council to clarify when a development will be eligible for social housing relief.”

32. The letter went on to set out Regulation 49 of the CIL Regulations, before stating that dwellings complying with the conditions in Regulation 49 would be eligible for relief without delay:

“All of the dwellings which Stonewater intends to provide as affordable housing comply with the...requirements and are therefore ‘qualifying dwellings’ and eligible for Social Housing Relief”.

33. By email dated 16 November 2020, the Chief Executive for the Council responded by explaining that legal advice had been sought and stating that:

“I am sorry this is causing a delay to build out of the site. You appreciate that 100% CIL relief at this scale will have a major impact on our evolving infrastructure pot. This is a new issue for Wealden and as such, we required legal advice to provide certainty for all.”

34. By letter dated 21 December 2020, the Council refused the application. It did so in identical terms to its later refusal of January 2021, set out in full further below. In short, the refusal letter explained that the section 106 agreement controlled the amount of affordable housing and limited it to 35%. The Claimant had not sought approval to bring forward additional housing. Accordingly, it had not been established that any dwellings coming forward would be qualifying dwellings for the purposes of the CIL Regulations. In determining the provision of additional affordable housing, the Council could properly have regard to the extent to which the additional dwellings would affect the provision of infrastructure.

35. On 18 January 2021, the Claimant re-applied for social housing relief, again on the basis that all 169 dwellings were to be provided as affordable housing. On the form it was stated that:

*“All 169 dwellings are to be provided as affordable housing in the following mix:
10 x rent to buy units
61 x shared ownership units
98 x social rented units”*

36. The Claimant provided a statement in support of its application which included some additional detail on the proposals for each tenure mix of housing. The statement went on to dispute the Council’s interpretation that the section 106 agreement controls the provision of additional affordable housing. It stated it was not necessary for the Claimant to provide a section 106 agreement in order to satisfy conditions 2 and 3 of Regulation 49. The obligations in the s106 agreement were irrelevant to the Council’s decision and the provision of relief was mandatory once the dwellings complied with conditions 2 and 3 of Regulation 49.

37. In response to the re-issued application, the Council’s Head of Planning and Environmental Services sent an email dated 22 January 2021 setting out the Council’s position as follows:

“I have taken the decision to spend further legal fees in this case and have consulted our QC. I am relaying that so you know the matter has been taken seriously and given priority during a very busy workload. That includes senior officers and myself, all of which have front line responsibilities for the Council dealing with the pandemic.

I would make the following points:

- *The application asserts that the dwellings will be offered on various bases. It asserts that this would mean they would be qualifying dwellings within Condition 2 or Condition 3*
- *However, there is no legal requirement in place which ensures that the dwellings would in fact be offered/occupied on the basis asserted in the application i.e. there is no legally binding commitment in perpetuity which requires the dwellings to be offered/occupied on*

the bases asserted. In the absence of this, the Council does not consider that it has been demonstrated that the dwellings will be “qualifying dwellings” within Regulation 49.

- *Without prejudice to any future determination by the Council in the exercise of its functions, if a legally binding obligation in perpetuity (in the form of a Planning Obligation pursuant to Section 106 of the Town and Country Planning Act 1990) was entered into which required all of the dwellings to be offered/occupied on the bases asserted in the application, that might enable the Council to further review the position.*

Please let us know whether you wish to discuss/supply such a document or whether you would prefer the council to determine the application on the basis of the assertions made to date.”

38. In response, the Claimant’s solicitors replied as follows:

“As per the supporting statement submitted with the application for relief, it is not a requirement of the Regulations that those dwellings satisfying conditions 2 and 3 of Regulation 49 are required to be bound by a planning obligation. It would be ultra vires of the Council to impose such a requirement. The only question for the Council in determining the application for relief is whether the dwellings satisfy the conditions in Regulation 49. Stonewater will therefore not be entering into a planning obligation to bind all of the units as Affordable Housing.

No doubt you are aware of Regulation 53 which ensures that if any of the dwellings cease to be used as affordable housing within the 7-year clawback period, that CIL will then become payable. Therefore, should Stonewater cease to use the dwellings as affordable housing during that time, they will be required to notify the Council under Reg 54 and will then become liable to pay CIL in relation to that dwelling. However, it should also be noted that Stonewater is a registered provider of affordable housing and so its business is providing affordable housing.”

39. The Head of Planning responded as follows:

“Thank you for your email. By return, would you please confirm if this is the extent of your reply to my email of the 22 January 2021? That being so, then we can proceed to determine the CIL claim.”

40. The Claimant's solicitors responded requesting a note of the Council's legal position and the name of the Council's barrister. There was no response to the substance of the Council's points about the evidential position.
41. By a letter dated 5 February 2021, the Council again refused the Claimant's application. Its reasons were as follows:

“Planning permission was granted on 29 May 2020 under reference WD/2018/2543/MAJ for 169 dwellings at Ersham Road/Coldhtorn Lane (“the Permission”). The Permission included provision for 35% Affordable Housing and is subject to a Section 106 Agreement dated 29th May 2020 (“the S106”). The S106 controls the amount of affordable housing that can come forward pursuant to the Permission. Your attention is drawn to Schedule 1 of the S106 which contains planning obligations (paragraphs 1 to 4 refer) which require the submission of Phasing Plan and Affordable Housing Scheme (as defined) and it is by this mechanism that the Council's approval is required (inter alia) to establish the number and type of affordable housing units coming forward. No submissions pursuant to Schedule 1 of the S106 have been received by the Council and so in the absence of approval of these details the development pursuant to the Permission cannot lawfully commence nor has it been established that any dwellings coming forward will be “qualifying dwellings” for the purposes of the CIL Regulations.

The Permission and S106 provides for the provision of affordable housing at a level of 35%. In determining any submissions pursuant to the S106 in relation to the provision of affordable housing which exceeds the proportion considered at the time of the grant of the Permission (being 35%), the Council can properly have regard to the extent to which the submitted level of “qualifying dwellings” would affect the provision of infrastructure. In view of the above, the Council hereby refuse the claim for relief as it has not been established that any dwellings coming forward would be “qualifying dwellings” for the purposes of the CIL Regulations.”

Submissions of the parties

42. At the hearing, it was said, on behalf of the Claimant that, properly construed the section 106 agreement does not control the provision of affordable housing over and above the 35% referenced in the planning permission and the agreement. Its focus is simply on securing 35% affordable housing as a minimum. It does not regulate the remaining 65% of the dwellings. It would, in any event, be contrary to common sense to construe the agreement as restricting the provision of more affordable housing given affordable housing is a desirable policy outcome. Irrespective of the proper construction of the CIL Regulations and the section 106 agreement, the Council made its decision on a

flawed understanding of the CIL Regulations, namely that a section 106 agreement was a pre-requisite to the grant of relief and secondly, by taking account of immaterial considerations, namely the absence of a planning obligation securing the additional 65% of affordable housing and having regard to the extent to which the refusal of relief would allow the Council to collect CIL.

43. On behalf of the Defendant it was said that, correctly interpreted, the section 106 agreement limited the amount of affordable housing to 35% and controlled the provision of additional housing. The Council had received no submissions in favour of it exercising its planning judgment so as to permit affordable housing at the enhanced level sought by the Claimant. Unless and until the Council had decided to approve 100% affordable housing for the purposes of the Section 106, the Council could not be satisfied that all of the dwellings would be qualifying dwellings. Properly understood its decision does not make the error of thinking that the Council has a discretion to refuse social housing relief because of any impact on infrastructure. Nor does the decision letter indicate that a section 106 agreement is a necessary pre-requisite to the grant of relief.

Discussion

Construction of the CIL Regulations - social housing relief

44. The first issue raised by the claim is construction of the CIL Regulations; in particular;
- i) Whether the provision of social housing relief is mandatory or discretionary; and
 - ii) whether a section 106 agreement is a pre-requisite to the grant of social housing relief under conditions 2 and 3 in Regulation 49(1).
45. The proper interpretation of tax legislation requires a close analysis of what, on a purposive construction, the statute actually requires (*Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, per Lord Nicholls at [39]). This approach has been applied to the interpretation of the CIL Regs (*R (Orbital) v Swindon BC* [2016] EWHC 448 Admin at [74] – [75] and, more recently, *Gardiner v Hertsmere BC* [2021] EWHC 1875 at [42]).
46. Regulation 49(1) is clear that a chargeable development which comprises or “is to comprise” qualifying dwellings is eligible for relief from liability for CIL. A qualifying dwelling may be and, is likely to be, a dwelling which is yet to be constructed. This is apparent from the words “is to comprise” and Regulation 51(3)(b) which requires, with one exception, all claims for social housing relief to be made before the commencement of the development.
47. For the purposes of Regulation 49 a qualifying dwelling is a dwelling which will satisfy at least one of the six conditions set out in regulation 49(3) – (7B) (Regulation 49(2)). The conditions address the criteria for the provision of social rent, affordable rent and intermediate rent dwellings by a local housing authority; a private registered provider of social housing; a registered social landlord or other bodies. By Regulation 51(1) a

person wishing to benefit from social housing relief must submit a claim. Regulation 51(3) addresses the form and timing of a claim. Regulation 51(3)(d)(ii) provides that the claim must be accompanied by evidence that the chargeable development qualifies for social housing relief by reference to the conditions mentioned in regulation 49.

48. Accordingly; the issues for the decision maker, in deciding whether to grant social housing relief under Regulation 49, are whether: a) the chargeable development is eligible for social housing relief by reference to the conditions mentioned in regulation 49; and b) the claim complies with the procedural requirements in regulation 51.
49. Pursuant to Regulation 51(3)(d)(ii), an applicant for social housing relief must submit evidence that the development qualifies for social housing relief. In the case of dwellings which have yet to be constructed this will amount to evidence to demonstrate that the applicant will in fact bring forward a development which will qualify for the relief sought. The logical corollary of the requirement for an applicant to submit evidence is that the relevant decision-making authority must consider the adequacy of that evidence and may reject the application if not satisfied by it. Whether the evidence is sufficient to demonstrate that one or more of the conditions in Regulation 49 will be satisfied in the future is a matter for the decision maker, having regard to the specific facts and circumstances of the case, subject to public law principles including *Wednesbury* reasonableness.
50. There is nothing in the CIL regulations which mandates the exact form of evidence required to satisfy the collecting authority under Regulation 51(3)(d)(ii). There is no express requirement in either condition 2 or 3, or elsewhere in the CIL Regulations, that the use of the qualifying dwellings in accordance with the terms of those conditions must be secured by way of a planning obligation or other legal mechanism. The absence of an express requirement is a clear indication that it is not a necessary pre-requisite. Where a planning obligation is a necessary pre-requisite to the satisfaction of a condition in Regulation 49 this is expressly stated, as in the case of Regulation 49(7A) and (7B) which concerns conditions 5 and 6.
51. Nevertheless, the inclusion of a section 106 agreement, or similar legal obligation, as part of the evidence in support of an application for relief under conditions 2 or 3 may be a material factor in the decision maker's assessment of the evidence. This is because, in practice, a section 106 agreement committing the developer to the asserted level of qualifying dwellings, is an obvious way in which a developer might demonstrate, evidentially, how the use of the proposed dwellings in accordance with either condition 2 or 3 is to be secured. By the same token, the absence of a section 106 agreement may be a material matter, as for example where no other evidence is submitted beyond assertion as to a future course of conduct. Whether the presence of a section 106 agreement, or its absence, justifies the grant or refusal of a claim for relief will depend on the facts and circumstances of a particular case.
52. Subject to the satisfaction of the procedural requirements in Regulation 51, the grant of social housing relief is mandatory, not discretionary. If the conditions are met, social housing relief must be granted. There is nothing found in the regulations either expressly, or by implication, which enables the decision maker to consider the effect of granting the relief including, for example, the impact of granting the relief on CIL receipts or the question of whether there would be a perceived over-concentration of affordable housing in a particular locality. These issues are not relevant to the question

of whether any condition mentioned in Regulation 49 is satisfied. It is not the expressed purpose of social housing relief to seek to control the number of qualifying dwellings delivered by a chargeable development. Instead, social housing relief, in the context of the CIL Regulations, is intended to facilitate and encourage the delivery of such qualifying dwellings by a mandated form of relief from CIL.

Construction of the section 106 agreement

53. The second issue raised by the claim is the interpretation of the section 106 agreement. In this respect, the central issue is whether the Council was correct in its decision letter to say that the section 106 agreement ‘controls the amount of affordable housing that can come forward pursuant to the permission’.
54. The relevant principles of interpretation were common ground and can be stated shortly. The Court must identify the natural and ordinary meaning of the words used, viewed in the context of the document as a whole, the surrounding context and in the light of common sense. In the case of a public document like the section 106 agreement, there is only limited scope for the use of extrinsic material or the factual background (such as the shared knowledge of the contracting parties) to the process of interpretation (*Lambeth London Borough Council v SSHCLG* [2019] 1 WLR 4317 §19; *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1WLR 85; *Norfolk Homes Limited v North Norfolk District Council* [2021] PTSR 863 and *Wood v. Capita Insurance Services Ltd* [2017] A.C. 1172 §10 per Lord Hodge JSC)).
55. Turning then to the agreement. The relevant provisions are as follows:
56. Clause 1 of the agreement sets out the following definitions:

“Affordable Housing” means “housing for Social Rent, Affordable rent and Intermediate Housing, provided to eligible households whose needs are not met by the market....”

“Affordable Housing Scheme” means “a scheme (including plans, details and specifications to be submitted to and approved by the District Council which specifies in relation to the whole of the Development or Phase: (a) the number, type (including number of bedrooms), tenure and location on the Development or Phase of the Affordable Housing Units and Affordable Housing Land which shall be determined having regard to the identified housing needs within Wealden and the Affordable Housing Tenure Mix; (b) the timing of the delivery and construction of the Affordable Housing Units within the Development or Phase and their phasing in relation to the occupancy of the Private Dwelling Units; and (c) details of the proposed Registered Provider and timings of the transfer of the Affordable Housing Units and associated Affordable Housing Land.”

“Affordable Housing Tenure Mix” means “the total number of Affordable Housing Units comprising an overall mix of 80%

Affordable Rented Units and/or Social Rented Units and 20% Intermediate Housing Units minimum which shall be constructed within the Development and Phase.”

“Affordable Housing Units” means “the 59 Dwellings in the Development which shall be for use as Affordable Housing consisting of an overall mix of 47 Affordable Rented Units and 12 Intermediate Housing Units which shall all be built in compliance with the Standards and in accordance with the approved Affordable Housing Scheme...”

“Phase” means “a part of the Development identified as a construction phase of the Development in the Phasing Plan.”

“Phasing Plan” means “a plan to be submitted to and approved by the District Council identifying the number, location, extent, timetable and programming of the construction phases and laying out of the Development on the whole Application Site and showing the number of Dwellings to be provided in each Phase, which of these Units are Affordable Housing and the Outdoor Playing Space within each Phase.”

“Private Dwelling Unit(s)” means “any Dwelling(s) which is not an Affordable Housing Unit.”

57. By clause 5.1, *“[t]he Owner covenants with the District Council and the County Council to fully comply with and to perform the obligations contained herein and in Schedules 1 to 6 of this Agreement in accordance with the requirements and timescales contained therein.”*
58. By Schedule 1 of the Agreement, the Owner (i.e. the Claimant) covenants with the Council as follows:

“1. Not to Commence Development unless and until the Owner has submitted a Phasing Plan (which for the avoidance of doubt may indicate that the Development will be carried out in a single Phase) to the District Council and this has been approved by the Head of Planning and Environmental Services.

2. In regard to the Affordable Housing Units, where the Phasing Plan indicates that there will be more than one Phase, the Phasing Plan shall show:

- i) the number, programming and physical extent of each Phase;*
- ii) the total number of Dwellings to be constructed on the Property; and*

iii) the total number of Affordable Housing Units to be constructed on the Property which shall comprise 35% of the Dwellings within the Phase (which shall be rounded up to the nearest whole Unit).

3. Not to Commence Development on any Phase unless and until the Owner has submitted the Affordable Housing Scheme to the District Council which shall conform with the Affordable Housing Tenure Mix (or such other similar size or tenure mix as may be approved by the District Council) and the District Council has approved such scheme and any accompanying plans and details in writing and has also approved the identity of the Registered Provider for the Affordable Housing Units on the said Phase.

4. That the Development shall be carried out in accordance with the approved Phasing Plan and Affordable Housing Scheme subject to any amendments approved in writing by the District Council from time to time.”

59. The Claimant points to the opening words of paragraph 2(iii) (“In regard to the Affordable Housing Units”) to submit that the paragraph which states that the total number of Affordable Housing Units shall comprise 35%, is directed only at the 35% affordable housing and is not to be read as regulating the remaining 65% of the dwellings. This is said to be consistent with all the other obligations in the agreement relating to affordable housing, which only concern the 35% Affordable Housing Units (as defined) and do not regulate the remainder of the development. The obvious intention of paragraph (2)(iii), which relates only to situations where the development will be brought forward in multiple phases, is to avoid the affordable housing element being backloaded into the final phase of the development. Without a requirement for the minimum percentage of affordable housing in each phase, a commercial developer (as was the case prior to the Claimant purchasing the site) would have a commercial incentive to construct the more valuable market dwellings first, thus delaying and/or risking the delivery of the affordable dwellings. The Claimant further submits that something as unusual and fundamental as a cap on the amount of affordable housing can be expected to be a free-standing obligation, as in a clause providing that “*No more than 35% of the Development shall comprise Affordable Housing*”, with the term “*Affordable Housing*” defined, as opposed to any cap arising out of a passing reference in the final sentence of a lengthy provision relating to phasing plans. It is said that there is no indication in the s.106 agreement or elsewhere of any intention to cap the amount of affordable housing. Clause 3.3 of the s.106 agreement indicates that the obligations were considered to comply with requirements of Regulation 122 of the CIL Regulations. The requirement of Regulation 122(2)(a) is that the obligation is “*necessary to make the development acceptable*”. It is therefore telling that the Officer’s Report contains no finding that such a cap (which would be highly unusual) was necessary to make the development acceptable.
60. Whilst the Claimant’s interpretation has logic, its difficulties become apparent on further consideration.

61. In my assessment, the language of the document points to an interpretation that the agreement controls the amount of affordable housing that can come forward, by fixing a specific requirement of 59 dwellings or 35% affordable housing. Paragraph 2(iii) of Schedule 1 says that precisely 35% of the units in any phase must be affordable. Accordingly, if the development proceeds in multiple phases, there must be 35% in each phase and thus, inevitably, as a matter of maths, 35% in aggregate. This specific requirement permeates the definitions, which draw a clear distinction between the ‘Affordable Housing Units’ which are “*the 59 Dwellings ... which shall be for use as affordable housing*” and ‘the Private Dwelling Units’ which means everything other than the 59 Dwellings. Paragraph 3 of Schedule 1 provides the mechanism whereby the Council can exercise control in all cases (not just multiple phases) over the provision of affordable housing. The, broadly defined, Affordable Housing Scheme must be submitted for approval and development may not commence until the Council has approved it.
62. Accordingly, a scheme which provides less, or more units, of affordable housing would not comply with the section 106 requirement to provide 59 units and hence would be contrary to its terms and to that extent unlawful, albeit the Council would have a discretion to vary the Section 106 agreement or enter into a new agreement.
63. By imposing a precise number of affordable housing, rather than a “floor”, the Section 106 is doing no more than giving effect to the planning application before it, which was for a scheme of 35% affordable housing, and hence to the expectations of both the developer at the time and the Defendant in granting permission. That is reflected also in the Planning Permission. A 35% scheme was the premise upon which the permission was granted.
64. The Claimant’s construction posits the 35% specified in the agreement as a minimum or threshold requirement. However, the definitions draw a clear distinction between the 59 Affordable Housing Units and every other dwelling (the Private Dwelling Units). Read together, these definitions do not permit a third category of dwelling, necessitated by the Claimant’s construction, of affordable housing, within the meaning of the separate definition of that term in the agreement, but which are, nevertheless, also not Affordable Housing Units but ‘Private Dwelling Units’. That makes no sense.
65. Further, the Claimant’s interpretation raises the prospect of an apparently illogical and unexplained distinction between development in multiple and single phases. On its face, paragraph 2(iii) relates only to situations where the development will be brought forward in multiple phases and requires precisely 35% of housing to be affordable. It has no application where there is only one phase.
66. Such an illogical distinction can only be avoided by implying the words “at least” into paragraph 2(iii). Such implication would only be permissible if it were “necessary” to make sense of the document. Implication is a strict test even in ordinary contractual interpretation, permissible only where “*it must have been intended that the document would have a certain effect*” (per Lord Hodge JSC in *Trump International* [2016] 1 WLR 85, ¶35), and where inter alia “*the term [is] so obvious as to go without saying or to be necessary for business efficacy*” (*Marks and Spencer* [2016] AC 742, at ¶23). The test is stricter still in planning documents, albeit not excluded altogether. A Court should ‘*exercise great restraint*’ in implying terms into public documents which have criminal sanctions. Breach of a section 106 obligation may give rise to injunctive relief

and thereby to criminal sanctions for any contempt of court. Furthermore, a section 106 obligation runs with the land and may affect the interests of parties who were not originally involved many years later, as well as the general public and other public authorities and agencies (*Trump* ¶¶35, 37 60 and 70).

67. I am not persuaded that the test for implication is met here. By implying additional words, the Claimant seeks to change the effect of paragraph 2(iii) of schedule 1, from one which imposes a specific requirement (59 units or 35% affordable housing) to one which does not. It cannot be said that a clause which imposes a requirement is “obvious[ly]” not intended, and it cannot be said that it is not effective. Any such implication would run counter to the definitions in Clause 1, which demonstrate the intention of the document to provide a specific requirement. The Council’s powers of approval under paragraph 3 are to be exercised on this premise.
68. The Claimant seeks support for its interpretation of the language on the basis that it makes no sense for the section 106 agreement to restrict the provision of additional affordable housing, given it is a desirable policy outcome. However, whilst affordable housing is generally desirable in policy terms, it does not follow that more affordable housing is always desirable without limit. There may be proper planning reasons to prefer a mixed scheme. For example, in this case, the Court’s attention was drawn to extracts from the Planning Officer’s report which suggest the expected CIL receipts from a scheme with 35% affordable housing were relevant to the decision making. The highways authority had expressed concern about the potentially severe impact from the development on the local highway network and considered mitigation was required. It was common ground that the necessary mitigation was to be funded by the CIL receipts from the development. However, it is neither necessary nor appropriate for this court to evaluate any preference for a mixed scheme on the facts of this case. It is sufficient to say that it is in accord with the statutory planning context, and / or “common sense”, to have a section 106 agreement which retains control over the provision of affordable housing. This does not defeat the achievement of more affordable housing since the Council, in the exercise of its planning judgment, may vary the Section 106 to permit this, if persuaded of its desirability.

The Council’s decision and the application process

69. Drawn together, the analysis of the first two issues raised by the claim produces the following key propositions by which to assess the Council’s decision:
- a. To benefit from the social housing relief under the CIL Regulations, it was incumbent on the Claimant to submit evidence demonstrating that it will in fact bring forward 100% affordable housing.
 - b. Whether the Claimant’s evidence is sufficient was a matter of judgment for the Council, subject to the usual public law principles including *Wednesbury* reasonableness.
 - c. An existing section 106 agreement fixes the affordable housing requirement at 35% or 59 units. This, and the

corresponding absence of a section 106 agreement locking in the 100% provision, was clearly a relevant and material factor for the Council to consider in its assessment of the evidence.

70. Turning then to the application process.
71. At the time of its first application for relief in September 2020, the Claimant had not yet carried out the development (and neither had anyone else). The application form simply stated that “*All 169 dwellings will be delivered for social housing*”. In its first refusal the Council explained its construction of the section 106 agreement (as controlling the provision of affordable housing at 35%) and pointed to the absence of submissions from the Claimant on why it should exercise its planning judgment to approve the additional level of affordable housing.
72. On 18 January 2021, the Claimant re-issued its application for relief with some additional information which, nonetheless, amounted, in effect, to no more than a repeated assertion that it intended to bring forward all the housing as affordable housing. In response, the Council explained the evidential difficulties presented by the Claimant’s application in terms of how much confidence it could have that the development would comprise 100% affordable housing (the email from the Head of Planning):

“The application asserts that the dwellings will be offered on various bases. It asserts that this would mean they would be qualifying dwellings within Condition 2 or Condition 3.

However, there is no legal requirement in place which ensures that the dwellings would in fact be offered/occupied on the basis asserted in the application i.e. there is no legally binding commitment in perpetuity which requires the dwellings to be offered/occupied on the bases asserted. In the absence of this, the Council does not consider that it has been demonstrated that the dwellings will be “qualifying dwellings” within Regulation 49.”

73. The Council went on to propose a solution; a fresh section 106 agreement:

“Without prejudice to any future determination by the Council in the exercise of its functions, if a legally binding obligation in perpetuity (in the form of a Planning Obligation pursuant to Section 106 of the Town and Country Planning Act 1990) was entered into which required all of the dwellings to be offered/occupied on the bases asserted in the application, that might enable the Council to further review the position.

Please let us know whether you wish to discuss/supply such a document or whether you would prefer the council to determine the application on the basis of the assertions made to date.”

74. The Claimant did not take up the Council's offer. It simply repeated its position that a section 106 agreement is not a *legal* pre-requisite for dwellings to qualify under condition 2 or 3. This is correct. However, the *evidential* value of any section 106 agreement is a different and relevant consideration.
75. Accordingly, the Claimant's application for relief, on the basis of 100% provision of affordable housing (169 units), was made in circumstances where there was in existence a Section 106 with provision for affordable housing at a lower level (59 units or 35%). The provision of 169 affordable housing units would not comply with the requirement in the existing section 106 agreement. The Claimant had not taken up the Council's suggestion of a fresh section 106 agreement. Its evidence that the dwellings qualified for relief consisted, in effect, of an assertion that 169 units of affordable housing would be provided, in apparent non-compliance with the existing section 106 agreement. The development could not therefore proceed unless and until the Council agreed, in the exercise of its planning judgment, to a fresh section 106 agreement or a deed to vary the existing section 106. Unless and until the Council did so, the proposed 100% provision was not lawful. It follows that the Council could not grant the social housing relief unless and until it was satisfied that it would be appropriate to permit 100% provision. Otherwise, to grant the social housing relief would pre-judge the exercise of its separate discretion to vary the section 106 agreement or enter into a fresh 106 agreement.
76. In these circumstances, it was entirely rational and unsurprising that the Council was not satisfied that sufficient "evidence" had been provided for the purposes of Regulation 51(3)(d)(ii) CIL Regulations. The points that it made in the decision letter reflect its position; critically, that it could not be satisfied that the dwellings would be qualifying dwellings where it had received no submissions in favour of it exercising its planning judgment so as to permit more affordable housing, and was therefore not satisfied that it should do so. Absent such approval, a scheme of 100% affordable housing could not lawfully commence. In those circumstances, the Council could not be satisfied that all of the dwellings would be qualifying dwellings so as to justify the full relief claimed.
77. Properly understood, the Council's decision is not based on the proposition that, as a matter of law, all applications for social housing relief must be accompanied by a legal obligation to carry out the proposed scheme. Neither does the decision make the error of thinking that the Council had a discretion to refuse relief because of any impact on infrastructure. Social Housing Relief is mandatory relief, where the relevant conditions are met. But where, as here, the conditions could only be satisfied if the Council first exercised some separate and freestanding discretion (to vary the section 106 or enter into a fresh agreement) and where it was open to the Council to have regard to a matter such as infrastructure provision in exercising *that* discretion, the Council was entitled to make the point that, in exercising that discretion, it would be entitled to have regard to the impact on infrastructure. But the critical and more general reason, given in the previous paragraph was simply that, unless and until the Council had decided to approve 100% affordable housing, the Council could not be satisfied that all of the dwellings would be qualifying dwellings.
78. The Claimant submits that it is apparent from a consideration of the application process as a whole; the conduct of the litigation and the Council's approach in other cases with other applicants, that, in reality, the Council has proceeded on the basis of a flawed

understanding of the Regulations and treated the provision of a section 106 agreement as a legal requirement for the grant of relief.

79. This submission requires consideration of when the Court can look beyond a decision letter and the application process in this case. The decision under challenge gives reasons. Those reasons are logically sufficient to justify the decision. On its interpretation that the section 106 agreement controlled the provision of affordable housing at 35%, with which the Court agrees, then it was natural, if not inevitable, for the Council to conclude that it could not be satisfied that 100% of the dwellings would be affordable in circumstances where it was not yet persuaded that (and had not been invited to consider whether) it should permit more. Absent such permission, 100% of the dwellings would not be affordable. Accordingly, the Council has given a legally valid, and logically sufficient, reason not to grant social housing relief. That reason stands as a sufficient independent basis for the decision, regardless of other reasons.
80. Second, whilst it is not the case that the court can never go behind the reasons given in the formal decision, such a course would be both exceptional, and would need very specific justification. In principle, the formal written decision of the Council is not in any different position from the formal decision given by a judge or a planning inspector. It would be wholly exceptional, if possible at all, to attribute additional reasons to such a decision maker. Bad faith might justify a different approach. But that is not suggested and is plainly not present. It might also be possible if the reasons given were incomplete (i.e. they did not provide a logically sufficient explanation of the decision). In such a case the court might simply quash and it might well be a defendant who seeks to go beyond the formal reasons. That does not arise here. It is not sufficient to simply show that other reasons or concerns were canvassed by the Council in the course of correspondence or to point to other decisions by the Council when the relevant material was not before the Court. During the hearing the Claimant pointed the Court to a letter dated 6/12/2019 from the Council (Development Manager) to the Claimant's agent stating: "*It is understood the site is to be built out and provided as a 100% affordable even though the obligation part of the scheme is 35%*". This was said to demonstrate that the Council had always understood and accepted the Claimant's proposal to provide 100% affordable housing. However, this document is of limited assistance because it pre-dates the grant of planning permission; the section 106 agreement and the Claimant's purchase of the site. In my judgment, the email from the Head of Planning (of 22/1/21) makes clear that the Council's decision was focussed on the evidential implications of its (correct) understanding that the section 106 agreement in existence imposed a specific affordable housing requirement of 59 units or 35%.

Conclusion

81. For the reasons set out above, the claim fails.