Neutral Citation Number: [2018] EWHC 3426 (Admin)

Case No: CO/2348/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2018

Before :

MR JUSTICE OUSELEY

- -

Between :

W MORRISONS SUPERMARKET PLC	**Claimant**
- and -	
LONDON BOROUGH OF HOUNSLOW	**Defendant**
- and –	
ESSENTIAL LIVING (BRENTFORD) LTD	**Interested Party**

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MR JONATHAN CLAY AND MR JACK PARKER
(instructed by **EVERSHEDS SUTHERLAND**) for the **Claimant**
MR RICHARD HARWOOD QC (instructed by **HB LAW**) for the **Defendant**
MR REUBEN TAYLOR QC (instructed by **TAYLOR WESSING**) for the **Interested Party**

Hearing dates: 22 & 23 November 2018

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Approved Judgment

MR JUSTICE OUSELEY :

1. On 4 May 2018, Hounslow London Borough Council granted planning permission to Essential Living (Brentford) Ltd for a major mixed use redevelopment on a site towards the eastern end of Brentford High Street, currently occupied by a supermarket operated by WM Morrison Supermarkets PLC and associated car parking. This car parking is free and available to town centre shoppers generally. The permission enables the demolition of the existing Morrisons supermarket and the redevelopment of the site, to provide a 3502 sq.m. superstore and 661sq.m. retail, cafe and bar use, along with 221 private rented sector apartments in two buildings varying between six and ten storeys high, 90 car parking spaces and amenity space.

2. Essential Living, the developer, has agreed that Lidl will operate the new store. Morrisons was unsuccessful in its quest to become the operator. Morrisons thus faced the termination of its lease by Essential Living, which owned the freehold of the site, without the prospect of occupying the new and larger store. Thereupon it began to object to the proposal. The genesis of Morrisons' objections, though understandably brought to my attention by both Hounslow LBC and by Essential Living, is irrelevant to the legal merits of the case it mounts; it is not disabled from taking the points it does.

3. Morrisons challenges that grant of permission on three broad grounds: (1) the Officer's Reports ought to have stated that the proposal was not in accordance with a relevant Local Plan policy, IMP2 and the site allocation, nor therefore with the development plan; both the Council and Essential Living contend that the proposal did accord with the relevant policy and with the development plan; (2) the Council ought to have assessed and considered the impact of the closure of the existing Morrisons supermarket on the viability and vitality of Brentford town centre, and the extent to which the proposed alternative arrangements in a s106 agreement would be effective in reducing that adverse impact or, as effective, when finalised, as the Council had anticipated when resolving to grant permission; the Council and Essential Living respond that there was no need for an assessment to be carried out of the temporary loss of a town centre supermarket pending redevelopment of a town centre replacement, and the proposed alternative arrangements met the requirements of the resolution to grant permission; and (3) Morrisons was treated unfairly and a legitimate expectation given to it by the Council, that it would be consulted about and have the chance to comment on the s106 agreement, had been breached; the Council and Essential Living suggested that no such legitimate expectation existed, but contended that it had not been breached: Morrisons had had the chance to comment on the material part of the s106 agreement in any event, but had not done so. The Council also contends, relying on s31(2A) of the Senior Courts Act 1981, that even if any of those grounds of challenge were made out, relief should be refused because it was highly unlikely that the outcome for Morrisons would have been different, if any of the errors had not been made.

4. The Council's Planning Committee, on 6 April 2017, accepting the Officer's recommendation, resolved to grant planning permission subject to conditions and the conclusion of a s106 agreement. There was then a considerable delay in concluding the s106 agreement, to the extent, that by February 2018, the Council resolved that the time had come for permission to be refused for want of progress, and on 12 February, the GLA decided not to take over the decision on the application, but to leave the Council to determine it. This appeared to produce a reaction from Essential Living, and progress on the s106 agreement followed swiftly. The Council notified the GLA of its further

change of position, and again the GLA left the decision in the Council's hands. The s106 agreement was signed, and planning permission granted on 4 May 2018. I shall have to go through that process in more detail when dealing with Ground 3, legitimate expectation and consultation by the Council with Morrisons about the s106 agreement. The original Ground 3 was rather subsumed into the first two Grounds.

Ground 1: breach of IMP2 and accordance with the Development Plan

5. Section 38 (6) of the Town and Country Planning Act 1990 required the Council to determine the application for planning permission in accordance with the development plan unless material considerations indicated otherwise. This duty requires attention to be paid to accordance with the development plan as a whole; breach by a proposed development of any one policy in a development plan cannot mean that the development is inevitably in breach of the development plan as a whole. Different policies covering different topics in a development plan may well pull in different directions, and a breach may be minor in degree or of a policy of minor significance in relation to the development proposed. All this is expounded in the judgment of Sullivan J in *R v Rochdale MBC ex p Milne (No. 2)* (2001) 81P & CR 27 at [47-50], and never since doubted.

6. The development plan here, so far as material, consisted of the London Plan 2016 produced by the Mayor of London, and Hounslow LBC's Local Plan adopted in 2015, after an Examination in Public by an Inspector appointed by the Secretary of State for Communities and Local Government, to consider its "soundness". This proposal gave rise to many considerations including the regeneration of Brentford town centre, housing and affordable housing provision, urban design especially of the residential blocks, traffic and noise. Mr Clay's submissions for Morrisons focused on the specific allocation of the site in the Local Plan, site 18, but before turning to that, I need to set its context in the Local Plan, along with other relevant policies.

7. The site is within Brentford town centre, a District Centre as defined in the London Plan. Policy TC1 of the Local Plan seeks to promote the success of the Borough's town centres. Town centres should be the focus of new retail and other town centre uses. Brentford was identified as a District Centre where further improvements were needed to strengthen its functions; it was struggling to fulfil its role as a District Centre, with a limited retail offer on the High Street and one main convenience store located to the east. Policy TC2 promoted the regeneration of Brentford town centre by encouraging "an appropriate increase in retail floor space, leisure and cultural uses…." At present it "underperformed with a more limited variety of shops and services than nearby centres, poor appearance and image, and negative perceptions from local people. This means that business opportunities are lost as local people choose to shop elsewhere. The council seeks to address these issues by promoting investment and regeneration in these centres." Redevelopment in Brentford included expanding retail use and other activities on various sites and it would also involve significant new residential accommodation and improving the public realm. Policy TC3 was to support the regeneration objectives by directing retail growth to the town centres and requiring impact assessments where development of over 500 sq.m of retail floor space was proposed outside one of Hounslow's four town centres, and the application of the sequential test. There was no suggestion that the proposal did not accord with those town centre policies.

8. There was no suggestion either that the proposal did not accord with policies for the provision of housing or affordable housing and their existence and thrust cannot be ignored where it is contended that the Council erred in law in its evaluative planning judgment that the proposal accorded with the development plan as whole. Policy SC1 encourages housing growth on allocated and non-allocated sites, including by making effective use of previously developed land. Housing growth was required to meet the projected population growth in the Borough; supply was to be maximised. The Borough's spatial strategy was to focus growth, including housing and retail in certain places, one of which was Brentford.

9. The London Plan 2016, also part of the development plan with which the proposal had to accord, contains policies for increasing housing supply and the supply of affordable housing. It requires Local Plans to seek to achieve their targets, and to exceed them, by identifying additional development capacity, releasing the potential of brownfield sites through intensification, town centre renewal and mixed use development. There was no suggestion that the proposal, by the time permission was granted, was inconsistent with the London Plan; the GLA's reservations had not related to the retail provision or to the mix of uses, but included the s106 agreement provisions for maximising affordable housing.

10. Site 18 was allocated for mixed use in the Local Plan, proposed as:

> "Retail-led mixed town centre use including residential, with an appropriate level of provision for town centre car parking.
>
> **Justification:** The mixed use allocation is based on a floorspace ratio of 75:25 retail to residential use. The supermarket continues to play an important role with regards to the provision of large floor plate retail floorspace within Brentford; however a diversification of uses could also contribute to the regeneration of Brentford town centre.
>
> **Phasing:** 2015 – 20
>
> **Land ownership:** Private
>
> **Context and constraints:** The site is within Brentford town centre and part of the secondary retail frontage....."

11. The policies for the implementation of the town centre strategy were first, in IMP 1, to implement the Local Plan in accordance with the principles of sustainable development as set out in the National Planning Policy Framework, the NPPF, of which the three dimensions were economic, social and environmental, and for which positive outcomes should be pursued simultaneously. Policy IMP 2, "Delivering Site Allocations", ensuring that site allocations contributed to the delivery of sustainable growth, was to be achieved by:

> "(a) Supporting in principle proposals that accord with the identified site allocation and the proposed use of the site and which have regard to the context, constraints and other provisions of the respective site allocations;…

> **We will expect development proposals to**
>
> (d) Accord with the identified site allocation and the proposed use of the site and to also have regard to the context, constraints and other provisions of the respective site allocations, including any council adopted planning brief;
>
> (e) Demonstrate that they have sought to meet the ratio of uses set out within the mixed use site allocations, and provide evidence to support any proposed variation with reference to other policies in the plan and provide open book financial assessments where viability is an issue…."

12. This particular policy was added to the draft Local Plan as a Main Modification by the Inspector who conducted the Examination in Public into the "soundness" of the draft Local Plan, reporting his conclusions to the Council. What he said, submitted Mr Taylor QC for Essential Living, was relevant to how IMP2 should be interpreted or applied. The Inspector commented:

> "198. **MM31** Adds new policy IMP2 'Delivering Site Allocations' in the interests of effectiveness and because of ambiguities in the descriptions of site allocations which could otherwise impede their delivery. In particular it seeks to provide that development proposals *'accord with'* the identified allocation and use of the site which in many cases included mixed uses. In the interests of the flexibility sought by the Council to respond to changing circumstances the identified allocation and use do not prescribe the amount of floorspace or unit numbers. Policy IMP2 also includes a requirement that development proposals *'have regard to'* the context, constraints and other provisions of each allocation description. The latter provision allows for the appropriate flexibility in the design of schemes.
>
> 199. The Council has put forward associated consequential additional minor modifications to the wording of the allocation descriptions and other provisions as M99 – AM136. For mixed uses sites these include reference to the ratios of floorspace in different use on which the allocations were based. This is a means of guiding development. The Council has proposed moving references to floorspace ratios from the 'Justification' paragraph to the 'Context and Constraints' paragraph as a further minor change. That and the wording of IMP2 mean that the ratios would remain flexible requirements to which regards should be had. In particular, whereas IMP2(e) provides that development proposals should seek to meet the ratio of floorspace uses set out in the allocations, it allows for variations for reasons which may include viability or which are otherwise supported by other plan policies."

13. The Officer's Report to the Planning Committee of 6 April 2017 recommended that approval be granted, subject to conditions and a s106 agreement covering identified topics. It summarised the proposal as:

> "a residential-led mixed-use scheme with 221 residential units and 4163 sqm of predominantly retail commercial floor space….The scheme is considered to be of a high quality design. Its location within Brentford town centre would assist with the on-going regeneration of the area and the development would comprise a mix of uses that would be suited to the sustainable location. The proposals would give rise to limited amenity issues, which are balanced against the benefit of much-needed housing to include discounted market rents."

14. The Report set out the position in relation to the London Plan policies on Town Centres and other topics. It took this from what the Greater London Authority had told the Council, in January 2017, in response to the application being referred to it: "The application broadly complies with the London Plan however, further information and/or confirmation, as detailed below is required to comply fully…." None of those areas of reservation applied to land use, in respect of which the GLA, noting the location of the site within Brentford Town Centre, observed that: "The proposal for mixed-use redevelopment and intensification of the site for commercial and residential use is supported in line with London Plan policies…." Although the scheme was broadly acceptable, it did not fully comply with the London Plan, but the deficiencies were remediable. The proposal for mixed-use redevelopment and intensification of the site for commercial and residential use was supported. The reservation in relation to housing required the GLA, the Council and the developer "to robustly interrogate viability to ensure that the maximum reasonable amount of affordable housing is being achieved."

15. Looking ahead for the moment, these deficiencies were remedied with the conclusion of the s106 agreement, and on 24 April 2018, the GLA, deciding to leave the decision in the hands of the Council, knowing of the progress on the s106 agreement, considered that the strategic issues raised at the consultation stage including housing had been satisfactorily addressed, and that the application complied with the London Plan.

16. I return to the Officer's Report. Policies were discussed in section 5. Paragraph 5.1 referred correctly to the obligation in s38(6), so that was clearly placed before the Committee. The important passage in the Report for these purposes is in section 6, headed "ASSESSMENT The principle of the proposed development". This reads:

> "6.1 Paragraph 14 of the National Planning Policy Framework (NPPF) states that there is a presumption in favour of sustainable development which should be seen as a golden thread running through both plan-making and decision taking. Paragraph 7 advises that there are three dimensions to sustainable development: economic, social and environmental.
>
> 6.2 Policy IMP1 (Sustainable development) of the adopted Local Plans sets out that the Council will implement the Local Plan in accordance with the principles of sustainable development. Further, policy IMP2 (Delivering site allocations) states that the

> Council will ensure that site allocations contribute to the delivery of sustainable growth and supporting infrastructure.
>
> 6.3 In the adopted Local Plan, the application site is allocated (Site Reference 18) as a retail-led mixed town centre use including residential, with an appropriate level of provision for town centre parking. The mixed use allocation is based on a floorspace ratio of 75:25 retail to residential use. It is further stated that the existing supermarket continues to play an important role with regards to the provision of large floor plate retail floorspace within Brentford; however a diversification of uses could also contribute to the regeneration of Brentford town centre.
>
> 6.4 The proposed development comprises of a greater amount of residential floorspace (13,016sqm) against its provision for retail/commercial (4.163sqm), at a ratio of 76:24. However, it is considered that the overall retail provision has not been compromised through the residential element of the application; with no residential apartments being located on the lower two floors of Building B or lower three floors of Building A.
>
> 6.5 Further, the development would re-use a brownfield site and provide for an enhanced retail offer within a defined town centre, which accords with stated aims in the NPPF, the London Plan and Local Plan. In addition, 221 residential apartments would help deliver much needed housing for the borough and contribute to the regeneration of Brentford town centre, in line with the aims of Local Plan Policy SC1 (Housing growth), TC2 (Ensuring the future vitality of town centres) and TC4 (Managing uses in town centres).
>
> 6.6 Consequently, it is considered that the proposed development would be in general accordance with the Local Plan allocation for the site and the broader objectives of the plan. The proposal is therefore acceptable in land use terms, notwithstanding the other planning issues that will be discussed in turn."

17. Thereafter, the Report covers the array of other development plan policies and issues to which the proposal gave rise, notably the need for housing. Mr Taylor drew my attention to passages relating to the viability appraisal for the affordable housing, further discussed in the later addendum Report. There was no issue but that the proposal was in accord with the policies for housing in the Local Plan. Indeed, there was no suggestion from Mr Clay that the proposal was inconsistent with any policy in the Local Plan other than IMP2 and the site allocation.

18. Section 7 of the Report dealt with planning obligations which, it was said, had to comply with regulation 122 of the Community Infrastructure Levy Regulations 2010 S.I. No.498, and therefore had to be "necessary to make the development acceptable in planning terms." It set out draft Heads of Terms which were likely to form the basis of

a s106 agreement, all of which are considered to satisfy this necessity test. Item (xv) was "Shuttle bus provision during construction phrase."

19. The conclusions of the Report in section 10 were as follows:

> "10.1 The proposal would result in the re-development of the site to provide for the delivery of much needed housing, including a provision of affordable housing on-site as well as a new foodstore and other flexible commercial space and public realm improvements.
>
> 10.2 The scheme is considered to be of a high design quality, suited to the existing site and surroundings and would provide a high standard of residential accommodation alongside commercial uses that would support the existing economic offer within the town centre. The proposal is considered to relate well to the local character and context, reflecting the site's location on High Street. The proposals would promote permeability through and around the site with significant benefits proposed to the public realm environment in the vicinity of the site.
>
> 10.3 By being located within the town centre, with its good public transport connections, any increase in car movements to/from the site will be negligible from the previous situation, with an emphasis on promoting alternative means of travel. Furthermore, the proposal would include a number of sustainable transport measures, including high levels of cycle storage and Travel Plans for both residential and commercial development to promote alternative modes of transport.
>
> 10.4 Whilst the upper sections of the development would be visible from Kew World Heritage Site, Kew Bridge, conservation areas and in views of The Beehive public house, the overall harm that would result would be outweighed by the public benefits of the proposal as identified above.
>
> 10.5 The proposal would therefore accord with the objectives and policies of the NPPF, the London Plan and the Local Plan as set out within this report."

20. An addendum Report was also prepared to deal with additional late objections including one on behalf of Morrisons, from chartered town planners and development consultants describing its letter, dated 31 March 2017, as "an important material consideration which carries significant weight". The letter dealt with the interpretation of policy. It offered a critique of the shortcomings of the Officer's Report. It presented a detailed report on car parking. No complaint is made about the way in which that was considered. Mr Clay's Skeleton Argument implies at [46] that they presented a detailed argument on retail impact; they did not. The retail impact assessment undertaken on behalf of Morrisons was provided to the Council in late 2017.

21. The short comments in their consultant's letter, on the effect of the closure of Morrisons' store, were in essence that this would divert trade to out-of-centre locations. The closure of the store and car park "would inevitably have a devastating effect on the future health of the town centre…". It would be "nonsensical" to permit the scheme "without resolving the retention of the Morrisons' operation and car park in the town centre during the construction period." How this was to be achieved was left to the Officer's imagination.

22. The author of the addendum Report was not persuaded by this sally, and responded that as the site was allocated for redevelopment within the Local Plan, a period of disruption was to be expected; and there were long-term benefits for the town centre from the proposal.

23. The addendum Report also dealt with an objection to the grant of permission without provision for an alternative temporary supermarket and car parking before demolition of the existing Morrisons store took place: Morrisons' car park was available to anyone shopping in Brentford town centre, and its temporary closure would be a major deterrent to shopping there. The response was that Heads of Terms had been agreed between Lidl and Essential Living, who were "exploring a package of measures to provide local residents with access to convenient shopping in the interim. These measures may include the following options: Temporary store; Regular shuttle bus to nearby foodstore; Home delivery assistance; and liaising with local health centres to redirect prescriptions to neighbouring pharmacies…." If members were minded to approve the application, those measures would be pursued through a s106 agreement. Those measures were described as expanding upon the provision of a shuttle bus referred to in the main report in its section dealing with the terms of the anticipated s106 agreement.

24. At the time when the Planning Committee considered these reports, the draft Heads of Terms available to officers, but not published, contained arrangements for such measures in language very similar to that provided to ES in March 2018, to which I come.

25. The Planning Committee resolved that planning permission be granted subject to, among other matters, "the prior completion of a satisfactory S.106 agreement as set out in section 11.0 of the report and heads of terms as set out in section 7.4 of the report (including amendments as set out in the addendum report)…."

26. Mr Clay submitted that IMP2 was a policy for supporting proposals which accorded with the site allocation and proposed use. Where the proposal did not accord with it, the developer had to provide evidence to support the variation with reference to other plan policies. This proposal did not accord with the site allocation because it was no longer retail-led but residential-led, and the use ratios were not 75:25 retail:residential but the reverse 24: 76 retail:residential. Thus, the proposal was in clear conflict with the Local Plan allocation. Members should have been told of this, and that they needed to consider whether there was evidential support for the variation. A justified departure from IMP2 would still have meant that the proposal did not accord with IMP2. Members needed to consider whether the proposal was then in accordance with the development plan. But it was irrational for Members to be told and to accept, as it was to be inferred they did, that the proposal accorded with the site allocation and IMP2. They had not considered s38(6) on the correct basis.

27. Mr Harwood and Mr Taylor contend that the Officer's Report rightly or at least, reasonably, judged the proposal to accord with the site allocation. The retail component provided a new and larger store than the existing Morrisons, together with further retail, cafe and bar floor space, making an increase of about 50% over what currently existed. The floor space was all at ground floor. It achieved all that the site allocation envisaged by way of retail floor space in scale and nature. Although the proposal was admittedly now "residential-led" rather than "retail-led", that only reflected the substantial increase in the residential component over what was originally envisaged. It had not been achieved at the expense of any retail component. It would not be sensible to reduce the size of the residential component, with the advantages in housing provision which it brought, in order to make the proposal retail-led. Morrisons did not object to the residential component, nor did it say that the retail component was too small or not of the nature envisaged by the site allocation and other plan provisions.

28. In my judgment, it is important to recognise IMP2 is a policy for implementing the policies of the plan through the site allocations. Implementing IMP2 is not itself an objective. So far as site 18 is concerned, the mixed-use allocation for retail with residential gives effect to town centre and Brentford town retail and residential policies. The language of IMP2 supports proposals which accord with the site allocation, as they are expected to do. But if the ratios are not met, "any proposed variation" can satisfy the allocation by reference to other policies in the plan. Although Mr Harwood QC for the Council and Mr Taylor are right that the specific ratios appear in the "Justification" part of the site allocation, which may be seen as of a lesser order in policy terms than the description of the allocation itself, the ratios reflect the description, and variations have to be justified under IMP2.

29. I appreciate the analysis which underlies the conclusion in the Officer's Report that the proposal would be in general accordance with the site allocation. I cannot agree. The wording of the site allocation, and the significance of the site allocation for the policy support in IMP 2, has to be respected in order to decide whether a proposal accords with it. The wording of the allocation is that the proposal is to be "retail-led"; this proposal is "residential-led." That is reinforced by the ratios; the flexibility in IMP2 to support a development with different ratios, which are but a guide, is not so great as to permit 75:25 to become 24:76. With such flexibility, a proposal with rather less retail floorspace could accord with the policy and yet defeat the whole object of the allocation. I do not consider either that the potential for variation within the policy, is so great that such a residential-led proposal could fit it without doing too much violence to the concept and purpose of variation and flexibility. Accordingly, I consider that the Officer's Report ought to have stated that the proposal did not comply with the wording of the site allocation and IMP2. I regard that as a matter of interpretation, and not as a matter of the application of the policy to a particular proposal, which would be a matter for the officer's planning judgment.

30. If the Officer's Report had approached matters in that way, it would, however, have been bound to explain, as it did, that the proposal accorded with the purpose and objectives of the town centre policies, of the site allocation itself, and with the housing policies of the development plan. It would have been bound to explain that the lack of accordance with IMP2 and the site allocation arose entirely from wording directed at a different situation from the one actually faced. The purpose of the policies and allocation would be more honoured in the breach of IMP2 and site allocation than in

their observance. The wording of "retail-led" and the ratios was intended to deal with a quite different sort of proposal from this one.

31. The purpose of development being "retail-led", and of the ratios giving predominance to retail over residential, was to ensure that Brentford District Centre's retail function was enhanced, and that the site was not developed instead predominantly for housing. This development achieved the objectives of the site allocation in terms of the size and nature of the proposed retail floor space; no one, including Morrisons, suggested otherwise. It did not object that there was too much or too little retail floor space or that it should have been configured differently. It was the extent of the additional housing development alone which created the problem with the wording of the site allocation. Yet it is evident that the additional housing, including affordable housing, in Brentford was supported by plan policies in the Local Plan and London Plan. There was nothing to suggest, and Morrisons had suggested nothing, that the scale of housing development, now proposed with the desired retail redevelopment, had been anticipated when the Local Plan ratios were set, let alone rejected. Understandably, Morrisons had not suggested to the Council that the housing should be reduced in extent to bring about compliance with the site allocation wording. Indeed, as the Council was satisfied as to its acceptability in planning terms, a reduction in its extent to comply with the wording of the site allocation would have been a sterile exercise.

32. In substance, that is the thinking that permeates the Officer's Report. The proposal satisfies the purpose of all the development plan policies. It does not satisfy the wording of one policy, albeit a central policy, but in the circumstances of this particular proposal, adherence to the wording would obstruct the achievement of its purpose. I am also satisfied that the error of interpretation did not lead to any material consideration being ignored, nor could it have led to any consideration being weighed differently, save that the purpose behind the policy would have been given greater weight than the wording by which that purpose was expressed. That wording appears not to have contemplated a proposal which could fully satisfy the retail requirement and yet achieve more in housing than anticipated. The structure of the reasoning would not have affected the outcome. The temporary adverse impact of the proposal on the vitality and viability of Brentford town centre was considered; it was not made material or immaterial by non-compliance with the text of the site allocation, contrary to Mr Clay's suggestion.

33. In such circumstances, had the Report directed members to the true meaning of the site allocation and IMP2, it is certain, or at the very least highly likely, that it would have directed them that the proposal accorded with the development plan, viewed as a whole. That would be an unarguably rational view; I do not see that an alternative view would be rational, but were it rational, it is highly unlikely in this case that such a view would have been adopted. I cannot see that a correction to the Officer's understanding of the meaning of the particular wording of the site allocation, would have changed his view of the accordance of the proposal with the development plan.

34. Accordingly, I am satisfied that, had the Officer not made the error which I have found he did, he would still have concluded lawfully that the proposal accorded with the development plan as a whole, and planning permission would still have been granted. Even if he might have concluded that it did not, it is highly likely he would still have lawfully recommended that planning permission be granted and that the outcome for Morrisons, without the error, was highly likely still to have been the same. For those

reasons, I refuse relief on Ground 1 and also, if it arises, on the basis of s31(2A) of the Senior Courts Act 1981.

Ground 2: the impact on viability and vitality

35. Mr Clay raised a series of points under this head.

36. Mr Clay did not contend that the Council ought to have undertaken its own retail impact assessment as a separate legal or policy requirement. In my judgment, there was no requirement in any development plan policy for a retail impact assessment to be undertaken for the purposes of this planning application for a retail store in a defined District Centre. It is on the eastern edge of the Centre but it is plainly within it. He referred to policies in the NPPF. Paragraph 26 did not require a retail impact assessment for a retail development inside town centres, as Mr Clay appeared to accept, although Eversheds Sutherland, solicitors for Morrisons, ES, had repeatedly argued in correspondence that it did apply because the construction phase of the development had the potential temporarily to cause expenditure to take place outside a town centre. ES's argument was a significant misunderstanding of what paragraph 26 says; had the NPPF intended to impose such a requirement for the construction phase of replacement town centre retail development, it would have said so expressly. To the contrary, it refers to retail impact assessments being necessary when assessing applications for retail development outside of town centres which are not in accordance with an up-to-date Local Plan.

37. Mr Clay relied instead on paragraph 27 which says that "Where an application…is likely to have significant adverse impact on one or more of the above factors, it should be refused." Those factors taken from paragraph 26 included the impact of the proposal on town centre vitality and viability, "including … trade in the town centre…up to five years from the time the application is made." Paragraph 27 of the NPPF does not deal with retail impact assessments. It requires refusal where the impact is found to be significantly adverse.

38. I reject Mr Clay's submission. Paragraph 27 is not relevant. First, paragraph 27 is clearly linked to the outcome of the assessment of a proposal to which paragraph 26 applies, because it aims not at carrying out an assessment, but at the consequences of the assessment required by paragraph 26. It is where the consequences of an assessment required under paragraph 26 are significantly adverse, that a refusal should follow. The sequential test is not relevant here. Second, paragraph 27 is clearly not written in the context of the temporary disruption which the redevelopment of a town centre retail site for retail purposes will create. Paragraph 27 is looking to a time horizon, five years, which is well beyond the construction period of the proposal. Even were paragraph 27 not to be linked to paragraph 26, had the NPPF meant that such a process should be undertaken to cover the period of construction of a replacement town centre retail development, it would have said so.

39. Mr Clay submitted that the impact of the closure of the existing Morrisons store and car park on the vitality and viability of Brentford town centre during the construction phase, was a material consideration, raised in its letter of objection but which was ignored. That is simply wrong as a matter of fact. It was considered adequately, albeit shortly, in the addendum Report. The response, referring to the town centre policies, site allocation and IMP2, shows that it was considered, along with proposals for

alternative provision, and very much in the context that the regeneration of the town centre's large plate convenience retail floor space would inevitably be disruptive temporarily, in order to achieve the greater benefits. There was no policy or rational requirement for a detailed analysis.

40. I also take the view that the very policies for Brentford town centre retail regeneration, coupled with the site allocation of the Morrisons store site for retail redevelopment, mean that acceptance of the temporary disruption to convenience trade on the site, the loss of car parking serving the town centre more generally, and the effect which that would have other town centre trade, had been built into the policy. The redevelopment proposals were not regarded as having a significant adverse effect on the town centre because of the benefits to retailing provision which they are judged to bring. The difficulties which local convenience shoppers would experience during the construction period were to be addressed by the mechanisms in the s106 agreement.

41. Mr Clay submitted that the Council ought to have carried out a refined retail impact analysis of the differing effects on the town centre of alternative store provisions, shuttle bus and home delivery, or ought at least to have considered their different effects, in order to inform its judgment about the grant of permission and the acceptability of the s106 provisions.

42. I cannot say that it would have been immaterial for the Council to have undertaken such a task. But it was not an error of law for them not to have done so. No such refined impact analysis was required by policy nor rationally in order for a lawful planning judgment to be reached on the acceptability of the proposed town centre store redevelopment. Members would obviously have been aware that the existing store and car park would close. The Local Plan policies were predicated on that effect, and were acceptable because of the regeneration their implementation would bring. What the Council required for acceptability was some alternative provision for the local convenience shopper, preferably in the form of an alternative store, and no doubt preferably as close to the existing as could be managed. But it was prepared to accept the outcome of the s106 agreement as meeting what it considered necessary. This was after all a provision which had to be agreed in the context of a development which the Council thought beneficial to Brentford and its town centre.

43. I accept that the Officer's Report does not specifically deal with the effect of the loss of the Morrison's car park on the rest of the town centre, though it would have been obvious to all that it would have an adverse impact, even though, as the Report pointed out, it was under-utilised. The nature of the permanent replacement parking is described and assessed. In my judgment, this point required no further assessment for a lawful decision; it was obvious that there were going to be temporary adverse impacts of the redevelopment of the site for regenerating retail and residential purposes which were judged in the site allocation and reports to outweigh the temporary disruption.

44. Mr Clay submitted that a smaller development, principally with significantly less residential accommodation, would have enabled a shorter construction time and hence a shorter period of harm to the viability and vitality of the town centre. It could also have created greater on-site flexibility, potentially permitting an alternative temporary store to be provided somewhere on-site. He took me to Essential Living's construction programme for the purposes of this submission. I do not accept it. This point does not appear in his Statement of Facts and Grounds, nor in his Skeleton Argument. Mr Taylor

in particular submitted that if that was the point to be made, Essential Living would have wished to reply with evidence of its own explaining the programme and the difficulties in the way of construction time, regardless of the scale of the residential accommodation, and alternative store locations on-site. He would also have wished to point out that it could not be assumed that other factors, such as the extent of affordable housing, would have remained the same because of the viability issues indicated in various passages in the two Officer's Reports, the GLA assessments, and indeed in the s106 agreement. This is not the manner and timing in which Mr Clay's submission should have been raised. It is not acceptable for the Court to be taken to that construction programme and for arguments about timescale and extent of development to be based upon Mr Clay's assertions and whatever the judge is supposed to be able to make of them.

45. Mr Clay submitted that the Council, in resolving to grant permission, had assumed that the temporary alternative store provision it contemplated for inclusion in the s106 agreement, would be provided on-site. But that was not required by the s106 agreement nor possible. Mr Knighting, the Council's East Area Deputy Planning Manager, who was dealing with the application, emailed ES on 7 November 2017 saying that now that Lidl had been identified as the store operator, options including a temporary store "on site" or a shuttle bus to a nearby foodstore were being finalised for inclusion in the next draft of the section 106 agreement, expected shortly. ES expressed surprise at the reference to a temporary store "on-site" because Morrisons had previously been informed by the developers that this would not be feasible. ES sought clarification. On 30 November Mr Knighting replied, in perhaps ambiguous terms, that the "option to provide a temporary store was clearly stated" in the addendum report, and it remained an option but no planning application had been received in respect of it. Mr Clay submitted that the Council's assumption was wholly unrealistic, as the construction programme demonstrated. He also submitted that it showed that the actual grant of planning permission was not authorised because it fell outside the scope of the resolution enabling an officer to issue the permission upon completion of the s106 agreement.

46. First, I am not satisfied that the Council did make the assumption attributed to it. I see nothing apart from the email of 7 November 2017 to suggest that the alternative store provision was envisaged to be on-site. The language used in the Reports is quite general and broad enough to encompass an alternative convenience store temporarily provided in premises elsewhere but sufficiently near to cater for the existing convenience shoppers, without the need for a shuttle bus. I see no reason why off-site provision should have been excluded as an alternative, even if it had not been the preferred location. I am not prepared to regard the language of Mr Knighting's email of 7 November 2017 as conveying that the temporary alternative store provision which the Council had in mind was limited to on-site provision. To me, the email is a short summary of options which had already been identified in the addendum Report, in order to make the point that there were arrangements which had to be considered with Lidl, and which were now to be finalised for inclusion in the next draft of the s106 agreement. Mr Clay's submission makes far too much of the email.

47. Second, the terms of the resolution resolving that planning permission be granted subject to the prior completion of the s106 agreement, set out above, made reference to "shuttle bus provision" and to further options in the addendum Report. I shall deal with

certain other criticisms which Mr Clay made of the finalised s106 agreement under Ground 3, but the Officer was entitled to conclude that the agreement did indeed match the requirements of the resolution under the broad head of measures to provide local residents with access to convenient shopping in the period during the redevelopment.

Ground 3: legitimate expectation and consultation over the s106 agreement

48. Section 7 of the Officer's Report dealt with planning obligations. Mr Clay pointed out that the draft heads of terms for the planning obligation, which was said to satisfy the necessity test, included "(xv) Shuttle bus provision during construction phase." If the s106 agreement were not concluded by a certain time, the officer was to be authorised to refuse permission.

49. Mr Clay placed no reliance on any policy or practice as the basis for the claim that Morrisons had a legitimate expectation of consultation over the terms of the draft s 106 agreement. He relied on what he submitted was an express promise of such consultation, which he said was broken.

50. I turn to the facts. Nothing material occurred before September 2017, some five months after the Council resolved to grant permission. On 15 September 2017, Mr Knighting, who was dealing with this application, emailed ES with the first draft version of the s106 agreement. ES replied on 17 October 2017 pointing out that the draft contained no provisions relating to shuttle bus or an alternative supermarket, and asking for a copy of any draft submitted by Essential Living which did. The letter continued: "… We would be further grateful for your assurance that the permission will not be issued unless or until we have seen a copy of the final draft of the section 106 and had an opportunity to comment." ES also said that a retail impact assessment was being commissioned and asked that no permission be granted until it had been considered by the Council. Litigation was "highly probable" were permission to be granted.

51. Mr Knighting replied on 22 October 2017, explaining that the first draft had contained a reference to the shuttle bus or alternative store being provided by Essential Living, but they could not take this further until the store operator was known. He dealt with the request for an assurance that permission be not issued until Morrisons had seen the final draft of the agreement as follows: "… I will send further iterations of the deed but I cannot delay the determination of the application if any response to this is delayed." That is the promise relied on by Morrisons. On 26 October, ES responded that they were grateful for confirmation that they would be consulted over further iterations of the agreement, noted but were rather dismissive of concerns over possible delay, adding however that they would respond promptly to consultation, but would expect a fair opportunity to respond.

52. I have already referred to the exchange of emails on and after 7 November 2017, dealing with the "on-site" provision, which were written in the context of the content of the s106 agreement. ES pressed for the updated draft agreement on 18 December 2017, and again on 16 January 2018, believing that the deadline for completion of the agreement had already expired. The Council said that it was working to a revised target date of 28 February 2018. ES were told by Mr Knighting on 2 February that the Council thought the delays were such that it now was minded to refuse permission. This led to rapid progress in the drafting of the agreement.

53. On 21 February 2018, ES pressed for a copy of the draft Section 106 Agreement, "which indicates the proposed alternative food retail provision to substitute our client's offering." This letter referred back to earlier correspondence in which ES had said that the impact on the viability and vitality of the town centre of the closure of Morrisons during the period of development would be such that planning permission should not be granted without an assessment of that effect and expenditure the while taking place elsewhere. It asked how the loss was to be time limited. It then repeated ES' mistaken view of paragraph 26 of the NPPF. On 7 March 2018, Mr Knighting emailed ES with the updated version of the draft agreement as produced by Essential Living's solicitor, to whom Mr Knighting would be responding shortly with further "edits". ES objected to the Council continuing these negotiations.

54. This version of the draft agreement contained the following provisions in relation to access to convenience shopping during the construction phase essentially the same as the draft Heads of Terms, available to officers in March 2017:

> "**12 SHUTTLE BUS/ALTERNATIVE FOOD STORE PROVISION**
>
> 12.1 The Owner shall use reasonable endeavours to make arrangements for temporary alternative food store provision in conjunction with the proposed operator/s of the food store to be provided as part of the Development in lieu of the current provision at the Development Land during demolition and construction works carried out pursuant to the Permission.
>
> 12.2 Should the Owner (acting reasonably) be unable to procure a temporary alternative food store provision within 6 months prior to Implementation, then the Owner shall make alternative provision, including but not limited to the provision of a shuttle bus to an alternative local food store, or arrangements for increased or discounted home delivery for food and groceries with a provider of the Owner's choosing, until such time as the new food store on the Development Land is Practically Complete.
>
> 12.3 In any event, 6 months prior to Implementation, the Owner will prepare and submit to the Council for approval in writing (such approval not to be unreasonably withheld or delayed) a scheme outlining the temporary measures which are to be adopted by the Owner during the construction period."

55. On 5 March 2018, Mr Knighting emailed the GLA to say that he hoped to have a draft of the agreement finalised by the end of that week.

56. On 9 April 2018, ES responded to the email of 7 March 2018, perplexed by the continued extensions of time afforded to Essential Living to finalise the agreement. It continued "All the points raised within our correspondence dated 21 February 2018 stand good." On 23 April, Mr Knighting told ES that the application had been referred back to the GLA for their Stage II decision as to whether the Mayor would intervene; this decision was awaited before the Council would proceed. ES asked for a copy of the referral which Mr Knighting emailed on Tuesday 1 May, late in the evening. Attached

as well was a further draft of the s106 agreement. The email did not state that this version was the final version, simply awaiting signature, or that it was anticipated that the permission would be issued that week, or that time for any reply from ES was very short. No reply had been sent by the time the permission was issued on 4 May 2018.

57. It was not really disputed by Mr Harwood that the email of 22 October 2017 itself constituted a promise sufficiently clear and unqualified to create a legitimate expectation that further drafts, including the final draft, of the s106 agreement would be provided to ES for their comments. To my mind, the qualification that determination would not be delayed if any response by ES were itself delayed, contains a clear implicit promise that there would be time for a response to be provided without delay. This is not a qualification to the promise but rather a restriction on the time for comment, which does not prevent the promise giving rise to a legitimate expectation. The promise did not involve an acceptance of the terms in which ES wrote on 17 October 2017. Mr Harwood said that it was not a promise of consultation with all that might entail. It is not necessary to reach a conclusion on how far it went in that respect.

58. But this promise, however far it went, was not a simple, unilateral promise. It is predicated on ES taking the opportunity to comment on the drafts as they were received. As Mr Clay accepted, the obvious purpose behind ES seeking copies of drafts of the agreement, before the final version, was so that they could respond with comments which might or might not be taken on board. They did not need to wait for the final version in order to comment on earlier versions. The Council was not just entitled to assume that ES would make such comments as it had on those earlier versions, rather than wait until the final version; that was the very basis upon which the earlier drafts were sought and sent. The promise creating the legitimate expectation did not permit ES to keep its powder dry, only putting forward for the first time substantive points in response to the final version of the agreement, which could have been made on the draft versions as ES was sent them. There was, therefore, to the extent that Morrisons assert a legitimate expectation, an implicit acceptance by Morrisons that it would respond with any comments it had on the drafts as they were presented. If there was no such implicit acceptance, it is impossible for Morrisons to contend that the promise was devoid of relevant qualification. The promise was effectively that the Council would provide the drafts for ES to respond quickly on the points it wished to, and on the basis that ES would do so, and not withhold its comments until the final version.

59. The promise to provide the drafts, including the final draft, was complied with. Although ES might well have appreciated, in the light of the GLA's decision of 23 April 2018, which was available on the GLA website, that the grant of permission was imminent, the Council did not tell ES that the version sent late on 1 May 2018 was the final version, or that a response was required on 2 or 3 May 2018 if it were to be received before permission was issued. In the absence of anything to alert ES to the need for such a very swift response, I consider that the legitimate expectation was breached, subject to what I say later about ES' response to the March 2018 version. It is not sufficient for the Council to say that the permission would not be delayed if the response were delayed, in these circumstances. There was no basis for it to judge that the response was being delayed. I appreciate that the Council could have concluded that two days would be ample time for a response, given the very limited addition to the only part of the s106 agreement of interest to Morrisons, and one which could not possibly found an objection. I appreciate that ES made no inquiry as to how long it had

in which to reply. I also appreciate that where the GLA referral, and the other emails between the Council and the GLA, which ES also received on 1 May 2018, together with the draft decision notice, all indicated to ES that the decision-making process would be coming to an end shortly. But the knowledge as to the exact timetable and the true shortness of time was exclusively the Council's.

60. However, I am not persuaded that there was any unfairness at all in substance in what the Council did, first, in the light of the absence of any substantive response to the March 2018 draft of the s106 agreement which contained the key provisions in relation to the replacement retailing. I reject entirely Mr Clay's assertion that the reason ES did not respond substantively to the March version, was that Mr Knighting's email of 7 March 2018 said that he would be responding shortly to Essential Living with further edits, and ES decided to wait for those edits. On Mr Clay's assertion, ES did not do what its request for successive drafts impliedly accepted it would do, which was to comment on the drafts so far as they could. Mr Clay's surprising assertion was entirely unsupported by evidence. There had been no suggestion to the Council that their comments on the drafts of the s106 would be withheld until the final version. Had ES told Mr Knighting of the stance which Mr Clay said ES was now adopting in response to the March version, the Council would have been able to make its position clear, and legitimately adjust its position. If ES did not accept, tacitly or explicitly, such a reciprocal obligation, that simply shows that there was no legitimate expectation, sufficiently clear and devoid of relevant qualification.

61. What is striking is how ES responded to the draft agreement sent on 7 March 2018. This was the first time they saw the detailed provisions for the alternative shopping arrangements. Yet their response, over a month later, was simply to refer back to previous correspondence of 21 February 2018 written before they ever saw the detailed provisions. As the only change between the March and May versions was that provision was now made in the May version for liaison with local health centres to redirect prescriptions to neighbouring pharmacies during the construction phase, it could not have added to the criticisms which ES might have wished to make. Nearly 2 months had passed, without any response to the terms of the agreement as ES had it.

62. The obvious inference is that ES, which had the chance to comment on the key provision, had nothing of substance to say, rather than that they asked for drafts in order to comment on them, and then resolved to do no such thing but to await the final draft. And did so, without telling the Council, all the while holding it to a promise which ES knew was given to prevent ES doing just that. I am not willing, in spite of Mr Clay's advocacy, to infer ES acted like that. No such change of position was disclosed in the Claim Form. But if ES did, Morrisons are in no position now to claim that the legitimate expectation remained in effect after March 2018.

63. Second, although Morrisons has complained that it had no real opportunity to make such points as it had after receipt of the final version, it has never vouchsafed in evidence for the Court that it had any points to make or what those points were. This is a topic on which evidence should have been furnished if there were anything in the point. When pressed, Mr Clay said that the fact that Morrisons have brought proceedings was testimony enough to the fact that it would have wished to make points in relation to the s106 agreement. I decline to draw that inference. There is no evidence as to the motivation behind these proceedings; there does not have to be. But where the operator of a store with, as Mr Clay told me, a turnover of £8m a year, is able to

continue to trade while proceedings continue, I am not prepared to infer that proceedings have been brought because of a sense of injustice at not being able to make points about the text of a s106 agreement on the provision of an alternative store, which they did not make when they had the chance. As Mr Harwood and Mr Taylor pointed out, Morrisons will have no interest in the site once its lease is terminated and it ceases to trade. The text of the agreement does not affect it save to the extent that it provides scope for an argument in judicial review proceedings, which confer benefits of a different stripe.

64. It is not surprising either, in view of the absence of substantive response to the 7 March 2018 version of the agreement, that it has provided no evidence about what it would have said. The assertion of unfairness is made wholly without evidential support that there was any point of substance it would have made. I am not persuaded at all, in the absence of evidence, that the criticisms which Mr Clay made of the agreement are points which Morrisons would have made in response to the May version of the agreement, having failed to respond to those self-same points in the March version. Not one of his points required reference to the final draft of the agreement. None derived from any differences between the two versions.

65. Mr Clay said that Morrisons would have repeated what ES had said earlier in the letter of 21 February 2018, and relying upon its retail impact assessment, submitted in late 2017, to say that the development would have "devastated" the town centre, without provision for alternative shopping in the town centre. They would have said that the agreement did not comply with Regulation 122 of the Community Infrastructure Regulations because it failed to make the development acceptable, for which purpose the Council had to assess what the impact would be. They would also have argued that the agreement was ineffective: there was nothing to compel the developer to provide a temporary alternative foodstore nor to constrain it to the town centre; the arrangements for the shuttle bus could be substituted by home delivery. Mr Clay drew my attention to the limited nature of the obligation to use "reasonable endeavours", and that there are more stringent ways of expressing obligations to achieve objectives.

66. I do not accept Mr Clay's assertion that ES would have made those points in response to the final version of the s106 agreement. The assertion is entirely unsupported by any evidence, on an issue where evidence was obviously required and obviously available, with experienced planning solicitors instructed well before the decision, and threatening litigation too. These are points the advocate has fashioned, and if they go anywhere, they go instead to the question of whether the agreement suffered from deficiencies which caused it to fall outside the scope of the resolution permitting the Officer to issue the permission. That is how I shall consider them.

67. Mr Clay submitted that, whether or not ES would have made the points he attributes to them, the s106 agreement did not satisfy the resolution. He repeated the points he said ES would have made. I point out that ES could have but did not raise this issue in response to the March version, as it could so easily have done. The issue here however is not whether any legitimate expectation was breached. It is a different point about the scope of the Officer's authority derived from the resolution, not in Mr Clay's Skeleton Argument but adequately trailed in the Statement of Grounds. There is nothing in it. The resolution leaves a very substantial measure of judgment to the Officer about the agreement.

68. I accept that some alternative provision for local convenience shoppers was regarded as necessary by the Committee in its resolution, which left to its Officer the judgment as to the acceptability of the provision made in the agreement. Nothing in the resolution suggested that any particular form of alternative shopping provision was required for acceptability. It would have been obvious that, to the extent that the alternative did not take the form of a town centre store, there would be a greater impact on the vitality and viability for the period of construction. The resolution did not require the provision of a temporary store whether on-site or off-site in the town centre or anywhere else nearby, nor did it require the provision of a shuttle bus. The Officer was not required by the terms of the resolution to carry out a retail impact analysis of each or any scenario which the s106 agreement could present. I have already said that there was no need for a retail impact assessment of the differences between those various alternatives in order for a lawful planning decision to be reached, and that the Officer's Reports dealt adequately with the position during the development of the site. What was acceptable required a lawful planning judgment, which could be reached based on professional understanding and local knowledge by the Officer within the scope of the resolution.

69. Mr Clay made something in this context of the basis upon which the Council had proposed to refuse permission in its draft decision sent to the GLA in February 2018. In the absence of a completed legal agreement "to secure the necessary planning obligations in respect of securing provision of temporary store or shuttle bus during construction phase … and ensuring continued access to a foodstore…", the proposal would not comply with a number of policies. It continued that the proposal would also not be acceptable in the absence of a completed legal agreement to secure "necessary planning obligations in respect of affordable housing provision and a viability review mechanism …." There is nothing in the reasons for refusal proposed by officers in February 2018 to assist Mr Clay. It affirms the need for alternative shopping provision but neither revokes nor qualifies the Committee's April 2017 resolution; it merely affirms the need for compliance with it.

70. Only one point arose from the text of the s106 agreement itself, and it arose on both versions. It is correct as a matter of construction that the agreement does not compel the provision of an alternative store or of a shuttle bus, and that there can be more stringent forms of obligation than to use reasonable endeavours. But the agreement is not unenforceable: clause 12.3 would prevent implementation without a scheme approved by the Council for the provision of such measures. Lidl has a commercial incentive to provide attractive shopping as soon as possible to meet the needs of those who had hitherto looked to Morrisons and to reduce the trade lost from those who would in the future look to Lidl in Brentford town centre. There is no basis for supposing the Officer misunderstood the effect of the s106 agreement.

71. The Officer knew the preferred and fall-back arrangements and rationally judged the agreement satisfactory for its purpose, which was to make alternative convenience shopping provision for local residents. The judgment as to whether home delivery was a satisfactory temporary solution for the convenience shopper, as a final fall back, was a matter for his judgment. He had the power so to conclude on the Council's behalf, conformably with the resolution. He reached a rational planning judgment that it was acceptable. In my judgment, it complied with the broadly expressed resolution.

72. Mr Clay is right that there could be a period between the closure of the Morrisons store and the implementation of the permission which triggers the s106 obligation. But there

was no obligation in the resolution for that to be avoided; and it is not to be supposed that the Officer was unaware of that hiatus in reaching his view that the s106 agreement met the resolution. I reject Mr Clay's contention that if the provision of a temporary store were not guaranteed, it became an immaterial consideration. The potential for its provision together with the other options was a material consideration, as was the fact that it might not be provided and some less satisfactory provision would have to be made. That was all inherent in the scope of the resolution, leaving the precise form of alternative shopping arrangement to the judgment and satisfaction of the Officer. Mr Clay is simply wrong that it was unlawful for permission to be issued if a temporary store were not secured.

73. None of Mr Clay's arguments come close to showing that the s106 agreement, or the grant of permission, fell outside the scope of the resolution authorising its grant.

74. Accordingly, on the basis of the very modest non-compliance with the legitimate expectation, assuming that it existed and continued through to May 2018, there was no unfairness in practice. There is no basis for quashing the decision, and I would decline in the exercise of my discretion to quash it, if a ground for quashing was made out on the facts as to the legitimate expectation as I have found them. It is also highly likely, applying s31(2A) of the 1981 Act, that the outcome for Morrisons would not have been different if any error in not notifying ES of the short time for replying had not been made. Nor was there any failure of the agreement to meet the requirements of the resolution.

Conclusion

75. This application for judicial review is dismissed.