



Neutral Citation Number: [2023] EWHC 456 (Admin)

Case No: CO/821/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2023

Before :

THE HONOURABLE MR JUSTICE DOVE

Between :

Bentley Pauncefoot Parish Council	<u>Claimant</u>
- and -	
Redditch Borough Council	<u>Defendant 1</u>
-and-	
Bromsgrove District Council	<u>Defendant 2</u>
-and	
UKLD Limited	<u>Interested</u>
	<u>Party</u>
-and-	
Heyford Developments Limited	<u>Interested</u>
	<u>Party 2</u>

Horatio Waller (instructed by **Richard Buxton Solicitors**) for the **Claimant**
John Litton KC (instructed by **Anthony Collins Solicitors**) for **Defendant 1 and 2**
Peter Goatley KC and Sioned Davies (instructed by **Gateley Legal**) for **Interested Parties 1 and 2**

Hearing dates: Tuesday 6th December 2022

Approved Judgment

This judgment was handed down remotely at 12pm on 2nd March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE DOVE

Mr Justice Dove :

1. The claimant brings an application for judicial review in relation to the grant of planning permission by the first and second defendants on 21st January 2022. Both of the defendants were engaged because the scale of the application involved land comprised in both of their administrative areas. The planning permission under challenge is a hybrid application containing both outline and detailed matters. The permission grants outline planning permission for the demolition of existing buildings and the erection of up to 2,560 dwellings, a local centre including retail floor space, health and community facilities and a three-form entry first school with associated playing area and parking, together with all necessary enabling ancillary works in respect of these features. The detailed element of the application was for the creation of a means of access off Birchfield Road, Cur Lane, Foxlydiat Lane and emergency pedestrian and cycle access to Pump House Lane. The application was subject to numerous conditions along with an obligation under section 106 of the Town and Country Planning Act 1990.
2. The case is advanced by the claimant on three grounds. The first two grounds relate to contentions that the committee were misled and that they did not have before them the necessary information to reach a lawful decision, in particular in relation to the implications of the development for impacts created by vehicular traffic. The details of these contentions are set out below. The claimant has the benefit of permission in relation to both of these grounds. Ground 3 relates to the claimant's concerns about the failure to require a contribution towards educational transport. Permission to apply for judicial review in relation to this ground was refused, and thus ground 3 is before the court as an application for renewal of permission in the first instance; if permission is granted then a substantive determination of this ground is required.
3. As at the hearing, I wish to record my thanks to all of the legal teams engaged on all sides of this case who have greatly assisted the court, both with their focused written and oral submissions, and also in the provision of helpful documentation to assist both in the preparation for the hearing and in the preparation of this judgment. I am particularly grateful for the preparation of an extremely helpful and well edited core bundle which contained the vast majority of the documents required for the purposes of this case within 250 pages, a size which facilitated efficient use at the hearing.
4. Although there are two defendants and two interested parties, they were each jointly represented. In the judgment hereafter when either defendant or interested party are used it is shorthand for both unless there is a specific need to identify a particular defendant or interested party.

The Facts.

5. The application with which this case is concerned was originally made in 2016. As set out above, it straddles the administrative area of the first and second defendants who both needed to reach decisions in relation to it. The application site is also within the administrative area of the claimant. It was allocated as a mixed-use urban extension in the second defendant's Local Plan and referenced as such in an appendix of the first defendant's Local Plan. Both of these plans were adopted with the site allocated in January 2017.

6. The application was supported by an environmental statement dated March 2016. The environmental statement contained, at chapter 14, an assessment of the impact of the development on Traffic and Transport. This assessment included an analysis of the approach to the phasing of access to the site. At the north eastern boundary of the site there is a principal distributor road, the A448, which was intended to form the primary access for the development. At paragraph 14.6.15 the environmental assessment provided as follows:

“14.6.15 However, it is likely that access for an initial phase of the Proposed Development would have to be gained via Foxlydiate Lane, and also potentially via the existing bridleway track at the A448 Overbridge. It is anticipated that this would be for a short-term duration of 12-18 months whilst the main access and necessary internal highway infrastructure is completed.”
7. The environmental statement went on to calculate that the increase in construction vehicles on Foxlydiate Lane compared with its base traffic amounted to a 59% increase for the initial phase of construction prior to completion of the main access to the A448. As a result of the analysis of the various impacts on the road links considered by the environmental statement it concluded that all other highway links could be screened out of any further assessment, with the exception of Foxlydiate Lane which was analysed further. Ultimately, when considering the cumulative impact upon residential amenity on local roads, the assessment concluded that the proposed development would be likely to have “a direct, permanent, long-term effect of moderate adverse significance.”
8. In September 2018 the interested party submitted a Transport Assessment to the defendant in support of the application. At section 4.3 this document contained an indication of phasing of the development which included as phase 1 the completion of 1,080 houses to be split into a north and a south section centred around 3 access points at Birchfield Road (the A448), Cur Lane and Foxlydiate Lane and it included the school and the local centre. Subsequent phases would comprise the balance of the housing proposed. An accompanying plan illustrates that the Foxlydiate Lane access would be immediately adjacent to proposed housing development as part of phase 1 north. A further plan contained within the Transport Assessment sets out the access strategy, namely that the principal site access would be the Birchfield Road or A448 access, with the Foxlydiate Lane and Cur Lane accesses being secondary access points.
9. The application was referred to the first defendant’s planning committee on 13th November 2019. The phasing of the access strategy was referred to, and it was explained that the site would initially rely upon an access from Foxlydiate Lane prior to the construction of the principal access off Birchfield Road. The difference in levels between the proposed Birchfield Road access and the site required substantial engineering works and earth moving and this was the reason for the need for that phasing. The committee report noted that there was no objection from Worcestershire Highways, a department of Worcestershire County Council and the highway authority for the application. The committee report noted the contributions required in respect of transport issues and the acceptance that these contributions met with the approval of the highway authority.
10. The committee report recorded a response from Worcestershire Highways to the comments lodged by the claimant in respect of the timing of the access. The response

reiterated the recognition of the significant engineering works required to create the site access which justified the phasing approach. The second defendant had commissioned an independent engineering consultancy to scrutinise the transport aspects of the application, and those consultants had reached the conclusion that there was no transportation reason why permission should not be granted.

11. The officers' conclusions in relation to transport and accessibility issues were that, accompanied by the package of measures proposed, the application was acceptable, and that there were no transport related reasons for permission to be refused. In an update to the committee report officers noted that there had been an additional representation from a member of the public expressing concern about the proposal to use Foxlydiat Lane for access to the site for the purposes of the construction of the first 200 houses of the development, which it seems then prompted further discussion at the committee meeting in respect of this issue.
12. In the minutes of the planning committee meeting it is noted that amongst the highways issues raised was the concern that Foxlydiat Lane would not be suitable to be used as the initial access for the site for the purposes of construction traffic up to the completion of the first 200 dwellings. Members were noted as expressing the concern that Foxlydiat Lane was too narrow to accommodate construction traffic alongside the extra vehicles arising from the first phase of 200 dwellings, and that the extent of the traffic use gave rise to safety concerns and would lead to traffic congestion. A relevant extract from the minutes is quoted below. Highways officers responded to this concern by advising that a construction traffic management plan had been drawn up and Foxlydiat Lane had been assessed as suitable and sufficiently wide for the purpose. The Foxlydiat Lane access would only be used during the construction phase of the first 200 houses, following which a condition would prevent the developer from using it further for construction purposes. This condition containing the trigger point of 200 houses had been negotiated with the developer and reflected the fact that significant engineering works would be required in order to achieve the main access point to the site on Birchfield Road. However, officers advised members that they could decide to amend this figure if they wished and that this did not form part of the actual application.
13. Members are noted as having expressed a range of views on this topic and it was requested by them that officers renegotiate the trigger point or lower it to 100. Ultimately, it was decided to defer the application, in particular so far as is relevant to the present case, so as to enable further consideration of the condition limiting the use of Foxlydiat Lane access during the construction phase and to further negotiate the opportunity for the Birchfield Road access to be used as the initial access for construction traffic. Again, the reasons for deferral are quoted below.
14. Following the committee decision, the defendant's planning officers took these points up with the planning consultants acting on behalf of the interested party. The upshot of the interested party's further consideration of the issues was the production of a Construction Access Review ("CAR") which is considered below. Discussions occurred as to the formulation of conditions to address the concerns which had been expressed by members. On 16th January 2020 the defendant's planning officer was in correspondence with an officer of Worcestershire Highways in relation to concerns about the operation of the Foxlydiat Lane access. In particular, the correspondence bears upon the phasing strategy in relation to access which was recorded in the committee report for the meeting of 13th November 2019. This strategy was that the

Foxlydiate Lane access was to be detailed and constructed prior to the first occupation of the development; the Birchfield Road access was to be detailed and constructed prior to occupation of the 200th dwelling; a further access at Cur Lane was to be detailed and constructed prior to the occupation of 400 dwellings; and finally prior to the occupation of 600 dwellings the main access and junction with Hewell Lane was to be provided prior to the occupation of the 600th dwelling.

15. The concern expressed by the officer was that whilst members' primary concern was construction traffic, it was unclear whether a disproportionate amount of residential traffic arising from the occupation of dwellings might be invertedly directed towards the Foxlydiate Lane and Cur Lane access points until the trigger point of 600 dwellings was reached. In particular, the officer's concern was that "the traffic arising from 600 completed and occupied homes could be using Foxlydiate Lane and not the access onto Birchfield Road, because the access on to Birchfield Road will have only needed to have been constructed to serve residential traffic until the 600th dwelling was occupied, so may not be suitable (or even available) for domestic traffic, because whilst the threshold for the provision of the construction access on to Birchfield Road is now zero, there is nothing to require that it also be made available for the occupiers of the first 600 dwellings as a means of access/egress". Allied to this was a concern of a similar nature in relation to traffic choosing to use Cur Lane prior to the Birchfield Road access being suitable for traffic deriving from the occupation of dwellings.
16. In his reply dated 21st January 2020 the Highways Officer observed that it was correct that "up to 600 dwellings could be serviced off the new permanent residential access on Foxlydiate Lane, after that the Birchfield Road signal-controlled access must be provided which will see the majority of those dwellings using that access instead". The Worcestershire Highways officer's conclusion was that given the significant scale of the junction alteration required at Birchfield Road and its cost, alongside the time to deliver it, this approach was not unreasonable.
17. On the same date the defendant's planning officer sought clarification in particular in relation to whether or not prior to the 600th occupation it would be acceptable for occupational traffic to utilise the Birchfield Road access that is completed at the 600th dwelling threshold, or alternatively that both construction traffic and new occupiers could use the Birchfield Road access before the 600th dwelling trigger point. The Worcestershire Highways officer's reply was as follows:

"What I am saying is that it'll be a construction site until then so the Applicant is unlikely to want to allow the wider public into an unfinished area so on site traffic controls will probably see domestic traffic on to Foxlydiate Lane until the main access is finished which should be by the 600th occupation at its latest. Whilst there would be increased flow on Foxlydiate Lane it would be for the 200m length to access Birchfield Road which does not have the same alignment as the length of the lane to the South. I am not of the opinion that there is a Highways reason to limit this, and once the new link road and junction becomes available a shorter and faster route would be provided so logic says that driver would use the new access, we cannot control the flow of domestic traffic by condition. At 600 units the new access will be built which can cater for domestic and

construction traffic, some residence may choose to use Foxlydiate Lane but that clearly will depend on their personal circumstances.”

18. As noted above the CAR had been prepared by independent traffic consultants to assist in relation to the issues concerning construction traffic. It was produced in January 2020 and the purpose of the report was identified as being to address the issues which had been raised by members in relation to construction traffic. The report provided a full assessment of the various construction access options available, commencing with seven potential options, some of which were immediately discounted, leading to a detailed analysis of two options, option 2 Birchfield Road and option 4 Foxlydiate Lane.
19. The CAR noted that whilst Birchfield Road would provide the most suitable point for construction access, given its proximity to the existing highway network, the difficulty created by the significant difference in levels between the existing highway and the site (amounting to a change in levels of approximately 4 metres over a 15 metre distance at the steepest) it would be impossible to immediately access the site from this location without building up levels to a suitable gradient from within the site. Option 4, Foxlydiate Lane, was the most appropriate option to permit access to the site from elsewhere in order to construct the Birchfield Road access.
20. The analysis within the CAR went on to set out the method which it would be necessary to employ in order to construct the Birchfield Road access. The CAR sought help from specialist groundwork contractors as to the number of construction vehicles anticipated to use the Foxlydiate Lane access in order to undertake construction of the Birchfield Road access. From this advice it was concluded that the Foxlydiate Lane access would be required for a period of approximately 24 weeks, with 25 construction vehicles per week using it, in order to complete the Birchfield Road access. The CAR went on to propose that, notwithstanding the agreement of the highways authority to the use of Foxlydiate Lane for construction of up to 200 units, there should be a condition restricting and prohibiting the occupation of any dwellings on the site until the details of the Birchfield access road have been submitted, approved, and constructed.
21. The application returned to committee on 19th February 2020. In the committee report the phasing approach was again set out, identifying that the development would commence in the south west corner of the site, initially relying upon access from Foxlydiate Lane prior to the construction of the principal access at Birchfield Road. The Birchfield Road access could not be constructed immediately because of the difference in levels between the external highway and the site at Birchfield Road. The report went on to set out in full the findings and conclusions of the CAR, including in particular the need for first access to the site to be gained from Foxlydiate Lane to provide a dedicated construction access for the construction of the Birchfield Road access. The interested party had also agreed to the imposition of a condition effectively prohibiting the construction of any dwellings prior to the approval of details for a construction of an access on to Birchfield Road.
22. A further update report was provided in which additional conditions in respect of construction traffic access were proposed. These conditions provided firstly for a requirement for engineering details of a dedicated construction access onto Foxlydiate Lane to be submitted and approved by the local planning authority prior to the commencement of the development, and then constructed in accordance with the

approved details. Secondly, prior to the construction of any dwellings it was a requirement that the details of a construction access on to Birchfield Road were to be submitted and approved by the local planning authority, and thereafter constructed in accordance with those details. Finally, a condition required that once the dedicated construction access on to Birchfield Road along with the construction of the haul road linking the Foxlydiate Lane access to the Birchfield Road construction access had been provided, use of Foxlydiate Lane for access by construction traffic was to permanently cease and thereafter construction traffic was required to use the dedicated construction access from Birchfield Road. Worcestershire Highways responded to various concerns on transportation matters raised by the claimant and in essence recorded that the interested parties' proposals had been the subject of scrutiny not only by officers of the highway's authority, but also by independent consultants instructed on behalf of the second defendant and that there was no foundation for any concerns in relation to those issues.

23. A second update report was provided for the committee meeting of 19th February 2020 which contained representations made by the claimant on 18th February 2020, in particular in relation to the conditions which had been proposed in the first update report. The representation from the claimants was as follows:

“If we understand the conditions correctly, they are as follows:

1. Access on Foxlydiate Lane to be used initially for construction of the main Birchfield Road access and ‘haul road’ between them ONLY.

2. Once the Birchfield Road access is completed it will be used SOLELY for construction traffic (which will not be allowed to use any other access) until ‘prior’ to the occupation of the 600th dwelling

3. For the first 399 dwellings occupied the Foxlydiate Lane Access will be the ONLY access.

4. The Cur Lane Access :

- is this the roundabout only or both the roundabout and the new connection to the rest of Cur Lane?

- it (they?) have to be completed prior to the occupation of the 400th dwelling.

5. The main Birchfield Road access and Hewell Lane improvement works have to be completed prior to the occupation of the 600th dwelling.

6. If the above is correct it means that Foxlydiate Lane will be supporting all the traffic for the first 399 houses then a portion of 599 houses.

7. From the Construction Access Review Plan it appears that a Road Safety Audit has only been carried out to ensure the safe operation of the junction for use by construction traffic (Para 2.3.6)

8. Can Foxlydiat Lane cope with such a large volume of additional traffic?

This does not appear to have been considered in the Plan submitted.

9. The original Transport Assessment for the development appears to show a total of 9 vehicle movements both in and out of the Foxlydiat Lane access during both am and pm peaks.

If the analysis of the safety and junctions have been carried out based on these numbers they would surely need to be re-evaluated prior to approving such conditions?"

24. The officers responded to each of these points within the second update report as follows:

“OFFICER RESPONSE TO COMMENTS FROM BPPC QUERIES

1. Correct

2. Correct

3. Correct

4. Both. Correct

5. Correct

6. Correct

7. There is no objection from the Highway Authority or BDC’s Highways Consultant in this respect.

8. There is no objection from the Highway Authority or BDC’s Highways Consultant in this respect.

9. There is no objection from the Highway Authority or BDC’s Highways Consultant in this respect.”

25. The minutes of the meeting confirm that members observed that there had been significant changes to the access proposal since the matter had last been before the committee. Whilst the concerns in relation to construction traffic were noted “it appeared that the points that had led to the deferment had been addressed”. The

members resolved that they were minded to grant the application subject to conclusion of a suitable obligation under section 106 of the Town and Country Planning Act 1990 addressing the various requirements which had been specified in the report together with the conditions which had also been set out.

26. Planning permission was ultimately granted subject to a section 106 obligation on 21st January 2022. It was granted subject to the following conditions which had been foreshadowed in the officer's reports:

“15) Prior to the construction of any dwellings hereby permitted, engineering details of a dedicated construction access onto Birchfield Road shall be submitted and approved in writing by the Local Planning Authority, and constructed in accordance with the approved details.

Reason: To ensure the safe and free flow of traffic onto the Highway.

16) Once the dedicated construction access onto Birchfield Road and construction of the haul road linking the Foxlydiat Lane access to the Birchfield Road construction access are provided, use of the Foxlydiat Lane access by construction traffic will permanently cease and construction traffic for the development will then use the dedicated construction access off Birchfield Road and that access only. No dwellings shall be constructed until the construction access off Birchfield Road is completed and fully operational as the sole means of access for construction vehicles.

Reason: To limit the disturbance of construction traffic on the amenity of residents in the locality.

17) Prior to the first occupation of the development hereby permitted engineering details of the access onto Foxlydiat Lane shall be submitted and approved in writing by the Local Planning Authority and constructed in accordance with the approved details.

Reason: To ensure the safe and free flow of traffic onto the highway.”

27. Subsequent to the grant of planning permission applications were made by the interested party under section 96A of the 1990 Act for non-material amendments to the permission. The first of these was an amendment to condition 20 relating to a requirement that prior to the occupation of the 600th dwelling on the site the main access onto Birchfield Road would have been submitted and approved in writing by the local planning authority and constructed by changing that threshold to the 200th dwelling so as to bring forward the requirement for these details and the construction of the main access which would be made available as quickly as possible.

28. The second application related to condition 26 concerning the Construction Environmental Management Plan by the addition of a further requirement as to the matters to be covered in that document to include the proposed duration of the works. It was made clear at the hearing of this matter that these applications had been granted. The motivation behind them was to fuel an argument that the decision reached by the defendant would have been the same in any event.
29. Turning to the facts pertaining to ground 3, the claimant draws attention by way of background to a document published by Worcestershire County Council entitled “Children’s Services Transport and Travel policy 2020/2021” which states that free transport to school will be provided to those children of compulsory school age attending their nearest designated or redesignated school for their home address, provided that the distance between the home and the school is in excess of the statutory requirement for the pupil’s age. The statutory distances are 2 miles for pupils up to the age of 8 and 3 miles for older pupils. This travel and transport policy is related to a policy in the Bromsgrove District Plan at policy RCBD 1.4 which requires the provision of necessary infrastructure in parallel with the implementation of new development.
30. The claimant draws attention to two decisions on residential applications close to the application site, the first being a site known as Foxlydiate Hotel, a proposal for the erection of up to 46 houses and 24 apartments at the time when it was considered by Worcestershire Highways. In a letter dated 14th June 2019 they explained that they had no objection to the application subject to a contribution of £54,181 being made to support student education transport to the Tudor Grange Academy, a school over 3 miles away from the site. This application was granted on 11th April 2022.
31. The second proposal was at a site known as Barn House Farm, Foxlydiate Lane which was for the demolition of existing buildings and the redevelopment of the site by 63 dwellings with associated infrastructure. This application was responded to by Worcestershire Highways on 21st October 2020 and they indicated that they had no objection subject to again a contribution being made towards free home to school transport. A contribution in the sum of £59,000 was ultimately included in a unilateral obligation pursuant to section 106 of the 1990 Act in respect of free transport to school pursuant to the Transport and Travel policy set out above. Ultimately, the application was the subject of an appeal against non-determination which was successful. The appeal was concluded under the written representations procedure, and allowed pursuant to a decision letter dated 8th February 2021. During the course of the Inspector’s evaluation of the merits of the proposal the contribution towards school transport was assessed and considered to satisfy the requirements of regulation 122 of the Community Infrastructure Levy Regulations 2010.
32. Against the background of these two decisions, it is contended by the claimant that a similar contribution in relation to free school transport should have been sought with respect to the application made by the interested parties. Contributions were sought in relation to middle and high school provision.
33. The question of education contributions was taken up by the claimant in correspondence with the education authority. When the education authority responded to the question of school capacity in the area, they made reference to the provision of transport assistance under the Transport and Travel policy where the nearest school at which a place was available was beyond the statutory walking distance. In particular in

a letter dated 21st June 2021 the claimants raised directly the failure of the Worcestershire County Council to seek a contribution towards school transport. In a response dated 24th August 2021 the defendants' planning officer responded to this concern in the following way:

“Item 3 – Home to School Transport

Contributions were requested from application 20/01568/FUL mainly on the basis of the lack of a safe walking route. Clearly safe walking routes will be available in relation to the proposed Foxlydiate development. Additionally, for Cur Lane, Middle and High Schools were marginally outside the maximum walking distances. WCC appreciates this may also be the case for a limited number of dwellings on the western extremities of the Foxlydiate development depending on how the education authority (Children First), assign designated schools and the location of internal pathways within the development.

As in the case of CT at the time the Foxlydiate contributions were negotiated, the principles for requesting contributions for Education Transport contributions had not been established therefore WCC was unable to request a contribution in any case.”

34. In order to assist the court a calculation has been produced demonstrating that, using the rates which had been applied to the Foxlydiate Hotel development and the Barn House Farm development, contributions in the order of £3.2 million would have been required to address this issue in respect of the application under consideration in this case.

The Law.

35. This application for judicial review does not raise any new issues of law but requires the application of public law legal principles in a planning law context which are well known and understood. Firstly, the decision needs to be judged within the statutory framework under which it was made, in this case that provided by the 1990 Act at section 70(2) and section 38(6) of the Planning and Compulsory Purchase Act 2004. A planning application must be determined in accordance with the development plan unless material considerations indicate otherwise. The question of material considerations in a planning context was recently reviewed in the Supreme Court in the case of *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 at paragraphs 29 – 32. Previous appeal decisions are capable of being a material consideration in a planning decision.
36. The principles in relation to the approach to be taken to challenges based upon officers' reports to committee were summarised and distilled by Lindblom LJ in *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452 at paragraph 42. They are well known but worth setting out here as follows:

“(42) The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:

- (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

- (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

- (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District*

Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.”

37. Two further well-known principles are also relied upon by the claimant in respect of this application. The first is that where a resolution to grant planning permission has been made it ought to be reconsidered by the planning committee when a new factor has emerged which might have had a material effect on the authority's deliberations and conclusions had it been known at the time of the committee meeting. Where such a new factor emerges, it is appropriate for the resolution to grant planning permission to be returned to members for reconsideration. Secondly, there is a duty pursuant to the case of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* requiring a decision maker to take reasonable steps to acquaint themselves with the relevant information necessary to enable them to answer the questions raised in a decision-making process. Whether or not reasonable steps to make further enquiry are required would be judged by the application of the *Wednesbury* principles.

Submissions and Conclusions.

38. It is convenient to deal with the submissions, and my conclusions in relation to each of the three grounds upon which this claim is based, separately and sequentially.
39. Starting with ground 1 the claimant's case is that the first committee report from 13th November 2019 was deficient in failing to properly explain both the phasing in relation to the use of the accesses to the site and also in giving the misleading impression that Foxlydiat Lane would be a secondary access when, in truth, it was to be the sole access for the initial phases of the development. Furthermore, the committee thereafter misdirected itself by concluding that the Birchfield Road access would be created and in use by the time 200 dwellings were occupied. Further, there were key misunderstandings in relation to the extent to which the Foxlydiat Lane access would be used for the purposes of occupier or residential traffic and would, in effect, be the sole or main access to the site.
40. In this context the minutes of the 13th November 2020 meeting note:

“Foxlydiat Lane was not suitable to be used as the initial access for the site covering construction traffic up to the point of completion of the first 200 dwellings. In the view of Members the road was too narrow to accommodate construction traffic and the extra vehicles that would arise from the first phase of 200 dwellings and this additional use would give rise to safety concerns.

...

Members suggested that the primary access from Birchfield Road should be completed first before any other construction on the site took place”

41. It was also in this context that the application was deferred for the following reasons:
 - “(i) to enable officers to give further consideration to the proposed condition limiting the use of the Foxlydiate Lane access during the construction phase;
 - (ii) to enable officers to undertake further negotiations regarding the Birchfield Lane access being used as the initial access for construction traffic.”
42. It is the claimant’s contention that these minutes should be understood as referring to concerns by members both in relation to construction and also occupier or residential traffic on Foxlydiate Lane.
43. The claimant’s contention as to the substance of the members’ concern further relies upon the points in relation to occupier or residential traffic which were set out in the exchange of emails between the defendant’s planning officer and the officer of Worcestershire Highways in which a concern as to use of the Foxlydiate Lane access up to the 600th occupation was discussed. The concerns expressed in this private correspondence were matters which, in the claimant’s submission, should have been drawn to the members attention at the second committee meeting through the further committee report. In particular, the claimant submits that the officer’s assertion in the committee report for the meeting on 19th February 2020 that the reasons for deferring had been overcome and resolved was misleading. None of the changes which were made in relation to the assessment and the associated conditions addressed the members’ concerns in relation to occupier or residential traffic on Foxlydiate Lane. Thus, the committee were misled and the decision they reached subject to an error of law.
44. The defendant and the interested party submit that the committee were not in any way misled in relation to the position as to construction and occupier traffic and the proposals as to the levels of usage of the Foxlydiate Lane access. In particular, the defendant submits that the minutes set out above are perfectly clear in recording the members’ concerns about the combination of construction and residential traffic arising from the occupation of the first phase of dwellings, and that that concern was in the context of construction traffic using the Foxlydiate Lane access prior to the construction of the primary access for construction traffic from Birchfield Road. Thus, the concern was principally in relation to construction traffic, and therefore of necessity the mixture of construction and residential traffic and the need for the early delivery of a bespoke construction traffic access point at Birchfield Road.
45. It is further submitted that the fact that this was the nature of the members’ concerns can be seen not merely from the minutes, but also from the preparation of the CAR which addressed the timing and delivery of a construction access. In relation to the claimant’s concerns the defendant and the interested party draw particular attention to

the analysis of the CAR contained in the committee report for 19th February 2020, along with the contents of the second update report. As set out above, the second update report identified, firstly, the claimant's understanding that under the revised arrangements proposed since the last committee report that the Foxlydiate Lane access would only be used for construction traffic associated with the construction of the main Birchfield Road access and the haul road between them only, and, secondly, that when the Birchfield Road access was completed it would be used solely for construction traffic. This was a proposition which was agreed with by the defendant's officers as set out above.

46. Thirdly, in so far as the claimant suggests that members were not properly advised as to the effect of the conditions' meaning that the Foxlydiate Lane access would support all of the occupation or residential traffic from the first 399 dwellings and then a portion of that traffic between 399 and 599 houses, this was again a proposition set out in the committee papers which the officers accepted as accurate, and which was before the members for them to consider. The defendant and the interested party therefore submit that far from being misled, the claimant's concerns were fully set out for members to consider against the backdrop, of course, that there was no objection sustained by Worcestershire Highways in that respect.
47. The defendant and the interested party also draw attention to the minutes of the meeting of 19th February 2020 in which the following is recorded:

“In debating the application Members referred to the significant changes as to access which had been achieved since the matter was last before committee. Whilst acknowledging the concerns of the residents as to construction traffic, it appeared that the points that had led to the deferment had been addressed.”

48. In my judgment there is no substance in the claimant's concerns in respect of the material before the committee in respect of the phasing and delivery of access to the site, and the implications for use both by construction and occupier or residential traffic. Firstly, the application material and the description of that material in the committee report for the meeting of 13th November 2019 made clear that the overall access strategy to the site in its completed form would include an access off of Foxlydiate Lane to serve the residential development which was proposed. There can, therefore, have been no misunderstanding that residential traffic was to be accommodated by the Foxlydiate Lane access, albeit that that access would not be the principal access to the site. Secondly, I am unable to read the minutes of the meeting of 13th November 2019, in the manner contended for by the claimant. It appears clear to me that the discussion which is being minuted focused, as the defendant and the interested party contend, upon the impact of construction traffic as part of a mixture of traffic using the Foxlydiate Lane access and the extent to which it would be possible to remove construction traffic from that mixture by amending the conditions to either lower or eliminate the trigger point in relation to occupations. The reasons for deferment which are noted in the minutes reflect that concern and task the officers with addressing it.
49. I accept the submission made that the preparation of the CAR following the meeting further reflects that understanding of the minutes. There is a further piece of supporting evidence in connection with the understanding of the minutes being as the defendant and the interested party suggest. That is that the committee, when they returned to the

application, clearly considered that it was the phasing of the construction traffic access which was the matter of concern that had led to them deferring the application, and that this was an issue which had been addressed by the revisions to the relevant conditions. Implicit in the claimant's submissions is that the committee may have forgotten the context of the decision to defer consideration of the application that they had reached three months previously. That in my judgment would be a surprising conclusion, and in this connection the claimant's thesis is not supported by the fact that, with limited exceptions, the membership of the committee was very similar on both occasions.

50. Turning to the material provided to the committee on 19th February 2020, it fully and carefully set out the revised access phasing strategy which would solely permit construction traffic to access Foxlydiate Lane for the purpose of constructing the haul road access and the construction access off Birchfield Road prior to which there would be no residential or occupational traffic using the Foxlydiate Lane access. As set out above this was clearly before members in the crisp exchange between the claimant and the defendant's officers as to the implications of the decision. The implications as to the extent to which residential traffic would, after the Birchfield Road access had removed the need to use it for construction access, be used by residential traffic was clear and unequivocally before the members.
51. It follows that the members were fully and properly advised and quite entitled to form the view that the revised position had addressed the concerns that had been raised earlier in relation to the impact on Foxlydiate Lane. I am unimpressed with the submission that the members ought to have been advised of the concerns raised by the defendant's officer in the emails with the officer of Worcestershire Highways. As will be evident from what is set out above, the concerns that were raised were in fact completely addressed and resolved. There was, therefore, nothing material to be drawn to members attention beyond the information that they already had fully set out in the committee report as to the extent, in particular, that the Foxlydiate Lane access would be the access for residential traffic prior to the use of the Birchfield Road access for residential or occupational traffic.
52. On the basis that all of the necessary information was before the members in relation to the phasing of access and the impact of both construction and residential or occupational traffic on Foxlydiate Lane the *Tameside* duty was not in play. All of the information that was necessary for a properly informed decision on the planning merits was available to the committee. In those circumstances ground 1 must be refused.
53. Turning to ground 2, under this ground the claimant contends that the committee were seriously misled in relation to the forecast period for the use of Foxlydiate Lane for construction access. The claimant draws attention to the findings recorded in the environmental statement that not only would there be a significant increase in the volume of traffic using Foxlydiate Lane for construction purposes but also, and in particular, the authors of the environmental statement had advised that the period of construction traffic usage would be 12-18 months. Thus, the committee were misled by the CAR and its adoption by the officers when it concluded that the use of the temporary construction access on to Foxlydiate Lane would be 24 weeks long. In fact, it would be significantly longer than that in accordance with what was contained within the environmental statement. Given the extent of the impact of construction traffic on Foxlydiate Lane this was a significant environmental effect as to which members were misled.

54. The defendant and the interested party respond by drawing attention to important differences between the assumptions which were being tested in the environmental statement and in the CAR. In particular, the CAR was assessing the time period required to construct an initial construction access off Foxlydiate Lane so as to facilitate the haul road and the main construction access at the Birchfield Road junction. The environmental statement was assessing not only the construction of the main access but also the construction and completion of necessary internal highway infrastructure. Thus, it is not possible for a comparison between the two assessments to be made. In any event, the defendant, and the interested party draw attention to the fact that the CAR was an evidence-based assessment in which advice from a relevant contractor had been sought and obtained. The details of the site activities were included in a non-exhaustive list and the defendant and the interested party draw attention to the absence of any contrary evidence in respect of the construction period pursuant to the reconfigured conditions and phasing.
55. Having reflected on the parties' submissions I am not satisfied that there is any substance in the claimant's complaints under this ground. I accept, firstly, the submissions of the defendant and the interested party that the environmental statement and the CAR were assessing different projects in terms of the scale and nature of the construction which was to be undertaken. In any event, it is not unusual for assessments of this kind to change in substance during the consideration of a planning application, or for the understanding of a particular environmental effect to be more fully and better informed by further work. That was the role of the CAR which had, on its face, been the subject of more detailed research and was supported by the input from a specialist contractor. In particular, it does not appear that there was anything before the committee of a similar quality to gainsay what the CAR advised. It was, therefore, up to date and effectively unchallenged. In those circumstances I am unable to conclude that the committee were misled by the use of that material within the committee report to advise members as to the potential impact of this proposal. Members were not misled by the committee report in this regard and therefore there was no error of law.
56. In reaching the conclusions which I have in respect of grounds 1 and 2 I have not had the necessity to either have regard to the grants of non-material amendments in relation to the rewording of the conditions set out above, nor to examine in detail the scope of any arguments that the defendant's decision would have been the same. Neither of these points arises on the basis of the conclusions which I have reached.
57. The final ground upon which this claim is advanced is ground 3. This ground was refused permission and therefore it is presented in the current case as, in effect, a rolled-up hearing. The claimant submits that the decisions which were reached in the case of the Barn House Farm and Foxlydiate Hotel applications were material considerations which ought to have been taken into account in determining the present application, not least on the basis of consistency. Furthermore, in respect of the Barn House Farm case that was an appeal decision which was clearly a matter which was material to the present case, and which had concluded authoritatively that contributions towards school transport from an essentially similar location were a legitimate requirement of housing development.
58. Further, the defendant's officer's response on 24th August 2021 was an inadequate response to the question of this contribution being raised since on the facts there was little to distinguish the relative positions of the application site and those involved in

those other two cases in terms of their distances from relevant schools. This was a material consideration which ought to have been taken into account, or alternatively, ought to have led to the matter being taken back to committee for the planning committee to determine whether or not this was a feature which altered the decision and a requirement which should have been included in the section 106 obligation.

59. The defendant and the interested parties submit that there is a simple answer to ground 3, which is that in the case of both the Foxlydiate Hotel and the Barn House Farm applications, Worcestershire Highways required a contribution in relation to home to school transport. By contrast, Worcestershire Highways made no such request to the defendant in relation to this application. Firstly, it is submitted that the defendant cannot be criticised for not seeking a contribution which was not sought by the relevant consultee, namely Worcestershire Highways; secondly, if there was any challenge in this respect it ought to be directed at Worcestershire Highways for failing to require such a contribution and none has been made.
60. I share the view of the judge considering this application on the papers that ground 3 is not arguable. It is trite to observe that every application for planning permission must be determined on its merits, and part of the consideration of the merits by a local planning authority will be the weight to be attached to requests for contributions from consultees. In this case the central consultee in respect of a contribution towards home to school transport were Worcestershire Highways, the highways authority, and Worcestershire County Council, the education authority. Both departments of Worcestershire County Council were involved in considering the application and also determining the appropriate contents of the planning obligation pursuant to section 106 of the 1990 Act. No contribution of the kind raised by the claimant was sought as part of the overall assessment by those with the statutory responsibility in respect of transport and education.
61. The defendants were entitled to rely upon those consultations, which were detailed and considered, and to conclude that no contribution of any kind sought by the claimant was justified. In effect ground 3 depends ultimately upon a dispute in relation to the merits of the application and does not disclose any arguable error of law.
62. The evidence in relation to a home to school transport contribution being required in the other two applications and the existence of that material did not cause either the highways authority or the education authority to change their response to the application. Thus, their response remained the same at the time of the decision as it had been at the time when members considered the merits of the application. It was, therefore an unnecessary requirement measured against the legal test set out above, for the application to be returned to committee: these decisions had not changed the attitude of the responsible statutory consultees and the officers were entitled to conclude that they would not alter the stance of the committee on the application. There is therefore in my judgment no substance in ground 3.

Conclusion.

63. For all of the reasons which are set out above I am satisfied that grounds 1 and 2 of this claim should be dismissed and that the claimant should similarly be refused permission to apply for judicial review in relation to ground 3.