

SCENIC LAND DEVELOPMENTS LTD

IN THE MATTER OF BICESTER OFFICE PARK

RELATING TO S106 PAYMENTS IN RESPECT OF TRANSPORT MATTERS

OPINION

Introduction

1. I am asked to advise Scenic Land Developments Ltd (“SDL” or “the Applicant”) in respect of its proposed development of a business park of up to 60,000 square metres of office space (“the Bicester Office Park” or “BOP”) on land to the west of Oxford Road, Bicester (“the Site”).

2. SDL has made an outline planning permission for the proposed development on the Site. Cherwell District Council (“CDC”) has resolved to approve the application, but subject to the making of an agreement under section 106 of the Town and Country Planning Act 1990 (“the 1990 Act”). There are outstanding points of dispute between the Applicant and Oxfordshire County Council (“OCC”) as to the need for certain transport related contributions. I am asked to advise in respect of those points of dispute.

3. In particular, I am asked to advise as to:
 - a. the overall approach to be taken to section 106 agreements in respect of transport matters, having regard to the National Planning Policy Framework (“NPPF”) and the Community Infrastructure Regulations 2010 (“CIL Regulations”), and the implications (if any) of the Local Plan policies and developer contributions Supplementary Planning Documents as to the general principles applicable to this case;

- b. whether, having regard to the evidence and the Applicant's case that the application proposals will not result in severe cumulative impacts on the road network (as referred to in paragraph 109 of the NPPF), the approach taken by OCC can be regarded as meeting the necessary tests, namely whether the contributions sought are necessary, directly related to the development and fairly and reasonably related in scale and kind;
- c. whether, if there was any evidence to suggest that the proposals would result in severe cumulative impacts on the road network, the approach taken by OCC can be regarded as meeting those tests in respect of the contributions sought;
- d. what reliance can be placed on the SEPR, or any other unspecified scheme of "similar benefit" by way of mitigation in respect of the development;
- e. the lawfulness of the OCC approach to the CIL pooling restrictions and the suggestion that it may not seek the contributions set out in its response and how this approach is relevant to the appropriate tests;
- f. the appropriateness of phasing any payment, if required, having regard to any potential future impact on timescales;
- g. the relevance of the scheme's viability, if any;
- h. the relevance of any OCC/CDC concerns about precedent and consistency and the implications of this case for any future requests for section 106 payments;
- i. the relevance of the inconsistency of approach taken by OCC in respect of other schemes in the vicinity to the application of the CIL tests, both in relation to strategic highway contributions and public transport contributions, and whether in the circumstances the OCC approach could be regarded as reasonable; and
- j. the likelihood of all, or any, of the contributions being sought by OCC being required if the Application were to be appealed and the reasonableness of

OCC's position, and any reliance placed on it by CDC, in the event of an appeal and an application for costs.

Factual Background

4. The Site comprises 13.1 hectares, situated immediately to the south of a recently completed Tesco superstore and to the north of Bicester Avenue Garden Centre.
5. The Site forms part of the 'Bicester 4' allocation in the Cherwell Local Plan 2011-2031 ("the Local Plan").
6. That part of the Local Plan provides as follows (so far as material):

"Strategic Development: Bicester 4 – Bicester Business Park

C.65 There is a sustainable opportunity for the provision of strategic employment space to the south of Bicester Town Centre and adjoining the A41. The Bicester Business Park site has planning permission for a 60,000m² business park incorporating offices (B1) and hotel (C1) use. This development area is located immediately to the east of the South West Bicester (Kingsmere) urban extension less than 1km from Bicester Village Railway Station and close to major retail uses and town centre facilities. The site has immediate access to the strategic highway network (Oxford-Aylesbury) with Junction 9 of the M40 motorway situated about 3km to the south. Major growth is planned nearby with the redevelopment of Graven Hill (Policy Bicester 2: Graven Hill, phase 2 of the South West Bicester extension (Policy Bicester 3: South West Bicester Phase 2 and the expansion of the centre of the town.

C.66 Although full implementation of the permitted scheme requires the completion of Junction 9 improvements, phase 1 of the highway works has [sic] been completed. The Council wishes to support the development of this important site and in doing so will work with County Council who have agreed junction improvements.

Policy Bicester 4: Bicester Business Park

Development Area 29.5 hectares

Development Description: This site to the south west of Bicester, bounded by the A41 to the north and west, is proposed for employment generating development in the form of a high quality B1 office scheme.

Employment

- **Jobs created – up to approximately 6,000 jobs. Site constraints and implementation of alternatives use planning permissions may reduce numbers slightly.**
- **Use classes – B1a (Office).**

Infrastructure needs

- **Open space – structured open space and planting that provide a strong landscape setting, support SUDS and improvements to the microclimate**

- **Access and Movement – M40, Phase 2 improvements to Junction 9. Contributions to improvements to the surrounding local and strategic highway road networks.**

Key site specific design and place shaping principles

- ...
- **Layout that enables a high degree of integration and connectivity between new and existing development particularly the mixed use urban extension at South West Bicester to the west, the garden centre to the south, and, to the north, Bicester town centre and Bicester Village retail outlet**
- ...
- **Provision for safe pedestrian access from the A41 including facilitating the crossing of the A41 to the north and west, and the provision and upgrading of footpaths and cycleways that link to the existing networks to improve connectivity generally and to develop links between this site, nearby development sites and the town centre.**
- ...
- **A Transport Assessment and Travel Plan to accompany development proposals**
- ...”

7. Policy SLE4 of the Local Plan deals with improved transport and connections and it provides as follows:

“Policy SLE4: Improved Transport and Connections

The Council will support the implementation of the proposals in the Movement Strategies and the Local Transport Plan to deliver key connections to support modal shift and to support more sustainable locations for employment and housing growth.

We will support key transport proposals including:

- Transport Improvements at Banbury, Bicester and at the Former RAF Upper Heyford in accordance with the County Council’s Local Transport Plan and Movement Strategies;
- Projects associated with East-West rail including new stations at Bicester Town and Water Eaton;
- Rail freight associated development at Graven Hill, Bicester;
- Improvements to M40 junctions.

Consultation on options for new link and relief roads at Bicester and Banbury will be undertaken through the Local Transport Plan (LTP) review process. Routes identified following strategic options appraisal work for LTP4 will be confirmed by the County Council and will be incorporated in Local Plan Part 2.

New development in the District will be required to provide financial and/or in-kind contributions to mitigate the transport impacts of development.

All development where reasonable to do so, should facilitate the use of sustainable modes of transport to make the fullest possible use of public transport, walking and cycling. Encouragement will be given to solutions which support reductions in green house gas emissions and reduce congestion. Development which is not suitable for the roads that serve the development and which have a severe traffic impact will not be supported.”

8. I am familiar with the site and surroundings, having been involved in relation to the Bicester Gateway inquiry.
9. Part of the Site formed part of a larger area of land for which outline planning permission was granted in 2010. This was for 60,000 square metres of B1 space and a hotel, subject to an agreement made under section 106 of the Town and Country Planning Act 1990 (“the 1990 Act”), under reference number 07/01106/OUT.
10. In November 2013 planning permission was granted for the Tesco superstore development on part of that larger site under reference number 12/01193/F (“the Tesco Permission”). It incorporated a new access known as Lakeway Drive. This access was intended to serve the superstore and the B1 use on the remainder of the original site. The original section 106 planning permission made in respect of outline planning permission 07/01106/OUT was varied so as to allow the construction of up to 45,000 square metres of office space on the remainder of the original site. I am instructed that part of the rationale for the grant of the Tesco permission was to unlock the wider business park site.
11. The current planning application (reference no 17/02534/OUT) now seeks outline planning permission for 60,000 square metres on the original site (excluding the Tesco superstore area) and now additional land in the Applicant’s control. It therefore seeks a new planning permission for up to 60,000 square meters of B1 floorspace, in line with the original outline planning permission and the site allocation Bicester 4.
12. The current outline planning application was submitted to CDC as the local planning authority with all matters reserved, save for access.
13. The outline planning application was accompanied by a new Environmental Impact Assessment (“EIA”) and detailed supporting material, including a Transport Impact Assessment prepared by the Applicant’s transport consultants, Motion.
14. Discussions have taken place between the Applicant, CDC and Oxfordshire County Council in its capacity as highway authority and most matters concerning the planning application have been resolved.

15. As part of those discussions, agreement was reached with OCC to use the Linsig model to assess the traffic implications of the proposed development. That model was previously used and agreed for the Bicester Village phase 4 development in the vicinity, the Tesco superstore application and, most recently, for the Bicester Gateway Retail scheme.
16. In addition, following discussions with OCC, the Applicant tested and modelled additional scenarios to take into account cumulative impacts of the development. Until recently the Applicant had understood that highway matters, including site access, junction capacity and mitigation works, were agreed. However it proved difficult to obtain a final formal response from OCC.
17. Eventually OCC issued its advice on 7 August 2018. This raised a number of technical issues and, for the first time, included a request for section 106 contributions totalling just over £4 million, including £2,965,185.99 towards the “South Eastern Perimeter Road (western section) or scheme of similar benefit” and £1million for bus and rail contributions, consisting of £670,532 for “East West Rail” and £375,000 for “Peak hour bus service enhancements”.
18. OCC’s position was stated to be one of objection to the application on the basis of it having a detrimental impact on the existing network which had not been adequately mitigated. OCC stated that if, despite its objection, permission were proposed to be granted, then it would require a section 106 agreement to include an obligation to enter into a section 278 agreement to mitigate the impact of the development, plus conditions and informatives as set out in its response.
19. In seeking the contribution to the SEPR, OCC has referred to ‘Volume 1: Connecting Oxfordshire: LTP 2015-2031’ and Policy 02: “Oxfordshire County Council will manage and, where appropriate, develop the county’s road network to reduce congestion and minimise disruption and delays, prioritizing strategic routes. OCC has stated:

“Under this policy document (particularly in the Bicester Area Strategy), the Plan identifies Bicester as a fast-growing area that shall need a South-East Perimeter Road (SEPR) linking the Eastern Perimeter Route at its junction with Gavray Drive to the

A41 (Aylesbury) road and the A41 (Oxford) road. The SEPR as a scheme has been assessed as being required by 2031 to deliver Local Plan Growth, using the Bicester Transport Model (BTM).

The SEPR scheme would ease congestion on the A41, and will therefore directly contribute towards mitigating the cumulative impact of Local Plan growth in Bicester, including this proposed development's impact. This development will therefore be expected to contribute towards the SEPR or a scheme of similar benefit."

20. Later in its response, the officer acting for OCC referred to strategic transport modelling demonstrating that the SEPR will bring benefits to the A41/Oxford Road and then commented on the position of Motion, the Applicant's transport consultants, as follows:

"Motion suggest that no further strategic transport contributions are required towards the SE Perimeter Road. A contribution towards the SE perimeter road is required, as although it is unlikely to be built by the TA assessment year of 2026, it is required within the Local Plan period before 2031 as a direct result of cumulative growth in Bicester, which includes the Bicester 4 allocation. The scheme has a direct relationship to the development site, as it will relieve congestion on the A41 through Bicester. In addition, as I will go on to outline, the mitigation proposed by Motion along the A41 is not sufficient on its own."

21. At the end of the consultation response there is a section dealing with this contribution containing the following (amongst other things):

“£2,965,185.99 Strategic Highway Infrastructure Contribution

Towards

The South-East Perimeter Road (Western Section) or scheme of similar benefit

Justification

The SEPR is detailed in Oxfordshire County Council's Local Transport Plan 4, as a scheme to ease congestion on the A41, and will therefore directly contribute towards mitigating this development proposal's impact. Other developments around Bicester have agreed to a proportionate contribution towards this strategic infrastructure that will bring direct relief to the A41 corridor for which this proposed development shall benefit.

Calculation:

The formula used in the following calculation is taken from the adopted Cherwell Developer Contributions Supplementary Planning Document (Feb 2018) and OCC's emerging Developer Guide. OCC are available to discuss the assumptions used in the calculation further with the applicant.

Strategic transport contribution =

$$(X-Y-Z) \div E$$

Where,

X = Cost of Scheme(s)

Y = Held/Committed funding

Z = LGF Funding / Alternative Funding

E = Expected Growth

SEPR Western Section

X = £21.3 m (October 2015 cost estimate) for SEPR Western Section

Y = £585,127.83 (estimated held or secured s106 contributions)

Z = £6,239,563 (notional 66.6% match funding)

E = Bic 4 and Bic 10 (phase 2) estimated 140,000 sq m

Total £2,965,185.99”

22. As to rail contributions, the OCC response stated:

“The varied section 106 [ie for the previous permission after the Tesco superstore was granted] also made provision to support rail service improvements, now partly implemented by East West Rail phase one. Oxfordshire County Council continue to support rail improvement schemes, making this sustainable form of travel more attractive and in turn reducing single occupancy car travel. EWR Phase 2 is still to commence which on completion will provide further connectivity enhancements.”

23. The purported justification and calculation for the sum requested at the end of the consultation response is in the following terms:

“£670,532 Strategic Rail Contribution

Towards

East West Rail

Justification

The extra travel demands arising from this proposal in common with other proposals has led and continues to lead towards the delivery of enhanced rail infrastructure provision, including the East West rail provision. The extant Section 106 planning obligation for previous proposals at this site made provision to support the enhanced rail infrastructure. Part of the enhancements have been brought forward in advance of individual development growth and as such will be ready to help accommodate the extra transport demands from initial development occupation. The Local Plan Policy SLE1 recognises the importance of public transport, such as rail infrastructure in supporting employment development in areas of the district, including Bicester. Policy SLE 4 also identifies that new development will be required to provide contributions towards transport impacts of development and recognises that development should facilitate the use of sustainable modes of transport to make the fullest possible use of public transport etc. The local commitment to contribute to East West Rail improvements includes a requirement for £11.06 m to deliver the improvements. The appropriate proportion of that requirement attributable to this development proposal is identified above.

Calculation:

The formula used in the following calculation is taken from the adopted Cherwell Developer Contributions Supplementary Planning Document (Feb 2018) and OCC’s emerging Developer Guide. OCC are available to discuss the assumptions used in the calculation further with the applicant.

Strategic transport contribution =

$$(X-Y-Z) \div E$$

Where,

X = Cost of Scheme(s)

Y = Held/Committed funding

Z = LGF Funding / Alternative Funding

E = Expected Growth

SEPR Western Section

X = £11.06m for Oxfordshire County Council contribution to EWR

Y = £1,691,287 (committed funding)

Z = Notional 66.6% match funding - £6,239,562.86

E = Bic 4 and Bic 10 (phase 2) estimated 140,000 sq m

Total £1,341,064.35

Divided by two major centres served by EWR Bicester & Oxford = **£670,532 contribution towards EWR**”

24. As to bus contributions, OCC has suggested a need for delivery of a bus stop within the business park, with delivery of a bus service into the Site, and a contribution of £10,000 for provision of a bus stop on the A41 to cover the possibility that it is not provided by the Bicester Gateway Retail scheme. At the end of the consultation response, OCC states (amongst other things):

“£375,000 Bus Service Enhancement

Towards

Extending a local bus service into and out of the Business Park during the main journey to work times (which are assumed to be 0700-1000 and 1600-1900 Mondays to Fridays) over a period of 5 years

Calculation

£50 per bus-hour. Six morning arrivals on Mondays to Fridays and six departures in the evening equates to £300 per working day (3 hours am and 3 hours pm) or £75,000 per annum. The cost for five years would be £375,000.

Justification

Much of the Bicester 4 sites is far from the main road, particularly the northbound bus stop.

LTP policies in relation to new developments

Local Plan Policy Bicester 4

Assumptions in the Transport Assessment

Demand for travel to/from work on-site can be expected to be almost entirely in the morning and peak hours. Contributions are therefore required to cover the estimated cost of extending a local bus service to/from this site during the main journey to work times. This is requested over a period of 5 years as this is estimated as the length of time for it to become commercially viable.

The provision of a guaranteed on-site bus service at journey-to-work times provides employees with some certainty of departure times, especially after work. The walking distance from the site to the northbound bus stop on the A41 is not only in excess of 400 metres from much of the site, but it also requires both carriageways of the A41 to be crossed on foot. In addition, the arrival times of buses on the main road service from Oxford cannot be predicted with any degree of reliability due to variable traffic congestion.

The Council wishes to encourage the use of modes other than the car for journeys to work in the Bicester area. The provision of an on-site bus service is seen as being a much more attractive proposition than the long walk, across a busy dual carriageway road to a bus stop with a highly variable bus service.

£11,000 Bus Infrastructure Contribution indexed from January 2018 using Baxter Index

Towards

- (i) Provision of bus stop infrastructure within the site (£1,000) and
- (ii) Bus Shelter including 2 flag poles on Oxford Road (£10,000)

Calculation

The £1,000 and £10,000 are the procured costs of the related infrastructures and installation.”

25. In the OCC response, OCC include a statement as follows:

“CIL Regulation 123

Due to pooling constraints on local authorities set out in regulation 123 of the CIL regulations 2010 (as amended) OCC may chose not to seek contributions set out in this response during the s106 drafting and negotiation.

That decision is taken either because:

- OCC considers that to do so it would breach the limit of 5 obligations to that infrastructure type or that infrastructure project or
- OCC considers that it is appropriate to reserve the ability to seek contributions to that infrastructure type or that infrastructure project in relation to the impacts of another proposal.

...”

26. The consultation response appears to suggest that OCC are also seeking £10,027 by way of an “Administration and Monitoring Fee”.

27. Those instructing me wrote to CDC on 8 August 2018 setting out the Applicant’s initial response to OCC’s position. The letter identified the significant risk to the future of the development posed by the requested contributions given the marginal viability of office development in Bicester and the difficulties of securing a partner.

28. The letter set out relevant legal and policy tests applicable to consideration of such contributions, including those set out in paragraph 56 of the NPPF, namely that planning obligations may only be sought where they meet all of the following tests:

- “- Necessary to make the development acceptable in planning terms;
- Directly related to the development; and
- Fairly and reasonable related in scale and kind to the development.”

29. The letter made reference to the relevant policy test in paragraph 109 of the NPPF that: “development should only be prevented or refused on highway grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe”. It then identified why the Applicant considered that the contributions being sought failed the relevant policy tests, stressing further the marginal viability of the scheme in any event.

30. In relation to the requested contribution towards the SEPR, the letter also made specific reference to a recent conclusion of the Inspector in the Bicester Gateway Retail Appeal

(APP/C3105/W/15/3137608) where the Appellant in that case had sought to rely upon the future provision of the SEPR. The Inspector stated at paragraph 7:

“It would not be right to take account of any mitigation provided by a South East Perimeter Road for which land has been safeguarded in the Graven Hill permission, as there is no currently identified financing of that highway scheme and it is at a relatively early stage in its progress towards implementation.”

31. The letter provided a detailed analysis of why the requested contributions were not reasonable or justified.
32. CDC confirmed by email dated 13 August 2018 that it intended to take the planning application to committee on 23 August 2018 with a recommendation to approve the application, subject to resolution of a number of matters including a section 106 agreement.
33. The Applicant requested a meeting with CDC. This was held on 17 August 2018 to seek to reach “in principle” agreement on the scope of any section 106 contributions in advance of the Committee deliberations. At this meeting the Applicant reiterated its concerns about the absence of proper technical and legal justification for the contributions being sought by OCC but, made it clear that it would be willing to pay appropriate contributions which would not undermine the viability of the scheme where they could be justified in planning and legal terms.
34. CDC undertook to appoint its own transport consultant to review the alternative positions, in an attempt to reconcile the position and with a view to taking the application to Committee on 23 August 2018 with a recommendation to approve the application, subject to a section 106 agreement being agreed.
35. CDC’s committee report was published 17 August 2018. In that report, the officers have recommended that planning permission be granted subject to (amongst other things) the imposition of conditions, the making of a section 106 agreement, the resolution of OCC’s concerns regarding impact on existing road junctions and the resolution by officers of the appropriate financial contribution, if any, towards strategic transport/highway contributions.

36. In the analysis section of the report, the officers deal with access, parking and transport in paragraph 8.5 onwards. In that paragraph officers seek to summarise the policy position as follows:

“Policy Bicester 4 requires the provision of safe pedestrian access to the site including facilitating the crossing of the A41 to the north and west as well as the provision of upgraded footpaths and cycleways that link to existing networks to improve connectivity generally. Policy SLE4 of the CLPP1 is broadly reflective of national policy in the NPPF by encouraging maximisation of sustainable modes of travel and resisting development that would have a severe adverse impact on the local road network. National planning policy in the NPPF has recently been updated and there have been minor but potentially relevant changes to its transport policies and is a material consideration. National planning policy requires assessment as to whether there is a safe and suitable access for all to a new development, promotion of sustainable transport modes and the mitigation of any significant impacts from the development on the transport network both in terms of capacity and congestion. Any residual cumulative impacts would need to be severe to refuse planning permission in common with the requirements of Policy SLE4. It is within this local and national planning policy context that the proposals need to be considered with respect to the suitability of access to the development and the transport impacts.”

37. The subsequent paragraphs then seek to analyse the proposals in this regard.

38. In relation to OCC’s requested rail and bus contributions, the officers state (amongst other things) as follows:

“8.8 ... Your officers share the applicant’s concern regard the necessity for a contribution to be made towards rail improvements. There is no reference to this in Policy 4 Bicester 4 and there is already a regular rail service to Bicester from nearby towns/cities to enable future staff of these offices that live outside Bicester to have a genuine option of travelling to the development by train. Officers are therefore not minded to pursue a contribution towards this through a planning obligation. At the time of writing this report officers have not reached a conclusion on the merits of seeking to secure a contribution towards enhancing existing bus services though it is noted that Policy Bicester 4 requires good accessibility to public transport services and the accommodation of new bus stops to link the development to the wider town. Accordingly, a contribution is sought from the development by OCC. However, the applicant has pointed out that bus stops would be provided within the verges of the A41 in close proximity to the site which would serve the development and so officers need to establish the circumstances with respect to the availability of a convenient pedestrian crossing of the A41 as part of the Bicester Gateway Retail development to enable access to the bus stop along the northbound carriageway of the A41. Without this it would dissuade travel by bus. Further consideration needs to be given as to whether the proposals would appropriately promote sustainable travel to the development without this contribution and whether it is indeed necessary and viable (either through the amount sought or a lesser sum).”

39. In relation to highway contributions, paragraph 8.9 of the report identified that in light of the disagreement between OCC and the Applicant on the effects of the development

on the highway network, particularly junction capacity, third party expert advice was being sought.

40. In paragraphs 8.10-8.11 of the report the officers dealt with the effect of the proposal on the junctions of A41/Lakeway Drive access and the mini-roundabout at Oxford Road/Kings End/Middleton Stoney Road. Officers appeared to support OCC's position further mitigation was required to address the impacts on these junctions which it considered would create severe capacity and congestion issues. Officers expressed the view that without such mitigation, they would be concerned that it could set a difficult precedent for CDC and make it harder to resist other development proposals in the future where they gave rise to similar issues for the local highway network.

41. Paragraphs 8.12-8.14 of the report sought to deal with the wider effect on the highway network and the strategic contributions sought by OCC. In paragraph 8.14 officers stated:

“OCC's consultation response on the planning application was received only a few of [sic] days prior to the deadline for the writing of reports. As such, officers have had little time to consider the merits of OCC's position and the legitimacy of its request for contributions in this respect. Officers continue to engage with the applicant, and have sought further expert highways advice with the hope that officers can reach a final conclusion on the highways issues in time for the Committee meeting. However, what is clear at present is that the Council is being advised by OCC that the proposals would result in severe traffic capacity and congestion issues at existing A41 junctions and that there is also no commitment to make a financial contribution towards strategic level highway mitigation which might only compound matters. Officers are also cognizant of the potential implications of not seeking strategic highway contributions from these proposals which could set a precedent for dealing with other similar development proposals in the future and Members should also bear this in mind. It could also see pressure from other developers looking to have their existing planning obligations removed where these require financial contributions towards the SEPR as part of recently granted planning permissions.”

42. On 21 August 2018 the Applicant's consultants received an email from CDC attaching further comments from OCC, along with a report prepared by Green Signals commissioned by OCC, and a report prepared by Edwards and Edwards commissioned by CDC.

43. In its subsequent representations, OCC has sought to raise additional concerns about the modelling that had been undertaken and in respect of Lakeview Drive. It seeks to

raise “in principle” concerns and requested that the planning application determination be deferred. OCC summarised its position as follows:

“Transport modelling

- Independent assessment of the applicant’s LinSig signalised junction modelling has concluded that there are a number of inaccuracies that “*create an unacceptably high margin of error, meaning that the results could not be relied upon*”. This indicates that the development could have a greater impact on the highway network than originally envisaged.
- With the highway mitigation proposed, the Lakeview Drive junction provides insufficient capacity for the whole development. It does not appear possible to increase the capacity of this junction within the highway boundary any further than already proposed. Given that access is not a reserved matter this needs to be resolved before a decision can be made by CDC’s planning committee.
- To provide sufficient capacity for the entire quantum of development proposed, it is likely that vehicles would need to be diverted away from the A41 by a scheme such as the South East Perimeter Road.
- To establish how much development could be carried out at the site without causing a severe impact on the highway network (prior to the SEPR or scheme of similar benefit being place), errors with the modelling would need to be corrected and further tests would be needed.

Points raised by the applicant in letter to CDC dated 8th August 2018

- The applicant’s comments primarily relate to S106 contributions. OCC reiterate that, while there is no agreement on the contributions, the reason for the highways objection is because **the Transport Assessment does not adequately assess the impact of the development or demonstrate that it can be adequately mitigated.**
- The main concern raised by the applicant is viability. If the above objection relating to highway impact can [sic] be overcome, S106 contributions can be negotiated with the aid of an open book viability assessment if necessary post any committee resolution to grant permission.
- Under ‘Infrastructure Needs’, bullet point 2 of Bicester Policy 4 explicitly requires: “Contributions to improvements to the surrounding local and strategic road networks.” To not collect a strategic transport contribution from this development would undermine the Local Plan and set an unacceptable precedent.

Points raised in CDC’s Planning Committee Report

- It is stated at paragraph 8.14 that OCC’s response was only received only a few days prior to the deadline for writing reports. To clarify, our response of 7th August 2018 was a revised response to the amended transport assessment submitted by the applicant. OCC’s original response was submitted 27th February 2018.
- OCC understand that CDC have appointed an independent transport consultant to review this application. The remit of the consultant is unclear. If any further evidence is provided, OCC respectfully request adequate time to review this. Members are urged not to accept any conclusions of the independent planning consultant without OCC review and responding to them first. It is particularly concerning that at paragraph 8.15 of the committee report it is suggested that CDC will be using the independent transport consultant’s advice rather than the Local Highway Authority’s.
- OCC have highlighted in previous responses that the applicant’s transport modelling assumes a higher junction capacity than the accepted industry standard, thus underestimating the transport impact of the development. Paragraph 8.9 states that third party advice has been sought on this, specifically

on the appropriate threshold above which signalised junctions stop being considered to operate within capacity. Further technical detail on this is provided on pages 7 and 8 below. Notwithstanding this, the fact remains that as currently modelled the results already show that the mitigation scheme is not adequate in terms of the resultant queuing.

- Paragraph 8.6 discusses the access to the development, but only considers the off-highway roundabout junctions on Lakeview Drive from which the Office Park would take access. This interpretation of ‘access’ is also reflected in the conclusion at 8.16. Access onto the highway network is in fact at the junction of Lakeview Drive and the A41, and, as highlighted in our response, the Highway Authority considers the impact of the development on queuing at this junction to be severe, and that it is very uncertain as to whether there could be a suitable mitigation scheme that could be delivered within the highway boundary. As stated in paragraph 8.6, the means of access is to be considered as part of this application, and the principle of the development depends upon the access being acceptable.
- Paragraph 8.9 states that “*OCC considers the ... modelling within the TA to be robust.*” However, as stated in this update, we have found significant inadequacies with the LinSig modelling which suggest that the results could underestimate the traffic impact.”

44. More detailed comments to the same effect are then set out in the body of the response.

An accompanying very short report from Green Signals, a consultancy commissioned by OCC, contains the following conclusions and recommendation:

“Both models appear largely accurate, however there a small number of errors that will have an effect of [sic] the overall results. Although the results look reasonable, the errors create an unacceptably high margin of error, meaning that the results could not be relied upon.

The geometric data within the model, such as lane widths, has only been checked against the proposed works drawings for the Base and Proposed mitigation, to the extents of those drawings.

Neither has the controller operation of the northernmost junction within the network been checked.

While the phases and stages used look reasonable, we cannot guarantee that the Base Model fairly represents the existing sites.

We would recommend that the errors in the model be corrected and the modelling resubmitted.”

45. The report from Edwards and Edwards commissioned by CDC is dated 20th August 2018 and is authored by Steve Clarke. It seeks to review the areas of contention raised by OCC in its 7 August response in turn.

46. As to the concerns expressed about Motion’s LinSig modelling, Mr Clarke expressed doubts as to whether an amended LinSig model would have any material impact, but suggested that Motion review the input data and produce updated outputs. He did not

believe the updated outputs would fundamentally change the conclusions he reached in the remainder of the report.

47. As to the A41/Lakeview Drive signalised junctions, Mr Clarke noted that it operated under MOVA which would be likely to have a positive effect on its operation, so potentially reducing the underutilised green time at the junction which the LinSig software is not able to model. Accordingly, the results in the TA represented a worst-case scenario and, in reality, the junction operation may be better due to MOVA.

48. In relation to the use of 90% degree of saturation as an acceptable capacity threshold, Mr Clarke considered that using this as a value which was the only goal would lead to inappropriate conclusions; his view was that consideration should also be given to predicted queues and their effects on other junctions, predicted maximum delays per vehicle on each of the approaches, how the junctions perform within the highway network, comparing the three assessment scenarios to see if there are significant differences between degree of saturation and practical reserve capacity, and what effect the proposed mitigation results provide.

49. Turning to the results from the assessments, Mr Clarke considered that the results shows that the junction would be predicted to suffer more in the 'Do-Something' scenario than in the 'Do-Nothing' scenario. As to OCC's concerns, he suggested it would be worth bearing in mind:

- a. The LinSig analysis is for the AM and PM peak hours only;
- b. The base scenario ... already produces a queue of 21 on Lakeview Drive which is more than the 15 referred to by OCC so the matter of blocking the Tesco roundabout will already be an issue during the PM peak hour.
- c. The LinSig analysis does not take account of the benefits of MOVA
- d. The access drive serving the Tesco car park has a very long two-way drive so even if there was a queue during the PM within the car park waiting to egress I doubt whether this would adversely affect the ability of drivers being able to access the car parking spaces.
- e. It is understood that Lakeview Drive is not intended to be publicly maintainable highway and will therefore be private.'

50. Mr Clarke then set out his views at paragraphs 3.14-15 as follows:

"3.14 In the context of the issues raised above, my views are as follows:

- a) The proposed mitigation will result in a net overall benefit (ie slight improvement to the Practical Reserve Capacity) in terms of the way the public highway network would operate in the PM peak.
 - b) Notwithstanding a) above, that LinSig analysis reveals that the DoS deteriorates with three lanes exceeding 90%. This is likely to mean that these lanes will be sensitive to future increases in traffic or variations in traffic volume leading to disproportional increases in queues and delays. This is a matter, I'll return to on the section entitled 'Planning Obligations'
 - c) Whilst respect OCC's concern about the impact on Lakeview Drive I am of the view that Lakeview Drive is a private road and as such unless the operation of the private road affects the public highway this is not necessarily a matter for the highway authority.
 - d) I refer to OCC's concern about substantial delays on Lakeview Drive being detrimental to road safety due to the possibility this may lead to unsafe manoeuvres by impatient drivers. With respect to OCC, I regard this as unsubstantiated speculation unless there is reasonable evidence available that can be used to support this assertion.
 - e) As alluded to in 3.9(d) above the access drive serving the Tesco car park is two-way and provides plenty of internal storage capacity so from the information provided, I find it difficult to share OCC's concern that traffic within the site would back up to the extent that vehicles would not be able to get in, with the risk that queuing traffic would back up onto the A41.
- 3.15 In summary and bearing in mind that the Stage 1 Road Safety Audit raises no objection to the design, in principle, I consider the proposed mitigation to be acceptable subject to:
- a) S106 obligations being agreed (see below);
 - b) The LinSig models being updated (see para 3.3) to validate my views about the proposed mitigation being acceptable."

51. As to the Oxford Road/ Middleton Stoney Road/King End Road roundabout, Mr Clarke considered that the 'Baseline Scenario with committed development' and the 'With Development + Mitigation' scenario were not materially different (see paragraph 3.21). He stated at paragraph 3.22:

"Table G shows some small increases in queues and delays on Middleton Stoney Road and Oxford Road but on Kings End there are decreases in queues and delays. When considered in the context of para 32 of the NPPF (2012) which is whether 'the residual cumulative impacts of development are severe' I would not consider that to be the case in respect of the presented analysis for this junction. As such, and on the basis that the modelling of the junction is agreed between the parties (see next para) the presented analysis demonstrates that the proposed highway works are predicted to mitigate the general impact of development at this junction."

52. In relation to modelling, he considered that Motion should provide technical justification for the modelling approach adopted and he wished to see a Stage 1 Road Safety Audit.

53. Turning then to the section 106 obligations, Mr Clarke referred to the competing contentions, some of the policy background and then set out his views in paragraph 3.28-3.31 as follows:

- “3.28 Motion[‘]s TA has revealed that even with mitigation the A41 Oxford Road will still suffer from congestion. As highlighted in 3.13(b) above, even with mitigation four lanes of the A41 Oxford Road/Lakeview Drive junction would have degrees of saturation in excess of 90% during the AM and PM peaks. Furthermore, the Oxford Road/Middleton Stoney Road/Kings End Roundabout junction with mitigation would result in two legs of the junction having RFC’s in excess of 0.85 during the AM and PM peaks
- 3.29 Clearly, the aim of the SEPR scheme would ease congestion on the A41 and will therefore directly contribute towards mitigating the cumulative impact of Local Plan growth in Bicester.
- 3.30 The site is not easily accessible to the existing bus stops on the A41, so enhanced public transport provision should be considered. Its [sic] not clear, however, whether a bus operator will be prepared to provide enhanced provision into the site via a private road. OCC are better placed than I to comment on this.
- 3.31 I consider that the proposed Travel Plan S106 obligations are reasonable for targets and outcomes to be monitored and the Travel Plan to be refined, if considered to be necessary.”

54. I would note immediately that parts of this analysis seem internally inconsistent on their face. The reference in paragraph 3.28 to the situation at Oxford Road/Middleton Stoney Road/Kings End as somehow providing support for a strategic highway infrastructure contribution does not make sense, given the conclusion earlier in the report that the mitigation works to this junction would ensure that the way it will operate will not be materially different to the way it will operate in the baseline scenario. Based on that conclusion, it is my view that Mr Clarke could only, as a matter of logic, conclude that the mitigation works to that roundabout could not justify a further strategic highway contribution. Moreover, later in the report at paragraph 5.1e) he also sets out his conclusion that the proposed mitigation to the A41/Lakeview Drive signalised junction would be adequate to support the development. This appears to conflict with his previous analysis of that junction.

55. In addition, the analysis more generally does not address the legal tests which I address below which any planning obligation must meet.

56. Section 4 of the report then purports to deal with the question of the timing of mitigation and seeks to agree with OCC that the all mitigation would be required prior to first occupation of the development.

57. Section 5 then sets out what is intended to be a summary, asserting that there is a very sound argument in favour of section 106 developer contributions to fund the transport infrastructure required to support Local Plan growth, but leaving the question of any amount of contribution and calculation as a matter for OCC to justify in the context of the SPD, the tests for planning obligations and other material considerations.

58. As to viability, Mr Clarke considered that in the absence of a viability assessment, this was a matter on which it was difficult to have too much sympathy and he referred to paragraph 57 of the NPPF. Mr Clarke then stated this:

“d) It is understood that the South-East Perimeter Road (SEPR) is a committed project. In general terms to enable Strategic Highway Infrastructure to be delivered, such as the SEPR, all new development in the area of influence will need to contribute. If development granted permission in the early phases do not contribute to this infrastructure but add to the existing traffic impact on the highway network then the later developments may be required to contribute a higher cost to ensure delivery [of] this required infrastructure. Failure to collect appropriate contributions at any stage could risk delivery of the identified infrastructure. With reference to the above the delivery of strategic highway infrastructure such as the South-East Perimeter Road (western section), or scheme of similar benefit, will be at risk if appropriate contributions are not forthcoming.”

59. Leaving aside the question of the proper analysis of whether any contributions can be justified (dealt with below), I note immediately that it appears Mr Clarke’s was not given the correct information. As far as I am aware, the South-East Perimeter Road is not a “committed project”. I assume that this would have affected his conclusions had he known the correct position. In addition, I note that his analysis does not deal with the legal framework for dealing with infrastructure contributions and, in particular, the CIL Regulations 2010 (which I address below). Neither OCC, nor Mr Clarke, purport to explain how relevant infrastructure contributions could in fact be lawfully collected for the SEPR in the way that appears to be assumed without infringing section 123 of the CIL Regulations 2010. I return to this below.

60. In light of OCC's belated criticisms of the modelling, Motion responded to CDC by letter dated 23 August 2018. This letter pointed out (amongst other things) the way in which the approach to modelling had previously been agreed and why the criticisms made were not valid.
61. However, Motion also took the opportunity to respond to the various outstanding concerns by providing some further modelling work to see whether additional mitigation could be provided (notwithstanding what it had already shown). The letter set out the results of that work and its response to the additional reports commissioned on behalf of OCC and CDC.
62. Motion has identified that with the provision of an additional westbound lane on Lakeview Drive, there would be a positive effect on the operation of the network. The degree of saturation on each of the links would fall below the 90% that OCC had identified as of concern (with the exception of the Esso access at 90.6%). Motion stated that this could be provided as a minor alteration if it resolved OCC's concern. Motion pointed out that addressing the capacity concerns would remove any need for a further contribution. It also pointed out that none of the modelling in respect of four previous developments in the area had taken account of the SEPR and referred again to the Inspector's approach at the Bicester Gateway Retail Park appeal.
63. The planning application was reported to CDC's Planning Committee on 23 August 2018. By 13 votes in favour, with 2 abstentions, the Planning Officers' recommendation to grant planning permission subject to conditions and a section 106 agreement was accepted. It has indicated that if agreement cannot be reached with CDC (with or without OCC support), then the Application will be presented to a future committee.
64. I am instructed that, in general, CDC members were very supportive of the application itself. It is understood that they consider provision of an office park to be long overdue and that the Tesco was supported expressly for the purpose of enabling the Business Park to come forward. Members were concerned about viability and the OCC request. However, they also expressed concerns about congestion on the A41 and, whilst not necessarily endorsing the OCC position, I understand that they require justifications to reject it.

65. Those instructing me consider that at the heart of the case for any required mitigation and/or strategic highway contributions are the following issues:

- a. whether there is any need for additional mitigation;
- b. whether there is a need for a contribution to the SEPR, or an alternative to it, and any public transport contributions, to mitigate any impact in light of the relevant policy and legal tests.

66. There is a concern that OCC is demonstrating inconsistency in its approach to this development, when compared with other recently approved schemes on the A41 in terms of the level (if any) of strategic highway and public contributions sought.

67. As noted above, I am instructed that the SEPR is not a committed scheme - there is no route, programme or funding in place for its delivery. It also may not be required in any event given that a new Oxford Cambridge Expressway ("OCE") is proposed. A preferred option for its route has very recently been selected. It is not clear what OCC have in mind by referring to a scheme of similar benefit to the SEPR.

68. The issue of the SEPR arose at the Bicester Gateway Appeal Decision. At paragraph 7 of the decision dismissing that appeal, the Inspector expressly discounted reliance on the SEPR as a potential form of mitigation in the following terms:

"It would not be right to take account of any mitigation provided by a south east perimeter road for which land has been safeguarded in the Graven Hill permission, as there is no currently identified financing of that highway scheme and it is at a relatively early stage in its progress towards implementation."

69. The SEPR is, however, identified within OCC's Local Transport Plan. The total estimated cost of its provision is said to be £21.3 million (October 2015 estimate), where OCC states that £585,127.33 is estimated to be held or secured by s.106 contributions.

70. From the documents it can be seen that OCC has purported to apply a formula taken from the Adopted CDC Developer Contributions Supplementary Planning Document (“SPD”) dated February 2018 when setting what it claims to be the required contribution from this proposal of £2,965, 185.99 to the SEPR and in respect of the proposed rail contribution. I understand that this approach has not been applied elsewhere on other approved schemes (although they may well have preceded the adoption of the SPD).

71. CDC has no CIL, nor any plans to introduce it.

Analysis

Issue (1) : Overall approach to section 106 agreements in light of NPPF, CIL Regulations 2010 the Local Plan and SPDs

72. As the issue of what may properly be sought in terms of contributions in respect of development is governed by both law and policy, it is appropriate to commence the analysis by setting out the correct legal position, before turning to questions of policy. Unfortunately the legal position has not been fully analysed by CDC to date, nor more particularly by OCC in purporting to seek the contributions that they have belatedly claimed.

The Legal Framework

73. Section 57 of the 1990 Act sets out the key provision that underpins the basic principles of planning control. Subject to certain exceptions (not relevant here), planning permission is required for the carrying out of any development of land.

74. Section 70(2) of the 1990 together with the section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) establish the plan-led system for the grant of such permission. Applications for planning permission are to be determined in accordance with the development plan for an area, unless material considerations indicate otherwise.

75. As a matter of principle, therefore, development can sometimes be required to provide mitigation, or even contributions to infrastructure, where such mitigation or infrastructure is necessary to make the development accord with the policies in the

development plan; alternatively, other material considerations (such as policies in the NPPF) may also affect the need for such mitigation or infrastructure provision.

76. Section 106 of the 1990 Act provides a well-established mechanism for an applicant to enter into planning obligations that run with the land which can secure appropriate contributions, where such contributions are required for the grant of planning permission for development.

77. I will turn to the relevant policies in the development plan and other policy documents below. Before doing so, however, it is important to note that the general legal principles set out above are now subject to other legal requirements set out in the Community Infrastructure Levy Regulations 2010 (“the CIL Regulations”). The CIL Regulations have enshrined, but also developed, certain principles that were previously explored in case law and some of which were only reflected as policy.

78. Part 11 of the CIL Regulations deals specifically with planning obligations. Regulations 122 and 123 of the CIL Regulations now set important legal (rather than policy) limitations on the use of planning obligations.

79. Regulation 122 provides, so far as material:

- “(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
- (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is
 - (a) necessary to make the development acceptable in planning terms;
 - (b) directly related to the development; and
 - (c) fairly and reasonably related in scale and kind to the development.”

80. Regulation 122 of the CIL Regulations has a long pedigree in relation to policy and principle, reflecting the position that planning permissions should not be bought or sold. However, the introduction of Regulation 122 of the CIL Regulations creating new legal requirements has been articulated as giving rise to the need for a “rigorous justification” for any contributions sought: see eg *Borough of Telford and Wrekin v Secretary of State for Communities and Local Government* [2014] EWCA Civ 507, per

Sullivan LJ at [70]. As a matter of principle, therefore, OCC and CDC (if they were to seek to require contributions required by OCC) will need to provide rigorous justification of how the contributions meet each of the three tests set out in Regulation 122.

81. Regulation 122(2)(a) means, amongst other things, that planning obligations should not be sought to secure contributions for infrastructure which is not necessary to make development acceptable in planning terms. Regulation 122 of the CIL Regulations is applicable to both OCC and CDC; but as CDC is the relevant planning authority responsible for the grant or refusal of planning permission in this case it is ultimately responsible for ensuring proper compliance with Regulation 122 of the CIL Regulations.

82. The effect of Regulation 122 of the CIL Regulations¹ was recently considered by the High Court in *Good Energy Generation Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 1270 (Admin). Lang J referred to previous case law on section 106 of the 1990 Act and then stated as follows:

“71. However, since these cases were decided, regulation 122 of the CIL Regulations 2010 has come into force, and thus where there is a section 106 TCPA agreement, the tests in regulation 122 have to be applied by the decision-maker. Those tests are more stringent than the common law tests set out above. I agree with the observations of Gilbert J. in *R (on the application of Working Titles Films Limited) v Westminster City Council* [2016] EWHC 1855 (Admin) where he said:

"20 The test of necessity in Regulation 122(2) (a) was originally not a test in law of the materiality of a planning obligation. Indeed that was the reason why the challenge failed in *R v Plymouth City Council ex p Plymouth and S Devon Co-op Society Ltd* [1993] 67 P and CR 78. It was a test of policy, and not a test in law – see Hoffman LJ in Plymouth at page 90, and Lord Keith in *Tesco Stores v Environment Secretary* [1995] 1 WLR 759 at 769 D-770 A, Lord Hoffman at p 777 B-C, 780 A-781C. The tests in (b) and (c) in Regulation 122 also go wider than the law did before its enactment. The test of materiality in law was hitherto that to be material, the provisions in a 106 obligation (a) had to have a planning purpose, (b) be related to the permitted development and (c) not be *Wednesbury* unreasonable (see Russell LJ in Plymouth at page 82 and Hoffman LJ at page 87). It follows that there are now tests in law which to some degree were not tests of law before their enactment. While I agree with him that the effect of Regulation 122 was drawn from previous Circulars, I respectfully disagree with Bean J in *Welcome Break Group and Others v*

¹ In contrast to general legal principles that applied to section 106 of the 1990 Act absent Regulation 122 - which remains the case in Scotland.

Stroud DC and Gloucestershire Gateway Ltd [\[2012\] EWHC 140](#) at paragraphs 49 and 50 where he treats the ratio of the *Tesco* case on the issue of necessity as still holding good. It is clear that the question of what is "necessary" is now a test in law, which it was not beforehand."

72. The interplay between the case law on material considerations and regulation 122 of the CIL Regulations 2010 was, in my view, accurately described in the Encyclopaedia of Planning at Vol. 2, page 2-3424, paragraph P106.10:

"To the extent that a planning obligation will overcome a legitimate planning objection to a development, its existence is a material consideration under s.70(2) in determining whether to grant permission, provided that it meets the tests set out in reg. 122 of the Community Infrastructure Regulations 2010. Regulation 122 provides that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development. Regulation 122 therefore builds upon certain of the policy guidance previously contained in Circular 05/05 by making compliance with these three tests a legal requirement for the consideration of a planning obligation as a material consideration in support of a proposed development. The reg. 122 requirements remain additionally as policy guidance in the NPPF. As a result, reg. 122 develops considerably the previously evolved case law relating to when a planning obligation could be a material consideration."

73. This issue was not considered in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [\[2017\] UKSC 66](#), presumably because regulation 122 of the CIL Regulations 2010 does not apply in Scotland."

83. As a matter of principle, I consider that an obvious failure by a local planning authority to comply with Regulation 122 of the CIL Regulations would not only be unlawful in itself, but also be likely to amount to unreasonable behavior.

84. Regulation 123 of the CIL Regulations introduced a new limitation on the use of planning obligations, linked to the introduction of CIL generally. Regulation 123 provides, so far as material:

- "(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
- (2) A planning obligation may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure (including, subject to paragraph (2B), through requiring a highway agreement to be entered into).
- (2A) Subject to paragraph (2B) a condition falling within either of the following descriptions may not be imposed on the grant of planning permission-

- (a) a condition that requires a highway agreement for the funding or provision of relevant infrastructure to be entered into;
 - (b) a condition that prevents or restricts the carrying out of development until a highway agreement for the funding or provision of relevant infrastructure has been entered into.
- (2B) ...
- (3) Other than through requiring a highway agreement to be entered into, a planning obligation (“obligation A”) may not constitute a reason for granting planning permission to the extent that-
- (a) obligation A provides for the funding or provision of an infrastructure; and
 - (b) five or more separate planning obligations that-
 - (i) relate to planning permission granted for development within the area of the charging authority; and
 - (ii) which provide for the funding or provision of that project or provide for funding or provision of that type of infrastructure, have been entered into on or after 6th April 2010.
- (4) In this regulation –
- ...
- “relevant infrastructure” means-
- (a) where a charging authority has published on its website a list of infrastructure projects or types of infrastructure that it intends will be, or may be, wholly or partly funded by CIL (other than CIL to which regulation 59E or 59F applies), those infrastructure projects or those types of infrastructure;
 - (b) except where paragraph (c) applies, where no such list has been published, any infrastructure; or
 - (c) in relation to any planning obligation requiring a highway agreement to be entered into or condition falling within paragraph (2A), where no such list has been published, no infrastructure.”

85. Regulation 123 is an important regulation in the context of CDC’s consideration of this application, as CDC is an authority that has not introduced CIL. CDC is not a “charging authority” which has published on its website a list of infrastructure projects or types of infrastructure to be funded, or partly funded by CIL. There is therefore no question arising of potentially overlapping contributions being sought. However, in the absence of CIL, CDC is now constrained by the limitation affecting the collection of pooled contributions to any forms of infrastructure by virtue of Regulation 123(3) (as explained further in the Government National Policy Planning Guidance).

86. In these circumstances, a planning obligation cannot be relied upon as a reason for granting planning permission where there are five or more separate planning

obligations associated with planning permissions granted for development providing for the funding of one piece of infrastructure.

87. This restriction is clearly intended to restrict the use of generic tariffs, or funding pots, for infrastructure that is capable of being funded by CIL.

88. I also note here, for the sake of completeness, that in *Oxfordshire County Council v Secretary of State* [2015] JPL 746, OCC was unsuccessful in its attempt to quash an inspector's decision to strike out a clause in a section 106 agreement requiring a contribution to be paid towards the authority's cost of administering and monitoring the other obligations in the agreement.

The Policy Framework

The NPPF

89. The NPPF has recently been reissued and provides national policy advice on section 106 contributions that is consistent with the legal framework set out above.

90. Paragraphs 54-57 of the NPPF provide as follows:

- “54. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.
55. Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification²³.
56. Planning obligations must only be sought where they meet all of the following tests²⁴:
- a) necessary to make the development acceptable in planning terms;
 - b) directly related to the development; and
 - c) fairly and reasonably related in scale and kind to the development.
57. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability

assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.

²³ When in force, sections 100ZA(4-6) of the Town and Country Planning Act 1990 will require the applicant's written agreement to the terms of a pre-commencement condition, unless prescribed circumstances apply.

²⁴ Set out in Regulation 122(2) of the Community Infrastructure Levy Regulations 2010.”

91. The NPPF also provides specific advice in relation to sustainable transport matters in Chapter 9. It contains specific national policy advice on considering development proposals in paragraph 108 and 109 as follows:

“108. In assessing sites that may be allocated for development in plans, or specific applications for development, it should be ensured that:

a) appropriate opportunities to promote sustainable transport modes can be – or have been – taken up, given the type of development and its location;

b) safe and suitable access to the site can be achieved for all users; and

c) any significant impacts from the development on the transport network (in terms of capacity and congestion), or on highway safety, can be cost effectively mitigated to an acceptable degree.

109. Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe.”

The Development Plan

92. I have already set out policies from the development plan relevant to the proposals and the position adopted by OCC to date in respect of such policies. Whilst the policy dealing with Bicester 4 refers to contributions to improvements to the surrounding local and strategic highway road networks, it does not specify what contributions are required, nor does it identify contributions being required to a SEPR. Policy SLE 4 indicates that CDC will support transport proposals that come forward through the Local Transport Plan, but with the expectation that these will be embodied into Part 2 of the Local Plan. Reference is made to the relief road for Bicester, but there is no policy requirement in Policy SLE 4 for development to make contributions to such a

relief road as a matter of principle (as opposed to mitigating the transport impacts of the development).

CDC Developer Contributions SPD – February 2018

93. CDC has adopted a Supplementary Planning Document (“SPD”) relating to developer contributions. This does not form part of the development plan itself, but it is capable of being a material consideration, but the weight it is afforded will depend upon its content. It is axiomatic, however, that the SPD cannot override the legal requirements of the CIL Regulations.

94. I note that section 1 of the SPD seeks to explain the position to seeking contributions in the absence of CIL, and the limitations that follow from Regulations 122 and 123.

95. Later, at paragraph 3.2, the SPD notes:

“3.2 Although the scope for securing S106 planning obligations has been reduced since April 2015 due to the pooling restrictions, it is expected that planning obligations will still be sought for:

- Affordable housing; and
- Infrastructure which is required to mitigate the direct impact of a development.

It should, however, be noted that this is a general guide and development proposals will continue to be assessed on a case by case basis with the individual circumstances of each site being taken in to consideration when identifying infrastructure requirements.”

96. I also note that paragraph 3.12 of the document states that a key objective of the SPD is to alert applicants of the likely level of planning obligations that can be expected from proposed development well in advance of any planning application being submitted; this is said to enable a developer to factor it into any potential land transaction. However, it is clear that the SPD has not had such an effect, with the purported contributions now being sought by OCC only having come very late in the day.

97. The SPD continues to deal with issues of viability in paragraphs 3.13 onwards. The broad thrust of these paragraphs is a stated intent of ensuring that contributions do not

threaten the viability of the sites, and where disagreement arises, the applicant being expected to provide clear and transparent evidence to support its case. I note, however, that there has been no meaningful opportunity for the Applicant to do so in this case; the contributions now being sought which will clearly be relevant to viability were only sought at the last minute by OCC. As far as I can see, previously the Applicant had no need to provide further viability material and it has not had proper to do so to date arising from the OCC's current position.

98. Section 4 of the SPD deals with planning obligation requirements in respect of transport. It states that all new development in the District will be required to provide financial and/or in-kind contributions to mitigate the transport impacts of the development to supply delivery of the infrastructure and services needed to facilitate travel. This, of course, does not begin to explain how such contributions will comply with Regulations 122 and 123 of the CIL Regulations.

99. Having dealt with local transport mitigation, paragraph 4.147 onwards state:

“4.147. In addition to local transport mitigation, S106 contributions will be required for strategic transport schemes (identified in the IDP) related to cumulative growth using the following formula (subject to the constraints of planning legislation):

X = Cost of Scheme(s)
Y = Held/Committed funding Z = Alternative Funding
E = Expected Growth

$$S106 \text{ Contribution} = (X - Y - Z) \div E$$

4.148. As denoted by ‘E’, where a scheme (to which a strategic transport contribution is requested) serves the needs of multiple developments, the cost of the scheme will be shared proportionately across the relevant developments (subject to any pooling restrictions).”

100. Again, whilst noting that this is “subject to the constraints of planning legislation” – presumably intended to be a reference to, amongst other things, Regulations 122 and 123 of the CIL Regulations – it is not explained how such contributions will be assessed against those legal requirements. Nor is it explained exactly how E is to be calculated in terms of the formula.

101. As a matter of basic principle, even if there were a legal basis for seeking tariff contributions which would not offend against Regulation 122 or 123 of the CIL Regulations, the calculation of any contribution would need to be fairly and

proportionately done. It would need to ensure that all relevant developments shared the cost proportionately when calculating the figure E, as it is intended to represent the share of the overall cost of the relevant infrastructure. However, there is no meaningful explanation of how this is achieved in terms of what other development is included. For example, it is not explained how shares are attributed to the different forms of development that will potentially benefit from such infrastructure (such as housing).

Issue (2): OCC's approach

102. Having set out the principles, I am asked whether, having regard to the evidence and the Applicant's case that the application proposals will not result in severe cumulative impacts on the road network (as referred to in paragraph 109 of the NPPF), the approach taken by OCC can be regarded as meeting the necessary tests, namely whether the contributions sought are necessary, directly related to the development and fairly and reasonably related in scale and kind.

103. For these purposes, I summarise my views on the current state of the evidence in relation to each of the contributions sought in turn in light of the legal and policy framework set out above.

General Approach

104. Dealing first with the NPPF, it is clear that as a matter of national policy under paragraph 108 the approach is generally to ensure that any significant impacts from development on the transport network (in terms of capacity and congestion), or on highway safety, can be cost-effectively mitigated to an acceptable degree. This, however, is subject to the principle in paragraph 109 of the NPPF that development should only be prevented or refused on highway grounds if there would be an unacceptable impact on highway safety, or if the residual cumulative impacts on the road network would be severe.

105. Accordingly, in my opinion, the NPPF positively advises CDC that planning permission should not be refused for this application in terms of its impact on the road network unless the residual cumulative impacts on the road network would be severe.

106. Turning to development plan policies, Policy Bicester 4 refers to making contributions to local and strategic road networks, but no specifics of such contributions are set out and the same is true of Policy SLE4. These policies now need to be read in light of the NPPF in any event. It is therefore difficult to see how an up-to-date application of the development plan policies can form a reasonable basis for objecting to a proposal in terms of impact on the road network unless there is a severe residual cumulative impact.

107. Moreover, even if one were to ignore the NPPF (which is clearly inappropriate) and read Policy Bicester 4 in isolation, on its face the policy is satisfied if some contribution is made to improvement of the surrounding local and strategic road network (something that has in fact already been offered by the Applicant). There is nothing in these policies which justifies, or supports, the scale of contributions that OCC has suggested as being required. And Policy SLE4 is specific in seeking new development to provide financial or in-kind contributions to mitigate the transport impacts of the development. If those impacts have been mitigated, or can be mitigated, in the way Motion has identified without any strategic contribution, then there is no obvious policy requirement for such additional strategic contribution.

108. Turning to the legal requirements affecting any planning obligation under Regulation 122, it is necessary to ensure that any contribution meets the three tests of being necessary, directly related to the development and fairly and reasonably related in scale and kind.

109. If there are no residual severe impacts on the highway network from the development, then it is difficult to see how these tests are met by attempting to impose a requirement for further significant contributions, in light of the clear policy position in paragraph 109 of the NPPF and in the absence of any more specific policy requirement in the development plan. I deal with this in more detail below in relation to each of the specific contributions sought.

The Specific Contributions

Strategic Highway Infrastructure

110. The sum of £2,965,185.99 is being sought by OCC by way of contribution towards the South-East Perimeter Road (western section) or scheme of similar benefit.

111. In my opinion, based on the evidence I have seen to date, there is no legal or proper policy justification for such a contribution for the following reasons.
112. First, in terms of impacts on highways, I refer to the latest position represented by Motion's response to the OCC and CDC consultant reports.
113. As I understand the state of the evidence, it is at least common ground between Motion and CDC's consultant that there is no residual material impact from the development proposal on the Oxford Road/Middleton Stoney Road/Kings End Road roundabout junction (see paragraph 3.21 of the Edwards and Edwards Report). It therefore appears that the development proposal mitigates its impact on the road network in terms of this junction. There is therefore no justification for seeking a contribution to the strategic road network, given the absence of any residual material impact arising from the development to this junction. I have already explained that I do not understand the later part of the Edwards and Edwards report which appears to contradict this approach.
114. As to the A41 Oxford Road (A41) / Lakeview Drive signalised junction, there appears to have been a difference of view between OCC/CDC and Motion previously as to the residual impact in relation to Lakeview Drive (ie before Motion's identification of an additional mitigation measure). I am far from satisfied that either OCC or CDC have explained how the previously identified residual impact on that junction could be classified as severe for the purposes of paragraph 109 of the NPPF. However, even if there is room for debate about that, the position has now been modelled further by Motion with the inclusion of an additional lane. From the material that Motion has now provided, I consider that any residual impact on that junction can be mitigated with that lane to ensure that there is no material exceedence of the 90% degree of saturation. In those circumstances, it is very difficult to see how any remaining objection to the proposal in terms of residual impact on the highway network can be pursued.
115. In light of this, I cannot see any proper justification for additional mitigation being required in the form of a contribution to the SEPR as a matter of principle. It seems to me that such a contribution would fail the tests under Regulation 122, not least

because such a contribution is simply not necessary to make the development proposal acceptable in planning terms.

116. Secondly, I find it difficult to see how OCC and CDC could legitimately seek a contribution to the SEPR, given that it is not a committed scheme and for all the reasons identified by the Inspector in the Bicester Gateway Retail decision. I am not aware of any significant changes in circumstances since that time which could justify a different decision.
117. Thirdly, even if a contribution to the SEPR could theoretically be justified in principle, I am at a loss to understand how the very large sum said to have been calculated under the SPD can be justified at all, both in terms of calculation and in terms of Regulation 123 of the CIL.
118. In terms of calculation, I have been unable to understand why OCC has applied the figures it has to the formula in terms of the figure E. It seems to me that even if it were legitimate to seek some sort of tariff from all development that would benefit from the SEPR, there is no basis for calculating E in the way that has been done simply by reference to the floorspace of the proposed development and other office space development, without factoring in all other forms of development (housing, retail etc) that would also benefit and be expected to make a proportionate contribution.
119. In terms of Regulation 123, no explanation is provided as to the composition of the sums already said to be secured by section 106 agreements, and whether there are already more than five section 106 contributions in place. But even if there were not, there is no coherent explanation as to how the remainder of the funding could and would be secured from future development without infringing Regulation 123 and the pooling restriction. If that cannot be achieved, it is impossible to see how the contribution meets Regulation 122. For example, the contribution from this development cannot be necessary if the SEPR depends upon other contributions in the future which cannot be secured without infringing Regulation 123. Nor could it be said to be fairly and reasonably related in scale and kind.

120. For these reasons, on the evidence as it stands, I do not consider there to be any proper legal or policy justification for the strategic highway contribution being sought by OCC.

Rail Contribution

121. A sum of £670,532 is sought by OCC by way contribution to East West Rail.

122. I do not need to spend any significant time in dealing with the lack of any legal or policy basis for this contribution, given that CDC officers have already expressly identified in the officers' report that they are not pursuing this contribution. As a matter of principle, I consider such a contribution would be likely to fail the tests under Regulation 122. There is, for example, no attempt by OCC to explain how it is necessary to make this development acceptable given the rail connections that already exist to the site. Nor is there any proper policy basis, in any event, for such a contribution. In addition, I would expect the same pooling problems in relation Regulation 123 to arise even if there were otherwise a justified policy basis for seeking such a contribution; but I consider it is unnecessary to go into this further in the circumstances.

Public Transport Contribution

123. A further sum of £375,000 is sought by OCC in relation to a peak hour bus service enhancement. I do not know whether this is still being pursued by CDC, but the Applicant has already pointed out the proposals for bus stop provision on the A41. As things stand, I do not see how such a contribution would comply with Regulation 122 of the CIL Regulations given the existing bus service provision that exists which has been identified by the Applicant.

124. Smaller sums are sought for bus stop infrastructure within the site and a bus shelter on the A41. I am not clear if these are pursued, but again I have not seen any meaningful explanation as to why these contributions are necessary. As to a bus stop within the site, there is no evidence that such a bus stop is necessary, or that a service would be diverted. As to the infrastructure on the A41, if this is to be provided through the Bicester Gateway Retail scheme, there would be no justification for seeking its provision from the Applicant.

Monitoring

125. Finally, I have already noted the OCC's consultation response referred to OCC seeking £10,027 by way of an "Administration and Monitoring Fee". As noted above, OCC has already failed in an attempted legal challenge to a decision by an Inspector to strike out such attempts to seek money for monitoring in this way. I am therefore surprised that OCC are still seeking such sums in this way. I do not regard such a monitoring fee to be necessary, nor directly related to the development, for the reasons dealt within that case.

Issue (3) : OCC's approach if severe cumulative impacts

126. I am asked to consider whether OCC's approach would meet the relevant tests in Regulation 122 if there were evidence to suggest that the proposals would result in severe cumulative impacts on the road network.

127. This question only relates to the strategic highway network contribution being sought. If there were residual severe cumulative impacts from the development within the meaning of paragraph 109 of the NPPF, this could potentially form a basis for refusing the scheme absent further mitigation measures to address that impact. In those circumstances, if a road scheme could be identified which was to be delivered to mitigate those impacts, then a contribution could potentially be classified as necessary for the purposes of Regulation 122. If the contribution were proportionate, it could also meet the other two tests. The difficult would remain, however, that the SEPR is not a committed scheme and it would be difficult to meet the Regulation 122 tests without knowing that it was to be delivered to address the development. In addition, my concerns as to the calculation of the sum being required from this development would remain, as would my concerns under Regulation 123 of the CIL Regulations 2010.

Issue (4): what reliance can be placed on the SEPR, or any other unspecified scheme of "similar benefit" by way of mitigation in respect of the development?

128. For the reasons I have touched on above, I do not consider that any meaningful reliance can be placed on the SEPR as things currently stand, let alone some other unspecified scheme of "similar benefit" by way of mitigation in respect of the development. As the Bicester Gateway Retail Inspector pointed out, the SEPR is at too embryonic a stage to provide any requisite degree of comfort as a scheme by way of

mitigation, given that it is not committed and its route is not known. In addition, there is uncertainty as to how it could legitimately be funded and when it would be delivered. In those circumstances, it is difficult to see how it can rationally be relied upon by OCC as a form of mitigation said to be necessary for development proceeding now.

Issue (5): the lawfulness of the OCC approach to the CIL pooling restrictions and the suggestion that it may not seek the contributions set out in its response and how this approach is relevant to the appropriate tests

129. As set out above, Regulation 123 of the CIL Regulations is directly relevant to any attempt to fund the SEPR by way of pooled section 106 contributions (or indeed any other form of infrastructure). CDC is not entitled to rely upon section 106 obligations to fund infrastructure with five or more such pooled contributions.

130. It is helpful to see that OCC acknowledge this point in principle in the standard part of their consultation response; but there is then no subsequent analysis in OCC's consultation response. In my view OCC should have explained clearly how they consider contributions towards the SEPR can legitimately be sought in light of Regulation 123 but I have not seen any such explanation.

Issue (6): the appropriateness of phasing any payment, if required, having regard to any potential future impact on timescales

131. Given that the whole point of contributions towards infrastructure is to address the impact of development which requires mitigation, I consider that it is necessary and appropriate to consider whether phasing of development can help to address any mitigation when mitigation is required. For example, if there were in fact a highway impact arising from office space provided on this site, it would be directly related to the number of users travelling by car. That in turn is directly related to the amount of floorspace proposed. If that highway impact would only arise after a certain volume of floorspace had been exceeded, it would be sensible to consider the phasing of development so that the need for highway mitigation were triggered at the point at which a certain floorspace were exceeded. I do not see why it would be reasonable or logical to exclude this approach as a means of addressing a development impact of this kind. I have seen no good reason for doing so

Issue (7): relevance of any OCC/CDC concerns about precedent and consistency and the implications of this case for any future requests for section 106 payments

132. Consistency is a general principle of good administrative law. Precedent, on the other, is a more difficult concept. That is because each and every case turns on its own facts and must be considered in light of the specific circumstances which apply to it.

133. In my opinion, there is no legitimate reason for OCC or CDC to rely upon precedent or consistency as a basis for seeking the contributions in question above, absent any proper legal or policy basis for the contributions themselves. The only precedent of not seeking contributions in those circumstances is the precedent of applying the law and policy to the facts of a particular case correctly, which cannot be objectionable. The fact that the law and policy may mean that OCC and CDC do not have a proper basis for collecting a levy for delivery of infrastructure such as the SEPR only serves to expose a problem of their own making, namely the absence of a proper CIL mechanism for collecting tariff type contributions for infrastructure in their area. That does not provide a basis for not complying with Regulations 122 or 123 of the CIL Regulations.

Issue (8): the relevance of the inconsistency of approach taken by OCC in respect of other schemes in the vicinity to the application of the CIL tests, both in relation to strategic highway contributions and public transport contributions, and whether in the circumstances the OCC approach could be regarded as reasonable

134. As I have already noted, consistency is a principle of good administrative law. If OCC has been inconsistent in its approach to other schemes, that is relevant. It should not, for example, be a basis for subsequently seeking a disproportionate contribution towards infrastructure from subsequent development proposals.

Issue (9) the likelihood of all, or any, of the contributions being sought by OCC being required if the Application were to be appealed and the reasonableness of OCC's position, and any reliance placed on it by CDC, in the event of an appeal and an application for costs.

135. On the basis of the evidence as it currently stands (in particular Motion's latest analysis), it seems to me that it is unlikely that an Inspector would require the

contributions being sought by OCC (save perhaps those relating to bus provision if they can be shown to be required) for the reasons I have set out above. In addition, in the absence of any meaningful justification from OCC on how these contributions comply with Regulations 122 and 123, I consider that an Inspector might well find OCC's position to be unreasonable and so potentially award the Applicant its costs of an appeal on such issues.

JAMES STRACHAN QC

39 Essex Chambers

London WC2A 1DD

3rd October 2018