



Neutral Citation Number: 2016 EWHC 1349 (Admin)

Case No: CO/5501/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL
(handed down at Winchester Combined Court)

Date: 09/06/2016

Before :

MR JUSTICE DOVE

Between :

**THE QUEEN (on the application of PETER
WRIGHT)**

Claimant

- and -

FOREST OF DEAN DISTRICT COUNCIL

Defendant

- and -

RESILIENT ENERGY SEVERNDALE LTD

**Interested
Party**

Neil Cameron QC and Zack Simons (instructed by Richard Buxton Solicitors) for the
claimant

Paul Cairnes QC and James Corbet Burcher (instructed by Solicitor for Forest of Dean
District Council) for the **defendant**

Martin Kingston QC and Jenny Wigley (instructed by Burges Salmon LLP) for the
interested party

Hearing date: 21st April 2016

Judgment Approved by the court

Mr Justice Dove :

Introduction

1. This case concerns the question of whether or not an element of the package of socio-economic benefits associated with a wind turbine development, in the form of a local community donation based on turnover generated by the wind turbine, amounts to a material consideration which it was lawful for the defendant to take into account when granting planning permission for the development to the interested party. In addition, the case also concerns whether or not it was lawful to impose a condition requiring the development to be carried out via a community benefit society registered under the Co-operative and Community Benefit Societies Act 2014.

The Facts

2. On 29th January 2015 the interested party applied for planning permission to the defendant for a proposal described in the application and the subsequent permission in the following terms:

“Change of use of agricultural land to wind turbine and installation of a wind turbine to generate renewable energy including grid connection and ancillary works.”

3. The application was supported by an Environmental Report produced by the interested party. The project comprised in the application was described in the following terms:

“2.2 Project Description

It is proposed that the project will consist of the installation of a single Community Scale Wind Turbine with a maximum height of 60m to hub height (87m to blade tip). This is the same as for the installed Great Dunkilns turbine at St Briavels. The

preferred turbine option is the Enercon E53 turbine or Powerwind 500 (or similar). The turbine will be of 500kW capacity and will follow the community focussed Resilient Energy partnership model established by the Resilience Centre and now recognised as an exemplar for community renewable energy.

The applicants intend to establish a community investment scheme where local people are able to share directly in the project returns.

Annual community donations will also be made based typically on 4% of turnover (estimated at an average of around £15k to £20k each year for 25 years of operation – up to £500k to help address current and future community needs).

Aspects of construction and materials will be purchased from by (sic) local suppliers where possible.

It is also our preference that the turbine tower and components would be manufactured by Mabey if possible. To this end we have actively introduced Mabey to a number of turbine manufacturers who have since confirmed Mabey as a supplier.”

4. The Environmental Report also addressed the question of the consultation process for the application, and provided information in relation to a presentation to Tidenham Parish Council. The presentation is described in the following terms:

“An explanation of the overall approach of The Resilience Centre regarding Community Scale renewable energy projects in local Resilient Energy partnerships was also provided, as well as details of the proposed community benefits, including locally owned, decentralised energy generation, local job creation/safeguarding, and an annual community donation based on a scale of 4% of turnover over the 25 year operational lifetime of the project. Projects following the Resilient Energy partnership model include a commitment to maximising local community benefits as for the installed St Briavels Wind Turbine (Resilient Energy Great Dunkilns). It is intended that the proposed Severndale Community Scale Wind Turbine will similarly be opened up for the community to invest in at the development stage. Enabling local people to directly share in the financial returns of the project through investment, combined with a sector leading community donation once the

project is operational, is a significant part of the Resilient Energy approach and distinguishes these community energy projects from those which follow a purely commercial development agenda,”

5. In the section of the Environmental Report dealing with socio-economic benefits the following extracts set out the basis upon which the application was promoted:

“5.9.1 Socio-Economics

The approach of Resilient Energy Severndale involves a partnership between the landholder and the Resilience Centre, based on a shared risk/expenditure basis and an equitable share of the financial rewards following development. The project is designed to help meet the energy needs of the local community (rather than an industrial scale project which far exceeds local energy demand) and furthermore, the ethos of the company is to provide a generous share of the rewards to the community, through providing both an opportunity for local people to invest in the project, and through an annual donation based on approximately 4% of turnover to help build Community Resilience in the locality.

...

The single wind turbine proposal is a partnership with local entrepreneurial farmer, Mr Lyndon Edwards, following the community focussed Resilient Energy model developed by the Resilience Centre; a Forest of Dean based social purpose business. The capital for building the project, should planning consent be issued, will be raised through a Community Energy investment offering which ensures that the largest proportion of money is returned to local people instead of banks. Additionally the local community will receive an annual donation based on approximately 4% of turnover providing up to £500 to help build resilience within the local community over the project’s 25 years of operation.

...

The socio economic benefits of the Resilient Energy approach are listed below with further details for each provided in subsequent paragraphs.

- **Community Scale Approach – helping meet & not exceed local energy needs**

- **Generation of clean energy and contributing meaningful amount to CO2 emissions reduction**
- **Community Focussed Approach – directly and indirectly benefitting the local host community/communities by retaining up to 80% of financial benefits in the local economy**
- **Contribution to Increased Energy Security for farmers and communities**
- **Democratic Community Finance Model & Established Community Investment scheme keeping money in local economies supporting the 80% of financial benefits retained locally**
- **Diversification of income for agricultural holdings sustaining local organic farms**
- **Creating and safeguarding local jobs; both directly (up to 2 local jobs created directly per turbine) and indirectly (an estimate of 20+ related jobs in the District based on current pipeline).**
- **Direct opportunities for local suppliers and contractors, Forest EPC, Forest Eco Systems and The Resilience Centre**
- **Sustainable Community Benefits over life of turbine averaging £40,000/MW installed capacity= 8X latest Government recommendations**
- **Educational Resource for local schools, site visits & lectures – 180 children visited St Briavels in first 6 months of operation and it is now an annual curriculum fixture**
- **New opportunities for proactive local businesses in other sectors (eg tourism, accommodation, equipment hire, maintenance, service sectors)**
- **Retention of a significantly greater proportion of money paid in electricity bills kept within the local economy through back to back power purchase agreement**
- **Retention of business rates within the District at £6,000/annum**

...

Community Focussed Approach – directly and indirectly benefitting the local host community/communities

The Resilient Energy Partnership model results in a fair and equitable distribution of revenue between landowner, community and developer (as outlined in the summary presentation of our overall approach in Section 9 of the Environmental Report). In addition a local community donation based on turnover (not profit) and expected to average £15,000-£20,000 per year for the 25 years operation (around £500,000 per 500kW turbine). The approach far exceeds to latest Government guidance (at around £40,000/MW versus £5,000/MW installed).”

6. The document concluded in relation to the socio-economic benefits of the proposal in the following terms:

“This planning application is for a temporary consent for a 500kW Community Scale Wind Turbine at Severndale Farm, Tidenham, following the Resilience Centre’s award winning Resilient Energy community model which aims to maximise the local economic and social benefits of locally led renewables at minimal environmental impact. The application is for an operational period of 25 years plus a year for construction and a year for decommissioning (i.e. 27 years in total).

...

This project is shown to have strongly positive socio-economic effects (greater than for much larger scale energy generating projects on a per MW installed basis) and the locally based applicants have a strong commitment to maximising local economic benefits. It is the intention of the applicants to make an annual donation to a local Community Fund based on 4% turnover (predicted to average around £15k-£20k per annum over the 25 year lifetime of the 500kW (0.5MW) wind turbine project). This equates to up to £500,000 over 25 years—around 8X the recommendation in the latest Governmental guidance (July 2013) per MW installed. For the operational St Briavels turbine a similar Community Fund is already delivering on a similar commitment as well as already providing returns to its community investors. It has funded a number of projects of local community benefit, as selected by an advisory panel of local people.

...

As a social purpose business, The Resilience Centre is committed to reinvesting in further projects which help to build resilience in society in the context of climate change and depleting resources. As the portfolio of renewables partnership projects develops, providing business investment capital, additional skilled employment opportunities will be created in a number of specialisms to deliver this broader sustainable development vision more widely from a local Forest of Dean base.”

7. The application was also accompanied by a Planning Statement which dealt with matters associated with planning policy and renewable energy policy. In the section on the benefits of the proposal the Planning Statement recorded the views of the author of that document in the following terms:

“3.4.6 Unlike the major commercial wind farm developments, this is one of a new range of community wind projects where the applicant will be offering shares to fund the project to the local community as well as setting up a community fund to be administered by local trustees. It is not suggested that any weight should be given in the decision-making process specifically to the presence of this fund, but the positive social and economic impacts that will result are material considerations in the decision-making process, and the direction of travel by Government in announcements during 2014 is clear. The recent announcement by the Government of the desire to see more community involvement in the decision-making process for onshore wind turbines as well as the community receiving more in the way of benefits from such developments clearly chimes with the type of proposal involved in this application. Indeed, in January 2014 DECC published its Community Energy Strategy Full Report placing communities at the heart of the debate as to how to engage local people in the energy process. The Resilience Centre is one of the pioneers of this new emphasis, having already erected one community wind turbine in the Forest of Dean to its award winning Resilient Energy partnership model and having consents for three more (two in Stroud District and the other in the Forest of Dean).”

8. Following a site visit by members of the planning committee on 23rd June 2015 officers wrote and published a committee report so as to enable an informed consideration of the application at the defendant’s planning

committee on 14th July 2015. This report recorded representations that had been made both in support of and opposition to the development proposal. The claimant had objected and both at this stage and subsequently had made representations opposed to the development. In respect of the proposed socio-economic benefits of the development the officers provided their opinion in the following terms:

“The applicant indicates that the local community would be provided with the ‘opportunity’ to invest in shares in the scheme with an envisaged return of 7%. In addition, an annual return of approximately 4% of the gross revenues is proposed to be donated to the host community via a Community Fund. The applicant refers to similar schemes that are operational and or pending construction. In considering the economic contributions that the applicant has indicated, while there are similar schemes that may or may not be in operation, there is no formal agreement or arrangements with shareholders and/or the local community in place for this particular proposal. While the applicant’s intention is not in question there are no clear controls and/or enforcement measures that could ensure that these are delivered; no shareholder agreement or clear beneficiaries to any community trust fund. The proposal therefore falls outside of the planning remit. In addition, the fund could be used to finance projects that would be unconnected with low carbon energy generation and therefore be contrary to the ethos of renewable energy. It is therefore considered that whilst such a contribution of payments to the local community may be desirable and may be one which could be seen as a strong reason for granting permission for a renewable energy scheme, in line with a recent appeal ‘called in’ by the Secretary of State for a solar farm at Wroughton, Swindon, the community benefit does not meet the above-mentioned requirements and in fact falls outside the scope of section 106(1) of the Town and Country Planning Act 1990 and fails the tests set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010 as amended.

In view of the above these contributions cannot be a material consideration and members should not give them any weight in assessing the planning merits of this application. In addition, while there would inevitably be economic benefits generated through a low level of local employment during the construction and delivery of the scheme this would be of a temporary nature. ”

9. The interested party did not agree with aspects of the officer's report and wrote to the defendant making representations in relation to it on 10th July 2015. In relation to the creation of a formal and legally binding commitment to deliver the socio-economic and community benefits of the proposal the letter stated as follows:

“Formally and legally binding commitment to deliver community benefits:

The Directors of Resilient Energy Severndale Ltd, the applicant, have provided legally binding written confirmation (dated 9th July 2015) that the project, if approved, will be developed through a recognised legal structure whose purpose is to deliver social environmental and economic benefits for the local community (a Community Benefit Society). This would mirror the legal structure of the existing Community Benefit Society which similarly owns the Alvington Community Turbine project.”

10. In its conclusions, the letter alluded to substantial public benefits which would accrue if planning permission were granted for the wind turbine. These matters were further detailed in Appendix 3 attached to the letter. The Appendix provided a broadly similar list of socio-economic benefits to those which had been set out in the Environmental Report and are quoted above. The Appendix also referred to and relied upon the financial benefits which would arise from the local community donation. This was expressed in the following terms:

“Community Focussed Approach – directly and indirectly benefitting the local host community/communities

The Resilient Energy Partnership model results in a fair and equitable distribution of revenue between landowner, community and developer (as outlined in the summary presentation of our overall approach in Section 9 of the Environmental Report). In addition a local community donation based on turnover (not profit) and expected to average £15,000-£20,000 per year for the 25 years operation (around £500,000 per 500kW turbine). The approach far exceeds the latest

Government guidance (at around £40,000/MW versus £5,000/MW installed).”

11. Consideration of the interested party’s application was deferred at the planning committee meeting of 14th July 2015. The following day the interested party wrote to the defendant in order to encourage them to reach an early determination of their planning application. In that letter the interested party set out its position in the following terms:

“With regard to the above planning application we would like to clarify and formalise our commitment regarding the proposed Community Ownership structure and can confirm that the project will be brought forwards as a Community Benefit Society, if planning consent is obtained. Furthermore the project would commit a total fund of £500,000 of Community Benefit directly to the local area over the first 20 years of operation of the project, to be distributed by a locally self appointed panel of stakeholders plus any additional surplus from the operation of the Society, estimated to be an additional £600,000 over the first 20 years of operation, a total of up to £1,100,000 in direct community benefits.

However, the ability to meet these commitments is time crucial as in the recent budgetary announcement the Chancellor instructed the Energy Minister to complete a mid season term budgetary review of Feed in Tariffs, currently underway and expected to deliver a revised degeneration ahead of the current Feed in Tariff degeneration date of 30th September.”

12. A further officer’s report was prepared to address the interested party’s concerns running up to and following the meeting of 14th July 2015. An update to the committee report was prepared for members so as to equip them for considering the application at a meeting on 11th August 2015. The updated report addressed a relatively recent Ministerial Statement in relation to wind energy proposals which had been made on 18th June 2015. The officer’s analysis of that policy together with their views in relation to the issues of socio-economic benefits and in particular the local community donation proposed were set out in the update report in the following terms:

“Further to the above while the applicant is in disagreement with the calculated figures within the officer report and that the Ministerial Statement should not be applied to this application as it is existing. It is considered that this assumption is incorrectly applied as the Ministerial Statement of the 18th June 2015 is quiet (sic) clear in indicating that during the transitional period where a valid planning application for wind energy has already been submitted to the LPA and the development plan does not identify suitable sites that the following transitional provisions apply:

“In such instances, the local planning authorities can find the proposal acceptable if, following consultation, they are satisfied it has addressed the planning impacts identified by affected local communities and therefore has their backing.”

In light of this the LPA undertook re-consultation to seek clarification on the level of local community support. Having re-consulted with statutory consultees, local residents and contributors (petition not included) it is noted that 58 representations have been received. It is clear that those within the Parish of Tidenham (Local Community to which the applicant has indicated would benefit from the scheme and to which the Ministerial Statement refers) are not fully supportive of the proposal and have reiterated their concerns regarding the adverse impacts that this development would create on the surrounding environment. It therefore remains that the local community are not considered to be in support of the application. The concern/objections of the local community have not been overcome.

The proposed procedure for the establishment and operation of a community benefit, grant fund, society and energy fund cannot be enforced and the Option Agreement is an option not a guarantee, which again cannot be enforced and therefore conditioned. It is therefore not considered that this is material to the determination of this application. Having regard to the representations received from near neighbours whilst there is concern over the application being presented to the August planning committee it is considered that there is sufficient information to achieve this deadline having considered the applicant’s late submission and reconsulted with statutory consultees and the local community therefore no further delay in determination is warranted.”

13. The publication of this update by the officers provoked further correspondence from the interested party. The interested party was in particular concerned in

relation to the officer's analysis of local support. In a letter dated 7th August 2015 the interested party provided the following representations:

“2) Consideration of Public Benefits of the Proposal

- The Officer Report takes into account no social, environmental and economic benefits of the proposal believing they need to be legally guaranteed in order for this to be possible. This is incorrect.
- The considerable social environmental and economic benefits of similar proposals in a neighbouring district were afforded considerable weight in the planning balance and also in the Inspector's decision for the Alvington Appeal as evidenced in the Applicant submission dated 10th July.
- The positive aspects of a proposal are required to be considered along with any adverse effects and a core requirement of the NPPF is such a balancing exercise.
- There is no reasonable justification for disregarding the considerable social, environmental and economic benefits.
- The lack of a correct balancing exercise having been undertaken by the FoD council was a key consideration in the Alvington turbine appeal.

...

5) Concluding remarks

The proposed community benefits are considerable (between £500,000 and £1 million, for direct community benefits over the life of the project, plus additional social environmental and economic benefits as outlined in the application and as an appendix to the Applicant response dated 10th July). The project would be a community owned and operated project which benefits local communities and local businesses. There are many similarities of this proposal with the Alvington proposal (consented on Appeal) in terms of both landscape impacts and the proximity of heritage assets (including both listed buildings and a schedule monument/villa). There is no clear justification from the authority, given a correct balancing exercise and recognition of the identical public benefits to Alvington, why this application cannot be similarly approved.”

14. The reference in this correspondence to the Alvington turbine appeal was a reference to a recent appeal decision dated 6th August 2014. Alvington is a village within the defendant's administrative area. The proposal which was the subject of the appeal was a similar scheme for a wind turbine to that which was before the defendant. The application which had led to that appeal had also been made by the interested party, and the Inspector in concluding that planning permission should be granted had addressed the question of the socio-economic benefits in the following terms:

“32. Paragraph 004 of the same PPG Chapter refers to the likely increasingly important role of community initiatives which should be encouraged as a way of providing positive local benefits from renewable energy development. In this case the proposal is a community wind project with associated social and economic benefits. I have no reason to doubt the Appellant's statement that a community investment scheme will be offered to fund the project with local investors sharing directly in the operating surplus. A similar scheme has already been established in the same District at St Briavels. As the turbine would provide significant income for the farmer, it is also likely that some of these funds will be spent on necessary maintenance of the listed building.

33. There are a significant number of representations of support from local people including a number of residents of Alvington, the nearest village. However there are also local objections, including the parish councils of Alvington and Aylburton.

34. The Council's Officer Report and Appeal Statement did not explicitly assess the public benefits of the proposal or carry out a balancing exercise before concluding with the assertion that the scheme would not deliver proportionate public benefits. The Council's Appeal Statement suggested that there is an absence of an overriding justification based on necessity, however that is not a national policy test. Indeed the Framework explicitly states at paragraph 98 that applicants for energy development should not be required to demonstrate the overall need for renewable energy.

35. It is concluded that the scheme's generation of renewable energy would be a benefit of considerable weight and importance both locally and nationally, particularly as it is a

community-led initiative of the type which the Government seeks to encourage.”

15. Having received this further information the officers prepared a final update for members dealing with these representations. That update observed as follows:

“...With regard to the additional representations from the applicant the following clarification is given.

- A review of the Alvington appeal decision confirms that the benefits of the proposal are a material consideration and weigh in favour of the development.
- It is a matter of fact that representations for and against the application have been received. However planning decisions are not taken on the basis of a popularity contest and should be taken based upon the material planning considerations relevant to the proposal.
- The recent government change of policy does place emphasis on a proposal needing to address the concerns of affected local communities. It is a matter for members of the planning committee to determine whether the issues raised by the objectors have been addressed.

In conclusion, the benefits of the scheme in terms of the provision of renewable energy and being a community led initiative weigh in favour of the development. However, in this case it is not considered that these benefits outweigh the identified harm in terms of the impact upon the landscape and to heritage assets...”

16. Within the papers with which the court was provided were both the formal minutes of the meeting of the planning committee on 11th August 2015 at which all of these matters were considered, and also a transcript of the debate which was had by the members leading up to their determination. Whilst submissions had been made both in writing and orally as to the effect of that documentation a consensus emerged at the hearing as to what was to be taken from the documents, following which it was agreed that there was no purpose

to be served by any further debate about their contents. It is therefore not necessary for the purposes of this judgment to set out the contents of those documents. The consensus between the parties was that what those documents demonstrated was that having considered the planning merits of the proposal, including the socio-economic benefits, the members concluded by a majority that planning permission should be granted. It was accepted on all sides, and in particular on behalf of the defendant, that the members had included the local community donation fund as a material consideration in favour of the proposals as part and parcel of the basket of socio-economic benefits which were relied upon by the interested party. In other words, the members took into account as a positive feature of the proposals that 4% of the turnover of the wind turbine would be donated to the community for them to spend on projects, activities and initiatives for the benefit of the community as determined by a panel of people selected from the community. Importantly the members caveated their support for the proposal with a requirement that there should be a pre-commencement condition to secure the community benefits. The nature of that condition was agreed very shortly after the members' resolution in correspondence between the defendant and the interested party. It was agreed that this requirement of the members could be satisfied by a pre-commencement condition which required the development to be carried out by Community Benefit Society.

17. On 19th August 2015 the Department for Communities and Local Government issued a direction pursuant to article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 prohibiting the defendant from issuing a planning application whilst the Secretary of State

gave consideration to whether the application should be called in for his own determination. That direction was withdrawn by a letter dated 29th September 2015. On 30th September 2015 the defendant granted planning permission to the claimant for the development as described in the application. The development was made subject to a number of conditions. For the purposes of this judgment the only pertinent condition is condition 28 which provided as follows:

“28. The development is to be undertaken via a Community Benefit Society set up for the benefit of the community and registered with the Financial Conduct Authority under the Co-Operative and Community Benefit Societies Act 2014. Details of the Society number to be provided to the local planning authority prior to commencement of construction.

Reason: to ensure the project delivers social, environmental and economic benefits for the communities of Tidenham and the broader Forest of Dean.”

18. Both the claimant and the interested party introduced evidence which it does not appear was directly before the defendant as decision-maker as part of the evidence in relation to the application. As this material formed the subject matter of written and oral submissions it is necessary to set it out below. It is, however, important to appreciate that these matters did not form part of the defendant’s decision-making process.

19. The claimant adduced evidence in relation to the local community donation and the way in which that had been publicly described as part of the consultation process. In particular, the claimant provided a witness statement in which he described attending a presentation made by the interested party as follows:

“6. I attended a presentation made by Andrew & Susan Clarke, Directors of The Resilience Centre Ltd to Tidenham Parish Council in May 2015. At that meeting Andrew Clarke described how the community fund from the wind turbine at St Briavels had been used. The funds were said to have been used for things including a defibrillator for the village halls, a Senior Citizens trip to Westonbirt Arboretum, installation of heaters in the St Briavels Church, playgroup equipment amongst others. None of the uses described related to renewable energy.”

20. The claimant exhibited to the witness statement the material described in his evidence as to how the community fund at St Briavels had been distributed. This was a document originally produced by the interested party and that provides as follows:

“The total amount available for allocation at the May meeting of the St Briavels Wind Turbine Community Fund Advisory panel was £10,300. Applications to end April 2015 were considered by the Advisory Panel, and the following award allocations were made.

£2,500 (in match funding): to the Friends of St Briavels Church towards required maintenance of the Grade 1 listed landmark, and installation of pew heaters to make the building more readily usable throughout the year by the community at large. The group intend to run a raffle and a major fundraising event on 27th June 2015. A match funding approach was requested in the application to encourage the whole community to get behind the project. The panel were impressed by the suggested approach which shows great commitment and strong community spirit.

£1,500: to the Charles Lord Denton Almshouses, a local charity which provides secure and affordable accommodation to older people who have a reasonable need. The funding will help with repair costs recently incurred and planned including drainage work, pathway ramp repairs, gable painting and chimney replacement.

£500 to St Briavels Parish Council towards the creation of a village handyman service. The panel agreed with the council that the village could benefit from a general tidy and completion of some simple village maintenance tasks. The panel look forward to seeing the benefits for the village over the next six months and would be happy to consider further applications at future funding rounds.

£552 to Heartbeat St Briavels to cover 12 months maintenance of the publicly accessible village defibrillators which are located at the Assembly Rooms, the Pavillion, Lindors and the fourth soon to be installed outside the school gates. The panel were pleased to hear that 100 people have now been trained in the use of the potentially lifesaving equipment and would be happy to consider further applications on an annual basis.

£250 to the St Briavels Playgroup towards purchase of replacement waterproof clothing to enable the youngest members of the community to participate in scheduled outdoor Forest activities to nurture an appreciation of the natural environment, even in inclement weather.

£350 to the St Brivaels Lunch Club which provides older citizens with a regular meal and chatter. The club has been run by the same team of dedicated volunteers for the last 8 years and the panel felt that their community commitment deserved recognition. The funds will enable the group (including volunteers) to be treated to a meal at a local pub.”

21. The interested party adduced evidence from Mr Andrew Clarke who is a director of the interested party and also involved in a number of projects promoted by The Resilience Centre. In the evidence, Mr Clarke emphasises the community focus of the application and the approach taken by The Resilience Centre to promoting renewable energy projects. He also sets out, as did the material accompanying the application, the socio-economic and community benefits which arise from the approach taken by the claimant. Importantly, he provides detailed information about the proposed Community Benefit Society in the following terms:

“10. The development will progress only via the legal structure of a Community Benefit Society, in accordance with condition 28 of the Planning Permission. It is intended that the society rules for Resilient Energy Alvington Court Renewables Limited (which have been approved by the Financial Conduct Authority with whom the society has been registered under the Co-Operative and Community Benefit Societies Act 2014), will be replicated for the Community Benefit Society established for development of the Resilient Energy Severndale turbine. Key features may be summarised as follows: The Objects of the Society are to carry on any business for the benefit of the

community which involved the development, financing, construction, installation, generation, transmission, operation and/or (if required) sale of a community sustainable energy generation project, for the purpose of

- a) generating electricity/heat from renewable energy resources;
- b) generating income for, and/or to be able to provide grants to, one or more Community Organisations, Persons and/or businesses within the community served by the society;
- c) developing a revolving fund to facilitate grants for alleviating fuel poverty and/or improving energy security by installing solar photo voltaic panels on residential properties;
- d) enabling the local and wider community to engage with community sustainable energy generation; and,
- e) supporting educational and/or other community activities which promote awareness of environmental and related issues.

The Society shall be owned and controlled by its Members on a fair and equitable basis.

It is intended that the host communities of Tidenham parish and environs will receive the greatest community benefits from the project, and this will accordingly be written into the society rules. This will also be detailed in the Share Offer document, which will be prepared in 2016. This will include projections based on financial modelling utilising an independently verified wind yield assessment for the project. As with Resilient Energy Alvington Limited, the Resilient Energy Severndale society will have a board made up of 6 Directors; 2 representing the landowner, 2 representing The Resilience Centre and 2 representing the Community. Members will elect community representatives to the Board at the first AGM. The Severndale Wind Turbine Community Fund Advisory Panel will be established within the first 12 months of turbine operation. Advertisements will be placed in the Parish newsletter and local press inviting community minded volunteers to put themselves forward.”

The grounds

22. The case is advanced on behalf of the claimant by Mr Neil Cameron QC on two grounds. Ground 1 is that the local community donation (that is to say the donation of 4% of the turnover from the project to be distributed by appointed members of the community set out in the application documentation) which

was part and parcel of the application and considered as one of the benefits telling in favour of the grant of planning permission was not a material consideration that the defendant could lawfully have taken into account. It amounted in effect to a financial donation which did not serve a planning purpose, was not related to land use and had no real connection with the development proposed. As a consequence of taking into account an immaterial consideration the defendant's decision was infected with illegality such that it should be quashed.

23. The claimant's Ground 2 is that condition 28, which as set out above requires the development to be carried out by a particular form of legal entity, did not serve a planning purpose and was not related to land use. As such, the condition did not pass the legal tests required since the condition did not pass the tests necessary to establish that it was a lawful condition and thus, again, the decision was infected with illegality. In that the condition was imposed as a requirement of the committee and went to the root of the permission it could not be excised or severed from the planning permission without the entire planning permission falling.

The law

24. The decision as to whether to grant or refuse planning permission is governed by the Town and Country Planning Act 1990 which provides as follows:

“s70 (1)Where an application is made to a local planning authority for planning permission—

(a)subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) they may refuse planning permission.

(2) In dealing with such an application to authority shall have regard to –

(a) the provisions of the development plan, so far as material to the application...

(b) any local finance consideration, so far as material to the application, and

(c) any other material considerations

...

(4) in this section –

“*local finance consideration*” means –

(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or

(b) sums that a relevant authority has received, or will receive, in payment of Community Infrastructure Levy”

25. A further important statutory requirement in relation to the exercise of the discretion to grant planning permission is contained within section 38(6) of the Planning and Compulsory Purchase Act 2004 which provides as follows:

“s38 (6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

26. The question of what should properly be regarded as a material consideration as a matter of law was considered by the House of Lords in the case of Newbury District Council v Environment Secretary [1981] AC 579. The context of that case was related in particular to the imposition of conditions

and when it would be lawful to impose conditions. In the course of his speech

Viscount Dilhorne observed as follows:

“It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them”

27. The House of Lords returned to the question of what might amount to a material consideration for a planning decision as a matter of law in the case of Westminster City Council v Great Portland Estates PLC [1985] 1 AC 661. This case arose in the context of a challenge to policies in a development plan which sought to protect specific industrial activities in central London. A property company contended that this policy was unlawful. The basis of this contention was that the policy was not concerned with the development and use of land but rather with the protection of particular users of land namely the businesses carrying on the industrial activities which the policy sought to protect and retain within central London. Lord Scarman addressed the question of principle and also the manner in which the principles applied in the context of the case in the following terms:

“My Lords, the principle of the law is now well settled. It was stated by Lord Parker C.J. in one sentence in East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B. 484. The issue in that case was whether the use of a parcel of land constituted development for which planning permission was required. The justices found that it did not and the Divisional Court, holding that the question of change of use was one of fact and degree, refused to intervene. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J. said, at p. 491, that when considering whether there has been a change of use 'what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier.' These words have rightly been recognised as extending beyond the issue of

change of use: they are accepted as a statement of general principle in the planning law. They apply to development plans as well as to planning control...

It is a logical process to extend the ambit of Lord Parker C.J.'s statement so that it applies not only to the grant or refusal of planning permission and to the imposition of conditions but also to the formulation of planning policies and proposals. The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development (see section 29(1) of the Act of 1971 in respect of planning permission: section 11(9), and Schedule 4 paragraph 11(4) in respect of local plans), is whether it serves a planning purpose: see [*Newbury District Council v. Secretary of State for the Environment* \[1981\] A.C. 578](#) , 599 *per* Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land. Finally, this principle has now the authority of the House. It has been considered and, as I understand the position, accepted by your Lordships not only in this appeal but also in [*Westminster City Council v. British Waterways Board* \[1985\] A.C. 676](#) in which argument was heard by your Lordships immediately following argument in this appeal.

However, like all generalisations Lord Parker C.J.'s statement has its own limitations. Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exceptions cannot be wholly excluded from consideration in the administration of planning control...

A fair interpretation of this part of the plan is that the council was concerned to maintain, as far as possible, the continuation of those industrial uses 'considered important to the diverse character, vitality and functioning of Westminster.' Here was, in paragraph 11.26 of the plan, a genuine planning purpose. It could be promoted and perhaps secured by protecting from

redevelopment the sites of certain classes of industrial use. Inevitably this would mean that certain existing occupiers would be protected: but this was not the planning purpose of the plan, though it would be one of its consequences.”

28. Thus it was held in that case that, properly understood, the policy was designed to protect land uses and not the particular occupiers who were carrying on those land uses. As such, the policy served a planning purpose and was lawful.

29. The courts have also had to grapple with the question in this area of the law of when the provision of benefits or the payment of monies can properly be regarded as being a material consideration. In City of Bradford Metropolitan Council v Secretary of State [1987] 53 P&CR 55 at page 64 Lloyd LJ observed:

“It has usually been regarded as axiomatic that planning consent cannot be bought or sold. As a broad general proposition that must be true.”

30. This broad proposition is undoubtedly grounded, at least in part, in the public interests which are engaged in the question of whether or not planning permission should be granted. This observation led to the courts having to consider whether financial considerations could properly be regarded as a material consideration in the determination of planning applications and in that connection where the boundaries of what might lawfully amount to a consideration could be drawn. The question was examined by the Court of Appeal in the case of R v Westminster City Council ex parte Monahan [1990] 1 QB 87. The case concerned a development scheme for Royal Opera House, Covent Garden. The improvements to the Royal Opera House and its extension, which plainly brought about public benefit in terms of the

enhancement of cultural facilities, were not in and of themselves financially viable. They could only be achieved financially as a consequence of the inclusion within the development scheme of office development which was contrary to the development plan. The proposal was advanced as a single comprehensive development scheme which, viewed overall, was financially viable even if the individual ingredient of the improvements to and extension of the Royal Opera House was not. In the challenge to the planning permission that was granted for the development proposal, the first issue was whether the material considerations in the planning decision could properly include financial considerations. Kerr LJ concluded that they could as follows:

“The first issue: can "any other material considerations" in section 29(1) properly include financial considerations?”

This issue can of course be phrased in many differently contentious ways. If one seeks a negative answer one might pose the question whether it can possibly be permissible to authorise a development which, in planning terms, is undesirable or even indefensible in order to provide funds for some other desirable development. On the other hand, a more moderate way of putting the issue would be to ask whether, as a matter of common sense, there could be any reason why the financial viability of a desirable development, and the means of achieving it, must necessarily be immaterial considerations in determining applications for planning permission. Similarly, one can argue by giving illustrations at different points of the spectrum. For instance it was said on behalf of the applicants that it would be inconceivable that if R.O.H. happened to own a site near Victoria it would be allowed to use it for the erection of an undesirable office block on the basis that the profits would be used to extend and improve the Royal Opera House. The respondents did not accept that this was self-evident if no other means were available and countered with more realistic illustrations to demonstrate the fallacy of the proposition that purely financial considerations can never be material. For instance, if it is uneconomic to restore a derelict listed building for its original residential or other use, then it would be perfectly proper and an everyday situation for a planning authority to allow it to be used wholly or partly for commercial purposes, if its restoration cannot in practice be achieved in any

other way. Or - to take an example given by Mr. Boydell - in the case of a landmark or tourist attraction such as a derelict old windmill, a planning authority might well decide to permit the owner to put up an otherwise undesirable kiosk to sell postcards and souvenirs if this is the only viable way of obtaining a desirable restoration.

This was the nature of the opposing contentions. In my view, for the reasons which follow, I have no doubt that the respondents' approach is correct in principle, and I would summarise it in the following way. Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation."

31. These issues returned to the Court of Appeal in the context of the case of R v Plymouth City Council ex parte Plymouth and South Devon Co-operative Society Ltd [1994] 67 P&CR 78. That case was concerned with three supermarket proposals advanced by Sainsbury, Tesco and the Co-Op. The Sainsbury proposal was accompanied by on-site features incorporated in the development in the form of a tourist information centre, a bird hide for bird watching overlooking the river Plym, and off-site financial contributions in the

form of payments for a park and ride site and the provision of £1 million towards the costs of providing highway and drainage infrastructure to enable the development of an industrial site within Plymouth. This latter contribution towards enabling the release of industrial land resulted from recognition by Sainsbury that if their supermarket proposal went ahead it would involve the loss of industrial land. The package of contributions proposed by Tesco in support of their supermarket included a wildlife habitat on a site which was contiguous with the development, the sale to the local planning authority of a site for a park and ride facility and a financial contribution towards a crèche. The council considered all three of the supermarket applications at a committee meeting in which they resolved to grant the applications made by Sainsbury and Tesco and defer the application made by the Co-Op. The Co-Op challenged the council's decision on the basis that the offers associated with the Sainsbury's and Tesco's developments exceeded what could properly be regarded as material considerations as a matter of law. This contention was rejected. Russell LJ concluded as follows:

"I reject as unarguable that any of the obligations volunteered by Sainsbury and Tesco and the acceptance of them even approached "*Wednesbury*" unreasonableness, and I simply ask myself whether each and every one of them were capable of being regarded as having a planning purpose and whether each and every one of them related to the permitted development. So far as benefits which were to be provided on site there does not appear to me to be the slightest difficulty or room for argument. They made the development more attractive and that must surely be in the public interest.

As to off site benefits, in particular the offer of a sum of up to £1 million by Sainsbury, and the offers of contributions toward the alleviation of traffic problems in the way of park and ride facilities, both plainly had planning purposes. It is common knowledge that park and ride facilities reduce vehicular traffic; a superstore would create vehicular traffic; the one would

counteract the other and accordingly in my view the park and ride facilities plainly related to the development proposed and was for a planning purpose.

The offer of £1 million was not in any sense divorced from Sainsbury's application to develop their store. The evidence from Mr. Dean was that sites available for industrial development within the city of Plymouth were not plentiful, and that by permitting the development at Marsh Mills for retail outlets the planning authority was further reducing the pool of resources for employment land. The offer in relation to Derriford Barton was a contribution toward restoring the balance disturbed by the grant of permission at Marsh Mills. In my judgment this, too, passed the Newbury test and the planning authority was entitled to take it into account as material to its planning decision. It is not material to enquire into the precise part played by these benefits in the decision reached by the planning authority. The reasons for granting permission are not disclosed though in passing it is worthy of observation to note that Hutchison J. did not seem to regard the benefits as “determining factors which led to the Council's decisions.” Those decisions, he thought, “were based on planning issues and particularly on the fact that no demonstrative harm to interests of acknowledged importance flowed from either or both proposals.”

32. Hoffmann LJ (as he then was) reached the same conclusions and his reasons for doing so both in general and in relation to the particular contributions were as follows:

“What in this context is a “material consideration?” The answer appears in the decision of the House of Lords in Newbury District Council v. Secretary of State for the Environment which concerned the *vires* of a condition attached to a planning permission. Viscount Dilhorne said such a condition must satisfy three tests:

- (1) It must have a planning purpose;
- (2) it must fairly and reasonably relate to the permitted development, and
- (3) it must not be *Wednesbury* unreasonable.

(1) and (2) are tests of materiality: in this context, considerations are material if they are planning considerations and fairly and reasonably relate to the development. The third test does not go to whether considerations are material but is an

overriding requirement that the authority's decision (to grant or refuse permission, impose a condition, require a section 106 agreement) shall not be *Wednesbury* unreasonable. Lord Scarman at page 618 said that most cases of *Wednesbury* unreasonableness would arise out of the authority having regard to considerations which failed one of the first two tests (or failing to have regard to considerations which passed them). But there might be exceptional cases in which a decision was *Wednesbury* unreasonable notwithstanding that it was based upon all the material considerations...

I therefore reject the suggested gloss upon the *Newbury* tests for materiality and consider whether they were satisfied by the matters which were proposed to be included in the section 106 agreements in this case. They all amounted to considerations of a planning nature and the only question is whether they fairly and reasonably related to the development. Many of them, such as the construction of the tourist centre and bird watching hide, were to be constructed upon or adjacent to the development itself. They were matters of benefit to the developer as well as to the community. I do not see how it can possibly be said that such embellishments did not fairly and reasonably relate to the development. The only benefits which in my judgment give pause for thought are the two substantial sums offered by Sainsbury as a contribution to work to be done away from the site. They are the £800,000 contribution to a park and ride facility and the contribution of up to £1 million for infrastructure on a new industrial site at Derrisford Barton.

Mr. Peter Watkins, of the Devon County Council Highways Department, said that the proposed superstores would have a traffic impact over a wide area of the local highway network. The beneficial effect of a park and ride facility would be to remove traffic from the main radial commuter/shopper routes, thus reducing conflict with traffic heading for the proposed superstore. In addition to this general causal link, Mr. Dean added that there were arguments for utilising part of the Sainsbury site itself for decked car parking to accommodate the park and ride, but Sainsbury preferred the park and ride cars to be accommodated elsewhere. If such accommodation were provided off the site, fewer people would use Sainsbury's own car park when they really wanted to park and ride rather than shop at Sainsbury. In my judgment this was evidence upon which the judge was entitled to decide that the park and ride facility was fairly and reasonably related to the development.

As for the infrastructure contribution, Mr. Dean said that there was a shortage of serviced and level sites available for the development or re-development of manufacturing in the city of Plymouth. The council considered that such land should be

available to foster new employment opportunities and Policy EM9 of the structure plan said that the use of employment land for retailing would not normally be permitted. It was true that in recent appeals to the Secretary of State concerning other superstores, little weight appeared to have been attached to this policy. But, as I have pointed out, the fact that a policy might not be upheld on appeal does not mean that a planning authority is not entitled in law to treat it as a material consideration. In this case, the council regarded the improvement of other land by Sainsbury as a compensating advantage, equivalent to the release of the Vosper site near the docks in the Tesco proposal. The offer, it should be noted, was not simply to pay the council f 1 million. It was to contribute up to £1 million to the actual cost of infrastructure works undertaken by the council within a period of two years at a specific site. In my judgment this benefit was also fairly and reasonably related to the development.

It follows that in my view the judge was right to hold that the council was entitled to treat all the matters in the packages of community benefits as material considerations and this attack on the *vires* of the decision to grant planning permission must fail.”

33. Shortly after this case had been decided a similar issue came before the House of Lords in the case of Tesco Stores Limited v Secretary of State [1995] 1 WLR 759. That case was also concerned with the provision of out-of-town supermarkets. In that case two developers applied for planning permission for out-of-town supermarkets on sites in the town of Witney. One developer, Tesco, offered to provide full funding of £6.6 million for development of a link road which had been designed to assist traffic conditions in Witney. The application by Tesco and a rival application promoted by Tarmac were both called in by the Secretary of State for his own determination.
34. The Inspector, following the holding of a public inquiry into the two proposals, recommended the grant of planning permission to Tesco and refusal of the Tarmac proposal. The Inspector concluded that there was some, but only a tenuous, relationship between the Tesco supermarket and the funding of

the link road which had been proposed. The Secretary of State having considered the Inspector's report rejected her recommendations and refused the Tesco's scheme and granted planning permission to Tarmac. The Secretary of State considered that in the light of the low levels of traffic generated by the supermarket which would be using the road and also the distance of the road from the supermarket site that it would be unreasonable to seek even a partial contribution from the developer of the supermarket to the road. The Secretary of State went on to conclude that, even if he was wrong that it would be unreasonable to seek even a partial contribution towards the road, then the weight which could be attached to any partial contribution was so slight or limited that the balance of the arguments would not have been affected so as to change his decision. The Secretary of State's decision was challenged by Tesco on the basis that they contended the Secretary of State had wrongly failed to treat their offer of funding for the road as a material consideration. The House of Lords concluded that on a fair reading of the decision letter the Secretary of State had not treated the contribution as immaterial and had in fact weighed it in his assessment of the planning balance. In the course of their speeches both Lord Keith and Lord Hoffmann addressed the question of when, as a matter of law, something became a material consideration in the planning balance. Lord Keith observed as follows:

“An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the

decision maker and in exercising that discretion he is entitled to have regard to his established policy.”

35. Lord Hoffmann, in expressing his conclusions, directly addressed the question of buying and selling planning permissions and reviewed the decision to which he had been party in the Plymouth case. He observed as follows:

“15. Buying and selling planning permissions

This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.*, 67 P. & C.R. 78, was such a case, leading to concern among academic writers and Steyn L.J. in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term “auction” rather than “competition” to describe the process of decision-making process in the Plymouth case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the Plymouth case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits. Or take the present case, which is in some respects the converse of the Plymouth case. Tarmac say that Tesco's offer to pay £6.6m. to build the West End Link was a blatant attempt to buy the planning permission. Although it is true that Witney Bridge is a notorious bottleneck and the town very congested, the construction of a superstore would make the congestion only marginally worse than if the site had been developed under its existing permission for offices. Therefore an offer to pay for

the whole road was wholly disproportionate and it would be quite unfair if Tarmac was disadvantaged because it was unwilling to match this offer. The Secretary of State in substance accepted this argument. His policy, even in cases of competition for a site, is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers.

Tesco, on the other hand, say that nothing was further from their minds than to try to buy the planning permission. They made the offer because the local planning authority had said that in its view, no superstore should be allowed unless the West End Link was built. Tesco say that this seemed a sensible attitude because although it was true that the development would add only marginally to the congestion which would have existed if offices had been built, this was an unrealistic comparison. In practice it was most unlikely that anyone would build offices in that part of Witney in the foreseeable future. The fact was that the development would make the existing traffic problems a good deal worse. In an ideal world it would have been fairer if the highway authority had paid for most of the road and Tesco only for a proportion which reflected the benefit to its development. But the highway authority had made it clear that it had no money for the West End Link. So there was no point in Tesco offering anything less than the whole cost. Why should this be regarded as an improper attempt to buy the planning permission? The result of the Secretary of State's decision is that Witney will still get a superstore but no relief road. Why should that be in the public interest?

I think that Tesco's argument is also a perfectly respectable one. But the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the Plymouth case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts.

I would therefore reject Mr. Lockhart-Mummery's submission that Tesco's offer was not a material consideration. I think that it was open to the Secretary of State to have taken the same view as the Plymouth City Council did in the *Plymouth* case, 67 P. & C.R. 78 , and given the planning permission to Tesco on the grounds that its proposals offered the greater public benefit. But the Secretary of State did not do so. Instead, he applied the policy of Circular 16/91 and decided to attribute little or no weight to the offer. And so, on the ground that its site was marginally more suitable, Tarmac got the permission.”

36. The Supreme Court reviewed all of these authorities and considered similar issues in the sphere of compulsory purchase in the case of R (Sainsbury's Supermarkets LTD) v Wolverhampton City Council (2011) 1 AC 437. This case concerned the local planning authority's decision to compulsorily purchase a site for a supermarket which was mainly owned by Sainsbury and, as to a small part, owned by Tesco (site A). Tesco also owned another site (site B) which was situated 850 metres away from site A and which contained a number of listed buildings which the local planning authority wished to see redeveloped and regenerated. Tesco had concluded that it was not financially viable to develop site B on its own but they offered to do so if they could cross subsidise it by developing site A. Thus the local planning authority proposed the CPO of site A so as to facilitate this scheme and in proposing the CPO took into account as a material consideration the commitment which had been made by Tesco to redevelop site B. The Supreme Court concluded that Tesco's commitment to redevelop site B was not a material consideration which the local planning authority could have lawfully taken into account in deciding to make the CPO. Lord Collins JSC summarised the relevant legal principles in the following way:

“70 What can be derived from the decisions in the planning context, and in particular the Tesco case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in Ex p Monahan [1990] 1 QB 87 about the development

in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.

71 Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made.”

37. Having traced the evolution of this area of law up to its distillation into the four principles which were identified by Lord Collins in paragraph 70 it is important to focus in particular on the legal test in relation to off-site benefits. It will be apparent from paragraph 70 that off-site benefits are the subject of a particular treatment no doubt because they are not directly part of the development itself. It is clear from the decision of the Supreme Court in Sainsbury's that off-site benefits will only be material where they are related to or connected with the development. As Lord Collins observed this is not a question of fact and degree. It is a legal requirement that there is a real, as opposed to fanciful or remote, connection between the suggested off-site benefits and the development. It is this principle that is particularly in play in the contentions raised under Ground 1.
38. A recent case engaging some aspects of the legal principles which have been set out above is the decision in Welcome Break Group Limited v Stroud District Council [2012] EWHC 140. In this case the claimant challenged the decision of the defendant to grant planning permission on the basis that within the S106 obligation there was a requirement that a proportion of the food that

was to be served at the motorway service area which had been granted planning permission should be sourced locally. The contention which was made was that the obligation failed to comply with Regulation 122(2) of the Community Infrastructure Regulations 2010 and was therefore not a legitimate matter that could be taken into account in the grant of planning permission. In rejecting that contention Bean J (as he then was) concluded as follows:

“50... An offered planning obligation which has nothing to do with the proposed development apart from the fact that it is offered by the developer is plainly not a material consideration and can only be regarded as an attempt to buy planning permission. However, if it has some connection with the proposed development which is more than *de minimis* then regard must be had to it. The extent, if any, to which it affects the decision is a matter entirely within the discretion of the decision-maker.

51 Mr Price Lewis submits that “the requirements to ensure that local produce and local employment opportunities are provided for are not matters which satisfy a policy that must be complied with in order to enable the development to proceed”. But it is not for me to say whether they are necessary to make the development acceptable. Subject to the requirement that they must be “directly related” to the development, which is the next point, that decision was for the committee.

52 On the “directly related” issue Mr Price Lewis prays in aid a paragraph in Circular 05/05 which provides:

“Obligations must also be so directly related to proposed developments that the development ought not to be permitted without them – for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution.”

53 I accept the submissions of Mr Choongh and Mr Kingston that the planning obligations relating to local food sourcing and local employment are directly related to the development and fairly and reasonably related to it in scale and in kind. The planning statement submitted with the application referred to paragraph 158 of Circular 01/2008 (see above) and Regional Planning Policy EC1 which deals with support for the sustainable development of the regional economy. The Committee were correctly advised that certain other proposed section 106 obligations, for royalty payments and an ethical

food sourcing policy were not in accordance with the requirements for section 106 agreements; these were duly removed. The Council's solicitor correctly explained the appropriate tests to the Committee in the course of the debate. The reference to a “functional or geographical link” in Circular 05/05 is not a statutory test; but, even if it were, I consider that it is plainly met in the present case.”

39. It is important to observe in relation to that case that Bean J did not refer to the decision of the Supreme Court in the case of Sainsbury's, and also that the case only very indirectly and tangentially related to off-site benefits. Both the provisions in relation to local employment and the sale of locally sourced food related to the operation of the development itself which was being granted planning permission.
40. Section 2 of the Co-operative and Community Benefit Societies Act 2014 creates the opportunity to register under that Act a community benefit society. Section 2(2) identifies as the condition for registration of a community benefit society that it shows to the satisfaction of the Financial Conduct Authority that “the business of the society is being, or intended to be, conducted for the benefit of the community”. The purpose of condition 28 was to require the carrying out of the development by this form of legal entity.

Policy and Guidance

41. National Planning Policy is to be found in the National Planning Policy Framework (“the Framework”). The Framework provides the following policies which were relied upon in particular by the defendant and the interested party in relation to both the promotion of thriving communities and also the role of community-led initiatives in respect of renewable energy:

“17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:

- be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency;

- not simply be about scrutiny, but instead be a creative exercise in finding ways to enhance and improve the places in which people live their lives;

- proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities;

...

- take account of the different roles and character of different areas, promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it;

- support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change, and encourage the reuse of existing resources, including conversion of existing buildings, and encourage the use of renewable resources (for example, by the development of renewable energy);...

97. To help increase the supply of renewable and low carbon energy, local planning authorities should recognise the responsibility on all communities to contribute to energy generation from renewable or low carbon sources. They should:

- Have a positive strategy to promote energy from renewable and low carbon sources;
- Design their policies to maximise renewable and low carbon energy development while ensuring that adverse impacts are addressed satisfactorily, including cumulative landscape and visual impacts;
- Consider identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, where this would help secure the development of such sources;
- Support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning...”

42. It will be apparent from what is set out above that not long prior to the determination of this application there had been a Written Statement by the Secretary of State for Communities and Local Government in relation to the approach which should be taken to wind energy development. The relevant parts of that Written Statement provided as follows:

“When determining planning applications for wind energy development involving one or more wind turbines, local planning authorities should only grant planning permission if:

- the development site is in an area identified as suitable for wind energy development in a Local or Neighbourhood Plan; and
- following consultation, it can be demonstrated that the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has their backing.

...

Whether a proposal has the backing of the affected local community is a planning judgement for the local planning authority.

Where a valid planning application for a wind energy development has already been submitted to a local planning

authority and the development plan does not identify suitable sites, the following transitional provision applies. In such instances, local planning authorities can find the proposal acceptable if, following consultation, they are satisfied it has addressed the planning impacts identified by affected local communities and therefore has their backing.”

43. National Planning Policy is supported by the Planning Practice Guidance. That also contains within it guidance in relation to the approach to be taken to community-led renewable energy which builds upon what is said in paragraph 97 of the Framework. It provides as follows:

“Paragraph: 004 Reference ID: 5-004-20140306

What is the role for community led renewable energy initiatives?

Community initiatives are likely to play an increasingly important role and should be encouraged as a way of providing positive local benefit from renewable energy development. Further information for communities interested in developing their own initiatives is provided by the Department of Energy and Climate Change. Local planning authorities may wish to establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership.”

44. In October 2014 the Department of Energy and Climate Change published a document entitled “Community Benefits From Onshore Wind Developments: Best Practice Guidance For England”. The introduction to that document describes community benefits in the following terms:

“What are community benefits?

Community benefits can bring tangible rewards to communities which host wind projects, over and above the wider economic, energy security and environmental benefits that arise from those developments. They are an important way of sharing the value that wind energy can bring with the local community.

Community benefits include:

1. Community benefit funds - voluntary monetary payments from an onshore wind developer to the community, usually provided via an annual cash sum, and
2. Benefits in-kind - other voluntary benefits which the developer provides to the community, such as in-kind works, direct funding of projects, one-off funding, local energy discount scheme or any other non-necessary site-specific benefits.

In addition to the above, there can also be:

3. Community investment (Shared ownership) – this is where a community has a financial stake, or investment in a scheme. This can include co-operative schemes and online investment platforms.
4. Socio-economic community benefits - job creation, skills training, apprenticeships, opportunities for educational visits and raising awareness of climate change;
5. Material benefits - derived from actions taken directly related to the development such as improved infrastructure.

This document contains guidance on community benefit funds and benefits in-kind (points 1 and 2). The provision of these community benefits is an entirely voluntary undertaking by wind farm developers. They are not compensation payments.

Material and socio-economic benefits will be considered as part of any planning application for the development and will be determined by local planning authorities. They are not covered by this guidance.

Guidance on shared ownership schemes is being produced by the Shared Ownership Taskforce.”

45. The document goes on to explain its purpose and its relationship to the planning system as follows:

“This document contains guidance on community benefit funds and benefits in-kind. The provision of these community benefits are entirely voluntary undertakings by wind farm developers and should be related to the needs of the local community.

These community benefits are separate from the planning process and are not relevant to the decision as to whether the planning application for a wind farm should be approved or not

– i.e. they are not ‘material’ to the planning process. This means they should generally not be taken into account by local planning authorities when deciding the outcome of a planning application for a wind development...

Socio-economic and material benefits from onshore wind developments are types of benefit that can be taken into consideration when a planning application is determined by the local planning authority and are not covered by this Guidance.”

46. Later on in the document further advice and guidance is provided in relation to community benefits and the planning system in the following terms:

“Community benefits and the planning system

The primary role of the local planning authority in relation to community benefits is to support the sustainable development of communities within their jurisdiction and to ensure that community benefits negotiations do not unduly influence the determination of the planning application.

There is a strict principle in the English planning system that a planning proposal should be determined based on planning issues, as defined in law. Planning legislation prevents local planning authorities from specifically seeking developer contributions where they are not considered necessary to make the development acceptable in planning terms. Within this context, community benefits are not seen as relevant to deciding whether a development is granted planning permission.

Currently the only situation in which financial arrangements are considered material to planning is under the Localism Act, as amended (2011) which allows a local planning authority to take into account financial benefits where there is a direct connection between the intended use of the funds and the development.

And Planning Practice Guidance states that “Local planning authorities may wish to establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership.”

Actions necessary for the development to go ahead will be determined by the local planning authority and may relate to the provision of additional infrastructure, for example road widening to enable the turbines to get to site, or counteracting direct losses of amenity or habitat. A local planning authority

can seek these contributions, either in-kind or as a payment towards the cost, as part of the planning permission.

Local authorities can still play a very important role in facilitating and discussing community benefits, provided they ensure these discussions do not unduly influence the planning decision.”

Conclusions

47. In relation to Ground 1, the starting point must be an understanding of the nature of the local community donation (also sometimes described as the Community Fund) which accompanied the application. That understanding has to be derived from the application documents which were before the defendant and which are set above. The documentation described the local community donation as the provision of 4% of the turnover from the wind turbine to be devoted to helping “current and future community needs” and “build Community Resilience in the locality”. The application drew on the experience of the project at St Briavels which the documentation noted “has funded a number of projects of local community benefit, as selected by an advisory panel of local people.” In their letter of 10th July 2015, responding to the first Officer’s report the interested party stated this in relation to the community donation:

“The community donations will provide a sustainable and regular source of funding for 25 years to enable the community to build resilience by addressing local needs and community challenges both immediate and long term. This may include a range of initiatives such as supporting energy saving measures, other projects delivering environmental benefits, direct contributions for existing services or community facilities or funding to help realise new projects of community benefit. As a direct donation, the turbine community funds may also help to leverage additional support for host communities by providing match funding for other funding bids.”

48. Based upon this material it is clear that the local community donation involves the provision of a significant sum of money derived from the operation of the development. It is intended that it will be locally administered by members of the community and that the money will be devoted to projects, activities or initiatives from which the local community will derive benefit. What is equally clear is that there are no particular community benefits which are identified to which the donation would be applied. It could be used for anything, provided that it benefitted the local community in some way. Beyond being of some benefit to the local community, as recognised or defined by the local people administering the fund, there is no limitation on how the money might be used.
49. Having identified the nature of the community donation it is perhaps instructive to consider some of its particular features. Firstly, it is a purely financial contribution which does not in any way regulate how the development might operate. Secondly, it is an off-site financial contribution. Thirdly, it is not an off-site contribution which is designed to ameliorate or address some impact on social or physical infrastructure in the way that for instance a housing proposal would be required to make a financial contribution to provide additional educational infrastructure caused by the additional school pupils generated by the development. Nor is it, like the contribution enabling the release of employment land in the Plymouth case, designed to address some adverse land use consequence of the grant of permission (in that case the loss of the site for employment use).

50. Before embarking on the legal questions which arise it is appropriate to consider whether this understanding of the community donation is in any way affected by the additional material which has been referred to above which was not directly before the defendant. Mr Martin Kingston QC, who appeared on behalf of the interested party, placed particular emphasis on the use of a Community Benefit Society to deliver the development, and the evidence from Mr Clarke as to the objects of that organisation. Those objects, he contended, would, firstly, ensure that the benefits to the community from the project would be legally guaranteed and realised. Secondly, he submitted that the objects would ensure that the monies would only be spent on matters relevant to land use planning. I am unconvinced that these submissions in any way alter how the nature of the community donation is to be understood as set out above. If it is assumed for the sake of the argument that the use of the Community Benefit Society vehicle, whose objects would have to be approved by the Financial Conduct Authority, could ensure that in practice the business of the developer and in its turn the administration of the community donation were only spent on community benefits the fact remains that the purposes of the Society would be extremely wide ranging. The purpose described of “generating income for, and/or to be able to provide grants to one or more Community Organisations, Persons and/or businesses within the community served by the society” (see paragraph 10(b) of Mr Clarke’s witness statement quoted above) would enable payment of the money to any individual, organisation or business in the community for any project, activity or initiative considered to be of community benefit. Turning to the second point raised, there is nothing in the definition which ties the use of the donation to land use

purposes with a real connection to the development proposed, subject to consideration of the arguments raised in relation to planning policy in the Framework and elsewhere which are addressed below.

51. The other element of the evidence which was not before the defendant was the detail submitted by the claimant in relation to the way in which the equivalent community donation had been spent in St Briavels. Mr Cameron contended that this evidence demonstrated by way of example that it could not be said that the ways in which the community donation could be used were either for a planning purpose or fairly and reasonably related to the proposed development. For instance, maintaining defibrillators, providing the play group with waterproof clothing and supporting a lunch club for senior citizens, whilst entirely laudable in their own right, had nothing to do with land use planning and were not fairly and reasonably related to the provision of a wind turbine. Mr Paul Cairnes QC who appeared on behalf of the defendant and Mr Kingston responded to these submissions by contending that the boundaries of materiality in this context were extremely broad. Furthermore, they both drew attention to the passages from the Framework at paragraphs 17 and 97 set out above and contended community benefits of the kind generated by the community donation fell fully within the references to supporting “local strategies to improve health, social and cultural wellbeing for all”, and delivering “sufficient community and cultural facilities and services to meet local needs” as well as supporting “community-led initiatives for renewable and low carbon energy”. These submissions were bolstered by cross-reference to the Ministerial Statement and the PPG. Mr Kingston contended that the list

of items on which the St Briavels community donation had been spent were all, within a broad view of matters, supported by this policy material.

52. I did not find these submissions convincing. The starting point must be, as Mr Kingston rightly accepted, that policy cannot make a consideration material if as a matter of law it is not. The consideration must pass the legal tests set out above before it can legitimately be taken into account by the decision-maker. When the policy refers therefore, for instance, to taking account of local strategies to improve health, social and cultural well-being it intends that that should be done in the context of the lawful regulation of land use. It does not mean that any matter or proposal touching on issues of health and social and cultural well-being will inevitably be a material consideration in development control or forward planning. Simply being a contribution for community benefit related to a local strategy for health, social or cultural wellbeing does not make that contribution in and of itself material to a planning determination. It must pass the *Newbury* test and be for a planning purpose and be fairly and reasonably related to the development proposed. It is difficult to see how the provision of waterproof clothing for a play group or lunches for senior citizens has any proper bearing on the issues relevant to the regulation of land use and control of development which are at stake when considering whether or not to grant planning permission for a wind turbine. The opportunity to make provision for them from the turnover of the scheme is not a planning purpose and is not fairly and reasonably related to the development.

53. Mr Kingston contended that this approach misunderstands the community-led nature of the development proposed. This proposal, he contends, as described in the documentation is not a commercial development but has at its heart that it is a community-led initiative. The community donation is part and parcel of that community-led approach which is fostered by both the Framework, the PPG and the Ministerial Statement and it cannot be isolated from the development as the claimant's submissions seek to. In a related submission Mr Kingston contended that it is important to examine not the money comprised in the community donation itself but what that money represents, namely the benefits which are the fruit of the community leading the way in making provision for its energy needs through a renewable, low carbon solution.

54. I am unable to accept that the fact that the proposal is community-led precludes or renders unnecessary an examination of the contributions associated with it to see whether or not they satisfy the legal requirements of being a material consideration in the planning decision. There is no doubt that support for a development, like opposition, is capable of being a material consideration in the planning process when it is based on valid planning considerations. That is no doubt the basis of the policy material relied upon in this respect by the defendant and the interested party. However, I have no doubt that it is still incumbent upon the decision-maker to scrutinise all elements of the development proposed and its package of benefits to establish in relation to each of them that they pass the legal test of properly amounting to a material consideration. There could be no credible suggestion that the community donation is part of a composite development of the kind engaged

by the third of Lord Collins' principles in paragraph 70 of his judgment, namely what is commonly referred to as an enabling development.

55. In applying the relevant legal tests for materiality derived from the review of the authorities set out above it is, of course, important to bear in mind that it is no part of the test to consider whether the contribution is necessary or required. Such an additional gloss was specifically rejected in both the Plymouth and the Tesco Stores cases. In my view it is clear that in applying the test from Newbury the community donation neither serves a planning purpose nor does it fairly and reasonably relate to the development proposed. It is irrelevant to the issues engaged by the exercise of land use planning or development control in determining the interested party's application. It is important to appreciate the essentially open-ended nature of the purposes to which the community donation could be applied: the sole constraint is that the purpose of any grant is for some form of community benefit as determined by those appointed from the community to administer the fund. The community donation is self-evidently not an on-site feature of the development designed to make it more attractive such as the bird hide and public art of the Sainsbury's proposal in Plymouth. Nor is it a constraint on the operation of the development itself imposed for a planning purpose like the obligation relating to local food sourcing and local employment of the kind addressed in the Welcome Break case. Nor is it an off-site contribution related to a planning impact off-site like the contributions to address the impact of the proposal in the Plymouth case on the extent of industrial land available in the city. The community donation is an untargeted contribution of off-site community benefits which is not designed to address a planning purpose.

56. Applying the principles and conclusions reached by Lord Collins in the Sainsbury's case it is important to observe firstly, as set out above, this is an off-site contribution and therefore engages the fourth of the principles he sets out in paragraph 70 of that decision. As such it is essential for the off-site benefits to have a real and not a remote or fanciful connection with the development. For the reasons set out above there is no real connection between the development of a wind turbine and the gift of monies to be used for any purpose which appointed members of the community consider their community would derive benefit.
57. Reliance was placed by the defendant and the interested party on the Inspector's decision in the Alvington appeal as supporting their contention that the local community donation was a material consideration in the application. They submitted that the Inspector endorsed the materiality of the local community donation in his decision to grant planning permission in that appeal. In my view these submissions were of little value to the defendant and the interested party. Firstly, the question of whether the local community donation is a material consideration is a question of law for the court. Secondly, it is unclear from the Inspector's decision at paragraph 32 whether he is directly referring to the local community donation and it certainly does not seem from his reasoning that the legality or materiality of the local community donation was a significant issue in the case before him. He deals globally with the socio-economic benefits in paragraph 34, and as the claimant accepted the other socio-economic benefits claimed were undoubtedly material considerations to be placed in the planning balance. Thus the

Inspector's appeal decision at Alvington adds little if anything to the substance of the legal conclusions which the court needs to reach in this case.

58. Similarly the claimant's reliance upon the observations of the author of the Planning Statement set out above, to the effect that the local community donation should not be given any weight, is of little moment in determining the legal issues that arise and which must be determined on the basis of the application of the legal principles that have been identified. The Guidance from the Department of Energy and Climate Change was also debated in the parties' submissions. The claimant contended that the Guidance supported its position; the defendant and the interested party contended that it was irrelevant to the local community donation which was not addressed by the Guidance but was a separate initiative. Neither the Guidance nor these submissions could replace or override the application of the relevant legal principles from the authorities, and they are of little if any help in resolving the issues in this case.
59. I am satisfied for the reasons set out above that the claimant's submissions are correct and that the defendant was not entitled to take into account as a material consideration in their planning decision the offer of the local community donation made by the interested party as part of their proposal. As a consequence the decision which they reached was unlawful. I have been invited by the defendant and the interested party to refuse relief in the exercise of my discretion under s31(2A) of the Senior Courts Act 1981 on the basis that the outcome of the decision would not have been substantially different if the error which I have identified by the defendant had not been made. I am unwilling to accede to this submission. It is clear from both the officer's report

and also the members' debate and voting that this was a balanced decision which could have been determined either way. It has not been necessary to rehearse for the purposes of the legal issues in the case the amenity objections which arose, and which the officers championed, as reasons for refusing the application. Those included both concerns relating to the impact on the historic environment and also landscape effects. I am not prepared to accept that there would have been no substantial difference to the outcome of the members' decision-making process had they appreciated that they could not take account of the community donation in determining whether consent should be granted. In my view the appropriate outcome in this case is that the defendant's decision should be quashed as a result of the claimant succeeding in relation to Ground 1.

60. In these circumstances it is unnecessary to address in detail the submissions which were made in Ground 2 in respect of imposition of condition 28, and I do not propose to do so. I would simply observe that the imposition of that condition was contended, at least in part, to be required by the need to secure the establishment of the local community donation. To that extent therefore the Grounds are interlinked. Nonetheless my conclusions in relation to Ground 1 are sufficient to dispose of the case.