



Appeal Decision

Hearing held and site visits undertaken on 25 October 2022

by Tom Bristow BA MSc MRTPI AssocRICS

an Inspector appointed by the Secretary of State

Decision date: 14 December 2022

Appeal Ref: APP/W1905/W/22/3296357

Finsbury Court, Parkside, Waltham Cross EN8 7TH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended against a refusal to grant planning permission.
 - The appeal is made by Mr J Milne of RG Airspace Developments Ltd. against the decision of Broxbourne Borough Council.
 - The application Ref 07/21/0985/F, dated 30 July 2021, was refused by notice dated 17 March 2022.
 - The development proposed is described on the Council's decision notice as 'development of the site to provide a building of up to four storeys accommodating 10 new homes comprising 3no. one bed and 7no. two bed flats associated car and cycle parking and landscaping'.
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Decision

1. The appeal is allowed and planning permission is granted for a building of up to four storeys accommodating 10 new homes comprising 3 no. one bed and 7 no. two bed flats, associated car and cycle parking and landscaping at Finsbury Court, Parkside, Waltham Cross EN8 7TH, in accordance with the terms of application Ref. 07/21/0985/F, dated 30 July 2021, subject to the conditions at schedule 1 to this decision (and, as reasoned subsequently, certain obligations contained within the planning agreement dated 5 December 2022 pursuant to section 106 of the Town and Country Planning Act 1990 as amended, 'the 1990 Act').

Preliminary matters

2. The proposal before me differs from that originally advanced for 14 flats. That difference results from a process of discussion between the main parties, culminating in the scheme described in the banner heading above. The revised scheme, based on 'Revision B' plans, was the basis on which the Council arrived at a decision and on which I have determined the appeal.
3. The hearing took place on 25 October 2022. However certain matters were also dealt with via written representations, principally conditions and obligations (as agreed and arranged at the hearing, see schedules 3 and 4 to this decision).¹ At the time of the hearing there remained limited common ground between the main parties as to the necessity, and also detail, of various obligations sought by the Council. Specifically the six contributions itemised under the 'Council Obligations' heading at paragraph 6.6 of the appellant's statement of case were in dispute (the 'disputed obligations'). As discussed subsequently, at my

¹ Pursuant to section 20 of the Business and Planning Act 2020.

request an amended section 106 agreement, dated 5 December 2022, was submitted after the close of the hearing ('the section 106 agreement').

4. An appeal should not be used to evolve a scheme. However, seeking to resolve outstanding matters in that respect is entirely rational. Paragraphs 55 to 57 of the National Planning Policy Framework ('NPPF') set out how consideration should be given as to whether otherwise unacceptable development could be made acceptable through the use of appropriate conditions or planning obligations (in that order of preference).

Applications for costs

5. The appellant submitted a written application for an award of costs against the Council, and the Council responded at the hearing, likewise in writing. In responding the Council also made a claim for an award of costs against the appellant. There has been suitable opportunity for each main party to comment on the application for costs, or rebuttal, of the other. I deal with those applications separately.

Planning background

The site

6. Parkside is a development of 58 flats arranged in three blocks, Finsbury Court, Greenwich Court and Hyde Court. Those blocks are set within communal grounds which, in large part, are given over to parking. Parkside was created in the early 1990s pursuant to planning permission Ref. 7/139-91 granted via Council decision notice of 24 April 1991 (the '1991 permission'). The current proposal is for the construction of a new block of flats in the north-eastern corner of Parkside, close to Monarch's Way. Certain plans show the entirety of Parkside edged red, albeit reflecting the principal area to which the scheme relates, the appeal site is stated to be around 0.98 hectares in the appeal form. That is broadly coterminous with the 'footprint area' shown in the appellant's updated Design and Access Statement ('DAS'), and for convenience is hereafter referred to as 'the appeal site'.
7. Notwithstanding the Council's helpful efforts at the hearing, planning records from the early 1990s here are patchy. The Council say that plan No. 959.102B, entitled 'Landscape Layout', reflects the permitted arrangement of the grounds to Parkside. The evidence on that point is ambiguous.² That is, however, somewhat academic. The 1991 scheme did not include a block of flats in the location now proposed. Existing permissions are material. However latter permissions are akin to authorised overlays (rather than inherently undermining what has previously been permitted).
8. Planning focusses on matters of public interest, and is therefore somewhat separate to private legal arrangements. However the two coincide where delivery is concerned. I understand that RG Airspace Developments Ltd. is an associated entity to Long Term Reversions (Harrogate) Ltd. I understand that the latter is successor in title to Furlong Brothers Construction, the applicant in respect of the 1991 permission (insofar as Parkside is concerned). There is therefore nothing to indicate that all elements of the scheme, including

² Noting the absence of a landscaping condition in the reproduction of the 1991 permission decision notice, and that plan No. 959.102B is referred to as 'an amendment' in hearing document 2.

proposed alterations to parking provision, would not be achievable in practice. There is also no dispute between the main parties that the section 106 agreement, to which Long Term Revisions (Harrogate) Ltd. is a signatory, is correctly executed (and there is nothing before me to the contrary).

Planning context

9. Each proposal must be determined in accordance with the development plan unless material considerations indicate otherwise.³ The development plan here includes policies of the Broxbourne Local Plan (adopted June 2020, the 'Local Plan'). I have also had regard to various other material considerations, including the Borough-wide Supplementary Planning Guidance addressing matters of design (updated 2013, 'SPG'), the NPPF, the Planning Practice Guidance ('PPG'), and the National Design Guide.
10. 2021 Housing Delivery Test ('HDT') data shows that housing delivery in the Borough has, over the last three years, amounted to 72% of that required. In the absence of protective policies here as in NPPF footnote 7, NPPF paragraph 11. d) ii. applies. That paragraph guides how development should be permitted unless any adverse impacts would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole.
11. Paragraph 11. d) ii. also applies in circumstances where a Council is unable to demonstrate a five year supply of deliverable housing sites ('5YHLS') in line with NPPF paragraphs 68 and 74. Whether a 5YHLS can be demonstrated is in dispute between the main parties. However HDT data, in itself, means NPPF paragraph 11. d) ii. is engaged. Therefore the existence of a 5YHLS or not, along with the extent of any predicted shortfall and its likelihood of persisting, may be material in the overall planning balance. However the foregoing only applies if development would not accord with the development plan in the first instance; the NPPF does not displace the statutory basis for decision-taking.
12. Via correspondence of 7 December 2022 the Council referred to the Written Ministerial Statement of 6 December 2022 entitled 'Update on the Levelling Up Bill' (the 'WMS').⁴ That does not, however, alter the foregoing reasoning. The WMS indicates potential future changes to planning legislation and policy. As highlighted by the Council, the WMS sets out the intention to 'end the obligation on local authorities to maintain a rolling five-year supply of land for housing where their plans are up-to-date.' However, given my reasoning above, cross referenced against NPPF paragraph 11. d) and associated footnote 8, it cannot rationally be said that the most important policies here are up-to-date.

Main issues

13. Against the context above, the main issues are (i) whether or not the proposal would make appropriate provision for parking, (ii) the effect of the proposal on the character and appearance of the area, and (iii) whether or not the proposal would contribute appropriately towards infrastructure provision.

³ Section 38(6) of the Planning and Compulsory Purchase Act 2004 as amended.

⁴ Official Record HCWS415.

Reasons

Parking

14. Criterion I. of Local Plan policy TM5 sets out how applications will be determined with regard to the Car Parking Guidelines in Appendix B. Appendix B recommends that 1.5 parking spaces and 2 parking spaces should be provided in respect of 1 or 2 bedroom dwellings respectively. On that basis, strictly numerically, the proposal should provide 18.5 parking spaces. Only 10 are proposed, on a one-to-one basis with flats. They would be for future occupants, not visitors.
15. However, criterion II. of Local Plan policy TM5, in summary, sets out that the Council will seek a 'sensible balance of car and cycle parking spaces' relative to the nature of the area, accessibility and the availability of different modes of transport. That is working towards the 'overall aim of reducing private car usage'. In a similar vein, and amongst other things, NPPF paragraphs 104 and 105 seek to actively manage patterns of growth to promote walking, cycling and public transport.
16. Notwithstanding the apparent absence of a PTAL rating here, Parkside is just by Waltham Cross town centre. The policy boundary thereof runs next to Hyde Court, encompassing a neighbouring supermarket. It is a short, convenient walk to various services and facilities, including bus services, along and around the High Street. Waltham Cross overground station falls close by to the north east, I am told around 370 metres away on the opposite side of Waltham Cross Playing Fields (as set out in the appellant's Townscape Appeal Note, 'TAN'). There are also now various industrial estates in the immediate vicinity around the M25 towards the south.
17. Connectivity here is also reflected in 2011 census data presented in the appellant's Transport Technical Note ('TTN'). Table 5 of the TTN, related to the Output Area in which Parkside is located, sets out that only 51% of individuals there relied on a 'car or van' to travel to work as opposed to other means including walking, cycling or public transport. Whilst only indicative of circumstances some time ago, 51% of 18.5 parking spaces referenced above is 9.4 (conscious it would be impractical to provide a decimal of a parking space).
18. There are presently 72 parking spaces at Parkside, 58 are demised/ allocated to residents, 14 are undemised/ available to visitors. Whilst the 1991 permission at Parkside was reached in a different policy context, existing allocated parking spaces are nevertheless on a consistent one-to-one basis as is now proposed. The proposal would not affect the existing 58 allocated spaces. It would, however, fall in an area given over to visitor spaces. Numerically, as opposed to physically on the ground, 10 of the 14 existing visitor spaces would be allocated to the flats proposed. The 4 remaining visitor spaces would be relocated elsewhere at Parkside (as illustrated at page 29 of the DAS).
19. The appellant's 'Appeal Statement Note' ('ASN') concerns observed parking pressures.⁵ There has been suitable opportunity to comment on it at appeal. The ASN found, broadly consistent with census data above, that the maximum

⁵ Prepared by Vectos, July 2022.

occupancy of parking spaces at Parkside was 41 out of 73.⁶ Paragraph 18 of the ASN explains that, whilst demand amongst 14 existing visitor spaces reached as high as 9, on that occasion only 2 of those vehicles were likely associated with visitors to, as opposed to residents of, Parkside.

20. Numerically the Council's observations are broadly similar. Their site visits indicated a general availability of capacity in allocated spaces, with some seven vehicles parked in visitor spaces on two occasions.⁷ The Council also sets out how, on those occasions, a further 7 or 5 vehicles were parked on the Parkside access road. My observations of site conditions are inevitably a snapshot in time. However they also broadly align with the foregoing.
21. There were multiple visitor spaces available at the time of my two site visits, around 0840 and 1800 on 25 October 2022. Several vehicles had ostensibly not moved between those two times, suggesting that they were not associated with visitors. There were also a handful of vehicles parked along the access road referred to by the Council above on both occasions; I was unable to identify restrictive signage or road markings preventing that from occurring.⁸ Practically, given the width of the access, ad-hoc parking would not necessarily impede the free flow of vehicles (dependent on the courtesy of drivers in the same manner as on-street parking elsewhere).
22. I have taken careful account of the representations of local residents, including specifically in relation to parking pressures and the implications of the scheme in terms of any existing entitlements, expectations or lease provisions. Nevertheless in so far as it is within the remit of this decision to assess, summarising my reasoning above, Parkside falls within an accessible location where private vehicular usage has been, and is likely to be, limited.
23. Provision of 4 visitor spaces is modest. Nevertheless it would be proportionate relative to existing pressures, there being nothing to indicate visitors could not also park outside of designated bays at certain places around Parkside without unduly inconveniencing others. Consequently, subject to securing the foregoing arrangements via suitably-worded conditions, the proposal would make appropriate provision for parking in line with the relevant provisions of Local Plan policy TM5 and NPPF paragraphs 104 and 105.

Character and appearance

24. Parkside comprises three blocks arranged along on a loose east-west axis. The Monarch's Way boundary to Parkside is demarcated by a brick wall emulating a sheet piling pattern. Hyde Court has a more segmented, or varied, form than Greenwich Court and Finsbury Court. In scale, however, elements of all blocks reach three storeys with a maximum height of around 12 metres.⁹ Roofs, of russet concrete tiles, are comparatively steeply pitched. Eaves are occasionally punctured by projecting gabled elements. Walls are principally of light buff bricks, with accentuated red brick soldier courses, arched window surrounds, quoins, small sections of painted render, with occasional angular oriel windows also present.

⁶ At 0200 on 25 June and 0430 on 1 July 2022, a lower level being recorded on a third count of 27 June 2022.

⁷ At 2115 Monday 12 September 2022 and 0945 on Wednesday 14 September 2022.

⁸ There was no indication, having aired this matter at the hearing, that any 'on-street' parking restrictions exist.

⁹ As stated by the Council.

25. To some extent the architectural detailing at Parkside picks up on lively brickwork in ostensibly inter-war properties along Arlington Crescent by the M25 (and also on certain design features of similar, or slightly later, properties along Abbey Road beyond Monarch's Way). However, aesthetically, Parkside typifies much late twentieth century development. Design features referenced above are incorporated somewhat haphazardly, reflecting features found in many early-to-mid twentieth century properties throughout the country, rather a specifically local typology. On account of the set back of the blocks comprising Parkside from Monarch's Way, along with the boundary features and established planting and trees around the site, there are few vantage points from which Parkside is readily perceived in conjunction with principally residential surroundings.
26. It would be more apt to describe Parkside as falling within an area of mixed character. Monarch's Way itself, a dual carriageway both westwards and eastwards, alongside associated street furniture, highway signage and boundary features, is a significant presence. As set out above, a supermarket falls to the west of Hyde Court which is of significant bulk with a plain, functional appearance. Various main town centre uses flank the High Street beyond, hosted by a variety of premises. There is a substantial profiled metal commercial building visible between the access to Parkside and the playing grounds next to it, part of the Monro Industrial Estate. The latter forms part of the contextual backdrop to Parkside, and also to properties along Arlington Crescent.
27. The new block proposed would be located close to the access to Parkside. The Council indicate that it would reach a maximum height of about 16 metres tall. The scheme would appear effectively 'side on' to Monarch's Way and Finsbury Court; the principal aspect from the units proposed being instead towards to the east and west (respectively in the direction of the commercial building and supermarket referred to above). The proposal is designed to be contemporary in appearance, as the Council put it 'similar to more recent flatted developments elsewhere in the Borough'. Balconies would be partially recessed within the overall envelope of the building, facades would contain limited detailing relative to existing blocks, and a 'simple, robust' palette of external materials would be used.
28. I acknowledge that the proposal would introduce significant built development in an area which is presently essentially open. The scheme would reach a maximum height greater than existing blocks at Parkside. The proposal would be readily perceptible from various vantage points along Monarch's Way and within Parkside. It would be set close to the former, acknowledging that there is generally greater separation from Monarch's Way to built development in the surroundings. There would also be partial views of the proposal from properties along Abbey Road, albeit at quite some distance across Monarch's Way. Any visibility from properties along Arlington Crescent, if such views were to exist at all, would be glimpsed and at significant distance (with boundary planting and the form of existing blocks at Parkside intervening). The proposal would inevitably entail change.
29. However, in a similar manner to Hyde Court, the proposed building would be segmented in form, with different elements differing in scale and height. Its

roof form would therefore be broken up rather than consolidated, in much the same way as at Parkside at present described above. The principal bulk of the scheme would, significantly, be drawn away from both Monarch's Way and Finsbury Court. The height of the northernmost and southernmost elements of the scheme would be comparable to, or lower than, that of Finsbury Court and Greenwich Court.¹⁰ I have described above that Parkside falls within an area of mixed character, and that there is contextual development either side of the site. In that context, whilst clearly differing from current circumstances, neither the scale, bulk, nor height of the scheme would appear discordant.

30. There are presently relatively spacious communal grounds at Parkside, setting aside what proportion thereof is actively used or well maintained. The Council argued, however, that the proposal cannot 'rely' on communal space elsewhere at Parkside to meet needs of future residents. Paragraph 3.3.5 of the SPG sets out that 'flats will normally be provided with communal amenity space and where this is the case, a minimum of 20 sq metres ('sqm') of amenity space is required for each flat.' Setting aside that each flat would have a private balcony of between 5 and 14.8 sqm, evidently 20 sqm per flat could not be provided within the 'footprint area' illustrated in the DAS. It is also judgement as to whether the proposal would 'provide' an additional 441 sqm amenity space,¹¹ given that space already exists, regardless of how well tended it is.
31. Nonetheless, in a practical sense, and cross-referencing my reasoning in paragraph 8 above, there is nothing to indicate that the appellant could not 'rely' on communal space at Parkside being available to future residents in practice. Such circumstances may of course not arise in many scenarios, for example where land ownership or succession has become fragmented. Moreover, had the three existing blocks at Parkside and the scheme before me all come forward at the same time, communal space would exceed the 20 sqm level guided by the SPG.¹² The latter proposition is hypothetical, but illustrates an important point.
32. Setting aside NPPF paragraph 11. d) ii., or the existence or not of a 5YHLS, planning policy and housing pressures differ markedly to circumstances in 1991. At the hearing the Council explained that their present intention is to enable the delivery of 806 dwellings per annum ('dpa'), compared to 454 dpa as envisaged via the Local Plan, or between 240-260 dpa in its statutory predecessor. Achieving that will inevitably require some intensification, and therefore divergence from earlier, lower-density, patterns of building. Holding the scheme up against the 'modern' requirements of the SPG, sufficient outside space for existing and future residents could be provided within those terms. Neither in visual nor spatial terms would the scheme therefore represent 'overdevelopment', as contended by the Council.
33. Similarly I have reasoned above that Parkside is typical of late twentieth century architecture. It might be described as nondescript, and as such there is no compelling reason to replicate its design in the present. In my view the broadly consistent appearance of external bricks and roof tiles proposed, along

¹⁰ Including as shown on plan No. WP-0751-A-0100, Revision B., and in the sketch sections in the DAS.

¹¹ DAS, page 30.

¹² Ibid., dividing the sum of existing amenity space and proposed amenity space between 58 existing and 10 proposed flats: $(1197+441)/(58+10)=24.1$.

with the overall form of the proposal, would ensure a suitable degree of design coherence.

34. The relocation of 4 parking spaces from the appeal site to elsewhere at Parkside would have little appreciable effect on character, much of Parkside being already given over to hardsurfacing and parking. The areas proposed for 'relocated' visitor parking are either next to, or between, existing or proposed parking (and in locations which are principally open and which appear to have broadly been left to their own devices). Drawing together the foregoing, I therefore conclude that the proposal would integrate appropriately with local character, in accordance with the relevant provisions of Local Plan policy DSC1 and NPPF paragraph 130, which in summary seek to ensure that all development integrates appropriately with its surroundings.

Obligations

35. In order to be adopted a plan should be, amongst other things, consistent with national policy. It is not for a planning appeal to go behind, or in some way amount to, the examination of a development plan document. NPPF paragraph 34 sets out that 'plans should set out the contributions expected from development. This should include setting out the levels and types of affordable housing provision required, along with other infrastructure (such as that needed for education, health, transport...'. NPPF paragraph 58 states that 'where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage.'
36. Local Plan policy INF1 'Infrastructure' sets out how the Council will implement its Infrastructure Delivery Plan (draft version dated January 2018, 'IDP'). Policy PO1 'Planning Obligations' provides further details about obligations that will be sought to 'deliver sustainable development', referencing in that context the provisions of Regulation 122 of the Community Infrastructure Levy Regulations as amended (which, in turn, are aligned with NPPF paragraph 57).¹³ Policy PO1 enables, in principle, obligations to be negotiated on the basis of viability. The PPG provides guidance in respect of obligations and viability.

The Council's methodology

37. There is extensive documentation before me regarding the history of exchanges between the appellant and Council in respect of obligations. I will set out the pertinent documents and points, before turning to the disputed contributions themselves. The appellant refers to correspondence from the Council of 11 and 18 November 2021 seeking, respectively, obligations amounting to £26,100 and £26,387 per unit. I am told that subsequent direct engagement with Hertfordshire County Council ('HCC') identified, based on their toolkit and data, a lower level of contributions sought in respect of certain types of infrastructure than originally requested.¹⁴ The appellant made an associated Freedom of Information request to Broxbourne Borough Council, and provided a legal opinion in respect of obligations to them (in advance of the Committee consideration of application Ref 07/21/0985/F).

¹³ Community Infrastructure Levy is hereafter referred to as 'CIL'.

¹⁴ Education, library services, youth services and fire and rescue (along with a monitoring fee).

38. The Council sets out in their statement of case that the 6 disputed obligations, now referenced in paragraphs 1.6 to 1.11 of Schedule 1 to the section 106 agreement, draw from the IDP in one way or another. Paragraph 19 of the IDP indicates that some funding may be achievable via CIL, the Council clarifying at the hearing that progress in respect of CIL, itself in something of a state of flux, is as yet nascent. Albeit with certain nuances depending on the particular type of contribution sought, the IDP sets out a headline figure for infrastructure required to deliver the strategy set out in the Local Plan. For example, in respect of transport works, IDP pages 144 to 152 list a series of 'infrastructure items' with estimated costs and timings, amounting to some £132.77 million (of which about £37 million is to funded from 'non s106 sources'). Section 5 of the IDP then relates infrastructure projects to six strategic sites in the Local Plan. Those strategic sites collectively account for just under 70% of the homes anticipated to be delivered over the Local Plan period.
39. Sticking with transport infrastructure, applying the foregoing methodology leaves around a £38 million funding shortfall. In that context the Council has used the nearest strategic site to a given proposal to inform obligations sought on non-strategic sites. In this instance the nearest strategic site is Waltham Cross Town Centre Northern High Street, which is anticipated to accommodate 300 homes between 2028 and 2033. The projected cost of 'A10/ other highway improvements' there is given at table 5.2 of the IDP as £0.5 million. The Council note that 'the costs attributed to this [strategic] site, were significantly lower than for other strategic sites'.
40. At my request, on 7 November 2022 the Council submitted a Supplementary Statement on obligations. That explains how contribution from the development proposed in respect of 'A10 Highway Improvements' is derived from the foregoing figure of £0.5 million, i.e. that sum is divided by 300, being the number of homes anticipated at the Northern High Street strategic site, and then multiplied by 10 reflecting the number of units proposed in this instance. That generates a figure of £16,666.67. The Supplementary Statement sets out that cumulative interest has been added to that figure base dated at 2018 (indexation). Indexation reflects inflation over time. Running £16,666.67 through the Hargreaves Lansdown Inflation Calculator, based on the Retail Price Index ('RPI'), arrives at a present-day figure of £21,535.¹⁵ That is broadly comparable to the £18,875, or £21,008 in the section 106 agreement, in dispute in this respect (the variance accounting for interest rate changes over the course of the application and appeal).

The dispute

41. The appellant's legal opinion referenced above clarifies that HCC obligations amounting to £61,648 were not in dispute, whereas Borough Council obligations amounting to £59,512 were. That remains the appellant's position at appeal. I concur that the HCC obligations meet the tests in NPPF paragraph 57 and CIL Regulation 122; they are necessary, directly related to the development, and fairly and reasonably related in scale and kind. They are established through an approach which accounts for the specific effects of the development proposed, and intended outcomes, based on an accessible methodology. I am likewise satisfied that the arrangements made in the

¹⁵ Rather than £10,925 as in paragraph 16 of the Supplementary Statement.

section 106 agreement in other respects, including in relation to managed areas and an estate management scheme, accord with the foregoing provisions also, are fundamentally intertwined with the effects of the scheme, and necessary to make the proposal acceptable in planning terms. I now turn to the 6 disputed obligations.

42. In broad terms the dispute at appeal therefore concerned obligations totalling £121,160, less than half of £263,870 initially sought. However, notwithstanding that the original 14 unit scheme seemed to fall short of 'being fully viable' within its own terms,¹⁶ as clarified during the hearing the appellant does not specifically contest the obligations sought by the Council on the basis of viability. Instead they argue that the Council's approach to seeking the 6 disputed obligations is unlawful and unjustified in this specific instance. My attention is specifically drawn, in the legal opinion referenced above, to the judgement in *Elsick* in that context (which the Council have had the opportunity to consider).¹⁷
43. Paragraphs 44 and 52 of the *Elsick* judgement explain two angles to the operation of obligations. The first is in respect of legality; as in section 106 of 1990 Act, an obligation must relate to the land (being binding on successors in title). The funding of 'extraneous infrastructure or other community facilities unconnected with its [a site's] development' is ventured as an instance of where that would not be achieved (as those things are ethereal rather than related to the land). The second angle relates to relevance or materiality in a given case. In part the latter point relates to an obligation not being 'trivial', or *de minimis*, in respect of its relationship to proposed development.
44. In my view, however, the judgement in *Elsick* should be treated with some caution. Whilst there are clear legal, and logical, crossovers, the judgement in *Elsick* was reached in the context of Scottish legislation as it stood in 2017. Notably paragraphs 59 and 60 of that judgement state 'in England and Wales Part 11 of the Planning Act 2008, which provided for a community infrastructure levy, was enacted to achieve similar ends... But the 1997 Act does not allow for such a scheme.'¹⁸ The appellant's legal opinion also refers to the Council's approach in this instance as being akin to a 'roof-tax'. That is a complex term, tracing its origins to the mid-2000s concept of planning gain supplement.
45. CIL was introduced in England on 6 April 2010, and has since been variously amended, including via the revocation of Regulation 123 on 1 September 2019. In summary, former Regulation 123 prevented the 'pooling' of five or more contributions under section 106 of the 1990 Act towards one infrastructure project or type of infrastructure. The PPG, with more extensive references in earlier iterations, also refers to 'tariff style contributions'.¹⁹ There is therefore some terminological complexity as to what is meant by a 'roof-tax', 'pooled contributions' or 'tariff style' contributions deserving of a thesis rather than appeal decision. The judgement in *Elsick* comes amidst the changes to CIL, to

¹⁶ Viability Report, paragraph 17.2, noting that the appraisal factors in only £35,000 for developer contributions (far less than the sum of the contributions agreed in section 6.6. of the appellant's statement of case).

¹⁷ *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited* (Scotland) [2017] UKSC 66.

¹⁸ Town and Country Planning (Scotland) Act 1997 as amended

¹⁹ Reference ID: 23b-024-20190315.

the PPG, and also between the publication of the first version of the NPPF and subsequent iterations.

Consideration

46. However, and I do not set out the following reasoning lightly, there are 6 methodological shortcomings with the Council's approach to establishing the disputed obligations such that I cannot conclude, in this specific instance, that they accord with NPPF paragraph 57 or CIL Regulation 122. That logically leads me, setting aside the lawfulness of the Council's approach, to a finding that, at best, the connection between those obligations and the development proposed would be *de minimis*. I ensured that there was opportunity at the hearing for discussion on the eventuality that I were to reach such a finding.
47. Firstly, with reference to NPPF paragraph 34, Local Plan policies PO1 and INF1 set out the strategic framework for seeking planning obligations. There is, however and understandably at a plan-level, limited specificity as to how the type or level of obligations are intended to be established in practice. Both policies reference the IDP, which is referred to in supporting paragraph 17.3 as 'the initial benchmark for negotiations'. A benchmark provides only so much clarity. It is unclear how a benchmark could suggest contributions associated with the proposal amounting to both £263,870 and £121,160. It appears, secondly, that the Council has approached seeking obligations, at least partially, on the basis of what would be reasonable to request. That is a different matter to what would be required to render a scheme acceptable.
48. Thirdly, Local Plan policy INF1 suggests that the IDP will be updated on an annual basis. However both main parties at appeal referred consistently to the draft version of January 2018. That is also the base date for indexation applied by the Council as set out above (indicating strongly that there have been no intervening updates). There is, furthermore, no information before me as to any projects that have been completed, or funded in whole or part, or as to how any contributions sought would related to phasing of infrastructure projects. Whilst I appreciate many Council resources are stretched, there is nonetheless an evidential shortcoming there.
49. Although explanatory text does not have the same force as policy wording, supporting paragraph 18.4 of the Local Plan sets out how the priorities for planning obligations will be 'projects drawn from the Infrastructure Delivery Plan/ schedule'. In that context, thirdly, there are no specific projects associated with the disputed obligations sought in respect of 'A10 Highway Improvements' or the 'Sustainable Transport Package'. I appreciate there may be some indirect specificity in that regarding by pegging the contributions sought from non-strategic schemes with that which is sought from strategic sites.
50. However, on disputed transport related obligations, it is in turn difficult to point precisely to the projects to which the £0.5 million 'A10/other highway improvements' or £0.26 million 'Sustainable Transport Package' referred to in the IDP in respect of the Waltham Cross Town Centre Northern High Street

relates to.²⁰ That lack of specificity is more clearly present in respect of town centre improvements, notwithstanding the Waltham Cross Town Centre Strategy (adopted March 2015). Paragraph 21 of the Council's Supplementary Statement explains that the £0.5 million sought there was established, in part based on 'the professional judgement of the Head of Planning and development, the Planning Policy Manager and author of the IDP'. That lacks interrogability.

51. In the Council's Supplementary Statement, the disputed health contribution is said to draw from the list at page 153 of the IDP. I am told that list is informed by the formula at IDP table 8.1 (which is not readily apparent from the IDP itself). As with transport, health infrastructure categories listed in the IDP are, in large part, intended to be funded by other means than developer contributions. The IDP does not indicate any specific projects, noting, for example, that premises for anticipated additions GPs will be 'in locations to be determined'. There is no further detail before me. IDP table 8.1 appears to use the standardised expectation that each dwelling will be occupied by 2.4 individuals, rather than relating to the likely occupancy of a given scheme. The source of that formula also appears to derive from elsewhere in England.²¹
52. I acknowledge, as also set out at paragraph 19 of the Supplementary Statement, that there has been a 'long standing ambition to refurbish the sports pavilion and recreational facilities at the Waltham Cross playing fields which lie close to the appeal site.' The Council also note an 'ongoing programme of local play improvements'. However neither the foregoing refurbishment nor improvements are reflected in pages 155 to 156 of the IDP, from which that contribution is also said to flow. Again there is no information before me in respect of the foregoing recreational sporting and community contribution projects, including in respect of their costs, funding or timing.
53. Fifth, developer contributions sought from non-strategic sites are pegged against strategic sites. As noted above, out of a total IDP indication of transport projects amounting to £132.77 million, the Supporting Statement indicates around £37 million is anticipated to be funded other than from Section 106 sources. I am told that strategic sites are anticipated, in aggregate, to contribute £57.67 million towards the outstanding balance of about £96 million. That leaves around £38 million unaccounted for in terms of transport.
54. As set out above, the Council have sought contributions from non-strategic sites on a pro rata basis relative to strategic sites. However those strategic sites do not relate to the £38 million unaccounted for, and any projects that remaining funding is intended to deliver. In other words it is uncertain whether the transport contributions sought here would go to projects which have, or are intended to be, funded by strategic sites. There is a lacuna in the information before me as to the projects to which the £38 million relates, and how those in turn relate to development brought forward on the ground.

²⁰ Which may, I acknowledge, be specified in other documents not before me such as those forming part of any application, also noting that the footnote to table 5.2 refers to 'various evidence sources (e.g. draft Transport Strategy)'.

²¹ NHS England, East and South Midlands Team, whereas Broxbourne falls within the NHS Midlands & East (Central Midlands) Team as noted in IDP paragraph 8.3.

55. Sixth and finally, indexation is commonly used and somewhat logical. However there is no reference to that in the Local Plan, and only two references in the IDP (at table 17.1 and paragraph 17.17). The first reference to the IDP methodology indicates that whilst calculations therein have not been index linked, 'build costs uplift is likely to be matched by similar rises in development value.' That, albeit implicitly, reinforces that indexation *per se* is somewhat logical as inflation, or deflation, affects both the economics of construction and market value of properties. However it does not do so in lockstep. IDP paragraph 17.17 refers to CIL indexation, which only uses RPI as a backup should the RICS CIL Index cease to be published (which draws from Building Cost Information Services data).²² The lack of clarity over indexation therefore introduces further ambiguity.
56. I acknowledge that the Council has successfully secured obligations on many schemes with reference to relevant provisions of the development plan and IDP. As noted in footnote 20, there may be other evidence in existence elsewhere, or related to other schemes, than that presented to me. However, for the foregoing reasons I cannot conclude that the disputed obligations are more than trivially related to the development proposed, or therefore fairly and reasonably related to it in scale and kind.²³ I cannot therefore say that the disputed obligations are necessary to make the development acceptable in planning terms.

Other matters

57. A good chunk of the hearing concerned 5YHLS. However I have reasoned above that the proposal would comply with the development plan (and in any event paragraph 11. d) ii. applies by virtue of HDT data and the absence of protective designations). I accept the proposal would overwrite what is presently 'natural' land with hardsurfacing, both in terms of the footprint of the scheme, parking associated with it, and relocated visitor spaces. However the appellant's Biodiversity Net Gain Design Note, indicatively in lieu of a detailed landscaping scheme which could legitimately be secured via condition, indicates that biodiversity net gain ('BNG') could be achieved.
58. Irrespective of landscaping originally approved or management subsequently, Parkside at present is relatively open with little by way of diverse fauna other than that which has taken over naturally in time, notably towards the south-eastern corner. Subject to requiring suitable landscaping and adherence to the Design Note via condition, there is every likelihood BNG could be achieved in line with criterion II of Local Plan policy NEB1, relevant provisions of NEB3 and NEB4, and the approach in NPPF paragraphs 174. d) and 180. d).
59. I have taken careful account of all representations before me in addition to the foregoing matters, including in respect of, privacy and light, the effect of the proposal on existing views, disruption during construction, congestion and access suitability, and note observations made in respect of the existing standard of maintenance of communal areas. I heard from Mr Arblaster, a local resident, during the hearing (see schedule 2 to this decision).

²² As set out in PPG Reference ID: 25-070-2020116, pursuant to the Community Infrastructure Levy (Amendment) (No.2) Regulations 2019.

²³ The Broxbourne Council monitoring fee falling away as a result of the foregoing.

60. At its closest, the development proposed would be some 18 or 17.5 metres away from windows serving flats at Finsbury Court (from which there are largely open views towards Monarch's Way). Section 3.2 of the SPG recommends a minimum window-to-window distance of 25 metres be maintained (or 30 metres for 3 or more storey development). However all southwards facing windows at the development proposed serve functional areas of the block, such as communal stairs or represent a second aspect to rooms (noting my reasoning above that the scheme is principally orientated east-west). In that context, and subject to securing any upper floor south-facing windows as obscure glazed via condition, the proposal would not have an unacceptable effect on neighbouring privacy. The substantial distance between the appeal site and properties along Abbey Road would ensure privacy to occupants of those properties would not be unduly reduced.
61. The proposal, would, I acknowledge, result in an additional sense of enclosure from certain perspectives within Parkside. However that would not, in my view, be to an unacceptable degree with reference to the mixed, town centre adjacent, character of the surroundings. I have also reasoned above that the scheme would be acceptable in terms of outside or communal space. Falling squarely towards the north of Finsbury Court, the proposal would have little, if any, appreciable effect on the availability of natural light to existing flats.
62. Construction is inevitably disruptive, particularly as many individuals work from home to a greater degree than in the past. However any disruption would be temporary. Adverse effects by virtue of noise, vibration and dust could also be reduced by virtue of requiring adherence to a Construction and Environmental Traffic Management Plan (CETMP) via condition. Relative to the prevailing nature of Monarch's Way and of the access to Parkside, there is nothing substantive to indicate that the vehicular movements associated with the development proposed would unduly affect the safe and efficient operation of highways (or, subject to appropriate provision in the CETMP be otherwise unacceptable).
63. Existing maintenance arrangements at Parkside are a separate matter to the proposal before me, cross-referring to my reasoning in paragraph 8 of this decision. However the section 106 agreement makes provision for the management of communal areas in association with the development proposed. Consequently neither that, nor any other matters, serve to alter my overall conclusion regarding the acceptability of the development proposed.

Conclusion

64. For the foregoing reasons, having taken account of the development plan as a whole along with all other relevant material considerations, I conclude that the appeal should be allowed subject to the conditions below at schedule 1, and, subject to my reasoning in paragraphs 35 to 56, the obligations contained in the section 106 agreement.

Conditions

65. In addition to requiring commencement within the relevant statutory period, I have imposed conditions specifying compliance with the supporting plans for clarity and in order to ensure that the proposal is implemented as assessed above. To ensure that the proposal integrates sensitively with its surroundings,

including in respect of biodiversity, I have additionally imposed conditions 3 and 4. There is no necessity to specify that an obligation is entered into if 10% BNG is not achieved on site; that percentage uplift is neither required locally nor nationally, and on the basis of the evidence before me there is every likelihood that that could be achieved in any event.

66. To safeguard the privacy of those nearby, I have imposed condition 5 requiring obscure glazing. Similarly, to minimise disruption resulting from construction, the proposal must adhere to a Construction Environmental Traffic Management Plan agreed pursuant to condition 6. To ensure appropriate provision is made for vehicle and cycle parking, and also waste storage and collection, I have imposed conditions 7 and 8.
67. Planning conditions needn't address matters covered by separate regimes. Nevertheless, and notwithstanding the provisions of Building Regulations 2010 as amended,²⁴ for clarity I have imposed condition 9 requiring that active electric vehicle charging points, or passive cable routes for such if that is not reasonable, are provided (thereby bringing the scheme in line with Local Plan policy TM4). Similarly whilst relevant development must accord with Building Regulations in respect of resistance to the passage of sound, the appellant's Noise Impact Assessment (NIA) includes specific assumptions regarding the fabric of the proposal building to ensure adverse implications of ambient noise are reduced to acceptable levels. I have therefore specified accordance with the NIA via condition 10, which is sufficient safeguard in that respect to secure compliance with the relevant provisions NPPF paragraphs 130) f. and 174. e).
68. There is limited evidence before me as to the history to the appeal site, or former uses before incorporation into Parkside. In all likelihood, falling within a mixed area with residential uses close by, the potential for contamination on site is low. Nevertheless the representations of the Council's Environmental Health Officer of 7 October 2021 points out various contamination pathways potentially associated with car parking. In that context, as a precautionary approach, it is reasonable to impose conditions 11, 12 and 13 which make arrangements for investigating and remediating any potential contamination encountered.
69. Conditions 6 and 11 must necessarily apply before any development is undertaken. Any works have the potential to result in disturbance whether in terms of noise, vibration, dust or traffic, and to encounter potential contaminants. Pre-commencement conditions in those respects would minimise or avoid adverse effects from arising.
70. In imposing conditions I have had regard to the tests in the NPPF, the PPG, and relevant statute, to ensure that all are necessary, relevant to planning and to the development to be permitted, enforceable, precise and otherwise reasonable. With that in mind I have amalgamated certain conditions proposed by the Council, and amended the wording thereof, to ensure they are appropriate (without altering their fundamental aims).

²⁴ Including via the Building Regulations etc. (Amendment) (England) (No. 2) Regulations 2021 which make provision for the charging of electric vehicles.

Tom Bristow
INSPECTOR

SCHEDULE 1, CONDITIONS

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: WP-0751-A-0100 Rev B, WP-0751-A-0110 Rev B, WP-0751-A-0111 Rev B, WP-0751-A-0112 Rev B, WP-0751-A-0113 Rev B, WP-0751-A-0114 Rev B, WP-0751-A-0200 Rev B, WP-0751-A-0300 Rev B, and WP-0751-A-0301 Rev B.
- 3) Before their use in the development hereby permitted, details or samples of all external facing and roofing materials shall have been submitted to, and agreed in writing by, the local planning authority. The development shall be carried out in accordance with the agreed details or samples and retained as such thereafter.
- 4) Notwithstanding condition 2, before any above ground works related to the development hereby permitted are undertaken, a landscaping and biodiversity scheme ('LBS') related to the managed areas at the site shall have been submitted to, and agreed in writing by, the local planning authority. The LBS shall include details of all hard and soft landscaping, boundary treatments, external lighting and shall set out how biodiversity net gain will be achieved. The agreed LBS shall accord with the recommendations for biodiversity improvement set out in the Biodiversity Net Gain Design Note, AESG, Ref. PWC-JDM-AESG-DN-00, dated 6 June 2022, with biodiversity net gain measured and forecast via the version of Natural England's Biodiversity Metric current at that time. The agreed LBS shall be implemented before the first occupation of any of the flats hereby permitted, and thereafter maintained in accordance with agreed details.
- 5) Before any flat hereby permitted is first occupied, all upper floor room windows which serve habitable rooms and are within the southern elevation of the development hereby permitted shall have been fitted with obscure glazing (to at least Pilkington obscurity level 4 or equivalent), and shall be non-openable to a height of 1.7 metres above internal finished floor level. Once installed as such the foregoing windows shall thereafter be maintained as such.
- 6) No development hereby permitted shall be undertaken until a Construction and Environmental Traffic Management Plan (CETMP) has been submitted to and agreed in writing by the local planning authority, which shall include details of the following:
 - i. A photographic condition survey of the public carriageway, verges and footways in the vicinity of the site,
 - ii. The routing of construction vehicles to and from the site, including estimated number, type per day/ week,
 - iii. Any traffic management requirements, including details of any vehicle holding area and details of the vehicle operator call up procedure,

- iv. A programme of works, including a timescale anticipated for each stage of site preparation, excavation and construction,
- v. Construction and storage compounds, including areas designated for car parking, loading/ unloading and manoeuvring,
- vi. Any site hoarding or security, including height, thickness and materials,
- vii. Siting of wheel washing facilities, cleaning of site entrances, site tracks and the adjacent public highways,
- viii. Timing of construction activities, including delivery times and removal of waste relative to network peak times,
- ix. Provision or availability of sufficient contractors, staff and visitors parking,
- x. Measures to protect pedestrians and other highway users,
- xi. Measures and training to reduce potential for conflict with cyclists, including membership of the Freight Operators Recognition Scheme or equivalent,
- xii. A site plan identifying the locations of the site entrances/ exists, wheel washing, parking, hoarding and water supplies,
- xiii. Site security,
- xiv. Fuel and chemical storage,
- xv. Measures to manage/ mitigate noise and vibration resulting from construction (including, as appropriate, silencers, attenuators, screens and barriers, along with noise limits, monitoring arrangements and time restrictions for certain activities), and
- xvi. A dust management plan carried in accordance with the Institute of Air Quality Management's Guidance on the Assessment of Dust from Demolition and Construction, version 1.1 (or successor).

The agreed CETMP shall be adhered to throughout construction.

- 7) Before any flat hereby permitted is first occupied, vehicular and cycle parking space shown on plan WP-0751-A-0110 Rev B, and 4 relocated visitor parking spaces as shaded light blue on the 'Proposed Site Plan' at page 29 of the Design and Access Statement prepared by Wimshurt Pelleriti, dated November 2021, shall have been provided (4 relocated parking spaces may, alternatively, be provided pursuant to details agreed in respect of condition 4). Once provided vehicular parking and relocated visitor parking spaces shall thereafter be maintained only for their intended purpose.
- 8) Notwithstanding condition 2 before the first occupation of any of the flats hereby permitted, a scheme for the storage and removal of refuse shall have been submitted to and approved in writing by the local planning authority, and implemented. Once implemented the agreed refuse storage and removal scheme shall thereafter be maintained and adhered to.
- 9) All parking spaces hereby permitted shall have active electric vehicle charging points, or passive charge points where it can be demonstrated that the provision of active charging points is not reasonable.
- 10) The development hereby permitted shall accord with the building fabric and glazing recommendations of the Noise Impact Assessment Report, KP Acoustics Ltd., Report 23006.NIA.01., or achieve equivalent performance to those recommendations.
- 11) No development hereby permitted shall be undertaken until an assessment of the risks posed by any contamination shall have been submitted to and

agreed in writing by the local planning authority. This assessment must be undertaken by a suitably qualified contaminated land practitioner, in accordance with British Standard BS 10175: Investigation of potentially contaminated sites - Code of Practice and the Environment Agency's Model Procedures for the Management of Land Contamination (CLR 11) (or successor documents), and shall assess any contamination on the site, whether or not it originates on the site, including associated with all previous uses and any relevant implications of imported soil or materials. The assessment shall include a survey of the extent, scale and nature of any contamination, and identification of any potential risks to human health, property (existing or proposed) on or off-site.

- 12) In the eventuality that contamination is identified and assessed in line with condition 11, no development shall take place where land affected by contamination is found which poses risks identified as unacceptable in the risk assessment, until a detailed remediation scheme shall have been submitted to and agreed in writing by the local planning authority. The remediation scheme shall include an appraisal of remediation options, identification of the preferred option(s), the proposed remediation objectives and remediation criteria, and a description and programme of the works to be undertaken including a verification plan. The remediation scheme shall be sufficiently detailed and thorough to ensure that, upon completion, the site will not qualify as contaminated land under Part IIA of the Environmental Protection Act 1990 as amended in relation to its intended use. The agreed remediation scheme shall be carried out by a suitably qualified contaminated land practitioner. Upon completion a verification report shall be submitted to and agreed in writing by the local planning authority demonstrating the effectiveness of the remediation. No flat hereby permitted shall be occupied until that report is agreed.
- 13) Any contamination that is found during the course of undertaking the approved development that was not previously identified pursuant to conditions 11 and 12, including in respect of any soil or materials imported, shall be reported immediately to the local planning authority. Development on the part of the site affected shall be suspended and a risk assessment carried out and submitted to and agreed in writing by the local planning authority. Where unacceptable risks are found, remediation and verification schemes shall be submitted to, and agreed in writing by, the local planning authority. These agreed schemes shall be carried out before the development is resumed or continued.

SCHEDULE 2, APPEARANCES

FOR THE APPELLANTS:

Philip Robson
Jamie Milne
Jonathan Murch
Gareth Jones
Will Wimshurst
Jed Holloway

Barrister, Kings Chambers
RG Airspace Developments Ltd.
DaviesMurch Ltd.
Gareth Jones Heritage Planning
Wimshurst Pelleriti
Town Legal LLP

FOR THE LOCAL PLANNING AUTHORITY

Douglas Cooper
Matt Kolaszewski
Camille Rantz McDonald

Broxbourne Borough Council
Broxbourne Borough Council
Broxbourne Borough Council

INTERESTED PERSONS

Mr J. Arblaster

Local resident

SCHEDULE 3, HEARING DOCUMENTS

- 1) Appellant's application for an award of costs.
- 2) Council letter of 10 December 1991 related to plans associated with the original grant of planning permission for development at Parkside.
- 3) Council's costs rebuttal and counterclaim.
- 4) Draft section 106 agreement.

SCHEDULE 4, POST HEARING DOCUMENTS

- 1) My post-hearing note (31 October 2022).
- 2) Appellant's response to the Council's costs rebuttal (7 November 2022).
- 3) Council's Supplementary Statement in respect of disputed section 106 obligations (7 November 2022).
- 4) Appellant's comments on Council's Supplementary Statement/ post hearing document 2 (11 November 2022).
- 5) Draft section 106 agreement (21 November 2022).
- 6) Schedule of conditions annotated by both main parties (22 November 2022).
- 7) Signed and executed section 106 agreement (5 December 2022).
- 8) Correspondence from the Council (7 December 2022) regarding the Written Ministerial Statement of 6 December 2022 entitled "Update on the Levelling Up Bill".