Neutral Citation Number: [2015] EWHC TBC (Admin)

Case No: CO/2723/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2015

Before :

MR JUSTICE OUSELEY

- -

Between :

THE QUEEN (on the application of SUZANNE COUVES)	**Claimant**
- and -	
GRAVESHAM BOROUGH COUNCIL	**Defendant**
-and-	
EDINBURGH HOUSE ESTATES LIMITED	**Interested Party**

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- -

James Findlay QC (instructed by **DMH Stallard LLP**) for the **Claimant**
Timothy Straker QC and Hugh Flanagan (instructed by **Sharpe Pritchard**) for the **Defendant**
Paul Brown QC (instructed by **Clyde & Co**) for the **Interested Party**

Hearing dates: 30th and 31st October 2014

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Approved Judgment

MR JUSTICE OUSELEY :

1. This is a challenge to the grant of planning permission on 1 May 2014 by Gravesham Borough Council, the Defendant, on an application by Edinburgh House Estates Ltd, EHEL, the Interested Party, for a major mixed use development in the centre of Gravesend, an area now known as the Heritage Quarter. The Claimant is the secretary of Urban Gravesham, a Civic Society; it is an unincorporated association, with over 400 members, which seeks particularly to protect the urban built heritage of Gravesend and Northfleet.

2. EHEL applied for planning permission in November 2012 for over 300 houses, a hotel, 12000 sq ms of retail floorspace, plus restaurants and the like, office space, a church/ community hall, public realm, highway improvements, and 650 car parking spaces. This application followed the withdrawal of an earlier one which the Defendant refused, but which was being appealed. Gravesham BC invited EHEL to withdraw that application and submit a revised one.

3. This application was considered in April 2013 by the Regulatory Board, RB, which is the Committee of the Council which deals with planning applications. The resolution which it passed, approving the application in principle, is at the heart of the controversy in this case. There then followed the anticipated negotiations between EHEL and Council officers about the terms of the agreement under s106 of the Town and Country Planning Act 1990 and planning conditions. The negotiations were concluded by 9 April 2014, and an officer decided to issue the permission, which he did on 1 May 2014. The Council says that he was acting under delegated powers; the Claimant says that he had no delegated powers of decision.

4. The Claimant's challenge proceeds on three grounds. First and primarily, Mr Findlay QC for the Claimant contended that the officer had no power to grant permission, once the matter had been considered by the RB, without an express delegation of that power to an officer, or without the outcome of the negotiations being reported back to the RB, neither of which steps were taken. The officer had purported to consider afresh whether to grant permission, so even if he had had delegated power to approve the outcome of the negotiations, he had gone beyond that power. The Claimant secondly contended that there had been changes of circumstance since the resolution of the RB, including in the differences between the s106 agreement as negotiated and as aimed for by the RB, such that, as only the RB had power to grant permission, it had failed to take into account those later material considerations. This ground depended on Mr Findlay succeeding on ground 1. Thirdly, if the officer did have delegated power to grant permission, he had failed to consider whether the RB resolution could bear the significant weight he gave it in the light of changes of circumstance, or in the light of flawed legal advice, which it received, about the risk of an order that the Council pay the costs of the appeal, because of an unreasonable refusal of planning permission. I have dealt with the last two grounds in reverse order.

The scheme of delegation

5. Section 101 of the Local Government Act 1972 provides the statutory basis for the delegation of powers to committees and officers. Nothing turns on its wording: a

Council can delegate powers to a Committee and directly to officers, or it can delegate powers to a committee which in turn can delegate them to officers. S101(4) contains or reflects the right of a delegating body to take the delegated decision for itself, notwithstanding the arrangement it has made for the delegation of powers.

6. The scheme of delegation in Gravesham Borough Council is as follows. By Article 8, an RB is to be appointed to deal with development control. Pursuant to Article 13, Annex 1 records which of the various bodies or officers are responsible for which decisions.

7. Annex 1.2 sets out the functions which "have been delegated to the Committees and Boards… Where these functions have been delegated to sub-committees, or to Officers of the Council, this is also shown below". Below, and delegated to the RB is this function: "To discharge the Council's functions as district planning authority [with immaterial exceptions]." In a column beside them headed "Delegations" it says "Certain functions have been further delegated to Officers…" This refers to Annex 1.13.

8. Article 7 establishes the Leader and Cabinet Executive as exercising all the Council's functions which the law and the Council's constitution do not allocate elsewhere. Annex 1.13B sets out the functions delegated by the Cabinet to individual Directors, Assistant Directors and Service Managers, adding that, unless otherwise stated, this delegation includes the power to authorise specific members of staff to undertake the Council functions identified. The Director (Housing and Regeneration) has the following planning powers:

> "*Planning, conservation and related functions*
>
> The following does not include power to make a Development Plan or to determine applications for deemed permission for the Council's own development. Any Member may require the reference of any undetermined application to the Regulatory Board. All decisions on applications are to be reported to the Regulatory Board. For the avoidance of doubt, only the Regulatory Board may determine the applications submitted by the Council itself.
>
> 1.13B.48 To exercise the Council's powers and duties in respect of the planning conservation and related functions under the following legislation or any legislation replacing or amending the same or any regulations there under.
>
> **Delegated from Regulatory Board…**
>
> Town and Country Planning Act 1990"

9. The final piece in the chain is the delegation from the Director (Housing and Regeneration) to Mr Gilbert, the Service Manager within that Directorate. The Director's memo of 2 January 2014, to "refresh" the onward delegation, authorises Mr Gilbert to act on his behalf on *"Planning conservation and related functions"*. The text which then follows, under the reference to *"Delegated from Regulatory Board"*, is the same as the text of the delegation to the Director. I was shown no general RB resolution delegating powers to anyone, notwithstanding the headings referred to.

The facts relevant to the delegation issue

10. Mr Gilbert's witness statement explained how the application came to be considered by the RB. There had been close member involvement in the pre-application process. The application was reported to the RB on the initiative of officers. There was no request by a member for the application to be referred to the RB. The agenda for the RB meeting on 30 April 2013 simply records the EHEL application as an item of business.

11. There were two officer reports before the RB. The Main Report started with the formal details of the application and applicant, then "Decision Level: Planning Regulatory Board". The recommendation was to follow in the supplementary report. The report is as would be expected to a body deciding an application, save that it is made clear that the terms of the s106 agreement have yet to be agreed, that the parties are some way apart on major issues, and that negotiations will have to follow over those issues and over planning conditions. There was no reference to the decision remaining with officers, who were seeking members' views so that they could be taken into account by the officer making the decision. Although the recommendation was yet to come, this report concluded by saying that the benefits were considered to outweigh the negative impacts, and that officers were of the view that the application provided "an exciting and much needed opportunity for investment in, and regeneration of, Gravesend Town Centre." So officers were not unable to reach a clear view on the merits of the application.

12. The Supplementary Report does not repeat the reference to the decision level, though it repeats the application details. It contains more details on the impact of the proposals on daylight and sunlight standards, saying that the impact is not enough to warrant refusing permission, and discusses the contentious s106 issues. A schedule of the Heads of Terms was attached which "sets out the council's requirements. These can form the benchmark for negotiations." Again there is no reference to the decision on whether or not to grant permission remaining with officers or the RB. Instead, after discussing various issues relating to the s106 agreement and viability, this report concludes:

> "The negative net value of the development is a fact of life at the present time, and should not fetter the planning authority in reaching a decision. If permission is granted, the 'deferred contributions' clause of the s106 agreement will be key to balancing viability and planning obligations, i.e. the council will be able to set 'triggers' during the different phases of the development, to ensure that the requirement is met. Therefore it is proposed that the Board resolve to grant planning permission, subject to the negotiations of s. 106 agreement. The result of

> that negotiation would be reported back to Regulatory Board before planning permission is granted. An overview of the necessary planning conditions is attached at Appendix 9.
>
> **Recommendation:**
>
> **Permission subject to planning conditions, informatives, referral to the Secretary of State and negotiation of the s. 106 Agreement."**

13. The minutes of the RB meeting record that the Board considered the application and the matters in the report, welcomed the regenerative effects of the development which were considered to be overriding, although Members had expressed concerns about a variety of topics. The resolution states:

> "**Resolved** that [the] application be **PERMITTED** subject to planning conditions, informatives, referral to the Secretary of State and negotiation of the S.106 Agreement".

14. This resolution was passed on the casting vote of the Chairman, there having been 3 in favour, 3 against and 3 abstentions. Many members of the public had attended, a few had spoken. Mr Findlay submitted that this resolution meant that it should be inferred that the recommendation and reasoning in the report, had been accepted.

15. Both Defendant and Urban Gravesham made records of the meeting. The Council did not point to any part of the Urban Gravesham transcript which showed that Members were told that they were acting other than in a decision-making capacity, and from my skimming of the transcript, there is nothing to suggest that Members thought that they were doing anything other than taking a decision whether or not to grant permission, subject to the satisfactory conclusion of the various outstanding issues referred to in the resolution.

16. Towards the end of the meeting, according to the transcript from Urban Gravesham and not disputed by the other parties, the meeting came to the recommendation, which the Chairman took from the supplementary report. Members voted on the resolution as minuted. Mr Gilbert was then asked to deal with conditions: he said that the parties were some way apart, and continued:

> "But suffice it to say that we shall negotiate with Edinburgh House and report to you the outcome of that negotiation. The planning conditions are summarised, to be material for you to consider at a later date but I think that the essence of them is set out satisfactorily in the supplementary report. So thank you for your decision this evening…."

17. Thereafter, the officers entered into negotiations with EHEL, which concluded in April 2014. EHEL signed the s106 agreement, and Mr Gilbert signed the sheet approving the issue of the permission, but processing the approval meant that it was not issued until 1May 2014.

18. On 9 April 2014, Mr Gilbert reported orally to the RB. There was a standing item on the agenda for reporting decisions made under delegated powers since the previous RB meeting, but the EHEL application was not a specific agenda item. The minutes under the heading "Planning applications determined under delegated powers by the Director (Housing and Regeneration)" record him advising that the s106 agreement had been signed, "and that a decision had been made to issue a planning permission." He advised that a report would be made under that agenda item at the next RB meeting.

19. Mr Gilbert did not explain the detail of the agreement, nor compare it to what the report to the RB on 30 April 2013 had said about the extent of the Council's aims. It was a simple statement that agreement had been reached, and that the decision to grant permission had been taken. There was no request from any RB member that the issue be brought back to the RB, or that permission should not be granted till the RB had had the chance to consider whether to require it to be brought back, nor was there any complaint that it had not been brought back when it should have been. There was nothing to suggest anything untoward.

20. As I shall come to, this reaction was in line with the unavailing requests made by Urban Gravesham to all 44 members of the Council to direct that permission should not be granted by the officers until the RB had reconsidered the application.

21. Permission was issued on 1 May 2014, after Mr Gilbert had considered what was called the Delegated Report to him prepared by the caseworker. Its stated purpose was to report the discussions with EHEL after the RB resolution, and to record the basis upon which the application "is to be progressed towards determination in an open and transparent manner". The report was not in fact provided to members until after permission had been issued.

22. The report, made to the Service Manager, dealt with the powers of the Service Manager. The RB had passed to the Director the power to exercise the Council's planning functions, which the Director in turn had passed to the Service Manager, which meant that he could determine most planning applications. It continued:

> "No member has required reference of this application to the Regulatory board and other restrictions upon an officer determining the application do not apply. Accordingly the planning application…is to be determined by the Service Manager, with the decision reported back to the Regulatory Board. The resolution of the Regulatory Board is a material consideration in making this decision. The weight afforded to the resolution in making this decision may be regarded as significant."

23. The report then considered the outstanding items specified in the RB resolution: conditions, referral and the s106 agreement negotiations. There were additional points to consider, arising or developing after the RB resolution: the evolution of the Local Plan Core Strategy, further representations, the approval of a large extension to the Bluewater Shopping Centre which was being opposed at the time of the RB resolution, and the question of whether the decision would be premature in the context of emerging plans. The caseworker recommended that the planning application be

approved. It was. The RB resolution was thus treated as a significant material consideration.

24. Mr Gilbert, in his witness statement, [9], said that after the RB meeting in April 2013, he was clear that it had finished its consideration of the application and there was no deferral of its decision. The RB, without doubt, expected officers to deal with the matters to which its decision to permit the development was subject. He, and the report to the RB, meant by "reporting" the "outcome" that the result would be reported, not that the details would be presented to the RB for further approval, which would be contrary to the RB's normal practice. Mr Findlay said that this understanding was not supported by the transcripts of the meeting, and that Mr Gilbert ignored the express limit on his authority.

25. Mr Gilbert had advised the Leader of the Council, also a member of the RB, of progress on the negotiation of the s106 agreement on ten occasions after the 30 April 2013 meeting. The Chairman of the RB had also been kept informed at occasional meetings, including on the day before the 9 April 2014 RB meeting and two in the weeks before the 1 May 2014 issue of the permission. Mr Gilbert said that he had also considered whether the decision should be reported back for further consideration by the RB. On 1 May 2014, after granting the permission, he emailed the Chairman of the RB to tell her that the permission had been issued, copying in all councillors, offering to brief members the next day. He said that he had made the decision in accordance with the powers delegated to him. There was no adverse reaction to what he had done. Mr Gilbert did report the matter to the RB on 28 May 2014. These two reports, he thought, met the commitment to report back to the RB. Again, no member took issue with what he had done, publicly or privately. No member asked for the matter to go back to the RB at any time and none had complained about what he had done, saying that he ought not to have taken the decision but ought instead to have gone back to the RB.

26. Mr Straker QC for the Council and Mr Brown QC for EHEL, drew my attention to letters from Urban Gravesham to the Council, including one dated 23 February 2014 and one dated 29 April 2014 to all Councillors trying to persuade any one of them to direct that the matter be brought back before the RB, before the decision was issued. One of 3 April 2014 to the Chief Executive, referred to Mr Findlay's advice that the Council would be "well advised" to remit the matter to the RB for reconsideration; they did not see how the Council could possibly issue a decision without doing that.

27. None of these letters suggest that a report back was to be expected in line with the resolution. But the consequence is that all members were aware of the concern expressed by Urban Gravesham, and yet not one member directed that the application revert to the RB, or complained about the process evolving before their eyes. I do not believe for one moment that Councillors, and in particular those on the RB, were not fully aware of that power.

Submissions on the delegation issue

28. Mr Findlay accepted that if the officer in question had decided the application from start to finish he could have made a lawful decision, and also that the RB could have delegated to him expressly the power to negotiate and conclude the s106 agreement and grant planning permission after the RB decision. Critical is what was said in the

reports and what happened at the RB meeting. Mr Findlay contended that in the circumstances here, that was not lawful.

29. The structure of delegation was from the Council to the RB and from the RB to the officer. There was no concurrent delegation of authority from the Council to the RB and to the officer. It would be chaotic, if there could be two parallel decision making routes, coming to different conclusions.

30. Once the RB had considered the application, it was seized of it, and remained seized of it unless it delegated the decision expressly to another officer or unless, as it commonly did, it delegated to an officer the function of negotiating the s106 agreement and deciding whether to grant planning permission in the light of the outcome of negotiation; though the officer could always refer the case back to RB. The delegated power for an officer to decide the application had been removed by the involvement of the RB and had to be reconferred. Power had not been re-conferred here; indeed, it had been effectively removed by the terms of the Supplementary Report, Mr Gilbert's comments at the meeting, and the RB's decision. The Supplementary Report clearly implied that the RB would have the opportunity to consider the outcome of the negotiations on the s106 agreement, because the sides were far apart. There was, he said, no purpose in the RB simply being informed that agreement had been reached. In substance, the RB had decided that the application had to be brought back before it before permission was granted, delegating only the negotiating power to officers. But Mr Findlay abandoned the contention, upon which permission was refused, that the Claimant had a legitimate expectation that the application would be taken back to the RB.

31. The meeting of the RB on 9 April 2014 involved no decision by the RB itself on the grant of permission, as the April 2013 meeting required. Its failure to "call in" the decision could not give the officer power he lacked; nor could the absence of any member request for the RM to make the decision itself. Treating the RB's expressed view as a material consideration was no answer to the vires point. Whatever consideration Mr Gilbert gave to the changed circumstances, and whatever view he formed of them, he still had no power to issue the decision.

32. Mr Straker submitted that all that s101of the Local Government Act 1972 required was that arrangements were made for the discharge of the relevant functions by an officer; those arrangements had been made, and had not been changed. Those arrangements involved delegation from the Council to both the RB and to the officer, though giving the latter the power to step in, on a direction, or officer request. There was an additional delegation from the RB to officers. A body which delegated powers could always exercise those powers as it retained them and did not part with them in delegating them; *R(Taylor) v Maidstone Borough Council* [2004] EWHC 2577(Admin), Sullivan J. The RB could exercise powers exclusively or concurrently or it could advise officers, giving a steer. Accordingly, the RB did not need to re-delegate powers in order for the officer power to grant permission to exist. In reality, this would not lead to chaos, as officers would know, as would the RB, who was doing what. It had not led to problems here; no one in the Council, officers or members had voiced any uncertainty over the extent of powers exercised by the officer. For some restriction to exist, it would have to be found in the text of the resolution, and not on the basis of interpreting remarks made by an officer, and the report.

33. Mr Brown agreed that the Council had delegated powers both to the RB and to the officers. These were concurrent and co-extensive, except for certain specified circumstances. The application came before the RB on such a basis. No express re-delegation is required when the RB had done what it wished to do with the application, on which it expressed itself in the resolution. Indeed, here the RB was not considering the matter because of any direction, requiring the matter to be referred to it, so there could be even less reason for the concurrent power not to continue, without any specific resolution to that effect. There was no revocation of the delegated power either expressly in the resolution or in the fact that the RB's considered the application.

34. Here, the RB intended that, subject to the negotiation of the s106 agreement, permission should be granted. It left that negotiating function to the officer, and nowhere imposed an obligation on him to bring the matter back for decision, as opposed to reporting the outcome for information. There was no express limit on what he could do. An obligation to report back before permission is granted, if such there was, is not an obligation to report back to see if permission should be granted. But it would enable a member to require the application to go back before the RB. In fact, the RB was told that agreement had been reached, albeit not the details, on 9 April 2014, and could itself have enquired further and directed that the matter be brought back for decision by it. The later absence of objection, despite the vigorous lobbying by the Claimant, showed that the decision-making process worked in the way members and officers expected it to.

35. It was the resolution which needed to be understood, as the formal record of the decision. Other material might be relevant to show what was in the Council's mind, but officer comments at meetings and in reports could not help on the meaning of the resolution.

Conclusion on the delegation issue

36. Although the delegation structure, in the light of the submissions, is less transparent and clear than the Constitution promised, there was ultimately to my mind a distinct unrealism about the Claimant's case. The RB undoubtedly had power to resolve in favour of granting permission, which was the highly contentious decision, hotly opposed by the Claimant and Urban Gravesham.

37. As a result of that decision, it was understood that an officer would negotiate the s106 agreement and conditions. It can safely be assumed that the RB trusted its officer to do the best which could be done and, if he were concerned about how the negotiations were going, to report back, keeping in touch with members, as he did. The wide powers enjoyed by members to bring the RB back in again, and those of officers, suggest that it would have expected the power exercised by the officer, in the light of its decision on the merits of the application, to be wide and not narrow. The fact of agreement, and the officer's intention to grant permission were reported back before the grant of permission. The debate is over whether or not the final decision had to go back to the RB.

38. It is a commonplace, where a committee has resolved in principle that a permission should be granted, for the power to grant permission to be delegated to an officer, or to an officer in consultation with, say, the committee Chairman, if satisfied with the

s106 agreement and conditions. This may perhaps be measured against the ambitions of the committee at the time of its resolution. It would also be common for an officer to decide whether there were any changes in circumstance which meant that the final decision required further member approval. In reality, that is what happened here, though I appreciate that the officer decision is not cast in those terms.

39. After all, as Mr Findlay accepted, the decision could have been made from start to finish by the officer, and it was only because the resolution to grant in principle was passed by the RB that any issue of the officer's powers arises. This gives a flavour of the technicality of Mr Findlay's point.

40. What, then, I find so difficult to follow about Mr Findlay's submissions, is that, if he is right about the delegation structure or the specific intentions of the RB or the meaning of the resolution, why did not one Council member, or the Chief Executive or Director of Planning, say so at any stage before the grant of permission? The RB was told of the position, its Chairman knew closely how matters were developing, and the Claimant was urging just such a step on all members. The issue was controversial; it had been decided on a casting vote. None of those persons has complained afterwards either.

41. The only conclusion I can draw, is that no one thought then or now that what the officer did was unauthorised. I find it difficult then to construe the delegating powers or the resolution as the Claimant urges. There are parts of the structure and resolution which are open to doubt, and can be picked over by lawyers. But the conduct of the officer, who treated it all as if he were doing exactly what was expected of him, and the reaction to it of his superior officers and of all of the members of the RB, and indeed all members of the Council, point surely towards the answer.

42. I also find it difficult to see why the decision should be quashed, even if the Claimant were right. The Council has clearly endorsed the process, and indeed adopted the decision. There has been no expression of reluctant acceptance that the officer has sold the pass.

43. However, I turn to the more precise arguments. I do not accept Mr Findlay's submissions that there was a simple hierarchical structure of delegation: Council to RB, and RB to officer, and nothing else. The terms of Annex 1.2 suggest that there is a dual and concurrent delegation from the Council both to the RB and to the officer. Article 7 and Annex 1.13B suggest that the Council delegated powers to the RB, and that the Council also delegated powers to officers via the Cabinet. Either way, the RB and officers have concurrent powers in planning matters except over the few decision specifically reserved to the RB. This means that the relevant RB powers here have also been delegated to officers. It may be that the Council or Cabinet exercised the powers which the RB has to delegate onwards the powers delegated to the RB. No resolution from the RB delegating matters from it to the officer has been produced.

44. Mr Straker denied that there had been any delegation by the RB, which is consistent with the absence of any resolution to that effect. I confess to being a little mystified, therefore, as to the significance of the heading *"Delegated from Regulatory Board"*. Elsewhere, the Annex identifies powers which have been delegated by the Council. Yet this section, which is the part referred to in the delegation by the Council, appears to contemplate that the Director is exercising powers delegated by the RB. The

Delegated Report also refers to powers being "passed" by the RB, i.e. delegated, to the Director, and by him to the Service Manager.

45. It may also be that the RB delegated matters to officers as well, in a superfluity of delegations. But either way, it does not matter very much. There was not the simple hierarchy of delegation for which Mr Findlay contended. The delegation provisions do not include the sort of restriction on the powers of the concurrent delegate for which Mr Findlay contends.

46. The concurrent power fits with the wide powers of the RB, on the direction of any member, to require an application to be referred to it. That prevents the officer exercising his delegated power the while, otherwise the referral would be pointless. The concurrent power also recognises that an officer may not wish to exercise all of his powers, and this sort of case is a good example, and so he can ask for various levels of decision to be taken by the RB, under its delegated powers, though the RB does not have to agree to such a request. This is not a probable cause of chaos, such that that cannot have been the scheme of delegation. A gap in communication is unlikely given the way in which the RB would expect to act after consideration of an officer report. The scheme can readily operate in a way in which does not permit dual or conflicting decisions, though each delegate may play a different part in reaching the final decision on the one application.

47. Once the RB has been asked by officers to consider an application, it is then seized of application. I do not think that that can sensibly be called an advisory opinion for the benefit of its officers. Here, that issue was the decision in principle whether planning permission should be granted or not. That is clear from the reports and the resolution. But if it decided that it wanted to grant permission at that meeting, improbable though that would have been but it could arise in another case, it could have done so. If it wanted to limit what the officer could then do, it could so decide, not least because it has the power to require matters to be referred to it. But if it does not do so, the power of the officer revives, assuming, as I think correct, that he had lost it until the RB had made whatever decision it chose. This means here that, once the RB had been asked to consider the matter, the officer could not proceed without the decision of the RB. Once the RB had reached whatever decision it wished to make, there is nothing express or necessarily implicit in the scheme of delegation to prevent the power of the officer reviving. This power needed no express re-conferring. Whatever else needed doing fell within his remit, unless removed expressly. Of course, he would have lost the power simply to take the opposite decision; but he would have power to judge whether or not the outcome of the s106 negotiations was satisfactory, and to judge whether the changed material considerations warranted a refusal, or more probably a return to the RB as a refusal would conflict with its earlier decision. The same would apply if the decision had been made on a referral, unless perhaps the terms of the referral covered more aspects of the decision on the application.

48. This means that the resolution should not be searched for language giving delegated power to the officer, but rather for language removing the power. The resolution does not deal with any powers of the officer expressly. There is plainly no express limitation on the officer's decision-making power, which Mr Findlay accepts the officer would have had, but for the fact that the RB considered the application and resolved that permission be granted after negotiations. An implied limitation to that effect would be a very curious, and scarcely necessary, consequence of the action of

the RB in considering the application, and resolving that permission be granted subject to negotiations. Indeed, as I understand Mr Findlay's argument, the very fact that the RB had considered the application would prevent any officer decision without express delegation by it to him. The actions of the officer did not need express or implied further or re-delegation; they simply had not been removed, but revived after the RB resolution, enabling him to carry on the decision-making process.

49. This is all consistent with what actually happened, and with the total absence of adverse reaction from members and officers alike.

50. Even if Mr Findlay were right that the only delegation of power was from the Council to the RB and from the RB to the officer, I can see no reason why the fact that the RB had considered the application or terms of the resolution meant that the officer required an express delegation of power to him after the resolution to carry on with the decision-making process. He would be able to rely on the general powers delegated to him to carry on the decision-making unless further restricted by the RB. It might be that he could not refuse it, but that is not in issue here.

51. I share Mr Brown's concern that the decision at the meeting should be discerned from a proper interpretation of the resolution. If Mr Gilbert, by the text of the Supplementary Report, taken as adopted by the resolution, were required to report back to the RB the outcome of the negotiation of the s106 agreement before the grant of planning permission, he did so on 9 April. He did not report the detail, but what he did would have enabled any one member at that meeting to require the application to be referred to the RB. At most, the Report contained a statement of intent, not fully adhered to, untroubling to those to whom it was made, rather than a forswearing of powers, which arguably he could not do, making the grant of permission an unauthorised act. What Mr Gilbert said at the meeting about reporting the outcome of the negotiations adds nothing to this issue. He did say that the conditions were material for the RB to consider later, though their essence had been set out. Again that, at most, was a statement of intent not fully adhered to, but the RB had the opportunity to ask to see them, and did not take it. The RB could have resolved on 9 April to remove the officer's authority, but it did not do so.

52. Mr Findlay has not pursued the argument that what the reports contained or what Mr Gilbert said at the meeting made for a legitimate expectation that the matter would be brought back to the RB, or that an RB member would require it to be referred to it.

53. The officer does not have an express power in the resolution to negotiate the terms of the s106 agreement. Mr Findlay submitted the officer needed, but had, an implied power to negotiate sine that was a commonplace task for officers to undertake and not one readily performed by the RB. But if so, there is no real reason why the officer should not also have had, from the same resolution, an implied power to conclude that the outcome of the negotiation was satisfactory in terms of the RB's expressed views, and that there were no later material considerations which might cause its decision in favour of permission to be reversed. This would be a commonplace, and perfectly sensible as an outcome given the right of any member to require the matter to return to the RB, as a safeguard against an unwise or over-reaching officer. It is difficult to see why that should all be changed by the fact that the RB considered the principle, in view of the acceptance by Mr Findlay that if the RB had never considered the application at all, the officer would have had power to decide all of the issues.

54. This assumes some importance in the light of conclusions to which I have come on the issues to which I now turn.

The challenge to the Delegated Report and the "significant weight" given to the RB resolution

55. This ground challenges the grant of permission on the basis of the "significant weight" that the officer in the Delegated Report accorded to the resolution of the RB. Mr Findlay contended, under this head, in an argument which overlapped with other grounds, that even if Mr Gilbert did have delegated power to take the final decision, to grant permission, he acted unlawfully because, in giving significant weight to the RB's resolution in April 2013, he failed to consider the impact of subsequent adverse changes in circumstances on that decision. These related (a) to the contrast, he said, existed between what the Main and Supplementary Reports said about the requirements of the Council on the s106 agreement, and what had actually emerged from the negotiations, and (b) to other changes in material considerations. Mr Findlay submitted that the officer ought also to have considered whether these were circumstances which might have caused the RB to come to a different decision.

56. I appreciate Mr Findlay's argument that the officer had to report back the result of any negotiation but that is not the point here. This was not put forward as a delegated authority point but as one going to the weight attached to the resolution of the RB.

57. The particular changes in circumstance upon which Mr Findlay relied were these.

(1) Community Facilities:

58. The Main Report noted that the redevelopment of the Western Quarter would lead to the loss of the Church Hall and a community centre. But the report said that an "integral requirement of the scheme" was the provision of a modern, purpose built community facility over which the church would have first refusal, albeit that , as now, it would be detached from the church but close by. Yet the s106 contained no obligation to replace it. In my judgment, this is misconceived. The Council's position is protected by condition D2 which prevents development of the Western Quarter, which is what would cause the loss of the existing facilities, until a further s106 agreement is entered into. This is reinforced by clause 4.3 in particular, of the s106 agreement. This also answers Mr Findlay's contention that the current agreement was flawed because the Church Commissioners were not party to it. Should the development stop at the Eastern Quarter, and there is no realistic way of requiring EHEL to carry out the whole, as Mr Brown rightly pointed out, the Western Quarter facilities would remain intact, and no one suggested that the Eastern Quarter facilities were at issue. There is no significant change.

(2) Highways:

59. The Supplementary Report said that the s106 agreement would seek to minimise the risk of partial delivery of the scheme by preventing the developer from "cherry picking" certain elements. This would involve trigger points to ensure that the necessary infrastructure was provided in a timely manner. The example was given of one particular scheme, integral to the successful and integrated operation of the completed development which "should be delivered at a relatively early juncture".

Yet, said Mr Findlay, this had not been achieved by the s106 agreement. However, what was set out in the Delegated Report, was that the two halves of that scheme, starting in the Eastern Quarter and then continuing in the Western Quarter, were now in two phases, with the Eastern Quarter phase 2 coming first, as that was the phase to be developed first, and the continuation in the Western Quarter coming in phase 3, and subject to the s106 agreement for that Quarter. The same point made by Mr Brown applies here as well. The Delegated Report reflected the limits on EHEL's pockets for upfront expenditure. A phasing plan had been agreed to enable timely provision of the infrastructure associated with the various components of the development as they came on stream. The Report said:

> "In terms of the intention of seeking a mechanism for securing the comprehensive delivery of the scheme, it has proven difficult to achieve in the context of scheme viability. However, a principle consideration when drafting the planning conditions and structuring the s. 106 Agreement was to ensure that sufficient public realm and associated infrastructure would be delivered to serve an individual phase of development prior to it coming into use. This would avoid a situation whereby one of the more profitable components of the development is delivered without the requisite public benefit, and avoid a potentially ugly void in the townscape ahead of the next phase coming forward."

60. There would also be a separate planning condition, B14, which required a comprehensive highway scheme to be approved, to reinforce that the development comprised a single scheme. There is no change beyond the sort of negotiating adjustment which the RB would have expected to enable the scheme to come to fruition, as the Main Report warned in advance.

(3) Comprehensive development:

61. I have largely covered the issues which this might raise above. But conditions also require an "overarching" Public Realm Strategy. It was the comprehensive scheme with trigger points which the Reports to the RB said would be in place. Mr Brown submitted, and I accept, that the negotiation of the conditions and agreement reflected, as the RB would have expected, the fact that the Supplementary Report did not recommend that EHEL be required to provide all the infrastructure and require completion of the whole scheme, a stance which would have been in essence unenforceable and contrary to Government policy, leading to a successful and costly appeal, in relation to a scheme which the Council wished to see implemented.

(4) Financial contributions:

62. These were considered in the Main Report first, but recognising that the obligations obtainable under a s106 agreement were governed by legal and policy limits, including that they were needed to make the development acceptable. The whole consideration of all contributions, including highway and community infrastructure is subject to these points properly set out in the Main Report. This said:

> "However, as advised by the NPPF, when seeking to discuss and negotiate planning obligations LPAs should take account of changing market conditions and maintain flexibility to prevent planned development being stalled. This essentially related to ensuring that the LPA's requirement, such as provision of affordable housing, are not overly onerous such that they make the scheme unviable and therefore undeliverable. Such consideration and negotiation stands to comprise part of the balanced determination process yet whilst seeking to encourage development it is not the case that the LPA should be expected to concede normally essential obligations solely because they would render the scheme unviable.
>
> In cases where the applicant contends that viability of a scheme is stretched, it is necessary for them to submit details of a financial appraisal to support that view which can then be used as a tool in negotiating the obligations, which in the present climate is likely to include a mechanism for deferred contributions. In the current application the applicant has submitted a commercially confidential financial appraisal that the Council have had independently reviewed. This will inform further discussions with the applicant that will be reported in a supplementary report."

63. I have already referred to the fact that Mouchel advised the Council on this, and to its recommendations, and set out the passage from the Supplementary Report on the negative value of the scheme which leads into the proposal that the grant of permission be subject to the negotiation of a s106 agreement. This provides an important context for Mr Findlay's submissions, or rather the answer to them. Mr Gilbert, in his witness statement, [14], thought that 90% of the value of the schedule appended to the Supplementary Report would be delivered based on tables in the Delegated Report, subject to the staged viability assessments. This would not all be paid in money, whether secured or deferred. A £1m Kent County Council highway contribution, requested for unspecified purposes, is the major cause of the difference in cash terms between the £9m discussed in 2013, and the agreement in 2014 for £6.6m, and was not obviously something dear to the Borough Council's heart. The cost of the community facilities on the Western Quarter are not part of this s106 agreement, which affects at least a further £0.5m. Some £0.5m for off-site road works is replaced by an obligation on the developer to do road works itself as part of the development. The Claimant's document [727A] does not give the full picture.

(5) Affordable housing:

64. The Main Report said that there would be on-site provision on the Western Quarter and a commuted sum to make up for the absence of provision on the Eastern Quarter, a departure from the Council's normal policy on the way in which affordable housing was provided. This was recommended as appropriate by officers for a variety of reasons. But the Report added that an important consideration would be the value of the commuted sum to be agreed with EHEL; £3.2m was to be sought, providing for approximately 20-25 new council homes. "However, in considering this financial contribution it is necessary to have regard to scheme viability as the government is

encouraging LPAs to negotiate with developers to avoid such requests preventing delivery of otherwise acceptable developments particularly concerning affordable housing." The Supplementary Report said the offer fell well short of what the Council required and that this was among its highest priorities, and should not be compromised. But, it continued, a possible way forward was for the payment of the contributions to the commuted sum to be deferred to various stages, "subject to viability testing at each stage."

65. Mr Findlay submitted that £3.2m was the figure which the RB had been told was not to be compromised, yet only £1m was provided for in the s106 agreement. This is not quite right. First, the RB was not told that £3.2m was exactly what the Council would get; ways forward were to be considered, and possible deferred payments were subject to the qualification on viability, which applied to many aspects of the s106 agreement. What was agreed is set out in the Delegated Report. EHEL had been told that its initial offer was unacceptable; negotiations had then taken place; agreement had been reached on the basis that £1m was to be paid on occupation of the 90th dwelling; a further £2.2m was to paid in two tranches, but in the first two phases of development. This would also be subject to the complex stage viability assessment. There is no significant change between what the RB sought and what was negotiated, as the Supplementary Report thought possible, in a complex scheme, the viability of which was a concern to both Council and EHEL. Mouchel had advised that £1.55m was acceptable.

66. In reality, there is nothing in this part of the first point at all, unless ground one is right and required the whole decision to go back to the RB. If it did not, it is obvious that the outcome of the negotiations was principally as presented to the RB, and no reasonable person could have thought otherwise. They could not have been regarded as significant changes. The officer made no error of law in giving the resolution significant weight.

67. The Delegated Report concluded that the "obligations secured remain principally as presented to the [RB] in April 2013." The officer may not have asked whether the RB might have come to a different decision, precisely as Mr Findlay submitted that he should have done, but what his answer would have been is unmistakeably clear. He would have been quite right as well, in view of RB's reaction to his report on 9 April 2014 and the knowledge which senior members had of what was happening in the negotiations.

68. I add that I do not accept that that is the question the officer should have asked, unless his authority were limited by the resolution to making a decision on the grant of permission only if such a outcome to the negotiations were achieved. I do not find such a limitation. The comment that the schedule to the Supplementary Report "can form the benchmark for negotiations" did not mean that the officer was saying that he accepted no choice but to insist on them or otherwise return to the RB. That would scarce have permitted negotiation at all, since he and the RB were well aware that a gap existed between the Council and EHEL on viability and what could be provided for in the s106 agreement. The Supplementary Report noted that Mouchel, commended the EHEL reduced offer "on the basis that it is as good an outcome as could be achieved in the current market conditions." So the RB could have been under no illusions that it was going to get all that it asked for. The "benchmark" here was the hope or aim and not the expectation or requirement. There was obviously to be a

compromise; the officer was expected to get the best deal he could. There is no reason to doubt that he did.

69. But if there were a limit on the negotiating authority that the obligations secured had to remain principally as presented to the RB, both the officer and a reasonable RB would have concluded that that was met.

70. The second part of Mr Findlay's point under this head concerned new or changed material considerations which he said were adverse to the grant of permission. These were all considered by the officer.

(1) The grant of permission for a major extension to Bluewater Shopping Centre:

71. The Council had failed to persuade Dartford Borough Council not to grant permission for a substantial increase in shopping floorspace in this regional shopping centre, which would compete with this proposal for Gravesend. The advice of specialist consultants was taken. The Delegated Report records it. It could clearly have an adverse effect on the viability of the scheme, and delay its coming to full success. Their report concluded that the Heritage Quarter scheme in Gravesend was "likely to be supportable in quantitative terms by 2018, although a degree of 'clawback' would also be required and qualitative terms case to arrest a slow spiral of decline in the town centre relative to competing centres. It is also noted that the importance of improving the town centre offer by such investment is consistently repeated in reports [for the LPA or Bluewater]." Various other factors were likely to led to an increase in shopping in the proposed Gravesend scheme, including increased local population, new visitor spending partly related to the proposed Paramount Theme Park, and the effect of a garden city proposed at Ebbsfleet. The Delegated Report points out that the Heritage Quarter scheme is intended to complement the existing town centre, helping its overall turnover and draw, bringing qualitative enhancements to encourage more people to live in and to visit Gravesend town centre, "which is arguably more important now that Bluewater has permission to be extended."

72. It is difficult to see how a Gravesend Borough Council officer could treat this as a factor adverse to the grant of permission, even though it might make the scheme itself more difficult to develop or to be fully used quickly; the Bluewater extension would only add to the town centre's need for the scheme to help it to compete with Bluewater as best it could. The officer's approach is unassailable.

(2) The Council's emerging Core Strategy:

73. The Delegated Report deals with this prematurity point very fully. The proposal accords with national policy and the emerging Core Strategy, now at an advanced stage; no main modification to the retail strategy for the town centre, had been raised by the Inspector considering its soundness. The case for refusal on this ground "would be very weak and should be set aside." It is difficult to think that any other approach could have been reasonably adopted.

(3) Ebbsfleet Garden City and Paramount Theme Park:

74. The Delegated Report dealt with these on the basis that, if implemented, they would increase the expenditure in the new scheme in Gravesend. They weighed in favour of

the grant of permission and not against it. I cannot envisage any other reasonable approach.

75. There is nothing in this second group of points which could warrant concluding that giving significant weight to its resolution involved an error of law. Again, although the officer did not in terms ask whether the RB might have made a different decision in the light of these circumstances, it is perfectly clear what his answer would have been, and I find it impossible to say that he was wrong in the light of the reaction of the RB at all times to the campaign by Urban Gravesham, its knowledge of these events, and of the position in relation to the decision on this application.

Defective legal advice

76. There was an argument concerning the legal advice given at the RB meeting on the prospects of success for the Council on appeal. I take this as a separate point, rather than as a part of the previous ground which is how it was presented. Mr Findlay submitted that both the RB's original resolution, and Mr Gilbert's subsequent degree of reliance on it, were flawed by their reliance on defective oral advice from the Council's solicitor that there were no reasonable grounds upon which to refuse permission, which would lead to an order for costs against the Council on the appeal. This incorrect advice was an immaterial consideration, unlawfully taken into account. This in particular related to the impact on the Conservation Areas, the setting of listed buildings and loss of daylight and sunlight.

77. Members had the two officer reports. The Main Report dealt at considerable length with both the impact on the Conservation Areas and on the setting of listed buildings. The adverse effect on the setting of the Church of an earlier application had led to its refusal; this in turn had informed the devolution of the scheme to its current state where the scheme was seen to enhance the Church's setting, and the views from the Thames. More immediate views would be affected but English Heritage had accepted that that loss would be in part offset by the creation of an enhanced view from within the shopping centre itself. So overall it was concluded "that the current proposal positively enhances the setting of the Grade II* Listed St George's Church."

78. The adverse impact of the earlier proposal on the Conservation Areas had likewise led to refusal of an earlier scheme and to a redesign. English Heritage now thought that there would be a townscape improvement for the High Street Conservation Area. There would be no adverse effect on the Riverside Conservation Area; some effects were described as "nothing but beneficial". The Borough Conservation Officer concurred with the developer's assessment that the effect on the direct setting of listed buildings was generally beneficial, and largely neutral on those further away; the effect on the character and setting of "built heritage assets" in and around the application site would be beneficial.

79. Daylight, sunlight and overshadowing were identified as potentially significant impacts for residents, and were subject to a more detailed assessment in the Supplementary Report. The developer had already submitted a formal assessment, and the Council had taken independent expert advice on it. The revised design had reduced the adverse impacts. A number of rooms in surrounding buildings would fail daylight and sunlight standards, the large proportion of which would only experience an impact of "minor significance"; some however would experience "moderate" and

"substantial" impacts. Some of the rooms affected would be living rooms or bedrooms. Some "substantial" impact predictions were themselves affected by what were in any event deep soffits and balconies. But to balance that, the majority of nearby residents would continue to receive adequate daylight and sunlight. The Supplementary Report concluded on this point:

> "In summary, and having regard to the economic and regenerative benefits of the scheme and the appreciation that an inevitable consequence of redeveloping a town centre location is often an adverse impact on existing property, it is considered that the extent of adverse impact to the adjoining residents identified is not sufficient to refuse consent of this application."

80. The sequence of events at the meeting was this. One issue which concerned the Members was whether they were grounds for a refusal which would stand up on appeal, or whether a refusal would simply land the Council with an order for costs on the grounds that the refusal had been unreasonable. Members asked for Mr Gilbert's advice. He went through the points, identifying many as "perilous" or "unwise". "The impact on the …Conservation Areas and Listed buildings can always be argued and so I suppose that, if you had to make a refusal, it would be one area where you could produce an expert to argue the case." He referred to another townscape point as a perilous ground for refusal, an easy point to make but less easy to sustain through evidence and argument. He said that there would be harmful daylight and sunlight impacts but that the "benefits in terms of employment and footfall and retail and investment and new housing outweigh those harmful impacts; they do exist…So I think there'll obviously be room for arguments, but they are quite limited, I think, the general trend towards, or pressure towards regenerative new development,…would be overwhelming, so an Inspector, I think, would be unlikely to support a refusal." Members continued to debate the costs risk.

81. Mr Goodman's advice, as the "legal person" was sought. "Quite simply the advice from the planning officer…are that there aren't grounds for refusal." The RB did not have to follow the officers' recommendation but it did have to make its decision on reasonable planning grounds. If it could not support its decision with evidence, the Inspector might award costs against it. "I would advise you that it's quite a strong risk but you don't have any tenable grounds for a refusal and you refuse, there will be a risk of costs, I'm afraid." There was noisy dissent from members of the public, during which Mr Goodman said that he stood by his advice "very strongly - there are not grounds for refusal".

82. This advice was said to be in error in the light of the reports and of what Mr Gilbert said. The grant of permission was therefore founded on an error.

83. This ground is totally without merit. The members read the reports and heard Mr Gilbert's analysis. They were told that it was for them to decide the issue but they had to have reasonable planning grounds for a refusal. They were as well placed as Mr Goodman to decide if Mr Gilbert's advice amounted to a recommendation not just to grant but that a refusal would be unreasonable. Mr Goodman made the point that an unreasonable refusal would lead to an award of costs. It would have been well known to members that a refusal against clear officer recommendations was the usual starting point for an award of costs on appeal. Mr Goodman advised them that they did not

have such grounds in the light of what Mr Gilbert has said. This is very much a matter of judgment for the officer expressing the view. The view cannot of itself be described as unreasonable. They then decided to grant permission.

84. It is suggested that Mr Gilbert did not mean that a refusal would be unreasonable, but he was there and he, and indeed members could and, in the atmosphere of controversy, undoubtedly would have said that that was not what Mr Gilbert meant. No one did.

85. The reports and Mr Gilbert's advice were not misrepresented either. He Main Report does not suggest that there is any basis for a refusal on Conservation Area or listed building grounds. Quite the reverse; the effects are neutral or beneficial. Mr Gilbert's comment at the meeting that one could always find an expert was not intended to be any encouragement to a different view, and was more a recognition that, at least on this sort of subjective topic, an expert can always be found who thinks that there is an adverse impact. But his clear underlying message is: "Where would that get you?" After all, the officer recommendation, the Conservation Officer's view and English Heritage's view would be public. And the Inspector would not decide that development could not proceed were he to agree with the hired-in expert; he would then have to ask whether the decision to refuse permission for that reason, balancing that impact against the benefits it would bring, was right and then, for cost purposes, reasonable. The question of reasonableness would focus on the balance leading to the refusal and not on whether the particular adverse impact, of itself, had been made out. The Main Report expressed clearly where that balance lay in the officer's judgment.

86. The effect of daylight and sunlight in the Supplementary Report was recognised as harmful for some residents. But for that to be a reason for refusal, it would have had to outweigh the advantages. Its view on the balance was clear. The impact was not sufficient for a refusal. That was what was said at the meeting. It would not be sufficient for a point of adverse impact to be established; it would have been necessary for the judgment that that outweighed the advantages to have been a reasonable judgment as well. That is how Mr Goodman's advice should be understood.

87. As Mr Brown pointed out, this point seems to be amount to an argument that the advice to the members should have been that there were grounds upon which a refusal of permission, albeit rejected on appeal, could have avoided an award of costs. But would itself not be a reasonable planning decision. So the argument would have to be that Mr Goodman's advice should have been that there were reasonable prospects of success on appeal. But that is simply not what the reports said or what planning officer advice was, on any view. There is no merit whatsoever in this point.

88. Its variant, which was that the officer considering what weight to give to the RB's resolution had failed to appreciate this error on the part of the legal adviser, and therefore wrongly gave its resolution significant weight, is even worse. It supposes that the planning officer was supposed to conduct some sort of judicial review of the RB resolution more than three months later, and hold it to be of no value for legal error. The Claimant could have brought judicial review proceedings at the time on this ground, but did not, although she was present at the meeting and heard the advice. There is no logical stopping off point at which the officer could have given the resolution less than significant weight, having concluded that the asserted error was

made, since that error is one of law, vitiating the decision, subject perhaps to his exercising his discretion, or it is nothing. Actually it is nothing; there was no error.

The effect of *R v South Cambridgeshire DC ex p Kides* [2002] EWCA Civ 1320, [2003] 1 P&CR 19

89. This was put forward as ground three, but it is convenient to deal with it last. *Kides* holds that where there are material changes in circumstances after the resolution to grant permission but before the actual grant of permission, those material considerations have to be considered by the decision-maker before the grant takes place. The principle was not at issue, though Mr Brown, as I shall come to, rightly pointed to the nature of the considerations which require a decision-maker to have to think again about its resolution.

90. Mr Findlay accepted that if the officer had delegated authority to issue the permissions as the decision-maker, as he had purported to do, the principle had been complied with in the Delegated Report. So he could not succeed on this ground unless he also succeeded on his first ground about delegation. He has failed on that and so fails on this point too.

91. But does *Kides* actually require the changes here, which I have already considered in the preceding grounds, to be considered by the RB, even if the officer had no authority to make a fresh decision? What Mr Brown points to is paragraphs 121-126 of *Kides* in the judgment of Jonathan Parker LJ. A consideration is material "in this context…if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or another. In other words, it must be a factor which has some weight in the decision-making process…."[121]. The officer with power to issue the decision, but not the power to take it, must refer the new consideration back to the decision-making body, [125]. In practical terms, the officer should err on the side of caution in referring matters back. But he could proceed to issue the notice. What then follows is not a statement of law but of guidance about what would be safe; *R (Hinds) v Blackpool Borough Council* [2012] EWCA Civ 466, [34-5]. Its language reflects the particular facts of *Kides*, and the way in which the relevant committee considered the new points. He could only "safely" issue the permission if "he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision". They are expressed cumulatively, though (b) and (c) seem more alternatives.

92. The point, as Pitchford LJ put it in [31] of *Hinds*, was that the factor at issue had to be material on the facts of the case. Here, (a) the RB was aware of all the new points, but (b) did not consider them with the application in mind, and (c) they are not points which could reasonably have altered the view of the RB.

93. I accept that the officer does not express himself in the language of (c); but that is the only conclusion which can be drawn from what he does say about these changes. In those circumstances, and notwithstanding (b), I do not see that the changed circumstances can be regarded as material in this context, that is, material to whether a different decision might be reached. That is not realistic. I do not see how (b) adds anything in this situation, thought it might perhaps do so in certain circumstances. But it is in any event a safety factor and not a legal requirement.

94. I accept that the officer did not ask himself the question about materiality as *Kides* envisages. He saw himself as taking the decision, having considered all the points for and against the proposal as at the date of the report. But it is perfectly clear what his thinking on that point was, and that was lawful.

95. In my judgment, even if the officer's authority were limited to granting permission only if satisfied that the s106 agreement fitted the resolution, the officer's decision would only have breached the *Kides* principle if there were any material changes after the resolution which could affect it. If not, there would have been no breach of that principle anyway. The officer would not be making a fresh decision, but affirming that no fresh decision was required, and so there was no impediment to the grant of permission. It is clear from the reasons which I have given on the earlier issues that I do not consider that there were any material considerations which fell within the scope of that principle.

96. This is not an issue of authority; it is a further reason why Mr Findlay's submission must fail, unless he is right that there was a limit on the authority of the officer such that he could do nothing, apart from negotiate, and then leave any decision to the RB. But, as I have said, once the officer had authority to judge the adequacy of the negotiations on the s106 agreement, and to issue a permission if satisfied, that would, in my judgment, also encompass authority to decide that these other factors did not amount to a reason not to issue the permission, if authority were needed.

Conclusion

97. This application is dismissed.