

This note explains the issues that are still not agreed between the Appellant, the Council and the County Council. This note responds to the note submitted by Hertfordshire County Council to the Inspector.

District Council Matters

As regards the District Council matters there is only issue between the parties. This concerns the conditionality clause relating to the exercise to be undertaken by the Inspector in respect of the planning obligations. The Council claims that the Appellant's proposal would render the agreement invalid and unlawful if the Inspector were to find that any of the obligations would not meet the tests for validity. That is not an interpretation that lends itself to the wording used. This wording has been accepted by Inspectors and local authorities on numerous occasions and has not been commented upon by the County Council. The wording is very clear in that the agreement is conditional upon the Inspector agreeing that each obligation is valid and that if the Inspector finds that a particular obligation does not meet the tests then that obligation becomes unenforceable and the conditionality requirements are fulfilled. This is a case of the Council seeking its preferred wording rather than agreeing to what is a workable clause.

It would seem from discussions with the Council that it is concerned with the conditionality of the clause. However, the agreement has to be conditional in the way specified in order to overcome the principles established in *R (Millgate Developments Ltd) v. Wokingham BC* [2011] EWCA Civ 1062 in which the Court of Appeal held that a unilateral undertaking was enforceable although the planning inspector had not regarded it as "necessary".

In the Millgate case, Millgate had applied for planning permission to Wokingham Council for residential development. Wokingham refused permission on grounds of failure to make adequate contributions to services, amenities and infrastructure but indicated that the objection could be overcome by an appropriate section 106 obligation.

Millgate appealed and put in a unilateral undertaking for the payment of contributions in accordance with Wokingham's requirements, with the obligation to pay triggered by the commencement of development. The Inspector allowed the appeal but (in the absence of any specific evidence from the Council) did not regard the undertaking as necessary and so gave it only "little weight" in granting permission on the appeal.

Wokingham requested payment of the contributions. Millgate sought a declaration in judicial review proceedings that enforcement of the undertaking by the Council would be unlawful. Wokingham disputed this and put in evidence justifying the need for the contributions.

The High Court and the Court of Appeal held that the undertaking was a lawful, unconditional and enforceable undertaking. Even though it would have been a cause of "dismay" to Millgate to reflect that the Inspector might have granted them planning permission without the undertaking, that did not assist them after the event: the enforceability of the undertaking could not now be challenged on the basis that, when made, it lacked a sufficient nexus with the proposed development, citing Lord Hoffmann in *Tesco* at 779. (The Court nevertheless noted that Millgate might still have the opportunity of disputing the amounts of the contributions in subsequent enforcement proceedings to the extent that they were not "reasonably required" in the terms of the undertaking).

The current wording adequately deals with the Millgate point.

County Council Matters

The note from HCC proceeds on an incorrect premise namely that a “completed” Unilateral Undertaking had been submitted to the Inspector. That is factually incorrect as only a draft was submitted and this had been made clear to the County Council prior to their note being submitted.

Further the note complains that the Appellant had failed to agree to pay the County Council legal costs in relation to the UU for the reasons set out. The Appellant has now agreed to pay a contribution limited to £2,000 even though there is no legal obligation to do so.

The Appellant has accepted the majority of the amendments that have been proposed and has removed the County Council from the Dispute Resolution and Repayment provisions.

In relation to the repayment provisions it is difficult to understand what the objection to these provisions is given that there was a certain time period for the moneys to be spent set out in the provisions which the District Council has accepted.

Having said that, the position is now that all of the payments to the County Council are subject to the principles established by the Court of Appeal in the case of *Patel v Brent LBC* No 3 [2005] EWCA Civ 644. This means that the moneys paid to the County in accordance with the UU have to be held on trust by the County Council, can only be used for the purpose for which they were paid and have to be spent within a reasonable time of payment.