



Neutral Citation Number: [2023] EWHC 389 (Admin)

Case No: CO/2304/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil Justice Centre
2 Redcliffe Street
Bristol BS1 6GR

Date: 24/02/2023

Before :

MR JUSTICE LANE

Between :

The King on the application of:

Hayle Town Council	<u>Claimant</u>
- and -	
The Cornwall Council	<u>Defendant</u>
-and-	
Burrington Estates (Hayle) Ltd	<u>1st Interested Party</u>
-and-	
Progress Land (Hayle 3) Ltd	<u>2nd Interested Party</u>

Mr S. Whale (instructed by **Hayle Town Council Clerk**) for the **Claimant**
Mr S. Brett (instructed by **Legal Services, The Cornwall Council**) for the **Defendant**
Mr T. Corner KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the
1st and 2nd Interested Party

Hearing date: 20 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives

(see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MR JUSTICE LANE

Mr Justice Lane :

A. INTRODUCTION

1. On 17 May 2022, the defendant granted planning permission for the erection of 85 dwellings with associated landscaping and infrastructure on land off Viaduct Hill, Hayle, Cornwall. The claimant seeks by this judicial review to have the grant of planning permission quashed on the basis that the defendant failed to take into account a decision taken by the defendant's Leader on 8 March 2022, that the defendant should withdraw from delivery of a scheme to upgrade the Loggans Moor roundabout on the A30 and negotiate the termination of the funding agreement entered into between the defendant and Homes England, whereby the latter would provide £12.9 million of Housing Infrastructure Funding, in order to deliver the upgrade of the roundabout. Homes England were concerned to see the upgrading because it would be critical, in the medium to long-term, to the delivery of up to 1,250 new homes in the Hayle Growth Area.
2. The Loggans Moor roundabout is on the A30, immediately to the north-east of Hayle. The site for the erection of the 85 dwellings is located between the existing settlement of Hayle and the A30. The Loggans Moor roundabout is a little less than 1.5 kilometres from the application site.
3. The decision of 8 March 2022, which I shall call "the Leader's Decision", came after the defendant's West Sub-Area Planning Committee had met to consider an officer's report ("OR") on the planning application and had decided unanimously that that application should be granted, subject to conditions. This was on 7 February 2022.
4. The Leader's Decision endorsed a written recommendation of 7 March 2022, which had been authored by senior officers of the defendant: Louise Wood, Service Director for Planning and Sustainable Development, Vicky Fraser, Service Director for Transport, Matthew Brown, Sustainable Growth and Innovation Manager and Adam Birchall, Head of Sustainable Growth and Innovation.
5. On 16 May 2022, a section 106 agreement was executed in respect of the planning application and, on 17 May 2022, planning permission was granted by means of a document in the name of Louise Wood.
6. On 18 May 2022, pursuant to the decision of 8 March 2022, the defendant's funding agreement for the Loggans Moor roundabout upgrade was terminated.
7. I was informed by counsel that they were in agreement as to the "main issues" in this case. These are:-

"1. Was the Leader's Decision a new factor which the rational decision-maker would regard as being so obviously material that it was realistically capable of causing the defendant to reach a different conclusion on the planning application, with the consequence that that new factor should have been taken into account before planning permission was granted?"

2. If yes, pursuant to section 31(2A) of the Senior Courts Act 1981, is it highly likely that the outcome for the claimant would not have been substantially different if the defendant had taken the Leader's Decision into account in the determination of the planning application?

3. Remedy, if applicable, and costs."

B. THE OFFICER'S REPORT

8. The OR of 7 February 2022 named the case officer for the application as Adam Carlyon. The recommendation, on the first page of the OR, was that delegated authority be given to the Service Director for Planning & Sustainable Development [Louise Wood] to approve the application, subject to conditions and the completion of a section 106 agreement securing the necessary planning contributions.

9. Under the heading "Balance of Considerations and Conclusion", there is the following:-

"1. The concerns of Hayle Town Council and the Electoral Division Member, in terms of the wider transportation impacts of the proposal are understood. However, there are mitigating factors - including the evidenced capacity within the wider highway network (inc Loggans Moor roundabout) to accommodate this proposed development, planned upgrading works to Loggans Moor roundabout, and transportation planning contributions secured from this development - which are considered to render the impacts acceptable on balance. Furthermore, the other concerns raised by local residents, whilst understandable, are not considered to be overriding and/or are capable of mitigation.

2. Taken together with the economic, social and environmental benefits of providing 85 dwellings and associated works in a suitable manner on an allocated site in the Development Plan, it is considered that the proposal is acceptable on balance, subject to conditions and the completion of a S106 Agreement, securing the necessary planning contributions. All other matters raised have been taken into account, including the planning history and the comments of the Town Council but none are of such significance as to outweigh the considerations that have led to the conclusion. The application is therefore recommended for conditional approval."

10. Paragraph 8 of the OR noted that the request to put the matter to the West Sub-Area Planning Committee was made by the Divisional Member "as he shares Hayle Town Council's concerns about wider transportation impacts associated with the development." Paragraph 9 recorded the objection of Hayle Town Council, which said that it had been informed at a recent Community Network Panel meeting "that Highways would not support any further housing applications until the Loggan's Roundabout (sic) has been updated and improved. Hayle Town Council has previously

resolved not to support any further development in this area until the infrastructure is in place”. Paragraph 8 said that Hayle Town Council also supported the concerns of neighbouring residents regarding potential noise, lack of privacy and drainage risks. Finally, the affordable housing allocation was considered to be too concentrated.

11. Beginning at paragraph 10, the OR set out the views of the Highway statutory consultees. Paragraph 12 recorded the views of Highway Development Management Officer (“HDMO”). Under the heading “Traffic impact on surrounding highway network” the HDMO stated that a transport assessment of likely trip generation for the development estimated 11 arrivals and 33 departures in the 0800 - 0900 am peak and 32 arrivals and 22 departures in the 1700 - 1800 pm peak, the peak hours being when the highway network was under the most pressure. Both the am peak and pm peak estimates were less than one vehicle trip per minute in the peak hours.
12. The OR continued as follows:-

“The trip generations have been compared to the existing flows on the nearby highway network to provide a percentage increase on the Guildford Road/Carwin Rise double mini roundabouts to the north east of the site and Foundry Road/B3302 priority junction. Traffic increases of 5%/6% during the AM/PM peak hours are predicted at the Guildford Road/Carwin Rise double mini roundabouts and a smaller increase of 2%/3% during the AM/PM peak hours at the Foundry Road/B3302 junction. The percentage increases are not considered to be significant and are unlikely to adversely impact the existing operation of the junction.

Loggans Moor roundabout upgrade

Cornwall Council has secured funding from Homes England’s Housing infrastructure fund for the upgrade of Loggans Moor roundabout, the upgrade to the roundabout will ease congestion and enable the development of the Hayle Growth Area. The scheme is scheduled for delivery 2022/23.

...

Transport Contribution

In line with the adopted Hayle Growth Area concept plan transport contributions are sought, specifically £3,425 per open market dwelling to go towards the Hayle Transport Strategy, this equates to £205,500. A strategic on-site contribution is also required of £3,122 per dwelling, equating to £265,370.

...

In summary, I have no Highways objection subject to the contributions outlined above and the following highway conditions:

Travel plan
Estate Roads
Parking and turning
Access Junction
Road connection with Kier Development.”

13. At paragraph 30, under the heading “Affordable housing”, the OR stated that the affordable housing team “SUPPORT the proposal of 85 homes of which 25 will be affordable housing, subject to the application meeting the requirements detailed below. It is said that there is a significant housing need in the town of Hayle to support the need for affordable housing”.
14. Under the heading “Representations”, paragraph 35 summarised the views of those opposing the application, including this third bullet point:-
 - “Highway network is unable to accommodate the proposed development alongside existing and new housing in the area without improvements.”
15. Under the heading “Assessment of Key Planning Issues”, there was the following:-

“37. The planning application needs to be assessed against the Development Plan policies and any other material considerations.

38. The key issues that require addressing in the determination of this application include:

 - Whether this is a suitable site for residential development;
 - Whether the design, scale and layout of the proposed development is acceptable; and
 - Whether the development is acceptable from immediate and wider transport perspectives.

39. Other matters will then be considered, followed by planning obligations and planning conditions.”
16. The OR then examined these key issues in turn. The development was considered to be acceptable and in accordance with Policy 3(1) of the Cornwall Local Plan Strategic Policies 2010 - 2030, the Hayle Neighbourhood Plan 2014 and the Cornwall Site Allocations Development Plan Document.
17. The OR next considered whether the design, scale and layout of the proposed development was acceptable. The conclusion was that it was acceptable.
18. Immediately above paragraph 51 of the OR, there was the heading “**Whether the development is acceptable from immediate and wider transportation perspectives**”. Paragraphs 51 to 55 read as follows:-

“51. Returning to policy H-UE1 in the CSADPD, part E advises that when assessing the off-site transportation impacts, particular consideration will need to be given to the capacity and safety of existing routes, such as Guildford Road, Trevassack Hill and Humphrey Davy Lane. This approach is supported by policy TR3 of the HNP, Policy 27 of the CLP and paragraph 110 of the NPPF.

52. The Council’s Highway Development Management Officer has not objected to the application, subject to conditions and a S106 Agreement. In reaching this view, he has been informed by:

- The suitability of the proposed junction at the southern boundary of the site to be upgraded in the future in order to connect to further development to the South, as informed by discussions with Cormac;
- The suitable percentage increases in trip generation arising from the development;
- Cornwall Council securing funding from Homes England’s Housing Infrastructure Fund for the upgrading of the Loggans Moor roundabout, which will ease congestion and enable the development of the Hayle Growth Area within which the application site is located. The scheme is scheduled for delivery in 2022/23; however, the release of funding is dependent on Homes England being satisfied that delivery is coming forward, which planning permissions are naturally a good way of demonstrating;
- Further funding being secured from nearby developments for the signalisation of the Carwin Rise double mini roundabouts;
- The suitable quantum of parking provision serving the development.

53. These assessments are agreed with. Of particular note are the predicated trip generations in the submitted Transport Assessment of 44 vehicular movements in the 8am - 9:00am peak and 55 in the 5:00 pm - 6:00pm peak, which equate to one vehicle trip per minute in the peak hours. The trip generations have also been compared to existing flows on the nearby highway network to provide a percentage increase on Guildford Road / the Carwin Rise double mini roundabouts to the north-east of the site and on Foundry Road/the B3302 priority junction to the West. Traffic increases of 5%/6% during the AM/PM peak hours are predicted on Guildford Road / the Carwin Rise double mini roundabouts and a smaller increase of 2%/3% during the

AM/PM peak hours on Foundry Road / the B3302 junction. The percentage increases are not considered to be significant; and are unlikely to adversely impact the existing operation of the junctions.

54. It is clear therefore that there is capacity within the wider highway network (inc. Loggans Moor roundabout) to accommodate this proposed development of 85 dwellings. However, there may naturally come a point, in the consideration of future applications for development in the Hayle Growth Area where demand exceeds capacity and further measures needed at that time.

55. The proposal is therefore considered to be acceptable from immediate and wider transportation perspectives, and to comply with Policy H-UE1 of the CSADPD, Policy TR3 of the HNP policy 27 of the CLP and paragraph 110 of the NPPF, subject to conditions and a S106 Agreement securing the transportation contributions set out in the Concept Plan.”

19. At paragraph 58, the OR set out the substance of the section 106 Agreement that would be required. Amongst other matters, reference was made to a standard transportation contribution per open market dwelling and a strategic on-site highway infrastructure contribution, as previously described.

C. THE MINUTES OF THE WEST SUB-AREA PLANNING COMMITTEE

20. The minutes of the Planning Committee’s meeting on 7 February 2022 have been approved. On the first page of the minutes, there is a list of those present, including the defendant’s officers. Adam Carylton is not listed. Peter Bainbridge, Principal Development Officer and Mark Broomhead, Development Management Group Leader, attended as did Huw Gibbon, Principal Development Officer (Highways).
21. The minutes state that the Principal Development Officer outlined the application, including the showing of plans and photographs to the Committee and that he summarised “the key issues”. The Principal Development Officer recommended that delegated authority be given to the Service Director for Planning and Sustainable Development to approve the application, subject to conditions.
22. The minutes note that “Mr Gordon attended the meeting, was permitted to speak and spoke against the application. Councillor Rance of Hayle Town Council attended the meeting, was permitted to speak and spoke against the application. Mrs Nelson (representing the developers) attended the meeting, was permitted to speak, spoke in support of the application and answered questions put to her by the Committee”.
23. Councillor Channon, the Electoral Division member, made seven points, by reference to Hayle Town Council’s concerns with the application. Amongst these was the concern that the access to the site was onto a road that was already suffering from several chokepoints; and that the main access to Hayle Town was via another estate and then onto a narrow road without pavements; that the site had no basic shopping facilities planned within it; that at the point where the narrow road runs under a single railway

under bridge at the junction with Chapel Lane, both visibility and pedestrian separation were non-existent, with many vehicles straying across the “virtual payment”; that the adjacent estate was now having through traffic from Viaduct Hill, with which it was not designed to deal; and that “there were concerns regarding serious Highways issues and the lack of facilities on the site”.

24. The minutes describe officers responding to members’ questions regarding ten specified matters. Amongst these were:-

“4. The traffic assessment had been based on Cornwall’s specific figures and it was believed that [they] would be accurate for the Hayle area as it only calculated car journeys and therefore did not take into account buses, cyclists or pedestrians”

....

7. Concern was raised at the proposed new round-a-bout (sic) [Loggans Moor] would result in the foot bridge being removed and that this would lead to more people having to cross a very busy road;”.

25. The minutes state that:-

“A full and detailed debate ensued, the main points of which were noted as follows:-

...

2. Concern was raised that if approved, this development would lead to worsening transport issues in the area;

...

Arising from consideration of the report and debate it was moved by Councillor Keeling, seconded by Councillor Marrington , and on the vote of 10 votes in favour, 0 against and 0 abstentions, it was **RESOLVED**” to approve the application, subject to conditions.

26. Immediately thereafter, the minutes state:-

“The reasons given by the Proposer for wishing to approve the application were as set out in the report, and Committee update.”

D. THE LEADER’S DECISION

27. I have already referred to the report to the Leader of the defendant, jointly authored by Louise Wood. This was finally cleared for submission on 8 March 2022. The report described the matter to be decided by the leader as a “key decision”, given its monetary value. The recommendation, which the Leader accepted, was:-

“That Cornwall Council withdraws from the delivery of the Loggans Moor scheme and negotiates the termination of Loggans Moor Housing Infrastructure Fund Grant Determination Agreement with Homes England.”

28. The executive summary stated that the report “relates to two interlinked projects, the Hayle Growth Area project and the Loggans Moor A30 Junction Improvements project”. The Loggans Moor junction was identified as a constraint to future growth within the Hayle area by (what is now) National Highways. The opportunity arose for Homes England and the Council to bid for and secure funding to facilitate an upgrade to the junction, “which would in turn support delivery of the Growth Area in accordance with the Local Plan”.
29. Paragraph 1.4 of the Report then described problems that had arisen, including “risk of costs exceeding the available budget”, as well as the programme “becoming more challenging in terms of being able to control the delivery of the land required for the infrastructure and the housing outputs with an increased likelihood of requirement to consider the use of compulsory purchase powers which would involve significant time and capital outlay by the Council”.
30. The Report said that “there is too much risk remaining in order to proceed”, concluding that “the current Council led approach ...is no longer acceptable in terms of a delivery mechanism for the A30 improvements”.
31. At paragraph 1.6 continued:-

“However, it is important to note that the report does not in any way change the policy expectation or requirements in respect of growth needed or that infrastructure improvements will be required to support that growth. Furthermore, the Council will continue to work with National Highways and the local members to review ways in which future growth can be appropriately brought forward.”
32. Further relevant passages from the report are as follows: -

“Loggans Moor A30 junction upgrade

2.2 As part of the strategy for Hayle's growth, the Cornwall site allocations DPD set out a transportation strategy to enable the objectives of the local plan. Part of the strategy recognised that the upgrade to Loggans Moor A30 junction, amongst other infrastructure, is critical to enabling growth in the medium to long-term.

2.3 To support this strategy, Cornwall Council was successful in bidding for £12.9m of Housing Infrastructure Funding, (HIF) to deliver an upgrade to the Loggans Moor A30 junction. Funding conditions on the Council, as an accountable body, link the funding to the delivery of the 1,250 homes within the Hayle Growth Area.

...

2.5 Delivery of the Growth Area is intertwined with the need for improvements to the A30 at Loggans Moor. This arose initially through the National Highways consultation responses to planning applications, objecting to development without improvements to the roundabout. To try and resolve this problem the Council made a Housing Infrastructure Fund (HIF) bid which awarded £12.9m of funding to upgrade the roundabout, in exchange for commitments by the Council to ensure delivery of homes in the proposed Hayle Growth Area.

...

2.12 ... Homes England has indicated that they are willing to agree to the termination of the grant funding agreement and, having discussed the specifics leading to the withdrawal of the project from the grant programme, it has been agreed that, in this particular instance, the eligible grant funded expenditure to date would not have to be repaid by the Council.

...

2.14 It is important to remember that withdrawal from the roundabout and associated Housing Infrastructure Funding (HIF) does not change the planning policy position in respect of the allocation of the growth area itself.

2.15 Going forward we are committed to continuing to review the growth and wider transport strategy in West Cornwall. We also recognise the substantial work that local stakeholders have put into properly articulating requirements for infrastructure in Hayle, as reflected in the adopted policy, and there is a clear need to maintain that input and scrutiny.

2.16 In the meantime, any planning applications that do come forward in Hayle, or within the Growth Area, will still be considered in the light of the existing policy and its infrastructure requirements, including those imposed by National Highways.

...

5.2 following on from this engagement with Cabinet Members, the Strategic Director for Economic Growth and Development and the Service Director for Planning and Sustainable Development [Louise Wood] undertook initial exploratory conversations with Homes England. As a result, Homes England indicated it is not able to change the milestones relating to housing delivery or give an extension of time for the completion of the junction works. Therefore,

pausing the project to undertake a review of the way forward was not possible...

5.3 The roundabout is on the A30 Trunk Road which is the responsibility of National Highways. The Strategic Director for Economic Growth and Development and the Service Director for Transport met with National Highways on 10 February 2022. National Highways do want to see future investment in this area and the Council will work with them to identify the next steps for possible improvements to the A30.

...

6.1 In the event that the Council unilaterally decided to withdraw from the delivery of the scheme without the consent of Homes England, then Homes England had the ability to seek full repayment of all HIF funds given, together with interest, although it is within their discretion as to whether they would seek to impose this.

6.2 However, as a result of engagement by officers with Homes England, it has been agreed that, subject to approval of this report, the project will be closed and the remaining unspent grant will be surrendered. Furthermore, Homes England recognised that all works have been progressed in good faith...

...

7.2 The current funding agreement with Homes England does not include a right for Cornwall Council to unilaterally terminate the agreement. However, correspondence with Homes England has confirmed the position set out in Section 6. To give effect to the proposals outlined in Section 6, the Council needs to make a formal decision using its executive powers to withdraw from the funding agreement. This report has been prepared in pursuance of that requirement.

...

9.1 By not progressing the projects it will have a negative impact on the ability to deliver new housing and commercial growth within the Hayle area; although this could have a positive impact on the demand for education places in the short to medium term. Furthermore, it would have a positive impact on greenhouse gas emissions that would otherwise have resulted from the construction of the Loggans Moor project.

9.2 Furthermore, the Loggans Moor scheme was going to take away an existing pedestrian footbridge over the A30 and replace it with an at grade crossing...

9.3 To mitigate the above impacts the intention is to continue to work with local members and the National Highways in seeking to find solutions to increase capacity and compliance of their network to enable further growth in the future”.

33. Part 10 of the report set out five main options to consider. Only one of these, option 5, was said to be consistent with the position outlined by Homes England:-

“5. To stop the projects and [negotiate] the termination of the Loggans Moor HIF GDA with Homes England - Due to the financial and legal challenges in relation to the other options set out above, it is felt that this represents, financially, the most prudent course of action.

Louise Wood is recorded as having signed off on the Report on 7 March 2022.

On 8 March 2022, the defendant’s leader, councillor Linda Taylor, made the decision: “that Cornwall Council withdraws from the delivery of the Loggans Moor scheme and negotiates the termination of Loggans Moor Housing Infrastructure Fund Grant Determination Agreement with Homes England”.

34. Louise Wood is recorded as having signed off on the Report on 7 March 2022.
35. On 8 March 2022, the defendant’s Leader, Councillor Linda Taylor, made the decision “that Cornwall Council withdraws from the delivery of the Loggans Moor scheme and negotiates the termination of Loggans Moor Housing Infrastructure Fund Grant Determination Agreement with Homes England”.

E. THE GRANT OF PLANNING PERMISSION

36. On 17 May 2022, the defendant granted conditional planning permission to the interested parties. As I have said, this grant was in the name of Louise Wood. The decision notice granting permission was sent under cover of a letter dated 17 May 2022, written by Adam Carlyon, the author of the OR.

F. CASE LAW

37. I have referred earlier to the list of agreed issues. Issue 1 is framed in the light of the recent, helpful judgment of Sir Ross Cranston, sitting as a High Court Judge, in R (Patrick Hardcastle) v Buckinghamshire Council [2022] EWHC 2905 (Admin).
38. At paragraph 95 of his judgment, Sir Ross cited R (Kides) v South Cambridgeshire DC [2002] EWCA Civ 1370, where it was held that an authority’s duty to “have regard to” material considerations is not to be elevated into a formal requirement that with every

new material consideration arising after the passing of a resolution (in principle) to grant planning permission, but before the issue of the decision notice, there has to be a specific referral back to Committee. The duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application with the application in mind – albeit that the application was not specifically placed before it for reconsideration (paragraph 122 of the judgment in Kides).

39. The Court of Appeal in Kides went on to consider the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice. The Court held:-

“124. At one extreme, it cannot be a sensible interpretation of S.70(2) [of The Town and Country Planning Act 1990] to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated*, prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could not* have regard prior to the issue of the decision notice.” (original emphasis)

40. At paragraph 125, the Court held that, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires the authority to have regard to that consideration. This means that the authority of the delegated officer “must be such as to require him to refer the matter back to Committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty”.
41. At paragraph 126, the Court said that, in practical terms, it “must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. The delegated officer can only safely proceed to issue the decision notice 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.” (original emphasis)
42. However, as Sir Ross Cranston observed at paragraph 97 of Hardcastle, in R (Dry) v West Oxfordshire DC [2010] EWCA Civ 1143, Carnwath LJ (as he then was) had emphasised that the guidance in Kides “is only guidance as to what is advisable and must be applied with common sense, and with regard to the facts of a particular case” (paragraph 16). Sir Ross observed that Carnwath LJ's dictum “is not, however, a route to avoid the statutory requirements: R (Hinds) v the Blackpool BC [2012] EWCA Civ 466, [35]”.
43. At paragraph 98, Sir Ross noted that, in Kides, the Court had described a material consideration as one which “would tip the balance to some extent, one way or another: [121]”.

44. In similar vein, Lindblom J (as he then was) had held in Wakil (t/a Orya Textiles) v Hammersmith and Fulham LBC [2013] EWHC (2833) Admin that what is required “is not merely some obvious change in circumstances but a change that might have had a material effect on the authority’s deliberations had it occurred before the decision was made. The crucial question for the court to consider is whether the new factor might have led the authority to reach a different decision” (paragraph 94).
45. At paragraph 99 of Hardcastle, Sir Ross considered that what is meant by a “material consideration” must now be determined in line with the contemporary jurisprudence “in as much as it differs from these authorities”. As held in R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UK SC52, a consideration is a material one if it is “so obviously material” that it must be taken into account: paragraphs 116-121.
46. Sir Ross Cranston reached this important conclusion:-
- “In this context it seems to me that a rational decision-maker would regard a new consideration as “so obviously material” if it was realistically capable of causing the authority to reach a different conclusion. Ultimately, this is a matter for the court, although what officers regard as material may be accepted by the court when conducting its own analysis...”.
47. I consider that counsel in the present case were correct to formulate the first main issue as they did. The test articulated in paragraph 99 of Hardcastle is, I respectfully consider, the correct one.
48. That test, however, covers only one of the two discrete Kides principles. As we have seen, the second principle enables an authority in the position of the present defendant to succeed, even if the new matter reaches the Hardcastle threshold, if the delegated officer, who is about to sign the decision notice granting planning permission, could not reasonably have discovered or anticipated the matter that has arisen since the since the planning committee resolved to grant permission.

G. DISCUSSION

49. For the defendant, Mr Brett puts his client’s case on what are, in essence, three separate bases, any one of which would, he submits, be sufficient to dispose of the claim. It is convenient to deal first with the defendant’s contention that the Leader’s Decision was, in effect, inchoate; and that it was not until 18 May 2022, the day after planning permission had been granted to the interested parties, that the defendant’s funding agreement with Homes England was terminated. If that is right, then the Kides principle never arises.
50. In this regard, Mr Brett says that the Leader’s Decision cannot be treated as a free-standing decision. The withdrawal of the defendant from the delivery of the Loggans Moor scheme and the negotiation of the agreement with Homes England are inseparable. Mr Brett contends that it would, in theory, have been possible for Homes England to insist upon terms for the defendant’s withdrawal from the agreement, such that the defendant may have decided that it was preferable to continue with it.

51. In this matter, I find myself firmly in agreement with Mr Whale. There is no escape for the defendant from the unequivocal statement in paragraph 6.2 of the report to the Leader that “it has been agreed that, subject to approval of this report, the project will be closed and the remaining unspent grant will be surrendered”. At paragraph 7.2, it is said that to “give effect to the proposals outlined in Section 6, the Council needs to make a formal decision using its executive powers to withdraw from the funding agreement”.
52. That is what happened on 8 March 2022. The Leader’s Decision brings the present case within the ambit of the Kides principle.
53. I accordingly turn to the question of whether the defendant’s decision to withdraw from the agreement with Homes England for the upgrading of the Loggans Moor roundabout was a new consideration that was “so obviously material”, in that it was realistically capable of causing the defendant to reach a different conclusion on the planning application.
54. This aspect of the claimant’s challenge involves an analysis of the OR. In doing so, I have regard to the principles concerning the proper approach of a court to an officer’s report, articulated by Lindblom LJ at paragraph 42 of R (Mansell) v Tonbridge & Malling BC [2019] PTSR 1452. In particular, such reports are not to be read with undue rigour, but with reasonable benevolence, bearing in mind that they are written for councillors with local knowledge. Furthermore, there is a general assumption that a planning committee will have reached its decision by reference to the whole of the officer’s report, not just its summary or conclusion.
55. Mr Whale places considerable emphasis upon paragraphs 1 and 2 of the OR which, he says, show that the Committee regarded the upgrading works to the Loggans Moor roundabout as a material consideration, which, overall, rendered the impacts of the proposed development “acceptable on balance”.
56. The consultation response of the defendant’s HDMO is of particular significance. Mr Whale points to the express reference in this response to the Loggans Moor roundabout upgrade, where the HDMO refers to the defendant as having “secured funding... for the upgrade of Loggans Moor Roundabout, the upgrade to the roundabout will ease congestion and enable the development of the Hayle Growth Area. The scheme is scheduled for delivery 2022/23”. Mr Whale submits that this is couched in unconditional terms.
57. At paragraph 35 of the OR, Mr Whale draws attention to the third bullet point, where one of the stated arguments in opposition to the planning application was that the highway network is “unable to accommodate the proposed development alongside existing and new housing in the area without improvements”. At paragraph 38, one of the key issues is “whether the development is acceptable from immediate and wider transportation perspectives”. Mr Whale submits that the word “wider” encompasses the Loggans Moor roundabout.
58. At paragraph 52, Mr Whale emphasises the fact that the defendant’s HDMO had not objected to the application, and that this view was informed by, amongst other things, the defendant’s having secured funding from Homes England for the upgrading of the Loggans Moor roundabout, “which will ease congestion and enable the development of

the Hayle Growth Area within which the application site is located”. Although the sentence that follows, which is an observation by the author of the IP, speaks of the release of funding for the upgrading being “dependent on Homes England being satisfied that delivery is coming forward”, Mr Whale stresses that the author of the OR emphasises the fact that planning permissions, such as was being recommended in the present case, “are naturally a good way of demonstrating” the delivery with which Homes England was concerned. This, Mr Whale says, is going some way, at least, to telling the Committee that the upgrading will take place, if they grant planning permission.

59. In paragraph 55, Mr Whale submits that the word “therefore” in the opening sentence “The Proposal is therefore considered to be acceptable from immediate and wider transportation perspectives...” must refer, in part, to paragraph 52, not just paragraphs 53 and 54.
60. Turning to the minutes of the Committee’s meeting of 7 February 2022, Mr Whale points to the fact that Mrs Nelson, representing the developers, spoke in support of the application and answered questions. According to the Statement of Facts and Grounds, Mrs Nelson “stated categorically during her representation at the meeting that funding had been secured for the upgrade and that the upgrade would ease congestion”. Mr Gibbon, Principal Development Officer (Highways) is said to have advised the Committee during the meeting that the upgrading project was “ongoing”, along with project discussions. The Committee Chair is said by the claimant to have advised its members that he had been told the upgrading had to be up and running because of the finance. The Statement of Facts and Grounds also says that other speakers “made representations on the premise that the upgrade would go ahead”.
61. Mr Whale submits that the defendant has not seen fit to challenge this evidence, which was endorsed by a Statement of Truth made by the claimant’s Clerk on behalf of the claimant.
62. Turning to the report to the Leader, which resulted in the Leader's Decision, Mr Whale emphasises the involvement, as a joint producer of the report, of Louise Wood, who issued the planning permission on 17 May 2022.
63. Thus, the claimant contends, the Leader’s Decision meets the “so obviously material” test in Hardcastle. The decision was realistically capable of causing the defendant to reach a different conclusion on the planning application. The OR informed members of planned upgrading works to the Loggans Moor roundabout; that the defendant had secured funding for the upgrading; that the upgrading would ease congestion and enable development of the Hayle Growth Area; that the scheme was scheduled for delivery in 2022/23; and that planning permissions were a good way of demonstrating that delivery is coming forward. The agent for the developers made a categorical statement as to the upgrading funding, which underlines the materiality of the Leader’s Decision. So too does Mr Gibbon’s advice that, the upgrading project was “ongoing”, along with project discussions. The Chair said he had been told that the upgrading project had to be “up and running”. The terms of the report to the Leader - in particular, the passages on the interlinked nature of the Hayle Growth Area project and the Loggans Moor project – underscore the materiality of the Leader’s Decision, as did the fact that the Leader’s Decision was a “key decision”.

64. Mr Whale seeks to counter the point, made on behalf of the interested parties, that the planning application was regarded in the OR as being acceptable, independently of the Loggans Moor upgrading scheme. Mr Whale says this overlooks the fact that the decision of the HDMO not to object was informed by the securing of funding for the upgrade, as can be seen in paragraph 53 of the OR. It also overlooks Mr Gibbon's stated position during the Committee meeting.
65. Despite Mr Whale's highly able submissions, I find myself firmly in agreement with the submissions of Mr Brett and Mr Corner KC on the correct interpretation of the OR and of the part it played in the decision of the defendant's Committee to resolve to grant planning permission.
66. Paragraphs 1 and 2 of the OR occur under the heading "Balance of Considerations and Conclusion". Like the others that occur in boxes in the OR, this has the appearance of a general or standard heading. That gives force to Mr Brett's submission that the references in paragraphs 1 and 2 to "balance" fall to be understood on the basis that it is the general nature of planning decisions to be decided on a balance of considerations.
67. Furthermore, I agree with the defendant and the interested parties that, in the important context of the planning application having been put to the Committee for decision because of the claimant's concerns, paragraphs 1 and 2 are, in reality, speaking to those concerns. This is made evident by the first sentence of paragraph 1.
68. Finally and in any event, the second sentence of paragraph 1 makes it plain that there is, at present, "evidenced capacity within the wider highway network (inc. Loggans Moor roundabout) to accommodate this proposed development". Given that the words "planned upgrading works to Loggans Moor roundabout" occur immediately after that phrase, it is manifest that paragraph 1 is a statement that there is existing capacity within the wider highway network to accommodate the proposed development and that that capacity encompasses the existing Loggans Moor roundabout. As we shall see, this point becomes even clearer when the whole of the OR is examined, especially paragraphs 53 and 54.
69. I turn to the response of the HDMO. As I have set out, the effect of the development on traffic volumes on the surrounding highway network was assessed in detail, by reference to peak hours. Importantly, the percentage increases were "not considered to be significant and are unlikely to adversely impact the existing operational of the junctions". That important finding was reached, irrespective of the issue of the Loggans Moor roundabout upgrade, which is addressed later in paragraph 12. Although Mr Whale draws attention to the ostensibly unconditional language used at this point, it is important to note that the reference to the upgrade features in relation to the development of the Hayle Growth Area. The significance of this will be apparent later in the OR.
70. I also agree with the emphasis placed by the defendant and the interested parties on the fact that the HDMO said he had no highways objections, subject to the transport contribution condition, which is not directly referable to the Loggans Moor upgrading, and to a number of stated conditions, none of which concerns that upgrading.
71. As for the third bullet point in paragraph 35, concerning opposition based on the alleged inability of the highway network to accommodate the proposed development, without

“improvements”, there is nothing in the OR or the minutes to compel the conclusion that the “improvements” included the delivery of the Loggans Moor upgrading scheme, as featured in the agreement with Homes England. On the contrary, as can be seen from the minutes, the specific highways issues mentioned by the Electoral Division member, when outlining the concerns of the claimant, were about the “narrow road without pavements, that runs via a single track railway underbridge at the junction with Chapel Lane”.

72. Paragraph 52 of the OR was the subject of detailed submissions from Counsel. I agree with the defendant and the interested parties that the third bullet point in paragraph 52 needs to be read in conjunction with the actual response of the HDMO, set out in paragraph 12. The reference in paragraph 52 to easing congestion and enabling the development of the Hayle Growth Area, within which the application site is located, is not to be read as the HDMO expressing the view that the development of the application site, as opposed to the Hayle Growth Area as a whole, was dependent upon the upgrading.
73. Furthermore, the author of the OR was careful to advise members, at this point, that the release of funding was dependent on Homes England being satisfied that delivery was coming forward. Whilst I take Mr Whale’s point that this is then used by the author to suggest that planning permission would be a good way of demonstrating that delivery, the inescapable conclusion must be that the members of the Committee were being specifically alerted to the fact that the upgrading scheme might not come to pass.
74. Mr Whale submits that there is a difference between the possibility of the upgrading scheme not seeing the light of day in the way then envisaged and the Leader’s Decision, which turned that possibility into a certainty. I do not accept any such bright line distinction can be drawn on the facts of this case. In any event, the essential issue is whether the Planning Committee, acting on the OR, decided that planning permission should be granted, in part because of the prospect that the upgrading scheme would come about. On a proper reading, that is not what the OR suggested members should do.
75. This becomes clear from paragraphs 53 and 54. Paragraph 53 returns to the issue of predicted trip generations, emphasising that the percentage increases “are not considered to be significant and are unlikely to adversely impact the existing operation of the junctions”. The point is driven home by paragraph 54, which is destructive of the claimant’s case on this issue. In paragraph 54, it is stated in terms that there is capacity within the wider highway network, including Loggans Moor roundabout, to accommodate the proposed development of 85 dwellings. That repeats what the HDMO said in his submission. The wider highway network includes Loggans Moor roundabout, as it now is, without the upgrading.
76. Also importantly, paragraph 54 concluded by saying that “there may naturally come a point, in the consideration of future applications for development in the Hayle Growth Area, where demand exceeds capacity and further measures are needed at that time”. At this point, what the HDMO said about the Hayle Growth Area becomes plain (even if it were not so already). Although the existing Loggans Moor roundabout is sufficient to deal with the increase in vehicles generated by the residential development of the application site, there is likely to come a time when a future application for residential development within the Hayle Growth Area may have to be refused, in the absence of

the upgrading of the roundabout. As can be seen from the report to the Leader, the same point was being made there. This likelihood, however, has no material bearing on the present application.

77. Mr Whale lays emphasis on the word “therefore” in the first sentence of paragraph 55, where it is said that the proposal is “therefore considered to be acceptable from immediate and wider transportation perspective”. He argues that the word “therefore” relates back to (*inter alia*) paragraph 12, which contains the response of the HDMO. On a proper construction, however, it is evident in my view that the word “therefore” in paragraph 55 covers the preceding four paragraphs, which occur under the heading “Whether the development is acceptable from immediate and wider transportation perspectives”. In any event, it matters not, since the HDMO's response does not bear the construction for which the claimant contends.
78. It follows that I do not accept the claimant’s contention that the HDMO might have objected to the planning application, had the Leader’s Decision occurred before the Planning Committee met and resolved to approve the application. I also do not accept the submission that National Highways might have objected to the application. As can be seen from the report to the Leader, the need for improvements to the A30 at Loggans Moor arose initially through the National Highways consultation responses to planning applications, which had objected to development without improvements to the roundabout. It was this that led the defendant to bid for a Housing Infrastructure Fund payment from Homes England. Mr Whale relies upon the reference at paragraph 2.5 of the Report to delivery of the Growth Area being “intertwined” with the need for improvements at Loggans Moor.
79. I am not told what the nature and scale were of those planning applications, which led to objections by National Highways. The fact is, however, that National Highways did not object to the present application. Nor did they indicate that the acceptability of the application from their perspective was dependent upon the upgrading scheme going ahead. Their silence is entirely understandable, on the basis that (as can be seen) the traffic generated by the proposed development would not be significant in highway terms.
80. Whilst on the subject of the report to the Leader, I agree with the defendant and the interested parties that the message from the report is not that the termination of the present agreement with Homes England means that the roundabout will not be upgraded. On the contrary, the thrust of the report is that the upgrading will be needed at some point, if the Hayle Growth Area policy is to be implemented to any substantial extent.
81. Meanwhile, the report makes it clear at paragraphs 2.14 to 2.16 that planning applications will still be considered in the light of the existing policy and its infrastructure requirements. That is what happened in the present case.
82. In reaching these conclusions, I have been mindful of the claimant’s case concerning what the claimant understands was said by various individuals at the meeting of the Planning Committee. I agree with Mr Whale that there is no reason to doubt what is contained in this regard in the Statement of Facts and Grounds, endorsed by the Town Clerk’s Statement of Truth on behalf of the claimant. The fact of the matter is, however, that those statements do not avail the claimant. Mr Gibbon’s advice, as described by

the claimant, does not go beyond (and certainly does not contradict) the HPDO's response, as recorded in the OR.

83. So far as the other comments are concerned, not only does the claimant face the difficulty, which I have earlier mentioned, that a planning committee is generally assumed to reach its decision on the basis of the OR; in the present case, the minutes specifically state that "the reasons given by the Proposer for wishing to approve the application were as set out in the report and Committee update". It is common ground that nothing material turns on the update. It is, therefore, abundantly plain that the Committee reached its conclusion for the reasons given in the OR. In these circumstances, it would require far more than the evidence concerning what certain individuals said at the meeting for this court to conclude that the Committee's decision was influenced by those comments. It is a commonplace of meetings of this kind that views will be expressed which, although they may be supportive of the recommendation of officers, are differently reasoned. Proper decision-making in the planning field is, however, likely to be imperilled if the courts were routinely to impute those different reasons to the Committee. A very strong case is, thus, needed in order for that to happen. It is lacking in the present instance.
84. In conclusion, it is useful to stand back and address the hypothetical question, which Mr Whale helpfully posed in his oral submissions. If, during the Committee meeting, the Leader had entered the room and told the Committee that she had decided, on behalf of the defendant, that it should withdraw from the delivery of the Loggans Moor upgrading scheme, would the Committee realistically have reached a decision to refuse the application? For the reasons I have given, I agree with Mr Brett and Mr Corner KC that the answer would be resoundingly in the negative. Applying section 38(6) of the Planning and Compulsory Purchase Act 2004, determination of the application fell to be made in accordance with the development plan unless material considerations indicated otherwise. Drawing on the OR, the Committee would have said that the application remained in accordance with the Development Plan and that the Leader's Decision did not have any material impact. The proposed development remained one which would have no significant effect on existing traffic infrastructure, including the Loggans Moor roundabout.
85. Accordingly, the claim fails for this reason.
86. At paragraph 49 above, I said Mr Brett submitted that the defendant should succeed on any one of three bases. I have rejected the first but accepted the second. In deference to the quality of Mr Whale's submissions, I shall deal with the third basis, even though it cannot affect the outcome.
87. As I have already explained, part of the Kides principle is that, even if the new matter was realistically capable of causing the authority to reach a different conclusion, this would not cause the Planning Committee's resolution to grant planning permission to be quashed, if the delegated officer who is to issue the decision was neither aware, nor ought reasonably to have become aware, of the new matter.
88. Mr Brett submitted that, in the present case, Louise Wood, the Service Director for Planning and Sustainable Development, cannot be expected to be aware of every issue bearing upon the very many planning applications that are made to and decided by the defendant each year. If I understood him correctly, Mr Brett told me that the defendant

has processed some 100,000 planning applications in the last 8 years. Accordingly, the fact that Louise Wood's name appears on grants of planning permission cannot mean that she is fixed with the kind of knowledge that the claimant attempts to impute to her. The author of the OR in the present case was Adam Carlyon. He did not become aware of the Leader's Decision until after the grant of planning permission on 17 May 2022. He could not reasonably be expected to have done so.

89. As Sir Ross Cranston recorded at paragraph 97 of Hardcastle, this aspect of Kides "is not, however, a route to avoid the statutory requirements". Although Robin Purchas QC held at paragraph 54 of R (Chilton Parish Council) v Babergh District Council [2019] EWHC 280 (Admin) that it is "not right that as a matter of law... that in carrying out his delegated duties, a council officer should be deemed to have knowledge of all other officers of the council", I consider that a local authority which is seeking to defend a judicial review on this basis should not assume it needs to do no more than merely (i) allude to the fact that it has many planning applications to deal with; and then (ii) assume that the principle of delegation will routinely be regarded by a court as hermitically sealing-off one decision-maker from another.
90. In the present case, the recommendation in the OR was that the Committee should give delegated authority to the Service Director for Planning and Sustainable Development to approve the application, subject to conditions. That was Louise Wood. The minutes specifically record that recommendation, which the Committee manifestly accepted.
91. As the presence of her name on the document indicates, it was, therefore, Louise Wood who granted the planning permission on 17 May 2022. I have been shown nothing to indicate that she sub-delegated that task to Adam Carlyon, who authored the covering letter of 17 May. The defendant could have led evidence on this issue, had it seen fit, as well as more generally on the relevant decision-making. In this regard, I contrast the present case from what appears to have been before the deputy judge in Chilton.
92. Accordingly, the position in the present case is, in effect, the reverse of that contemplated in Kides and which occurred in Chilton. The officer who granted planning permission, Louise Wood, undoubtedly knew about the Leader's Decision to withdraw from the upgrading scheme. She had been one of the authors of the report which led directly to that decision. What she may not have known is why the Planning Committee resolved to grant permission. Assuming, for the moment, the counter-factual that the Planning Committee's decision had been materially affected by the Loggans Moor upgrading scheme, the question is whether Louise Wood ought reasonably to have known this. Given that, in this scenario, this fact would have been evident from the OR and/or minutes of the Committee meeting, it seems to me that she should have been aware.
93. In conclusion, had this issue been determinative of the claim, I would have decided it in favour of the claimant.
94. There is no need for me to address section 31(2A) of the 1981 Act.

H. DECISION

95. The application for judicial review is dismissed.