Michaelmas Term
[2019] UKSC 53
On appeal from: [2017] EWCA Civ 2102

JUDGMENT

R (on the application of Wright) (Respondent) *v* Resilient Energy Severndale Ltd and Forest of Dean District Council (Appellants)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Thomas

JUDGMENT GIVEN ON

20 November 2019

Heard on 22 and 23 July 2019

Appellant (1)
Martin Kingston QC
Jenny Wigley
(Instructed by Burges Salmon LLP (Bristol))

Respondent
Neil Cameron QC
Zack Simons
(Instructed by Harrison Grant)

Appellant (2)
Paul Cairnes QC
James Corbet Burcher
(Instructed by Forest of Dean District Council)

Intervener (Secretary of State for Housing, Communities and Local Government)
Richard Kimblin QC
(Instructed by The Government Legal Department)

Appellants:

(1) Resilient Energy Severndale Ltd
(2) Forest of Dean District Council

LORD SALES: (with whom Lady Hale, Lord Reed, Lord Lloyd-Jones and Lord Thomas agree)

1. This case concerns a challenge by the respondent ("Mr Wright") to the grant of planning permission by the local planning authority (the second appellant: "the Council") for the change of use of land at Severndale Farm, Tidenham, Gloucestershire from agriculture to the erection of a single community scale 500kW wind turbine for the generation of electricity ("the development"). Mr Wright is a local resident. The first appellant ("Resilient Severndale") was the successful applicant for the planning permission.

2. In its application for planning permission, Resilient Severndale proposed that the wind turbine would be erected and run by a community benefit society. The application included a promise that an annual donation would be made to a local community fund, based on 4% of the society's turnover from the operation of the turbine over its projected life of 25 years ("the community fund donation"). In deciding to grant planning permission for the development the Council expressly took into account the community fund donation. The Council imposed a condition ("condition 28") that the development be undertaken by a community benefit society with the community fund donation as part of the scheme.

3. Mr Wright challenged the grant of planning permission on the grounds that the promised community fund donation was not a material planning consideration and the Council had acted unlawfully by taking it into account. Mr Wright succeeded in his challenge before Dove J at first instance. The Court of Appeal dismissed an appeal by Resilient Severndale and the Council. They now appeal to this court.

4. The issue on the appeal is whether the promise to provide a community fund donation qualifies as a "material consideration" for the purposes of section 70(2) of the Town and Country Planning Act 1990 as amended ("the 1990 Act") and section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). These are very familiar provisions in planning law. There is also a subsidiary issue whether the Council was entitled to include condition 28 in the planning permission.

5. Section 70(1) of the 1990 Act provides in relevant part:

> "Where an application is made to a local planning authority for planning permission -

> … they may grant planning permission, either unconditionally or subject to such conditions as they think fit …"

6. Section 70(2) of the 1990 Act provides:

> "In dealing with an application for planning permission or permission in principle the authority shall have regard to -
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (aza) a post-examination draft neighbourhood development plan, so far as material to the application,
>
> (aa) any considerations relating to the use of the Welsh language, so far as material to the application;
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

7. Section 38(6) of the 2004 Act provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Policy background

8. The land in question is agricultural and is not designated for development in the development plan for the area. The proposed development is not in accordance with the development plan.

9. Paragraph 97 of the National Planning Policy Framework (March 2012) in force at the relevant time ("NPPF") states:

> "To help increase the use and supply of renewable and low carbon energy, local planning authorities should recognise the responsibility on all communities to contribute to energy generation from renewable or low carbon sources. They should:
>
> - Have a positive strategy to promote energy from renewable and low carbon sources;
>
> - Design their policies to maximise renewable and low carbon energy development while ensuring that adverse impacts are addressed satisfactorily, including cumulative landscape and visual impacts;
>
> - Consider identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, where this would help secure the development of such sources;
>
> - Support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning …"

10. Planning Policy Guidance has been issued to expand upon the guidance in the NPPF regarding renewable and low carbon energy (reference ID: 5-004-20140306, revision date 6 March 2014 - "the PPG") as follows:

> "*What is the role for community led renewable energy initiatives?*
>
> Community initiatives are likely to play an increasingly important role and should be encouraged as a way of providing positive local benefit from renewable energy development. Further information for communities interested in developing their own initiatives is provided by the Department of Energy and Climate Change. Local planning authorities may wish to

> establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership.
>
> Neighbourhood plans are an opportunity for communities to plan for community led renewable energy developments. Neighbourhood Development Orders and Community Right to Build Orders can be used to grant planning permission for renewable energy development. To support community based initiatives a local planning authority should set out clearly any strategic policies that those producing neighbourhood plans or Orders will need to consider when developing proposals that address renewable energy development. Local planning authorities should also share relevant evidence that may assist those producing a neighbourhood plan or Order, as part of their duty to advise or assist. As part of a neighbourhood plan, communities can also look at developing a community energy plan to underpin the neighbourhood plan."

11. In October 2014, the Department of Energy and Climate Change published a document containing general guidance with the title, "Community Benefits from Onshore Wind Developments: Best Practice Guidance for England" ("the DECC Guidance"). The object of the DECC Guidance was to set out principles of good practice applicable through the preparation and planning phases and on to the operational phase for onshore wind energy developments, with the aim of securing local community acceptance and support for such developments. It was published alongside a document entitled "Best Practice Guidance on Community Engagement".

12. The Ministerial foreword to the DECC Guidance included the following:

> "Communities hosting renewable energy play a vital role in meeting our national need for secure, clean energy and it is absolutely right that they should be recognised and rewarded for their contribution."

13. The Introduction stated:

> "Communities have a unique and exciting opportunity to share in the benefits that their local wind energy resources can bring

through effective partnerships with those developing wind energy projects."

14. Under the heading "What are community benefits?", the Introduction continued as follows:

> "Community benefits can bring tangible rewards to communities which host wind projects, over and above the wider economic, energy security and environmental benefits that arise from those developments. They are an important way of sharing the value that wind energy can bring with the local community.
>
> Community benefits include:
>
> 1. Community benefit funds - voluntary monetary payments from an onshore wind developer to the community, usually provided via an annual cash sum, and
>
> 2. Benefits in-kind - other voluntary benefits which the developer provides to the community, such as in-kind works, direct funding of projects, one-off funding, local energy discount scheme or any other non-necessary site-specific benefits.
>
> In addition to the above, there can also be:
>
> 3. Community investment (Shared ownership) - this is where a community has a financial stake, or investment in a scheme. This can include co-operative schemes and online investment platforms.
>
> 4. Socio-economic community benefits - job creation, skills training, apprenticeships, opportunities for educational visits and raising awareness of climate change.

> 5. Material benefits - derived from actions taken directly related to the development such as improved infrastructure.
>
> This document contains guidance on community benefit funds and benefits in-kind (points 1 and 2). The provision of these community benefits is an entirely voluntary undertaking by wind farm developers. They are not compensation payments.
>
> Material and socio-economic benefits will be considered as part of any planning application for the development and will be determined by local planning authorities. They are not covered by this guidance …"

15. Prior to October 2014, many onshore wind developers already provided voluntary contributions in various forms over the lifetime of their projects. The DECC Guidance stated:

> "The wind industry through RenewableUK has consolidated this voluntary approach by coming together to produce a protocol which commits developers of onshore wind projects above 5MW (megawatts) in England to provide a community benefit package to the value of at least £5,000 per MW of installed capacity per year, index-linked for the operational lifetime of the project.
>
> Community benefits offer a rare opportunity for the local community to access resources, including long-term, reliable and flexible funding to directly enhance their local economy, society and environment …
>
> The best outcomes tend to be achieved when benefits are tailored to the needs of the local community …"

It referred to a number of case studies where community benefit funds have been set up by wind farm developers, eg by RWE Innogy UK in respect of the Farr Wind Farm in Scotland (£3.5m over the lifetime of the wind farm).

16. However, the DECC Guidance makes clear the relationship between the guidance it gives in the context of renewable energy policy, and the planning regime.

Under the heading "Preparation phase guidance: Background to community benefits", it states:

> "This document contains guidance on community benefit funds and benefits-in kind. The provision of these community benefits are entirely voluntary undertakings by wind farm developers and should be related to the needs of the local community.
>
> These community benefits are separate from the planning process and are not relevant to the decision as to whether the planning application for a wind farm should be approved or not - ie they are not 'material' to the planning process. This means they should generally not be taken into account by local planning authorities when deciding the outcome of a planning application for a wind [farm] development.
>
> Currently the only situation in which financial arrangements are considered material to planning is under the Localism Act as amended (2011), which allows a local planning authority to take into account financial benefits where there is a direct connection between the intended use of the funds and the development.
>
> And Planning Practice Guidance [the PPG] states that, 'Local planning authorities may wish to establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership'.
>
> Socio-economic and material benefits from onshore wind developments are types of benefit that can be taken into consideration when a planning application is determined by the local planning authority and are not covered by this Guidance."

This explanation is in accordance with the general object of the DECC Guidance, which is to set out ways in which the support of local communities for wind energy development in their area might be promoted, rather than to provide policy guidance regarding the operation of the planning system. The distinction was emphasised again later in the document, under the heading "Planning phase guidance: Planning and the role of local authorities":

> "Local authorities can play an important role in supporting community benefit negotiations by supporting the development of neighbourhood, community or parish plans and having positive local plan policies.
>
> Community benefits should be considered separately from any actions or contributions required to make a development acceptable in planning terms. …
>
> The primary role of the local planning authority in relation to community benefits is to support the sustainable development of communities within their jurisdiction and to ensure that community benefits negotiations do not unduly influence the determination of the planning application.
>
> There is a strict principle in the English planning system that a planning proposal should be determined based on planning issues, as defined in law. Planning legislation prevents local planning authorities from specifically seeking developer contributions where they are not considered necessary to make the development acceptable in planning terms. Within this context, community benefits are not seen as relevant to deciding whether a development is granted planning permission. …"

17. As will be seen below, I consider that this is an accurate statement of the conventional and well-established rule of planning law, which stems from the interpretation of the relevant planning statutes.

Factual background

18. The Resilience Centre Ltd ("Resilience Centre") was established in 2009 to focus on the provision and use of capital to generate social benefits as well as financial returns. It aims to help build resilience in society in the context of climate change and limited natural resources, with a view to improving local economies.

19. To these ends, the Resilience Centre has developed a model for investment in community energy projects. This involves the Resilience Centre and the landowner obtaining planning permission for a project, in this case the erection of a wind turbine to generate electricity, but with a commitment to open up the project to individual investors from the local community once permission has been

obtained. However, according to the proposal in the present case, there would still be a commercial return for the Resilience Centre and the landowner.

20. Since the Cooperative and Community Benefit Societies Act 2014 came into force on 1 August 2014, the Resilience Centre's legal structure of choice has been to involve a community benefit society registered under that Act. This has tax advantages. By section 2(2)(a)(ii) of that Act, it is a condition of registration of such a society that its business is conducted for the benefit of the community.

21. In the present case, the Resilience Centre says that the development will provide various benefits for the local community. These include the opportunity for individuals in the community to invest in the project by subscribing for shares in the proposed community benefit society, with estimated returns of 7% pa, and the community fund donation. The money donated is to be allocated to community causes by a panel of local people.

22. On 29 January 2015 Resilient Severndale, using the Resilience Centre as its agent, applied to the Council for planning permission for the development, relying amongst other things on these benefits for the local community. The application focused on the benefits of renewable wind energy and the policy emphasis, including in the DECC Guidance, on the engagement of local people in the energy process.

23. An officer's report dated 7 July 2015 advised the Council's Planning Committee ("the Committee") that the community benefit fund was not a material consideration that could be taken into account when considering the planning application, because (i) there were no clear controls and/or enforcement measures that could ensure the benefit was delivered, and in any event, (ii) the fund could be used to finance projects that were unconnected to low carbon energy generation.

24. Resilient Severndale submitted further observations to the Council, which resulted in consideration of the application being deferred. Further submissions were then made, to the effect that the project would commit up to £1.1m in direct community benefits (ie 4% of turnover, together with £600,000 that it was estimated would be earned by the turbine over and above the community benefit society's commitments which, under the terms of the society, would also be dedicated to the community), and referring to a successful appeal to an inspector in relation to Alvington Wind Farm. Further officer reports were then produced. The final report dated 11 August 2015 concluded that the community benefit fund was a material consideration in favour of the development.

25. The same day, 11 August 2015, the Committee resolved to approve the application. It is common ground that its members had included the local community donation fund as a material consideration in favour of the proposals as part and parcel of the basket of socio-economic benefits which were relied upon by Resilient Severndale.

26. On 30 September 2015, the planning application was granted subject to a number of conditions, including condition 28, as follows:

> "The development is to be undertaken via a Community Benefit Society set up for the benefit of the community and registered with the Financial Conduct Authority under the Co-Operative and Community Benefit Societies Act 2014. Details of the Society number to be provided to the local planning authority prior to commencement of construction.
>
> Reason: to ensure the project delivers social, environmental and economic benefits for the communities of Tidenham and the broader Forest of Dean."

27. The fund, once set up, was to be allocated by a panel of local individuals established for that task. The objects of the fund would include any community project. Evidence in the proceedings indicates that a similar fund in relation to a wind turbine at St Briavels had been distributed for (amongst other things) the creation of a village handyman service, the maintenance of publicly accessible defibrillators in the village, the purchase of waterproof clothing to enable young members of the community to participate in scheduled outdoor activities in inclement weather, and to provide a meal at a local public house for the members of a lunch club for older people in the village and club volunteers.

28. Mr Wright challenged the decision to grant planning permission by way of judicial review, on the ground that the community benefit fund donation was not a material consideration for planning purposes. He submitted that it did not serve a planning purpose, it was not related to land use, and it had no real connection to the proposed development. At first instance Dove J accepted those submissions and made an order quashing the permission. He applied what he took to be settled law regarding what constitutes a material consideration for the purposes of the planning statutes derived from a series of authorities, in particular *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 ("*Newbury*"), *Westminster City Council v Great Portland Estates Plc* [1985] AC 661 ("*Westminster*"), *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd*

(1993) 67 P & CR 78 ("*Plymouth*"), *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 ("*Tesco*") and *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20; [2011] 1 AC 437.

29. The Council and Resilient Severndale appealed. Their appeal was dismissed by the Court of Appeal in a judgment by Hickinbottom LJ, with which McFarlane and Davis LJJ agreed. Hickinbottom LJ agreed with the reasons given by Dove J. He relied on the same case law and also on *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66; [2017] PTSR 1413 ("*Aberdeen*"), a decision which post-dated Dove J's judgment but which, in the view of Hickinbottom LJ, confirmed that the judge's approach was correct. Davis LJ gave a short concurring judgment to emphasise that the question was not whether the proffered benefits were desirable, but whether in planning terms they were material and whether they satisfied the criteria of materiality set out in the speech of Viscount Dilhorne in *Newbury* at p 599H ("the *Newbury* criteria"). Davis LJ also expressed agreement with the judgment of Dove J.

30. The Council and Resilient Severndale now appeal to this court. They contend that Dove J and the Court of Appeal erred in their approach to the question of what counts as a material consideration for the purpose of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act and that they should have found that the community benefits to be derived from the development constitute a material consideration which the Committee was entitled to take into account when it decided to grant planning permission for the development. The main burden of presenting the oral argument for the appellants was assumed by Mr Martin Kingston QC, for Resilient Severndale. The Secretary of State for Housing, Communities and Local Government was given permission to intervene orally and in writing. He was represented by Mr Richard Kimblin QC. Mr Kimblin made submissions which were supportive of the arguments for the appellants. He invited the court to "update *Newbury* to a modern and expanded understanding of planning purposes".

Discussion

31. Planning permission is required "for the carrying out of any development of land": section 57(1) of the 1990 Act. So far as is relevant, "development" is defined in section 55(1) to mean "the making of any material change in the use of any buildings or other land". Section 70(2) of the 1990 Act requires a planning authority to have regard to the development plan and certain other matters "so far as material to the application" and to "any other material considerations": that is to say, material to the change of use which is proposed. Similarly, in relation to an application for planning permission, the "material considerations" referred to in section 38(6) of the 2004 Act are considerations material to the change of use which is proposed.

32. In *Newbury* at pp 599-601 Viscount Dilhorne treated the scope of the concept of "material considerations" in section 29(1) of the Town and Country Planning Act 1971 (which corresponds to what is now section 70(2) of the 1990 Act) as the same as the ambit of the power of a local planning authority (in what is now section 70(1)(a) of the 1990 Act) to impose such conditions "as they think fit" on the grant of planning permission. It had been established in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 ("*Pyx Granite*"), *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 ("*Fawcett Properties*") and *Mixnam's Properties Ltd v Chertsey Urban District Council* [1965] AC 735 ("*Mixnam's Properties*") that the power to impose conditions was not unlimited. Viscount Dilhorne referred to the following statement by Lord Denning in *Pyx Granite* at p 572, approved in *Fawcett Properties* and *Mixnam's Properties*:

> "… the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

Viscount Dilhorne referred to other authority as well and set out the *Newbury* criteria at p 599H as follows:

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

33. Lord Edmund-Davies agreed with the speech of Viscount Dilhorne. Lord Fraser of Tullybelton approved the same three-fold test in his speech at pp 607-608, as did Lord Scarman at pp 618-619 and Lord Lane at p 627. The view of the law lords was that a condition attached to the grant of planning permission for the change of use of two hangars to use as warehouses on condition that they were removed at the end of a specified period of time did not fairly or reasonably relate to the permitted development and was therefore void.

34. The equation of the ambit of "material considerations" with the ambit of the power to impose planning conditions is logical, because if a local planning authority has power to impose a particular planning condition as the basis for its grant of permission it would follow that it could treat the imposition of that condition as a material factor in favour of granting permission. The relevance of the *Newbury*

criteria to determine the ambit of "material considerations" in what is now section 70(2) of the 1990 Act and section 38(6) of the 2004 Act is well established and is not in contention on this appeal.

35. The *Westminster* case was concerned with the lawfulness of a policy adopted by the City of Westminster as part of its local plan to promote and preserve certain long established industries in central London and to limit the grant of planning permission for office development to exceptional cases. The House of Lords applied the same test for whether a matter was a material consideration in the preparation of a local plan as in relation to the grant or refusal of planning permission (under provisions of the Town and Country Planning Act 1971 which have been re-enacted in the 1990 Act), and held that the policy was concerned with a genuine planning purpose, namely the continuation of industrial use important to the character and functioning of the city, and hence was lawful.

36. Lord Scarman gave the sole substantive speech, with which the other members of the appellate committee agreed. He referred at p 669 to the statement by Lord Parker CJ in *East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484, at p 491, that when considering whether there has been a change of use of land "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier." Lord Scarman pointed out (p 670) that development plans are concerned with "development", "a term of art in the planning legislation which includes now, and has always included, the making of a material change in the use of land." He held that Lord Parker's dictum applies to the grant or refusal of planning permission, to the imposition of conditions and also to the formulation of planning policies and proposals, and said (p 670):

> "The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development … is whether it serves a planning purpose: see [*Newbury*], 599 per Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land."

37. It has long been recognised that a consequence of this approach of relying on the *Newbury* criteria to identify "material considerations" is that planning permission cannot be bought or sold. In *City of Bradford Metropolitan Councils v Secretary of State for the Environment* (1986) 53 P & CR 55, at 64, Lloyd LJ said that this was "axiomatic". In *Plymouth* this was taken to be a correct statement of the law (at p 83, per Russell LJ; p 84, per Evans LJ; and p 90, per Hoffmann LJ). *Plymouth* was concerned with whether a developer's agreement to provide certain off-site benefits could properly be regarded as fairly and reasonably related to the development for which permission was sought, so as to constitute a material

consideration which the local planning authority was entitled to take into account when granting permission. The *Newbury* criteria were applied in order to answer that question. On the facts, a sufficient connection with the proposed development was found to exist. That was also the case in relation to certain off-site benefits taken into account in *Tesco*: see pp 782-783 per Lord Hoffmann, as he had become. In both cases, there was a sufficiently close nexus between the off-site benefits to be provided and the proposed change in the character of the use of the land involved in the proposed development.

38. However, in *Plymouth* Hoffmann LJ made reference at p 90 to a general principle that planning control should restrict the rights of landowners only so far as may be necessary to prevent harm to community interests and referred to the concept of materiality in that regard, "because there is a public interest in not allowing planning permissions to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development". This statement was not qualified in *Tesco*. Therefore, a condition or undertaking that a landowner pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient connection with the proposed development as to qualify as a "material consideration" in relation to it.

39. A principled approach to identifying material considerations in line with the *Newbury* criteria is important both as a protection for landowners and as a protection for the public interest. It prevents a planning authority from extracting money or other benefits from a landowner as a condition for granting permission to develop its land, when such payment or the provision of such benefits has no sufficient connection with the proposed use of the land. It also prevents a developer from offering to make payments or provide benefits which have no sufficient connection with the proposed use of the land, as a way of buying a planning permission which it would be contrary to the public interest to grant according to the merits of the development itself.

40. In this court in *Aberdeen* these points were emphasised by Lord Hodge (with whom the other members of the court agreed) at paras 43-46. In that case, planning obligations imposed on developers to make contributions to assist with development of infrastructure around Aberdeen were found to be unlawful because they were not related to the use of the land for which the developers sought planning permission. At para 43, Lord Hodge cited with approval a passage from the judgment of Beldam LJ in *Tesco Stores Ltd v Secretary of State for the Environment* (1994) 68 P & CR 219, at 234-235, including the following:

> "Against the background that it is a fundamental principle that planning permission cannot be bought or sold, it does not seem

> unreasonable to interpret [subsection 106(1)(d) of the 1990 Act] so that a planning obligation requiring a sum or sums to be paid to the planning authority should be for a planning purpose or objective which should be in some way connected with or relate to the land in which the person entering into the obligation is interested."

41. At para 44 Lord Hodge continued:

> "A planning obligation, which required as a pre-condition for commencing development that a developer pay a financial contribution for a purpose which did not relate to the burdened land, could be said to restrict the development of the site, but it would also be unlawful. Were such a restriction lawful, a planning authority could use a planning obligation in the context of an application for planning permission to extract from a developer benefits for the community which were wholly unconnected with the proposed development, thereby undermining the obligation on the planning authority to determine the application on its merits. Similarly, a developer could seek to obtain a planning permission by unilaterally undertaking a planning obligation not to develop its site until it had funded extraneous infrastructure or other community facilities unconnected with its development. This could amount to the buying and selling of a planning permission. Section 75, when interpreted in its statutory context, contains an implicit limitation on the purposes of a negative suspensive planning obligation, namely that the restriction must serve a purpose in relation to the development or use of the burdened site. An ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice. It is that implicit restriction which makes it both ultra vires and also unreasonable in the *Wednesbury* sense for a planning authority to use planning obligations for such an ulterior purpose."

42. The protection for landowners on the one hand and for the public interest on the other has been held to be established by Parliament through statute, as interpreted by the courts. Parliament has itself in this way underwritten the integrity of the planning system. In *Tesco* Lord Hoffmann pointed out that the question of whether something is a material consideration is a question of law: p 780. Statute cannot be overridden or diluted by general policies laid down by central government (whether in the form of the NPPF or otherwise), nor by policies adopted by local planning authorities. As Lord Hodge said in *Aberdeen* at para 51, "The inclusion of a policy in the development plan, that the planning authority will seek … a planning

obligation from developers [to contribute money for purposes unconnected with the use of the land], would not make relevant what otherwise would be irrelevant."

43. The same point can be made about the policy statements in the DECC Guidance. In any event, as set out above, that document itself explains that the guidance it contains has to be read subject to the established legal position regarding what qualifies as a material consideration for the purposes of the grant of planning permission.

44. In the present case, the community benefits promised by Resilient Severndale did not satisfy the *Newbury* criteria and hence did not qualify as a material consideration within the meaning of that term in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Dove J and the Court of Appeal were right so to hold. The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community. Moreover, they did not fairly and reasonably relate to the development for which permission was sought. Resilient Severndale required planning permission for the carrying out of "development" of the land in question, as that term is defined in section 55(1) of the 1990 Act. The community benefits to be provided by Resilient Severndale did not affect the use of the land. Instead, they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold. This is so whether the development scheme is regarded as commercial and profit-making in nature, as Hickinbottom LJ thought it was (para 39), or as a purely community-run scheme to create community benefits.

45. For the appellants, Mr Kingston submitted that the planning statutes had to be regarded as "always speaking" so far as concerns what counts as a "material consideration", and that this meant that the meaning of this concept should be updated in line with changing government policy. I do not agree. The meaning of the term "material consideration" in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act is not in doubt and updating the established meaning of the term is neither required nor appropriate. To say that the meaning of the term changes according to what is said by Ministers in policy statements would undermine the position, as explained above, that what qualifies as a "material consideration" is a question of law on which the courts have already provided authoritative rulings. The interpretation given to that statutory term by the courts provides a clear meaning which is principled and stable over time. I note that Parliament has considered it necessary to amend section 70(2) when it wishes to expand the range of factors which may be treated as material for the purposes of that provision, for instance in relation to the Welsh language: subparagraph (aa).

46. Mr Kingston relied on statements in *Fawcett Properties* which he maintained showed that policies do inform the meaning of the statutory term "material consideration", and suggested that since this authority was referred to and relied upon by the House of Lords in *Newbury* the interpretation of "material consideration" taken from the latter case had to be read as subject to what was said about this in *Fawcett Properties*. However, in my view, nothing said in *Fawcett Properties* supports Mr Kingston's submission.

47. In that case, a local planning authority had granted permission for the building of two cottages on green belt land subject to a condition that their occupation was limited to persons whose employment is or was in agriculture, forestry or an industry related to agriculture, and their dependants. At the time of imposing the condition the local planning authority had issued a draft outline development plan which indicated that its object in relation to the area where the cottages were to be built was to maintain the normal life of an agricultural district. When imposing the condition the authority stated that the reason for doing so was that it "would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes". The appellants later acquired the freehold and brought proceedings to challenge the validity of the condition on various grounds, including that (i) the imposition of a condition according to the personality of the occupier rather than with reference to the user of the premises was outside the power of the local planning authority to impose such conditions as it thought fit and (ii) the condition bore no reasonable relation to the policy in the outline plan or to any other sensible planning policy. Lord Jenkins described the first challenge as the "broad" ultra vires claim and the second as the "narrow" ultra vires claim: pp 683-684. The nature of these challenges was explained clearly by Romer LJ in the Court of Appeal ([1959] Ch 543 at 572-573 and 568-572, respectively), in a judgment approved by the House of Lords on these points. The House of Lords dismissed the challenge and upheld the condition.

48. It is ground (i) which is relevant for present purposes. On that, Romer LJ held that a condition framed with reference to the occupation of the inhabitants of the cottages was sufficiently linked to the user of the land in question as to be permissible: [1959] Ch 543, 572-573; and to similar effect see 558-559 per Lord Evershed MR and 578-579 per Pearce LJ. This reasoning was upheld in the House of Lords: p 659 (Lord Cohen), p 667 (Lord Morton of Henryton), p 675 (Lord Keith of Avonholm), p 679 (Lord Denning) and pp 683-684 (Lord Jenkins). The reasoning in the Court of Appeal and in the House of Lords on this point is fully in line with Viscount Dilhorne's statement of the first two of the *Newbury* criteria. It offers no support for the submission that the statutory concept of a "material consideration" varies according to the content of planning policy documents.

49. Mr Kingston, however, in seeking to advance that submission, sought to rely on passages in the speeches in the House of Lords which were directed not to ground

(i) and the question whether the condition related to the development permitted, in the sense of being sufficiently connected with the proposed change in use of the land, but rather to ground (ii): pp 660-661 (Lord Cohen), 674-675 (Lord Keith), 679 (Lord Denning) and 684-685 (Lord Jenkins). Ground (ii) was concerned with a different question, arising under the third of what were later called the *Newbury* criteria, namely whether the condition was rationally connected, not with the proposed change in use of the land, but with the policy in the outline plan or "any other sensible planning policy" (pp 660-661 per Lord Cohen). The Court of Appeal dismissed this challenge, on the basis that there was a sufficient rational connection between the condition and the policy in the outline plan. All members of the appellate committee of the House of Lords came to the same conclusion. Contrary to the submission of Mr Kingston, their reasoning in that regard does not indicate that the statutory concept of a "material consideration" varies according to the content of planning policy documents.

50. Mr Kingston also sought to gain support for his argument from a series of cases in which policy was relied upon in order to justify the imposition of conditions or, he submitted, to identify material considerations for the purposes of the planning statutes. Again, however, on proper analysis these authorities do not help him.

51. In *R (Copeland) v London Borough of Tower Hamlets* [2010] EWHC 1845 (Admin) a local planning authority had to consider whether to grant planning permission for a fast-food outlet near a school, which was said to conflict with government policy on healthy eating for children. The authority proceeded on the footing that this was not capable of being a material consideration. However, at the hearing the authority's counsel accepted that whether the site was used for a fast-food outlet was a matter which "relates to the use of land and is thus capable of being a planning consideration" (para 25) and the decision was quashed, because the planning committee had not appreciated, as they should have done, that this was a matter capable of being a material consideration to which they could give consideration. The concession made by counsel was clearly correct: whether or not the property was used as a fast-food outlet was very directly a matter concerning its use. The policy did not affect that one way or the other. It was relevant to a different question, whether in policy terms the grant of planning permission would be justified or not.

52. The same analysis applies in relation to the other authorities on which Mr Kingston relied. In each case, a condition was imposed or planning permission was refused on the basis of a consideration which directly related to the use of the land in question and hence which satisfied the second of the *Newbury* criteria. The policy justification for the condition or for treating the consideration as having significant weight was a distinct matter, as in *Fawcett Properties*, and it was in relation to this that reference to policy guidance was significant. Contrary to the submission of Mr

Kingston, the policy guidance did not affect the meaning of the term "material consideration" in the planning statutes.

53. In *R v Hillingdon London Borough Council, Ex p Royco Homes Ltd* [1974] QB 720 the Court of Appeal held in relation to the grant of planning permission for a residential development that the imposition of conditions that the houses built should be occupied by persons on the planning authority's housing waiting list was ultra vires, on the basis that the conditions were a fundamental departure from the rights of ownership and were so unreasonable that no local planning authority, appreciating its duty and properly applying itself to the facts, could have imposed them: the imposition was found to be *Wednesbury* unreasonable (see pp 731-732 per Lord Widgery CJ, referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). The result was that the planning permission was quashed. Mr Kingston rightly points out that later national planning policy guidance contemplated that use of land for the provision of affordable housing would be a desirable policy objective and that conditions in relation to residential developments requiring a proportion of dwellings to be made available for affordable housing are now accepted as lawful and are very common. However, this is because the alteration in national policy has made it clear that a reasonable local planning authority, acting within the parameters of the *Wednesbury* decision, can properly find such a condition to be justified in terms of planning policy. Contrary to Mr Kingston's submission, the change in the legal position has not occurred because the meaning of the statutory term "material consideration" has been altered by reason of the promulgation of new national planning policy. Mr Kingston's submission again confuses two different questions.

54. This point is borne out by the decision of the Court of Appeal in *Mitchell v Secretary of State for the Environment* (1995) 69 P & CR 60, on which Mr Kingston also relied. In that case, a developer applied for planning permission to convert a building from use for multiple occupation by way of bedsitting rooms to a small number of self-contained flats. There was a draft development plan of the local planning authority which set out a policy to resist such changes of use, on grounds of the local need for affordable housing in the authority's area. The authority refused permission for the development, relying on the policy in the draft plan as a material consideration. The developer appealed to the Secretary of State. The Secretary of State dismissed the appeal and refused planning permission, treating the need for affordable housing as a material consideration as the authority had done. The developer challenged the Secretary of State's decision, contending that the policy of the authority was not a material consideration, and was successful at first instance in having the decision quashed. The Court of Appeal allowed the Secretary of State's appeal. Saville LJ (with whom the other members of the court agreed) observed at p 62 that the proposed change from multiple occupation to self-contained flats was a change in the character of the use of the land within the guidance given by Lord Scarman in *Westminster* at p 670 (see above). He held that the need for affordable

housing in a particular area was a relevant policy consideration which justified the Secretary of State in deciding to refuse to grant permission for the development in question. Balcombe LJ gave a short concurring judgment, referring to planning policy guidance regarding the desirability of provision of affordable housing. There was no question in the case as to whether what was in issue sufficiently related to the proposed use of the land itself: clearly, the configuration of the accommodation in the property directly related to the use of the land. The question was whether there was sufficient policy justification for insisting that the use of the land should be consistent with the draft development plan policy to promote affordable housing, and it was held that there was. Balcombe LJ regarded it as material to that question that national planning policy guidance had been issued stating that this should be treated as a material planning consideration.

55. *R (Welcome Break Group Ltd) v Stroud District Council* [2012] EWHC 140 (Admin) concerned the grant of planning permission to develop land as a motorway service area upon condition of the acceptance of obligations by the developer and site owner in an agreement made under section 106 of the 1990 Act which included that a local employment and training policy should be submitted for the approval of the local planning authority and that reasonable endeavours would be used to stock goods and produce from local producers for sale at the site. A challenge to quash the grant of planning permission, including on the ground that the condition and obligations were immaterial to the merits of the proposed development, was dismissed. The judge implicitly found at paras 50 and 53 that there was a sufficient connection between the obligations and the proposed development (that is to say, the proposed use of the land) so that these were matters capable of falling within the statutory concept of "material considerations", and separately held that there was sufficient policy justification for the authority to be entitled to impose the condition as a matter of planning judgment (paras 49-53). It was in relation to this latter issue that he took into account national planning policy guidance and the relevant regional policy dealing with support for the sustainable development of the regional economy. So, again, this authority provides no support for Mr Kingston's submission.

56. The same points apply as regards *Verdin (t/a The Darnhall Estate) v Secretary of State for Communities and Local Government* [2017] EWHC 2079 (Admin). The case concerned a challenge to a decision of the Secretary of State refusing planning permission for residential development. The claimant was successful on a number of grounds, including that the Secretary of State had wrongly rejected, without giving adequate reasons, a proposed condition requiring local firms to be used for the development and a proposed condition requiring local procurement as part of the proposed development. However, there was no issue regarding whether these conditions sufficiently related to the proposed use of the land. It seems to have been common ground that they did. Rather, the grounds of challenge were analysed in relation to the distinct question whether there was a

sufficient policy basis on which these conditions could be said to be material considerations. It was in relation to that question that the judge had regard to national policy in the NPPF and the development plan regarding sustainable economic development: see paras 92-98 and 108-114, respectively. The two conditions were potentially material in terms of policy, and the Secretary of State had not given adequate reasons to explain why he had rejected them.

57. Finally, Mr Kingston relied on *R (Working Title Films Ltd) v Westminster City Council* [2016] EWHC 1855 (Admin). This concerned a challenge to the grant of planning permission for erection of a building for mixed uses, including the provision within it of a community hall in accordance with a planning obligation undertaken by the developer. A ground of challenge relied on was that the local planning authority was wrong to have had regard to the community benefit from provision of the community hall as something which compensated for under-provision of affordable housing in the residential part of the development. The judge rejected the challenge, holding that this was a planning judgment which the authority was entitled to make: para 25. Again, the case provides no support for Mr Kingston's submission. The planning obligation clearly related to the use of the land, and this was not in issue. The discussion related to the policy justification for accepting such a planning obligation.

Conclusion

58. For the reasons given above, I would dismiss this appeal. I would resist Mr Kimblin's invitation on behalf of the Secretary of State that we should "update *Newbury*". In deciding to grant planning permission for the development, the Council relied on matters which do not qualify as "material considerations" for the purposes of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. That means that the grant of planning permission has rightly been quashed. It is unnecessary to give separate consideration to condition 28. The imposition of that condition cannot make an immaterial consideration into a material consideration within the meaning of the statutory provisions.