Michaelmas Term
[2022] UKSC 33
On appeal from: [2020] EWCA Civ 1331

JUDGMENT

DB Symmetry Ltd and another (Respondents) *v* Swindon Borough Council (Appellant)

Before

Lord Reed, President
Lord Hodge, Deputy President
Lord Kitchin
Lord Sales
Lady Rose

JUDGMENT GIVEN ON
14 December 2022

Heard on 12 July 2022

Appellant (Swindon Borough Council)
Richard Harwood KC
Victoria Hutton
(Instructed by Swindon Borough Council)

First Respondent (DB Symmetry Ltd)
Richard Humphreys KC
(Instructed by Jones Day (London))

Second Respondent (Secretary of State for Levelling Up, Housing and Communities)
Richard Honey KC
Charles Streeten
(Instructed by Government Legal Department)

LORD HODGE (with whom Lord Reed, Lord Kitchin, Lord Sales and Lady Rose agree):

1. The principal issues on this appeal are whether it is lawful for a planning authority in granting planning permission for a development to impose a planning condition that the developer will dedicate land within the development site to be a public highway, and whether the planning condition in issue is properly construed as having that effect. The appellant, Swindon Borough Council ("Swindon BC"), submits that the Court of Appeal in *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 ("*Hall v Shoreham*") erred in law if in that case they held that a local planning authority could not lawfully require a landowner by means of a planning condition to dedicate land as a public highway and thereby avoid the payment of compensation.

(1) Factual background

2. The development site ("the site"), which comprised agricultural fields immediately south of the A420 road, is part of the proposed New Eastern Villages ("the NEV"), which lie to the north-east of Swindon. The emerging Swindon Borough Local Plan 2026 identified the NEV as a strategic allocation of land to deliver sustainable economic and housing growth, which would provide about 8,000 homes, 40 hectares of employment land and associated retail, community, education and leisure uses.

3. The NEV lie to the east of the A419 dual carriageway which runs north from the M4 motorway. The A420 cuts through the NEV and meets the A419 from the east. It is envisaged that the parts of the NEV to the south of the A420, which include the site, will be connected to the wider road network at three points: to the A420 at Symmetry Park (the connection to be from the site) and at a point further east, and a new Southern Connector Road will be built to join the NEV from the south to the A419 Commonhead Roundabout.

4. In 2014, Gleeson Development Ltd and Portfolio Holdings Ltd submitted a planning application in relation to the site for outline planning permission for:

> "employment development including B1b (research and development/light industrial), B1c (light industrial), B2 (general industrial) and B8 (warehouse and distribution), new landscaping and junction to A420 (means of access not reserved)

> Site Address: Eastern Villages South, Land at and to the South of A420 (Great Stall Middle), Swindon, Wilts."

5. On 3 June 2015 Swindon BC granted an outline planning permission for this development on the site, subject to 50 conditions. It is clear from the Illustrative Landscape Masterplan referred to in condition 50 of the outline planning permission that it was envisaged that there would be road connections between the site and other development sites which would comprise the proposed NEV located to the south of the A420. These roads would enable the other development sites to connect with the wider road network. Lewison LJ, who delivered the leading judgment in the Court of Appeal ([2020] EWCA Civ 1331; [2021] PTSR 432), described the roads within the site shown in the Illustrative Landscape Masterplan in these terms (paras 3 and 4 of his judgment):

> "[3] … Within the western part of the site, a road ran southward from a new junction with the A420 and continued to the southern boundary. It was labelled 'North-South access road'. Halfway down that road a roundabout was shown, from which another road, described on the plan as the 'East-West spine road', ran to the eastern boundary of the site. The portion of the North-South access road which ran from the A420 junction to the roundabout was described as a 'dual carriageway' on the Masterplan. The southerly continuation of the North-South access road from the roundabout was labelled 'North-South link to wider NEV' and described as a single carriageway. The annotations to each road were that they contained a 'carriageway' and 'footpaths/cycleways to both sides', giving the respective widths (between 59 and 61 metres).
>
> [4] Three development areas were indicated: area A on the eastern side of the North-South access road, and to the north of the East-West spine road; area B to the south of the East-West spine road; and area C, on the western side of the North-South access road, above the roundabout, and quite close to the A420. An Addendum to the Design and Access Statement stated that it had been amended 'to show highways extending to the site boundaries'. The purpose of that amendment was to 'show the connectivity of the site to surrounding land'."

6. It was an important element of the proposed NEV that the development sites within the NEV should be connected with each other and the wider road network. Lewison LJ referred to the report of the planning officer to Swindon BC's planning committee when it considered the application for outline planning permission for the site, which pointed out that the site was part of a wider development proposal and was to "integrate physically and functionally" with adjoining development. The NEV were to be a series of interconnected villages and each scheme had to demonstrate how it fitted into the wider NEV. The report stated that the proposal "must provide connections to future development within the [NEV] in the interests of enabling the comprehensive and sustainable development of the NEV as a whole".

7. It is clear from her recommendation that the planning officer envisaged that the outline planning permission, if granted, would be subject to the satisfactory completion of a planning obligation under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act") containing an infrastructure package to mitigate the impact of the development. I discuss the difference between planning conditions and planning obligations at paras 50-64 below. For the moment, it is sufficient to say that planning obligations are those which are, generally, agreed between the local planning authority and the owner of the land under section 106 of the 1990 Act. A planning obligation differs from a planning condition, which is imposed by the local planning authority. It is, as discussed below, a common planning practice to include in an agreement under section 106 of the 1990 Act an obligation on the developer and owner of the land to dedicate part of its land for public use. This was not done in this case. A section 106 agreement was entered into on 2 June 2015 but it contained no provision requiring the dedication of the access roads within the site as public highways.

8. Further, as Lewison LJ recorded in para 6 of his judgment:

> "One section of the report was headed 'Infrastructure requirements'. Paragraph 63 said that the site was 'a key gateway' of the NEV; and para 64 referred to the need for proposals to meet the infrastructure needs to mitigate the impact of the development. Para 65 said that the transport requirements arising from the scheme included 'a combination of direct provision of infrastructure and financial contributions towards mitigation of direct impact.' But importantly, the legal context in which they were discussed in para 64 was regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010/948) dealing with planning obligations rather than conditions. It is also

> of note that the heading to what became condition 37 included a reference to a 'section 38 agreement'."

9. The reference in the report to the section 38 agreement is to an agreement under section 38 of the Highways Act 1980 between a person and the local highways authority under which the person dedicates a way as a highway: see para 33 below. There was also no agreement under section 38 of the Highways Act 1980.

10. Swindon BC now asserts that condition 39 of the outline planning permission imposes on the developer the obligation of dedicating the access roads shown as highways on the Illustrative Landscape Masterplan as public highways. Condition 39 states:

> "Roads
>
> The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.
>
> Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

11. Swindon BC asserts that this condition requires the developer to dedicate the roads as public highways. As explained below, the developer, DB Symmetry Ltd ("DBSL"), and the Secretary of State for Levelling Up, Housing and Communities (the "Secretary of State"), who are the respondents, contend that the condition simply regulates the physical attributes of the roads to be constructed before the site is brought into use. As this dispute, the second principal issue on this appeal, concerns the correct interpretation of this planning condition it is necessary to set out some other relevant conditions which provide the context of the disputed condition.

12. Condition 3 required the submission of reserved matters and the implementation of the development to be in broad accordance with the Illustrative Landscape Masterplan. The internal access points into development areas A and B

were to be subject to detailed assessment at the reserved matters stage. The reason for this condition was:

> "to ensure… that the arrangement of employment uses on site is acceptable and allows for north/south and east/west highway linkages to site boundaries in the interests of the proper and comprehensive planning of the wider New Eastern Villages Development Area."

13. Condition 37, which is headed "Local Highways Authority" provides:

> "The proposed estate roads, footways, footpaths, verges, junctions, street lighting … vehicle overhang margins, … accesses, carriageway gradients, driveway gradients, car parking and street furniture shall be constructed and laid out in accordance with details to be submitted and approved by the Local Planning Authority in writing before their construction begins. For this purpose, plans and sections, indicating as appropriate, the design, layout, levels, gradients, materials and method of construction shall be submitted to the Local Planning Authority.
>
> Reason: to ensure that the roads are laid out and constructed in a satisfactory manner."

14. Condition 38 is headed "Foot/Cycleways" and provides:

> "The proposed footways/footpaths shall be constructed in such a manner as to ensure that each unit, before it is occupied or brought into use, shall be served by a properly consolidated and surfaced footway/footpath to at least wearing course level between the development and highway.
>
> Reason: to ensure that the development is served by an adequate means of access."

15. Several other conditions were imposed in the interests of safety. Those included condition 34, which required parking and turning areas to be constructed in

accordance with Swindon BC's parking standards; condition 40, which related to a minimum footway width for a proposed bus shelter; condition 42, which laid down the minimum distance between entrance gates and the back edge of the highway; condition 43, concerning the gradient of private accesses from the highway within 10 metres from junctions with "the public highway"; condition 44, which prohibited bringing the development into use until required visibility splays for all private accesses were provided to the required standard; and condition 45, which required detailed junction analysis of junctions with the North-South access road.

16. The planning obligation under the section 106 agreement required the East-West spine road to be constructed to base course level to the site boundary in accordance with condition 39 of the planning permission within one year from the first occupation of area A. It also required the north-south link to the wider NEV, that is the North-South access road south of the roundabout, to be constructed to base course level to the site boundary within one year of the first occupation of area B, again in accordance with condition 39. The planning obligation stated that the final alignment of those roads which were shown indicatively on the Illustrative Landscape Masterplan was to be as approved by Swindon BC in the reserved matters approval pursuant to condition 37 of the outline planning permission.

17. The planning obligation also required the owners of the site on receipt of notice from Swindon BC to transfer land adjoining the A420 and to the west of the North-South access road to Swindon BC for the purpose of carrying out improvements to the A420 and to grant Swindon BC a licence to enter other land for the same purpose. The land to be transferred, which was referred to as "the A420 Improvements Land", was either to be dedicated by Swindon BC as a highway maintainable at public expense or to be used solely for undertaking the improvements to the A420. The section 106 agreement contained no obligation to transfer or dedicate the North-South access road or the East-West spine road. As a result, the dispute between the parties has focused on the terms of the planning condition, condition 39.

18. The first respondent, DBSL, which purchased the site, challenged the assertion by Swindon BC that condition 39 required it to dedicate the access roads within the site as (public) highways. It was not disputed at the hearing of this appeal that the commercial reality was that, if condition 39 did not have the meaning for which Swindon BC contended, DBSL could seek a financial contribution from the owners and developers of neighbouring development sites to the south of the A420 in return for a licence to use the main access roads within the site or their dedication as public highways. On 19 June 2017 DBSL applied under section 192 of the 1990 Act for a certificate of lawfulness of proposed use or development ("the certificate") to the effect that the formation and use of private access roads in the site as private access

roads was lawful. Swindon BC refused to grant the certificate by a decision dated 21 August 2017.

19. DBSL appealed to the Secretary of State, whose planning inspector, having considered the parties' written submissions, allowed the appeal. She stated in para 20 of her decision:

> "In my view, Condition 39 simply imposes a requirement concerning the manner of construction of the access roads and requires them to be capable of functioning as a highway along which traffic could pass whether private or public. It does not require the constructed access roads to be made available for the use by the general public. I believe that a reasonable reader would adopt the Appellant's understanding of the term 'highway' as used in the context of the condition as a whole with the clear reference to the construction of the roads as opposed to their use or legal status. The distinct inclusion of the term 'public highway' in the reason for imposing Condition 39 reinforces my view on that point."

The Inspector interpreted the section 106 agreement as requiring only the construction of the two roads to base course level and not that they be made available to public use. On the certificate she gave as the reason for issuing the certificate the following:

> "The proposed use of the access roads within the development site for private use only would be in accordance with Conditions 37 and 39 of [the] planning permission … and the terms of the section 106 legal agreement dated 2 June 2015. The private use of the access roads in connection with the development is therefore authorised by that planning permission and would be lawful."

(2) The statutory review

20. On 14 December 2018 Swindon BC applied to the High Court for statutory review of the Inspector's decision under section 288 of the 1990 Act. In a judgment dated 1 July 2019 Mrs Justice Andrews quashed the Inspector's decision. In

summary, Andrews J analysed the dispute as a question of the construction of condition 39. Counsel for the Secretary of State and DBSL both referred her to *Hall v Shoreham* but did not argue that that decision rendered condition 39 unlawful if it were construed in the manner for which Swindon BC argued. Instead, counsel relied on that case and subsequent case law as an important aspect of the factual and legal context against which the planning permission fell to be construed.

21. Andrews J, after citing authorities on the interpretation of planning conditions, focused her attention on the meaning of the word "highway". Noting that section 336 of the 1990 Act applied definitions from the Highways Act 1980, including "bridleway", "footpath" and "highway", "except insofar as the context otherwise requires", she discussed the definition of "highway" in the Highways Act 1980 but did not find it illuminating. She found the definitions of the various sub-species of a "highway" to be of more significance as each definition involved the public having a right of way over it. She also derived support for her conclusions from legal dictionaries and other dictionaries, none of which interpreted "highway" as meaning a private road. While accepting that conditions 38 and 39 were concerned with ensuring appropriate construction and safety standards, she opined that that did not mean that they were not also concerned with roads and paths over which there were public rights of way. She drew support from the context of the permission as a whole and the factual context. In relation to the former, in contrast with other conditions which spoke of "roads" or "roadways", condition 39 was concerned with access roads and described them as "highways". Condition 3 of the permission and the section 106 agreement, which was part of the factual background, made it clear that Swindon BC considered it essential that there were connections between the various development sites in the NEV development area. She considered that it made no sense for the North-South access road and the East-West spine road to be privately owned roads over which the public could not pass as of right.

22. Andrews J stated that a condition which required transport links, including footpaths and cycle links, between the various development sites within the NEV, was for a planning purpose, fairly and reasonably related to the development of the site and could not be described as irrational. She concluded that the word "highway" in condition 39 was to be given its ordinary meaning as a public road. The use of the phrase "public highway" in the reason for condition 39 was probably a reference to an adopted highway running outside the site. She concluded that condition 39 required the construction of public roads that were fully functional for public use. Andrews J therefore set aside the certificate.

23. DBSL appealed to the Court of Appeal with the permission of that court. On 16 October 2020 the Court of Appeal (Lewison, Arnold and Nugee LJJ) unanimously

allowed the appeal, upholding the Inspector's decision and the certificate. Lewison LJ gave the leading judgment. In summary, he held that a condition that requires a developer to dedicate land which he owns as a public highway without compensation would be an unlawful condition "at least at this level in the judicial hierarchy". He expressed the view that the interpretation of condition 39 which the Inspector adopted was a realistic one, even if it was not the most natural, and gave 11 reasons for that view. He invoked the validation principle, namely that the court will prefer an interpretation that renders a document valid rather than void. Thus, if a document were capable of being read in two ways, each of which was realistic, the court should adopt the meaning which would result in validity: *Egon Zehnder Ltd v Tillman* [2019] UKSC 32; [2020] AC 154, paras 38 and 42 per Lord Wilson. He therefore concluded that condition 39 should be given the meaning which the Inspector ascribed to it.

24. Swindon BC appeals to the Supreme Court with the permission of this court.

(3) The appellant's challenge

25. With no disrespect to the skilful arguments of counsel, the parties' positions can be summarised briefly. Richard Harwood KC for Swindon BC argues that condition 39 properly construed imposes an obligation on the developer to dedicate the new access roads as highways, thereby giving the public right of passage over those roads and ensuring that various parts of the NEV would be linked by highways. He observes as common ground that it would have been reasonable and lawful for Swindon BC to require that the access roads be dedicated as highways through the mechanism of a planning obligation under section 106 of the 1990 Act without the payment of compensation. But, he submits, a local planning authority can impose a planning condition to achieve the same result. Such a condition would, he submits, be for a planning purpose, fairly and reasonably relate to the development permitted and would not be irrational in public law terms. If, contrary to his submission on *Hall v Shoreham*, the judgments of the Court of Appeal in that case are properly interpreted as meaning that it is unlawful to impose a planning condition that requires a developer to dedicate land which it owns as a public highway without the payment of compensation, the Court of Appeal erred in so holding.

26. Richard Humphreys KC for DBSL and Richard Honey KC for the Secretary of State both argue, first, that the Court of Appeal in the present case was correct in following the landmark decision of *Hall v Shoreham* and in holding that a planning condition cannot require the dedication of public rights of way over land without compensation when, in the same 1990 Act, provision is made for the developer to agree with the local planning authority to confer such rights, and, absent such

agreement, powers are conferred to acquire such rights compulsorily, subject to the payment of compensation. Secondly, the Inspector was correct to interpret condition 39 as being concerned with the standards of construction of the access roads and the timing of their construction and not, as Swindon BC contends, as requiring the developer to dedicate public rights of way over the access roads.

27. There are therefore two principal issues on this appeal. The first is a general legal question whether a local planning authority can impose by a planning condition an obligation on the developer of land to dedicate roads, which it constructs as part of its development, as public highways. The second is a question specific to this grant of planning permission. It is whether condition 39 is concerned with the standard of construction of access roads, as the Inspector and the Court of Appeal held, or, as Swindon BC contends and the High Court held, with the dedication of public rights of way over the access roads. I will consider each issue in turn after I have set out the relevant statutory provisions.

(4) The relevant statutory provisions

The Town and Country Planning Act 1990

28. Section 70 of the 1990 Act provides so far as relevant:

> "(1) Where an application is made to a local planning authority for planning permission –
>
> (a) … they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> …
>
> (2) 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, …
>
> (c) any other material considerations."

Section 72 of the 1990 Act makes further provision for the imposition of planning conditions. It provides so far as relevant:

> "(1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section –
>
> (a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; …"

29. Section 106 of the 1990 Act provides for the creation of planning obligations by agreement or otherwise. The section provides so far as relevant:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section … as 'a planning obligation'), enforceable to the extent mentioned in subsection (3) –
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or

(d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically."

The power to require the payment of money (subsection (1)(d)) was introduced into the 1990 Act by the Planning and Compensation Act 1991, section 12. Subsection (3) provides the general rule that an authority can enforce a planning obligation against the person entering into the obligation and against any person deriving title from that person. Subsection (9) provides that a planning obligation is to be entered into by an instrument executed as a deed which states that the obligation is a planning obligation, and identifies (a) the land in which the person entering into the obligation is interested, (b) the person entering into the obligation and his interest in the land and (c) the local planning authority by whom the obligation is enforceable.

30. Sections 226 and 227 of the 1990 Act provide for the compulsory acquisition of land for development and other planning purposes. I set out their provisions so far as relevant:

Section 226:

"(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area –

(a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment, or improvement on or in relation to the land; or

(b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. …

(7) The Acquisition of Land Act 1981 shall apply to the compulsory acquisition of land under this section. …"

Section 227:

"(1) The council of any county, county borough, district or London borough may acquire by agreement any land which

they require for any purpose for which a local authority may be authorised to acquire land under section 226.

(2) The provisions of Part 1 of the Compulsory Purchase Act 1965 (so far as applicable), other than sections 4 to 8, section 10 and section 31 shall apply in relation to the acquisition of land under this section."

31. Section 336 of the 1990 Act defines "land" as meaning "any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land."

The Community Infrastructure Levy Regulations 2010

32. Regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010/948) ("the 2010 Regulations") limits a planning authority's ability to rely on a planning obligation as a reason for granting a planning permission. Regulation 122 provides:

"(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

(2) Subject to paragraph (2A), a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is –

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development."

The Highways Act 1980

33. The Highways Act 1980 contains a mechanism by which a person who proposes to dedicate a way as a highway can seek to have the proposed highway maintained at public expense: section 37. Section 38 empowers a highway authority by agreement to "adopt", that is to undertake the maintenance of, a way. Section 38(3) provides:

> "A local highway authority may agree with any person to undertake the maintenance of a way-
>
> (a) which that person is willing and has the necessary power to dedicate as a highway; or
>
> (b) which is to be constructed by that person, or by a highway authority on his behalf, and which he proposes to dedicate as a highway;
>
> and where an agreement is made under this subsection the way to which the agreement relates shall, on such date as may be specified in the agreement, become for the purposes of this Act a highway maintainable at the public expense."

34. Section 278 of the Highways Act 1980 empowers the highway authority to arrange for the construction of a road at the developer's expense. Subsection (1) of that section provides:

> "(1) A highway authority may, if they are satisfied it will be of benefit to the public, enter into an agreement with any person –
>
> (a) for the execution by the authority of any works which the authority are or may be authorised to execute, …
>
> on terms that that person pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement."

35. By these means the highway authority, which may or may not be the same as the local planning authority, can arrange by agreement with the developer that a road be constructed at the developer's expense and then dedicated as a highway maintainable at public expense. If a highway is maintainable at public expense, it vests in the highway authority: section 263. This involves the vesting in the highway authority of those rights in the vertical plane of the highway which are necessary to enable them to perform their statutory functions including control, repair and maintenance: *Southwark London Borough Council v Transport for London* [2018] UKSC 63; [2020] AC 914, paras 8 and 12 per Lord Briggs. If the highway is not maintainable at public expense it remains vested in the owner of the soil but is subject to public rights of passage.

(5) Analysing the statutory provisions and case law in relation to planning conditions

36. The wording of sections 70 and 72 of the 1990 Act and their statutory predecessors does not expressly set clear limits on the scope of planning conditions. Section 70 speaks of the local planning authority imposing "such conditions as they think fit". Section 72 speaks of "regulating the development or use of any land under the control of the applicant", but that section is expressly without prejudice to the generality of section 70(1). Nonetheless, those statutory provisions relating to planning conditions do not exist in a vacuum but fall to be interpreted in the context of the 1990 Act as a whole, including the provisions relating to planning obligations and compulsory purchase, which I discuss below. Over the years it has been judge-made law which has clarified the meaning of the statutory provisions relating to planning conditions and has established an understanding of their role in the planning system.

37. In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 the Court of Appeal (Lord Denning, Hodson and Morris LJJ) addressed the predecessor provisions of sections 70 and 72 of the 1990 Act which were contained in section 14 of the Town and Country Planning Act 1947 ("the 1947 Act"). The court confirmed the tests that planning conditions must fairly and reasonably relate to the permitted development and that the planning authority must not use its powers for an ulterior purpose: p 572 per Lord Denning, a statement with which Hodson LJ (pp 578-579) and Morris LJ (p 590) agreed.

38. This statement was approved by the House of Lords in *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, the case which upheld the validity of a planning condition which limited the occupation of cottages to agricultural workers. See Lord Keith of Avonholm at p 674, Lord Jenkins at p 685. In *Mixnam's Properties*

Ltd v Chertsey Urban District Council [1965] AC 735, the House of Lords addressed the extent of a local authority's power to impose conditions on the grant of a licence under section 5 of the Caravan Sites and Control of Development Act 1960, which restricted the rents to be charged and gave security of tenure to the occupiers of the caravans. In so doing, Lord Reid approved of and applied Lord Denning's dictum in *Pyx Granite* to which I have referred. He stated:

> "Whether general words in an Act should be given a limited meaning is a question which frequently arises, but so much depends on the particular circumstances that general statements of the law in other cases can be no more than guides. … I think that the general effect of the authorities is properly stated in Maxwell on Interpretation of Statutes 11th ed, p 79: 'General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act.'" (pp 751-752)

The issue on this appeal is to establish the extent of the limitations which the objects of the 1990 Act impose on the general words in sections 70 and 72.

39. It is necessary to examine in more detail the judgments of the Court of Appeal in *Hall v Shoreham* as this case plays a central role in this appeal. Hall's development site lay between the north bank of the river Adur at Shoreham-by-Sea and the main Brighton Road. To the west of the development site was land owned by Southern Wharves Ltd. To the east of the development site was further land owned by Hall and, beyond that, land owned by the British Transport Commission. All the land on that narrow strip of land between the Brighton Road and the river was scheduled for industrial development. Hall applied for planning permission to erect a concrete aggregate grading plant and a ready mixed concrete plant and to provide a further access to the main Brighton Road. Because that road was already suffering from excessive traffic, the Council imposed planning conditions which were intended to avoid unnecessary further congestion on the main road in the interests of highway safety. The first two, which were not contentious, included a condition to reserve land at the north edge of the development site for widening the main road. The remaining conditions, which were the subject matter of the dispute, required Hall to construct an ancillary road to the south of the reserved land over the frontage of the development site (ie immediately south of the land reserved for widening the main road) at their own expense, when required to do so by the local planning authority, and to "give right of passage over it to and from such ancillary roads as may be constructed on the adjoining land" (condition 3). Hall was allowed a temporary access onto the main road for a period of five years or until the ancillary roads had

been constructed and a new access to the main road had been constructed (condition 4). What was envisaged was that the several sites lying between the river and the main road would be served by an ancillary road running parallel to and lying to the south of the main road with a new access onto the main road. Hall sought a declaration that these conditions were void for uncertainty and were ultra vires. Their challenge based on uncertainty failed but the ultra vires challenge succeeded. This may have been a Pyrrhic victory as the Court of Appeal held that the ultra vires conditions were fundamental to the grant of the planning permission which was, accordingly, void.

40. Willmer LJ interpreted the conditions as requiring Hall to give a right of passage to any person coming from or going to the ancillary roads to be constructed on the adjoining land – "the plaintiffs' ancillary road is virtually to be dedicated to the public" (p 246). He referred to the *Mixnam's Properties* case as it was determined in the Court of Appeal ([1964] 1 QB 214) and summarised the principles laid down in that case. The first was that the conditions should not make a fundamental alteration in the general law relating to the rights of the person on whom they were imposed, unless the power to do so is expressed in the clearest possible terms. He held that the interference with Hall's rights of property such as their right to prevent other people from passing over their land did not breach this principle. The second principle, which was the principle affirmed in *Pyx Granite*, that the conditions imposed must fairly and reasonably relate to the permitted development, was not breached because the conditions were in connection with the permitted development. It was the third principle – "[that] the conditions imposed must not be so unreasonable that it can be said that Parliament clearly cannot have intended that they should be imposed" (p 247) – that he found to be breached. He expressed concern that a requirement in effect to dedicate the ancillary road to the public could result in Hall having no redress if the road became choked with traffic or required repair because of the weight of traffic. He also expressed concern that Hall would be at the mercy of the adjoining landowners once its temporary access was closed after the construction of the ancillary road and without remedy if access along the ancillary road were obstructed. The local planning authority could have reserved a strip of land for the ancillary road and at the appropriate time could acquire the land compulsorily under the Highways Act 1959, on payment of compensation. While Hall and the adjoining owners could relieve themselves of the burden of upkeep of the road by requiring the Council to declare the highway maintainable at public expense, they would receive no compensation for having constructed the road at their own expense.

41. Bearing in mind that the Council could acquire the land for the ancillary road by compulsory purchase on payment of compensation, Willmer LJ concluded that the impugned conditions were so unreasonable as to be ultra vires. In reaching that

conclusion he referred to a judgment of the Judicial Committee of the Privy Council in *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343, in which Lord Warrington of Clyffe, delivering the Board's judgment, stated:

> "In considering the construction and effect of this Act, the Board is guided by the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."

Willmer LJ thus applied an early example of the principle of legality in deciding that, in the absence of clear wording in the 1947 Act, the imposition of the impugned planning conditions taking away Hall's right of property without paying compensation was ultra vires on the ground of *Wednesbury* unreasonableness. The statement in the *Colonial Sugar Refining* case remains good law, subject to Lord Reid's qualification that such a parliamentary intention may appear "by irresistible inference from the statute read as a whole": *Westminster Bank Ltd v Beverley Borough Council* [1971] AC 508, 529.

42. Harman LJ expressed doubt as to whether the impugned condition 3 sought to confer only a private right of passage on adjoining landowners or a more burdensome right in favour of any person who gained access to the ancillary roads. Contrary to the views of the other Lord Justices, he considered the condition to be void for uncertainty. Turning to the *Wednesbury* challenge, he stated, correctly in my view, that the local authority's power to attach conditions to a planning permission "is, on the face of it, unlimited" but that a question of vires arose. Observing that compensation would be payable if the land were to be acquired compulsorily under the Highways Acts, he stated (p 256):

> "It may be that it is within the power of the authority to require an applicant to grant his neighbour a right of way over his land as a condition of its development. It is not in my judgment within the authority's powers to oblige [the applicant] to dedicate part of his land as a highway open to the public at large without compensation, and this is the other possible interpretation of the condition. As was pointed out to us in argument, the Highways Acts provide the local authority with the means of acquiring lands for the purpose of highways, but that involves compensation of the person whose land is taken, and also the consent of the Minister."

43. Pearson LJ interpreted condition 3 as providing for the construction of an accommodation road and requiring Hall to give a right of passage over their stretch of the accommodation road to persons coming from or going to the continuation of the accommodation road on either side of Hall's development site. The right of passage conferred was only a "quasi highway" because there was no dedication of the road as a highway; members of the public could not enforce the right of passage, but the Council could enforce the planning condition. He agreed with Willmer LJ that the condition was ultra vires on the ground of unreasonableness but on the basis that it was in conflict with the general law of highways which provided that, when land is taken for the purpose of making a highway, the owner of the land is entitled to compensation. In so holding he relied on the first and third of the three principles which the Court of Appeal laid down in *Mixnam's Properties* and which Willmer LJ summarised (para 40 above).

44. There are differences in approach between the three Lord Justices, as I have shown. Further, their interpretation of the condition as requiring the ancillary road "*virtually* to be dedicated to the public" or as "*in effect*" a dedication of the land as a highway (Willmer LJ at pp 246 and 249, emphasis added) and as creating "a quasi-highway" (Pearson LJ at p 260) means that they were not addressing a condition which in terms required the dedication of the ancillary road as a highway. Nonetheless, in my view *Hall v Shoreham* is authority by analogy for the proposition that a local planning authority cannot use a planning condition to require a landowner to dedicate land as a public highway.

45. In reaching its view the Court of Appeal considered the validity of a planning condition which compelled the landowner "virtually" to dedicate the ancillary road to the public where the authority had the option of compulsory purchase under the Highways Act 1959 which would have entitled the landowner to compensation. The reasoning of the court, with its emphasis on the circumvention of the compensation regime under the Highways Act 1959, encompasses a planning condition which required a landowner to dedicate land as a public highway.

46. This is how the decision in *Hall v Shoreham* has been understood in case law thereafter. In *R v Hillingdon London Borough Council, Ex p Royco Homes Ltd* [1974] 1 QB 720, the Divisional Court held that planning conditions, which purported to require that houses in a residential development, for which planning permission was sought, were to be occupied by people on the council's housing waiting list and with security of tenure for 10 years, were ultra vires. Lord Widgery CJ, with whom Melford Stevenson and Bridge JJ agreed, discussed (at p 730) the case of *Hall v Shoreham* and stated that the terms on which the Council required the ancillary road to be used were "such as almost to make it equivalent to a public highway." He continued (pp 731-732):

> "I find *Hall's* case [1964] 1 WLR 240 helpfully similar to the situation which is before us. In *Hall's* case the local authority, with the best of motives, wanted in effect a new extension to the public highway and thought it right to require the developer to provide it at his own expense as a condition of getting planning permission. That was rejected in the Court of Appeal because it was a fundamental departure from the rights of ownership and was so unreasonable that no local authority, appreciating its duty and properly applying itself to the facts, could have reached it. …"

47. Further, as Lewison LJ has demonstrated in paras 39-41 of his judgment, *Hall v Shoreham* has been interpreted as holding that it was unreasonable for the local planning authority to impose the condition because the authority could have exercised powers of compulsory acquisition under the Highways Act 1959; imposing the condition had deprived the landowner of its entitlement to compensation. See *Hartnell v Minister of Housing and Local Government* [1965] AC 1134, p 1173 per Lord Wilberforce; *Westminster Bank Ltd v Beverley Borough Council* [1969] 1 QB 499, 529 per Diplock LJ; *Leeds City Council v Spencer* [2000] LGR 68, 78-79 per Brooke LJ.

48. In my view there is no substance in the submissions by Swindon BC that the decision in *Hall v Shoreham* is confined to its own facts, or that it matters that the developer in that case had not proposed the ancillary road as part of its development but had provided space for it on its plans at the request of the planning authority. The principle established in that case is of more general application. Further, I do not accept that the submission, that public authorities may use powers which do not involve the payment of compensation in preference to those which do, provides an answer in this case. That principle is vouched by the speech of Lord Reid in the *Westminster Bank Ltd* case in the House of Lords ([1971] AC 508, pp 529-530) and by the judgment of Lord Carnwath in *Cusak v Harrow London Borough Council* [2013] UKSC 40; [2013] 1 WLR 2022, para 27. In the latter case see also Lord Neuberger, para 69. The existence of the principle however does not establish that there is a power to be exercised which does not involve the payment of compensation. Whether there is such a power was the logically prior question which was addressed in *Hall v Shoreham*.

49. The court in *Hall v Shoreham* focused on the scope of the power to impose planning conditions where there were powers of compulsory acquisition under the Highways Act 1959. It did not have to consider the power of compulsory acquisition under the 1947 Act as it was available only when the land had been designated in the development plan for such acquisition: the 1947 Act, section 38. Compulsory

acquisition under the 1947 Act was therefore not an option. The provision of expanded powers of acquisition, which are now in section 226 of the 1990 Act, was not enacted until the Town and Country Planning Act 1968, section 28, but the introduction of those wider powers of acquisition in the planning legislation rather than solely in the highways legislation would not have been relevant. If section 226 of the 1990 Act had then existed, it would not have altered the court's reasoning. Further, the power to acquire land by agreement and with the consent of the Minister under section 40 of the 1947 Act, the predecessor of section 227 of the 1990 Act, would not have been relevant to the question whether the planning authority could use planning conditions to circumvent the payment of compensation because the agreement would most likely have included the payment of consideration for the acquisition.

50. The court in *Hall v Shoreham* also did not address section 25 of the 1947 Act, the predecessor of section 106 of the 1990 Act, which provided for an agreement between the local planning authority and the landowner for the purpose of restricting or regulating the development or use of the land. Section 25 of the 1947 Act differed from section 106 of the 1990 Act; it required the local planning authority to obtain the approval of the Minister, but it might have been an option open to the Council. The court did not consider the possibility that the local planning authority could achieve the dedication of the ancillary road by such agreement with the landowner to create a planning obligation, which was then known as a planning agreement. That, however, does not affect the validity of the court's reasoning. If the Court of Appeal had considered the predecessor to section 106 of the 1990 Act, its reasoning would not have differed. As I shall explain, there is a fundamental difference between achieving such a result by agreement and imposing that result by planning condition. While there are, as Swindon BC submits, some planning conditions which cannot be imposed without the agreement of the landowner, they are few and far between and are not relevant in this case.

51. In the well-known case of *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 ("*Newbury*") the House of Lords confirmed that the power to impose planning conditions was not unlimited and that there were three legal tests for the validity of such conditions: (1) the conditions must be imposed for a planning purpose and not for an ulterior one, (2) they must fairly and reasonably relate to the permitted development, and (3) they must not be so unreasonable that no reasonable planning authority could have imposed them. See Viscount Dilhorne pp 599-600, with whom Lord Edmund-Davies agreed; Lord Fraser of Tullybelton pp 607-608; Lord Scarman pp 618-619; Lord Lane p 627. Lord Scarman found the first two tests in the express words of section 29(1) of the Town and Country Planning Act 1971 (now section 70 of the 1990 Act) in its reference to material provisions of the development plan and other material considerations. Whether or not the first test is

to be found in the express words of the section, that test has been an established part of our planning law since Lord Denning articulated the test in *Pyx Granite* in 1958 and arises from the statutory context of the section: see *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66; 2018 SC (UKSC) 75; [2017] PTSR 1413 ("*Elsick*"), para 29. Lord Scarman identified the third test as the application to planning law of the more general public law test of *Wednesbury* unreasonableness (p 619). Viscount Dilhorne (p 600) cited *Hall v Shoreham* as an example of the third test.

52. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 ("*Tesco Stores Ltd*") concerned the question whether a planning obligation to build a link road offered by a developer was sufficiently related to the proposed development of a superstore as to constitute a material consideration in the grant of a planning permission for that development. In that case Lord Hoffmann, in his discussion of the validity of planning conditions, described *Hall v Shoreham* as "the landmark case" (p 772) which "exercised a decisive influence upon the development of British planning law and practice" (p 773). He quoted central government guidance (para 63 of Circular 1/85) which he suggested was intended to reflect its ratio decidendi:

> "No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute except where there is specific statutory authority. Conditions requiring, for instance the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. Similarly, permission cannot be granted subject to a condition that the applicant enters into an agreement under section 52 of the Act [now section 106 of the Act of 1990] or other powers. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works, eg provision of an access road, which are directly designed to facilitate the development."

53. While Lord Hoffmann's discussion was obiter and was not addressed by the other Law Lords, there can be little doubt that *Hall v Shoreham* has influenced not only government policy but also the understanding of the role of planning conditions among people who engage with or operate the planning system. Indeed, *Hall v Shoreham* is consistent with government guidance from the early years of the planning system and appears itself to have reflected that guidance. In the Ministry of

Local Government and Planning Circular No 58/51 which was entitled "The Drafting of Planning Permissions" and was issued on 10 September 1951, it was stated (para 12) that "The Town and Country Planning Act is an Act for regulating the development and use of land; and the powers which it confers are only available for those purposes". It continued:

> "Moreover, it will often be found that matters which are of proper concern to planning are already regulated either by statute or common law. In such cases it is generally undesirable to seek to cover the same ground by attaching conditions to a planning permission. The existence of the condition will not free the developer from his other responsibilities; if the requirements are the same the condition is unnecessary, while, if they conflict, confusion will result. … But, in general, the powers of the Planning Act ought not to be used to duplicate or alter the impact of more specific legislation, particularly if the result would be to deprive the developer of compensation to which he would otherwise have been entitled."

Under the title of "Improper Conditions", para 13 stated:

> "It is a general principle that no payment of money or other consideration can be required when granting a statutory consent except where there is specific authority. Conditions requiring, for example, the cession of land for road improvement or for open space should not therefore be attached to planning permissions. …"

54. Government policy on the scope of planning conditions has remained substantially the same in relation to the payment of money and the dedication of roads as public highways. In the (1995) DOE Circular 11/95 it is stated:

> "Conditions Requiring a Consideration for the Grant of Permission
>
> 83. No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute, except where there is specific statutory authority. Conditions requiring, for

> instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works on land within the application site, to overcome planning objections to the development eg provision of an access road. Further advice on this and on agreements with developers to cover such matters is given in "Planning Obligations" (DOE Circular 16/91, WO 53/91)
>
> …
>
> Annex B: Conditions which are unacceptable
>
> 4. To require that the land in front of the buildings shall be made available for future road widening. This condition improperly requires land to be made available as part of the highway (*paragraph 72*).
>
> 5. To require that a lay-by shall be constructed and thereafter assigned to the highway authority (*paragraph 72*). …"

Similarly, in the 2014 National Planning Practice Guidance it is stated:

> "Are there circumstances where planning conditions should not be used? …
>
> Conditions requiring land to be given up:
>
> Conditions cannot require that land is formally given up (or ceded) to other parties, such as the Highway Authority. …"

Those statements of government policy are not legally binding but they demonstrate an established understanding as to the scope of planning conditions which is relevant to the interpretation of condition 39, which is the second issue on this appeal.

(6) The use of planning obligations

55. It is not disputed that in this case Swindon BC could have achieved the dedication of the access roads as highways by means of a planning obligation under section 106 of the 1990 Act, the relevant provisions of which I set out in para 29 above. I accept as correct the parties' understanding in that regard. It has for some time been a matter of government policy that developers, rather than the public sector, should meet the external costs of a development, including the provision of infrastructure, such as roads, drainage, schools and community facilities, to accommodate the development. At the same time, government policy and the law have rejected the "buying and selling of planning permissions" where a local planning authority makes exorbitant demands of a developer or a developer offers planning gain which is not sufficiently related to its proposal in the hope of obtaining planning permission.

56. The law contributes to the avoidance of this mischief by (a) delimiting the validity of a planning obligation, and (b) circumscribing the relevance of a planning obligation as a material consideration in the determination of a planning application.

57. In relation to the former, it is well established that a planning authority can achieve, by obtaining the agreement of a landowner to a planning obligation, a purpose which it could not achieve by imposing a planning condition. In *Good v Epping Forest District Council* [1994] 1 WLR 376, the Court of Appeal recognised that the two statutory powers were distinct: Ralph Gibson LJ giving the judgment of the court at p 387. A planning authority can enter into an agreement with the owner of the land for the purpose of restricting or regulating the development or use of the land in the ways set out in section 106. In *Tesco Stores Ltd* the House of Lords approved the judgment in *Good v Epping Forest*, recognising that a planning obligation did not have to satisfy the second of the *Newbury* tests, ie there was no requirement that it must fairly and reasonably relate to the permitted development: Lord Keith of Kinkell p 769. The first and third *Newbury* tests must, however, be satisfied. In his judgment in *Tesco Stores Ltd* Lord Hoffmann stated (p 779):

> "The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in [*Good v Epping Forest*], the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable."

58. I note in this regard the opinion of Lord MacLean in the Outer House of the Court of Session in *McIntosh v Aberdeenshire Council* 1999 SLT 93. He held that a planning agreement, by which the developer of housing agreed to construct on his proposed development site and thereafter allow the use without payment of a road to provide access to any future housing development to the west of that site, was valid because it restricted the owner's use of his land for a sound and proper planning purpose.

59. Lord Hoffmann in *Tesco Stores Ltd* went on to state (p 779) that it did not follow that because, on the authority of *Hall v Shoreham*, a condition imposing an obligation to cede land or pay money would be regarded as *Wednesbury* unreasonable, the same would be true of a refusal of planning permission if a developer was unwilling to enter into a similar planning obligation. In my view the more significant legal constraint on the abuse of planning obligations comes from two sources.

60. First, judge-made law has placed limits on the relevance of a planning obligation in a planning authority's determination of an application for planning permission. In *Tesco Stores Ltd* the House of Lords held that an offered planning obligation which has nothing to do with a proposed development cannot be a material consideration and can be regarded only as an attempt to buy planning permission. Where the planning obligation is related to the development proposal in a way which is not trivial, the weight to be given to the obligation in determination of the application for planning permission is a matter within the discretion of the planning authority. See also the judgment of this court in *Elsick* paras 43-44, and in *R (Wright) v Forest of Dean District Council* [2019] UKSC 53; [2019] 1 WLR 6562 ("*Wright*"), in which Lord Sales stated (para 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."

In *Wright* the court was addressing a planning condition under section 70 of the 1990 Act and not a planning obligation, but the passage which I have quoted applies to both. The planning condition sought to reflect a developer's offer by requiring the annual payment of a community donation out of the turnover of the wind turbine for the development of which planning permission was sought. The court held that the community benefits did not have a planning purpose or relation to the proposed development and were therefore not a material consideration. The planning permission was therefore quashed. In my view, it would have made no difference if the developer had included the offer in a planning obligation as it also would have breached the first of the three *Newbury* criteria in that the community benefits did not have a planning purpose. It would also not meet the requirements of regulation 122 of the 2010 Regulations (para 32 above).

61. In passing I observe that Lord Sales in *Wright*, para 53, addressed an argument that planning policy had moved on since the 1970s and had altered what amounted to material considerations and therefore what would be considered to be *Wednesbury* unreasonable. He acknowledged that changes in national planning policy, such as the recognition of a local need for affordable housing, have resulted in planning conditions, which require a proportion of dwellings in a development to be made available as affordable housing, being recognised as lawful and being adopted widely by planning authorities. But that had not altered the meaning of "material considerations". Planning law from the outset has in large measure removed a landowner's right to develop its property as it pleases. In my view, requiring a proportion of a proposed housing development to be affordable housing is an aspect of planning policy regulating the development of land. The developer is restricted in how it develops its land; it can construct such houses and voluntarily sell them to members of the public. Such a requirement is different in principle from the imposition by a planning condition of a requirement that the landowner cedes rights to the public such as by dedicating roads within a development site as public highways. *Wright* therefore gives no support for the view that a local planning authority may use a planning condition to require the dedication of a road as a public highway. The options available to the planning authority to achieve such a result are obtaining an agreement from the landowner to create a planning obligation or the acquisition of the relevant land by compulsory purchase or agreement.

62. Secondly, Parliament also has intervened by imposing limits on the use of planning obligations in regulation 122 of the 2010 Regulations, which I have quoted in para 32 above. A planning obligation may constitute a reason for granting planning permission for the development only if three cumulative criteria are met: the planning obligation must be (a) necessary to make the development acceptable in planning terms, (b) directly related to the development, and (c) fairly and reasonably related in scale and kind to the development. As I have said, it is not disputed in this

case that a planning obligation to dedicate the access roads as public highways would be a valid planning obligation and I see no reason why such a planning obligation would not have been a material consideration in the grant of planning permission for the development.

63. It may appear to some that it does no credit to the law for it to invalidate a planning condition requiring the dedication of roads within a development site as public highways in order to facilitate the development of neighbouring sites while allowing a planning authority to request a developer to enter into an agreement to achieve that result by means of a planning obligation and to treat the existence or non-existence of such an obligation as a material consideration in the determination of the planning application. It may be thought that the developer is faced with Hobson's choice: to agree to enter the agreement creating the planning obligation or face a refusal of its planning application. There is, however, a fundamental conceptual difference between a unilaterally imposed planning condition and a planning obligation: the developer can be subjected to a planning obligation only by its voluntary act, normally by entering into an agreement with the planning authority, and not by the unilateral act of the planning authority. Further, there may be more scope for a developer to negotiate the terms of an agreement under section 106 of the 1990 Act as the planning authority will often have an interest in encouraging development within its area. The options for the planning authority, which wants to give permission to a proposed development, therefore are to negotiate an agreement with the landowner or to exercise powers of compulsory acquisition and pay compensation.

64. As I have said, the Court of Appeal's judgment in *Hall v Shoreham* is based on an early application of the principle of legality. In this regard I am mindful of the words of Browne-Wilkinson LJ in *Wheeler v Leicester City Council* [1985] AC 1054, a case which concerned the legality of a decision by a local authority to ban a rugby club from using a public recreation facility because it had not condemned a tour to South Africa during the years of apartheid, thereby interfering with freedom of the person and freedom of expression. He stated at p 1065:

> "Parliament (being sovereign) can legislate so as to do so; but it cannot be taken to have conferred such a right on others save by express words. The position is analogous to a case where, under discretionary powers of administration conferred by Parliament, an authority has sought to impose a financial charge on an individual. It is established that general words do not authorise the imposition of such a charge since no tax can be imposed save by express

parliamentary language: see *Attorney-General v Wiltshire United Dairies Ltd* (1921) 19 LGR 534; (1922) 127 LT 822."

65. I do not need to consider Article 1 of Protocol No 1 of the European Convention on Human Rights to support the view to which I have come. In conclusion on the first issue, therefore, I would hold that a planning condition which purports to require a landowner to dedicate roads on its development site as public highways would be unlawful. I reach this conclusion without regret as to hold otherwise would be to undermine a foundational rule of the planning system on which people have relied for decades and create uncertainty where there should be certainty.

(7) The interpretation of condition 39

66. In *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85 and *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 WLR 4317 this court has given guidance on the interpretation of planning conditions. In summary, there are no special rules for the interpretation of planning conditions. They are to be interpreted in a manner similar to the interpretation of other public documents. The court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. This court has rejected assertions that there can never be a term implied into a condition in a planning permission, but it has recognised that a court must exercise great restraint in implying terms into public documents which have criminal sanctions: *Trump International*, paras 33-36; *Lambeth LBC*, para 18. As a planning permission is a document created within the legal framework of planning law, the reasonable reader is to be treated as being equipped with some knowledge of planning law and practice: see the judgment of the Court of Appeal delivered by Lewison LJ in the *Lambeth LBC* case [2018] EWCA Civ 844; [2019] PTSR 143, para 52, and the judgment of Lewison LJ in the present case, para 64.

67. To prevent the reader having to refer back in this judgment it is appropriate that I set out again the words of condition 39 which fall to be interpreted on this appeal. Condition 39 states:

> "Roads
>
> The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.
>
> Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

68. In my view the condition does not purport to require the dedication of the access roads as a public highway. Instead, it addresses the quality and timing of the construction of those roads and other access facilities. While the Court of Appeal in this case relied on the validation principle in support of that interpretation (viz. para 23 above), I am persuaded that there is no need to rely on that principle as, in agreement with the Inspector and Arnold LJ, I consider that the meaning of the condition is clear. I have reached this view for the following six reasons.

69. First, the condition makes no mention of any requirement to dedicate the access roads as public highways and does not otherwise require the landowner to grant any public rights of way over those roads. The phrases that the facilities serve "a necessary highway purpose" and that each unit is "served by fully functional highway" are insufficient to support a construction of the condition as a dedication of the access roads and other facilities. Not only, as discussed in the courts below, is the word "highway" capable of bearing differing meanings, although its usual meaning is of a way over which there are public rights of way, but also the use of the word "highway" in this context, if it is referring to a public highway, is consistent with an assumption that the dedication of the access roads had been or would be dealt with in the section 106 agreement.

70. Secondly, again concentrating on the words used in the condition, the phrase "the proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose" gives no adequate guidance as to the extent of the land which it is asserted was to be dedicated as a public highway. This is in contrast with the section 106 agreement which defines the "A420 Improvements Land", which was to be transferred to Swindon BC, by reference to land indicated on an attached drawing.

71. Thirdly, the reason which Swindon BC gives for the condition discloses that the purpose of the condition is that there are to be adequate means of access to the developed units in the interests of highway safety. It addresses the need for the access roads to be constructed before the development is occupied. It does not seek to ensure that there is a public highway through the site.

72. Fourthly, while the condition speaks of a fully functional highway the reason given for the condition draws a distinction between the access roads and the public highway as the access roads etc are to provide "adequate means of access to the public highway".

73. Fifthly, the condition is located in the list of conditions in a context in which the planning authority is predominantly addressing the design, method of construction, and physical characteristics of the means of access. See conditions 37, 38, 40, and 42-45 quoted or summarised in paras 13-15 above.

74. Sixthly, the wider context of the legal framework of planning law, including the landmark case of *Hall v Shoreham*, the well-established government guidance on the imposition of planning conditions, and the practice of local planning authorities of securing the dedication of roads by means of a section 106 agreement would strongly suggest to the reader that Swindon BC did not seek to impose a requirement of the dedication of the access roads etc as public highways in this condition which, as I have said, makes no mention of such dedication.

75. Condition 39 is therefore a valid planning condition which does not purport to require the dedication of the access roads etc as a public highway.

(8) Conclusion

76. There is no doubt that in this case Swindon BC would have been wholly justified in terms of planning policy in requiring the owner of the site to dedicate the access roads within the site as a highway extending to the boundaries of the site to enable the public to have rights of access to and from the other proposed development sites in the NEV south of the A420. It could have done so by means of a section 106 agreement, but for reasons unknown it did not do so. Its attempt after the event to rely on condition 39 fails for two reasons. First, it would have been ultra vires to require the dedication of the access roads as a highway by means of a planning condition. Secondly, on a proper construction condition 39 did not purport to do so.

77. I would dismiss the appeal.