CO/3599/2015

Neutral Citation Number: [2016] EWHC 624 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
PLANNING COURT

Friday, 4 March 2016

Before:
HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

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BETWEEN:

THE QUEEN ON THE APPLICATION OF WATERMEAD PARISH COUNCIL

Claimant

and

AYLESBURY VALE DISTRICT COUNCIL

Defendant

and

CREMATORIA MANAGEMENT LTD

Interested Party

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Mr R Kimblin QC (instructed by Schwab Legal Group, Solicitors) for the Claimant
Ms C Parry (instructed by the Defendant's Legal Department) for the Defendant
Mr A Goodman (instructed by HP Public Law) on behalf of the Interested Party

Hearing date: 1 March 2016

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JUDGMENT

HHJ WAKSMAN QC:

INTRODUCTION

1. On 18 June 2015, the defendant local planning authority, Aylesbury Vale District Council ("the Council") granted planning Permission for the demolition of a restaurant and the construction of a crematorium at a known flood risk site at Watermead ("the Permission"). It was based on an officer's Report made in November 2014, shortly before the Council's planning committee met on 10 December ("the Report"). The Report recommended the grant of Permission subject to certain further conditions relating, in particular, to the mitigation of flood risk. The committee delegated the application back to the planning officer for determination, following receipt of satisfactory amended information to resolve the issues remaining which had been raised by the Environment Agency ("the EA"). This was provided and the Permission granted was accompanied by a completed post-committee delegated determination check list of the same date.

2. The claimant, Watermead Parish Council ("Watermead") is the parish council for the area in which the crematorium will be built. The interested party, Crematoria Management Ltd ("CML"), has much experience in the construction and operation of crematoria. Watermead seeks judicial review of the Permission on two related grounds, both arising from matters set out in the Report. First, the Report wrongly applied the presumption in favour of development contained in paragraph 14 of the National Planning Policy Framework ("the NPPF"). Secondly, the Report wrongly stated that a sequential test was not necessary. The Council and CML deny any unlawfulness on these grounds. CML adds that as the decision was highly likely to be the same, if carried out lawfully (on Watermead's case), I should refuse relief as a matter of discretion. It further argues that there has been a delay here, causing it prejudice, since the matter being challenged was the Report made in November 2014, while the claim was only issued on the last day of the 6-week period following the actual grant of Permission, that is on 30 July 2015. Therefore, as a matter of discretion on that ground also, relief should be refused.

RELEVANT POLICIES

3. There is no relevant development plan here in respect of flood risk at this site. I therefore turn first to the NPPF. The relevant provisions are as follows. Paragraph 14 states that at the heart of the NPPF is a presumption in favour of sustainable development which should be seen as a golden thread running both through plan making and decision taking, and on decision taking, it is said that this means that:

> " • approving development proposals that accord with the development plan without delay"
>
> And (which is this case):
>
> " • where the development plan is absent, silent or relevant policies are out-of-date, granting Permission unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> – specific policies in this Framework indicate development should be restricted."

4. There is a footnote to that last line which says:

> "For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority) designated heritage assets; and locations at risk of flooding or coastal erosion."

5. Paragraph 100 reads as follows:

> "Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, but where development is necessary, making it safe without increasing flood risk elsewhere."

6. And then it talks specifically about local plans. Paragraph 101 says:

> "The aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. The Strategic Flood Risk Assessment will provide the basis for applying this test. A sequential approach should be used in areas known to be at risk from any form of flooding."

7. Then paragraph 102 says:

> "If, following application of the Sequential Test, it is not possible, consistent with wider sustainability objectives, for the development to be located in zones with a lower probability of flooding, the Exception Test can be applied if appropriate."

8. Then it sets out what the Exception Test is, which is by reference to benefits from the development in question and what has to be demonstrated by site specific flood assessment.

9. Paragraph 103 says:

> "When determining planning applications, local planning authorities should ensure flood risk is not increased elsewhere and only consider development appropriate in areas at risk of flooding where, informed by a site-specific flood risk assessment20 following the Sequential Test, and if required the Exception Test, it can be demonstrated that:
>
> • within the site, the most vulnerable development is located in areas of lowest flood risk unless there are overriding reasons to prefer a different location; and
>
> • development is appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed, including by emergency planning; and it gives priority to the use of sustainable drainage systems."

10. Paragraph 104 then states:

> “For individual developments on sites allocated in development plans through the Sequential Test, applicants need not apply the Sequential Test. Applications for minor development and changes of use should not be subject to the Sequential or Exception Tests but should still meet the requirements for site-specific flood risk assessments."

11. And then moving on to the NPPF Planning Practice Guidance, issued in March 2014 to accompany the NPPF, there are the following provisions under Flood Risk and Coastal Change. First of all, under Section 1:

> "The National Planning Policy Framework sets strict tests to protect people and property from flooding which all local planning authorities are expected to follow. Where these tests are not met, national policy is clear that new development should not be allowed."

12. And then the main steps are set out:

> "[They] are designed to ensure that if there are better sites in terms of flood risk, or a proposed development cannot be made safe, it should not be permitted."

13. And then under Manage and Mitigate Flood Risk it says:

> " • Where development needs to be in locations where there is a risk of flooding as alternative sites are not available, local planning authorities and developers ensure development is appropriately flood resilient and resistant, safe for its users for the development's lifetime..."

14. Later on, under section 4 in relation to the sequential test, it says:

> "This general approach is designed to ensure that areas at little or no risk of flooding from any source are developed in preference to areas at higher risk. The aim should be to keep development out of medium and high flood risk areas (Flood Zones 2 and 3) and other areas affected by other sources of flooding where possible.
>
> Application of the sequential approach in the plan-making process, in particular application of the Sequential Test, will help ensure that development can be safely and sustainably delivered and developers do not waste their time promoting proposals which are inappropriate on flood risk grounds."

15. Under section 5, the aim of the sequential test was to:

> "... The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3..."

16. Under who is responsible under general section 11:

"It is for local planning authorities, taking advice from the Environment Agency as appropriate, to consider the extent to which Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. The developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere."

17. Paragraph 17 defines minor development. This means:

" • minor non-residential extensions:

industrial/commercial/leisure etc. extensions with a footprint less than 250 square metres."

and other measures which are not relevant here.

18. There are issues between the parties as to the interpretation of, and the weight to be given to, some of these provisions by an LPA, and I will deal with those questions later in this judgment.

THE FACTS

19. There is no dispute on the key underlying facts. The site abuts the River Thame north of the road called Watermead. On the opposite side of the river is Watermead Lake (see the plan at the hearing bundle 2, page 1). The existing development on the site, namely the river restaurant and associated parking was mainly in flood zone 3 with the nearby hill, which has the remains of a defunct dry ski slope being in flood zone 1. Flood zones are defined as follows:

"Zone 1 - low probability 'having a less than 1 in 1,000 annual probability of river or sea flooding'...

Zone 2 - medium probability 'land having between a 1 in 100 and 1 in 1,000 annual probability of river flooding'...

3a - high probability 'land having a 1 in 100 or greater annual probability'...

3b - functional floodplain 'this zone comprises land where the water has to flow or be stored in the time of flood.'"

20. There is an existing site plan and photograph in bundle 2 pages 6-8. The proposed development would remove the restaurant entirely and site the crematorium building higher up and inset into the hill. There would remain parking but now only for 76 cars. The car park would be made permeable and redone, and there would be associated landscaping. The previous car parking was for 125, so the number of cars would be reduced. The crematorium's site would be mainly in zone 1, whereas the restaurant was mainly in zone 3. There are plans and photographs of the proposed development at bundle 2, page 2 and 9 to 10, and that was enlarged, and what that indicates in the yellow highlighting, was showing where the crematorium was cut into the hillside, the removal of the existing restaurant lower down, outbuildings and hard paving, the car parking on the other side of the river, 33 spaces in one section, 46 in another, and the bridges which would be renovated.

21. The overall effect of the development would be to lessen the flood risk because most of the development would not be in zone 1. There would be improved flood water storage, there

would be no increased risk of flooding elsewhere, and indeed certain works would benefit adjacent areas in this respect, for example, alterations to the bridge, raising the soffit, for example, over the river at this point.

22. On 5 February 2014, CML produced its preliminary flood risk assessment ("FRA"), prepared by its consultant engineer, Mr Onions, on 2 April 2014. The EA then produces its review thereof, which stated the following:

> "Sequential Test
>
> The proposal is for a demolition and rebuild, which does not constitute a change of use. We understand the built development would be located on the slopes of the hill, mostly Flood Zone 1 but partly Flood Zone 3, and access roads will be formed on the low lying land (Flood Zone 3b). Therefore, in compliance with the national planning policy, the Sequential Test will need to be discussed with Aylesbury Vale District Council at the earliest possible opportunity.
>
> We agree this is classified as 'less vulnerable' development in the Technical Guidance to the NPPF and should the Sequential Test be passed, the build development would be appropriate in Flood Zone 3a providing the FRA demonstrations that it would not be at an unacceptable risk of flooding and will not increase flood risk elsewhere."

23. The full FRA was produced on 30 May. It took account of the EA review and at paragraph 7 under the section entitled "Policy" it referred to the NPPF and the siting of the new development, and then said:

> "Section 104 of NPPF refers to changes of use and states that these should not be subject to the Sequential Test or Exception Test, which replaces the requirements of Table 3 in the [technical guidance] TG-NPPF. The Agency does not consider this as a change of use, because it is the site not the building being refused, but it is considered [that is CML are saying] to be relevant, since there is such a dramatic benefit to the river bank conditions with the removal of the restaurant, which would not occur if this scheme was not to proceed."

24. Later it says:

> "The proposed development will improve flood storage, will not significantly affect flood flow characteristics and will therefore not cause increased flood risk elsewhere. Runoff will be attenuated to greenfield rates or less. The overall proposal would therefore be described as 'betterment'."

25. The EA did not itself take up the question of sequential test with the Council, nor did CML, despite EA's advice that it should. On 26 June the EA objected to development on several grounds, one of which related to flood risk. It said that the FRA was deficient, in particular because it did not provide an adequately detailed flood compensation scheme. However, that objection letter continued as follows:

> "The applicant can overcome our objection by submitting an FRA which covers the deficiencies highlighted above and demonstrates that the development will not

> increase flood risk elsewhere and where possible reduces flood risk overall. If this cannot be achieved we are likely to maintain our objection to the application.
>
> The applicant will need to submit a floodplain compensation scheme that is designed to provide compensation on a level for level basis."

26. The details are then set out.

27. After the submission of successive documents sent by CML to the EA to seek to deal with these points, the EA finally pronounced itself satisfied on the question of flood risk. It did so in a letter dated 20 August 2014. It said that the information address its concerns and they were able to withdraw their objection with regard to flood risk.

28. There were certain objections not concerned with flood risk which were maintained but these were later withdrawn. So far as flood risk is concerned, they said that they recommended a pre-commencement condition for details of flood compensation to be submitted, and in relation to the replacement bridge, while they were happy with its design, they would expect to see drawings showing that design.

29. The Report prepared by Mr Denman, the planning officer, contained the following passages. At paragraph 1.2 he said, in summarising the conclusion, that the proposal would constitute a sustainable form of development and, on a balanced judgment, overall the adverse impacts of the proposal do not significantly and demonstrably outweigh the benefits. Therefore, having regard to the NPPF as a whole and all relevant policies, adverse impacts would not significantly and demonstrably outweigh the benefits that would be derived from the proposal. He recommended the application be deferred, and delegated with a view to approval. The proposal is then described in some detail to the same effect as the summary which I have already given.

30. On the "Evaluation" in section 9, he said that the NPPF are important material considerations. Then at 9.3 he said:

> "Development proposals are to be considered in the context of the policies within the NPPF which sets out the presumption in favour of development at paragraph 14."

31. At 9.9 he said:

> "At the heart of the NPPF is the presumption in favour of sustainable development which should be seen as a golden thread running through both plan-making and decision-taking."

32. At paragraph 12 he refers to what sustainable development means and then back again to paragraph 14 explaining what the presumption means:

> "... unless material considerations indicate otherwise, approving development proposals that accord with the plan or where the development plan is absent, granting Permission unless any adverse impact would so significantly and demonstrably outweigh the benefits when assessed against the policy and the NPPF taken as a whole, or specific policies in the NPPF indicate development should be restricted."

33. Then, under 9.40 he refers to the NPPF at section 10. He then refers to paragraph 100. At 9.41 he says as follows, and I quote:

> "A Flood Risk Assessment was submitted with this application. This site is adjacent to the River Thame, within an area liable to flood. Initially, the proposal gave rise to objection from EA, however following a lengthy process of negotiation, the developers have amended the scheme to satisfy EA requirements in relation to flood risk (both on the site and elsewhere) and ecology. The proposal relates to an already developed site, and therefore a sequential assessment is unnecessary. Subject to amendments and additional information as recommended by EA, it is considered that the proposal would not give rise to increased flood risk. This is considered a neutral factor in the planning balance. However, in view of the fundamental importance of the flood risk issue, it is considered that the amended details of the flood compensation scheme, along with the addendum to the FRA, should be submitted and agreed prior to approval of the application."

34. And then in paragraph 9.62, he said:

> "... paragraph 14 of the NPPF requires that where the development plan is absent, silent, of relevant policies are out of date, planning Permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when addressed against the policies of the NPPF taken as a whole."

35. Then he opined that the proposal would constitute sustainable development, where there are significant benefits and that:

> "... in terms of adverse impact these are in relation to the impact on the character of the site, the adjacent land and the settlement character of Watermead. These are weighed in the planning balance and it is considered this is a balanced judgment, but overall the adverse impacts of the proposal do not significantly and demonstrably outweigh the benefits."

36. He is therefore having regard to how it is said the presumption applies in the case of where the development plan is absent.

37. In the light of what he said in paragraph 9.41, no sequential test was carried out. So far as alternative sites for crematoria are concerned, CML, as major developer of crematoria, had considered a large number of other potential sites but concluded in its assessment that this was the most suitable.

38. There is, however, one twist to all of this. In paragraph 9.39 Mr Denman referred to another site for a proposed crematorium at Bierton which also scored well in terms of location and accessibility. It was acknowledged there was likely to be a need only for one crematorium but commercial competition was not a matter for the planning authority. In each application, the need was to be determined by the operators of those facilities. It was not appropriate for an application, ie this one, to be refused on the basis as a current proposal or a recent approval for similar development on an alternative site. Proposals must be considered independently and objectively. If it results in two approvals, the promoter of each scheme must decide whether or not to proceed with the approved development.

39. Matters have moved on since then. CML challenged that permission at Bierton by way of a judicial review and it was quashed. On 14 October 2015 permission was regranted on the

basis, among other things, that there was now a need for two crematoria. CML is seeking to challenge that decision as well by judicial review.

40. As for Watermead, it had objected to the proposed development by a letter dated 3 July 2014. So far as flood risk was concerned, it alleged that there would be indisputable increased flood risk elsewhere to Watermead if the development went ahead. However, that was not so and Watermead makes no such contention now. It also said the following. It is noted that within the response from the EA a sequential test needed to be carried out and various other conditions. However, a great concern for the residents of Watermead was the ground water quality, the burial of ashes, and then it went on to deal with that matter. When the planning committee delegated the application to the planning officer for determination on 10 December, it required that the two outstanding matters were resolved to the EA's satisfaction prior to any grant, rather than making them conditions subsequent to it. One concerned flood mitigation measures and the other the height of the bridge. Further information and proposals were duly submitted as noted above. As I have indicated, on 23 February the EA pronounced itself satisfied.

THE LAW

41. The NPPF was and is not part of any relevant development plan. Accordingly section 38(6) of the Planning and Compulsory Purchase Act 2004, which concerns acting in accordance with development plans unless material considerations indicate otherwise does not apply. However, section 70 (2) of the Town and Country Planning Act 1990 does. It states that the LPA must when dealing with a planning application:

> "... have regard to the provision of the development plan so far as material to the application and to any other material considerations."

42. The NPPF is one such material consideration. It is conceded by Watermead, as it must, that an LPA is not obliged to follow the process set out in any particular part of the NPPF, even if applicable under its own terms. That follows from the use of the words "have regard to" in section 70 (2) and the undoubted power of the LPA to exercise its own planning judgment in relation to any particular material consideration. That is reflected in the judgment of the House of Lords in *Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 where, at p1450 Lord Hope said of the recently produced amendment as to the status of development plans which had previously simply been material considerations, that

> "the development plan…was something to which the planning authority was to have regard, along with other material considerations. The weight to be attached to it was a matter for judgment of the planning authority. The judgment to be exercised in the light of all material considerations and against the application for planning permission. It is not in doubt that the purpose of the amendment…was to enhance the status in the exercise of judgment of the development plan.
>
> It requires to be emphasised, however, the matter is nevertheless [ie even after its amended status], still one of judgment, and this judgment is to be exercised by the decision taker. The development plan does not, even with the benefit of section 18A have absolute authority. The planning authority is not obliged.. "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced state of the development plan will ensure that in most cases control of the development will be taken in accordance with it.

> But some of its provisions may become outdated..or circumstances may …show that they are no longer relevant. In such a case the decision where the balance lies between its provisions …and other material considerations which favour development…will continue as before to be a matter for the planning authority."

43. This commentary on the development plan prior to its amendment as an example of a material consideration is very useful in relation to the NPPF's status as a material consideration, and the flexibility that still exists, even within the development plan under its present status is also important.

44. Accordingly, the LPA is not obliged slavishly to follow the NPPF as if it were a statute. In any appropriate case, the LPA can decide on a proper exercise of its planning judgment not to follow it provided, accordingly, it is clear why it is taking that course. This will satisfy the obligation to have regard to the provision in question. The next and more detailed question concerns what is meant by various aspects of the NPPF. These must be construed objectively. I have already referred to paragraph 14 and the footnote thereto.

45. There is an issue between the parties over the interpretation of the second bullet point where specific policies in this framework indicate development should be restricted. It is easier here to take the Council and CML's interpretation first. They contend that whereas here there is a restrictive policy contained in the NPPF in relation to the development in question, because it is a flood risk area, then the presumption does not initially apply because otherwise it would run counter to an effective presumption running against the development under that restrictive policy. But, that said, if and when that policy is applied, or it does not need to be applied, then the outcome is still in favour of development, the restrictive policy having its work, as it were. The presumption in favour of development resurfaces and can be applied.

46. However, Watermead contends that where it is a development to which a restrictive policy applies then, the presumption in favour of development goes and is lost forever. I think this goes too far. As a matter of principle, where the restrictive policy has been dealt with, it is difficult to see why an overarching presumption in favour of sustainable development should not apply. It would mean that once a proposed development was in a particular area, governed by a restrictive policy, the presumption could never apply. So, for example, in relation to flood risk, if, for example, the LPA had performed the sequential test, and the site of the proposed development was the only reasonable site, and all the other measures specific to the site had been properly dealt with, why, when dealing with all the other factors, should the presumption not operate? The special circumstances arising from the site's location in a flood risk area have already been dealt with, as it were.

47. Mr Kimblin QC accepts, of course, that the absence of a presumption does not mean that Permission could not be granted. It is simply that the weighing process does not have that following wind in favour of the development, as it were. But if national policy has set out that following wind, then it is difficult to see why, *prima facie*, it should not apply in the circumstances I have referred to. Indeed, on Watermead's analysis, once a restrictive policy governs the area where the site is located, the presumption is removed, whether the policy is then applied and the development "passes" as it were, or it is not applied at all because the development is outwith it, for example, because it is no more than a of change of use. That seems odd to me. In fact, out of all of the NPPF there is only one specific reference to removal of the presumption where a restrictive policy exists. That is paragraph 119. It says:

"The presumption in favour of sustainable development (paragraph 14) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined."

48. However, as Mr Kimblin QC put it, this is a unique case because it is the only provision in the whole of the NPPF that derives from EU law. For Article 6 purposes NPPF is a plan or project. It must not contradict environmental protection. But putting that exceptional case to one side, the presumption is not otherwise removed expressly in relation to or by any other policy in the NPPF and, in my judgment, the position is as the Council and CML have put it, and not as Watermead would have it. Of course, in any given case, how much work there is left for the presumption to do after the application, or disapplication of the relevant restrictive policy will depend on the nature and scope of that policy and the facts of the case. But in our case certainly there is room for the operation of the presumption since there were many other factors in play than simply flood risk. In my judgment, therefore, there is no freestanding point of challenge arising out of the use of presumption, the presumption in this case.

49. If the Council acted lawfully with regard to the sequential test question, it did not act unlawfully by applying the presumption in the way that it did in the passages already referred to, particularly in the beginning and the end of the Report. If, on the other hand, the Council acted unlawfully in connection with the sequential test, then the presumption could not resurface, but all that does is to provide a further ground of unlawfulness.

50. I therefore turn to some issues surrounding paragraphs 100-104 of the NPPF. Watermead set great store by the first sentence of paragraph 100, the rest of that paragraph clearly being directed to the making of local plans, not deciding planning applications. The Council and CML say the first sentence also is directed only to local plans. In my judgment, this does not much matter. It is only paraphrasing the basis point made later on that the sequential test requires the local planning authority to see if there are other reasonable available sites which are appropriate for development in the lower flood risk area. See, for example, paragraph 101. The word "necessary" in paragraph 100 is not some additional condition to be satisfied. It means necessary in the sense that there are, in fact, no reasonably available alternative, appropriate sites, so the only one there is, is the site proposed. And therefore the development has to be there. But, if so, then it must be safe from flood risk and not increase flood risk elsewhere, and so on.

51. This is also reflected in paragraph 103 and Mr Kimblin QC is right to say that the question of avoiding risk at the site in question, following a site specific FRA, is dealt with after the sequential test, which, on this hypothesis, results in the site in question being the only reasonably available appropriate one. Finally, paragraph 104 provides specific exceptions for minor development and change of use. And I have already set out above how minor development is applied in so far as is relevant to this case. I should add that the sequential test process only applies at all if the development area is at risk of flooding, and that is defined as zone 2 or zone 3. If the development is a zone 1 flood risk, the flood risk process does not apply unsurprisingly since zone 1 is everywhere, rather an zones 2 and 3.

52. Against that background, I will now consider the challenge in context, and I do so by reference to the sequential test.

ANALYSIS

53. One starts with the fact that the EA considered that the sequential test should be done because the development was not a change of use. But save for its reference there to the letter of 2 April 2014 took the point no further, CML's point in the FRA was that while this was true, the fact that the existing site as a whole was being reused was relevant because there was such a dramatic benefit to riverbank conditions, due to the removal of the restaurant and overall there was betterment. The planning officer obviously had that in mind. On the face of the Report, that sort of consideration was taken up by him in his paragraph 9.41. He was not saying, in my judgment, that the development was minor development or merely change of use on a fair reading, and even without recourse to any other materials, he was surely saying that a sequential test was not required or appropriate because of the existing development at the site, a statement which has to be reviewed in context, ie what that development was and its present risk, compared with the new one. As described earlier, the crematorium would be located on higher ground, principally zone 1, and further away from the river. The undisputed evidence by that time and subject to the provision of amended flood compensation details, was that overall there would be less flood risk to the buildings and the surroundings than before. There would be some improvement to flood risk elsewhere. There would indeed be betterment.

54. However, Mr Denman has put in a witness statement to elaborate upon and give more detail to his reference to the sequential test in paragraph 9.41 not being necessary. There is some dispute about this, but first of all I need to set out what he said in the relevant paragraphs. They begin at paragraph 19.

55. He said:

> "19. I did not deal extensively with the question of whether a sequential test was required because this was not an issue raised by any of the objectors and the EA had not raised an objection on this basis. Given the large number of issues in this application there was a need to keep the Report to committee of proportionate length so the committee were able to digest it. [I interpose here to say it is right to say that mention was made in the objection letter by Watermead, but, in the context to which I have already referred, this was little more than a passing reference.] If any of the committee or objectors had raised any concerns or questions about this part of my Report either at the time or subsequently I would have explained that the relevance and the site being previously developed was as follows.
>
> 20. It did not seem to me that the NPPF specifically anticipated the situation before me, which was a case where there was an existing development on a site which was causing harm in flooding terms, and a proposed development which would reduce the flooding harm caused. It did not seem to me that having regard to the aims of the NPPF it was intended a Sequential Test should be required in this situation.
>
> 21. I was supported in this view by the fact that in my judgment the development proposed was closely analogous to 'Minor Development'".

56. He then referred to paragraph 104 and the definition of minor development. He thought that the reference to minor non-residential extensions was particularly relevant because while it was an application for demolition and rebuild, the extent of the increased enclosed footprint, as between the site of the Riviera restaurant and the site of the proposed crematorium was

less than 250 square metres. So it was relevant that the restaurant could have been extended by 250 square metres without any requirement for sequential assessment. This suggests the NPPF did not anticipate a situation where there is a slightly larger building but one which took development largely out of flood zone 3.

57. And then he said that all of this was based on what he thought of the aims of the NPPF and he set out in paragraph 24 the facts that he took into account. Although stated in a little more detail, it is broadly what he already said about the difference between the existing development and the new development and that it was less vulnerable and the fact that in that context the EA had pronounced itself fully satisfied. He then says that although a view had been expressed by the developer that the proposal comprised change of use, that was not an argument that he accepted. In fact, the passage I have referred to in the FRA is somewhat more nuanced than that in any event.

58. Watermead submits that all of this evidence is illegitimate ex post facto reasoning of the kind not permitted (see cases such as *Ermakov* [1996] 2 All ER 302). If I look at it at all, I should be very wary and give it little or no weight. I disagree, and unlike, for example, the case of *Lanner Parish Council v Cornwall Council* [2013] EWCA Civ 1290, there is no contradiction in my view between this evidence and what was said in the Report. Moreover, since no-one positively took the sequential test point, it is not surprising that Mr Denman did not dwell on it took long. In my view, Mr Denman was simply expanding upon why he had took the view and the way he had expressed it in paragraph 9.41. At the end of the day, the reasoning here is not complex. It is fairly obvious. There was an existing development with greater flood risk. The modest net increase in size of the new development was compared with the existing, and made it akin to minor development, though strictly speaking it was not. The EA was fully satisfied about the flood compensation proposed, and which would be better than the existing site development. None of that conflicts with the short statement actually made in the Report, nor do I have any reason to suppose that what Mr Denman says now was not in his head, as it were, at the time. I can, therefore, and do take it into account.

59. Against that background and since Mr Kimblin QC accepts that the Council was entitled not to follow the sequential test process if it considered it unnecessary as a matter of planning judgment, one needs to discern what the sequential test challenge actually is. It could, in theory, have been perversity or a irrationality but that has been specifically disavowed. That only leaves error of law. But what is the error? Mr Kimblin QC suggested that Mr Denman did not appreciate that the question of sequential test is a matter for the LPA to undertake but that is wholly contradicted by how he deals with it in the Report. Clearly he saw it as a matter for him, and if further support was needed, it is in his witness statement. Then it is suggested that he somehow misunderstood the NPPF. If he had supposed that there was an <u>actual</u> exception for prior developed sites, along with minor development and change of use, that would be an error, but clearly in context he was not saying that.

60. In the end, Mr Kimblin QC suggested that the misunderstanding was that he went straight to the question of site-specific flood risk compensation, and the question of whether it would increase flood risk elsewhere, rather than consider and apply the sequential test. But that is not a correct analysis of what he said, as described above. Rather, it was a consequence of his judgment that there was no need for the sequential test. So, naturally, he moved on to site specific considerations. I agree that if all the Report had said was that the sequential test was unnecessary because on a site specific basis the flood risk would be sufficiently mitigated and would not increase flood risk elsewhere, that would be to put the cart before the horse. It would assume the sequential test has been applied in favour of development,

and one goes to the next stage. But that is not the point, or certainly not the main point made by the Report on the sequential test in paragraph 9.41, clarified, insofar as necessary, by the witness statement. The main point is tied to the fact of and the comparison with, the existing development and the scale of the new development, its relevant size and the fact of betterment.

61. I cannot see that is wrong in principle or irrational for the LPA in the unusual circumstances of this case, to consider that whether the sequential test is really necessary where it is analogous to a case of minor development, as Mr Denman sets out, and as CML had consistently argued. After all, if there had been an extension of the restaurant in its current location in zone 3 of less than 250 square metres, then no Permission would have been needed.

62. This short point can be expressed another way. If the proposed development goes elsewhere, ie there was another site which was preferable under the sequential test, then the flood risk at the proposed site constituted by the restaurant would remain as well. If the development proposed, on the other hand, stayed on that site the flood risk would be mitigated overall. And it would lessen the extent of development in flood risk areas. This is precisely the sort of case where a common sense view, applying planning judgment of flood risk policy, should allow for an exception to be made. It cannot be attacked as irrational or wrong in principle, and in context I think that the reasoning behind it is clear enough.

63. I have been referred to the case of *EA v Tonbridge* [2006] PTCR 29. Here, the EA sought judicial review of the LPA's grant of planning Permission for the building of 63 sheltered accommodation apartments in a flood risk area. It argued that the LPA had failed to carry out the sequential test then required by PPGN 25, the predecessor to the current provision. In setting out the principle, Lloyd Jones J, as he then was, accepted that an LPA could depart from policy for good reason. However, the principal issue between the parties there was not whether it was lawful to have expressly declined to apply the sequential test, having already referred to it (which is this case), but whether the LPA had indeed performed it. The LPA's principal argument was that although no reference was made to it in the planning decision, it had operated that test because the site was already in an area which was deemed suitable for residential development in its urban capacity study and, moreover, the EA had not objected to the inclusion of that site in that study. Accordingly, the LPA argued that this meant it had already carried out the sequential test in substance. Lloyd Jones J rejected this, holding that the test was required in cases of individual planning applications as well. As noted above there is now an express exception in the body of paragraph 104 of the NPPF where the site is allocated in a development plan and through the sequential test. That is not the issue in this case.

64. Lloyd Jones J also noted that the LPA had separately expressed the view that it could not apply the sequential test concerning redevelopment of the existing site because it was beyond its control and that the test only applied to greenfield sites. Put another way, the view was expressed that the test had no application to previous developed sites where there was historic use rights. The Council there accepted that this was wrong in law. It is unclear what the prior development and historic use was but none of that affects the case before me. The Council here did not contend, on a fair reading of the Report, that as a matter of law, where whenever there was a previous developed site, the test had no application. In its proper context it was saying, for specific reasons relating to this site and the unusual circumstances pertaining to it, that it was proper to disregard the test as being unnecessary. So *Tonbridge* takes the case no further.

65. Accordingly, there is no unlawfulness in relation to the Council's treatment of the sequential test issue. That being so, and for the reasons given above, there can be no unlawfulness in relation to the way in which it applied the presumption. For those reasons, there is no basis for interfering with its judgment not to apply the sequential test provisions here.

66. On that basis, therefore, there is no unlawfulness attaching to the Permission, and this challenge to it must fail. In those circumstances, it is not necessary for me to deal with the alternative contention made by CML that if there was unlawfulness, I should refuse relief. That concludes my judgment. I am grateful to Counsel for their very helpful and succinct submissions.