Neutral Citation Number: [2022] EWHC 3335 (Admin)

Case No: CO/1952/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

MR TIM SMITH
(sitting as a Deputy High Court Judge)

- -

Between :

HERSCH SCHNECK	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING & COMMUNITIES	
(2) WEST BERKSHIRE DISTRICT COUNCIL	**Defendants**

- -
- -

Richard Turney (instructed by **Asserson**) for the **Claimant**
Nina Pindham (instructed by **Government Legal Department**) for the **First Defendant**
The **Second Defendant** did not appear at the hearing

Hearing date: 22nd November 2022

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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR TIM SMITH (SITTING AS A DEPUTY HIGH COURT JUDGE)

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MR TIM SMITH (sitting as a Deputy High Court Judge):

Introduction

1. This claim is a challenge to an appeal decision taken by one of the First Defendant's Planning Inspectors. The Second Defendant, West Berkshire District Council (**"the Council"**), is the local planning authority whose refusal of the Claimant's planning application led to the appeal in question.

2. Through his company Mountley Limited the Claimant owns the site known as Emerald House, Newbury Business Park, London Road, Newbury (**"the Site"**). The Site was originally in office use but I was informed that it has undergone a partial conversion to residential use, in exercise of permitted development rights under the Town & Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No.596) (as amended) (**"the GPDO"**), with the result that it is now in a mix of commercial and residential use. When the conversion has been completed the residential component of the Site will comprise 109 flats.

3. On 14th October 2019 the Claimant applied to the Council for planning permission for an additional 13 flats that would be accommodated in a new floor to be erected on top of the building.

4. The planning application was refused by the Council on 20th March 2020. The Claimant appealed against the refusal to the First Defendant. A Planning Inspector, Mr Jonathan Edwards (**"the Inspector"**), was appointed by the First Defendant to decide the appeal. The appeal was conducted according to the written representations procedure with a site visit being undertaken by the Inspector on 12th April 2021.

5. By his decision letter dated 22nd April 2021 (**"DL"**) the Inspector dismissed the appeal on two grounds, the first of which related to the failure of the development to make an appropriate contribution towards affordable housing and the second of which related to flood risk.

6. The Claimant challenges the decision to dismiss his appeal under section 288 of the Town & Country Planning Act 1990 citing three grounds which I summarise as follows: ground 1 relates to errors in the Inspector's conclusions on affordable housing, ground 2 relates to errors in the Inspector's conclusions on flood risk, and ground 3 relates to errors in the Inspector's treatment of the "fall-back" argument advanced by the Claimant as part of his submissions on the appeal.

7. The claim was considered on the papers by Neil Cameron KC sitting as a Deputy High Court Judge. By his Order dated 15th July 2021 Mr Cameron KC granted permission for the claim to proceed on grounds 1 and 2 but refused permission on ground 3.

8. The Claimant renewed his application for permission to proceed on ground 3 and his renewed application came before me alongside the substantive hearing of grounds 1 and 2. Mr Richard Turney for the Claimant and Ms Nina Pindham for the First Defendant both agreed that it was appropriate for me to deal with the renewed application in parallel with the substantive hearing of grounds 1 and 2. In particular Mr Turney acknowledged that if he were to succeed on his renewed application for permission there would be no additional material to introduce to the Court in order for the substantive ground 3 to be argued and determined by me. I agreed to proceed on this basis.

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9. The claim was listed for hearing originally in March 2022 and then in June 2022. The parties agreed two adjournments of those hearing dates in the hope, explained Mr Turney, that the need for the claim could be avoided through parallel discussions between the Claimant and the Council. That did not transpire and so the claim remained on foot. Both parties agreed that it was unnecessary for me to know of the circumstances behind the previous adjournments.

10. The Council as Second Defendant filed an Acknowledgement of Service along with Summary Grounds of Resistance indicating an intention to defend the proceedings alongside the Secretary of State as First Defendant. Following the grant of permission on grounds 1 and 2 the Council's representative advised that its Summary Grounds would serve as its Detailed Grounds of Resistance too. Ultimately the Council elected not to appear at the hearing and to leave the defence to the claim in the hands of the First Defendant, although its Summary Grounds were not withdrawn and so I have had regard to them in addition to the written and oral submissions made on behalf of the Claimant and the First Defendant.

11. The final procedural point to note is that the Order of Mr Cameron KC granting permission included a series of standard case management directions. One of those related to the filing of skeleton arguments, firstly by the Claimant and then by the Defendants. The Claimant's skeleton argument was filed late. This prompted an application from the First Defendant for an amendment to the directions allowing him to file his own skeleton argument late. I granted that application and reserved a decision on the costs of it.

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<u>Factual Background</u>

12. Originally the Site was an office building. In September 2018 the Claimant applied to the Council for a determination of whether prior approval was required for the exercise of permitted development rights under Part O of the GPDO to change the use of the Site from an office use to form 109 residential apartments. On 25th October 2018 the Council confirmed that prior approval was not required, subject to compliance with certain conditions. Those conditions were complied with and hence the Site benefits from the permission for 109 apartments conferred by the GPDO.

13. Thereafter on 7th October 2019 the Claimant submitted a planning application (**"the Application"**) to the Council for development at the Site to:

> "Increase the height of the building and replacement mansard roof to include provision for a new third floor of residential accommodation (13 units), provision of dormer windows on second floor and scheme of external design treatment to facilitate works"

14. The statutory development plan is the West Berkshire Core Strategy 2012. Two policies of particular relevance to this claim are policies CS6 (related to the provision of affordable housing) and CS16 (related to flood risk).

15. Dealing firstly with affordable housing, policy CS6 provides as follows:

> "**Provision of Affordable Housing**
>
> In order to address the need for affordable housing in West Berkshire a proportion of affordable homes will be sought from residential development. The Council's priority and starting expectation will be for affordable housing to be provided on-site in line with Government policy.

Subject to the economics of provision, the following levels of affordable housing provision will be sought by negotiation:-

- On development sites of 15 dwellings or more (or 0.5 hectares or more) 30% provision will be sought on previously developed land, and 40% on greenfield land;

- On development sites of less than 15 dwellings a sliding scale approach will be used to calculate affordable housing provision, as follows:-

    - 30% provision on sites of 10 – 14 dwellings; and

    - 20% provision on sites of 5 – 9 dwellings.

Proposed provision below the levels set out above should be fully justified by the applicant through clear evidence set out in a viability assessment (using an agreed toolkit) which will be used to help inform the negotiated process.

In determining residential applications the Council will assess the site size, suitability, and type of units to be delivered. The Council will seek a tenure split of 70% social rented and 30% intermediate affordable units, but will take into consideration the identified local need and the site specifics, including funding and the economics of provision.

The affordable units will be appropriately integrated within the development. The Council will expect units to remain affordable so as to meet the needs of both current and future occupiers. Where this is not relevant or possible, the subsidy will be recycled for the provision of future affordable housing."

16. The First Defendant's planning policies are found in the National Planning Policy Framework, the current edition dating from 2021 (**"NPPF"**). The NPPF also includes policies requiring the provision of affordable housing in connection with certain proposals for residential development.

17. The Council's suite of planning policies also includes The West Berkshire Planning Obligations Supplementary Planning Document (2014) (**"the SPD"**). It includes an acknowledgement that applicants may seek to demonstrate that planning obligations which policy ordinarily requires cannot be provided due to viability constraints. It advises, at paragraph 40:

    "If an applicant wants to demonstrate that the S106 obligations cannot be provided due to exceptional viability circumstances, the applicant will be required to submit an open book viability assessment to the Council for consideration"

18. By reason of this policy the Claimant submitted with the Application various supporting documents including a financial viability appraisal (**"the FVA"**). The purpose of the FVA was to demonstrate to the Council that it would not be economically viable for the proposed development to make any contribution towards affordable housing, as would otherwise be required by the planning policies of both the Council and the First Defendant.

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19. The NPPF also contemplates the use of financial viability appraisals in circumstances like this. Paragraph 57 of the NPPF provides that:

> "Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available"

20. This policy is supplemented by guidance in the section of the First Defendant's Planning Practice Guidance (**"PPG"**) on planning obligations, in particular the following passage:

> "**Are planning obligations negotiable?**
>
> Yes. Plans should set out the contributions expected from development towards infrastructure and affordable housing. Where up to date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. Planning obligations can provide flexibility in ensuring planning permission responds to site and scheme specific circumstances. Where planning obligations are negotiated on the grounds of viability it is up to the applicant to demonstrate whether particular circumstances justify the need for viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker
>
> Paragraph: 010 Reference ID: 23b-010-20190315
>
> Revision date: 15 03 2019"

21. The conclusion of the FVA was that it would not be viable for the development to make any contribution towards affordable housing, either by in-kind provision or through the payment of a financial contribution in lieu of provision, and as such none was proposed by the Claimant at that stage.

22. Subsequently the Claimant made an offer to the Council of £25,000 as a financial contribution towards the provision of affordable housing. The offer was rejected by the Council and no further offers were made by the Claimant.

23. Flood risk policy is again a combination of policies in the Development Plan and the NPPF together with guidance in the PPG.

24. Policy CS16 of the Development Plan provides as follows:

> "**Policy CS 16**
>
> **Flooding**
>
> The sequential approach in accordance with the NPPF will be strictly applied across the District. Development within areas of flood risk from any source of

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flooding, including Critical Drainage Areas and areas with a history of groundwater or surface water flooding, will only be accepted if it is demonstrated that it is appropriate at that location, and that there are no suitable and available alternative sites at a lower flood risk.

When development has to be located in flood risk areas, it should be safe and not increase flood risk elsewhere, reducing the risk where possible and taking into account climate change.

Proposed development will require a Flood Risk Assessment for:

- Sites of 1 ha or more in Flood Zone 1.
- Sites in Flood Zone 2 or 3.
- Critical Drainage Areas.
- Areas with historic records of groundwater and/or surface water flooding.
- Areas near ponds or the Kennet and Avon Canal, that may overtop.
- Sites where access would be affected during a flood.
- Areas behind flood defences.
- Sites with known flooding from sewers.

Development will only be permitted if it can be demonstrated that:

- Through the sequential test and exception test (where required), it is demonstrated that the benefits of the development to the community outweigh the risk of flooding.
- It would not have an impact on the capacity of an area to store floodwater.
- It would not have a detrimental impact on the flow of fluvial flood water, surface water or obstruct the run-off of water due to high levels of groundwater.
- Appropriate measures required to manage any flood risk can be implemented.
- Provision is made for the long term maintenance and management of any flood protection and or mitigation measures.
- Safe access and exit from the site can be provided for routine and emergency access under both frequent and extreme flood conditions.

On all development sites, surface water will be managed in a sustainable manner through the implementation of Sustainable Drainage Methods (SuDS) in accordance with best practice and the proposed national standards and to provide attenuation to greenfield run-off rates and volumes, for all new development and re-development and provide other benefits where possible such as water quality, biodiversity and amenity"

25. Paragraph 158 of the NPPF also includes a sequential test for developments in areas at risk of flooding and provides as follows:

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"The aim of the sequential test is to steer new development to areas with the lowest risk 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 risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."

26. Finally the relevant section of the PPG provides as follows:

"When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere.

(Paragraph: 033 Reference ID: 7-033-20140306)"

The Council's decision

27. The Application was referred to the Council's Planning Committee for a decision. It was accompanied by a report prepared by one of the Council's planning officers.

28. The section of the report assessing the Application against affordable housing policies stated as follows:

"Part 5 of the NPPF requires the delivery of affordable housing on major housing development sites. Policy CS6 also sets out the requirements of the provision of 30% (previously developed land) on site affordable housing on development sites of 15 dwellings or more. The West Berkshire Planning Obligations Supplementary Planning Document (2014) also sets out the requirements for affordable housing provision.

A Prior Approval Consent (18/02279/PACOU) was approved for the Change of use of offices (Class B1a) to form 109 apartments. Given that the current proposal comprises 13 additional dwellings, it is considered that the total number of dwellings at the application site is 122. The applicant has submitted a Viability Report and it concludes that the proposal is not viable to provide any affordable housing and the applicant is not seeking to provide financial contribution towards affordable housing provision in the local area under Section 106 Planning Obligation.

Policy CS6 was based on a viability study prepared in 2007 and updated in 2009 to specifically test affordable housing policy and it clearly demonstrates that development in West Berkshire is viable and the policies do not impose disproportionate burdens on developers. The application is accompanied by a viability assessment based on the provision of 13 dwellings that seeks to demonstrate that the proposed works cannot remain viable while providing a contribution towards affordable housing. The Council has no reason to challenge the findings of this assessment.

In West Berkshire, the need for the provision of affordable housing is acute. In the absence of a planning obligation to secure a provision or a contribution towards affordable housing provision in the local area, the proposed development is in conflict with the requirements of Policy CS6 and the West Berkshire

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Planning Obligations Supplementary Planning Document (2014) which sets out the requirements for affordable housing provision.

The NPPF also requires the delivery of affordable housing on major housing development sites. West Berkshire is able to demonstrate an up to date supply of land for housing, and is therefore not reliant on sites that are not policy compliant to bring forward adequate housing in the District. The proposed development is not considered to secure sufficient public benefit to development to outweigh these material concerns with the under-provision of affordable housing on the site and the lack of compliance with policy identified above.

The proposed development fails to comply with Policy CS6, the West Berkshire Planning Obligations SPD (2014) and the NPPF"

29. In relation to flood risk the report stated as follows:

"The application site is within the Environment Agency Flood Zone 2 and Zone 3 and a Flood Risk Assessment (FRA) is required. However, it is not required in this case as the applicant has submitted a FRA under the Prior Approval application (18/02279/PACOU). The SuDS team has raised no objection to the proposal subject to conditions to secure that the development hereby permitted shall be carried out in accordance with the approved FRA. A condition shall also be imposed to secure that details of sustainable drainage measures should be submitted prior to the commencement of the development hereby permitted"

30. Thus it will be seen that so far as the Council's planning officer was concerned the Application was contrary to affordable housing policy but was compliant with flood risk policy.

31. The report recommended that planning permission be refused. The final section of the report – entitled "Planning Balance and Conclusion" – stated as follows:

"While the principle of residential development is accepted, due to the failure of the proposals to provide affordable housing, contrary to the recommendations of the NPPF and the requirements of Policy CS6, your officer's recommendation is that this application should be refused"

32. The recommendation was accepted by members of the Planning Committee. Planning permission was refused by a decision notice dated 20th March 2020. The single ground of refusal stated as follows:

"The application is accompanied by a viability assessment demonstrating that the proposed development of the site would not provide either affordable housing or a financial contribution towards the provision of affordable housing. In West Berkshire there is an acute need for the provision of affordable housing and Policy CS6 of the West Berkshire Core Strategy (2006-2026) 2012 requires the provision of 30% on site affordable housing on sites of 10 or more dwellings on previously developed land. The proposed development comprises the provision of an additional 13 new dwellings on a wider development of 122 dwellings. In the absence of a planning obligation to secure a contribution towards affordable housing provision in the local area the development is contrary to the requirements of Policy CS6 of the West Berkshire Local Plan Core Strategy (2006-2026) 2012 and The West Berkshire Planning Obligations Supplementary Planning Document (2014) which sets out the requirements for affordable

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housing provision. Furthermore the proposals fail to comply with the recommendations of Part 5 of the National Planning Policy Framework (February 2019) which requires the delivery of affordable housing on major housing development sites"

The Appeal

33. On 24th April 2020 the Claimant appealed to the First Defendant against the Council's refusal of planning permission. The documents submitted with the appeal included a Statement of Case prepared by the Claimant's planning consultant.

34. In relation to affordable housing policy, and in particular the conclusions about the viability of providing affordable housing, the Statement of Case asserted the following:

> "4.2 The Appellant accepts that there is a need for affordable housing within this District and that Policy CS6 confirms that subject to the economics of provision, affordable housing provision will be sought by negotiation in accordance with the thresholds and percentage provisions in the policy.
>
> …
>
> 4.6 Whilst Policy CS6 of the Plan seeks the delivery of affordable housing it is important to understand the way in which it is worded. The LPA has misunderstood the policy's wording and effect.
>
> 4.7 Firstly, the policy sets the affordable housing requirement "subject to the economics of provision". The only possible interpretation of that part of the policy is that the requirements set out in the policy do not apply if it would be uneconomic to make such provision. Secondly, policy CS6 expressly contemplates the potential for a provision of affordable housing below the percentage identified in the policy where it states:
>
>> *"Proposed provision below the levels set out above should be fully justified by the applicant through clear evidence set out in a viability assessment (using an agreed toolkit) which will be used to help inform the negotiated process."*
>
> 4.8 If any quantum of Affordable Housing from a development proposal which was below the policy aspiration (even with appropriate viability assessment) was considered to be a breach of the policy per se then those words in the policy would be meaningless. The Appellant's case is that the meaning and effect of the words is obvious: lower levels of Affordable Housing provision can be justified through viability assessment. This is consistent with the Inspector's Report on the Core Strategy which stated (at paragraph 125):
>
>> *"To be justified and effective the policy needs to explicitly indicate that the proportions of affordable housing set out will be sought by negotiation and will take into account the economics of provision"*
>
> 4.9 It is a noteworthy omission that this highly material part of the policy is not considered in the Officer Report for this application (Appendix AP2).
>
> 4.10 The Appellant submits that the policy, and indeed the NPPG (see below), identify that a quantum of affordable housing below the "policy ceiling" can be acceptable and in accord with the development plan subject to

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appropriate viability assessment. The LPA has omitted to consider this part of the relevant policy, and accordingly misdirected itself.

4.11 It is apparent to the Appellant that the LPA consider that any quantum of affordable housing below such a policy ceiling is contrary to that policy per se regardless of viability and should therefore result in the refusal of permission on that basis. Quite simply, that is a misinterpretation of the policy.

4.12 The Appellant has from the outset provided an industry recognised Viability Appraisal model in its assessment of the potential for affordable housing delivery from the appeal proposal.

…

4.19 It is common ground that the LPA do not dispute the methodology or findings of the Viability Assessment and this is set out in its Officer report concludes on this issue:

> *"The application is accompanied by a viability assessment based on the provision of 13 dwellings that seeks to demonstrate that the proposed works cannot remain viable while providing a contribution towards affordable housing. The Council has no reason to challenge the findings of this assessment."*

4.20 The Appellant submits that the use of viability assessments to assess the quantum of affordable housing which can be delivered from a particular development is supported by the planning guidance and is also identified as a factor which can reduce the policy quantum of affordable housing in the key development plan policy (Policy CS6).

4.21 In the case of this appeal there is common ground that the viability assessment undertaken by the Appellant is an appropriate methodology and its findings are not challenged. Accordingly, it can be concluded that no affordable housing can viably be provided as part of the proposed development"

35. Flood risk matters were not dealt with in the Claimant's Statement of Case since it was agreed by the Council that the Application complied with flood risk policy.

36. The Council submitted its own Statement of Case in response to that of the Claimant. In relation to affordable housing policy and the viability considerations the Statement of Case included the following passage:

"4.6. The appellant has submitted a Viability Assessment and it concludes that the proposal is not viable to provide any affordable housing. The Assessment also sets out that the appellant would not provide financial contribution towards affordable housing provision in the local area under Section 106 Planning Obligation.

4.7. Paragraphs 007 to 009 of Section 10 of the Planning Practice Guidance provide guidance on how viability should be assessed in decision-making process. Paragraph 57 of the NPPF clearly states that the weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case. The Council has carefully assessed the submitted Viability Assessment. Though the Council does not dispute or challenge the findings of the Assessment, the Council does not consider that the proposal has

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secured sufficient public benefit to development to outweigh the material concerns with the under-provision of on-site affordable housing.

4.8. … Policy CS6 of West Berkshire Core Strategy 2012 only sets out the viability assessment is used to help inform the negotiated process when the proposed provision below the levels of affordable housing set out in the Policy.

4.9. During the negotiation process, the Council has reinstated the policy requirement and has clearly informed the appellant that the Council is willing to accept any financial contributions to the provision of affordable housing if on-site affordable housing cannot be provided, subject to the Council is satisfied with the proposed amount of contribution.

4.10. The appellant has made an offer to make a financial contribution of £25,000 towards affordable housing, it was however rejected by the Council as the proposed figure is far below the equivalent value of the on-site provision of affordable housing. This is the only offer made by the appellant received by the Council regarding the financial contribution to the provision of affordable housing.

4.11. Both the Council and the appellant also agree that there is an acute need for the provision of affordable housing in West Berkshire. It is important to be considered that Policy CS6 of West Berkshire Core Strategy 2012 was based on a viability study prepared in 2007 and updated in 2009 to specifically test affordable housing policy and it clearly demonstrates that development in West Berkshire is viable and the policies do not impose disproportionate burdens on developers.

4.12. While both the Council and the appellant agrees that there is a need for affordable housing in West Berkshire, it is important for the Council to ensure that the provision of affordable of housing should be in accordance with the Policy CS6 of West Berkshire Core Strategy 2012 and a greater weight should be given to this as it secures a public benefit.

4.13. From the reason above, the Council does not agree that the proposed development sufficiently secures public benefit to development to outweigh these material concerns with the under-provision of affordable housing on the site and the lack of compliance with Policy CS6 of West Berkshire Core Strategy 2012 and the West Berkshire Planning Obligations Supplementary Planning Document (2014), in the absence of a planning obligation to secure a provision or a contribution towards affordable housing provision in the local area"

37. Then in August 2020 the Claimant became aware that the GPDO was about to be amended with effect from 1st September 2020 to include new "Class AA" permitted development rights of relevance to the Application. The new Class AA permitted development rights, which did indeed come into effect on 1st September, are in the following terms:

"**Permitted development**

AA. The enlargement of a dwellinghouse consisting of the construction of —

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(a) up to two additional storeys, where the existing dwellinghouse consists of two or more storeys; or

(b) one additional storey, where the existing dwellinghouse consists of one storey,

immediately above the topmost storey of the dwellinghouse, together with any engineering operations reasonably necessary for the purpose of that construction"

38. On the strength of this the Claimant made a supplementary submission to the Inspector regarding what he considered to be a relevant fall-back argument supporting the appeal. The introduction to his supplementary submission stated as follows:

"1.3 Since the submission of the appeal, and its evidence, the Government has introduced, coming into force at the end of August, further permitted development rights relating to the provision of additional storeys of development above existing buildings.

1.4 Given that this appeal deals directly with the provision of an existing floor of development on an existing building then the Appellant submits that this new permitted development is now a most material consideration for the Inspector's consideration given that it would constitute a fallback position by the 1st September"

39. There then followed in the supplementary submission a detailed consideration of the individual criteria to be met before a prior approval would be granted by the Council and Class AA permitted development rights were available. The Conclusions section of the supplementary submission stated:

"3.1 From 1st September the Appellant could submit a prior notification application for an identical scheme to that proposed in this appeal.

3.2 We have identified, as set out above, that such a scheme would be compliant with all of the limitations of this new permitted development.

3.3 Furthermore, it is clear from the only reason for refusal of the application, the subject of this appeal, that all of the conditions of that new permitted development would be met by such a scheme.

3.4 As a result we respectfully request that the Inspector takes due account of this permitted development in terms of the determination of this appeal as it is clearly from 1st September as a material fallback position"

40. The Council responded briefly to this supplementary submission by the Claimant. Its response concluded with this paragraph:

"1.8. The Council accepts that the appeal proposal could be considered as permitted development under the proposed 'Class AA - new dwellinghouses on detached buildings in commercial or mixed use'"

41. Flood risk then emerged as an issue in the appeal at the instigation of the Inspector. On 10th December 2020 the Inspector wrote to both parties to the appeal as follows:

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"I write to you in respect of the above appeal. The Inspector notes that the appeal site lies within Flood Zone 2 and 3. Paragraph 155 of the National Planning Policy Framework (the Framework) states that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk. The Framework and the Planning Practice Guidance (PPG) requires a sequential risk-based approach to the location of new development through the use of the Sequential Test. Table 2 contained within Paragraph 066 of the PPG indicates that dwelling houses are deemed to be a 'more vulnerable' use. Table 3 contained within Paragraph 067 is clear that for the proposal to be acceptable in Flood Zone 3 with regard to flood risk, both the Sequential Test and Exceptions Test are required to be passed. The submitted Flood Risk Assessment provided via email on the 18 November contains no Sequential Test.

The Inspector has a duty to consider the impact of the proposed development on European Sites. The appeal site is located adjacent to the River Lambourn, which is designated as a Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI). There is no evidence that a Habitat Regulations Assessment (HRA) has been completed as part of the application. It is necessary for the competent authority (the Inspector) to carry out the HRA. However, based on the information provided it is not possible for an appropriate assessment to be completed.

Whilst these two issues did not feature as reasons for refusal of the planning application, the Inspector has a duty to assess the impact of the proposal both in respect of Flood Risk, and European Sites under the Habitats Regulations. Consequently, at this time the Inspector is unable to make a positive recommendation in respect of the appeal proposal, and has no option but to dismiss the appeal on the above grounds.

The Inspector would welcome any comments on the above within 5 working days, no later than 17th December 2020. Your reply should be copied to the Local Planning Authority"

42. I note in passing that the habitats issue referred to by the Inspector fell away subequently, but meanwhile in response to the request for additional information the Claimant commissioned its consultants, RPS, to prepare information regarding flood risk. A report from RPS was submitted to the Inspector on 10th January 2021. The report included the following passages:

"The proposed development comprises a rooftop extension of an existing building, which by nature is attached to its location. In addition, the Emerald House Flood Risk Assessment (FRA) and the addendum to the FRA (document reference HLEF60531 Emerald House FRA, March 2018) prepared for the permitted development application of the same building, demonstrate that the finished floor levels of the building are minimum 666mm above the predicted maximum flood levels for the 1 in 100 year flooding event with 35% climate change allowance. Furthermore, the proposed development is at roof level and due to its elevated location, it is not at risk of any potential flooding at ground level. This demonstrates that a sequential approach has been applied within the site by locating the higher vulnerability residential accommodation at a high level which is significantly above the modelled flood level.

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On the basis of the above, noting that residential development must occur within Flood Zones 2 and 3a in order to deliver the required homes within this Spatial Area, that the development relates to a rooftop extension of an existing building and that a sequential approach has been adopted within the site, it is considered that the site passes the Sequential Test."

…

It is understood that the development is located within Flood Zone 2 and 3a. However, the development provides economic, social and environmental benefits to the community that outweigh flood risk. This is in accordance with NPPF as the development will provide wider sustainability benefits to the community.

With reference to point (b) above, the Flood Risk Assessment produced by RPS (ref HLEF60531, March 2018) demonstrated to the EA's satisfaction that the site where the development is proposed will be safe, without increasing flood risk elsewhere. This has been achieved through:

1. The application of the sequential approach within the scheme, locating the higher vulnerability residential accommodation at a higher level significantly above the modelled 1 in 100 year plus 35% climate change flood level. This elevation also provides mitigation against the risk of flooding from other sources such as surface water and groundwater.

2. Demonstrating that a dry access/egress would be available in the 1 in 100 year plus 35% climate change flood event.

3. The recommended use of flood resilient building techniques in construction of the ground floor levels, where appropriate.

It is therefore considered that the development passes the Exception Test"

43. The Council did not file any submissions of its own on flood risk.

The Inspector's Decision

44. The DL was dated 22nd April 2021. It was brief, at just over four pages and with twenty five numbered paragraphs. A separate one-page decision letter dismissing the Claimant's costs application was issued on the same date. That decision is not challenged.

45. In the DL, having identified the main issues in the appeal as being whether an appropriate contribution was being made towards affordable housing and whether the development would comply with policy on flood risk, the Inspector then set out his conclusions on each of the two issues.

46. In relation to affordable housing the Inspector's conclusions were as follows (DL6-10):

"6. Policy CS6 of the West Berkshire Core Strategy 2012 (CS) states that a proportion of affordable homes will be sought from residential development. On schemes of 10 to 14 dwellings, the Council will seek by negotiation 30% of units to be affordable. Provision below such a level must be fully justified

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through evidence set out in a viability assessment which will be used to help inform a negotiation process. Also, the policy states that the starting expectation will be for affordable housing to be provided on-site. However, the Council's Planning Obligations Supplementary Planning Guidance 2014 (SPG) sets out a range of other options including a financial contribution in lieu of on-site provision. In these regards, CS policy CS6 and the SPG are generally consistent with the Framework, although this expects at least 10% of housing on major schemes to be provided as affordable units.

7. The appellant's viability report indicates the development would be unviable if affordable dwellings are included and so none are proposed. The Council do not challenge the findings of this assessment and I have no reason to come to a different view on the matter.

8. Under the terms of CS policy CS6, any economic justification to support affordable housing provision below the stated 30% should inform a negotiation process. The submissions make a brief reference to an offer made by the appellant of a £25,000 contribution towards affordable housing which was rejected by the Council. There is no planning obligation before me that would secure such a payment. In the absence of any other evidence, I am unconvinced that a proper negotiation process has been undertaken that would ensure the proposal before me makes the optimum delivery towards affordable housing provision.

9. The appellant suggests that as an assessment shows inclusion of affordable housing could not be financially supported, the proposal complies with CS policy CS6. However, this interpretation fails to take account of the clear references in the policy to negotiation and negotiated process. Furthermore, paragraph 40 of the SPG explains that even where there are genuine viability issues in delivering the desired affordable housing, the Council will still need to be satisfied that any offer is sufficient to make the development acceptable in planning terms. As such, it does not follow that economic justification for the inclusion of no affordable housing means a scheme would be acceptable.

10. For these reasons, I conclude the proposal would not make an appropriate contribution towards the provision of affordable housing. In this regard, it would be contrary to CS policy CS6, the SPG and the Framework which, amongst other things, seek to address the need for affordable housing."

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47. In relation to flood risk the Inspector's conclusions were as follows (DL11-18):

"11. The Framework states that development should be directed away from areas of risk of flooding through the application of a sequential test. The basis of this test is that development should not be permitted if there are reasonably available sites appropriate for the proposal in areas with a lower risk of flooding. CS policy CS16 is consistent with the Framework in these regards.

12. The River Lambourn lies immediately to the north of the appeal property. The site is largely situated in flood zone 2, an area where there is a medium probability of river flooding with areas along the boundary in flood zone 3a where there is a high flood risk. In light of the sequential test, it follows to consider whether there are other sites at lower flood risk which are available and could accommodate the proposed units.

13. The appellant's submissions refer to a number of sites with development potential identified in the Strategic Housing Land Availability Assessment (SHLAA). While it is stated that large parts of Newbury are located in flood plains, there is no indication as to whether these SHLAA sites are at a lower flood risk than the appeal property. Furthermore, there is no convincing explanation to support the suggestion that the SHLAA sites would be unsuitable to provide residences in a single building simply because they are larger than the appeal property. Also, there is little information that clearly shows the appeal proposal would be particularly beneficial in terms of achieving sustainable development objectives compared to housing schemes on any of the SHLAA sites.

14. Reference is made to the nearby London Road Industrial Estate that is allocated for housing development and located in flood zone 2. However, from the information provided, it would appear the appeal site lies outside this allocated land. Also, it does not follow from this allocation that all residential development must occur in areas of medium and high flood risk in order to meet the CS housing requirements.

15. As such, the information provided fails to clearly demonstrate that there is no other available site that is at a low risk of flooding and is suitable for a development of 13 residential units. Accordingly, the submissions fail to show compliance with the sequential test.

16. The Council has raised no concern over the development in terms of flood risk. However, its views on the matter appear to have been based on a flood risk assessment provided with a previous application for the change of use of the building. This assessment highlights that the sequential test is not applicable for most change of use developments under the terms of the Framework. However, this appeal proposal is for an extension rather than a change of use and there is no indication in the Framework that the sequential test is not applicable for additions above ground level. Also, the Environment Agency raise no objections to the proposal but its consultation response provides no evidence that the sequential test has been considered.

17. The information on the sustainability benefits of the proposal and measures to protect the development from flooding without exacerbating risk elsewhere show compliance with the exception test. However, the Framework and the Planning Practice Guidance state that this test is only applicable if it is not possible for a development to be located in zones with lower flood risk. I have been unable to find compliance with the sequential test and so the exception test submissions do not affect my conclusion on this main issue.

18. For the above reasons, I conclude that insufficient information has been provided to show the proposal would comply with CS policy CS16 and the Framework in respect of flood risk. Amongst other things, these only accept development in areas of flood risk where it is demonstrated that there are no suitable alternative sites at lower risk of flooding."

48. The appeal was therefore dismissed.

The Legal Framework

49. There is no dispute between the parties about the relevant legal framework.

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50. Section 288 of the Town & Country Planning Act 1990 provides as follows:

> **"288. Proceedings for questioning the validity of other orders, decisions and directions.**
>
> 1. If any person-
>
> …
>
> > (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds-
> >
> > > (i) that the action is not within the powers of this Act, or
> > > (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> he may make an application to the High Court under this section.
>
> …
>
> (4A) An application under this section may not be made without the leave of the High Court.
>
> …
>
> (5) On any application under this section the High Court-
>
> > (a) may, subject to subsection (6), by interim order suspend the operation of any order or action, the validity of which is questioned by the application, until the final determination of the proceedings;
> >
> > (b) if satisfied that any such order or action is not within the powers of [the 1990] Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action"

51. The grounds of statutory review under what is now section 288 of the 1990 Act are as stated by Forbes J. in *Seddon Properties v Secretary of State for the Environment (1978) 248 ED 950* at [951]:

> "I need not rehearse in detail the wealth of authority that governs the principles under which a decision by the Secretary of State in a case such as this may be reviewed in the courts. These principles are well known. There are, so far as is relevant here, five of them.
>
> (1) The Secretary of State must not act perversely. That is, if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion that he did reach, the decision may be overturned. See, for example, Ashbridge Investments Ltd. v. Minister of Housing and Local Government per Lord Denning M.R and Harman L.J. This is really no more than another example of the principle enshrined in a sentence from the judgment of Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation: "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."

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(2) In reaching his conclusion the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant: see, for example, again the Ashbridge Investments case, per Lord Denning M.R.

(3) The Secretary of State must abide by the statutory procedures, in particular by the Town and Country Planning (Inquiries Procedure) Rules 1974. These rules require him to give reasons for his decision after a planning inquiry (rule 13), and those reasons must be proper and adequate reasons that are clear and intelligible and deal with the substantial points that have been raised: Re Poyser and Mills' Arbitration.

(4) The Secretary of State in exercising his powers, which include reaching a decision such as that in this case, must not depart from the principles of natural justice: per Lord Russell of Killowen in Fairmount Investments Ltd. v. Secretary of State for the Environment.

(5) If the Secretary of State differs from his inspector on a finding of fact or takes into account any new evidence or issue of fact not canvassed at the inquiry, he must, if this involves disagreeing with the inspector's recommendation, notify the parties and give them at least an opportunity of making further representations: rule 12 of the Rules of 1974”

52. The approach of the Courts when reviewing Inspector’s decision letters is as summarised by Lindblom L.J. in *St Modwen Developments Limited v Secretary of State for Communities and Local Government [2018] PTSR 746* at [6]-[7]:

“6. In my judgment at first instance in Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) (at paragraph 19) I set out the ‘seven familiar principles’ that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

‘(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the ‘principal important controversial issues’. An inspector’s reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 WLR 1953, at p.1964B-G).

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(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations 'whatever weight [it] thinks fit or no weight at all' (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P&CR 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).'

…

7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in Suffolk Coastal District Council v Hopkins Homes Ltd [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in Barwood Strategic Land II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in Mansell, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

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53. Section 38(6) of the Planning and Compulsory Purchase Act 2004 relating to the interrelationship between development plan policy and other material considerations in decision-making provides as follows:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise"

54. The interpretation of policy is a question of law. Per Lord Reed JSC in *Tesco Stores Limited v Dundee City Council [2012] PTSR 983* at [18]-[19]:

> "18. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> 19. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 (per Lord Hoffmann)"

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55. The position to be adopted by the decision-maker in relation to a claimed "fall-back" argument is as stated by Lindblom L.J. in *R (Mansell) v Tonbridge & Malling BC [2019] PTSR 1452* at [27]:

> "27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
>
> (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.
>
> (2) The relevant law as to a "real prospect" of a fallback development being implemented was applied by this court in the Samuel Smith Old Brewery case: see, in particular, paras 17–30 of Sullivan LJ's judgment, with which Sir Anthony Clarke MR and and Toulson LJ agreed; and the judgment of Supperstone J in Kverndal v Hounslow London Borough Council [2016] PTSR 330 , paras 17 and

42–53. As Sullivan LJ said in the Samuel Smith Old Brewery case [2009] JPL 1326 , in this context a "real" prospect is the antithesis of one that is "merely theoretical": para 20. The basic principle is that "for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice": para 21. Previous decisions at first instance, including Ex p PF Ahern (London) Ltd [1998] Env LR 189 and Brentwood Borough Council v Secretary of State for the Environment (1996) 72 P & CR 61 must be read with care in the light of that statement of the law and bearing in mind, as Sullivan LJ emphasised, "'fallback' cases tend to be very fact-specific": para 21. The role of planning judgment is vital. And, at [2009] JPL 1326, para 22: "[it] is important … not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court."

(3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO . In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."

The Grounds and Conclusions on each Ground

Ground 1: affordable housing and viability

Submissions

56. For the Claimant Mr Turney submitted that the wording of the Council's single reason for refusal clearly accepted that it was not viable to make any contribution towards affordable housing. In the planning appeal the Council still did not challenge the findings of the Claimant's FVA, and indeed the Council's Statement of Case recorded in terms that *"The Council has no reason to challenge the findings of [the FVA]".*

57. Mr Turney further submitted that the Council's case on affordable housing is neatly encapsulated in the following passage from its Statement of Case:

"In West Berkshire, the need for the provision of affordable housing is acute. In the absence of a planning obligation to secure a provision or a contribution towards affordable housing provision in the local area, the proposed development is in conflict with the requirements of Policy CS6 and the West Berkshire Planning Obligations Supplementary Planning Document (2014) which sets out the requirements for affordable housing provision.

The NPPF also requires the delivery of affordable housing on major housing development sites. West Berkshire is able to demonstrate an up to date supply of land for housing, and is therefore not reliant on sites that are not policy compliant to bring forward adequate housing in the District. The proposed development is not considered to secure sufficient public benefit to development to outweigh

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these material concerns with the under-provision of affordable housing on the site and the lack of compliance with policy identified above.

The proposed development fails to comply with Policy CS6, the West Berkshire Planning Obligations SPD (2014) and the NPPF"

58. But, he submitted, this was a misinterpretation of policy CS6. CS6 is framed so as to be subject to the economics of provision and if the viability analysis showed that no affordable housing could be provided then this is an outcome contemplated by, and in accordance with, policy CS6. The SPD cannot redefine the clear wording of a development plan policy. It is only a material consideration.

59. The undisputed evidence before the Inspector was that it was not viable to provide any affordable housing. Mr Turney submitted that, properly construed, policy CS6 is not breached merely because an affordable housing contribution less than that required by policy is offered, and the same rationale must apply even if no contribution at all is offered. Mr Turney submitted further that this interpretation of policy CS6 is supported by the explanatory text below the policy, in particular paragraph 5.30 which provides as follows:

> "… The Council recognises that in some circumstances there may be exceptional costs of development which need to be acknowledged, and that the policy may represent the starting point for negotiation. The Council will carefully scrutinise proposals which appear to fall artificially below the required thresholds which may indicate a possible attempt to avoid making the appropriate contribution towards the delivery of affordable housing. Such proposals are likely to be refused planning permission where they fail to make efficient use of land"

60. A secondary limb to Mr Turney's submissions on ground 1 was that the Inspector's conclusions were irrational because having accepted the evidence that the development was unable to make any contribution towards affordable housing and remain viable it was irrational then to conclude (DL10) that the development *"would not make an appropriate contribution towards the provision of affordable housing".*

61. In these circumstances, submitted Mr Turney, the Inspector was wrong to conclude at DL9-10 that the appeal proposals were contrary to policy CS6 and he was led into further error by the Council's submission that the proposals could only therefore be justified if *"sufficient public benefit"* were secured through them.

62. For the First Defendant Ms Pindham submitted that the Inspector, having accepted that the development could not viably support any contribution towards affordable housing, then rationally applied the evidence to the wording of the policy, and that the Claimant is therefore mounting an impermissible attack on the exercise of planning judgement by an expert Inspector. She relied in part upon the explanatory text below policy CS6 as revealing the importance placed by the Council on the provision of affordable housing, emphasising in particular the statement at paragraph 5.28 that *"... the level of need remains extremely high, and the policy must therefore seek to maximise opportunities for increased affordable housing delivery".* This point, she submitted, forms the foundation of the Inspector's conclusions at DL6 and DL8 and it discloses no error of law.

63. In any event, submitted Ms Pindham, the Claimant is wrong to criticise the Inspector's application of the policy to the facts. Despite the conclusions of the viability assessment that nothing could be afforded the Claimant had nevertheless offered a financial contribution of £25,000 towards affordable housing. The offer had

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not been withdrawn nor had it been captured in a completed planning obligation put before the Inspector. However small, the offered financial payment would have made a contribution towards maximising affordable housing provision as paragraph 5.28 below policy CS6 contemplated. Moreover the fact that there was an offer from the Claimant indicated that there was a negotiation to be had; the Claimant had not revised its offer at all after rejection and hence it was reasonable for the Inspector to conclude that the "negotiated process" which formed part of the wording of policy CS6 had not been concluded. In these circumstances, she submitted, the Inspector had interpreted policy CS6 correctly and was right to conclude that it was breached by the development proposals.

Analysis and conclusions

64. Section 38(6) of the Planning and Compulsory Purchase Act 2004 makes clear the exercise to be conducted by the Inspector as decision-maker. His determination must be made in accordance with the development plan unless material considerations indicate otherwise. The starting point is the development plan. For the purposes of ground 1 the development plan means policy CS6. Other material considerations include the SPD and the NPPF (although in the case of the latter it adds little of substance to policy CS6).

65. Policy CS6 sets out the starting point for the contribution which residential development should make towards affordable housing. It sensibly recognises that the contribution that each development can make towards affordable housing is "subject to the economics of provision", that there can be a "negotiation" around the level that will actually be provided, and that where provision below the levels referred to is proposed the reduction "should be fully justified by the applicant through clear evidence".

66. It follows that policy CS6 does not make the provision of affordable housing at the indicated levels mandatory for all residential developments. The very words of the policy contemplate that there may be situations in which the economics of provision mean that provision at the levels set by policy – or, as a logical extension of this proposition, at any level – is impossible. This is the clear meaning of policy CS6 and it is reinforced by paragraph 5.30 of the supporting text to which I have referred above.

67. It follows, submitted Mr Turney, that once an applicant has demonstrated to the Council's satisfaction that it is not viable to provide any affordable housing the Council must accept that policy CS6 is satisfied.

68. I have two particular concerns with the Inspector's reasoning that built up to his conclusion on compliance with policy CS6.

69. Firstly the Inspector acknowledged in terms (DL7) the conclusion of the Claimant's FVA and the implications of it for the affordable housing provision associated with the development:

> "The appellant's viability report indicates the development would be unviable if affordable dwellings are included and so none are proposed. The Council do not challenge the findings of this assessment and I have no reason to come to a different view on the matter"

70. He then referred to the "negotiation process" contemplated by policy CS6. He noted that an offer of £25,000 had been made by the Claimant and rejected by the Council, noted also the absence of a completed planning obligation, and he concluded (DL8):

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"In the absence of any other evidence, I am unconvinced that a proper negotiation process has been undertaken that would ensure the proposal before me makes the optimum delivery towards affordable housing provision"

71. For the First Defendant Ms Pindham submitted that once an offer of £25,000 had been made a process of "negotiation" contemplated by policy CS6 had commenced, that it had not been concluded, and that the Inspector was therefore right to conclude that policy CS6 was not met. During oral argument, in answer to my question Ms Pindham clarified her submission. She argued that in circumstances where viability demonstrated nothing could be afforded then an applicant who offered nothing would have complied with policy CS6 but that once an offer had been made then, no matter how inadequate it was, it defeated the argument about compliance with policy CS6.

72. I cannot accept that submission. Firstly if Ms Pindham's interpretation of policy CS6 were correct it would incentivise applicants to make no offer at all because the minute they did so they would trigger a negotiation which could easily lead to the policy not being complied with if it ended fruitlessly. Secondly the Council's case before the Inspector illustrated that a policy-compliant provision of affordable housing, if allowed to be provided as a payment in lieu of actual provision, would amount to £419,000. The Claimant's offer of £25,000 was recognised by the Council in its Statement of Case to be *"far below the equivalent value"* required by policy and it was rejected. It was not the start of a negotiation. I see it as nothing more than a goodwill gesture of nominal value which is entirely consistent with the Claimant's case that nothing could be afforded. It was rejected by the Council and nothing more was offered. To construe it as the start of a negotiation which defeats compliance with policy CS6 is to test the wording of the policy beyond its breaking point.

73. Ms Pindham also relies on paragraph 42 of the Council's Planning Obligations SPD, emphasising in particular the highlighted words:

> "Where the Council is satisfied that there are genuine viability issues in delivering the desired affordable housing and/or infrastructure elements, the Council may review the range and nature of obligations required **but will still need to be satisfied that any changes to the infrastructure provision and/or affordable housing is still sufficient to make the development acceptable in planning terms**"

These words are echoed in DL9 (albeit the Inspector inadvertently attributes them to paragraph 40 rather than paragraph 42).

74. I accept that in principle it may be open to a decision-maker to conclude that consenting residential development which makes no contribution towards affordable housing is too high a price to pay even where the viability evidence demonstrates that none can be afforded. The scope for such a conclusion to be reached lawfully depends on the applicable policy. In this particular case paragraph 42 of the SPD lends some support to such a conclusion.

75. But in my judgement where the Inspector has fallen into material error here is his conclusion that policy CS6 is breached. If there is support for the conclusion that the lack of affordable housing on agreed viability grounds makes a development unacceptable in planning terms, that support flows from the SPD not from policy CS6. The SPD is merely a material consideration. Applying the section 38(6) assessment correctly the starting point is the development plan policy. Once it had been concluded that it was unviable to offer any affordable housing then, properly

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construed, policy CS6 was met. The nominal offer of £25,000 did not alter that fact. It was not the commencement of a negotiation which remained unconcluded.

76. The approach to the predecessor to section 38(6) commended by Lord Hope in *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447* at p.1450 as follows:

> "The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission"

77. That duty cannot be discharged with an incomplete understanding of the development plan. The Inspector clearly concluded (DL10) that the proposals were contrary to policy CS6. In doing so I consider that he fell into error. His starting point for conducting the exercise required of him by section 38(6) was therefore wrong. Whatever conclusion paragraph 42 of the SPD supports it must be assessed against the fact that the proposal complies with policy CS6, not that it is in conflict with it. This the Inspector did not do.

78. I observe in passing that Ms Pindham's submissions to me did not include an invitation to exercise my discretion to withhold relief on the basis that the Inspector would still have come to the same decision (per *Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1989) 57 P&CR 306*), but because the error goes right to the heart of the section 38(6) exercise I consider that I would be in no position to reach such a conclusion in any event.

79. Ground 1 therefore succeeds.

Ground 2: flood risk

Submissions

80. Flood risk formed no part of the Council's decision to refuse the Planning Application. Nevertheless both parties accept that the Inspector was perfectly entitled to raise the issue on his own initiative as he did. The Claimant's complaint is with how he considered the issue.

81. Mr Turney submitted that his ground 2 comprises three separate limbs which I summarise briefly as follows: procedural unfairness, a failure to have regard to the PPG as a material consideration, and the adequacy of the reasons given for his conclusions.

82. As to procedural unfairness Mr Turney noted that the Claimant's material was the only evidence on flood risk volunteered to the Inspector in response to his request. Despite this, the first that the Claimant knew that there was any view opposing his own was when he saw the Inspector's conclusions in the DL. Mr Turney added that he was given no opportunity to address the concerns that DL13-14 reveal the Inspector clearly still harboured, and that that is unfair.

83. As to guidance in the PPG Mr Turney submitted that it was material to note that the residential development proposed here was a vertical extension to an existing building and that in such circumstances the *"pragmatic approach on the availability of alternatives"* encouraged by the PPG when applying the sequential test was clearly not embraced by the Inspector.

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84. As to reasons Mr Turney submitted that it was not clear from the Inspector's reasoning why he had concluded (DL18) that *"insufficient information has been provided to show the proposal would comply with CS policy 16 and the [NPPF]".*

85. In relation to the procedural fairness ground Ms Pindham submitted that the Claimant had been given a fair opportunity to respond to the Inspector's concerns over flood risk and had failed to overcome them. The Inspector was not obliged to warn the Claimant that this may be the outcome nor to give the Claimant additional opportunities to overcome concerns that he still had.

86. In relation to the PPG Ms Pindham submitted that it was clear from the decision letter that the Inspector had considered the consequences of the development being an extension on top of an existing building. He had referred to it directly at DL16. Moreover she submitted that paragraph 33 of the PPG, concerning (amongst other things) the pragmatic approach to be employed when applying the sequential test, had not been brought to the Inspector's attention in the Claimant's submissions responding to his question and hence he was not obliged to respond to it directly. In any event even if it had been referred to it would not have assisted since the question of flood risk remained a concern for access to and egress from the building even though self-evidently it would not affect the units directly at the high level at which they sat.

87. In relation to reasons Ms Pindham submitted that in this case it was clear that the Inspector was not satisfied by the arguments advanced by the Claimant that the policy tests had been met. This is what he said. Those reasons were legally adequate.

Analysis and conclusions

88. I deal firstly with the question of procedural fairness. Ms Pindham relies on a number of authorities including, most pertinently as it seems to me, the decision of the Court of Appeal in *Secretary of State for Communities and Local Government v Engbers [2016] EWCA Civ 244.* That case also involved complaints about the fairness of the procedure adopted by an Inspector at a public inquiry, specifically with whether the Inspector had given an indication that he remained concerned about an issue on which he had already heard evidence. Giving the judgment of the Court rejecting the complaint Lewison L.J. held (at [53]) as follows:

> "Mr Lockhart-Mummery submitted that since Mr Farmery's second appearance at the inquiry was concerned only with the main access to the site, the developer could reasonably have thought that although the inspector might once have had concerns about the pedestrian crossing, those concerns had been satisfied and, if they had not, the inspector was duty bound to make that clear. I disagree. As Jackson LJ said in Hopkins, the inspector is not required to give the parties regular updates about his thinking. Indeed he may not have reached any conclusion at all on a particular issue before the end of the inquiry. Nor is the inspector required to give advance notice that he proposes to reject one party's evidence in favour of another party. The decision letter is the appropriate place for the inspector to explain why he has reached the factual conclusions that he has"

89. Ms Pindham drew my attention in particular to the comment about regular updates about the Inspector's thinking. She did so with good reason, because it seems to me that this is precisely what Mr Turney's submissions appear to require of the Inspector.

90. In this case the Inspector identified an issue that had not been canvassed in the parties' original statements of case or evidence because it had not been an issue taken

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by the Council in refusing the Planning Application. He had offered both parties the opportunity to comment on it. Only the Claimant had availed himself of that opportunity. The Claimant had, one assumes, put his best arguments forward and they had not been good enough to persuade the Inspector. Applying the reasoning of Lewison L.J. in *Engbers* there was no duty on the Inspector to warn the Claimant that this may be the outcome. The Claimant cannot complain that the procedure adopted was unfair.

91. I take Mr Turney's second and third limbs of ground 2 together.

92. In relation to the PPG Mr Turney's submissions rely to a large degree on paragraph 33 and especially the encouragement to decision-makers to adopt a *"pragmatic approach"* when applying the sequential test. The particular pragmatism expected of the Inspector here was a recognition that the development proposed was a rooftop extension to which (in Mr Turney's submission) the sequential approach ought not be applied strictly.

93. Ms Pindham is correct to note that paragraph 33 was not referred to in the flood risk submission by the Claimant's consultants, RPS. The fact that the development was a rooftop extension was referred to in the RPS submissions but then so it was in the Inspector's decision letter (DL16 refers to *"additions above ground level"*).

94. I accept Ms Pindham's associated submission that, when assessing whether the Inspector addressed all material issues in front of him, context is all important. She relies upon the judgment of Holgate J. in *Mayor of London v Secretary of State for Housing and Local Government [2020] JPL 1387* by analogy with the facts of the present case; I say by analogy because in *Mayor of London* the arguments concerned passages in a Statement of Common Ground about harm to Metropolitan Open Land which one party to the inquiry then resiled from and which the Inspector in his decision letter also departed from, but in my view nothing turns on the distinction and the analogy is a sound one. In his judgment Holgate J. held (at [81]-[84]):

> "81. A further consideration is the degree of importance to the issues in the appeal of the agreed matter from which the Inspector departs …
>
> 82 … (i) harm to MOL purposes was not relied upon by the Mayor (or otherwise identified) as a substantial matter in the appeal …
>
> 83 … On any fair reading of paragraph 5.1.7 of the SOCG, "harm to MOL purposes" was not given any prominence or treated as a point adding anything of substance to the harm that was expressly identified.
>
> 84. This is also borne out by the superficial treatment of the subject in the proof of evidence on behalf of the Mayor …"

95. Paragraph 33 of the PPG was not put to the Inspector specifically and so he was not required to mention it specifically in his decision. Nevertheless I am satisfied that in substance the Inspector's approach does demonstrate a reasonable degree of pragmatism based on the facts. He identified that the appeal proposals were for rooftop development. He observed – correctly – that the NPPF says nothing to disapply the sequential test to developments above ground level. Given the location, largely in flood zone 2, of the existing building upon which the appeal development would be built it was reasonable for the Inspector to consider whether other locations with a lesser risk of flooding could have accommodated the development.

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96. The Claimant had chosen to site the additional 13 residential units comprised in the Planning Application on the roof of an existing building, but in my view they are not so dependent upon the existing building that they could not be accommodated anywhere else. In those circumstances I consider that the Inspector was right to question whether other more appropriate locations were available for the 13 residential units. Ultimately he concluded that the sequential test had not been met because the Claimant had not satisfied him that there were no suitable alternative sites at lower risk of flooding. That, it seems to me, was a conclusion he was entitled to reach on the evidence in the exercise of his planning judgment. That being so it is a conclusion with which the Court will not interfere.

97. In relation to reasons, the classic statement of the law remains that of Lord Brown of Eaton-Under-Heywood in *South Bucks District Council v Porter [2004] 1 W.L.R. 1953* at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision"

98. I do not consider the Inspector's decision letter to be found wanting in any regard identified by Lord Brown.

99. It follows that ground 2 is dismissed.

Ground 3: the fallback argument

100. I remind myself that ground 3 still requires the permission of the Court to be granted.

Submissions

101. In relation to the fallback position said to be afforded by Class AA permitted development rights Mr Turney submits that the argument was highly germane to the two controversial issues in the appeal, because if permitted development rights were found to apply they could be exercised without the need to provide any affordable housing and without the need to satisfy the sequential test on flood risk.

102. Mr Turney referred to the Inspector's key conclusions in DL20 and submitted that two problems arose there.

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103. Firstly the Inspector appeared to query whether permitted development rights would actually be available. It is assumed from the reference to "conditions and limitations" that this was because Class AA rights apply only on detached buildings in commercial use or a mixed use. But at the time the existing building was in the lengthy process of being converted from an office use to a residential use and hence it was in "mixed use". There should not therefore have been any question about whether the Class AA rights were available. Mr Turney speculated that the Inspector may have been questioning whether the (separate) Class A permitted development rights were available but that was never the Claimant's case. Moreover the Council, in responding to the Claimant's submissions on the fallback argument, had expressly stated:

> "The Council accepts that the appeal proposal could be considered as permitted development under the proposed "Class AA – new dwellinghouses on detached buildings in commercial or mixed use""

104. Secondly, noting that a prior approval was needed from the Council before the permitted development rights were exercisable the Inspector concluded that:

> "No such prior approval has been issued and I cannot be certain it would be granted for any proposal related to the appeal site"

105. But, submitted Mr Turney, the Claimant's case before the Inspector had set out all the criteria that would have to be satisfied for a prior approval to be granted and had concluded in respect of all of them that they would be satisfied based on the Council's responses to the Planning Application. In such circumstances, Mr Turney added, there was no good reason to doubt that a prior approval would have been granted by the Council. In any event in apparently applying a test based on certainty the Inspector had misdirected himself, because case-law makes clear that the threshold is in fact much lower than that: *"[A] possibility will suffice"* (per Sullivan L.J. in *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] JPL 1326* at [21]).

106. In response Ms Pindham submitted that the Inspector's approach disclosed no errors. She accepted that permitted development rights are capable of giving rise to a fallback argument and that the correct test to apply was one of 'a possibility'. But, she submitted, looked at fairly on the facts that is the approach that the Inspector had adopted. He had accepted that the fallback argument existed but he had also noted that there was no prior approval in place and hence had attributed what he described as "limited weight" to it as a material consideration. This formulation makes it plain that he accepted it was a material consideration because had he not done so then he would be bound to have accorded it no weight at all. That being the case his conclusion in DL20 about the weight to be accorded to it is classically an exercise of planning judgement in which the Courts should not interfere.

107. Addressing the Council's position on the fallback argument Ms Pindham submitted that it was not in agreement with the Claimant. I note that the Council's Summary Grounds of Resistance in this case acknowledged the reference in its appeal submissions accepting *"… that the appeal proposal could be considered as permitted development under … Class AA"* but submitted that this was not the same as accepting that it would be permitted development. The gist of the Council's summary grounds was that one must assume that this form of words was chosen deliberately, and it was reasonable to speculate that the Council intended it to convey no more than an agreement that in principle the permitted development rights might be available if the criteria for the grant of a prior approval were made out.

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108. In light of these factors, submitted Ms Pindham, the Inspector's conclusions were perfectly adequate and his approach disclosed no error of law, and that Mr Cameron KC was right to dismiss the ground as unarguable.

Analysis and Conclusions

109. Mr Turney makes a persuasive argument for the importance of the fallback argument in the appeal. If a fallback position were agreed to be present then it would bypass the objections based on the lack of affordable housing and flood risk because neither issue would have to be confronted if permitted development rights were utilised.

110. In light of this it is perhaps surprising that the Inspector tackled the fallback argument as briefly as he did in the DL. His conclusions comprised just one eight-line paragraph (DL20) under the heading "Other considerations and planning balance". The brevity of the conclusions are not, of course, determinative of whether the Inspector was wrong in law to conclude as he did but they do require a careful scrutiny of the limited number of words actually used.

111. Mr Turney identifies the correct legal test of materiality for a fallback argument. The words of Sullivan L.J. in *Samuel Smith* were elaborated upon by Hickinbottom J. in *R (Zurich) v Lincolnshire Council [2012] EWHC 3708* at [75] when he said:

> "The prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fall back position happening is "very slight indeed", or merely "an outside chance", that is sufficient to make the position a material consideration"

112. In this case the Claimant's representative in the appeal went through a patient exercise of distilling from the words of Class AA the criteria that would have to be satisfied before a prior approval could be granted and then arguing why, based on the Council's response to related aspects of the Planning Application, a prior approval would be likely to be given. The Council can be assumed to have given the same response to a prior approval request as it did to the Planning Application even though the Inspector may subsequently have departed from some of the Council's own conclusions (for example on flood risk).

113. I have noted the Council's imaginative submission in its Summary Grounds about what the Council meant when it said that the appeal proposals *"could be considered as permitted development"*. I prefer Mr Turney's more straightforward interpretation, but in any event even if the Council's legal submission were correct the Council did not gainsay any of the Claimant's analysis and conclusions on the individual criteria in Class AA in its representations to the Inspector. I have also noted the other factors now referred to in the Council's Summary Grounds about, for example, the rating treatment of the Site but none of this was before the Inspector and so none of it can have informed his conclusions.

114. The brevity with which the Inspector framed his conclusions on the fallback argument does not serve him well. At no point in DL20 does he grapple with the Claimant's submission that a prior approval would at least be likely to have been granted based on his analysis of the criteria (none of which the Council appeared to take issue with in the appeal), nor of the Council's apparent acceptance of the availability of permitted development rights in its statement in response. Instead having identified (correctly) that as a matter of fact no such prior approval had been issued he disposes of the point with the conclusion that *"I cannot be certain it would be granted"*. I agree with Mr Turney that, on its face, the Inspector appears to have been applying far

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too high a threshold to the prospect of it happening. In my judgement the only rational conclusion on the evidence is that it was at least "a possibility" (per *Samuel Smith*) and "more than a merely theoretical prospect" (per *Zurich*).

115. Ms Pindham is correct to note that the Inspector did accept that the fallback argument was a material consideration. But he then attached only limited weight to it. His use of the words "As such …" immediately preceding this conclusion can only mean that the conclusion derives from one or both of his conclusions that Class AA permitted development rights would not be applicable in this scenario and/or that the lack of certainty around whether a prior approval would be granted limits the weight to be accorded to the material consideration. Both propositions betray legal errors in the Inspector's reasoning. In the case of the former, for the reasons I have set out above Class AA permitted development rights were indeed available in this scenario. In the case of the latter a conclusion based on the absence of a prior approval is irrational in the face of the Claimant's patient analysis of the criteria and how they are met, undisputed by the Council in the appeal. Put at its absolute highest for the First Defendant the reasons given by the Inspector for reaching this conclusion are wholly inadequate and that does not rescue the decision from being unlawful.

116. It follows that, not only is ground 3 plainly arguable, it is compelling. I therefore grant permission for ground 3 on the renewed application, and ground 3 succeeds.

Conclusions

117. For the reasons I have given above grounds 1 and 3 succeed and ground 2 is dismissed.

118. I will now invite the parties to agree an appropriate form of Order or, failing agreement, to make submissions in writing on the form of Order and on any supplementary matters. In relation to costs, at the conclusion of the hearing I agreed with the pragmatic position the parties arrived at concerning the costs of the First Defendant's successful application to extend the time for filing the skeleton argument. The position regarding these costs should form part of either an agreed Order or the submissions of the parties.

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