CHISWICK CURVE- CHRISTOPH EGRET.

CLOSING OF THE APPELLANT

Introduction.

1. The entrance to London from the West is in many ways the most tangible gateway into the Global capital. The elevated section of the M4 is the main route to the city from its International airport.

2. It "drives" into the City at high level on a structure of significant scale and presence.

3. It takes the visitor out of the Green Belt and into and towards the metropolitan global City beyond. It provides him/her with glimpses of what is to come

4. This Gateway has the potential to announce the capital, and in many ways the country that it serves, as a thriving, vital, artistic and articulate place.

5. The potential to mark that place, that moment, with a building of world class quality by one of Europe's most lauded and talented of architects is one that the planning system should not let slip.

6. In this context and at this location, Christoph Egret's building will be immediately recognised as a world class building of immense quality.

7. It would mark not only an important spatial place of international and national entry into London, but would mark also the confidence, independence and cultural élan of the society and the system that created it.

8. It would announce in a gesture at once bold and subtle that here is a society which is capable of producing a building which represents the best of the new. It will be a symbol of a diverse, sensitive post- modern culture that has something of its own to add to the centuries of history upon which it is overlaid.

9. And the confidence and ability to foster, to see understand and appreciate the best of the new is in no way inimical to the conservation of the best of the old. In a crowded island and in particular in its main city and engine of growth for the entire country, the spatial planning system has long recognised that seeing the best of the new juxtaposed with the best of the old is not harmful.

10. Those that oppose this development opposed with equal fervour developments which are now, in a wide range of contexts, universally recognised throughout the world as appropriate symbols of the capital city and its spatial planning system.

11. It is no coincidence when it comes to buildings of the highest quality that "conservation" and "conversation" are anagrams of each other.

12. And it is no coincidence either that those who oppose Egret's work do so either from the standpoint of saying that **any** visibility of modern Britain is harmful irrespective of quality or without any coherent or informed analysis of the undoubted quality of the work.

Architecture of the Highest Quality.

Introduction

15. It is right that this closing begins with the quality of the Architect and the quality of the Architect's work at this location.

16. And, given the importance of an understanding of the architectural quality that this proposal brings to the area, that should be the starting point for the Inspector's Report and the Secretary of State's decision too.

17. That is how the inspectorate has structured its reports in similar cases and there is no good reason to take a different position here.

18. The consistent view has been correctly taken by the Inspectorate and the Secretary of State (often contrary to the position adopted by HE) that a fair-minded assessment of impact on heritage assets cannot be essayed in the absence of a consideration of design quality.

19. I am confident that such a view should and will prevail in the circumstances of this case. And with that confidence in hand I begin with the Architect.

Architect

20. Christophe Egret is an architect of the first order. He is an architect known and appreciated by architects for his understanding of and response to context.

21. The gentle way in which he reflected on the receipt of the Stirling Prize for the Peckham Library was characteristic of the man. "I suppose it reinforced a little bit my confidence in my own abilities". Everyone in the architectural world knows and knew that Egret "owned" that prize winning project. It is his Stirling Prize.

22. And a simple trip to south London to see the building in operation and to see the genuine joy in knowledge that it transmits to its community is to begin to understand the ability of modern good quality architecture still to excite, inspire and delight.

23. His other corpus of work also reflects this combination of joy, humility and absence of brashness. It is thoughtful, absent in assertiveness, gentle and artistic. The

Secretary of State is unlikely to be able to visit Mr Egret's completed buildings fully to understand these points. But it is the duty (and we trust, pleasure) for the Inspector to represent this as faithfully and fully as possible in his report.

Contrasting approaches to Quality.

24. In the same way as in Peckham, Egret has understood and responded to the bespoke context of the appeal site to produce a building that is the very definition of contextual. From his earliest beautiful hand drawn sketches right through to the final models giving expression to his ideas, Egret has understood and explained every last nuance of the locus in quo and his building's relationship to it.

25. When such a proper assessment of the architecture of the Curve is undertaken, its multi-layered qualities unfold gently and easily.

26. Here, is not the place to repeat the presentation of the Architect to the Inspector: but some sense of the quality of analysis and response to context which it disclosed is needed to be placed before the Secretary of State.

27. The Secretary of State must be able to understand the quality of architectural response and the thought and passion that has infected this project.

28. He must be made to understand how wide of the mark are the allegations of thoughtlessness and absence of skill. He must properly understand and have explained to him the sparsity of the analysis of quality on the side of those that would oppose the Curve

29. A comparison between the care attention and thought poured into this project by the architect and the careless throw-away analysis of many who would criticise it is I fear obvious and apparent.

Egret's Approach.

30. Egret's approach to the understanding of the context of the Curve and the processes leading to the final design was and was described by Paul Finch as exemplary.

31. Finch has probably presided over more, hugely important Design Review Panels than any other person.

32. Ever.

33. The shape of the best of modern day London reflects his life's work. As long-term Chairman of CABE and its design review panel, he knows and understands when a building has been well presented and its context well understood.

34. His systematic judgment on the process here and then the building which it produced should be given significant weight.

35. His involvement in a design review role led him to voice his keen support for the quality of the project and in particular its role in preparing an integrated movement solution and wider spatial strategy for the Brentford East area. The admiration for the project following his design review came first, his review of the wider strategies was clearly for him seen as no more than an extension of that review role.

36. The suggestion that Mr Paul Finch is not an independent witness but a hired gun whose "evidence should treated as unreliable" could only be made by someone whose knowledge of the man, his work, his history and his utter professional integrity is severely faulty.

37. Egret's overall explanation and exposition of the various architectural partis which he mined from the Curve's context cannot be done justice in the dry world of a lawyer's closing.

38. And we probably "murder to dissect".

39. But, even an examination just of his explanation of the derivation of the outer envelope of the building discloses deep understanding and care. It was careful and considered and yet, for those with an ear to hear, profoundly exciting at the same time. Thus:

    a. The creation of a multi formed composition of reduced and delicately designed volumes was from the beginning a response to near context and reflected an understanding that in longer distance views there was a need for an articulated and sculptural response. The vertical height of the curve reflected the position of the building along the two hugely scaled infrastructure curves of the railway and motorway, the council's own regeneration plans for Brentford East, and the design intention to avoid a juxtaposition of Egret's new glass "house" with the delicate, filigree and ethereal beauty of the Palm House at Kew.
    b. The chamfered approach to the way the building hits the ground offers a generous public realm and increases the length of the (remarkable for a tower) active street frontage. It also allows a differentiation and understanding of the residential floorspace from the commercial floorspace in this busy regeneration corridor.
    c. Setbacks in the building create a deliberate "stepping visual relationship" between the building volumes, breaking down the mass and inviting the eye to read the building as a series of volumes of proportion. This approach again seeks to pick up the relevant requirement in the M4 corridor to act as a landmark building, while being respectful to wider landscape and heritage contexts by stepping and articulating the mass of the building.
    d. A highly glazed façade allows the building to blend its appearance with its surroundings, as well as offering unparalleled views out of the building and natural light within.

e. Vertical and horizontal fins and a family of cladding types break down, pixilate or more accurately pointillate in Seurat and Signac sense the appearance of the building both close to and in the distant views. This has the effect of maintaining and even reducing the human scale of the building while deconstructing the rigid floor patterns and repetitiveness of less well considered buildings.
f. A palate of earthtone colours for the fins and cladding features means that when seen from a distance, the facades of the buildings are broken down, pointillated but deliberately pick up and are sympathetic to the colours and forms of the foreground of the views, their trees, buildings and overall context.
g. This palette of fins is then gently twisted and manipulated better to reflect the curving shapes of the masses which will not read as shadowed blocks from close to or from distant.
h. The twisting of fins reduces against the glass as the building rises meaning that the building is at its lightest and most glazed as it touches and dissolves into the sky and at its most solid where in townscape terms that is most appropriate.

40. It must be made apparent to the Secretary of State that this is a building of the highest quality, born of its surroundings with every design move thought through and justified.

41. As in all things truly good, the thoughts which have produced this building are simple. The skill lies not in complexity but in an ability to see what will work and why.

42. That is what Egret has done here.

43. And Sir, it will be secured by the inquiry plans which are Egrets, with the requirement to submit the key “moves” of the architecture in a condition (as per 1 Blackfiars) and by the architect retention condition, (which could just as easily have found its way into the s 106 but which was not sought there by the council.)

Other Approaches to Quality.

The Mayor.

44. Please read all of the material from the Mayor together and fairly. There are two reports and two letters in CG appendices and rebuttal appendices. They are to be read cumulatively and fairly and not out of context. Because of the close and consistent contact between the Mayor and the Secretary of State, we are very satisfied that he will be familiar with the Conventions of the Stage one and Stage Two processes and the need to read the two documents together and in context.

45. The London Mayoral team is the most experienced team at dealing with the quality of and implications of tall buildings of any spatial development team in Europe. This expertise began with the formation by the Mayor of Lord Roger's group set up to encourage the highest quality of architecture in the Capital and has transposed itself into the design policies of the London Plan and its relevant SPGs.

46. These policies have been the subject of successive consideration and examination by panels and have been endorsed as a thorough and appropriate means of understanding and judging architectural quality in the capital.

47. Policy 7.7 in particular provides a comprehensive checklist in the Statutory Development Plan against which tall buildings fall to be considered. It is designed to be a comprehensive and balanced development plan check-list against which the suitability of individual tall buildings fall to be considered. We would invite you and know that the Secretary of State will consider the proposal fairly and fully against its terms.

48. It is of the greatest significance therefore that in these circumstances, the Mayoral team requires the Inspector to tell the Secretary of State on appeal that it takes the view that Egret's proposal represents the architectural quality of the highest order.

49. It reaches that conclusion following a thorough, well informed and systematic assessment of quality through the operation of the policies of its own Plan.

50. And as Mr Egret was clear, the assessment of quality was not one of blind or unthinking approbation.

51. The Mayoral team immediately saw the compelling correctness in the overall approach of the proposal but worked with the design team in exactly the way suggested as appropriate by the NPPF and the PPG, to understand and to fully form an accurate assessment of quality.

52. This included making suggestions which the design team adopted and worked upon and also seeking further, better and more detailed particulars of the last detail of the facade treatment.

53. In all of the circumstances, the weight to be given to the identification by the Mayor of the fact that the proposal is of the highest architectural quality and is consistent with the polices which provide a clear and systematic approach to the consideration of tall buildings is to be given very significant weight.

The Council.

54. The largest part of the Council's XX of the Architect sought to identify that the Council had taken a very clear and consistent approach to the alleged unacceptability of the proposal and its quality from the start.

55. Wrong.

56. The formal pre-application position of the Council, supported as Mr Egret explained by a series of meetings expose a very different one to that presented in XX.

57. The council itself described the architectural parti of the proposal as “compelling” and of the highest quality design. It commented with approbation that the architect had responded properly and accurately to the input from the officers and urged progress towards an application. It indicated that the breaking down of the massing of the development and in particular the way in which the pointillation of the buildings picked up the relevant foreground elements of the key views was of great quality. All facts that corporately the council appeared to have “forgotten”.

58. At the time of the consideration of the application, rather than undertake a thorough and systematic assessment of design quality as part of its assessment of impact, the Council’s Design and Heritage Consultants simply asserted that they did not accept that design quality was capable of avoiding or ameliorating potential harm to various heritage assets.

59. The assessment of impact of the proposal upon those assets is set out below. What is important at this stage is an understanding that the Council, having originally recognised the essence of the proposal as compelling, thereafter did not undertake anything like a thorough assessment of the architectural quality of the proposal as it would be seen in the relevant views or at all.

60. And with the greatest of respect to Mr Grover, who has a scant few pages entitled Design in his proof, neither does he.

61. It is no criticism of Mr Grover that he has been in this respect asked to undertake a task which is not a good fit with his qualifications or experience. That is not his fault. But his criticisms of the amount of active frontage, of the creation of a pedestrian experience of quality and of the use and function of the publicly available atrium and mezzanine canteen and restaurant all establishing that in this respect he was working considerably beyond his brief.

62. He accepted that he has no professional architectural qualification or experience (beyond his first degree) and that he has had no experience of critiquing the operation function or form of tall buildings in the particular London (or any other) context.

63. By focussing on what he, incorrectly, asserted to be individual elements of deficiency, he failed to undertake a thorough systematic appraisal of architectural quality at all. All of his criticisms were comprehensively and compellingly dealt with by Mr Egret in his evidence in chief.

HE.

64. HE made no assessment of architectural quality of the proposal at all.

65. Mr Dunne was remarkably frank about it. He said it didn't pass the threshold whereby an assessment of architectural quality was appropriate. It hadn't reached the stage where quality had become a relevant consideration.

66. That's a wholly inappropriate response.

67. When pressed on the issue of quality of the design and the way it would be seen, his considered opinion was that, "we have nothing against the design and understand the skill of Mr Egret… this would probably be the best building in Nine Elms if it were to go there."

68. Rarely could a witness have disclosed such a fundamental misunderstanding of the role of context in the understanding of architectural quality. Not Mr Dunne's fault. He was neither asked to comment by his client, nor was he qualified to comment in any rational and systematic way in the quality of architecture of the proposal.

69. That was an absent hole in the centre of EHs analysis.

70. It is as if HE has closed its eyes to the very clear, consistent and compelling assessment of these issues by the Inspectorate and the Secretary of State over the last 15 years. (see summary in KKQC closing in Elizabeth House… accepted as accurate by the Inspector Croft Tab K).

71. In the absence of a thorough and proper assessment of quality, HE's assessment of harm is simply incomplete and unfair.

72. Indeed, it would almost appear as if HE has ceded all responsibility for the rational and systematic assessment of architectural quality to the judging panel of a trade newspaper which awards something it calls the Carbuncle Cup. It is only in that context that any analysis of quality of architecture appears to have been entertained.

73. This approach to architectural quality might even be funny were it not for the time, skill and attention that has been taken with this proposal and were it not for the importance of this site and case to the spatial strategy of London and the clear guidance that the Inspectorate has given on the importance of taking architectural quality seriously in assessments of impact on heritage assets.

RBGK.

74. RBGK made no assessment of architectural quality at all either on a proper reading of its evidence.

75. And perhaps that is not surprising when the absolutist nature of the case it is now forced to promote is understood.

76. No systematic assessment of architectural quality in the round is ever even essayed. Mr Croft said he really didn't need to look any further than height and mass to get the answer he needed. Of course, this is hardly surprising when the formal position now taken by RBGK, namely that the visibility of any new building within the Kew Gardens envelope is harmful is understood… but if that really was intended to be the case, then Mr C would not even have had to look at height and mass (see below) that is not the formal position which was adopted or disclosed in his own party's rule 6 statement or in his evidence (see below).

77. The height of absence of rational consideration of evidence of quality arose at the end of Mr M's XX of one of Europe's best architects. It was, as a round up to the several hours of XX suggested (without a hint of supporting expert analysis or irony) that he had designed a "tall, fat, misshapen building".

78. The whole edifice of policy from By Design, through to the NPPF and the PPG has been put in place precisely to avoid this unevidenced, unconsidered and frankly preposterous approache to architectural quality.

Summary

79. The Appellant team, Mr Finch and the Mayoral team are the only people even to seek to consider and to identify the architectural quality of the proposal in any systematic way as required by policy and as was indicated by the inspector as important back on Day 1.

80. The Secretary of State guided by the understanding of the proposal by the Inspector should have no difficulty in concluding that the Curve is not only architecture of the highest quality but that it represents the "best of today". If it doesn't, we pack up and go home. A tall building which is not of the highest architectural quality and integrity does not deserve to be built.

81. But if it is that and more, that has a profound impact on the way in which this case then runs.

82. The failure of other parties even properly to engage in an assessment of quality not only means that the objections to the proposal's impact is at best partial and uninformed; it also meant that at times, criticisms of the building not supported by any rational analysis were reduced to cartoon level name-calling.

83. This is exactly the type of trial by assertion and name calling that the introduction of By Design, the recruitment of a qualified cadre of architect inspectors and the now powerful policy in favour of rational assessment of design was meant to stop.

84. It also means that the assessment of impact of HE is, again, fundamentally incomplete and inaccurate.

85. It is to the impact of this exemplary building on heritage assets that I now turn.

Impact of the proposal on heritage assets.

Introduction and ground-rules

86. The Curve has no direct impact on any historic asset at all. It sits well outside the WHS buffer zone upon which it has no direct impact either.

87. The Curve will be visible from a number of heritage assets and in views of and over other heritage assets.

88. It will therefore, at most, have an indirect and mostly distant impact on the settings of heritage assets by reason of its visibility.

89. It is the nature and effect of this visibility as understood in the full spatial context of the heritage asset which falls to be considered.

90. When considering alleged harm to the significance of a designated asset by reason of visibility in its setting, it is necessary to understand that Parliament has chosen to treat the settings of different categories of designated heritage assets in different ways.

An unnecessary diversion: suggestion of inadequacy of Images for Assessment.

91. This application is an ES application for the purposes of the Regulations.

92. The Council is statutorily bound to ensure that the ES is among other things fit to allow the impacts (including in cases like this visual impact) of the proposal reasonably to be considered, understood and judged.

93. If, at any time, it believes that the ES is not fit for purpose or is misleading in any material way, it is under a duty to put that right. If it believes a methodology is incorrect or incorrectly or inadequately explained, it has the continuing power and duty to require that to be rectified. It cannot simply turn up at an inquiry into a n ES appeal and say, sorry chaps ES or important parts of it are not fit for purpose, there should be a refusal.

94. In a case involving a tall building, the assessment of visual impact is undertaken via a TVIA. In the present case, an ES was submitted along with a TVIA. It was consulted upon in the usual way and a supplementary document which was issued which dealt comprehensively with each and every concern raised by the Council.

95. No other party raised any concerns with the adequacy of the images presented at this or any other relevant time.

96. There was no mention of any inadequacy of the images in any party's rule 6 statement. There were no amendments made to any rule 6 statement to reflect the any alleged concern. Neither was there even a hint that such a point would be taken despite a pre-inquiry meeting where such issues should have been raised and by which time, Mr Spence had been instructed.

97. In the circumstances of this case, this last-minute assertion that the images in the ES were not fit for their purpose made on (delayed) exchange of evidence for the first time was:

    a. Procedurally unreasonable, professionally discourteous and
    b. Without any merit or substance.

98. I do not propose to take up large parts of this closing discussing the matters raised by Mr Spence. If either he or the LPA believes that the established policy and approach of the LVMF in London to the presentation of TVIAs ought to be altered, then they should seek to alter the LVMF and that that is a matter between the Mayor, The Secretary of State and the LI but not a matter for this inquiry.

99. Suffice it to say here that:

    a. Mr Spence's assertion that tilt lens technology was not typical was established to be factually incorrect in the circumstances of London and the LVMF. Almost all of the images establishing best practice in the LVMF are tilt shift lenses. His agreement that if TSL were to be used at all there was a clear argument for consistency of use across a TVIA was correct and RC explained clearly that there were a significant number of views where tilt shift methodology was necessary or appropriate.
    b. His assertion that tilt-lens technology was the choice of last resort was not supported by any document other than a draft guidance note to landscape institute members nationally that he had had a hand in publishing hours before the inquiry opened.
    c. None of his criticisms of lens choice actually went to geometrical accuracy of the application or ES images at all.
    d. His suggestion that a development always had to be in the absolute centre of the rendered image is a ludicrous and unsupportable proposition. He was despite being asked 6 times by the applicant and twice by the inspector unable to identify a single image that he thought was geometrically deficient in this regard.
    e. The LVMF makes it clear that images should generally be somewhere towards the middle of the image. Which is where in almost all of the

applicant's images it is. Where it is not it is for the purpose of establishing a particular context, which is then referred to and explained.

100. In all of these circumstances, it came as no surprise that actually when pressed on the matter neither Mr Spence, nor the Council were alleging that the images presented by the applicant were in any way unfit for the purpose of understanding the visual impact of the proposal: the main function and requirement of an ES.

101. The Applicant in this case without any complaint or demur from the lpa has followed a now very well-trodden path in the presentation of its images and has followed the very best and fully understood practice. If there was any issue with this approach it needed to be raised much earlier in the piece than on exchange.

102. The Applicant draws significant comfort from the fact that the Inspector, who inherits the role of the lpa on such matters, following the evidence has not seen it necessary to issue a Reg 22 request to ensure that the ES in and of itself is fit for purpose.

103. It already is and always was. And the Inspector has an array of information within that document (and beyond) sufficient to support a clear and reasoned recommendation to grant planning permission and advertising consent- and that is the relevant test, because it is the significant environmental impacts of a GRANT of permission which fall properly to be assessed.

104. It is also right to note that it was the lpa which introduced this element of criticism of the case. Given that there is not a single image where any meaningful geometrical inaccuracy or distortion is alleged and where the inspector can be given extracts or blown up versions of the Appellant's images if appropriate, then I do not need to go any further.

105. But I will say this, the criticisms of Mr Spence's methodology have not gone away as Mr Coleman made clear in his evidence. "I don't resile from the criticisms put forward by AVR".

106. It is just that as soon as it was accepted that the applicant's images were legally fit basis upon which a planning permission could be granted, there was little point criticising an alternative method based on Scottish Windfarm Guidance and a hastily rushed out piece of draft guidance. Even if Mr Spense made that irresistible by dubbing himself and his expertise as "second-to-none" in the country: there's nothing like gentle humility.

107. But on any view, Mr Spences's methodology It is cumbersome, unnecessarily complex (involving a 360-degree panorama at A1 size for each view: never made available) and still has unexplained differences from the AVR images which are agreed to be geometrically accurate. (see Rebuttal images). For what it is worth to

the secretary of State (very little) this practitioner does not think it's the future… and it certainly isn't the present.

108. I return to the merits of the case.

The World Heritage Site as a designated Heritage Asset.

Introduction and approach generally.

109. Kew Gardens is one of the capital city's four World Heritage Sites. It was inscribed in July 2003. And as such, and as inscribed it is a designated heritage asset in its own right.

110. As a World Heritage Site, Kew Gardens is a designated heritage asset of the highest significance. Its international importance must be recognised and given the fullest of appropriate weight.

111. But the WHS does not suspend the ordinary operation of the planning system or require a decision-maker to slavishly accept allegations or propositions which simply cannot be supported on the evidence or by a proper application of policy.

112. WHS are special categories of designated heritage assets.

113. The approach to impact upon a WHS as a designated heritage asset is thus necessarily a little different to and distinct from other heritage assets.

114. It is important to understand exactly what it is that is inscribed and how and why it is protected

115. It is the Outstanding Universal Value of the World Heritage Site as a whole as found on inscription and as set out in the Statement of Outstanding Universal Value which primarily indicates its importance as a heritage asset.

116. The PPG specifically states that it is this OUV, identified in the Statement which should be taken in to account by the Secretary of State in determining cases on appeal or call-in.

117. The OUV of Kew Gardens so far as is relevant to this application comprises:

a. a rich and diverse historical landscape providing a palimpsest of landscape design;
b. an iconic architectural legacy.

118. It is these features which were found to exist and to justify inscription as at June 2003 which constitute the significance of the designated heritage asset for the

purposes of national guidance. It is these features and this significance which falls to be protected by the planning system.

119. It is worth quoting from the ICOMOS Guidance to understand what it is decision-makers are to seek to protect.

> "In the case of WH properties, their international significance is established as at the time of inscription and defined as their Outstanding Universal Value. State Parties undertake to retain and guard *this* OUV through protecting and conserving that attributes that convey OUV" (all emphasis added) (INQ 32) Icomos guidance)

120. It follows that it is the OUV as it is found and described at "inscription" which falls to be "retained and guarded".

121. There is no requirement on a decision-maker to require development to enhance OUV or to seek to create a different OUV to that which was crystallised at the date of inscription. That would run wholly contrary to the way in which law and policy in relation to heritage assets.

122. Parliament has not thought it appropriate or necessary, specifically to protect the setting of a WHS by legislation. The setting of a WHS does not fall to be protected for its own sake. Neither does it garner by itself any statutory protection at all.

123. In these circumstances, the statutory provisions and presumptions that arise in relation to some heritage assets do not exist. It is therefore especially important to examine the nature and content of the policy guidance which is in play in relation to the settings of WHS.

124. The NPPF reflecting and consistent with the absence of a statutory protection for settings of Conservation Areas and WHS makes it clear, that not all aspects these assets settings are of equal importance.

125. It is critical therefore that decision-makers identify what is truly important as part of their decision-making duties.

126. Further guidance on protecting **the setting** of WHS is contained in the PPG. (CDC 02) It also points out that the UNESCO Operational Guidelines seek protection of the "**important** views and other areas or attributes that are functionally important as a support to the Property". The identification of important views is deliberate and consistent with the NPPF indicating that not all elements are of equal value.

127. The PPG also makes it clear again consistent with these Operational Guidelines and the NPPF that not all aspects of a WHS setting are of equal importance, that the setting of a WHS may be appropriately protected by "the protection of specific views and viewpoints".

128. The role of the Management Plan in this respect is to "protect conserve and present the Site" and to identify how "the Outstanding Universal Value, authenticity and integrity is to be maintained." Clearly this can include the identification, specific and protection of views important to the protection of OUV.

129. In the London specific context, the relevant development plan policy and Supplementary Guidance re-enforces the fact that it is the maintenance and protection of the **identified** OUV of a site as a whole which is the essential focus of consideration for this category of designated heritage asset.

130. The London Plan makes it clear that all of the WHS in London are embedded in the constantly evolving urban fabric of London. And that it is for decision makers to "strike a balance between protecting OUV and allowing the surrounding land to continue to change and evolve as it has for centuries."

131. This is a clear recognition that in London an essential part of the character of each of the WHS lies in the fact the WHS are inevitably understood and experienced as part of the London urban environment.

132. The references to the need to protect identified and important viewpoints and vistas is for this reason in London is thus yet more important. Development within the setting of the WHS is specifically envisaged as being appropriate acceptable in each of the London WHS- subject to appropriate quality and assessment. The identification of what are truly important setting views is therefore the more necessary.

133. In furtherance of this balanced and proportionate approach, Policy 7.11 of the London Plan specifically states that the Mayor will **"identify and protect aspects of views that contribute to a viewer's ability to recognise and to appreciate a World Heritage Site's Authenticity, integrity, significance and Outstanding Universal Value."**

134. And the WHS SPG (CDC 11) requires "**Views into and out of and across World Heritage Sites should be identified in management plans DPDs and other relevant strategies" …." Development proposals should be assessed against the impact on identified strategic and local views."**

135. The approach to the wider setting of a WHS and development is therefore clear and consistent: it applies to the WHS at Kew. There is simply no justification for rationally suggesting otherwise. Decision makers are required to follow it in the circumstances of this case:

a. Not all aspects or setting views of a WHS are of equal importance: where harm is alleged a judgment must be made which is fair and proportionate about the relevant significance of the view involved.

b. To assist in such an exercise and to reflect the fact that the protection of all views from any impact is NOT appropriate, both the Operational Guidelines and the PPG indicate the nature and extent of "protection" of **"important views" from unacceptable impact.**

c. There is a requirement in London for such views to be specifically identified and for the impact of development on such views to be considered in accordance with the relevant policies.

The Identification and protection of important views.

136. The LVMF has undergone significant and multiple consultation. It has identified a significant number of key views which contribute to a viewer's ability to recognise and to appreciate a World Heritage Site's authenticity, integrity, significance and OUV. It has where it has thought it necessary and appropriate specifically protected the identified settings of London's WHS. If it was appropriate to have done this for Kew it could have and would have.

137. Further the WHS Management and Landscape plans for Kew Gardens have all sought to reflect this and its antecedent advice by identifying important views and vistas in the parks.

138. The whole purpose of identifying these views as important and as needing protection is to give a proportionate, objective assessment of that which is truly of importance to assist decisionmakers when specific developments in the non-statutory setting of a WHS are being considered. This is particularly the case in London, where the protection of WHS from any visual impact is simply neither practical nor justified.

139. The important Views and Vitas for Kew Gardens are dutifully identified on page 95 of the WHS Management Plan. (CDF 10) They replicate the similar views and vistas consistently identified in earlier plans and landscape masterplans.

140. There has been a consistent consensus of opinion in relation to these views in the process leading to this inquiry.

141. Given the policy matrix set out above and the importance with which such views are invested in the UK and London context, all parties expressed (as they were clearly obliged to given the policy matrix) a judgment on the impact of the proposal on important views and vistas.

142. All rule 6 parties (including RBGK) expressing a view accepted and asserted (at the least) that none of these views or vistas is unacceptably harmed by the proposal.

143. HE and the LPA repeated and formally accepted this view in their evidence to the inquiry in evidence in their proofs and in the witness box.

144. RBKC also specifically identified the views and viewpoints in their proofs, Mr Williams on behalf of the RBKC confirmed very clearly his understanding that RBKC was not alleging unacceptable harm to these identified views. There is, entirely consistent with this position, no specific suggestion in Mr Croft's proof at all, that the proposal unacceptably harms those specifically identified views or vistas contrary to the advice in the PPG and the SPG.

145. The scramble to construct such a case in evidence in chief and to distance itself from its previous positions in this regard was as instructive as it was unseemly.

146. Often times, the way in which a party feels the need significantly to shift its position during the course of an inquiry gives a decision-maker in a field of subjective judgment a very clear clue as to where the more objective truth lies.

147. Here the RBGK had realised too late that, given the policy context identified above that it was a little "naked" in the relevant harm to **important** and **identified** views department, particularly when it alone was alleging that the impact here fell into the "substantial harm or total destruction of significance category".

148. So, it had two choices available to it:

a. to shift its position in relation to the important views and vistas identified in the Management Plan (and for decades earlier) to now allege breach of the policy where it had in reality previously asserted none or
b. to ignore the policy and to allege that ANY "infraction" into the visual envelope of Kew AT ALL" was unacceptably harmful.

149. It chose without hint of appropriate embarrassment eventually to do BOTH.

150. Mr Croft chose to contradict Mr Williams and the balance of the heritage evidence by alleging in chief that the proposals did cause unacceptable harm to 2 views on the plan of important views and vistas after all (including in his evidence in chief views from the Pagoda!) This shift in evidence does not bear scrutiny as the next section of this closing makes clear.

151. And then extraordinarily, Mr M sought to construct an argument that the generality of government policy and clear London Plan policy did not apply to the specific circumstances of London and that ANY intervention into the Kew visual envelope would be contrary to policy, and harmful.

152. Neither this proposition, nor anything approaches it will be found in Mr Crofts evidence. Please read it with this in mind.

153. Further in xx he did as accurately record in Mr JMQCs closing agree that the "opening did baldly assert that visibility equated to harm" but that was in the context of a line of previous questions where he specifically said he didn't take that approach.

154. He said that visibility of itself was not harmful and that an understanding of design quality was important to an understanding and consideration of impact. He said in terms that in this context, he agreed that there will be aspects of quality to take into account. “When looking at the impact it is important to have a view on the qualities of design. Here we are at a distance, so the sculptural form height massing and coloration are all important” he said. In agreeing that the opening said what it did, namely that visibility was harmful therefore he was accepting that it was saying something different from his analysis.

155. Given the clear and I hope thorough way in which the other parties (including objectors) have established that visibility of a tall or any building does not equate to necessary harm at Kew gardens, I can be brief in simply dismissing this as a wholly inappropriate and impermissible reading of policy when seen in the round.

156. Insofar, as this extraordinary proposition relies upon a rather inaccurate reading of the Management Plan:

a. A proper reading of the Management Plan does not support a proposition that any further visibility of a building in the setting is harmful. The document itself is very clear that it does not seek to set aside the wider and longstanding policy of protecting “significant sightlines and vistas”: indeed, it wonders whether it should extend the views (not necessary if ANY impact harmful. (see p16)
b. Even if the MP is read in a way which supports the proposition that any new visibility of a building in a wider setting is harmful (which is simply not possible), then it is so fundamentally inconsistent with all levels of WHS policy including the Operational Guidelines, the NPPF, the PPG the London Plan and its daughter documents that no significant weight should be given to such an interpretation.

157. I also note that RBKG appear to have given not a moment’s thought to the implications of this new and wholly untenable proposition being followed through for their fellow inhabitants of London: the ones who live, work, plan, love and grieve in the City beyond. “Visibility equals harm to the highest-grade world heritage site already teetering on substantial harm” kills stone dead any realistic aspirations for the Golden Mile corridor, for urban regeneration and for the well-being of the areas surrounding the site. I doubt that Mr Ground will be seconding this interpretation on behalf of the LBH any time soon.

158. What RBKG is now seeking: because it is forced to on the evidence, is a policy which in effect requires no visibility to the world beyond: it is a no more development visible in our inward facing closeted world. Any further visual intervention is ipso facto harmful, whatever it is, however well designed it is and however unimportant and unidentified the view.

159. Both these new propositions, that important views and vistas are harmed and that all visibility is harm are not only wrong, they are much, much more notable for the circumstances in which they have arisen and what they tell the decision-maker about the shifting nature of RBGK's case.

160. RBGK, began by asserting very clearly in its Rule 6 statement that it was not the impact of a building per se that would be the issue for this inquiry which at the same time accepting that none of the important identified views was harmed.

161. A rule 6 Statement is not a lawyer's pleading, and it is not a pleading point to identify that a parties' case has fundamentally shifted during the course of a case and indeed an inquiry. A rule 6 statement is meant as a matter of fundamental fairness to identify the nature of a real parties case, both on matters of fact and planning judgment at an inquiry.

162. Parliament has said that a Rule 6 is a necessary part of the planning appeal system and the Inspectorate has consistently provided guidance on the importance of the document as a way of defining the case a party puts for the purpose of the fair and equitable running of the inquiry.

163. Of course, if a case changes, then there is a duty for a Rule 6 statement to be amended so that parties can deal with that change in their evidence.

164. There was no such amendment to suggest that ANY breach of the visual envelope was harmful. and neither was there was specific allegation in either of the proofs that the identified views were unacceptably harmed.

165. Now at the time of closing, understanding against the proper decision-making matrix that it is in a little evidential difficulty, the case has become that ANY further visual "intrusion" (which is alleged to be a synonym for visibility) at all is harmful and, by the way you do after all harm two important vistas and views contrary to the PPG and the SPG despite the fact that we said you didn't.

166. The evidence does not come close to supporting this substantially altered case.

The harm now alleged to Important Views and Vistas.

167. In his evidence in chief, Mr C was forced to construct an argument alleging unacceptable harm from two important viewpoints.

168. He accepted in terms that his written proof did not contain any such analysis and that his new analysis in chief was contrary to the written submissions associated with the and sent alongside the rule 6 statement where it was accepted there was no impact on the important views and vistas.

Palace Views.

169. First, there was an allegation that a viewpoint from the upstairs windows of Kew Palace was unacceptably harmed by the visibility of the Curve in one of the north-east facing windows

170. It is to be noted that HE takes no point at all on any of the impacts on Kew Palace, muchless this limited one.

171. And it is easy to see why.

172. The view or vista that is protected is a 360 degree one.

173. From the upper stories of the Palace, it is inevitable given its context, that one gets a full throated and fully legible understanding of the place of the Palace in modern London.

174. Views to the north of the Palace from the second and third floors give a very clear and irremovable feel for the place of the Gardens in its context. What is seen is the entire close context of that part of London which is either correctly identified as inner London or its borders. These views of context are simply ignored by the RBGK team.

175. And even from the window to the back and side of the Palace where the Curve will be visible from behind darkened curtains, the keyhole view will be one (which consistent with the other ignored views to the rear) already reflects the existence of the same M4 corridor and its buildings.

176. There is no duty on the developer to enhance these existing views: they are already part of the existing context of the WHS and its OUV. The question in relation to existing OUV is whether in these views and in this context the Curve truly compromises an ability to appreciate the OUV, integrity or significance of the WHS as a whole.

177. Clearly it does not. The existing windows give views of the M4 corridor. That won't change. Except this time, instead of the ability to see a modern city context through the trees of largely mediocre buildings, (including importantly the Citadel "clearly not a building of the highest architectural quality"), what will be seen will be the top elements of a "glass house" of great quality and lightness of touch.

178. The detailed quality of the building, because of the lightness of its materials, the breaking-down and articulation of its mass and form and the way, will even in this distant view of the city beyond the Palace cause no harm: to the contrary, it will enhance an existing workaday experience of the city beyond.

179. The view of the world class building from this old Royal Palace will be a delight.

180. It will certainly be a vast enhancement on the Citadel which will clearly be visible in all of its glory from this location.

181. As Mr Croft accepted this view didn't feature as a specific harm to an "important view" in Mr Croft's proof at all. Indeed, this view wasn't mentioned in that part of the proof dealing with setting of the WHS views and OUV at all. Rather it featured as part of an overall section alleging but "very little impact" at all on the Palace as an asset in its own right.

182. And in fact, Mr Croft identified that all of the changes to the Palace's setting (combined) did not alter its ICOMOS scoring at all. No specific scoring at all was given to the impact on the alleged harmed view from the second-floor window.

183. Rarely has such mean broth been required to bolster so rich an allegation.

Pagoda

184. Allegations of unacceptable harm to the views from the Pagoda are wholly unsustainable.

185. But the fact that these were invented or re-invented as harms to important Views in evidence in chief really do help to benchmark the defensive and uncritical position now adopted by the RBGK.

186. The view from the Pagoda stretches over London for 40m in some directions: perhaps testing the concept of setting of a listed building to absolute destruction: the area of the total view assuming 40m in all distances is 5,027square miles.

187. It is important that proportion and common sense apply in a consideration of allegations of harmful impact in such circumstances. They have been set aside by RBGK in its examination in chief chase for a relevant key view harm.

188. And at all material times until Mr Cs evidence in chief, there were no serious allegations of harm to the huge 360 degree view available from the top of the Pagoda. Change was noted but no harm of any description was identified.

189. The truth is, this allegation was introduced only to seek to allow the suggestion that one of the important views or vistas mentioned in the Operational Guidelines, in the NPPG, and in the London Plan and SPG as critical to an assessment of setting harm had actually been effected.

190. There was and never had been any suggestion that this important view or vista even needed to be modelled in the ES at all in the context of the distance between the Pagoda and the Curve much less that there was unacceptable harm.

191. There is no harm to the WHS's OUV here or the ability of viewers to appreciate its OUV. If anything, a legible marker of its relationship to the wider already visible City beyond will reinforce its value. The Curve will from this vantage point add interest and legibility. A high-quality expression of architecture marking a place of importance in the City will be appreciated and easily understood.

192. Suggestions that the proposal will harm the specially created important main vista of the Broadwalk are not sustainable from a geometric point of view. The planned and designed vistas, properly defined and delineated are in no way impacted upon by the proposal. Suggestions that non-vista views are harmed in an incidental sense are dealt with impacts on views other than the identified views and vistas below.

193. In conclusion, on the important issue of whether the specifically identified important views and vistas have been unacceptably harmed by the Curve, the emphatic answer is that they have not. HE and the local planning authority do not and cannot argue that they have been. RBGK has shifted its formal position to suggest that that they are unacceptably harmed because it realises the importance of the absence of harm to its case.

194. That should be clear and unambiguous finding of this inquiry process.

Other Views (not identified as important on the Important Views and Vistas plan).

195. The fact that specific views and vistas have been carefully identified for protection by the Management Plan following the guidance in the Nppf PPG LP and spg, does not mean that there is carte blanche in respect of the part of the WHS not covered by these identifications.

196. But it does mean that there is required to be a proportionate and reasonable approach to be taken to an assessment of such views and the contribution of such views to an understanding and appreciation of the OUV of the site in the round. There will be a good reason why they haven't been so identified in the context of a policy matrix requiring the important views to be managed.

197. That is, of course, exactly what the appellant has done in the circumstances of the present case. It has taken a proportionate and evidence-based approach to the issue of other views.

198. Indeed, one of the main partis of the architectural approach took as its starting point an appropriate relationship between the Palm House and the Curve.

199. Thus, Mssrs Egret and Coleman, sought to avoid the immediate juxtaposition of the Curve, a modern glass "house" curved and multi formed in the views of the light and delicate structures of the Palm House, as seen in the main walk from the Temperate House.

200. An instinctive understanding of the judgment reached by townscape expert and Architect is made very clear by looking at the images of the Palm House in the evidence, in the Kew Gardens literature and when on site.

201. The particular form and quality of the Curve as a light, ethereal modern glass house deliberately shares many characteristics with the Palm House: its curves, its light and filigree nature, the expression of natural colour in juxtaposition with glass all speak a similar language.

202. The architectural team, showing its proportionate, bespoke approach to the relationship between the building and its assets chose not directly to juxtapose the new glass house with the old.

203. HE accepts as it must that any residual impact to the Palm house as a result of this decision is negligible. There is certainly no harm to the building as a listed building and certainly no sustainable suggestion that this impact has any meaningful impact on the OUV of the WHS as a whole.

204. The other setting impacts of the Curve (outside the important views and vistas identified at p95 of the Management Plan) on the WHS and its OUV were no less considered. I do not deal with every alleged impact on the WHS in this already overlong closing. Where I do not, I rely on the contents of RC proof of evidence and rebuttal. This includes the Temple of Aeolus and the Cambridge Cottage. I pause only to remind the Secretary of State that the council

205. Thus, the impact of the Curve upon the non-identified view from the old White House Great Lawn over the Orangery was given much care and attention.

206. Three things are to be remembered.

207. **First,** this view is neither an historic nor a designed one. It is not surprising that it is not a specifically identified important view either.

208. Indeed, properly considered, the view would have been the antitheses of what was in fact intended by the great architects and landscape architects.

209. The Orangery was specifically designed to be seen and appreciated as a classical construction, seen on axis from the symmetrically centred viewpoint of what the Kew Masterplan calls the Orangery Lawn.

210. Deliberately and powerfully white it's stucco commands the attention of the eye in the wider landscape.

211. So, structured on its main access was it that in order to achieve Palladian perfection, its functional ability to actually operate as an Orangery was secondary.

212. The windows on the side elevations were remedial afterthoughts, added much later, when it was realised that the building, classically perfect when seen in elevation from its lawn was not fit for botanical purpose when judged in the round.

213. And now, of course the side and rear elevations of the Orangery have been added to by modern glass and plastic fascia, reflecting its present (and unauthentic) use as a café/restaurant.

214. These essential architectural facts are reflected in the landscape treatment of the Orangery.

215. The clear original tree belt separating the Orangery Lawn and the White House Lawn is clearly and demonstrably logical and deliberate. It reflects the understanding of the classical ordering and landscaping of the Orangery as a building and its deliberately different axial treatment.

216. The same applies to the equally symmetrical and classical façade of the old White House building which commanded its lawn and would have been the focus of a deliberately closed and directed view along its axis.

217. The Orangery lawn afforded the key designed view of the classical building. The tree-belt directed that view. The tree belt served a similar, though less regimented function for the Great Lawn which in turn did the same job for its great house.

218. The tree belt thus separated the White House and its associated lawn from that of the functionally separate and often separately occupied Orangery and its lawn.

219. The evidence from the Maps, which were designed to be accurate for purposes of botanical and landscape garden exposition (and later with defined precision for OS purposes) reflect the architectural logic represented by the façade design and accepted by HE.

220. Mr Crofts assertion that the tree belt was insignificant and could be seen through is not supported by a jot of evidence. It is also architecturally incoherent. Mr Dunne's acceptance that the existing view was not an historic one, but a new and not "designed" one.

221. It is impossible to see how the image with the Swan Boat assists RBGK at all. It is taken from the other side of the lake which is not the kinetic and incidental view being considered. And it clearly shows significant planning separating the buildings in the location of the relevant view.

222. The views which exist today of the western elevations of the Orangery from the Great Lawn are neither historically planned nor are they longstanding or

functionally significant in architectural or landscape terms. HE correctly conceded this point.

223. True, these more modern views allow visitors using the Great Lawn today to see the Orangery restaurant across the previously separated lawns, its altered side elevation and closer to its advertising facias. All good for Mr Williams and the turnover of the restaurant. But neither Sir William Chambers nor Capability Brown are likely to have approved of the new commercial view.

224. Overall, it is very clear why correctly, this kinetic sequence is not anywhere identified as an important historic view.

225. **Second,** the planning system has granted planning permissions in relation to these views which must as a matter of law, be taken into account in assessing whether the visibility of the Curve truly harmfully affects the understanding and appreciation of the OUV of the WHS as a whole.

226. There is a dispute as to whether LBH failed to have regard to the nature of the impact of BFC in these specific and glimpsed and kinetic views. It is notable that the Council (represented here) do NOT adopt that view of their conduct of the case.

227. The Council was clearly aware of the visibility of the proposals in these views. It indicated clearly in the R/Committee that the visibility of the upper stories of the development existed but that the "infractions are minor and are not considered significantly harmful, so they would not reduce the ability of visitors to appreciate the OUV integrity, authenticity of significance of the Gardens, thereby complying with policy 7.10 of the London Plan."

228. No party, including those who were specifically and vehemently objecting to the proposal took the view that this view was so important that it needed to be checked or modelled and yet it would have been perfectly clear to anyone vaguely competent that the building would be visible in the vicinity of the views from the White House Great lawn. It is instructive that HE which played a very significant role in the objection to the unsuccessful objection to Brentford does not take this point.

229. But the issue of what was or was not taken into account is now actually beside the point. Planning permission has actually been granted, has been implemented and BFC will clearly be seen as a distant but clear and understandable townscape presence. The suggestion that the Orangery will be seen in this non-identified view or vista free from development which is what drove the complaints of EH and ERBKG is simply unsustainable. It will not.

230. **Third**, in addition, this view has been the subject of very recent consideration by the Mayoral team which is now formally the planning authority for the determination of the application. It considered the impact of the Citroen Garage site in these very views and concluded that, although visible in the distance, the development will have little impact upon the majority of the listed structures and

therefore not harm their setting. In relation to the Orangery, it found that "where the development can be partially glimpsed, it will form a distant backdrop above the roofline with a similar height to the consented Brentford Football Stadium that is also visible in the view. This would not harm the setting of the listed building. "Similarly, the impact on the wider Kew WHS

231. The impact of the Curve would be even less worthy of a finding of a breach of Policy 7.10 of the London Plan.

232. Care has been taken to ensure that from this view, the building is seen as a lightweight, translucent, well-articulated form which reaches the sky in a play of forms and shapes in the **distance**: its materiality and colour deliberately not challenging the overpowering white of the Orangery.

233. Because of the distance beyond the Orangery, and importantly because of its height and distinctively different materiality, the Curve would be seen as distant and very separate object. But still an object of quality and skill.

234. **Fourth,** it is very clear that in these views, there will be an impact from the Citadel on this view. Although shorter than the Curve, it will clearly be visible in these very kinetic views of the Orangery.

235. And the Citadel will not be a thing of great architectural quality. Neither is it anything other than self-assertive and visually brash and reflective.

236. It is common ground between the applicant and the local planning authority this permission has been implemented and is a live permission which could be built out now at any time.

237. It is, and always has been also common ground between the Applicant and the Local Planning Authority that there is at least a reasonable prospect of the Citadel building being built in the event that this application should notionally fail. The case was specifically opened on this premise by Mr Ground: that prospect is also reflected in the report to committee in this case and in the Council's proofs.

238. Remarkably, HE on the last evening of evidence for the first time started to construct an argument that there was no reasonable prospect at all of the fall-back coming about. I deal with this hopeless submission below.

239. There can be no sustainable doubt but that the very high-quality architecture of the Curve would be a significant enhancement to the construction of and visibility of the Citadel in this view.

240. For reasons more fully explored below, it would be a tragedy if the out-turn of this inquiry was to be the creation of a mediocre and bland building of no merit but significant impact.

241. **Fifth**, guided by HE (and with the full support of the RBGK- see Crofts approbation of the emerging documents), a building of 60m-65M high on this site (and thus significantly visible in these views) has been found to be specifically acceptable in the context of the Golden Mile.

242. Such a building is said to lead to negligible impacts on the relevant heritage assets. (C DD5 4.35)

243. This time there can be no doubt but the impact on the listed Orangery was front and central in that judgment by the local planning authority HE (and RBKC).

244. And of course, that judgment is a heritage impact judgment which has been made in the context of the capacity study for the area which was produced pursuant to the requirement of the adopted development plan for the regeneration corridor.

245. It a judgment which is careful and made in the knowledge of all of the relevant considerations.

246. And in the absence of anyone taking a prematurity point, this consensus represents the best evidence before the inquiry that the lpa and HE take the view that seeing a building in the context of this WHS distant view and in the background of a listed building is as a matter of principle acceptable and can be achieved without unacceptable harm. It is a judgment that has been reached with the benefit of all of the relevant evidence.

247. If the Secretary of State accepts this consensus of opinion, that a tall building on this site can, the issue for him is whether a building of the highest quality world class architecture is somehow unacceptable.

248. The answer is that it is not. If it is it acceptable in heritage terms to see a tall building at this location, then to see a world class tall building which is at least in part world class because it has been designed specifically to be seen in these locations would not be a harmful addition.

249. The ability to see and understand and appreciate the OUV of the WHS as a whole would not be compromised. The setting of the building would in all of these circumstances be left unharmed and compared to the Citadel would be enhanced.

The Oblique View from the front of the Palace.

250. The palace front façade is just about the most powerful, eye-catching built thing in the Gardens. Its solidity, exuberance and sheer well…. colour…. grabs the attention in a very two dimensional and powerful way.

251. Through the trees to the right, past the lamp posts, the floodlights, security cameras and other paraphernalia of more modern life, a glimpsed and distant view of the Curve from the position agreed by HE and the LPA might be discernible to ardent fans of good quality modern architecture.

252. Again, any view of the Curve from this location will display all of the qualities of the proposal carefully described and composed above. The shape of the building, its articulation form and materiality will be readable in that potion of the Curve that would be visible.

253. HE, does not allege any harmful impact in relation to this view and that is clearly correct. The significance of the asset is in no way harmed at all by the proposal's limited appearance in this view. Neither is the ability to see the

Trees.

254. The proposal takes place in a large mature Botanic Garden.

255. The screening impact of trees must be a relevant consideration.

256. And unlike in inner urban areas, the position has always been adopted by the lpa and HE that the existence of trees in the Gardens is taken into account unless there is a good evidential reason for those trees not to be taken into account.

257. In the present case, RBGK produce no evidence that any relevant tree or trees is an any way at risk or in any other way inappropriate to be taken into account.

258. In closing Mr M specifically identified 3 views that he said were specifically reliant upon the screening of a small number of trees. If there was any evidence at all that those specifically identified trees were in jeopardy, that evidence would have been called.

259. More to the point, the Management Plan and the WHS SPG makes it perfectly clear that the Gardens should be alive to the potential for screening what it believes to be harmful elements of impacts on its setting by prudent planning.

260. And because of the size scale and function of the gardens, its largely self-enclosed prospects and the ability of the Gardens to plant appropriately located additional trees to provide additional is self-evident.

261. And in those very few views where trees provide efficient screening at the minute, it is perfectly apparent that if Kew find the view of a world class building harmful simply because it is visible, then it has the potential, easily achieved of simple, foreground planting.

262. So, take the one of the view of the Orangery from the Old White House Lawn, the Gardens complain that some views of the Curve would be protected by a single foreground tree. True, but that tree is not particularly tall, it is a foreground tree and there is no evidence at all that either it is at risk or that it could not be supplemented by further appropriate foreground trees. We know historically that that would not be inconsistent with the planting regime at this part of the Gardens.

263. Much the same goes for the very glimpsed views of the Palm House. There is no evidence to this inquiry that the relevant tree belt in that case is anything other than "thriving". But there is as you will see on site and in the photographs a very clear potential for the existing planning both in the foreground of the views and in the relevant tree belt to be enhanced.

264. The same goes for the keyhole view at the oblique angle to Kew Palace. What will be seen there through the keyhole will be a remarkable fleeting reminder of a seminal building: it wouldn't distract. But if Kew wants not to see it, then enhancing the very close border of shrubs and small trees in which the security cameras, lights and burglar deterrents are already set would do the job.

265. The sourcing and provision of appropriate trees and even now mature trees of significant scale is a commonplace feature of landscaping practice. This Rule 6 party is probably the best placed on the planet properly to understand and to procure the relevant and appropriate trees.

266. Thus, in the very particular circumstances of a Botanic Garden, where views of the proposal are at best limited in any event, full regard should be given to the existence of existing trees and tree belts. That has what the LPA has done in relation to every other relevant application. There is no reason to take a different view here in the absence of any evidence whatsoever that any relevant trees or tree belts are at risk.

267. In fact. given the fact that none of the relevant views in this case is an important view or vista, and given the very limited and incidental nature of such glimpsed views, the thousands of trees which are planned to be planted each year in the Gardens and the clear guidance contained in the SPG on the unique ability of this body to effect screening of what it sees as unwanted setting impacts, the Secretary of State should place weight on the ability of the Gardens to reduce the visibility of the Curve should it so wish.

268. Indeed, the Secretary of State may wish to ask himself why no thought at all has been given by the Gardens in the context of this inquiry to the straightforward potential to take the advice of the SPG and to consider the potential to assist the economic regeneration of its neighbouring areas by screening some the limited number of non-identified views about which it complains.

The issue of alleged cumulative Impact of the Curve with the effects associated with its longstanding, pre-inscription context in order to construct an impact of substantial harm on the OUV of the asset.

269. For the first time in his evidence in Chief Mr Croft identified that the impact of the proposal itself upon the OUV of the Curve was, even on his own evidence, less than substantial. And within the less than substantial category, the harm to the WHS as a whole was about half way along the continuum of less than substantial.

270. It follows that in order for the impact of the proposal to be identified as substantial, it must be accumulated with another "impact" on the OUV of the inscribed Site as at the date of inscription.

271. And there's the rub. Have you wondered why Mr Croft, led by Mr M felt the need to consider this line? Have you wondered why no party objecting to the proposal has jumped onto the RBGK bandwagon of substantial cumulative harm?

272. It is because it is an unsustainable concept and those that have responsibilities beyond this case have seen and understood that it the wrong approach.

273. The WHS inscription creates a very specific and particular form of designated heritage asset. The designation is the inscription. The inscription captures the OUV of the asset as at the date of inscription.

274. The inscription reflects the OUV of the site as at inscription and the duty and requirement in policy is as we have seen to preserve protect and to maintain those values as then inscribed. The duty arises from a specific treaty obligation which has been transposed into planning policy but not into legislation (see above).

275. There is no planning policy requirement for developers to enhance OUV of a WHS as identified in the inscription, (though if they do, that is obviously a powerful material consideration in favour of a grant of permission.) or to return it to a previous pre-inscription state or states.

276. It also follows in the present case, that all of the OUV of the inscribed site exists notwithstanding the pre-existence of its more urban pre-transcription context, permissions and emanations.

277. It further follows that in the particular circumstances of a WHS "impacts" on the OUV as inscribed can only take place as a result of developments post inscription. And if it were otherwise an illogical chaos would ensue.

278. Now In an idealised world, if the fullest understanding was what was sought of the landscape created in the 1700s, the industrial revolution would not have happened, and the Brentford Water Tower (a listed tall building intrusion which Kew

see as unfortunate) would not have "intruded" into the created pastoral views exactly as enjoyed by the royal family and its circle.

279. Neither in an idealised world would the lovely symmetry of the iconic architecture of the White House have been so callously destroyed.

280. Neither in an idealised world would the need for post-war social housing in west London have arisen after a war in which a tyranny of the worst kind had tried to destroy freedom and London's overcrowded and criminally poor-quality housing stock.

281. Neither in this ideal world would Kew sit close to a regeneration corridor or a world international airport whose emanations would be clear and understandable reminders of the modern world.

282. And neither, I suspect in the ideal world where the only issue to be considered was the retention of the C18th idyll would the sight of the top decks of red London buses down the Kew Road be seen as anything other than intrusive.

283. If none of these things had happened Kew Gardens would be a truly remarkable place.

284. But is a nonsense to say that all of these pre-inscription deviations from the time when George III was in residence or indeed from any other post inscription time from the 1950s, 1850s and beyond fall to be considered to be "impacts" on the OUV as at 2003, which is what the system is meant to protect.

285. Thus, the Haverfield Towers form part of the inevitable context and setting of the WHS as designated. They are not developments which as a matter of fact, law or judgment can have impact on the OUV as inscribed.

286. By the same token, the permissions to turn Heath Row, a small terrace of farm cottages nearby into Heathrow, one of the World's most important and busiest airports cannot have had an "impact" on the OUV as it was inscribed and designated.

287. In such circumstances, the generalised accumulation of the impact of the proposal, with historical events long past in order to construct a level of impact on the designated asset for the purposes of para 133 or 134 of the NPPF is simply neither permissible nor rationally possible.

288. Where would you start and what weight would you give to each of the relevant other post inscription "impacts"?

289. Thus, when the London Plan SPG so heavily relied upon for this cumulative impact of development argument by RBGK, is looked at carefully in the light of this analysis it is clear what it means.

290. It advises decision-makers to have regard to cumulative impact on the OUV of an inscribed site. It cannot and does have in mind pre-inscription developments going back generations which form the very essence of the context of the site as inscribed.

291. It speaks of the consideration of the cumulative effect of separate **impacts** on the WHS as a designated asset, (including relevant past permissions) and on its OUV as designated. It is very clear that the decision maker is looking for the cumulative impact of proposed changes to the defined and identified OUV which it needs to safeguard by reference to the appropriate policy.

292. This is made clear both by the specific comments in relation to the context of Kew Gardens in the SPG itself and in the comments of the Mayor mirroring these provisions in the circumstances of this case.

293. Thus, identification and assessment of extent of harm to the inscribed designated asset can only be logically affected by reference to the OUVs identified as at the time of designation. If you seek to accumulate "harms" with permissions granted decades and generations ago, you end up judging harm overall by reference to a state of affairs which not only pre-dates designation, but which makes the decision-makers job impossible, unrealistic and frankly artificial. Where do you stop accumulating permissions which have impacted on Kew 1998, 1958, 1948, 1848, 1748?

294. Of course, that does not mean that the existence of the Haverfield Towers is irrelevant as a material consideration. The decision-maker does not close its eyes to the existence of the estate. But given that the entirety of the OUV of the WHS to be protected exists notwithstanding and in spite of its impact, the main role of the Haverfield Estate is to provide evidence of the tangible urban context of the Site.

295. That is exactly how the Mayor accurately analyses the position in the SPG and in his dealings with applications relevant to the Gardens (See CDG 1 and references to urban context.)

Strand on the Green
Introduction

296. Again, it is important to be clear how the various statutory provisions apply to the circumstances of Strand on the Green.

297. Strand on the Green is a Conservation Area within which there are a number of listed buildings.

298. There is and cannot be any allegation of any direct harm to the listed buildings or to the Conservation Area. All the significance of the assets associated

with their physical existence and relationships is left intact, there is no physical intervention with any of this fabric.

299. The setting of the Conservation Area is not protected by statute and that is important because it means that s 72 of the Act is not engaged. The statutory presumptions do not apply to Conservation Area settings.

300. Impacts on the setting of a Conservation Area are capable of effecting the significance of an asset but, unlike the setting of a listed building, development within the setting of a Conservation Area but outside the defined Conservation Area do not engage the provisions of relevant section

301. The significance of a heritage asset is also defined in part by its place in its spatial context. The ability to know and to understand that an asset exists and thrives in the heart of a global city is part of its essence and part of its interest.

302. This is particularly true of Strand on the Green (and of Kew Green- see below). The fact that these assets display features which are unusual and contrast with the more modern emanations of the Global City in which they live is part of their history, historic, aesthetic and cultural interest.

Significance reflected in the View

303. Thus, the fact that Strand on the Green and its buildings is already seen and understood in its location as part of the wider City is an inevitable part of its existing character, appearance and significance.

304. And, it also helps set the expectation for the future planning of the area and the implications that will have for the way in which the Conservation Area and its buildings will be seen.

305. Thus, the statutory Development Plan for the area, already identifies the Golden Mile as a significant corridor of growth and an appropriate place for tall buildings and dense development.

306. That future has already arrived in part with the Brentford FC implemented permission.

307. The application site has consistently been identified as the only site upon which a tall, special, notable landmark building can and should be located. Such an expression is not limited to policy documents but has also been the subject of two formal grants of planning permission: one implemented and ready to go (see below).

308. As part of a study of the site by site capacity for tall buildings promised by the development plan, in association with HE, a strategy for this new layer of urbanity as seen from beyond the Conservation Area on the Surrey side of the River has been

constructed. It clearly correctly and consistent with granted permissions, accepts that a tall building on the application site is appropriate. CD D6 pp85 et seq)

309. For the reasons set out above, it is, in a case where no-one is arguing prematurity, the best evidence that the Secretary of State has as to the considered view of the lpa and HE on the in-principle impact of taller and denser layers of development and their impact on heritage assets.

310. EH and LPA's considered position is that such a new level of urbanity and a tall building, clearly visible from the Surrey bank at this location

a. Need not unacceptably harm the sensitive balance of significance of the Strand on the Green assets and
b. Should consolidate the layer of townscape visible in the M4 corridor by being the pre-eminent building in that hierarchy with other elements lower in height. CDD 06 page 87… Mr Ground has mislaid that.)

311. Once those parameters are understood, imposing arbitrary height restrictions, on buildings which are yet to be designed and will inevitably be seen in this and other views to say 60m and 43m when viewed from various vantage points constitutes planning by numbers of the worst kind.

312. Once it is accepted that this new layer of urbanity is appropriately seen in the overall context, then the issue of impact cannot for the reasons set out above and accepted by the Inspectorate many times over accurately be assayed without an understanding of the quality of what is proposed and of how it relates to its context.

313. But that is exactly what those framing the height restriction do. They posit an acceptable height, either based on the "not great architecture Citadel" or on a freestanding assessment of an amorphous non-designed extruded bits of computer generated "form".

314. With respect, it is as if we have stepped back 25 years in building design and townscape planning.

315. Further, the ability to craft a meaningful hierarchy in the corridor depends not only on height but also again on design and quality. In this case, it is all too clear that framing a strategy based on heights of 43m and 60m is unlikely to give an appropriate articulation of skyline. If you want bland then bland is what you will get.

316. The Curve however fits the strategy (at p87) for quality and articulation of the new layer of urbanity perfectly. It is true that the proposal will be visible, but the significant visibility of a building on the site is accepted and understood to be appropriate.

317. From Strand on the Green it will be noticeable and significantly so. That is in part its accepted function as part of the inevitable and accepted third layer of townscape at this location.

318. But, because of the nature of its design and its distance behind the River Facades it will always be seen as a distant object of high quality design. For the reasons set out above, the impact will be of a well-designed building, with an appropriate form

319. In addition, the relevant viewpoint, the tow path, is by definition a linear one.

320. At all times given the impact of parallax, the proposal will be altering its position in relation to Conservation Area. The human brain sees and appreciates such distance effects, instinctively, evolutionarily and very clearly. There will not be a static moment of "confusion" here. The human eye and brain is far too clever and will understand that the Curve is a distant object additional to the foreground object which will still be appreciated and understood for what it is in its wider context.

321. Except that now its wider context will be represented by a world class building of great quality on a site which the planning system accepts should be marked.

322. And in this sense, Mr Coleman's analysis can be clearly understood. The proposal does not harm the significance of the Conservation Area itself and from the Surrey station, the view of the multi layered Middlesex side will be enhanced.

323. There will be a new feature in the townscape marking a new and planned for layer of urbanity along the m4 with a high-quality moment of architecture setting the qualitative tone for that which is to follow.

324. If, contrary to these submissions a view is taken that some harm is occasioned to the wider setting of the Conservation Area by this distant view across a Conservation Area then:

a. Given the huge nature of the significance which is retained within the designated asset and its wider setting, such a view could only conceivably be one that in the circumstances was less than substantial harm properly understood (see below) and
b. Wherever harm is struck would be considerably better than the impact of the Citadel which is a legal fall-back for the purposes set out below.

325. In these circumstances the public benefits of the proposal would easily outweigh the alleged harm (see below) and the proposal would constitute a significant enhancement on the consented and implemented permission in views from the surrey side and generally. (see RC Appx 1 Views of Citadel).

Kew Green

326. Many of the same arguments fall to be made in relation to Kew Green. I can in these circumstances be briefer. That does not betoken any lesser level of consideration to this important Conservation Area.

327. Its characteristics have been much debated. I will not prolong that debate.

328. Suffice it to say that it is unique. It has many of the attributes of a n archetypal village green. But an archetypal village green it is not. It is bisected by the South Circular which is clearly one of London's major strategic routes.

329. Its location in the vicinity of the M4 corridor is tangible. As the council put it as part of its consideration of the Albany Waterside proposals, visitors to the Green cannot avoid the fact that they are visiting a particular conservation area which sits in the heart of the urban area.

330. It is the very location of the Conservation Area itself with its huge proportion of listed buildings and their close relationship with the Green which forms the fundamental part of the significance of Conservation Area as a whole. In order to get there from anywhere else the visitor has to pass through and be very aware of her spatial location in the wider City.

331. And that wider City is as a matter of absolute fact already significantly visible from the heat of the Conservation Area. Thus, from in front of the church views of the emerging corridor and its less distinguished buildings are apparent.

332. Planning permission has been granted for BFC which will further accentuate the truth about the wider setting of this conservation area; namely that it is located hard against the urban fabric of the city and that visibility to and from that city already forms part of its character.

333. The Curve will be visible in certain wider setting views.

334. But for all of the reasons set out above it will not be an unwelcome presence. Mr Egret explained very carefully why its particular form and detail will be appreciated in this view and the images in Mr Coleman's proof ` (appendix: close up images of detail) emphasise this fact clearly. The site view with the various aides memoire, will establish this yet more clearly.

335. In particular, Mr Egret explained that although taller and further away than the buildings in the Green, the scale of his proposal would not be greater. It had been deliberately and very carefully designed so that the scale of the parts of the building do not read as larger than the component scalar parts of the Green.

336. There is no harm to the significance of the Conservation Area resulting from seeing another layer of the City above. Particularly where that building is of such high quality.

337. Again, of course the points made about the best evidence of the lpa and HE as to the in-principle acceptability of a visible layer of urbanity beyond the Conservation Area in the M4 corridor also apply to the circumstances here.

338. The issue is not the visibility of the city beyond but the specific impact of that visibility.

339. Our submissions about the quality of what will be seen need not be repeated.

340. Again, the issue of the Citadel is relevant. It will be clearly visible and noticeable in significant views from the Green. Again, such visibility will be of a mediocre, shiny expansive poor-quality building.

341. If there is to be identified harm here, for the reasons advanced below, the nature of the harm could only conceivably be characterised as “less than substantial”.

342. Almost all of the key features of this conservation area will remain completely unaffected. The massive contributions of the fabric of the Listed buildings would remain. Most of the setting vies of the Conservation would remain untouched. The relationship between the handsome facades of the area and the green would not be disturbed, particularly when it is accepted that visible elements of the wider city in the M4 corridor is agreed could be accommodated with negligible impact on the main heritage assets including Kew Green.

Gunnersbury Park

343. Similar points arise in relation to this important agglomeration of Registered Park and Listed Buildings in Gunnersbury Park.

344. Three views were concentrated upon by the inquiry. Only two remain in issue. It being accepted that over the wider playing field views, the impact of the proposal is no longer really at large.

Cemetery

345. The Secretary of State should be in no doubt but that this building of quality and poise in the context of the Cemetery will have an important and beneficial impact in the context of its location.

346. The cemetery is already juxtaposed with the M4 and its buildings. They already appear clear and distinct in views from the Cemetery.

347. The capacity study identifies the acceptability of an entire wall of M4 related development anticipated as the preferred approach reached by the lpa and HE.

348. In these circumstances the elegant, incredibly well designed double façade facing the cemetery slightly off axis is elegant and respectful

The View from Gunnersbury House and associated views.

349. This view perhaps characterises the different views of parties to this inquiry most clearly. Detailed submissions are unlikely to be helpful.

350. Gunnersbury Park is undoubtedly an Urban Park. The ability to see the world beyond already exists.

351. Further the visitor cannot but fail to notice the nature of this urban location as part of his/her visit and the journey to the Park.

352. The "illusion" of being in an unspoiled, country park is in reality not a real one in the spatial context of west London.

353. And it certainly is not harmfully impacted by what is almost certainly the most attractive view of a building of great quality.

Other Conservation Areas.

354. The other Conservation Areas are dealt with in full by Mr Coleman from section 9.37 of his proof and beyond.

355. I do not propose to deal with them separately here.

356. The Inspectorate is now very used to dealing with the juxtaposition between tall buildings and adjacent residential Victorian and Edwardian Conservation Areas.

357. All have a strong pattern and grain that give them a well-defined and self-contained character and appearance.

358. Seeing a well-designed tall building marking an important spatial location from within such a Conservation Area is not harmful.

"Substantial harm to or total loss of" and "Less than Substantial Harm".

359. On the present state of the law binding on all of us in this room, the position in relation to the distinction between substantial harm to or total destruction of and less than substantial harm is very, very clear.

360. Those who seek to make it more complex do so because it suits them. They are wrong. There is in law only one way forward for you and that is to follow Bedford and for once Mr M and I are “singing from the same hymn sheet”

361. The NPPF in para 132 requires “clear and convincing justification” for “any harm or loss” relating to heritage assets.

362. The clear and convincing justification referred to is not a freestanding test. The “clear and convincing justification” is provided in the fasciculus of paragraphs that follow.

363. For “substantial harm to or total loss of significance” to a designated heritage asset the relevant paragraph and the relevant test is contained in paragraph 133. If a proposal passes that test, then the clear and convincing justification will have been found to exist.

364. For anything “less than substantial harm” the appropriate test is set by paragraph 134. A different test applies.

365. The meaning of the policies in the NPPF, because of the way in which they are produced and are meant to be relied upon is now accepted to be a matter of law. The meaning of the words in the document are ultimately no longer a matter of reasonable interpretation but are a matter law for the courts. (See Tesco v Dundee as applied to NPPF in St Albans Para 4..Copies provided)

366. The words of the NPPF properly construed thus have one legal meaning and that meaning is a matter for the Court and not for the decision-maker Secretary of State or the applicant or objector.

367. In the circumstances of this case, the relevant words in the NPPF have been the subject of explicit consideration by the High Court. The Court has found in Bedford that “in the context, of non-physical or indirect harm, …one was looking for an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced.” (Mr Maurici identifies the same quote para 165 closing" Or to put it another way it requires that “very much if not all of the significance of the asset was drained away”

368. That is the ratio of the Bedford case. It is very relevant to the circumstances of this case which is an allegation of non-physical indirect harm. In such a circumstance, the Court has identified as a matter of law what the relevant passages in. the NPPF mean

369. HE has never liked that decision. But that as Mr M recognises at footnote 343… (the submissions made on this appeal proceed as they must on the basis that Bedford was correctly decided"), the Bedford view of the meaning is the meaning of the words as a matter of law and this appeal must proceed on the basis that Bedford is correctly decided.

370. Further, since the meaning of the words in the NPPF is a matter of **law** for the Courts alone, the meaning of those words cannot be altered by other words in another inferior document such as the PPG.

371. If the framers of the NPPF want to change what the Courts have said and crystallised as a matter of law is the meaning of the relevant parts of the NPPF, then they need to issue an altered NPPF.

372. It is to be noticed, that the Government clearly do not feel the need to alter the relevant parts of the NPPF (CD C3) notwithstanding the fact that Bedford has been determined for many years and has been relied on by the Inspectorate on many occasions (including post peg). The draft NPPF retains essentially the same wording as that considered by the Court.

373. The ppg cannot for these reasons alter the legal meaning of the NPPF. The PPG is in this context a law taker not a law maker. If the ppg did seek to alter the meaning of the words as a matter of law, it would be unlawful as Mr Ground accepted. But it doesn't.

374. Looked at in the context of what the Courts have said is the meaning of the words in the NPPF as a matter of law, the PPG says that substantial harm is a high test.

375. And yes, it is. That is entirely consiustent with harm that was serious such that its "significance was vitiated altogether or very much reduced". That is a high test: indeed, it is THE high test that the Court has found these words to mean. A high test is and therefore can only be the Bedford interpretation. The ppg has to be consistent with Bedford and the only way it can be id if high test means the Bedford test.

376. So, the further guidance in the PPG cannot alter the meaning of the words as a matter of law either. And they don't. When the PPG advises **"in determining whether works to a listed building constitute substantial harm, an important consideration would be whether the adverse impact seriously affects a key element of its special architectural or historic impact" it** does not and cannot lessen the meaning of the NPPF as established by the Court.

377. In fact, because as an example, it is a direct impact specifically to a key element of the actual designated heritage asset and not to the statutorily unprotected setting of an asset, the example given is not a very helpful one for the objectors.

378. It is agreed that it is **theoretically** possible for a setting impact to equate to substantial harm to or total destruction of significance, but to constitute substantial harm on the law as stated by Bedford, such setting harm would need to fall into the category "of vitiation of significance altogether or leaving the asset very much reduced".

379. The Secretary of State in Razor's Farm only took exception to your assessment that it might be theoretically impossible for substantial harm to arise as a result of setting. But on your conclusions and adopting your reasoning he accepted that you were right to find less than substantial harm. He did not suggest (nor could he) that Bedford was in any way incorrect or deficient. Indeed, he applied it.

380. Suggestions that Bedford is wrongly decided or has somehow been overruled are simply not accurate. It remains good law and has now been followed on many scores of occasions. On the evidence in this case, it has always been followed (especially post ppg) when the matter has been fully argued at inquiry or when legal advice is likely to have been sought by the Inspectorate in large cases. There will always be some limited exceptions, cases where Bedford was not argued for example…. though tellingly none are relied on in this case by the objectors.

381. But what is now crystal clear is that HE has been operating on the basis put forward by Mr Harwood in closing BUT AT NO OTHER POINT., that Bedford is not to be followed. That proposition if it was going to made should have been crystal clear in opening and in evidence so that the nature of the HE finding of substantial harm could have been fully and carefully explored in that remarkable context.

382. Mr M, as mentioned correctly accepts that we must all proceed here as a matter of law on the basis that Bedford was rightly decided. It is not for you or the Secretary to say it is wrong or to apply it (perversely since it upheld your judgment and reasoning) in any way differently or inconsistently with its ratio.

383. The council, through Mr Grover also accepts that it has taken specific advice on the matter from Christopher Katkowski QC and that he too confirmed the correctness of this approach and the requirement to follow Bedford. It is a pity and a shame that that advice has not been disclosed to the inquiry.

384. It follows that EH has proceeded on a wholly inappropriate basis to its conclusion of substantial harm. It has adopted a much lower and entirely relativistic interpretation of the meaning of the words in the NPPF. HE is giving the NPPF the meaning it wants and not the meaning given to it by the Courts as a matter of law.

385. It follows that its conclusions on substantial harm are legally flawed and judgmentally deficient The Secretary of State will take legal advice on this matter and will be told that Mr M and I are correct. Bedford must be treated a good law as to the meaning of substantial harm or total loss of significance.

386. What that meaning requires in the present case, is that reflecting the dichotomy of tests contained in 133 and 134, for a non-physical setting harm allegation, substantial harm should only be found where the very "significance of the relevant Conservation Area has been vitiated or very much reduced". This recognises its position in the

387. This involves a consideration of whether post development it can be truly said of two of the richest Conservation Areas in London have been vitiated or very much reduced" or that "very much if not most of the significance of those assets as a whole have been drained away".

388. What that requires is consideration of the level of significance that these two conservation areas would retain in the event that permission were to be granted much in the way that Inspector Gray tackled the Listed bus garage following the significant direct impact of works to turn it into a supermarket in Baltic Wharf.

389. Both of these conservations would continue to express all of the significance associated with that which can be found and understood in the conservation areas themselves. The significant numbers of listed buildings of national importance would continue to exhibit all of their aesthetic, cultural, special architectural and historic interest. The relationship of these buildings to the other parts of each conservation area would be untouched. The existence of a distant object in the background of some views would even if harmful leave the vast vast majority of the significance of these two impressive Conservation Areas totally unharmed.

390. And if Bedford is right… and we must assume it is…. then it is inconceivable that this proposal could cause substantial harm in the terms required by law to be used. And of course, that is why albeit right at the end of the inquiry, without any notice or forewarning HE is obliged to say that Bedford is wrong.

391. And that substantial harm is inconceivable on a proper application of Bedford has been the appellants case all along. Mr Coleman says so at least 9 times in his proof. That is his clear professional opinion, clearly expressed. Mr Harwoods "Great Forensic Triumph" of taking Mr Coleman through a matrix table of semantic descriptors of the impact, which are explicitly not to be used in the way he used them and then to proclaim that Mr Coleman's professional views had as a result altered to a conclusion of substantial harm is ludicrous. It flies in the face of every strand of Mr Coleman's considered and consistent evidence.

392. Ultimately of course the matter is for the Secretary of State. There is no reason on earth to take a different view to the view taken ordinarily by the inspectorate and the Secretary of State as to the meaning of substantial and the continued operation of Bedford. Bedford is a deliberately high test. The PPG reflects Bedford because like us, it has to.

393. And on that basis, any harm could only be conceivably at the lower end of less than substantial.

The Citadel as a Fall Back.

Introduction.

394. At all material times in this case, the local planning authority has proceeded correctly on the assumption that the Citadel development was an appropriate fall-back position for a disappointed landowner **in the notional event that it were to refuse planning permission for the Curve.**

395. The very structure of the report to committee reflect this very assumption.

396. Such an assumption also permeates the local authorities case at this inquiry. Thus, in opening, and having regard to all of the evidence, the Council trumpeted the fact that it accepted that there was at the very least a reasonable prospect of the Citadel Permission being granted permission.

397. Indeed, in its main proof of evidence Mr Baker expressly relies on the potential for the Citadel to be completed as a positive part of the council's case.

398. We spent three weeks of the inquiry carefully considering the potential impact of the Citadel on this shared assumption that there was nobody saying to the inquiry that the Citadel was not an appropriate fall-back position.

399. The suggestion close to 6pm on the last day of evidence from EH that there was no fall-back position is to be given no weight whatsoever.

400. The law on fall-back has recently been reconsidered and clarified by the Court of Appeal.

401. In Mansell, the Courts confirmed at para 27 (2) that for a fall-back to be required to be taken into account by a decision maker as a material consideration, the potential development does not have to be probable or indeed even likely: a possibility will suffice. The court gave a series of indicators which a decision maker might wish to take into account in considering the fall-back possibility. They include "allocation of site for development"; "planning permission being issued" "the existence of a firm design or the landowner having said what his intentions were"

402. In this case, there can, despite the last-minute intervention by a party calling no evidence on the issue, that the fall-back position of the construction is very much more than a possibility. The following matters should be considered:

a. There is a full planning permission.
b. It has been implemented by significant physical works.

c. There has been significant expenditure on discharging all of the pre-commencement conditions
d. There have been payments made to the council as a result of the operation of the implementation of the permission.
e. The design is firm, and its consequences well understood.
f. Mr Goddard has sought direct evidence from the landowner as to his intentions in 2018 in the event that the Curve were to be refused and in the light of other options available to him. In these circumstances, which are the relevant ones for the purposes of this consideration, the position was very clear, he was very likely to proceed with the Citadel in the absence of a better option. There is no evidence at all to contradict this the clearest statement of intent.
g. The local planning authority are positively asserting the availability of the citadel as a realistic way of gaining the benefits of the proposal without the alleged harm.

403. In these circumstances, there must at least be a possibility of the Citadel being constructed by the landowner. The landowner is a legally and functionally different person from the developer here. It is simply incorrect to

404. The fact that the proposal did not meet the threshold of commercial viability in 2015 does not mean that there is no possibility of it being built now. The very fact of hugely expensive implementation was specifically intended to keep that possibility alive into the future. The act of implementation by itself means that the possibility of the Citadel is alive in perpetuity.

405. Further, a proposition which was not seen as commercially viable in 2015 in the context of an application for the Curve is a wholly different concept if the Curve is not available as an alternative. Indeed, in a very real sense if it is imagined that the Curve were to be turned down than the Citadel would be one of the few and probably the best option for a landowner given the policy matrix which is in place. The very essence of commercial viability involves a consideration of the other options available to the developer (see NPPF on viability and the importance of other alternatives available to the landowner.)

406. Further and in addition the recent planning appeal decisions in relation to the acceptability in amenity and safety of advertisements on the site and along the corridor as a whole mean that it is overwhelmingly likely that additional advertising on the Citadel site would also be likely to be granted, again significantly boosting commercial viability in the 2018 world.

407. Yet further, as Mr Goddard said, in the London context it is now usual for developers to proceed with developments which on the face of the appraisals do not meet the policy definition of a reasonable return. The risk-reward profile is such that developments which on an appraisal would appear to be unviable are proceeding. The Curve on its face is not commercially viable in terms of the policy. That is an

agreed position, it does not result in the return which the NPPF suggests is competitive or viable. It is commercially unviable in that sense.

408. But no-one is saying there is not a possibility of it being built.

409. Indeed, the very real potential for it to be built is why we are all here.

410. In all of the circumstances, there is of course at least a "possibility" of the Citadel being built in the notional world where the Curve had been refused. Mr Ground does not actually argue otherwise. He still positively asserts the Citadel is a fall-back. Albeit a preferable one. That is a useful benchmark of the Council's ambitions.

411. And the fall-back is not only legally to be taken into account, it should be given very significant weight.

412. Given the nature of the site, the one-off opportunity to provide a gateway of quality and the quality of the architecture involved in the Citadel, the Inspector should give the very real potential for the implemented permission to be completed significant weight.

413. Not only is the only evidence before the inquiry as to the present intentions of the developer that he will be likely to complete the building but if it were completed it would result in the unique opportunity to provide a world class piece of architecture on the site being lost for a generation.

414. Of course, the existence of a fall-back means that when testing the impact of the proposal as we have been doing (above), judgments on acceptability have to be made in the context of an understanding of what the lawful fall-back position is likely to be.

415. In short, the Secretary of State must find that the potential for an implemented permission, kept alive for the sole purpose of ensuring the very possibility of completion plus the direct evidence of the landowner. This is an easy fall-back case in all of the circumstances.

416. The consequences of that fall back coming about are serious and significant. The Secretary of State should give the prospect of the fall-back coming about and its consequences very great weight.

417. If the legacy of this inquiry to west London were to be the loss of an Egret masterpiece and the building of a mediocre gateway to the world's best city, that would be wholly regrettable.

Amenity Space.

418. There is a separate reason for refusal based on an allegation of inadequate amenity space.

419. It reminded me much of the inquiries I used to do for Hounslow in the late 90s. And that's not surprising because the same policies are being relied upon. The approach taken by the local authority is wrong headed and out of date.

420. Three elements fall to be considered.

421. First, the identification of the applicable policy. Second, the availability of suitable and available outdoor amenity space and thirdly alleged criticisms of the way of getting to it.

422. The policy relied upon by the local planning authority was SC5. There are several layers of flexibility deliberately built into that policy in relation to external space standards.

a. First, the policy does not require absolute compliance with the relevant standard. It simply requires that these (very old) standards have been considered.,
b. Second, the reason that it is not mandatory is that it is based on open outer-suburban character. The LP Inspector would not allow strict compliance with the old standards to be required as Mr B accepted.
c. Third the standards themselves are not inflexible but will be applied with regard to exceptional design considerations.

423. It follows that there is no credible allegation of breach of policy. There is no policy requirement to provide a fixed numerical level of amenity space.

424. The question is whether there is a harmful shortage of usable external amenity space.

425. There is no such shortage in this case. That is because the combination of what is being supplied on site and the availability very close by of perhaps one of the largest and best and soon to be improved agglomeration of facilities at GP.

426. Mr B identified it as a superb facility which would be fit for the purpose of meeting the needs of residents clearly and sufficiently. He was right.

427. So, the only remaining issue is the ability safely and appropriately to get to the Park.

428. Mr B in effect chose to advance a highway objection when there is no such sustainable objection. He is not a Highway Consultant. Neither does he have any technical or specialist knowledge of such issues.

429. The body that does: TfL also the body which has the responsibility for pedestrian and cycle safety, comfort and accessibility has no issue with the proposal at all. It considered though a series of carefully minuted meetings that the proposal is safe, appropriately convenient and unobjectionable. (see his final Appendices and the two very careful letters from TfL indicating that all their concerns were met)

430. Of course, this reflects the Council's own position about the ability of the site to act as an appropriate stepping stone to the entirety of the Brentford East development.

431. In short, there is no sustainable amenity space reason for refusal here.

Advertisement consents.

432. Advertisements are part of modern life. In fact, they are part of life since before modern times. Some of the most creative of minds begin their life in advertising and as an artform and as a business it is one of the most thriving of Britain's communities.

433. And London is the advertising world's hub.

434. The M4 elevated section has always been one of that world's showcases. I wonder how many of those travelling from the west will remember the Lucozade advert I referred to in opening as their first marker of arrival in the capital.

435. Now, hugely innovative adverts mark its course. Some of the adverts are in fact whole showrooms which deliver the goods that they advertise on displays designed by top quality architects. (Wilkinson Eyre).

436. In all of these circumstances, the film strip advertisement elements of Mr Egret's building are as much a part of its architectural being as are the fins and the form and structure of the building.

437. For those enough old enough to remember 35mm film cameras, one can see absolutely and instinctively how the subtle sinuousness of an advertising strip of film, would fit into the sprockets of the camera over the shutter plane of the building.

438. This would be a new, innovative and exciting addition to the Great West Corridor.

439. Of course, the ability of the Secretary of State to consider objections to the adverts is limited to public safety and amenity considerations.

440. But the materiality of the adverts to the building as a whole goes much wider. The adverts add in an appropriate context, a very clear, vibrant and exciting

component to the entry to London the world capital and capital of the advertising world.

441. They were integrally designed to be read with and to be part of the enjoyment of the building. They form part of its essence in the same way as anything else designed by Mr Egret.

The Planning Balance.

442. The planning balance in this case only arises in the terms of the NPPF in the event that there is some finding of harm to heritage assets.

443. For the reasons set out above, the appellants clear position is that there is no material harm to the relevant heritage asset.

444. Of course, if there such a finding of harm to any designated heritage asset then it will be required to be justified by clear and convincing justification in line with the NPPF.

445. For the reasons set out above, the application of Bedford means that in the circumstances of this case, there can be no realistic prospect of a finding that any of the assets in this case are harmed such that their very significance is vitiated or very much reduced.

446. It follows that on this basis, that there would be a requirement to establish that any such harm would be weighed against the public benefits **of the proposal.**

447. Unlike a 133 test, it is the benefits of the proposal before the inquiry which fall to be balanced. There is not in 134 a requirement for the decision maker to consider whether the benefits could only necessarily be brought about by the proposal. In other words, there is no explicit requirement to show that there are reasonable alternatives in a 134 world.

448. The benefits brought about by this proposal are fully set out in the evidence of Mr Goddard. The Secretary of State will have regard to the full panoply of extensive public benefits.

449. I shall choose here to identify only those public benefits which merit some discussion. That does not mean that the ones not identified are to be left out of account.

450. Top of the list is the creation of a new world class piece of architecture at probably the most important gateway to the capital. I have said much about this above and need not repeat it. But it is a public benefit of massive proportion. This

building will appear in text books as Mr Finch says. It will represent a new and important feature on the London skyline.

451. The weight to be given to this strategic benefit is very significant.

452. Then, there is the contribution to housing. The present Secretary of State will need no persuading of the weight to be given to the provision of over 350 residential units and a more than policy compliant provision of affordable housing.

453. The housing crises in London is well understood by the Secretary of State.

454. The response from the lpa on this issue is unacceptable. It says we are meeting our targets and therefore the weight to housing is to be limited.

455. Wrong.

456. The targets being met do not come close to meeting the OAN of London or of Hounslow.

457. The LP targets were specifically found to be unsound by the Inspector, but rather than throw out the whole plan which would have left him with the previous and even lower figures of the earlier plan, he only allowed the present plan to be published in the basis that the figures were to be exceeded borough by borough and on the basis of an early commitment to a comprehensive review (All accepted by Baker).

458. The truth of the matter is that Hounslow is not now coming close to making its proper contribution to the meeting of its own or London's housing need.

459. The Council has itself now established that its OAN is a staggering 1898 homes per year. Its present target (to be exceeded whenever it is possible is 882.

460. There is no room for complacency. The failure of the planning system to provide sufficient homes for its population is a failure of the first order. Perhaps the most important feature of the planning system and its first duty is to provide its families with sufficient homes and affordable homes of quality.

461. Without that, travel to work areas cannot find appropriately located workers. Unsustainable patterns of development are sustained and worsened. Without sufficient homes, prices escalate, children are required to move away from the communities in which they grew up and social difficulties and mixed and balanced communities fail.

462. Suggestions that an office building and in particular the Citadel would bring the same befits are self-evidently wholly incorrect.

463. Any office development would not bring any of the huge benefits associated with the proposals housing's mixed use. It is hugely interesting to note given the Council's claims in this respect that it identified this very site as a housing site to provide in excess of 350 units. Given that housing is simply not deliverable on the first 5/6 floors on the site, the ambitions of the council for in excess of 350 units of housing are interesting to say the lease. It is a matter for the Secretary of State but the potential for the site to accommodate 350 units at a level in excess of 5 stories is likely to result in a building significantly taller that 60-65 m.

464. Suggestions that a significantly lower mixed-use scheme made for the first time in evidence by the LPA simply cannot be supported given their OWN case in relation to the affordable housing. It accepts that the scheme is below the level of commercial viability.

465. The only evidence of whether a substantially smaller mixed-use development could produce the same benefits comes from the Appellant and a qualified valuer who agreed all of the relevant figures with the local planning authority's expert witness.

466. His evidence clearly establishes and explains why a lower mixed-use development on this incredibly complex site, where residential development cannot be located below the 5th floor would simply not be viable.

467. There is no evidence to contradict this point at all.

468. I leave the other benefits to the Secretary of State's attention. These first two are by themselves sufficient significantly to outweigh any "less than substantial harm" as ascertained pursuant to Bedford.

469. If a more relativistic and unlawful position in relation to substantial harm is adopted however, then it follows that the relevant degree of substantial benefit to overcome the lower. threshold level of harm is also "movable" and relative.

470. It is impossible to judge in this relativistic world where any decision maker setting aside Bedford would pitch substantial harm and so detailed submissions on this matter are frankly also impossible.

471. But it would be relevant to note in particular the unique nature of this application site.

472. It is accepted to be the only site in this part of London which could provide an important spatial marker in the spatial makeup of London. The benefits of a world class building at this location would be a substantial public benefit which could not reasonably be provided elsewhere.

Overall Conclusions.

473. You have the opportunity here sir, to make a difference. To allow a building which will at once mark the country's commitment to quality and sensitivity; to grant a permission which will act as a badge to our commitment to the best of the new.

474. We urge you and the Secretary of State to take that opportunity.

RUSSELL HARRIS QC.
LANDMARK CHAMBERS.
July 6th 2018.

Neutral Citation Number: [2013] EWCA Civ 1610

Case No: C1/2013/2734

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE PELLING QC (Sitting as a Judge of the High Court)
CO 4686 2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2013

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE RYDER
and
SIR DAVID KEENE

- -

Between :

City and District Council of St Albans	**Appellant**
- and -	
The Queen (on the application of) Hunston Properties Limited	**1st Respondent**
Secretary of State for Communities and Local Government and anr	**2nd Respondent**

- -

Matthew Reed (instructed by the **Appellant's Head of Legal Services**) for the **Appellant**
Paul Stinchcombe QC and Ned Helme (instructed by **Photiades Solicitors**) for the **First Respondent and (Treasury Solicitors** for the **Second Respondent).** The Second Respondent did not appear.

Hearing date: 20 November 2013

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Approved Judgment

Sir David Keene :

Introduction

1. This appeal concerns the interpretation of the relatively recent (March 2012) National Planning Policy Framework ("the Framework") and in particular of the policies contained therein in respect of residential development proposals. The issue is one which arises in the situation where, as in the present case and in a number of other planning authority areas, there is not as yet a local plan produced after and in accordance with the Framework.

2. Hunston Properties Limited ("Hunston") applied for outline planning permission for the construction of 116 dwellings, a care home and some associated facilities on five hectares of agricultural land within the district of St Albans. Permission was refused by the District Council, now the appellant, principally on the ground that the site was almost entirely within the Metropolitan Green Belt. Hunston appealed under Section 78 of the Town and Country Planning Act 1990 ("the 1990 Act") and, simplifying the history of the matter, the appeal was dismissed on 12 March 2013 by an inspector appointed by the Secretary of State. Hunston then challenged that decision in the Administrative Court under Section 288 of the 1990 Act. H.H. Judge Pelling QC, sitting as a judge of the High Court, quashed the inspector's decision, and the Council now appeals with permission granted by Sullivan LJ. The Secretary of State appeared by counsel in the Administrative Court to resist the Section 288 challenge but seeks to play no part in these appeal proceedings.

3. I note the basis on which Sullivan LJ gave permission to appeal. He said that he was not persuaded that the appeal had a real prospect of success, but he found there to be a compelling reason for the appeal to be heard so that there could be a "definitive answer to the proper interpretation of paragraph 47" of the Framework, and in particular the interrelationship between the first and second bullet points in that paragraph.

Policy Context

4. The Framework was published by the Government in order to set out its planning policies for England, so as to give guidance to local planning authorities and other decisions-makers in the planning system. It was seen by the Minister for Planning as simplifying national planning guidance "by replacing over a thousand pages of national policy with around fifty, written simply and clearly." Unhappily, as this case demonstrates, the process of simplification has in certain instances led to a diminution in clarity. It will be necessary to set out the wording of paragraph 47 of the Framework very soon in this judgment. I have to say that I have not found arriving at "a definitive answer" to the interpretative problem an easy task, because of ambiguity in the drafting. In such a situation, where one is concerned with non-statutory policy guidance issued by the Secretary of State, it would seem sensible for the Secretary of State to review and to clarify what his policy is intended to mean. Nonetheless, the Supreme Court in *Tesco Stores Ltd -v- Dundee City Council* [2012] UKSC 13 has emphasised that policy statements are to be interpreted objectively by the court in accordance with the language used and in its proper context, so that the meaning of the policy is for the courts, even if the application of the policy is for planning authorities and other planning decision-makers: see paragraphs 18 and 19. That case

was concerned with policy in a statutory development plan, but it would seem difficult to distinguish between such a policy statement and one contained in non-statutory national policy guidance. I accept, therefore, as do the parties to this appeal, that it is for this court to seek to arrive at the appropriate meaning of paragraph 47 of the Framework.

5. That paragraph begins the section of the Framework entitled "Delivering a wide choice of high quality homes." Insofar as material for present purposes, it reads as follows:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> - Use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
>
> - Identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land."

These are the two bullet points referred to by Sullivan LJ.

6. There is no doubt, that in proceeding their local plans, local planning authorities are required to ensure that the "full objectively assessed needs" for housing are to be met, "as far as is consistent with the policies set out in this Framework". Those policies include the protection of Green Belt land. Indeed, a whole section of the Framework, Section 9, is devoted to that topic, a section which begins by saying "The Government attaches great importance to Green Belts": Paragraph 79. The Framework seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that "the general extent of Green Belts across the country is already established." It seems clear, and is not in dispute in this appeal, that such a Local Plan could properly fall short of meeting the "full objectively assessed needs" for housing in its area because of the conflict which would otherwise arise with policies on the Green Belt or indeed on other designations hostile to development, such as those on Areas of Outstanding Natural Beauty or National Parks. What is likely to be significant in the preparation of this Local Plan for the district of St Albans is that

virtually all the undeveloped land in the district outside the built up areas forms part of the Metropolitan Green Belt.

7. However, no such new Local Plan for this district currently exists. There remains the old-style Local Plan, the St. Albans City and District Local Plan Review, dating from 1994, but it is not suggested that its contents insofar as they deal with housing land requirements are of any relevance today. The most recent policy document containing a quantified assessment of such requirements in the district was the East of England Plan, which contained a figure of 360 dwelling units per annum, but that Plan was revoked on the 3 January 2013, in accordance with the Government's move away from strategically based figures. Thus, as the inspector in the present case put it:

> "there is a policy vacuum in terms of the housing delivery target." [paragraph 23]

8. The appellant Council resolved on 17 January 2013 that the target of 360 dwellings per annum from 2001 to 2021 remained the most appropriate interim housing target for housing land supply purposes.

9. There are a number of other policies in the Framework which are of relevance. At paragraph 13 it states that the Framework:

> "constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications."

Paragraph 14 begins by saying that:

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

It goes on in that same paragraph to spell out what that means for plan-making and for decision-taking. In respect of the latter, it sets out two bullet points. The first deals with cases where there is a development plan. The second is relevant to the present appeal:

> "where the development plan is absent, silent or relevant policies are out-of-date, [it means] granting permission unless:
>
> any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole;
>
> or
>
> specific policies in this Framework indicate development should be restricted."

A footnote, no.9, gives examples of such policies as are meant by that last sentence, including policies relating to land designated as Green Belt.

10. As I have already said, the Framework includes specific policies to protect Green Belt land. Paragraphs 87 and 88 are of particular relevance. They state:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

The Framework does not seek to define further what "other considerations" might outweigh the damage to the Green Belt, but in principle there seems no reason why in certain circumstances a shortfall in housing land supply might not do so.

The Planning Appeal and the Inspector's Decision

11. It was agreed at the planning inquiry that the proposed development on this site would constitute inappropriate development in the Green Belt. The inspector noted that, by virtue of paragraph 87 of the Framework, it should not be permitted except in very special circumstances. That led her to the topic of housing land supply.

12. The inspector referred to paragraph 47 of the Framework and then considered the development plan position. She observed that there was "no definitive housing delivery requirement" in any relevant plan (paragraph 24 of decision letter). She described the Department for Communities and Local Government ("DCLG") 2008 projections of new households as providing the most up-to-date figures. They gave a projection of 688 new households per annum in this district. Hunston contended for various upwards adjustments of that annual figure, but even without those it can be seen that arithmetically the projection produced a five year requirement of 3,440 dwelling units. Hunston's figure was 3,600 units.

13. However, the inspector regarded such figures as failing to take account of the constraints on development within the district, particularly the Green Belt. She noted that the old East of England (regional) Plan had reflected such constraints and had come up with its figure of 360 units per annum:

> "26… striking a balance of the social, economic and environmental objectives with the aim of achieving sustainable development. The balance was evidence based, consulted upon, subject to a sustainability appraisal, justified and publically examined."

The inspector added that there was no evidence to suggest that the constraints would be any less applicable now, and at paragraph 29 she said that the figure in the East of England Plan (the RSS):

> "29. … provided housing requirements for the period to 2021 and took account of the severe constraints in the District. It provides the only figure that has been scrutinised through the independent examination process. Government policy aims for localism rather than top down set targets but there was nothing to indicate that the constraints identified in the RSS process are reduced because the RSS is no longer extant."

14. Consequently, the inspector concluded as follows on housing need:

> "At this time and in the absence of an identified need that takes account of any constraints to development and acknowledging the age of the RSS data, and the fact that the RSS has now been revoked, I consider it is reasonable that the annual housing target should have regard to constraints in the district and be that which takes them into account. As resolved by the Council on 17 January 2013, provision should be made for a minimum of 360 residential units per annum on specific deliverable sites." (Paragraph 30)

15. On the supply side of the exercise, the District Council put forward a figure of 2183 dwelling unit sites available within five years. On analysis, the inspector found that that was too high by about 100 units, but nonetheless it meant that there was a supply of housing land in excess of the five year requirement if that was put at 360 dwellings per annum. As a five year total, she appears to have put the total five year housing land supply at about 2080 units. Thus the inspector at paragraph 67 concluded:

> "67. Additional delivery of housing would be of value as would the proposed affordable housing provision whether at 35% or 53%. Nevertheless, the five year housing land supply has been found to be robust even if the delivery may not be as high as the Council advises on some sites. A 5% buffer over and above the five year supply has been found to be appropriate and there is a realistic prospect that adequate provision has been made for the delivery of five years plus 5% supply of housing land. Therefore the supply of additional housing on a greenfield Green Belt site is not afforded weight."

16. The inspector in her overall conclusion on the residential development gave weight to certain factors, but said:

> "However, in the absence of an identified need for the release of a greenfield Green Belt site, the substantial harm to the Green Belt and significant harm to the character and appearance of the countryside are not clearly outweighed by the other material considerations either individually or as a whole. Therefore the very special circumstances necessary to justify the inappropriate residential development in the Green Belt do not exist." (Paragraph 71)

She added that the development would be contrary to Local Plan policies and to Government policy in the Framework, and consequently she dismissed the appeal.

The High Court Decision

17. In the Section 288 proceedings it was argued by Hunston that the inspector had erred by failing to identify the "full objectively assessed needs" for housing in the area, as required by the first bullet point in paragraph 47 of the Framework, and had failed, in this situation where there was no new Local Plan containing housing requirements, to recognise the shortfall between those needs and the supply of housing sites. Had she adopted the correct policy approach, she might have found that very special circumstances, sufficient to outweigh the contribution of the appeal site to the Metropolitan Green Belt, existed. Thus she erred in law.

18. The deputy judge accepted this argument. In his judgment at paragraph 28 he said:

> "28. Where it is being contended that very special circumstances exist because of a shortfall caused by the difference between the full objectively assessed needs for market and affordable housing and that which can be provided from the supply of specific deliverable sites identified by the relevant planning authority, I do not see how it can be open to a LPA or Inspector to reach a conclusion as to whether that very special circumstance had been made out by reference to a figure that does not even purport to reflect the full objectively assessed needs for market and affordable housing applicable at the time the figure was arrived at."

He went on to add:

> "A figure that takes account of constraints should not have any role to play in assessing an assertion by an applicant in the position of HPL that an actual housing requirement has not been met."

He observed that the Framework did not encourage the use of need figures derived from such earlier regional plans as the East of England Plan, as it could have done if it had been intended by the government that such should be the approach where a new Local Plan prepared in accordance with the Framework had not been adopted.

19. The District Council had relied upon the wording of the first bullet point in paragraph 47 of the Framework and in particular the words about meeting the housing needs "as far as is consistent with the policies set out in this Framework." The Council contended that this justified the inspector's use of figures for housing needs which reflected the very substantial constraints on development within this district. The judge rejected that argument, commenting at paragraph 29:

> "… the suggestion that the words "… *in so far as is consistent with the policies set out in this Framework…"* requires or permits a decision maker to adopt an old RSS figure is unsustainable as a matter of language. That language requires

> that the decision maker considers each application or appeal on its merits. Having identified the full objectively assessed needs figure the decision maker must then consider the impact of the other policies set out in the NPPF…
>
> …
>
> … It is entirely circular to argue that there are no very special circumstances based on objectively assessed but unfulfilled need that can justify development in the Green Belt by reference to a figure that has been arrived at under a revoked policy which was arrived at taking account of the need to avoid development in the Green Belt."

20. He concluded that the inspector's approach had been wrong in law. The proper approach was to assess need, then identify the unfulfilled need having regard to the supply of specific deliverable sites, and then to decide whether fulfilling the need (plus any other factors in favour of permission) clearly outweighed the harm which would be caused to the Green Belt. As he rightly said, that final stage involved planning judgment, which was not for the court. As a result he quashed the inspector's decision.

Discussion

21. In essence, the issue is the approach to be adopted as a matter of policy towards a proposal for housing development on a Green Belt site where the housing requirements for the relevant area have not yet been established by the adoption of a Local Plan produced in accordance with the policies in the Framework. Such development is clearly inappropriate development in the Green Belt and should only be granted planning permission if "very special circumstances" can be demonstrated. That remains government policy: paragraph 87 of the Framework. In principle, a shortage of housing land when compared to the needs of an area is capable of amounting to very special circumstances. None of these propositions is in dispute.

22. Neither party before us sought to take issue with the inspector's findings as to the supply of housing land over the five year period in this district. But, as will be evident from the earlier passages in this judgment, the inspector found that there was no shortfall in the supply because she regarded it as necessary to identify a housing requirement figure which reflected the constraints on built development in the district generally which resulted from the extensive areas of Green Belt there. The best she felt she could do was to adopt the earlier East of England Plan figure which, though in a revoked plan, sought to take account of such constraints. Was she entitled to do so?

23. The appellant Council contends that she was. On its behalf Mr. Reed emphasises the close links between the first two bullet points of paragraph 47 of the Framework (which I will number 47(1) and (2) for the sake of convenience.) Paragraph 47(2) requires there to be five years supply of housing sites, that is to say a supply sufficient to meet a local planning authority's housing requirements for five years. But to discover what is meant by the reference to housing requirements, one has to go to paragraph 47(1), and while that refers to "the full objectively assessed needs," it also adds the qualification "as far as is consistent with the policies set out in this

Framework." That, it is submitted, means that one has to take into account such policies as those on the protection of the Green Belt. The qualification does not relate solely to the process of producing a Local Plan. Paragraph 47(1) has to be read as a whole and, if one goes to it as Hunston do for the reference to "full objectively assessed needs" when dealing with a development control decision, one must take on board the qualification as well. One cannot rely on the objectively assessed needs part without having regard to the reference to policy constraints.

24. The Council contends that the inspector used the former East of England plan figure for housing requirements while recognising that it was not ideal. But she was doing her best to arrive at an assessment which reflected the whole of paragraph 47(1) and not just part of it, so as to include the constraints flowing from other policies as well as the household projections. The mere fact that this was a development control situation as opposed to local plan formulation does not, it is said, undermine the need to reflect the whole of paragraph 47(1). The policies in the Framework provide guidance, as paragraph 13 states, both for the drawing up of plans and in the determination of planning applications.

25. I see the force of these arguments, but I am not persuaded that the inspector was entitled to use a housing requirement figure derived from a revoked plan, even as a proxy for what the local plan process may produce eventually. The words in paragraph 47(1), "as far as is consistent with the policies set out in this Framework" remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:

> "to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework."

That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure.

26. Moreover, I accept Mr Stinchcombe QC's submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. I appreciate that the inspector here was indeed using the figure from the revoked East of England Plan merely as a proxy, but the government has expressly moved away from a "top-down" approach of the kind which led to the figure of 360 housing units required per annum. I have some sympathy for the inspector, who was seeking to interpret policies which were at best ambiguous when dealing with the situation which existed here, but it seems to me to have been mistaken to use a figure for housing

requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.

27. It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a shortfall. The supply fell below the objectively assessed five year requirement.

28. However, that is not the end of the matter. The crucial question for an inspector in such a case is not: is there a shortfall in housing land supply? It is: have very special circumstances been demonstrated to outweigh the Green Belt objection? As Mr Stinchcombe recognised in the course of the hearing, such circumstances are not automatically demonstrated simply because there is a less than a five year supply of housing land. The judge in the court below acknowledged as much at paragraph 30 of his judgment. Self-evidently, one of the considerations to be reflected in the decision on "very special circumstances" is likely to be the scale of the shortfall.

29. But there may be other factors as well. One of those is the planning context in which that shortfall is to be seen. The context may be that the district in question is subject on a considerable scale to policies protecting much or most of the undeveloped land from development except in exceptional or very special circumstances, whether because such land is an Area of Outstanding Natural Beauty, National Park or Green Belt. If that is the case, then it may be wholly unsurprising that there is not a five year supply of housing land when measured simply against the unvarnished figures of household projections. A decision-maker would then be entitled to conclude, if such were the planning judgment, that some degree of shortfall in housing land supply, as measured simply by household formation rates, was inevitable. That may well affect the weight to be attached to the shortfall.

30. I therefore reject Mr Stinchcombe's submission that it is impossible for an inspector to take into account the fact that such broader, district-wide constraints exist. The Green Belt may come into play both in that broader context and in the site specific context where it is the trigger for the requirement that very special circumstances be shown. This is not circular, nor is it double-counting, but rather a reflection of the fact that in a case like the present it is not only the appeal site which has a Green Belt designation but the great bulk of the undeveloped land in the district outside the built-up areas. This is an approach which takes proper account of the need to read the Framework as a whole and indeed to read paragraph 47 as a whole. It would, in my judgment, be irrational to say that one took account of the constraints embodied in the polices in the Framework, such as Green Belt, when preparing the local plan, as paragraph 47(1) clearly intends, and yet to require a decision-maker to close his or her eyes to the existence of those constraints when making a development control decision. They are clearly relevant planning considerations in both exercises.

31. There seemed to be some suggestion by Hunston in the course of argument that a local planning authority, which did not produce a local plan as rapidly as it should, would only have itself to blame if the objectively-assessed housing need figures produced a shortfall and led to permission being granted on protected land, such as Green Belt, when that would not have happened if there had been a new-style local plan in existence. That is not a proper approach. Planning decisions are ones to be

arrived at in the public interest, balancing all the relevant factors and are not to be used as some form of sanction on local councils. It is the community which may suffer from a bad decision, not just the local council or its officers.

32. Where this inspector went wrong was to use a quantified figure for the five year housing requirement which departed from the approach in the Framework, especially paragraph 47. On the figures before her, she was obliged (in the absence of a local plan figure) to find that there was a shortfall in housing land supply. However, decision-makers in her position, faced with their difficult task, have to determine whether very special circumstances have been shown which outweigh the contribution of the site in question to the purposes of the Green Belt. The ultimate decision may well turn on a number of factors, as I have indicated, including the scale of the shortfall but also the context in which that shortfall is to be seen, a context which may include the extent of important planning constraints in the district as a whole. There may be nothing special, and certainly nothing "very special" about a shortfall in a district which has very little undeveloped land outside the Green Belt. But ultimately that is a matter of planning judgment for the decision-maker.

Conclusion

33. The inspector did err in law in the approach she adopted to calculating the housing land requirement over the five year period. I would therefore quash her decision. The Section 78 appeal will consequently have to be redetermined in accordance with the guidance in this judgment, if my Lords agree. I would dismiss this appeal.

Lord Justice Ryder:

34. I agree.

Lord Justice Maurice Kay:

35. I also agree.

Status: Positive or Neutral Judicial Treatment

Tesco Stores Limited v Dundee City Council

On appeal from: [2011] CSIH 9

SC

21 March 2012

[2012] UKSC 13

2012 WL 609184

before Lord Hope , Deputy President Lord Brown Lord Kerr Lord Dyson Lord Reed

Judgment Given on 21 March 2012

Heard on 15 and 16 February 2012

Representation

Appellants Martin Kingston QC Jane Munro (Instructed by Semple Fraser LLP).

Respondents Douglas Armstrong QC James Findlay QC (Instructed by Gillespie Macandrew LLP).

Interveners (Asda Stores Limited and MacDonald Estates Group PLC) Malcolm Thomson QC Kenny McBrearty (Instructed by Brodies LLP).

Judgment

Lord Reed (with whom Lord Brown, Lord Kerr and Lord Dyson agree)

1 If you drive into Dundee from the west along the A90 (T), you will pass on your left a large industrial site. It was formerly occupied by NCR, one of Dundee's largest employers, but its factory complex closed some years ago and the site has lain derelict ever since. In 2009 Asda Stores Ltd and MacDonald Estates Group plc, the interveners in the present appeal, applied for planning permission to develop a superstore there. Dundee City Council, the respondents, concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. Their decision to grant the application is challenged in these proceedings by Tesco Stores Ltd, the appellants, on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan: a misunderstanding which, it is argued, vitiated their assessment of whether a departure from the plan was justified. In particular, it is argued that the respondents misunderstood a requirement, in the policies concerned with out of centre retailing, that it must be established that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres.

The legislation

2 Section 37(2) of the Town and Country Planning (Scotland) Act 1997 , as in force at the time of the relevant decision, provides:

> “In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to

any other material considerations."

Section 25 provides:

> "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise –
>
> (a) to be made in accordance with that plan … "

The development plan

3 The development plan in the present case is an "old development plan" within the meaning of paragraph 1 of Schedule 1 to the 1997 Act. As such, it is defined by section 24 of the 1997 Act, as that section applied before the coming into force of section 2 of the Planning Etc. (Scotland) Act 2006 , as including the approved structure plan and the adopted or approved local plan. The relevant structure plan in the present case is the Dundee and Angus Structure Plan, which became operative in 2002, at a time when the NCR plant remained in operation. As is explained in the introduction to the structure plan, its purpose is to provide a long term vision for the area and to set out the broad land use planning strategy guiding development and change. It includes a number of strategic planning policies. It sets the context for local plans, which translate the strategy into greater detail. Its preparation took account of national planning policy guidelines.

4 The structure plan includes a chapter on town centres and retailing. The introduction explains that the relevant Government guidance is contained in National Planning Policy Guidance 8, *Town Centres and Retailing* (revised 1998). I note that that document (NPPG 8) was replaced in 2006 by *Scottish Planning Policy: Town Centres and Retailing* (SPP 8), which was in force at the time of the decision under challenge, and which was itself replaced in 2010 by *Scottish Planning Policy* (SPP). The relevant sections of all three documents are in generally similar terms. The structure plan continues, at para 5.2:

> "A fundamental principle of NPPG 8 is that of the sequential approach to site selection for new retail developments … On this basis, town centres should be the first choice for such developments, followed by edge of centre sites and, only after this, out of centre sites which are currently or potentially accessible by different means of transport."

In relation to out of centre developments, that approach is reflected in Town Centres and Retailing Policy 4: Out of Centre Retailing:

> "In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that:
>
> • no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres;
>
> • individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres;
>
> • the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres;
>
> • the site is readily accessible by modes of transport other than the car;
>
> • the proposal is consistent with other Structure Plan policies."

5 The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy

guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues, at para 52.2:

> "As part of this approach planning authorities should adopt a sequential approach to new shopping developments with first preference being town centres, which in Dundee's case are the City centre and the District Centres."

That approach is reflected in Policy 45: Location of New Retail Developments:

> "The City Centre and District Centres will be the locations of first choice for new or expanded retail developments not already identified in the Local Plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that:
>
> a) no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centres; and
>
> b) individually or cumulatively it would not prejudice the vitality and viability of the City Centre or District Centres; and
>
> c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and
>
> d) the site is readily accessible by modes of transport other than the car; and
>
> e) the proposal is consistent with other Local Plan policies."

6 It is also relevant to note the guidance given in NPPG 8, as revised in 1998, to which the retailing sections of the structure plan and the local plan referred. Under the heading "Sequential Approach", the guidance stated:

> "12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses … First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge-of-centre sites, and only then by out-of-centre sites in locations that are, or can be made easily accessible by a choice of means of transport …
>
> 13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre …
>
> 14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town centre which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time …
>
> 15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out-of-centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an

> out-of-centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable …"

The consideration of the application

7 The interveners' application was for planning permission to develop a foodstore, café and petrol filling station, with associated car parking, landscaping and infrastructure, including access roads. The proposals also involved improvements to the junction with the A90 (T), the upgrading of a pedestrian underpass, the provision of footpaths and cycle ways, and improvements to adjacent roadways. A significant proportion of the former NCR site lay outside the application site. It was envisaged that vehicular access to this land could be achieved using one of the proposed access roads.

8 In his report to the respondents, the Director of City Development advised that the application was contrary to certain aspects of the employment and retailing policies of the development plan. In relation to the employment policies, in particular, the proposal was contrary to policies which required the respondents to safeguard the NCR site for business use. The Director considered however that the application site was unlikely to be re-developed for business uses in the short term, and that its re-development as proposed would improve the development prospects of the remainder of the NCR site. In addition, the infrastructure improvements would provide improved access which would benefit all businesses in an adjacent industrial estate.

9 In relation to the retailing policies, the Director considered the application in the light of the criteria in Retailing Policy 4 of the structure plan. In relation to the first criterion he stated:

> "It must be demonstrated, in the first instance, that no suitable site is available for the development either within the city/district centres or, thereafter on the edge of these centres … While noting that the Lochee District Centre lies within the primary catchment area for the proposal, [the retail statement submitted on behalf of the interveners] examines the potential site opportunities in and on the edge of that centre and also at the Hilltown and Perth Road District Centres. The applicants conclude that there are no sites or premises available in or on the edge of existing centres capable of accommodating the development under consideration. Taking account of the applicant's argument it is accepted that at present there is no suitable site available to accommodate the proposed development."

In relation to the remaining criteria, the Director concluded that the proposed development was likely to have a detrimental effect on the vitality and viability of Lochee District Centre, and was therefore in conflict with the second criterion. The potential impact on Lochee could however be minimised by attaching conditions to any permission granted so as to restrict the size of the store, limit the type of goods for sale and prohibit the provision of concessionary units. The proposal was also considered to be in conflict with the third criterion: there was no deficiency in shopping provision which the proposal would address. The fourth criterion, concerned with accessibility by modes of transport other than the car, was considered to be met. Similar conclusions were reached in relation to the corresponding criteria in Policy 45 of the local plan.

10 In view of the conflict with the employment and retailing policies, the Director considered that the proposal did not fully comply with the provisions of the development plan. He identified however two other material considerations of particular significance. First, the proposed development would bring economic benefits to the city. The closure of the NCR factory had been a major blow to the economy, but the re-development of the application site would create more jobs than had been lost when the factory finally closed. The creation of additional employment opportunities within the city was considered to be a strong material consideration. Secondly, the development would also provide a number of planning benefits. There would be improvements to the strategic road network which would assist in the free flow of traffic along the A90 (T). The development would also assist in the re-development of the whole of the former NCR site through the provision of enhanced road access and the clearance of buildings from the site. The access improvements would also assist in the development of an economic development area to the west. These benefits were considered to be another strong material consideration.

11 The Director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and retailing policies. There were however other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

12 The application was considered by the respondents' entire council sitting as the respondents' Development Quality Committee. After hearing submissions on behalf of the interveners and also on behalf of the appellants, the respondents decided to follow the Director's recommendation. The reasons which they gave for their decision repeated the Director's conclusions:

> "It is concluded that the proposal does not undermine the core land use and environmental strategies of the development plan. The planning and economic benefits that would accrue from the proposed development would be important to the future development and viability of the city as a regional centre. These benefits are considered to be of a significant weight and sufficient to set aside the relevant provisions of the development plan."

The present proceedings

13 The submissions on behalf of the appellants focused primarily upon an alleged error of interpretation of the first criterion in Retailing Policy 4 of the structure plan, and of the equivalent criterion in Policy 45 of the local plan. If there was a dispute about the meaning of a development plan policy which the planning authority was bound to take into account, it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and failed properly to understand the policy. In the present case, the Director had interpreted "suitable" as meaning "suitable for the development proposed by the applicant"; and the respondents had proceeded on the same basis. That was not however a tenable meaning. Properly interpreted, "suitable" meant "suitable for meeting identified deficiencies in retail provision in the area". Since no such deficiency had been identified, it followed on a proper interpretation of the plan that the first criterion did not require to be considered: it was inappropriate to undertake the sequential approach. The Director's report had however implied that the first criterion was satisfied, and that the proposal was to that extent in conformity with the sequential approach. The respondents had proceeded on that erroneous basis. They had thus failed to identify correctly the extent of the conflict between the proposal and the development plan. In consequence, their assessment of whether other material considerations justified a departure from the plan was inherently flawed.

14 The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a "suitable" site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

15 In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

16 So far as concerned the assessment of “suitable” sites, the interveners' retail statement reflected a degree of flexibility. There had been a consideration of all sites of at least 2.5 ha, whereas the application site extended to 6.68 ha. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 ha, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The Director, and the respondents, had accepted that it was not a suitable site for these reasons.

Discussion

17 It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361* ; *Horsham DC v Secretary of State for the Environment (1991) 63 P & CR 219* , 225–226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25 , namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33, [1997] 1 WLR 1447* . It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:

> “In the practical application of sec 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.”

18 In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as “a proper interpretation” of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a “proper interpretation” of the plan of much of its meaning and purpose. It would also make little practical sense. 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 (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department [2008] QB 836*), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19 That is not to say that such statements should be construed as if they were statutory or contractual provisions. 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). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20 The principal authority referred to in relation to this matter was the judgment of Brooke LJ in *R v Derbyshire County Council, Ex p Woods [1997] JPL 958* at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."

By way of illustration, Brooke LJ *referred to the earlier case of Northavon DC v Secretary of State for the Environment [1993] JPL 761* , which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of R (Heath and Hampstead Society) v Camden LBC [2008] 2 P & CR 233 , where a planning authority's decision that a replacement dwelling was not "materially larger" than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase "materially larger" referred to the size of the new building compared with its predecessor, rather than requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in *City of Edinburgh Council v Scottish Ministers 2001 SC 957* the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

21 A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.

22 It is of course true, as counsel for the respondents submitted, that a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion, on the question whether the proposal was in accordance with the policy, as it would have reached if it had construed the policy correctly. That is not however a complete answer to a challenge to the planning authority's decision. An error in relation to one part of a policy might affect the overall conclusion as to whether a proposal was in accordance with the development plan even if the question whether the proposal was in conformity with the policy would have been answered in the same way. The policy criteria with which the proposal was considered to be incompatible might, for example, be of less weight than the criteria which were mistakenly thought to be fulfilled. Equally, a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion as it would otherwise have reached on the question whether the proposal was in accordance with the development plan. Again, however, that is not a complete answer. Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.

23 In the present case, the Lord Ordinary rejected the appellants' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in which the sequential approach could reasonably be applied ([2010] CSOH 128, para 23). For the reasons I have explained, that approach does not correctly reflect the role which the court has to play in the determination of the meaning of the development plan. A different approach was adopted by the Second Division: since, it was said, the proposal was in head-on conflict with the retail and employment policies of the development plan, and the sequential approach offered no justification for it, a challenge based upon an alleged misapplication of the sequential approach was entirely beside the point (2011 SC 457, [2011] CSIH 9, para 38). For the reasons I have explained, however, even where a proposal is plainly in breach of policy and contrary to the development plan, a failure properly to understand the policy in question may result in a failure to appreciate the full extent or significance of the departure from the development plan which the grant of consent would involve, and may consequently vitiate the planning authority's determination. Whether there has in fact been a misunderstanding of the policy, and whether any such misunderstanding may have led to a flawed decision, has therefore to be considered.

24 I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the appellants' primary contention is that the word “suitable”, in the first criterion of Retailing Policy 4 of the structure plan and the corresponding Policy 45 of the local plan, means “suitable for meeting identified deficiencies in retail provision in the area”, whereas the respondents proceeded on the basis of the construction placed upon the word by the Director of City Development, namely “suitable for the development proposed by the applicant”. I accept, subject to a qualification which I shall shortly explain, that the Director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.

25 First, that interpretation appears to me to be the natural reading of the policies in question. They have been set out in paras 4 and 5 above. Read short, Retailing Policy 4 of the structure plan states that proposals for new or expanded out of centre retail developments will only be acceptable where it can be established that a number of criteria are satisfied, the first of which is that “no suitable site is available” in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word “suitable”, in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out of centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

26 Secondly, the interpretation favoured by the appellants appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a “suitable” site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping provision which cannot be met in a sequentially preferable location. If “suitable” meant “suitable for meeting identified deficiencies in retail provision”, as the appellants contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

27 Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out in para 6 above. They provide further support for the respondents' interpretation of the policies. Paragraph 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Paragraph 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

28 I said earlier that it was necessary to qualify the statement that the Director and the

respondents proceeded, and were correct to proceed, on the basis that “suitable” meant “suitable for the development proposed by the applicant”. As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc and Redcar and Cleveland BC [1998] JPL 23* , 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

29 It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in Lidl UK GmbH v Scottish Ministers [2006] CSOH 165 , para 14, whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.

30 In the present case, it is apparent that a flexible approach was adopted. The interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing. Even taking that approach, however, they did not regard the Lochee site vacated by the appellants as being suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate. In accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts: they did not proceed on an erroneous understanding of the policy.

31 Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility. The considerations in favour of the proposed development were very powerful. They were also specific to the particular development proposed: on the information before the respondents, there was no prospect of any other development of the application site, or of any development elsewhere which could deliver equivalent planning and economic benefits. Against that background, the argument that a different decision might have been taken if the respondents had been advised that the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

Conclusion

32 For these reasons, and those given by Lord Hope, with which I am in entire agreement, I would dismiss the appeal.

Lord Hope

33 The question that lies at the heart of this case is whether the respondents acted unlawfully in

their interpretation of the sequential approach which both the structure plan and the relevant local plan required them to adopt to new retail developments within their area. According to that approach, proposals for new or expanded out of centre developments of this kind are acceptable only where it can be established, among other things, that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres. Is the test as to whether no suitable site is available in these locations, when looked at sequentially, to be addressed by asking whether there is a site in each of them in turn which is suitable for the proposed development• Or does it direct attention to the question whether the proposed development could be altered or reduced so as to fit into a site which is available there as a location for this kind of development?

34 The sequential approach is described in National Planning Policy Guidance Policy 8, *Town Centres and Retailing* , para 5.2 as a fundamental principle of NPPG 8. In R v Rochdale Metropolitan Borough Council, Ex p Milne, 31 July 2000, not reported , paras 48-49, Sullivan J said that it was not unusual for development plan polices to pull in different directions and, having regard to what Lord Clyde said about the practical application of the statutory rule in *City of Edinburgh v Secretary of State for Scotland 1998 SC (HL) 33* at p 44, that he regarded as untenable the proposition that if there was a breach of any one policy in a development plan a proposed development could not be said to be “in accordance with the plan”. In para 52 he said that the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.

35 I see no reason to question these propositions, to which Mr Kingston QC for the appellants drew our attention in his reply to Mr Armstrong's submissions for the respondents. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128, para 23, is the interpretation of the policy which it sets out primarily a matter for the decision maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents' decision to follow the Director's recommendation and approve the proposed development is not that it was *Wednesbury* unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.

36 In Lidl UK GmbH v The Scottish Ministers [2006] CSOH 165 the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development out with the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge of centre or out of town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13 Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be “suitable” in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14 he said that the question was whether the alternative town centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it.

37 Mr Kingston submitted that Lord Glennie's approach would rob the sequential approach of all its force, and in the Inner House it was submitted that his decision proceeded on a concession by counsel which ought not to have been made: [2011] CSIH 9, 2011 SC 457, para 31. But I think that Lord Glennie's interpretation of the phrase was sound and that counsel was right to accept that it had the meaning which she was prepared to give to it. The wording of the relevant provision in the local plan in that case differed slightly from that with which we are concerned in this case, as it included the phrase “or can reasonably be made available”. But the question to which it directs attention is the same. It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no suitable site is available within or on the edge of the town centre.

38 The context in which the word “suitable” appears supports this interpretation. It is identified by

the opening words of the policy, which refer to “proposals for new or expanded out of centre retail developments” and then set out the only circumstances in which developments outwith the specified locations will be acceptable. The words “the proposal” which appear in the third and fifth of the list of the criteria which must be satisfied serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. It is worth noting too that the phrase “no suitable site is available” appears in Policy 46 of the local plan relating to commercial developments. Here too the context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers in para 28, above, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.

39 For these reasons which I add merely as a footnote I agree with Lord Reed, for all the reasons he gives, that this appeal should be dismissed. I would affirm the Second Division's interlocutor.

Status: Positive or Neutral Judicial Treatment

Michael Mansell v Tonbridge and Malling Borough Council v Croudace Portland, the East Malling Trust

Case No: C1/2016/4488

Court of Appeal (Civil Division)

8 September 2017

[2017] EWCA Civ 1314

2017 WL 03912513

Before: The Chancellor of the High Court Lord Justice Lindblom and Lord Justice Hickinbottom

Date: 8 September 2017

On Appeal from the Administrative Court Planning Court

Mr Justice Garnham

[2016] EWHC 2832 (Admin)

Hearing date: 4 July 2017

Representation

Ms Annabel Graham Paul (instructed by Richard Buxton Environmental and Public Law) for the Appellant.

Mr Juan Lopez (instructed by Tonbridge and Malling Borough Council Legal Services) for the Respondent.

The interested parties did not appear and were not represented.

Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1 Should the judge in the court below have quashed a local planning authority's grant of planning permission for the redevelopment of the site of a large barn and a bungalow to provide four dwellings? That is what we must decide in this appeal. It is contended that the authority misdirected itself in considering a "fallback position" available to the landowner, and also that it misapplied the "presumption in favour of sustainable development" in the National Planning Policy Framework ("the NPPF") – a question that can now be dealt with in the light of this court's recent decision in *Barwood Strategic Land II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893* .

2 The appellant, Mr Michael Mansell, appeals against the order of Garnham J., dated 10

November 2016, dismissing his claim for judicial review of the planning permission granted on 13 January 2016 by the respondent, Tonbridge and Malling Borough Council, for development proposed by the first interested party, Croudace Portland, on land owned by the second interested party, the East Malling Trust, at Rocks Farm, The Rocks Road, East Malling. The proposal was to demolish the barn and the bungalow on the land and to construct four detached dwellings, with garages and gardens. Mr Mansell lives in a neighbouring property, at 132-136 The Rocks Road – a grade II listed building. He was an objector.

3 It was common ground that the proposal was in conflict with the development plan. Rocks Farm is outside the village of East Malling to its south-east, within the "countryside" as designated in the Tonbridge and Malling Borough Core Strategy. The site of the proposed development extends to about 1.3 hectares. The barn, about 600 square metres in area, had once been used to store apples. The bungalow was lived in by a caretaker. The application for planning permission came before the council's Area 3 Planning Committee on 7 January 2016. In his reports to committee the council's planning officer recommended that planning permission be granted, and that recommendation was accepted by the committee. The officer guided the members on the "fallback position" that was said to arise, at least partly, through the "permitted development" rights for changes of use from the use of a building as an agricultural building to its use as a dwelling-house, under Class Q in Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO").

4 Mr Mansell's challenge to the planning permission attacked the officer's approach to the "fallback position" and his assessment of the proposal on its planning merits. Garnham J. dismissed the claim for judicial review on all grounds. Permission to appeal was granted by McCombe L.J. on 21 February 2017.

The issues in the appeal

5 The appeal raises three main issues:

(1) whether the council correctly interpreted and lawfully applied the provisions of Class Q in the GPDO (ground 1 in the appellant's notice);

(2) whether the council was entitled to accept there was a real prospect of the fallback development being implemented (ground 2); and

(3) whether the council misunderstood or misapplied the "presumption in favour of sustainable development" (ground 3).

Did the council correctly interpret and lawfully apply the provisions of Class Q?

6 When the council determined the application for planning permission the permitted development rights under Class Q were in these terms, so far is relevant here:

"Q. Permitted development

Development consisting of –

(a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order; and

(b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwellinghouses) of that Schedule.

Q.1 Development not permitted

Development is not permitted by Class Q if –

…

(b) the cumulative floor space of the existing building or buildings changing use under Class Q within an established agricultural unit exceeds 450 square metres;

(c) the cumulative number of separate dwellinghouses developed under Class Q within an established agricultural unit exceeds 3;

…

(g) the development would result in the external dimensions of the building extending beyond the external dimensions of the existing building at any given point;

(h) the development under Class Q (together with any previous development under Class Q) would result in a building or buildings having more than 450 square metres of floor space having a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order;

… ."

The permitted development rights under Class Q are subject to several "Conditions" in paragraph Q.2, none of them controversial here.

7 In section 6 of his main report to committee for its meeting on 7 January 2016 the officer dealt at length with the "Determining Issues". In discussing those issues he considered the "fallback position" in paragraphs 6.14 to 6.19:

"6.14 In practical terms for this site, the new permitted development rights mean that the existing agricultural barn could be converted into three residential units. Some representations point out that only a proportion of the barn could be converted in such a manner (up to 450sqm) but the remainder – a small proportion in terms of the overall footprint – could conceivably be left unconverted and the resultant impacts for the site in terms of the amount of residential activity would be essentially the same. The building could be physically adapted in certain ways that would allow for partial residential occupation and the extensive area of hardstanding which exists between the building and the northern boundary could be used for parking and turning facilities.

6.15 The existing bungalow within the site could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building. Such a scenario would, in effect, give rise to the site being occupied by a total of four residential units albeit of a different form and type to that proposed by this application. This provides a realistic fallback position in terms of how the site could be developed.

6.16 I appreciate that discussion concerning realistic 'fallback' positions is rather complicated but, in making an assessment of any application for development, we are bound to consider what the alternatives might be for a site: in terms of what could occur on the site without requiring any permission at all (historic use rights) or using permitted development rights for alternative forms of development.

6.17 In this instance a scheme confined to taking advantage of permitted development would, in my view, be to the detriment of the site as a whole in visual terms. Specifically, it would have to be developed in a contrived and piecemeal fashion in order to conform to the requirements of the permitted development rights, including the need to adhere to the restrictions on the floor space that can be converted using the permitted development rights.

> 6.18 I would also mention that should the applicant wish to convert the entire barn for residential purposes, above the permitted development thresholds, such a scheme (subject to detailed design) would wholly accord with adopted policy. Again, this provides a strong indicator as to how the site could be developed in an alternative way that would still retain the same degree of residential activity as proposed by the current application but in a more contrived manner and with a far more direct physical relationship with the nearest residential properties.
>
> 6.19 The current proposal therefore, in my view, offers an opportunity for a more comprehensive and coherent redevelopment of the site as opposed to a more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights."

8 For Mr Mansell, Ms Annabel Graham Paul submitted to us, as she did to the judge, that the officer's advice in those six paragraphs betrays a misunderstanding of the provisions of Class Q in the GPDO, in particular sub-paragraphs Q.1(b) and Q.1(h). She argued that the restriction to 450 square metres in sub-paragraph Q.1(b) applies to the total floor space of the agricultural building or buildings in question, not to the floor space actually "changing use". Before the judge, though not in her submissions in this court, Ms Graham Paul sought to bolster that contention with a passage in an inspector's decision letter relating to a proposal for development on a site referred to by the judge as "Mannings Farm". The inspector had observed that "[the] floor space of the existing building … far exceeds the maximum permitted threshold, of 450 sq m, as set out in [sub-paragraph] Q.1(b)", and that "the intention is to reduce the size of the building as part of the proposal but Q.1(b) clearly relates to existing floorspace and there is no provision in the GPDO for this to be assessed on any other basis".

9 Garnham J. rejected Ms Graham Paul's argument. In paragraph 30 of his judgment he said:

> "30. In my judgment this construction of paragraph Q.1(b) fails because it disregards the definition section of the Order. The critical expression in subparagraph (b) is " *the existing building or buildings* ". Paragraph 2 of the Order defines " *building* " as " *any part of a building* ". Accordingly, the paragraph should be read as meaning " *the cumulative floor space of the existing building or any part of the building changing use* …". If that is right, it is self-evident that the limit on floor space relates only to that part of the building which is changing use."

10 The judge found support for that conclusion in several inspectors' decisions, one of them a decision on proposed development at Bennetts Lane, Binegar in Somerset. In correspondence in that case the Department for Communities and Local Government had pointed to the definition of a "building" in the "Interpretation" provisions in paragraph 2 of the GPDO. Because that definition included "any part of a building", their view was that "in the case of a large agricultural building, part of it could change use … and the rest remain in agricultural use" (paragraph 32 of the judgment). However, as was accepted on both sides in this appeal, the court must construe the provisions of the GPDO for itself, applying familiar principles of statutory interpretation.

11 In paragraph 34 of his judgment Garnham J. said this:

> "34. Ms Graham Paul contends that that construction of subparagraph (b) means that it adds nothing to subparagraph (h). I can see the force of that submission and, as a matter of first principle, statutory provisions should be construed on the assumption that the draftsman was intending to add something substantive by each relevant provision. Nonetheless, giving the interpretation section its proper weight, I see no alternative to the conclusion that Class Q imposes a floor space limit on those parts of the buildings which will change use as a result of the development. In those circumstances, I reject the Claimant's challenge to the Officer's construction of the Class Q provisions in the 2015 Order."

12 Ms Graham Paul submitted that this interpretation of the relevant provisions would render

sub-paragraph Q.1(b) of Class Q redundant, because sub-paragraph Q.1(h) already limits the residential floor space resulting from the change of use under Class Q to a maximum of 450 square metres. The statutory provisions for permitted development rights in the GPDO ought to be interpreted consistently. The interpretation favoured by the judge, submitted Ms Graham Paul, depends on reading into sub-paragraph Q.1(b) the additional words "any part of a building" after the words "the existing building or buildings", which, she said, is wholly unnecessary. Statutory provisions ought to be construed on the assumption that the draftsman was intending to add something of substance in each provision. The judge's interpretation offends that principle, said Ms Graham Paul, because it would, in effect, subsume sub-paragraph Q.1(b) into sub-paragraph Q.1(h). Only her interpretation of sub-paragraph Q.1(b) would enable sub-paragraph Q.1(h) to add something of substance to the provisions of Class Q. And in principle, Ms Graham Paul argued, it makes good sense to prevent, without an express grant of planning permission, the partial conversion of large agricultural buildings to accommodate residential use, leaving other parts of the building either in active agricultural use or simply vacant.

13 Ms Graham Paul sought to reinforce these submissions by pointing to other provisions of the GPDO where similar wording is used: Class M, which provides permitted development rights for changes of use of buildings in retail or betting office or pay day loan shop use to Class C3 use, and states in sub-paragraph M.1(c) that development is not permitted if "the cumulative floor space of the existing building changing use under Class M exceeds 150 square metres"; and Class N, which provides permitted development rights for changes of use from specified sui generis uses, including use as an amusement arcade or centre, and use as a casino, to Class C3 use, and states in sub-paragraph N.1(b) that development is not permitted if "the cumulative floor space of the existing building changing use under Class N exceeds 150 square metres."

14 I cannot accept Ms Graham Paul's argument. I think the judge's understanding of Class Q was correct. The provisions of Class Q relating to the scope of permitted development rights should be given their literal meaning. When this is done, they make perfectly good sense in their statutory context and do not give rise to any duplication or redundancy.

15 The focus here is on the provisions as to development that is "not permitted" under paragraph Q.1, and in particular the provisions of sub-paragraphs Q.1(b) and Q.1(h). Sub-paragraph Q.1(b) establishes the "cumulative floor space of the existing building or buildings" that is "changing use under Class Q …". The limit on such "cumulative floor space …" is 450 square metres. This restriction is stated to be a restriction on the change of use, not on the size of the building or buildings in which the change of use occurs. Sub-paragraph Q.1(b) relates to a single act of development in which the building in question, or part of it, is "changing use". The floor space limit set by it relates not to the total floor space of the building or buildings concerned. It relates, as one would expect, to the permitted development rights themselves, which apply to the "cumulative" amount of floor space actually "changing use under Class Q". The use of the word "cumulative" in this context – as elsewhere in the GPDO – is perfectly clear. It connotes, in relevant circumstances, the adding together of separate elements of floor space within a building or buildings, or, again in relevant circumstances, a single element of floor space, which in either case must not exceed 450 square metres. The total floor space of the building or buildings concerned may itself be more than 450 square metres. But the cumulative amount of floor space whose use is permitted to be changed within that total floor space must not exceed 450 square metres.

16 This interpretation of sub-paragraph Q.1(b) avoids arbitrary consequences in the application of the permitted development rights under Class Q. It does not make the availability of those rights for a qualifying "agricultural building" depend on the total floor space of the building itself. It would not, therefore, create a situation in which the permitted development rights under Class Q would be available for a building whose total floor space was 450 square metres, but not for a building with a floor space of 451 square metres or an area greater than that. If the consequence is that the permitted development rights, when fully used, would result in a building partly in use as a dwelling-house and partly still in agricultural use, that is an outcome contemplated by the GPDO. I see no difficulty in that.

17 Had the draftsman intended to confer permitted development rights under Class Q only to a building or buildings whose total floor space was not more than 450 square metres, the relevant provision would have been framed differently. There would have been no need to use the word "cumulative" or some other such word. The provision would simply have stated, for example, "the total floor space of the existing building or buildings within an established agricultural unit in

which the change of use under Class Q is being undertaken does not exceed 450 square metres". But that is not what sub-paragraph Q.1(b) says, or, in my view, what it means.

18 Nor can I see how an interpretation of sub-paragraph Q.1(b) in which the restriction of 450 square metres applies not to the floor space actually changing use but to the total floor space of the building or buildings in which the change of use is taking place can be reconciled with the definition of "building" in paragraph 2 of the GPDO as including "part of a building". Unless one disapplies that part of the definition of a building to sub-paragraph Q.1(b), one must read that provision as meaning "the cumulative floor space of the existing building or buildings or part of a building changing use under Class Q … exceeds 450 square metres" (my emphasis). That understanding of sub-paragraph Q.1(b) would not sit happily with the concept that the restriction of 450 square metres applies not to the floor space changing use but to the total floor space of the building itself.

19 My interpretation of sub-paragraph Q.1(b) does not leave sub-paragraph Q.1(h) redundant. Sub-paragraph Q.1(h) achieves a different purpose. It prevents, for example, a change of use as "permitted development" in an agricultural building of which part is already in Class C3 use, or an aggregation of successive changes of use through separate acts of development, that would result in more than 450 square metres of floor space in a building or buildings being in Class C3 use. Neither of those outcomes would necessarily be prevented by sub-paragraph Q.1(b).

20 Finally, there is nothing in the provisions of Class M and Class N, or in any other provision of the GPDO, to suggest a different understanding of Class Q. The provisions in sub-paragraphs M.1(c) and N.1(b) also contain the word "cumulative" in referring to the floor space "changing use", not to the total floor space of the "existing building or buildings" in which the change of use is taking place. And in both Class M and Class N the draftsman has also included a provision – respectively in sub-paragraphs M.1(d) and N.1(c) – stating that "the development (together with any previous development under [the relevant class]) would result in more than 150 square metres of floor space in the building having changed use under [the relevant class]". Although we are not deciding those questions, it seems to me that the same analysis would hold good for those provisions too.

21 In my view, therefore, the officer did not misrepresent the permitted development rights under Class Q in his advice to the committee on the "fallback position". The provisions of Class Q were correctly interpreted and lawfully applied.

Was the council entitled to accept that there was a real prospect of the fallback development being implemented?

22 Garnham J. accepted that the council was entitled to conclude that there was a "realistic" fallback. In paragraphs 36 and 37 of his judgment he said:

> "36. In paragraph 6.15 of the report the Officer concluded that the fall back position was "realistic". In my judgment he was entitled so to conclude. The evidence establishes that there had been prior discussions between the Council and the Planning Agent acting for the East Malling Trust who owns the site. It was crystal clear from that contact that the Trust were intending, one way or another to develop the site. Alternative proposals had been advanced seeking the Council's likely reaction to planning applications. It is in my view wholly unrealistic to imagine that were all such proposals to be turned down the owner of the site would not take advantage of the permitted development provided for by Class Q to the fullest extent possible.
>
> 37. It was not a precondition to the Council's consideration of the fall back option that the interested party had made an application indicating an intention to take advantage of Class Q. There was no requirement that there be a formulated proposal to that effect. The officer was entitled to have regard to the planning history which was within his knowledge and the obvious preference of the Trust to make the most valuable use it could of the site."

23 The judge accepted the submission of Mr Juan Lopez for the council that the committee did

not have to ignore fallback development that included elements for which planning permission would be required and had not yet been granted. He noted that "[the] building could be converted, so as to provide dwelling houses limited in floor space to 450m2 by the construction of internal walls without using the whole of the internal space of the barn" (paragraph 40). And he went on to say (in paragraph 41):

> "41. In my judgment therefore, it would have been unrealistic to have concluded that, were the present application for permission to be rejected, the interested party would do nothing to develop this site. On the contrary it was plain that development was contemplated and that some development could have taken place pursuant to Class Q. The Council was entitled to have regard to the fact that there might be separate applications for permission in respect of some elements of the scheme and to advise that appropriate regard must be had to material planning considerations including the permitted development fall back position. Accordingly I reject the second element of the Claimant's challenge on ground 1."

24 Ms Graham Paul criticized the judge's approach. She said it would enable permitted development rights under the GPDO to be relied on as a fallback even where there was no evidence that the landowner or developer would in fact resort to such development. The judge did not consider whether the council had satisfied itself that there was a "real prospect" of the fallback development being implemented (see the judgment of Sullivan L.J. in *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] J.P.L. 1326* , at paragraph 21). The "real prospect", submitted Ms Graham Paul, must relate to a particular fallback development contemplated by the landowner or developer, not merely some general concept of development that might be possible on the site. Only a specific fallback makes it possible for a comparison to be made between the planning merits of the development proposed and the fallback development. The relevance of a fallback depends on there being a "finding of actually intended use as opposed to a mere legal or theoretical entitlement" (see the judgment of Mr Christopher Lockhart-Mummery Q.C., sitting as a deputy judge of the High Court, in *R. v Secretary of State for the Environment and Havering London Borough Council, ex parte P.F. Ahern (London) Ltd. [1998] Env. L.R. 189* , at p.196).

25 Ms Graham Paul said there was nothing before the council to show that either the East Malling Trust or Croudace Portland contemplated the site being developed in the way the officer described in his report. On the contrary, the conversion of the barn for residential use – as opposed to its demolition and replacement with new dwellings – seems to have been regarded as impracticable or uneconomic. The East Malling Trust's planning consultant, Broadlands Planning Ltd., had submitted a "Planning Statement" to the council in December 2013, seeking the council's advice before the submission of an application for planning permission. In that document two possible schemes for the site were referred to (at paragraph 26). Neither could have been achieved using permitted development rights. One involved the retention of the barn and its conversion to four dwelling-houses, the other a "wholesale redevelopment of the site", perhaps with the replacement of the bungalow, to create five new dwellings. In a letter to Broadlands Planning Ltd. dated 30 January 2014 the council's Senior Planning Officer, Ms Holland, said she was "not convinced that the proposal would result in the building being converted, but rather [that] large portions would be removed and a new building created". And the East Malling Trust's marketing agent, Smiths Gore, in a letter to potential developers dated 27 February 2014, suggested it was "unlikely that a developer would contemplate the conversion of the Apple Store". There was, said Ms Graham Paul, no other contemporaneous evidence to lend substance to the fallback scheme to which the officer referred in his report, and no evidence of the council trying to find out what, if anything, was actually contemplated. The evidence did not demonstrate a "real prospect" – as opposed to a merely "theoretical" prospect – of such a development being carried out. The judge should have recognized that the fallback development referred to in the officer's report was not a material consideration.

26 I cannot accept that argument. In my view the officer did not misunderstand any principle of law relating to a fallback development. His advice to the members was sound.

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 *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.'s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council [2015] EWHC 3084 (Admin)* , at paragraphs 17 and 42 to 53). As Sullivan L.J. said in his judgment in *Samuel Smith Old Brewery* , in this context a "real" prospect is the antithesis of one that is "merely theoretical" (paragraph 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" (paragraph 21). Previous decisions at first instance, including *Ahern* and *Brentwood Borough Council v Secretary of State for the Environment [1996] 72 P. & C.R. 61* must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, "… "fall back" cases tend to be very fact-specific" (ibid.). The role of planning judgment is vital. And "[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" (paragraph 22).

(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.

28 In this case, in the circumstances as they were when the application for planning permission went before the committee, it was plainly appropriate, indeed necessary, for the members to take into account the fallback available to the East Malling Trust as the owner of the land, including the permitted development rights arising under Class Q in the GPDO and the relevant provisions of the development plan, in particular policy CP14 of the core strategy. Not to have done so would have been a failure to have regard to a material consideration, and thus an error of law.

29 That the East Malling Trust was intent upon achieving the greatest possible value from the redevelopment of the site for housing had by then been made quite plain. The "Planning Statement" of December 2013 had referred to two alternative proposals for the redevelopment of the site (paragraph 26), pointing out that both "[the] redevelopment and replacement of [the] bungalow" and "[the] conversion of the existing storage and packing shed" were "permissible in principle" (paragraph 35). The firm intention of the East Malling Trust to go ahead with a residential development was entirely clear at that stage.

30 In my view it was, in the circumstances, entirely reasonable to assume that any relevant permitted development rights by which the East Malling Trust could achieve residential development value from the site would ultimately be relied upon if an application for planning permission for the construction of new dwellings were refused. That was a simple and obvious reality – whether explicitly stated by the East Malling Trust or not. It was accurately and quite properly reflected in the officer's report to committee. It is reinforced by evidence before the court – in the witness statement of Mr Humphrey, the council's Director of Planning, Housing and

Environmental Health, dated 18 March 2016 (in paragraphs 6 to 24), in the witness statement of Mr Wilkinson, the Land and Sales Manager of Croudace Portland, also dated 18 March 2016 (in paragraphs 4 to 7), in the first witness statement of Ms Flanagan, the Property and Commercial Director of the East Malling Trust, dated 17 March 2016 (in paragraphs 4 to 6), and in Ms Flanagan's second witness statement, dated 17 June 2016 (in paragraphs 2 to 5).

31 As Ms Flanagan says (in paragraph 2 of her second witness statement):

> "2. At paragraph 6 of my first witness statement, I state that there was no doubt that the Trust would consider alternatives to the preferred scheme. To further amplify, the Trust (as a charitable body) is tasked with obtaining best value upon the disposal of its assets. A number of alternative uses were considered for the site, including industrial uses. However the Board was aware that a residential scheme of some type would provide the best value for the application land, even were that to include a conversion of the existing agricultural building."

Ms Flanagan goes on to refer to Smiths Gore's letter of 27 February 2014 (in paragraphs 4 and 5):

> "4. … This letter … states that at that time [Smith Gore's] opinion was that it was unlikely that a scheme of conversion would be contemplated by any developer. However, this letter pre-dated the permitted development rights that subsequently came into effect in April 2014. By the time the planning application had formally been submitted, these permitted development rights were in effect.
>
> 5. Had no other scheme proven acceptable in planning terms, and if planning permission had been refused for the development the subject of the planning application, the Trust would have built out a "permitted development" scheme to the fullest extent possible in order to realise the highest value for the land, in order to thereafter seek disposal to a developer."

32 That evidence is wholly unsurprising. And it confirms the East Malling Trust's intentions as they were when the council made its decision to grant planning permission in January 2016, by which time the current provisions for "permitted development" under Class Q of the GPDO had come into effect. It states the East Malling Trust's position as landowner at that stage – as opposed to the view expressed by an officer of the council, and an opinion by a marketing agent in a letter to developers, almost two years before. It is consistent with what was being said on behalf of the East Malling Trust in its dealings with the council from the outset – in effect, that the site was going to be redeveloped for housing even if this had to involve the conversion and change of use of the barn to residential use. It reflects the fiduciary duty of the trustees. And it bears out what the council's officer said about the "fallback position" in his report to committee.

33 I do not see how it can be said that the officer's assessment of the "fallback position", which the committee adopted, offends any relevant principle in the case law – in particular the concept of a "real prospect" as explained by Sullivan L.J. in *Samuel Smith Old Brewery* . It was, in my view, a faithful application of the principles in the authorities in the particular circumstances of this case. It also demonstrates common sense.

34 The officer did not simply consider the fallback in a general way, without regard to the facts. He considered it in specific terms, gauging the likelihood of its being brought about if the council were to reject the present proposal. In the end, of course, these were matters of fact and planning judgment for the committee. But the officer's advice in paragraphs 6.14 to 6.19 of his report was, I believe, impeccable. He was right to say, in paragraph 6.14, that the "new permitted development rights" – under Class Q in the GPDO – would enable the barn to be converted into three residential units; in the same paragraph, that the building "could be physically adapted in certain ways that would allow for partial residential occupation …"; and, in paragraph 6.15, that the bungalow "could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building". He was also right to say, therefore, that the site could be developed for "four residential units albeit of a different form and type to that proposed by this application". All of this was factually correct, and represented what

the council knew to be so. It did not overstate the position. It went no further than the least that could realistically be achieved by way of a fallback development – through the use of permitted development rights under Class Q and an application for planning permission complying with policy CP14.

35 The officer also guided the committee appropriately in what he said about the realism of the "fallback position". At the end of paragraph 6.15 of his report he said that the fallback development he had described was "a realistic fallback position in terms of how the site could be developed". He was well aware of the need to take into account only a fallback development that was truly "realistic", not merely "theoretical". He came back, in paragraph 6.16, to the question of "realistic 'fallback' positions", again reminding the members that this was what had to be considered. He went on to acknowledge, rightly, that the council had to consider what could be achieved "using permitted development rights for alternative forms of development". The context for this advice was that in his view, as he said in paragraph 6.15, he was dealing with "a realistic fallback position". He went on in paragraph 6.17 to consider what "would" happen if a scheme taking advantage of permitted development rights came forward. And in paragraph 6.18 his advice was that a redevelopment involving the conversion of "the entire barn for residential purposes, above the permitted development thresholds … would wholly accord with adopted policy". That was a legally sound planning judgment. The same may also be said of the officer's conclusion in paragraph 6.19, where he compared the proposal before the committee with the "more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights".

36 In short, none of the advice given to the council's committee on the "fallback position" can, in the particular circumstances of this case, be criticized. It was, I think, unimpeachable.

37 In my view, therefore, the council was entitled to accept that there was a "real prospect" of the fallback development being implemented, and to give the weight it evidently did to that fallback as a material consideration. In doing so, it made no error of law.

Was the judge right to conclude that the council did not misunderstand or misapply the "presumption in favour of sustainable development" in the Nppf?

38 Paragraph 14 of the NPPF states:

> "14. At the heart of [the NPPF] is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> …
>
> For decision-taking this means:
>
> • approving development proposals that accord with the development plan without delay; and
>
> • where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
>
> - specific policies in [the NPPF] indicate development should be restricted."

39 In *Barwood v East Staffordshire Borough Council* this court stated its understanding of the policy for the "presumption in favour of sustainable development" in the NPPF, and how that presumption is intended to operate (see paragraphs 34 and 35 of my judgment). In doing so, it

approved the relevant parts of the judgment of Holgate J. in *Trustees of the Barker Mill Estates v Secretary of State for Communities and Local Government [2016] EWHC 3028 (Admin)* (in particular paragraphs 126, 131, 136, and 140 to 143). Three simple points emerged (see paragraph 35 of my judgment). The first and second of those three points need not be set out again here. The third, however, is worth repeating – because it bears on the issue we are considering now. I shall emphasize the most important principle for our purposes here:

> " …
>
> (3) When thesection 38(6)duty is lawfully performed, a development which does not earn the "presumption in favour of sustainable development" – and does not, therefore, have the benefit of the "tilted balance" in its favour – may still merit the grant of planning permission. On the other hand, a development which does have the benefit of the "tilted balance" may still be found unacceptable, and planning permission for it refused … . This is the territory of planning judgment, where the court will not go except to apply the relevant principles of public law … . The "presumption in favour of sustainable development" is not irrebuttable. Thus, in a case where a proposal for the development of housing is in conflict with a local plan whose policies for the supply of housing are out of date, the decision-maker is left to judge, in the particular circumstances of the case in hand, how much weight should be given to that conflict. The absence of a five-year supply of housing land will not necessarily be conclusive in favour of the grant of planning permission. This is not a matter of law. It is a matter of planning judgment (see paragraphs 70 to 74 of the judgment in [*Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin)*])."

40 The judgments in this court in *Barwood v East Staffordshire Borough Council* entirely supersede the corresponding parts of several judgments at first instance – including, most recently, *Reigate and Banstead Borough Council v Secretary of State for Communities and Local Government [2017] EWHC 1562 (Admin)* . In those cases, judges in the Planning Court have offered various interpretations of NPPF policy for the "presumption in favour of sustainable development", and have explained how, in their view, the presumption should work. There is no need for that to continue. After the decision of the Court of Appeal in *Barwood v East Staffordshire Borough Council* , it is no longer necessary, or appropriate, to cite to this court or to judges in the Planning Court any of the first instance judgments in which the meaning of the presumption has been considered.

41 The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a "doctrinal controversy". But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker's own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain – because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see paragraph 22 of my judgment in *Barwood v East Staffordshire Borough Council*). That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.

42 The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:

> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms [1997] E.G.C.S. 60* (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286* , at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin)* , at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2* , at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre (2000) 80 P. & C.R. 500* , at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council [2016] EWCA Civ 1061* , at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council [2016] EWCA Civ 795*), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council [2017] EWCA Civ 152*). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council [2017] EWCA Civ 427*). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.

43 Was the officer's advice to the members in this case flawed in that way? I do not think so.

44 In paragraph 6.1 of his report the officer said:

> "6.1 As Members are aware, the Council in its role as Local Planning Authority is required to determine planning applications and other similar submissions in accordance with the Development Plan in force unless material considerations indicate otherwise. … The NPPF and the associated [Planning Practice Guidance] are important material considerations."

He went on to consider the relevant policies of the development plan, in particular policies CP11, CP12, CP13 and CP14 of the core strategy, and then advised the committee, in paragraph 6.6:

> "6.6 With the above policy context in mind, it is clear that the proposal relates to new development outside the village confines (on land which is not defined as "previously developed" for the purposes of applying NPPF policy), is not part of a wider plan of farm diversification and is not intended to provide affordable housing as an exceptions site. Consequently, the proposed development falls outside of the requirements of these policies and there is an objection to the principle of the proposed development in the broad policy terms."

and in paragraph 6.7:

> "6.7 It is therefore necessary to establish whether any other material planning considerations exist that outweigh the policy objections to the scheme in these particular circumstances."

45 In paragraph 6.8 the officer acknowledged, in the light of the relevant guidance in the Planning Practice Guidance, that "the policies contained in … the NPPF are material considerations and must be taken into account", and, in paragraph 6.9, that since the core strategy had been adopted in 2007 it was "necessary to establish how consistent the above policies are with the policies contained within the NPPF". His advice in paragraphs 6.10 to 6.13 of his report was this:

> "6.10 With this in mind, it must be noted that paragraph 49 of the NPPF states that applications for new housing development should be considered in the context of the presumption in favour of sustainable development. Paragraph 50 of the NPPF emphasises the importance of providing a wide choice of high quality homes, to widen opportunities for home ownership and create sustainable, inclusive and mixed communities. Paragraph 55 states that in order to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities.
>
> 6.11 These criteria all demonstrate a clear government momentum in favour of sustainable development to create new homes and drive economic development. The proposed development would create four high quality new homes on the very edge of an existing village settlement.
>
> 6.12 A further indicator of such emphasis is borne out of the recent changes to the regime of permitted development rights set out by national government by the Town and Country Planning (General Permitted Development) Order 2015 . This allows for far more development to take place without the need for planning permission from Local Authorities and generally provides a steer as to government's thinking on how to boost the country's economy through the delivery of new homes.
>
> 6.13 Such continued emphasis from government is a material consideration that must be balanced against the policy context set out in the TMBCS."

46 I have already referred to the officer's advice on the "fallback position" in paragraphs 6.14 to 6.19 of his report. In paragraphs 6.20 to 6.42 he considered the planning merits of the proposal and its advantages by comparison with the fallback development, drawing the committee's attention to relevant policies both in the core strategy and in the NPPF. He advised that the design and density of the proposed development were acceptable and beneficial (paragraphs 6.20 to 6.23). In paragraph 6.24 he said:

> "6.24 With these considerations in mind, particularly the emphasis contained within the NPPF concerning sustainable development generally, the impetus behind the provision of new homes, the benefits of removing existing structures and the permitted development "fallback" position, it is my view that, on balance, other material

considerations can weigh in favour of the grant of planning permission."

47 He concluded that the effects of the development on the settings of listed buildings and the setting of East Malling Conservation Area would not be harmful (paragraphs 6.25 to 6.30). He also found the proposed arrangements for access to the site and for car parking acceptable (paragraphs 6.31 to 6.36). He advised that "… the existing barn could be partially converted and the existing access retained for use by those units which arguably could have a greater impact on amenity in terms of activity, noise and disturbance than the proposed development simply by virtue of the greater degree of proximity to the existing residential properties" (paragraph 6.33). He told the committee that in his view it "would be counterproductive to seek affordable housing contributions as this would merely limit the ability of the Trust to recycle funds to provide wider support for the Trust" (paragraph 6.37). And the loss of Grade 2 agricultural land was "not … a justifiable reason to refuse planning permission …" (paragraph 6.39).

48 The final paragraph of the officer's report is paragraph 6.42, where he said this:

> "6.42 In conclusion, it is important to understand that the starting point for the determination of this planning application rests with the adopted Development Plan. Against that starting point there are other material planning considerations that must be given appropriate regard, not least the requirements set out within the NPPF which is an important material consideration and the planning and design of the proposal for the site in the context of the permitted development fallback position. The weight to attribute to each of those other material planning considerations, on an individual and cumulative basis, and the overall balance is ultimately a matter of judgement for the Planning Committee. My view is that the balance can lie in favour of granting planning permission."

49 In recording the argument on this issue in the court below, Garnham J. noted Ms Graham Paul's submission that "the presumption in favour of sustainable development set out in paragraph 14 of [the NPPF] was not operative" in this case – because the development plan was in place and up-to-date and the council was able to demonstrate a five-year supply of deliverable housing sites (paragraph 43 of the judgment). Ms Graham Paul had conceded that "sustainability may be capable of being a material consideration in considering a conflict with a development plan". What the officer had done in paragraph 6.10 of his report, said the judge, had been "to invite the committee to note the effect of paragraphs 49, 50 and 55 [of the NPPF]". It was not suggested that those paragraphs of the NPPF had been misrepresented. Nor was it suggested that the officer had failed to point out that the proposed development "fell outside the local plan"; he had done that in paragraph 6.6 of his report. In those circumstances, said the judge, "it cannot sensibly be argued that the officer misled the committee in any material respect" (paragraph 47). The judge also rejected the submission that paragraphs 49, 50 and 55 of the NPPF were irrelevant. He observed that the NPPF "provides for a presumption in favour of sustainable development which it says should be seen "as a golden thread" running through decision-taking". He added that "[the] weight to be given to those considerations in any given case is a matter for the planning authority but it cannot, at least on facts such as the present, be said that the underlying principle is irrelevant" (paragraph 48). He rejected the submission that the officer had not justified the departure from the development plan. The officer's report, he said, "accurately and fairly sets out the competing considerations and it was a matter for the judgment of the planning authority how those considerations were resolved" (paragraph 49).

50 In the submissions they made to us at the hearing, though not in their respective skeleton arguments, both Ms Graham Paul and Mr Lopez recast their arguments in the light of what this court has now said about the "presumption in favour of sustainable development" in *Barwood v East Staffordshire Borough Council* , including the basic point that the presumption is contained solely in paragraph 14 of the NPPF (see paragraph 35 of my judgment in that appeal). They were right to do so.

51 It was common ground before us, as it was in the court below, that the "presumption in favour of sustainable development" did not apply to the proposal. And the council's officer did not advise the committee that it did. As Ms Graham Paul acknowledged, the only reference to the

"presumption in favour of sustainable development" in the officer's report is in the first sentence of paragraph 6.10. But, she submitted, in view of what the officer said in that paragraph of the report, and also in paragraph 6.42, we should conclude that the committee took the presumption into account as a material consideration, which it ought it not to have done. Ms Graham Paul did not submit that the proposal was given the benefit of the so called "tilted balance". But she argued that the effect of the officer's advice was that the "presumption in favour of sustainable development" was one of the "requirements set out within the NPPF …", which the officer treated as "an important material consideration" and a significant factor weighing in favour of the proposal in the planning balance.

52 I disagree. In my view the argument fails on a straightforward reading of the officer's report, in the light of the judgments in this court in *Barwood v East Staffordshire Borough Council* . I do not accept that the officer counted the "presumption in favour of sustainable development" as a material consideration weighing in favour of planning permission being granted.

53 The reference to the "presumption in favour of sustainable development" in paragraph 6.10 of the officer's report is a quotation of the first sentence of paragraph 49 of the NPPF, not of paragraph 14. The quotation is correct. In the same paragraph of the report the officer also referred to two other passages of policy in the NPPF, namely paragraphs 50 and 55. The policies are correctly summarized. The common factor in those three passages of NPPF policy is not the "presumption in favour of sustainable development". It is the promotion, in national planning policy, of sustainable housing development. That this is what the officer had in mind in this part of the report is very clear from what he went on to say in paragraphs 6.11, 6.12 and 6.13, and then in paragraph 6.24.

54 In those paragraphs the officer was not purporting to apply the "presumption in favour of sustainable development" to the proposal. Nor did he advise the committee that the presumption was engaged, or that it was, in itself, a material consideration weighing in favour of the proposal. He referred, in paragraph 6.11, to "[these] criteria" – meaning the matters to which he had referred in paragraph 6.10 – as demonstrating "a clear government momentum in favour of sustainable development to create new homes and drive economic development"; in paragraphs 6.12 and 6.13 respectively, to "such emphasis " and "[such] continued emphasis from government"; and in paragraph 6.24 to "the emphasis contained within the NPPF concerning sustainable development generally …" (my underlining). The language in those paragraphs is very distinctly not the language one would have expected the officer to have used if he thought he was applying the "presumption in favour of sustainable development". The intervening and subsequent assessment, culminating in his final conclusion on the planning merits of the proposal in paragraph 6.42, is concerned with its credentials and benefits – and advantages when compared with the fallback – as sustainable development.

55 Paragraph 6.42 of the officer's report does not, in my view, betray a misunderstanding of NPPF policy for the "presumption in favour of sustainable development". The advice given to the committee in that paragraph was not inaccurate or misleading. The officer did not undertake the planning balance in terms of the policy for "decision-taking" in paragraph 14 of the NPPF. There can be no suggestion that, contrary to his earlier conclusion and advice in paragraphs 6.6 and 6.7 of his report, he was treating this as a case in which the proposal accorded with the development plan, so that it was to be approved "without delay" under the first limb of the policy for "decision-taking" in paragraph 14. Nor can it be suggested that, contrary to the whole tenor of his assessment of the proposal in paragraphs 6.1 to 6.41, this was a case in which the development plan was "absent" or "silent" or any "relevant policies" of it were "out-of-date", so that the second limb of the policy for "decision-taking" in paragraph 14 applied.

56 This case is clearly and materially different from *Barwood v East Staffordshire Borough Council* – a case that shows what can go wrong when a decision-maker is misled as to the meaning and effect of government policy for the "presumption in favour of sustainable development". Here the officer did not commit an error of the kind made by the inspector –and conceded by the Secretary of State – in that case: the mistake of discerning a "presumption in favour of sustainable development" outside paragraph 14 of the NPPF and treating that wider presumption as a material consideration weighing in favour of the proposal (see paragraphs 43 to 48 of my judgment in *Barwood v East Staffordshire Borough Council*). The officer did not say, as the inspector did in *Barwood v East Staffordshire Borough Council* , that "where a proposal is contrary to the development plan [the "presumption in favour of sustainable development"] is a material consideration that should be taken into account" (paragraph 12 of the decision letter in

that case). Unlike the inspector in that case (in paragraphs 37 to 41 of his decision letter), he did not bring the "presumption in favour of sustainable development" into the balancing exercise as a material consideration (see paragraphs 26 and 29 of my judgment). And, in my opinion, it cannot realistically be suggested that the members would have thought they were being invited to apply that presumption in government policy, or to give it weight as a material consideration, in their assessment of the proposal.

57 The "presumption in favour of sustainable development" did not, in fact, feature as a material consideration to which the officer gave any positive weight when undertaking the planning balance. The exercise he conducted in paragraph 6.42 of his report was an entirely conventional and lawful balance of other material considerations against the identified conflict with the development plan, as section 38(6) of the Planning and Compulsory Purchase Act 2004 requires. It was, in fact, a classic example of that provision in practice. This is not to say that in his assessment of the proposal he had to refrain from considering the extent to which it complied with relevant NPPF policies – in particular, in the specific respects to which he referred, the sustainability of the proposed development in the light of NPPF policy, as well as its compliance with relevant policies of the development plan. That was a perfectly legitimate, and necessary, part of the planning assessment in this case. Had the officer left it out, he would have been in error, because he would then have been failing to have regard to material considerations. But he did not make that mistake. He assessed the proposal comprehensively on its planning merits, exercising his planning judgment on the relevant planning issues. He took into account the sustainability of the proposed development in the light of NPPF policy, but without giving it the added impetus of the "presumption in favour of sustainable development". I cannot fault the advice he gave.

58 Finally on this issue, I do not accept the suggestion made by Ms Graham Paul in reply that the council's response to Mr Mansell's solicitors' pre-application protocol letter, in its solicitors' letter dated 22 February 2016, can be read as conceding the error for which Ms Graham Paul contended. In fact, it squarely denied that error. Having referred to the quotation of the first sentence of paragraph 49 of the NPPF in paragraph 6.10 of the officer's report, it acknowledged that the proposal was a "departure from the development plan" and that the development plan was not "absent" or "silent" nor were relevant policies "out-of-date". It then said that neither the officer nor the committee had treated the "presumption in favour of sustainable development" under paragraph 14 of the NPPF as "operative" in this case. It acknowledged, therefore, that neither of the limbs of the policy for "decision-taking" in paragraph 14 of the NPPF could have applied here. And it said that the officer's report "does not begin to suggest otherwise". I agree.

59 It follows that this ground of appeal must also fail.

Conclusion

60 For the reasons I have give, I would dismiss this appeal.

Lord Justice Hickinbottom

61 I agree with both judgments. Without diminishing my concurrence with anything my Lords have said, I would wish expressly to endorse the observations of Lindblom L.J. in paragraphs 39-40 to the effect that, in future, reference to pre- *Barwood v East Staffordshire Borough Council* authorities on the meaning and operation of the presumption in paragraph 14 of the NPPF should be avoided; and in paragraph 41, supported by the further comments of the Chancellor, on the respective roles of planning decision-makers and the courts in planning cases.

The Chancellor of the High Court

62 I too agree with Lord Justice Lindblom's judgment, but would add a few words from a more general perspective. In the course of the argument, one could have been forgiven for thinking that the contention that the presumption in favour of sustainable development in the NPPF had been misapplied in the planning officer's report turned on a minute legalistic dissection of that report. It cannot be over-emphasised that such an approach is wrong and inappropriate. As has so often been said, planning decisions are to be made by the members of the Planning Committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and the courts must give them space to undertake that process.

63 Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a planning officer's report. An appeal will only succeed, as Lindblom L.J. has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common-sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied.

64 It is also appropriate to reiterate what Lindblom L.J. said at paragraph 35 of the *East Staffordshire* case to the effect that planning decision-makers have to exercise planning judgment as much when the presumption in favour of sustainable development is applicable as they do they do when it is not. The presumption may be rebutted when it is applicable, and planning permission may be granted where it is not. In each case, the decision-makers must use their judgment to decide where the planning balance lies based on material considerations. It is not for the court to second guess that planning judgment once it is exercised, unless as I have said it is based on a distinct and material defect in the report.

65 I agree that this appeal should be dismissed.