RE: HARTWELLS OF BATH

CLOSING SUBMISSIONS

ON BEHALF OF STANDARD LIFE ASSURANCE LIMITED

RULE 6(6) PARTY

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1. I gather from Mr Welch that yesterday Mr White reminded you in the inquiry of your comments earlier at this inquiry when dealing with SLA round table sessions and submissions that you had hoped that SLA objection "would just go away". Mr White did so because he considered it was relevant in some way to your determination. But since it has again been raised it means that I need to address this issue.

2. With the greatest respect, these are comments you should not have made. You frankly acknowledged at the outset of the inquiry that because of personal issues you were not up to speed with our objection and for example did not know I was appearing (although PINS had been duly notified).

3. Before my involvement at the inception, our request for formal testing of evidence with cross examination was refused at the CMC, and at Mr White's

request round table session ordered instead. The reasons you subsequently gave legal complexity, expert evidence etc. do not fit the round table test. In any event, no written agenda was set for the round table despite the complex issues.

4. My client was disappointed not to be able to start our round table session on the first day of the inquiry, as had been timetabled, and were concerned to hear the inspector say he hoped our objection would 'go away', something repeated on the second day of the inquiry, as well as being recalled on day 7 by Mr White. Having set out a timetable for the afternoon session to hear our case on the defects of the Transport Management Plan and the "Thorpe Park" easement it was only robust advocacy on my part that prevented the session being closed down, again at Mr White's behest. I should add that the third party representations concerning the conduct of the inquiry that were sent to PINS are independent and without the knowledge of my clients.

5. Suffice it to say, Standard Life's objection has not been withdrawn, they are not going away, and for all the reasons given in these Closing Submissions and elsewhere, and we respectfully submit you must grapple with them fairly and squarely.

Introduction

6. Whether or not there is an agreed management plan, the appeal scheme's use of the Maltings for access is "fundamentally flawed", as the appellant was advised by the Council long ago.[1] Rather than designing out problems, this

[1] CD4 – Council's pre-app response 29.10.18, at page 8.

scheme designs them in. The harm to the Maltings that would result from the appeal scheme constitutes but one of a number of symptoms of overdevelopment of the Hartwells site that have become clear for all to see during the course of this inquiry. Put simply, it is transparent that the need to use the Maltings for access to the appeal site is a direct result of the Appellant's desire to overdevelop their site for commercial gain, that the burden of that desire falls on Standard Life Assurance Limited ("Standard Life"), and that alternative schemes which do not take access across the Maltings are indeed possible and viable.

7. The problems with the Appellant's scheme are redolent of an attempt to 'maximise', rather than simply 'optimise'. Standard Life's presence at this inquiry has not been for flight or fancy, but in order to protect its legitimate interest: the security and integrity of the Maltings and the amenity of its tenants – something of broader interest too given the importance of the industrial estate.

8. These Closing Submissions should be read together with the Opening Submissions of Standard Life, which are relied upon but not be repeated here. These Closing Submissions deal with matters in the following order:

    a. The Maltings
    b. Overdevelopment of Hartwells site
    c. Impact of overdevelopment on the Maltings
    d. Planning harm
    e. Management plan

9. The issue identified by the Inspector at the Case Management Conference to which these Closing Submissions are directed is:

> "*7. Whether the proposed development would lead to a significant intensification of the use of the use of the vehicular access route through The Maltings or any other significant*

effect resulting from it as an 'agent of change' that would seriously harm the industrial estate's operations (including an exploration of the appellant's rights of access through The Maltings now and post-development)."

10. The proposal represents poor design and overdevelopment of the site, Standard Life does not object in principle to any redevelopment of the Hartwells site, but simply that this particular proposal represents a poor design and overdevelopment of the site. Its objections in relation to the impact of the scheme on the Maltings is a manifestation of the unsuitability of this particular scheme.

The Maltings

11. The Maltings is prime mixed industrial estate, protected by development plan policy as a Strategic Industrial Estate[2], which designation recognises the economic significance of such areas and affords them protection, as strongly supported by the recent employment growth review undertaken in March 2020 which recommends protection at all costs given scarcity and importance for employment in the locality.[3] This includes both quantitative protection of industrial estates, as well as protection of the *quality* of these estates, so as to ensure their longevity and that they serve the employment base.

12. The Maltings is an important source of employment, has never required intensive management[4] and consequently is low cost to run and attractive to tenants (it is fully occupied).[5] Ms Cowking of Standard life emphasised the Maltings is "extremely successful", and a "rare beast" given that there are few

[2] Policy ED2A of the Placemaking Plan 2017 (CD37c).
[3] CD68; Louise Bending (LB) evidence, Round Table Session (RTS); LB Proof of Evidence (POE) 4.6-4.8, 5-6.
[4] And has no on-site facilities for security staff or permanent on site management, Nicola Perry (NP), RTS.
[5] NP, RTS.

comparable examples in Bath.[6] Because of the importance of the site, a high level of certainty is required as to impact, to ensure its future is not prejudiced.

13. At the time of grant of the 1994 Deed containing the Right of Way, Hartwells was in use as a car garage, with use of the Right of Way therefore very different in character to what is now envisaged with residential and student accommodation. Historically its use has been under the direction and control of the site operators (Hartwells), with virtually no use at weekends or at night on weekdays. That made managing any issues simple. The problem for the future is that the wide variety of users of the Right of Way will not be under the control of Oakhill: the potential for conflict will increase exponentially; the ability to manage it much diminished.[7]

Overdevelopment

14. Whilst it has never been disputed that the appeal site benefits from the Right of Way, but that does not mean that it is acceptable in planning terms to use that Right of Way so as to harm the Maltings. Indeed if anything the fact that the private law options are so limited means that the planning system must exercise particular scrutiny over planning harm that might result as a consequence of the appeal scheme, and it results from overdevelopment.

15. It is clear that the level of development goes beyond what SB15 envisages circa 80-100 dwellings. This number may include those for the elderly. It may include student accommodation if that does not harm the council achieving e.g. its standard housing need requirements. This proposal goes way over that level. It does not include the whole of the allocated site. It makes the ability to deliver the allocated site as a whole more difficult if not

[6] Amanda Cowking (AC), RTS.
[7] NP, RTS.

impossible. The policy does not envisage this level of development crammed onto part of the site juxtaposed to the cement batching plant. As a result of this "greedy" over development the parameters set by this outline position (i.e. number of dwellings and access) will set parameters which mean that a poorly designed scheme is the only outcome. The question of design must be addressed now.

16. As you know sir, the correct approach at the outline stage is: that it must be demonstrated to the decision maker's satisfaction that a scheme in accordance with the non reserved non-reserved parameters of the outline application (e.g. number of dwellings, buildings, maximum number of storeys) is capable of being accommodated on the site which is acceptable in amenity and other terms (including sunlight/daylight). As Lindblom LJ noted in *Crystal Properties (London) Ltd v Secretary of State for Communities and Local Government and Hackney LBC* [2016] EWCA Civ 1265; [2017] J.P.L. 594 (CA (Civ Div)). There is authority for the principle that where matters have been reserved for subsequent approval the reserved matters application must be within the scope of the outline planning permission (see, for example, the judgment of Willis J in *Lewis Thirkwell v Secretary of State for the Environment* (1978) 248 E.G. 685; [1978] J.P.L. 844 and the decision of the Court of Appeal in *R. v Secretary of State for the Environment Ex p. Slough* BC 94 L.G.R. 376; (1995) 70 P. & C.R. 560).In so doing, a developer must seek to establish the parameters of a building at outline which would be acceptable. At paragraph 34 Lindblom LJ

> 34. …the fact [is] that the application for outline planning permission, while it reserved all matters, including "scale", for future consideration, had identified a specific floorspace for each of the uses in the proposed development and a total proposed floorspace for those uses, and that the illustrative drawings on which Crystal Property had relied in its

"Grounds of Appeal" showed a building containing that much floorspace. Crystal Property's case on appeal was put to the inspector squarely on the basis that the illustrative drawings represented the proposal in the application for outline planning permission. It was that scheme, and only that scheme, on which Crystal Property depended in seeking to establish, as the inspector put it, "the parameters of a building that would be considered acceptable on the appeal site".

17. The failure to bring forward the allocated site as comprehensive development means that it is likely that the residential will be juxtaposed next to the cement batching plant the inspector is very troubled by this) – the allocation assumes that it all would come forward together and therefore does not presumably address this problem. Moreover, once the development is granted permission with its Newbridge access etc. and over-head hanging it makes it really difficult and expensive for any residential development to come forward to replace the batching plant.

18. The impact of the Maltings is but one example of the poor and harmful design compromises that have been made in order lever in this level of development.

19. The need for private access to Car Park 2 via the Maltings results from the additional 9 residential units in the scheme, as seemed to be accepted by the Appellant's witness Mr Brown, who also accepted that with more design flexibility, potentially the design starting point would be to use Newbridge Road for all private vehicles.[8] That is obviously right. Newbridge Road is the main road adjoining a long section of the site, and it is clearly the more

[8] Kenneth Brown (KB), XX.

favourable private access option as compared to a route through an unlit industrial estate. The reason the scheme does not achieve this is that because of the quantity of development, the need for car parking spaces can only be satisfied by finding room in whatever corners of the site have space, regardless of consequences.[9] Indeed Mr Monachino-Ayres confirmed the design *rationale* for the location of Car Park 2 was simply that that was where those spaces would fit within the site. In the case of Car Park 2, the consequence is the wholly unsuitable access required across the Maltings and all the problems that creates. How many residential schemes by choice provide resident access across industrial land?

20. Beyond the need to access Car Park 2, the further symptom of overdevelopment is reliance on the Right of Way for servicing and delivery access to the scheme. This is because of the gradient of the ramp off Newbridge Road, the tight turns, and the constrained headroom for vehicles passing beneath Block B.[10] This need not be so. During the Round Table Session Mr Krassowski averred that a scheme on the site which involved a ramp enabling HGVs access from Newbridge Road was possible but not "viable to delivery". However, Mr Krassowski subsequently accepted in answer to a question from John Moran (an architect who worked on the 2014 scheme for the site[11]) that the 2014 scheme which did not take access at all from the Maltings (and which, it should be noted, provided a development with *half* the amount of floorspace as the appeal scheme) was viable.[12] As Mr Moran carefully explained, his work showed a feasible scheme could be designed for the site that avoids using access from the Maltings at all, and had a ramp from Newbridge Road that allowed for all vehicles. Put shortly, the harm to the Maltings that arises from

[9] One might also cite here the overflow car park to the east of the site adjacent to the STR, which was criticised during the Council's evidence for its unhappy relationship with the STR and the rest of the site.
[10] Ian Monachino-Ayres (IMA), RTS.
[11] CD08, p.23 – DAS, drawings of 2014 scheme.
[12] Mark Krassowski (MK), XX by John Moran (JM).

overdevelopment is something that *could* be avoided with a better designed scheme.

21. Indeed, a comprehensive redevelopment scheme *should* be perfectly able to accommodate all of its access and servicing needs through its long Newbridge Road frontage, and not across third party (Maltings) land. The inability of the scheme to 'wash its own face' in access terms through direct connections to the highway network, is a strong indicator of design compromises that result from overdevelopment.

22. The Council's pre-application advice, something the Appellant sought to rely on for selected other purposes[13], unequivocally stated the proposal constituted "significant overdevelopment of the site" because of harm to the character and appearance of the surrounding area. The Council also took exception to the servicing strategy, criticising the way that servicing of buildings was "scattered around the site and service / refuse collection vehicles would need to enter the most sensitive parts of the site and from the rear."[14] In particular, the Council noted correctly that "[A] service strategy that depends on access from the Maltings industrial estate and turning on the proposed cycleway appears <u>to be fundamentally flawed</u>."[15] [Underlining added]

23. The Council enjoined that the servicing arrangements be "comprehensively reviewed," yet this has nowhere been done. The Appellant was alerted to these problems and has done nothing about them as requested. Standard Life's presence at this inquiry is testament to that failure, amongst others.

24. After submission, the highways officer raised concerns with the access route through the Maltings, questioning the reasonableness of such a servicing route, and access to parking, recommending it be "comprehensively reviewed" before

[13] MK, XX by Jon Darby (JD), discussing the pre-application advice in 2018 (CD4) and its approach to policy CP10, Mr Krassowski relying on that advice in relation to the correct approach to housing mix.
[14] CD04, page 1.
[15] CD04 – page 8.

any planning decision is made, and also identifying the need for effective measures in place to manage the access route agreed between Standard Life and Hartwells, to ensure appropriate use of the right of way.[16] It is therefore not right to say that the Council's only concern related to the control of the gate and the legal status of the Right of Way.[17]

25. Mr Edmunds for the Applicant in an email to the case officer (Mr Gomm) of 25 September 2019 appears to have been the first to put forward the idea of a planning condition to deal with the issue of management of the access through the Maltings.[18] This was followed by a further email from Mr Krassowski of 23 October 2019, suggesting either a Grampian condition or s.106 obligation indicating how the Right of Way would be managed following the development.[19] It is therefore, frankly, bizarre for the Appellant to now say that management of the Right of Way is not a matter that is material to planning, when their previous position suggesting conditions or obligations dealing with the issue must assume the issue *is* material to planning.

26. In the committee report, officers required submission of a s.106 obligation securing the submission of a management plan for the use of the Right of Way across the Maltings,[20] and therefore they too formed the view it was a planning issue that required to be dealt with in the determination process.

Impact on the Maltings

27. The Appellant accepts that users of the appeal site cannot use the Right of Way so as to unreasonably interfere with the operations and activities at the

[16] CD31.xiii; CD67a; CD67b.
[17] LB, RTS.
[18] CD27a.
[19] CD27a.
[20] CD34, p.19.

Maltings.[21] In the case of unreasonable interference with the occupants of the Maltings, Standard Life could only seek to restrain such use by injunction.[22] This is a costly, cumbersome process and any remedy is discretionary. As matters stand that remedy could be pursued only in private law. Regardless of the private law position between the parties, the planning question for the Inspector to decide is what the impact would be as a result of the change in character of the use. Standard Life's clear position is there would be unacceptable harm, which has not been shown to be capable of being avoided through any management plan to date.

28. By introducing frequent use by private vehicles of residents and third parties at all hours, HGV and MGV access out of hours, and emergency vehicle access at all times, the operations of the Maltings would be compromised.

29. First, the position presented in the Mayer Brown Maltings Utilisation Note[23] appears to now be out of date, in the light of Mr Monachino-Ayres subsequent evidence that the Right of Way is envisaged to be used by MGVs as well as HGVs. The Utilisation Note does not refer to MGVs, and it appears the calculations undertaken in that document do not consider them in the future projections because at the time of that Note MGVs were not intended to use the Maltings. At the very least, the position even now remains unclear. In any event, it is not understood how those managing the appeal site, let alone Standard Life, would be able to monitor the weight of vehicles using the Maltings Right of Way, and identify the extent to which use was going beyond that currently forecast.

30. The need for an unrestricted category of residents and emergency vehicles, as well as pedestrians, to have access 24 hours a day across the Maltings, is likely to create serious security issues for the Maltings and its tenants, increased

[21] Matthew Fraser (MF), RTS.
[22] See paragraph 4 of Eversheds Sutherland Legal Note at Appendix 2 to Ian Monachino-Ayres' rebuttal proof.
[23] CD69

opportunities for criminal activity, and increased liability for breaches of health and safety requirements by way of conflict between pedestrians and other third parties passing through a busy industrial estate which includes associated machinery and vehicles.

31. As was clear from the Round Table Session, it seems it will be all but impossible to place any meaningful controls on delivery vehicles seeking to use the Maltings to access the Appeal site, even if they don't fall within the permitted vehicle category for using the Right of Way. As all surely know, home deliveries are becoming ever more frequent by the day[24], and the Appellant has proposed no feasible way of preventing this causing problems of congestion on the Maltings. Mr Monachino-Ayres simply did not provide a convincing proposal for how deliveries would be controlled, and the notion that all deliveries would be arranged through Oakhill is frankly absurd in practice, given the wide variety of delivery drivers, many of whom are self-employed, cannot be contacted in advance, and whose delivery slots cannot be predicted.[25] Furthermore, there will be a substantial number of deliveries, given the level of accommodation (residential and student) being provided by the scheme.[26] Despite the clear need for (and reference to) a Management Company by Oakhill, Oakhill have not set out any proposals as to how that would operate and what control they would have over them which provides further concerns re: enforcement. Any deed with a BVI company has practical and legal enforceability issued (including s106 Agreement by Council against a BVI company) (see further below). As well as extra costs for us and potentially the tenants, Hartwell presumably needs my client's consent even to alter the gate on Brassmills if the ROW is to operate as per the draft TMP. Consent which thye do not have.

[24] LB, RTS.
[25] IMA, LB, RTS.
[26] LB, RTS.

32. These problems will be aggravated by the fact that it seems Car Park 1 will be unsuitable for many deliveries, given the deck level, separated by steps from the rest of the development,[27] which will inevitably lead more delivery vehicles than anticipated to use Car Park 2 at any opportunity.

33. A further problem with the delivery and servicing strategy for the appeal scheme is that Car Park 2, said to be the primary service yard for larger vehicles, is a considerable distance from other blocks, and this will make transporting bulkier items across the large site incredibly difficult, particularly given the compromised nature of the courtyards in terms of clutter in open spaces such as bin and bike stores.[28] That is another consequence of ill-thought out design.

34. The use of the access route as the main point of servicing for the appeal site for larger refuse and delivery vehicles is likely to create conflict between such vehicles and the tenants of the Maltings, particularly Maltings units 5 and 6 (closest to the entrance to the appeal site), who are entitled to unfettered access to their units, but who will very likely be disturbed by vehicles parking up to wait for the gates to the appeal site to be opened, or turning around to exit if they have been turned away.[29] This introduces a conflict not currently present, and is a further symptom of poor design.

35. At one point, reliance seemed to be placed by Mr Krassowski during the Round Table Session on the fact the appeal units would be leasehold tenancies and therefore Oakhill would have more control on the behaviour of the residents. No draft tenancy agreement, nor operative terms, was provided to the inquiry however, despite a request.[30] No weight can be given to this point therefore.

36. Given the likely high demand for, and relatively short supply of, parking at the appeal site, combined with the new arrangements for free flowing access for

[27] IMA, RTS.
[28] Gregory Jones QC (GJ), RTS; Funda Kemal, EiC.
[29] JLL (Nicola Perry) letter at Appendix 5 to proof of Louise Bending.
[30] MK, RTS.

residents across the Maltings, there is the potential for significant overspill parking, including into the Maltings. Needless to say, such would be an entirely unacceptable impact on the Maltings, where the parking provision is an important part of the commercial offer to tenants and their customers, and is in short supply[31]. Whilst there is a provision of the Deed of Grant restricting parking by appeal site occupants on the Maltings, this is difficult to enforce, and there should not be a need to resort to private law remedies as a result of planning harm (in the same way that it is no answer to say that a neighbour likely to be adversely affected by noise from a proposed development has a private law remedy in nuisance).

37. Needless to say, Standard Life does not wish for any of the above eventualities to come to pass. However it is extremely concerned that there are issues which will result from the scheme which would in truth be very difficult indeed to control, even with the best will in the world. Matters such as controlling a wide range of third party delivery vehicles, and monitoring the weight of vehicles entering in order to minimise use of the Right of Way, seem in particular to be inherently difficult to control or enforce against. Nevertheless they are harms that arise from the Appellant's scheme, and it is the Appellant that has failed to address them in a satisfactory way.

38. The Appellant has still provided no assessment of the likely impacts caused to the employment uses of the Maltings by this change in character of use of the right of way. Indeed, little if anything at all is said about the proposed construction access requirements across the Maltings, given that it provides the main access route for large vehicles, such as are likely to be required for the construction phase.

[31] NP, RTS.

39. The Appellant has not brought forward a scheme which would protect the Maltings employment site. From Mr Moran's evidence it seems such a thing is eminently possible[32], and invariably requires careful thought and consideration as part of the design of the scheme. Unfortunately, although clearly on notice about this issue the attitude of the Appellant until very recently has been simply dismissive of the need to design its scheme with the Maltings in mind.

40. Any such scheme for the proposed development would, amongst other measures, result in a clear need to upgrade and effectively manage the Brassmill Lane gate in order to reconcile the new types of users with the requirements of the Maltings. This is one of the main reasons why an agreement needs to be reached between the parties, rather than simply a document that imposes requirements on users of the appeal site who require access across the Maltings.

41. Given that this and other necessary measures come about as a result of Hartwells' development proposals, it is only right that they be required to pay for all and any such improvements and ongoing costs (since it is unlikely to be recoverable from tenants through increased service charge[33]), and to indemnify Standard Life should consequences of the change to the use of the access route cause loss to Standard Life, and provide a robust and easily enforceable mechanism for cases of breach. At the close of a two week public inquiry, the Appellant has *still* come nowhere near.

Agent of Change

42. Beyond access, is the considerable risk of complaints by new residents at the appeal site in respect of the industrial activities taking place at the Maltings. The

[32] CD08, p.23.
[33] NP, RTS.

Appellant is the 'agent of change' and ought to have designed a scheme that avoided these conflicts.[34]

43. The Maltings and its tenants should not have restrictions placed on it in terms of noise through complaints made by new residents. No proper assessment has been made about the possible impact on restrictions of the use of the Maltings (see e.g. *Cemex (UK Operations) Ltd v Richmondshire District & Anor* [2018] EWHC 3526 (Admin)). Indeed the noise assessment produced by the Appellants is limited in scope and does not clearly identify the various noise sources it is commenting upon. The further note produced during the course of the inquiry does not progress matters.

44. The inspector will have seen for himself the proximity and noise of the concrete batching plant on his site visit. Combined with operations at the Maltings, it is clear this is an industrial area. The design of the appeal scheme has not addressed these potential conflicts in enough detail, and not properly assessed the noise sources.

45. As was set out in our Statement of Case at paragraphs 26-30, the submitted noise assessment makes the incorrect assumption that noise sources from the Maltings will only issue during the working day, whereas in fact the Maltings' tenants have unrestricted 24/7 use of their units, which are sui generis, and this flexibility is an important part of the commercial desirability of the Maltings.[35] Even to the extent not utilised by present Maltings tenants, this flexibility is

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[34] Paragraph 182 states that: 'Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.'

[35] CD23 (Noise Impact Assessment), page 10, paragraph 5.2

part of the offer to prospective Maltings tenants. (See e.g. *Cemex*). This means the noise assessment is incomplete.

46. Failing to assess the effects on new residents outside of the working day means the noise assessment overlooks the impact on bedrooms in the development, expressly stating that "as the commercial noise only occurs during the working day, impact on potential sleep disturbance, i.e. in bedrooms, does not need to be considered" (see first full paragraph of s.5.2, and first bullet point on page 11, of the Noise Assessment (p.10-11 of CD23)). That is to repeat the error, and only serves to save up problems for the future. The assessment is now out of date given the changing needs following the pandemic and the era of home working.

47. This is significant because the conclusion reached in the Noise Assessment is that the Maltings industrial noise will cause a "significant adverse" noise impact on the proposed development (CD23, p.10, second last full paragraph under section 5.2; and see conclusion section 6, on p.14). The noise assessment does not properly address this. Standard Life's concerns about the potential for conflict and complaint are realistic, and it would wish for redevelopment of Hartwells to come forward in a way that encourage neighbourly harmony, even if the land-use type is to change.

48. The noise assessment acknowledges that when windows in the proposed development are opened for ventilation, noise ingress levels will be exceeded. This is thought to be acceptable because the noise sources only occur during the working day, but this is a misplaced assumption as previously noted.[36] It

[36] CD23, page 12, para 5.2.

shows the unsuitability of the proposed design and layout,[37] and conflicts with government Covid-19 guidance on keeping windows open to ensure air flow.[38]

49. Furthermore, the noise assessment contains out of date information, some dating from 2010, and the assessment noise measurement positions do not necessarily reflect those areas at highest risk of disturbing noise: there is no measurement position from close to the entrance between the Maltings and the appeal site.[39]

50. Despite asserting in its rebuttal that it cannot control future complaints[40], the Appellant now appears to have accepted that it can enter into an easement for noise, addressing some of the agent of change points. Nevertheless, this does not overcome the fact that the need for such an agreement only highlights poor design. Furthermore, no such agreement has yet been reached on an Easement.

51. This is a necessary and proportionate requirement to ameliorate the risk of new residents' complaints restricting the operations of the Maltings. But it can only seek to mitigate and not avoid the risk. Obviously if no measures are taken even to mitigate the risk then the level of harm is commensurately higher.

Consequential Planning harm

52. As already noted, although there is a legal right of way, that is not the end of the matter: it is actually part of the problem. The planning issue for this matter

[37] **'Significant observed adverse effect level'** is defined in the PPG on noise as '….the level of noise exposure above which significant adverse effects on health and quality-of-life occur'. The PPG on noise also states that above the significant observed adverse effect level, 'noise causes a material change in behaviour such as keeping windows closed for most of the time' and that 'the planning process should be used to avoid this effect occurring, by use of appropriate mitigation such as by altering the design and layout' of a proposed development.

[38] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952645/Social-Distancing-large-print.pdf

[39] See CD23 at figure 1 on page 3, and also page 7.

[40] Rebuttal proof of Ian Monachino-Ayres, submitted on 9 February 2021, at paragraph 3.1.4 – third bullet on page 4.

in the appeal is the adverse impact in planning terms as a result of the change that would occur following development of the appeal site, the unacceptability of that impact, and the absence of suitable mitigation.

53. The harm identified above is, in planning terms, a loss of the amenity value of the Maltings, prejudicially to Standard Life and its tenants as well as the threat to a scarce and valuable employment site. Protection of amenity is a central aspect of the purposes of the planning system, in the NPPF taking effect through the 'agent of change' principle encapsulated at paragraph 182. There is simply no authority for the proposition that such amenity is rendered immaterial in planning terms because of the existence of private legal rights, such as the Right of Way. Indeed, to accept the Appellant's proposition that because of the Right of Way there is no planning issue would not be a safe basis for deciding the appeal.

54. There is no reason to depart from the usual and uncontroversial approach to material considerations set out in *Westminster City Council v Great Portland Estates Ltd* [1985] AC 661 at 670, that the test is whether a consideration serves a planning purpose, and that a planning purpose is one that relates to the character of the use of the land. And it is also relevant to refer to the proposition stated by Pill LJ in *West Midlands Probation Committee v Secretary of State for the Environment* (1998) 76 P & CR 589 at 597 that "The impact of a proposed development upon the use of and activities upon neighbouring land may be a material consideration."

55. There would be compromise to the amenity of the Maltings if the appeal was allowed with no plan in place to manage use of the access way. This harm would result in compromise of a very high quality industrial estate,[41] contrary to development plan policy that protects the same, as well as contrary to the needs

[41] See JLL (Nicola Perry) letter at Appendix 5 to proof of Louise Bending.

of local businesses for high quality premises.[42] The Maltings is of conspicuous utility in this respect given its relatively central location in the city, playing an important role in the city's employment base.

56. The Appellant has taken the contradictory position that, on the one hand the issue of access via the Maltings is asserted to be "unfounded and unjustified"[43] and not a planning issue that needs to be resolved at this appeal[44], giving it no weight in their planning balance even in the absence of an agreed management plan, yet on the other hand it has sought to negotiate an agreement with Standard Life controlling the access route, submitting three draft management plans to this inquiry.[45] The position in fact became even more extreme on day 7 of the inquiry, when on the same day the Appellant's planning witness Mr Krassowski asserted that the Standard Life objection did not need to be addressed "for planning reasons", followed later the same day by Appellant's team discussing openly the possibility of an adjournment to allow more time for Standard Life's objection to be resolved. That is an absurd and unrealistic position. The fact is the Appellant knows the issue of the Maltings is a planning issue, but has simply left it too late to redesign their scheme to design-out the conflict which results in Standard Life's continued objection. The assertion that belated offers are made in order to be a "good neighbour" are in fact an admission. What is a good neighbour in planning terms? Someone who does not harm the amenity and well being of their neighbours. The purpose of the planning system is to ensure that development is designed on a "good neighbour principle"

57. For the reasons identified above, the issue of impact of the changed access over the Maltings is clearly a planning issue. This much was recognised by the Council's officers who prepared the committee report (see pages 19, and 29

[42] See sections 5-6 of proof of Louise Bending.
[43] Appellant statement of case, paragraph 5.4.
[44] Mark Krassowski proof at 8.11, Ian Monachino-Ayres main proof at 7.5.1; MK, XX.
[45] CD70, Appendix 1 to rebuttal proof of Ian Monachino-Ayres.

where officers noted it was necessary to have an agreement secured in order to make the proposal acceptable[46]), and had been identified at pre-application stage and repeatedly by highways officers as noted above.

58. The tension in the appellant's case is that on the one hand they cite the wide scope of the easement in support of the point that they can use the Right of Way for whatever purposes they wish, but on the other hand they invoke the Right of Way as giving Standard Life the ability to restrain any unreasonable user. In relation to reasonableness of use of a Right of Way, the bar for an injunction is high, and in any event would require Standard Life to bring a suit at its own expense, with attendant cost and uncertainty. That only serves to highlight the need to consider this issue through the planning process, which has higher standards than simply the remedies provided by the civil law.

59. The fact there is a Right of Way makes no difference to whether this is a planning issue. Officers considered it material to planning, as clearly did the Appellant at least implicitly when recommending a condition or obligation relating to management of the access. There is no excuse for the Appellant's self-contradictory position, pursued one imagines in order to stifle discussion of the Maltings issue.

Management plan

60. Various documents entitled "Management Plans" have been only belatedly provided to Standard Life, with a fifth version arriving late in the evening of the 16th (day 1 of the inquiry).

[46] CD34.

61. To date, the Appellant has failed to demonstrate that it can deliver a suitably robust and enforceable management plan which does not prejudice the Maltings. The reasons why include but are not limited to the following:

    a. The draft Management Plan is not drafted in precise enough terms to be enforceable and therefore be a worthwhile document serving its purpose.

    b. There is very little connection between the 1994 Deed and the draft Management Plan/Deed of covenant, so it is not understood what the relation between the two is intended to be.

    c. For the Management Plan to be effective, the 1994 Deed needs to be formally varied. It is not clear whether the latest documents from the Appellant intend to do this.

    d. The connectivity between the Deed of Covenant and the Management Plan are not clear.

    e. To be enforceable and binding, the Management Plan needs to be a legal document executed by the original parties to it.

    f. The Plan needs to be clear about which planning permission it relates to.

    g. There are references to a management company in the Plan, but the identity of this organisation is unknown and there needs to be an obligation to procure that any future management company relating to the development enter into a deed of covenant as if they were Oakhill's freehold successor.

    h. The construction management plan provisions give no protection as to the extent and type of construction traffic, health and safety requirements of Standard Life are adhered to, and no enforceable obligation as to Standard Life's increased costs arising from these activities.

i. There are inadequate enforcement provisions within the Management Plan itself.

j. The class of vehicles permitted to use the Right of Way needs to be more restrictively circumscribed.

k. There is no restriction on vehicles (other than resident vehicles) parking or stopping within the Maltings.

l. There is no clarity as to how Oakhill will communicate with delivery companies to arrange delivery appropriately, rather than directly by residents.

m. There is no provision covering the event of failure of the gate to Car Park 2.

n. Standard Life's tenants must have the ability to open and lock the Brassmill Lane gate outside of normal hours as they do at present.

o. There is no enforceable obligation to ensure payment of capital and running costs incurred as a result of access and installation of the Brassmill Lane gate works, and provide for consequences in event of non-payment.

p. There needs to be provision for new electricity supply to serve the upgraded Brassmill Lane gate.

q. Standard Life has concerns regarding enforcement on London Road Nottingham Limited given its BVI status. It is unreasonable to ask Standard Life to rely on an offshore company of this nature for these obligations, Standard Life also needs protection in the event of disposal by LRNL.

62. It should be recalled that the Council's planning and highways officers considered such an agreement was indeed necessary in planning terms, and this follows naturally from what has already been noted above in these Closing Submissions. Such an agreement is necessary, but has not yet been delivered.

63. Additionally, in the final version of the section 106 agreement, Schedule 8 provides the obligation for entering into a Vehicle Management Plan, which is defined at page 8 as "a document setting out the Owner's detailed proposals for the management of vehicles in the Development and for vehicles having unrestricted access to and from the Development through the Maltings Industrial Estate such Plan to follow the principles set out in the Framework Management Plan." (emphasis added)

64. It appears the section 106 agreement therefore works on the basis that the Vehicle Management Plan will place *no* restrictions on use of the Right of Way. This appears to cut across the purposes of the Management Plan as put before the inquiry in week 1, which *does* place restrictions on vehicular access.

Conclusion

65. In conclusion, the appeal proposals would change the nature of use of the access route across the Maltings, causing unacceptable harm to the operations and security of the Maltings, threatening the operations of a rare and important employment site.

66. This harm arises directly from overdevelopment and poor design of the proposal. It could be alleviated altogether by a different scheme which did not take access across the Maltings, as has been indicated is possible and viable.

67. The problem has been made worse by the refusal of the Appellant to engage with these issues at an early enough stage in the planning process. The belated efforts have not brought matters to an agreed conclusion. The Appellant has failed to demonstrate that it can secure agreement for a suitably robust and satisfactory and enforceable management plan agreed between Hartwells and Standard life.

68. In the absence of such an agreement, the unacceptable harm identified does not have any mitigation, and the Inspector is respectfully invited to dismiss the appeal.

GREGORY JONES QC
JONATHAN WELCH
Francis Taylor Building
26th February 2021

Neutral Citation Number: [2018] EWHC 3526 (Admin)

Case No: CO/1639/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Date: 19/12/2018

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

CEMEX (UK) OPERATIONS LIMITED	**Claimant**
- and -	
RICHMONDSHIRE DISTRICT COUNCIL	**Defendant**
-and-	
DAVID METCALFE	**Interested Party**

- -
- -

Miss Jenny WIGLEY (instructed by **Clyde & Co**) for the **Claimant**
Mr Juan LOPEZ (instructed by **Darlington Borough Council Legal Services**) for the **Defendant**

Hearing dates: 9 and 26 November 2018

- -

Approved Judgment

Her Honour Judge Belcher :

1. In this matter the Claimant challenges the decision of the Defendant local planning authority dated 15/03/2018 granting planning permission (the Permission") to the IP (the "IP") for the conversion of a stone barn into a three-bedroom dwelling with

detached garage on land at Quarry Barn, Moor Road, Leyburn, North Yorkshire (the "Property").

2. The Statement of Facts and Grounds contains five Grounds of challenge. By Order dated 20 June 2018, John Howell QC, sitting as a Deputy High Court Judge, granted permission on the papers in relation to Ground 4 and part only of Ground 5, but refused permission on Grounds 1, 2, and 3, and the remaining part of Ground 5. He ordered the matter to be listed for one day-based on that permission order. The Claimant sought to renew the Application for Permission on Grounds 1 to 3 and asked that this be considered within the substantive hearing. Those Grounds are substantial, and the net effect was that the one day allowed for the substantive hearing was insufficient. Fortunately, we were able to find a second day within a reasonably short time frame, but I repeat my advice to Counsel that in such circumstances, the time estimate given should be revisited and, if appropriate, a revised time estimate provided to the listing officer. Having heard argument over 2 days, I am satisfied that permission should be granted on Grounds 1, 2, and 3. I grant permission accordingly.

3. At the outset of the hearing, both parties sought permission to rely upon further witness evidence, and each opposed the other's Application on the basis that the evidence in question was inadmissible. I allowed both Applications on the basis that I considered the evidence to be admissible, and that the real issue was as to its relevance and or weight. There was also an Application by the Claimant for permission to add, whether as a new Ground or as part of Ground 5, the comments at Paragraph 8 of the Claimant's Response. I gave a preliminary indication that I did not consider this to be a new Ground, but in any event, Counsel agreed that all matters should be dealt with by the court within this hearing. References in this judgment to the trial bundle will be by Tab number, followed by the page number, for example [15/102]. References to the bundle of authorities will be by the capital letters AB, followed by the Tab number, for example [AB/10].

The Facts

4. The Claimant is a global producer and marketer of cement, concrete and other building materials. Within the UK it is a leading producer of ready mix concrete, and the third largest cement and asphalt producer. The claimant operates a major limestone quarry (the "Quarry") on an industrial site which includes an asphalt road stone coating plant (the "Asphalt Plant") at Black Quarry, Leyburn North Yorkshire. The Asphalt Plant and the Property are located directly opposite each other on opposite sides of a road called Whipperdale Bank. The Property is located 64 m to the south of the Asphalt Plant. The distance between the Quarry and the Property is 569 metres.

5. The Quarry and Asphalt Plant operate subject to planning conditions imposed on 5 April 2000 in a Minerals Planning Permission granted by North Yorkshire County Council (the "Minerals Permission") [23/161-170]. Conditions 14 to 16 of the Minerals Permission limit the hours of operation of the Quarry, but there is no limit on the hours of operation of the Asphalt Plant [23/166]. Condition 17 of the Minerals Permission, which appears under the heading "Noise Control ", requires that noise from the operations on the site including the use of fixed and mobile machinery shall not exceed a noise limit of 55 dB (A) LA eq (1 hour) free field at two residential properties, namely Moor Farm, and Stonecroft, Washfold Farm [23/167]. There is no dispute in this case

that the Claimant's operations, and the Asphalt Plant in particular, generate a considerable amount of noise.

6. I have the benefit of an aerial photograph based on ordnance survey land line data [12/86]. I was provided with an enlarged and much clearer version of this document which was kept loose during the trial. For ease of reference I shall refer to that enlarged aerial photograph as "AP1". AP1 has a number of arrows and distances marked on it. There are arrows purporting to show distances between Moor Farm and the Property, and between Washfold Farm and the Property. Miss Wigley advised me that those arrows should in fact be from the respective farms to the Asphalt Plant, rather than to the Property. There is no dispute in this case that the distances shown on AP1 are from the respective farms to the Asphalt Plant. Thus, Moor Farm is 1131 metres from the Asphalt Plant, and Washfold Farm is 652 metres from the Asphalt Plant.

7. On 21/01/14 the Defendant granted planning permission for conversion of the Property in a manner almost identical to the development which is the subject of the Permission which is challenged before me. The Claimant's case is that it did not receive any notice from the Defendant in relation to that planning application, and did not otherwise become aware of it. In those circumstances, the Claimant was obviously not able to object to that application. It is the Claimant's case that had it been aware of that application, it would have objected to it because of the proximity of the Property to the Quarry and the Asphalt Plant, and the adverse impact those operations would have in noise terms for the residents of the Property. (See Witness Statement of Mark Kelly, paragraph 26: 25/176]. There is no dispute that the Defendant's own Environmental Health Department was not consulted with regard to noise emanating from the Claimant's operations in relation to the 2014 grant of planning permission.

8. The Property has been developed. However, there is no dispute that the works undertaken to convert the barn constituted unlawful development. This is because the pre-commencement conditions contained in the 2014 planning permission had not been discharged prior to the start of the works. Accordingly, in February 2017, the IP made a fresh planning application to regularise the position, with the proposed development being the same as that previously approved, save for the addition of a detached garage.

9. On 25/04/2017 the Claimant submitted objections in the form of an e-mail note from Dr Paul Cockcroft of WBM Acoustic Consultants, raising the issue of noise impacts at the Property. As a result, the Defendant's Planning Officer, Natalie Snowball, consulted Lindsey Wilson, a Scientific Officer in the Defendant's Environmental Health Department. Lindsey Wilson made an initial visit to the site to look at the relationship between the quarry and the dwelling. On 23/05/17 Lindsey Wilson sent an e-mail to Natalie Snowball about that visit. In her e-mail Lindsey Wilson describes clearly audible noise from the Asphalt Plant despite the wind direction blowing noise away from the Property. She comments that the noise had the potential to have a significant adverse impact on that the proposed dwelling, particularly at night as it would appear that the Asphalt Plant has permission to operate through the night where background noise levels will be low. In those circumstances, she recommended that the IP should be requested to carry out a noise impact assessment by reference to BS 4142:2014 "Methods for rating and assessing industrial and commercial sound", and should give consideration to BS 8233, "Guidance on sound insulation and noise reduction for buildings", with regard to whether recommended noise levels are achievable [16/117].

10. Her email continues as follows:

> "I have also sought advice from North Yorkshire County Council mineral planning with regards to the planning permission for the quarry and whether any existing noise conditions would apply to [the Property] should permission be granted, or whether they could apply any review of the planning permission, which I understand is overdue. ….. My initial concern is that should a noise limit from quarry operations be applied to this property, the quarry may be unable to comply particularly to any night time limit applied, and this would therefore impact on the operations of the existing quarry. I would therefore also recommend that consideration is given to this aspect" [16/117].

11. The IP instructed Apex Acoustics to undertake the noise assessment. Apex Acoustics produced a report dated 10/08/2017 (the Apex Report") [17/119-138]. I shall have to consider the Apex Report in some detail later in my judgment, but for present purposes it suffices to say that the assessment carried out under BS4142 indicated a significant adverse effect from noise at the Property for both daytime and night time periods, and demonstrated high noise levels at the Property. The assessment results showed levels of noise far exceeding the threshold for the 'significant observed adverse effect level' as contained in the Noise Policy Statement for England ("NPSE"). This is the level of noise exposure above which significant adverse effects on health and quality of life occur and the policy aim is to avoid such levels [33/226 and 227]. The Apex Report sets out two "Feasible Ventilation Strategies" for achieving satisfactory noise levels within the Property, which options both include continuous mechanical ventilation [17/122]. Again, I shall return to this in more detail later in my judgment.

12. There is no dispute in this case that the IP did not wish to install mechanical ventilation at the Property. By way of follow-up to a meeting between Brian Hodges, Planning Consultant for the IP, and Natalie Snowball and Lindsey Wilson, Brian Hodges emailed Natalie Snowball on 08/12/17 to confirm "… the works proposed to satisfactorily attenuate the noise impact from the nearby quarry operations" [18/139]. That email was copied to Lindsey Wilson. He attached a further copy of the Apex Report and referred to the fact that with respect to internal noise levels, subject to appropriate glazing specification and ventilation arrangements, any Significant Observed Adverse Effect Level impacts can be avoided. He then gives details and specification of the existing glazing which had already been installed and which exceeds the example specification for glazing as referred to at Paragraph 2.9 of the Apex Report. He then goes on to deal with ventilation stating as follows:

> "It is confirmed that the trickle vents used on the windows and doors are Greenwoods Slot Vents as referred to at 2.10 of the Noise Assessment Report and satisfy the performance requirements to achieve the acceptable internal noise levels. As detailed in Table 1 of the Noise Assessment Report Summary of minimum facade sound insulation treatment included in assessment calculations, in order to achieve the acceptable internal noise levels it is necessary to remove the slot vents from certain windows in the bedrooms."

He then goes on to list the vents to be removed and confirms that the works would be carried out within two months from the grant of planning permission and would be the subject of a planning condition. There is no reference at all to mechanical ventilation in that email.

13. By further email dated 03/01/2018 Brian Hodges emailed Natalie Snowball (copied to Lindsey Wilson) indicating that in addressing the issue of the reduction of noise levels within the building involving the reduction in the ventilation arrangements, he was conscious of the implications and possible conflict with building regulations. He goes on to confirm that even with the removal of the required vents, the ventilation requirements to meet building regulations are still satisfied, and he encloses an email received from Yorkshire Dales Building Consultancy Ltd to confirm that [19/144]. The enclosed email from Yorkshire Dales Building Consultancy Ltd states as follows

> "Further to our discussion regarding the provision of background ventilation… windows which will need to have the background ventilation openings (trickle vents) sealed in order to better meet the requirement for sound reduction into the building, will not reduce the background ventilation provisions required by building regulations as the provision can be met by the 2nd openings into each of the rooms….[19/147]."

In response to that, by email dated 08/01/2018, Lindsey Wilson replied

> "Thank you for the additional information from Building Control who confirmed that the ventilation arrangements are satisfactory. I therefore confirm that Environmental Health are satisfied with the proposed glazing and ventilation arrangements."

14. On 12/03/18 Lindsey Wilson provided her report to Natalie Snowball. I shall visit the detail of this report when considering the Grounds of challenge. For present purposes it suffices to say that Lindsey Wilson confirmed that the noise assessment recommended certain glazing and ventilation options all entailing the use of mechanical ventilation in order to achieve the recommended noise levels. She notes that the IP does not propose to use mechanical ventilation "….. and has forwarded documentation from Building Control who have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation". She concluded that satisfactory internal noise levels can be achieved through the use of glazing and ventilation arrangements [21/150-151].

15. She also dealt with the question of the Mineral Permission and the need to protect the existing quarry operation. She sets out advice received from North Yorkshire County Council who advised that the conditions set out in the Minerals Permission for the Quarry are the only conditions that they would refer to and are in force until such time as that permission may be subject to a review under the ROMP (i.e. review of minerals permission) regulations or a variation. She confirms that the noise limits contained within the Minerals Permission would not apply to the Property and therefore there would be no breach of the Minerals Permission [21/151].

16. Natalie Snowball prepared a delegated application report dated 15/03/18. It was referred to throughout the proceedings as the Officer's Report and I propose to refer to

it in the same way but using the commonly recognised abbreviation "OR". In the OR, Natalie Snowball set out verbatim the final comments received from Environmental Health [14/94-96]. At paragraphs 6.8 to 6.13 of the OR, Natalie Snowball deals with "Noise and Amenity". The need for noise attenuation measures to overcome the unacceptable noise level was recognised and paragraph 6.11 provides as follows:

> "Environmental Health commented on the agent's mitigation proposals confirming that the glazing specification of the building would appear to meet the requirements of the acoustic report, but raised concern regarding whether sealing up the trickle vents as proposed by the agent would result in unacceptable ventilation in the dwelling. The agent had this checked by a Building Control Inspector who confirmed that the ventilation in the dwelling was acceptable and met the requirements under the Building Regulations" [14/99]

17. The OR notes the Claimant's continuing concern about the very high noise levels generated by the Asphalt Plant and the impact of this on the amenity of the Property, and that the Claimant is concerned that if the planning permission is approved it would have the effect of placing unreasonable restrictions on the Cemex Asphalt Plant operations particularly at night time. Paragraph 6.13 provides as follows:

> "Environmental Health have looked carefully at the proposal, and the concerns of Cemex, and whilst recognising that the proposed dwelling will experience relatively high levels of noise from the [Asphalt Plant], they have concluded that, with the mitigation measures proposed by the agent including removing and blocking up trickle vents in certain windows,……satisfactory noise levels….. inside…… the dwelling can be achieved…….. They have also confirmed that the proposal will not conflict with the mineral planning permission which relates to the operations at [the Quarry] including the roadstone coating plant" [14/99]

18. On 15/03/18 the Permission was granted by the Defendant's planning manager under the Defendant's scheme of delegation. The Permission is subject to a condition requiring the removal or blocking up of trickle vents in certain bedroom windows in the Property. There are no conditions expressly requiring the retention of specified window glazing or requiring the installation of a mechanical ventilation system. The "Informative" on the planning permission states as follows:

> "[The Property] is located in close proximity to [the Quarry], and in particular the [Asphalt Plant], which has permission to operate 24 hours per day if required. The occupants of [the Property] will therefore experience noise from the quarrying operations. By using a combination of glazing and ventilation to the property, guideline internal noise levels in accordance with BS 8233:2014 'Guidance on sound insulation and noise reduction from buildings' can be achieved with windows closed…" [11/83].

19. The Claimant's Minerals Permission is due for review in April 2025 under ROMP. Any review will be required to consider operating conditions alongside any change in circumstances, including the existence of any new dwellings in the vicinity of the Quarry. On the second day of the hearing, the Defendant provided me with a second aerial photograph showing a number of other properties in the vicinity of the quarry, all of which have been developed pursuant to planning permissions granted since the grant of the Minerals Planning Permission in April 2000. I shall refer to this aerial photograph as "AP2". The Claimant asserts that there is a very real risk that conditions could be imposed under ROMP in order to protect the residential amenity of occupants of the Property, and that such conditions could have a serious impact on the quarry operations. They suggest that such conditions could include restrictions on the permitted hours of operation of the Asphalt Plant and/or noise limit restrictions on the level of noise from the Asphalt Plant measured at the Property.

Legal Principles.

20. With the exception of an issue as to the relevance and or weight of evidence provided by the planning officer in relation to the decision-making process, there is no dispute between the parties as to the relevant legal principles. I shall first summarise those areas where there is no dispute as to the legal principles to be applied. This is drawn from the skeleton arguments provided by both Counsel for which I am grateful.

21. Planning applications are required to be determined in accordance with the statutory development plan unless material considerations indicate otherwise (S38(6) Planning and Compulsory Purchase Act 2004 and S70 Town & Country Planning Act 1990) [AB/1 and 2]. Whether or not a consideration is a relevant material consideration is a question of law for the courts: **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1WLR 759 at 780 [AB/6]. A material consideration is anything which, if taken into account, creates the real possibility that a decision-maker would reach a different conclusion to that which he would reach if he did not take it into account: **R (Watson) v London Borough of Richmond upon Thames** [2013] EWCA Civ 513, per Richards LJ at paragraph 28 [AB/16].

22. Decision-makers are under a duty to have regard to all applicable policy as a material consideration: **Muller Property Group v SSCLG** [2016] EWHC 3323 (Admin) [AB/14]. National Planning Policy is set out in the National Planning Policy Framework ("NPPF") and the National Planning Practice Guidance ("NPPG"). National planning policy is "par excellence a material planning consideration": **R oao Balcombe Frack Free Balcombe Residents v West Sussex CC** [2014] EWHC 4108 (Admin) at paragraph 22 [AB/15]. The weight to be given to a relevant material consideration is a matter of planning judgement. Matters of planning judgement are within the exclusive province of the local planning authority: **Tesco Stores Ltd** (supra).

23. An OR is not susceptible to textual analysis appropriate to the construction of a statute. **Oxton Farms and Samuel Smith Old Brewery v Selby DC** [1997] WL 1106106 [AB/12]); **South Somerset District Council v Secretary of State for Environment** [1993] 1PLR 80. The OR should not be construed as if it was a statutory instrument: **R (Heath and Hampstead Society) v Camden LBC and Vlachos** [2007] 2 P&CR 19. The OR must be considered as a whole, in a straightforward and down-to-earth way, and judicial review based on criticisms of the OR will not normally begin to merit

consideration unless the overall effect of the report significantly misleads the committee about material matters which are left uncorrected before the relevant decision is taken.

24. An OR is to be construed in the knowledge that it is addressed to a knowledgeable readership who may be expected to have a substantial local and background knowledge. There is no obligation for an OR report to set out policy or the statutory test, either in part or in full. **R v Mendip DC ex p Fabre** [2000] 80 P&CR 500 [AB/11]. Policy references should be construed in the context of general reasoning: **Timmins v Gelding BC** [2014] EWHC 654 (Admin) paragraph 83 [AB/17]. An OR is written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. A decision-maker does not need to rehearse every argument relating to each matter and every paragraph: **Seddon Properties v Secretary of State for the Environment** (1981) 42 P&CR 26 [AB/13]. These principles apply equally to a delegated application report.

25. The legal principles set out thus far are not in dispute. In this case Natalie Snowball, the Planning Officer, has provided two Witness Statements setting out, amongst other things, how she asserts she reached her decisions in relation to matters under challenge. It was suggested on behalf of the Claimant that this evidence was inadmissible as amounting to ex post facto rationalisation. As already indicated, I granted permission for both Witness Statements to be adduced in these proceedings, indicating that I would consider relevance and weight at a later point.

26. Having revisited the submissions made to me in relation to these matters, I conclude that there is in fact no real difference between counsel on the law to be applied in the circumstances. The law is helpfully set out by Green J in **Timmins v Gelding BC** [2014] EWHC 654 (Admin) at paragraphs 109 -113 (AB/17). In that case, Green J had regard to certain admissions made in the evidence of the principal planning officer (see paragraphs 47 and 55). Only at paragraphs 109 -113 did he deal with the more general issue of the relevance of witness statement evidence from the decision maker.

27. What is clear, for the reasons listed in paragraph 109 of Green J's judgment, is that there are a number of circumstances in which witness evidence can be properly received from a decision maker. In order to decide whether to accept or reject such evidence, is necessary for the court to identify the basis upon which the impugned statement is relied upon. It is equally clear that it should be rare for a court to accept ex post facto explanations and justifications which risk conflicting with the reasons set out in the decision. In support of that conclusion Green J referred to the decisions of the Court of Appeal in **Ermakov v Westminster City Council** [1995] EWCA Civ 42, and **Lanner Parish Council v the Cornwall Council** [2013] EWCA Civ 1290. Mr Lopez submitted that there is nothing in Miss Snowball's Witness Statement which conflicts with the reasons set out in her OR which formed the basis for the decision in this case. I accept that submission, and I do not understand it to be challenged by Miss Wigley.

28. However, the courts are also reluctant to permit elucidatory statements if produced for the purpose of plugging a gap in the reasoning. Green J refers to this principle at paragraph 113, citing the judgment of Ouseley J in **Ioannou v Secretary of State for Communities and Local Government** [2013] EWHC 3945. In my judgement this is where the issue lies between the parties in this case. Mr Lopez submits that the Witness Statements are not plugging any gap in the reasoning, whereas Miss Wigley submits that is exactly what the Witness Statements are designed to do. Thus, the issue is one

of construing the basis upon which the Witness Statements are relied upon, rather than an issue of law. In those circumstances I shall return to this issue when dealing with the relevant Grounds.

The Grounds

29. The Claimant's grounds of challenge are as follows:

i) Errors as to the scope of the decision making process including as to the ability of the Environmental Health Officer to object to the proposed development and as to the ability of the Defendant to control the development (including to refuse the application). [3/24]

ii) Taking into account an immaterial consideration, namely that the Property is occupied "by a long-standing local family aware of the presence of the adjacent quarry". [3/27]

iii) Failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy. [3/28]

iv) Failure to take into account the impact on the Claimant of the fact that the Minerals Permission is due to be reviewed in 2025 and that, at that time, onerous conditions could be imposed on the Claimant's operation as a result of the grant of the Permission. [3/28]

v) Irrational failure to take into account all relevant considerations when deciding not to include all the conditions recommended by the IP's own noise consultant. [3/29]

Grounds 1 and 2

30. As both Counsel did in their submissions before me, I propose to deal with these two Grounds together. The full Grounds are set out in paragraph 29 above. However, in essence, each of these Grounds amounts to an allegation that the Environmental Health Officer ("EHO") constrained her consideration of the issues in this case by reason of the fact that the development of the Property had already taken place, and that the Property was already occupied. Ground 2 suggests a further and more specific constraint on the decision-making process, namely that the Property was not simply already occupied, but that it was occupied by a long-standing local family aware of the presence of the adjacent quarry. The Claimant asserts that this implies that the family in residence will be more willing to accept the noise from the quarry operations than might be the case for future occupiers, and that it is an improper and irrelevant consideration.

31. In relation to the more general point under Ground 1, Miss Wigley submitted that the EHO has erroneously assumed the principle of residential development in this location has already been accepted and that the options to control or mitigate noise are limited by the fact that the dwelling is complete and occupied. The way the EHO approached the matter is set out verbatim in the OR report at [14/94]. Miss Wigley relies upon the fact that the EHO indicated that if Environmental Health had been consulted initially, it is likely they would have objected to the development. The EHO then states that as

the barn conversion is complete and occupied, she considers it appropriate to assess whether the noise impact can be mitigated and reduced to provide an acceptable level of amenity for the residents and also that the existing quarry operations can be protected.

32. Miss Wigley submitted that there cannot be two different standards of what is acceptable, one to be applied to a planning application for a future development which has not yet been commenced, and one for a property which is already occupied. She submitted that the EHO's assessment has been influenced by the fact of occupation and amounts to an attempt to squeeze the application through on the basis of what the IP wants because the property is already occupied. Whilst the EHO asked for a noise assessment, Miss Wigley pointed to the fact that the scope of that assessment is itself limited by reference to the fact that "…. The building has already been constructed, limiting the potential options for facade sound insulation design". (Apex Report, paragraph 3.2; [17/123]) Miss Wigley submitted that the assessment by the EHO as to what is acceptable is tainted by that approach, in effect adopting a starting point that "There's not much we can do in terms of design and layout". She submitted that the fact that the development has taken place should not preclude a finding that the mitigation needed to deal with noise does involve changes in design or layout.

33. Mr Lopez made the point that it is inevitable that the planning authority will approach this application on the basis of what has been built, precisely because it is an application to regularise the position. He submitted that the planning authority cannot consider the matter in a vacuum. For a future application, the planning authority of necessity considers plans and proposals; for an application to regularise the position, of necessity, they consider what has in fact been built. He submitted that does not mean they have restricted themselves, but simply that they have adopted a practical and sensible starting point. He also pointed out that whilst the EHO had said it was likely they would have objected to the development if consulted at an earlier stage, there is no certainty in that respect.

34. During her submissions in reply to Mr Lopez, I asked Miss Wigley to make the following assumptions in relation to a hypothetical property which was a sensitive receptor for noise. I asked her to assume, if an application for permission had been made prior to development, that it would have been granted with a noise mitigation package including alterations in design and layout. I further asked to assume that for the same property but already built, a perfectly proper package could be achieved to address the noise issues but without involving alterations in design and layout. I suggested to her that in those circumstances it was hard to see how it could be said that a grant of planning permission with the lesser noise package (by which I meant the package without alterations in design and layout) could be challenged on the basis that the local authority should have approached matter as if based on plans rather than actual build. Miss Wigley very properly conceded that would be a proper approach for the planning authority to take, provided it can truly be said that the package of noise measures for the property as built is a proper package, and even if the planning authority might have preferred something different had it been considering the matter at an earlier stage on the basis of plans only.

35. However, Miss Wigley submitted that concession did not invalidate Grounds 1 and 2 in this case. She submitted that the concern behind Grounds 1 and 2 is that the threshold of acceptability in terms of noise mitigation measures has been compromised by the

fact that this is a retrospective application for permission in respect of an occupied dwelling. In my judgment, it follows from that concession, that the true source of complaint here is not that the EHO has imposed improper constraints by considering the property as built, but rather that the package of noise mitigation measures produced is unsatisfactory for other reasons. There is nothing in the EHO's advice to the planning officer, or in the OR to suggest that either the EHO or the planning officer did not understand that this was an application that could be rejected, or that either failed to understand that mitigation measures going beyond those desired by the IP could be imposed if the planning authority thought that was the right thing to do.

36. Turning specifically to Ground 2, Miss Wigley submitted that the EHO's reference to the Property "….being occupied by a long standing local family aware of the presence of the adjacent quarry" ([21/149] and adopted verbatim in the OR [14/94]) shows that the assessment of appropriate noise mitigation measures has been compromised by an assumption that the environment need not be so good for a local family already occupying an unlawful development. Miss Wigley submitted that this was a curious statement to include if it has no relevance to the matter. She submitted it must have been included as factoring into the assessment on the impact on amenity, as in "This family is perhaps more tolerant of noise than others".

37. I agree that it is not immediately obvious why the fact that the Property is occupied by a long standing local family aware of the presence of the adjacent Quarry needs to be mentioned by the EHO or by the planning officer. However, it is a significant leap from the fact of that mention, to the assertion that the effect was that the EHO and the planning officer were effectively treating this as a personal planning application for a family more likely to put up with the noise because they were already occupying and aware of the Quarry. There is absolutely nothing in the documentation to suggest that an error of that sort was made. The statement about the occupation of the family could equally well be proffered to explain why the current occupiers may not have complained about noise, with the implication that future occupiers might. I cannot accept that single sentence evidences a constraint of the type argued for by Miss Wigley. In my judgment, if relevant at all, the issues raised under Grounds 1 and 2 are more relevant to and supportive of the complaint in Ground 3. It follows that I reject Grounds 1 and 2.

Ground 3

38. Ground 3 is the alleged failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy. At the time of the Permission decision, the relevant NPPF was the 2012 version. In this judgment all references to the NPPF are to the 2012 version. Paragraph 123 NPPF provides (so far as relevant) that planning policies and decisions should aim to:

    i) avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of a new development

    ii) recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established.

The above are the first and third bullet points in Paragraph 123 NPPF.

39. The PPG on noise defines the "Significant observed adverse effect level" as "….the level of noise exposure above which significant adverse effects on health and quality-of-life occur" [33/226]. For ease of reference I shall refer to this level as "SOAE" or "SOAE level", as appropriate. In a section entitled "How to recognise when noise could be a concern", there appears the following paragraph:

> "Increasing noise exposure will at some point cause the [SOAE level] boundary to be crossed. Above this level the noise causes a material change in behaviour such as keeping windows closed for most of the time or avoiding certain activities during periods when the noise is present. If the exposure is above this level the planning process should be used to avoid this effect occurring, by use of appropriate mitigation such as by altering the design and layout. Such decisions must be made taking account of the economic and social benefit of the activity causing the noise, but it is undesirable such exposure to be caused." [33/226]

40. The same section contains a table summarising the noise exposure hierarchy, based on the likely average response. Noise that is noticeable and disruptive crosses the SOAE level and should be avoided. This is described as follows

> "…. noise which causes a material change in behaviour and/or attitude, eg avoiding certain activities during periods of intrusion; where there is no alternative ventilation, having to keep windows closed most of the time because of noise. Potential for sleep disturbance resulting in difficulty in getting to sleep, premature awakening and difficulty in getting back to sleep. Quality of life diminished due to changing acoustic character of the area." [33/227]

It should be noted that the most serious noise in the table, described as noticeable and very disruptive, and of unacceptable adverse effect, should be prevented, rather than simply avoided [33/227].

41. The PPG goes on to consider what factors influence whether noise could be a concern, pointing out that the nature of noise is subjective such that there is not a simple relationship between noise levels and the impact on those affected. A number of general factors to consider are listed, followed by more specific factors to consider when relevant, including the following:

> "consideration should also be given to whether adverse internal effects can be completely removed by closing windows and, in the case of new residential development, if the proposed mitigation relies on windows being kept closed most of the time. In both cases a suitable alternative means of ventilation is likely to be necessary. Further information on ventilation can be found in the Building Regulations" [33/228]

42. I now turn to the Apex Report, which is the noise assessment prepared for the IP at the request of the EHO. Apex Acoustics measured weekday noise levels at the facade of the Property exposed to noise from the Quarry and the Asphalt Plant. As requested by the EHO the tests were carried out under British Standard, BS 4142: 2014. Under BS 4142:2014 the methodology is to obtain an initial estimate of the impact of the specific sound by subtracting the measured background sound level from the rating level. Typically, the greater this difference, the greater the magnitude of the impact. A difference of around +10dB or more is likely to be an indication of a significant adverse impact, depending on the context [38/380].

43. The results in the Apex Report indicated a SOAE for both daytime and night time periods. The differences between the background sound level and the rating level were reported by Apex Acoustics as +35dB for daytime, and +43dB for night-time [17/126; table 5]. I have a Witness Statement from Dr Paul Cockcroft, a specialist Acoustic Consultant engaged by the Claimant. He explains that the generally accepted rule is that a change of 10 dB(A) corresponds roughly to halving or doubling the loudness of a sound. The noise level for the night-time assessment, which is recorded as +43dB above the background sound level, would be eight times as loud as the level representing a significant adverse impact. [26/182].

44. The Apex Report proposes two alternative ways to address the noise issue and to meet internal noise criteria. Section 8 of the report deals with "Facade acoustic design to meet internal criteria". The internal criteria referred to are the noise criteria. The report sets out a proposed provision to meet the issues, whilst emphasising that it is not intended to constitute a ventilation strategy design, which is the responsibility of the mechanical engineers [17/127, paragraph 8.7]. In order to achieve the desired internal noise levels, the Apex Report recommends the glazing and ventilator performance specifications shown in the summary table, which is table 1 in the report. The author adds that the current construction design will need to be reviewed to comply with these requirements [17/128, paragraphs 8.24 – 8.25]. Table 1 contains the author's summary of **minimum** facade sound insulation treatment included in the assessment calculations (my emphasis added). Both options set out in Table 1 contain minimum glazing performance requirements, and continuous mechanical ventilation, Option A being for mechanical extraction with the use of a single trickle vent to each of the bedrooms for make-up air, and Option B being frame of continuous mechanical supply and extract with heat recovery, which does not require any trickle ventilators [17/122: Table 1].

45. Paragraph 2.8 of the Apex Report refers to the proposals in Table 1 as "…a set of minimum glazing and ventilation strategy options, interpreted from Approved Document F (AD-F)" [17/121]. The summary goes on to refer to the glazing options and concludes at paragraph 2.13 as follows: "On this basis it is considered that any [SOAE Level] impacts on internal noise levels are avoided…" [17/121].

46. As already mentioned, the proposal includes glazing options, and paragraph 8.13 of the Apex Report refers to the acoustic performance of the proposed glazing. There is no dispute in this case that the glazing currently installed at the Property meets the acoustic performance recommended. The Apex Report continues at paragraph 8.14 (still under the heading of "Glazing") "Opening windows may be acceptable to provide purge ventilation; all opening lights should be well fitted with compressible seals."

47. Miss Wigley submitted that there is a nexus between mechanical ventilation and purge ventilation, a nexus which she submitted is recognised both in the BS 4142:2014 and in Building Regulations. In BS 4142:2014 in Section 11 on "Assessment of the impacts" [of sound], amongst the pertinent factors to be taken into consideration is the following:

> "The sensitivity of the receptor and whether dwellings or other premises used for residential purposes will already incorporate design matters that secure good internal and/or outdoor acoustic conditions, such as:
>
> i) facade insulation treatment;
>
> ii) ventilation and/or cooling that will reduce the need to have windows open so as to provide rapid or purge ventilation; and
>
> iii) acoustic screening" [38/381]

48. (AD)-F of the 2010 Building Regulations deals with Ventilation. The "Key terms" are set out in Section 3 and include the following of relevance to this case;

> "***Background ventilator*** is a small **ventilation opening** designed to provide controllable ***whole building ventilation***.
>
> ***Purge ventilation*** is manually controlled ventilation of rooms or spaces at a relatively high rate to rapidly dilute pollutants and/or water vapour. Purge ventilation may be provided by natural means (e.g. an openable window) or by mechanical means (e.g. a fan).
>
> ***Whole building ventilation*** (general ventilation) is nominally continuous ventilation of rooms or spaces at a relatively low rate to dilute and remove pollutants and water vapour not removed by operation of ***extract ventilation, purge ventilation*** or ***infiltration***, as well as supplying outdoor air into the building. For an individual dwelling this is referred to as ***'whole dwelling ventilation'***." [36/244-245]

49. Paragraph 5.7 of (A-D) F provides as follows:

> "***Purge ventilation*** provision is required in each ***habitable room…..*** Normally, openable windows or doors can provide this function …, otherwise a mechanical extract system should be provided…." [36/257]

Miss Wigley also referred me to Table 5.2a where there is reference again to the need for purge ventilation for each habitable room, where it is also noted "There may be practical difficulties in achieving this (e.g. if unable to open a window due to excessive noise from outside), and "As an alternative… a mechanical fan…. could be used" [36/261]. I note that the same wording is repeated in each of Tables 5.2b [36/263], 5.2c

[36/265] and 5.2d [36/266], with the addition, in the latter two cases, of an indication that expert advice should be sought in such situations.

50. Miss Wigley submitted that it is clear from the above matters that purge ventilation is not a binary matter. Where there is another form of ventilation, the need for purge ventilation will be reduced. She pointed out that the acknowledgement in the Apex Report that opening windows may be acceptable to provide purge ventilation is against a background of the recommendations in that report that a mechanical ventilation system is also needed. She further submitted that the alternative ventilation strategy to opening windows is a mechanical system (per Paragraph 5.7 (A-D) F set out in paragraph 48 above), and that there is no question of trickle vents alone providing this function. She also referred me to paragraphs 4.15 and 4.16 (A-D) F. It is clear from paragraph 4.15 that purge ventilation is ventilation of a separate type to whole building ventilation. Furthermore, purge ventilation is intermittent and required only to aid the removal of high concentrations of pollutants and water vapour released from occasional activities such as painting and decorating or accidental releases such as smoke from burnt food or spillage of water. It is noted that purge ventilation provisions may also be used to improve thermal comfort although this is not controlled under the Building Regulations [36/251, paragraph 4.15].

51. In paragraph 4.16 there is reference to trickle ventilators being used for whole dwelling ventilation and windows for purge ventilation [36/251]. Miss Wigley submitted that trickle vents are plainly for useful background ventilation of the whole building and are not a substitute for purge ventilation by the opening of windows and/or the use of a mechanical system.

52. As set out in paragraphs 12 -13 above, the IP did not wish to install mechanical ventilation and there were discussions between the EHO, the planning officer and the IP's agent concerning ventilation. The agent provided the email [18/147] from the building surveyor set out in paragraph 13 above. Miss Wigley submitted that discussion relates entirely to background ventilation, or whole dwelling ventilation and that no consideration was given to purge ventilation and whether purge ventilation would be adequate, given that mechanical ventilation was not being provided as recommended in the Apex Report.

53. Miss Wigley very properly accepted that the fact that there is no express reference by the EHO or the OR to the PPG is not, without more, a ground for challenging the reports of either officer. She submitted, however, that it must be clear that the issues concerned have been fully covered. There is no dispute between the parties that the PPG is a significant material consideration because it is government policy. The application of the policy is of course a matter of planning judgement and depends upon the facts of the case. The significance of the relevant policy will also depend on the facts of the case. Miss Wigley submitted that in this case the PPG is central, particularly as the noise mitigation relied upon in this case is closed windows, when the PPG clear policy is to try and avoid this. She pointed to the fact that there is no reference to any of these factors in the advice of the EHO or in the OR. She submitted that the OR shows that the planning officer placed total reliance on the EHO response on these matters as the OR sets out verbatim the EHO's final recommendations. Miss Wigley submitted there is no evidence at all that the EHO has considered the applicability of the PPG and, in particular, the desirability of avoiding relying on windows being closed to address the noise issues. She submits that the EHO has in effect cherry picked from the Apex

Report, and simply relied upon the email from the building surveyor (wrongly described as Building Control by the EHO but nothing turns on this) which "…… confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation", and that they met the Requirements under the Building Regulations.

54. All the e-mail from the Building Surveyor does is to confirm that the sealing of certain trickle vents to assist with reducing sound in the building will not reduce the background ventilation provisions required by Building Regulations. Plainly, that email does not address in any way at all, the impact of noise and the proposed control of noise into the building by the use of closed windows. It simply deals with the adequacy of background ventilation. Obviously, it cannot address, and does not purport to address, how the residents of the Property might be affected by noise if, for example, they wish to keep windows open for lengthy periods of time during hot weather. Indeed, the Building Regulations themselves make it clear that they do not control the use of purge ventilation for thermal comfort (see paragraph 49 above). Miss Wigley relies upon the fact that nowhere is there any indication that the EHO or the planning officer considered that PPG advises that the SOAE level identified in the noise assessment, (a document expressly asked for by the EHO), should be avoided and is undesirable. She acknowledged that this is obviously not an absolute requirement, but it is nevertheless relevant policy and the council is required to have regard to it and take it into account. She submitted that the council should either have ensured that the mitigation measures overcame or avoided the SOAE level, or it should have been balanced against other considerations and an explanation given as to why it was not to be avoided in this case. She submitted that all the guidance in the PPG (quoted at paragraphs 39 – 41 above) contains a link between mechanical ventilation and the need to open windows, but no one at the council considered this.

55. She submitted that the EHO and the OR both state that internal noise levels can be met with glazing and the windows being closed, without any consideration as to the need for mechanical ventilation. Whilst the Apex Report allows for windows to be used for purge ventilation, it does so in the context of and contingent upon the provision of alternative mechanical ventilation, something Miss Wigley submitted, which has been completely missed by the council officers both in construing the Apex Report and in failing to consider the guidance in the PPG.

56. On behalf of the Council, Mr Lopez submitted that the treatment of the noise issues has been perfectly properly carried out and is consistent with the PPG guidance. He pointed out that both the NPPF and PPG indicate that planning decisions should aim to avoid noise from giving rise to significant adverse impacts, but neither is prescriptive. He further submitted that there is no rule that purging must be avoided and, therefore, that it is a matter of planning judgement for the decision taker to consider the acceptability of purging. There is nothing in the PPG identifying an acceptable degree of purging, subject to the issue of noise. Mr Lopez submitted that it is possible to depart from the guidance without their necessarily being an error. That is plainly right, and Miss Wigley accepted that in her submissions.

57. Mr Lopez submitted that it is plain on the face of her report dated 12 March 2018 that the EHO has carried out her own independent assessment and concluded that some purging would be acceptable. He submitted this is a matter of planning judgement and not open to challenge. The passage in question appears in the EHO report at [21/150]

and is repeated verbatim in the OR at [14/94]. I shall refer to the passage from the OR as this was the passage addressed by Mr Lopez in his submissions. Under the heading "Impact on amenity" there appears the following:

> "BS 4142 recognises that not all adverse impacts will lead to complaints and it's not intended for the assessment of nuisance. [The Property] is occupied by a long standing local family aware of the presence of the adjacent quarry. BS 4142 also allow scope look at absolute noise levels rather than just relative levels and for other standards such as BS 8233 to be considered. It was therefore recommended that the applicant considered BS 8233:2014 'Guidance on sound insulation and noise reduction for buildings' as part of their assessment in order to see whether the recommended guideline indoor and outdoor noise levels can be achieved. The report shows that guideline indoor levels can be achieved with a combination of glazing and ventilation and that some areas of the garden can offer an acceptable amenity space in accordance with BS 8233.
>
> With regards to internal noise levels, the noise assessment recommended certain glazing and ventilation options all entailing the use of mechanical ventilation in order to achieve the recommended noise levels. However, the applicant does not propose to use mechanical ventilation and has forwarded documentation from Building Control who have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation. I note the view of Cemex that windows should be sealed shut to protect residents, however, I consider that the option for windows to be openable for the purposes of purge ventilation to be acceptable." [14/94]

58. Mr Lopez emphasised the use of the word "However". He submitted that marks a clear transition. He submitted that prior to the transition the report shows that the EHO was aware of the contents of the Apex Report. The transition shows that the EHO has moved on to make an assessment based on her knowledge that the IP did not want to use mechanical ventilation. He submitted the transition represented by the word "However" supports the fact that there has been a separate assessment by the EHO. He submitted the EHO has stood back, with the knowledge and understanding that mechanical ventilation would not be used but has concluded in her own assessment that purging was an acceptable way of addressing matters. He submitted that relates not just to the issue of ventilation, but also to the issue of noise.

59. Mr Lopez reminded me that the Claimant's challenge on this Ground is not a reasons challenge, or an irrationality challenge. He submitted that the Claimant's challenge is that the EHO has either forgotten the fact that the IP did not want mechanical ventilation or has forgotten that the Apex report was all prefaced on mechanical ventilation. In my judgment that is not an accurate statement of the Claimant's challenge. The challenge is a failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy.

60. Miss Wigley accepted that Ground 3 is neither a reasons nor an irrationality challenge. Her challenge is that the policy and guidance has simply not been considered, and because of that there are no reasons given for departing from policy, and thus there are no reasons to challenge. Further there is no irrationality challenge which could only follow from an assessment which had been undertaken. The whole thrust of the Claimant's submissions in support of Ground 3 is that there is no evidence of an independent assessment or any independent calculations carried out by the EHO.

61. Mr Lopez submitted that the EHO was clearly aware of the Apex Report, a report which gave options, but which was not saying these are the only options. He submitted it was therefore open to the EHO to depart from the options proposed in the Apex Report, and to say why she had done so. He submitted she did not need to go into figures and that she had everything in front of her to entitle her to make the judgement she made. He submitted it was completely unreal to suggest that the EHO had not exercised her own judgement and made a wholly separate assessment, separate from the Apex Report. He submitted there is nothing in the EHO's report which signposts back to the Apex Report, and he refuted the suggestion put forward on behalf the Claimant that the EHO has effectively cherry picked from the Apex Report, taking background ventilation alone and not considering the ventilation strategy as a whole.

62. Whilst I accept that the EHO has clearly recognised that the IP did not wish to use mechanical ventilation, I am wholly unpersuaded by the suggestion that the EHO has necessarily carried out a wholly separate and independent assessment. The word "however", is at the beginning of a sentence which goes on to place reliance on the documentation described as being from Building Control and relies in that sentence on the fact that Building Control have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation. That is of course a reference to the email set out in paragraph 13 above. As I have already said, that email was dealing simply with whether the background ventilation provision after the sealing of certain trickle vents satisfied the ventilation requirements in the Building Regulations. In my judgement the straightforward reading of the sentence commencing with the word "however" is that the provision of the information from Building Control is such that it can properly be concluded that mechanical ventilation is not needed. The e-mail from "Building Control" [19/147; quoted at paragraph 13 above] refers to the provision of background ventilation. As already set out, the Building Regulations address ventilation, not noise in this respect.

63. Mr Lopez made much of the fact that the EHO is a scientific officer. He asserted that she is just as much an expert as Dr Cockcroft, the Claimant's acoustic expert, although there is no evidence as to the EHO's qualifications. In any event, whatever her qualifications, they do not protect her from the possibility of making a mistake, any more than the professional qualifications of Dr Cockcroft, or indeed the qualifications of any of the lawyers in this case, protect each or any of them from the possibility of making mistakes. Human beings all make mistakes. Mr Lopez repeatedly submitted that it was unreal to suggest that the EHO had not made her own independent assessment taking into account not just ventilation, but also noise impact. Miss Wigley suggested that the reason he kept relying on something being unreal, was precisely because he had no other point to put forward.

64. The court is plainly not constrained to assume it is unreal that officers may not have carried out their functions properly. If that were the position, the jurisprudence as to the

need for reasons for decisions to be provided would be wholly otiose. Indeed, there would be no need for this court to have a reviewing function, as it would be obliged to assume that all officers had done what they were required to do, and had done it properly, whether or not they had signposted that fact in the relevant documents.

65. I accept Miss Wigley's submissions that nowhere in the EHO's report or the OR is there any indication that, having set aside the provision of mechanical ventilation as recommended as a minimum in the Apex Report, the EHO then made a separate assessment of her own as to the noise impacts in the light of the policy guidance as to the undesirability of managing noise by keeping windows closed. Of course, it is not an absolute requirement, but it is relevant policy which the Defendant is required to have regard to and to take into account. In those circumstances, the Defendant should have ensured either that appropriate mitigation measures were in place designed to avoid the SOAE level for internal noise at the Property or have taken the policy into account and balanced it against other considerations to justify any position which did not seek to avoid the SOAE level internally. I recognise this is not a reasons challenge, but the absence of any reasons or explanation designed to show why it is appropriate in this case (if indeed it is) to allow a scheme of glazing and background ventilation which does not avoid the SOAE level, particularly in the face of the Apex Report setting out minimum requirements to achieve that and which are being expressly rejected for the purposes of the Permission application, suggests to me that no such independent assessment was carried out. Alternatively, if it was carried out, in my judgment, it is not clear that it was taking the documents at face value, and recognising they are addressed to a knowledgeable readership, and must not be read in an over legalistic way. In my judgment, the Claimants challenge on Ground 3 is made out.

66. I have before me two Witness Statements from Natalie Snowball [28/198-204] and [29/205-209]. Both are addressed to issues arising under Grounds 4 and 5. Unsurprisingly, Natalie Snowball does not address the reasoning in relation to Ground 3 as she adopts the advice of the EHO. There is no Witness Statement from the EHO, Lindsey Wilson. I regard that as unsurprising. Any evidence which she might purport to give on this subject would, of necessity, involve plugging gaps given the findings which I have made.

67. By Section 31(2A) Senior Courts Act 1981 the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. I do not consider Section 31(2A) assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the PPG guidance been considered in the context of the need to avoid closing windows as a way of controlling noise, it might be the case that mechanical ventilation would have been required as recommended in the Apex Report. Equally, some other form of mitigation might have been proposed. These are matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment.

68. It follows that Ground 3 succeeds and the planning permission in this case must be quashed. Whilst that is sufficient to dispose of the proceedings, I should plainly also consider Grounds 4 and 5 in this judgment.

Ground 4

69. Ground 4 is the alleged failure to take into account the impact on the claimant of the fact that the minerals permission is due to be reviewed in 2025 and that, at that time, onerous conditions could be imposed on the claimant's operation as a result of the [grant of planning] permission. [3/28]

70. In relation to noise effects and existing businesses, the PPG states as follows

> "The potential effect of a new residential development being located close to an existing business that gives rise to noise should be carefully considered. This is because existing noise levels from the business even if intermittent (for example, a live music venue) may be regarded as unacceptable by the new residents and subject to enforcement action. To help avoid such instances, appropriate mitigation should be considered, including optimising the sound insulation provided by the new developments building envelope. In the case of an established business, the policy set out in the third bullet of paragraph 123 of the Framework should be followed." [33/227]

The third bullet of paragraph 123 of the NPPF is set out in paragraph 38 above.

71. There is no dispute in this case that the EHO properly recognised at the outset that she had to consider the potential impact on the quarry operations of a grant of planning permission for the Property. This is clear from her initial response of 23 May 2017 as set out in paragraph 10 above. The Claimant relies on the fact that the existing Minerals Permission requires that noise from the Claimant's mineral operations shall not exceed a noise limit of 55dB (A) for the two properties named in condition 17 [23/167]. As is clear from AP1, the two named properties are 1131m and 652m from the Asphalt Plant. The Property is only 64m from the Asphalt Plant. Miss Wigley submitted that the fact that such conditions were considered necessary to protect the residential amenity in relation to those two dwellings, indicates a strong likelihood that a similar condition would be considered necessary in relation to the Property, at which the effects on residents are likely to be more acute given how much closer it is to the Asphalt Plant. The Claimants rely upon the fact that the Apex Report demonstrates that if such a condition were imposed in relation to the Property, it would be immediately breached.

72. In his Witness Statements ([25/172] and [27/194]) Mark Kelly, the Claimant's Planning Manager, gives detailed evidence as to the likely impact on the Claimant's business of the imposition of such a planning condition. Mr Lopez correctly makes the point that none of that evidence was before the planning authority at the time the decision was made. The objections before the planning authority made clear in general terms that there was the potential for adverse effect on the Claimant's business if the quarry operations were restrained in the future, but without the level of detail given in Mr Kelly's Witness Statements. Those statements give details as to potential impacts on the viability of the operation, and as a result the possible loss of employment for local people, and possible loss of business rates income for the Defendant. Mr Lopez invites me to disregard that detailed evidence on the basis that none of it was before the Council at the time it made the decision. In my judgement that submission must be correct. I should approach this on the basis of the information that was before the Council at the

time it made its decision. What was before the Council, was the Claimant's concerns that its business might be restricted by planning conditions on the Minerals Permission in the future.

73. The Claimant's case is that the Council has failed to consider the risk that the Claimant's business could be the subject of unreasonable restrictions by reason of conditions imposed at ROMP as a result of changes in nearby land uses, namely the grant of a residential planning permission for the Property.

74. There is no dispute that North Yorkshire County Council (which is the minerals planning authority) confirmed that the grant of planning permission for residential use at the Property would not amount to a breach of the existing minerals permission. The following appears in the OR, (having been taken verbatim from the EHO's report at [21/151]):

> "Throughout this application I have been aware of the need to protect the existing quarry. I am also aware of the concerns of Cemex in this regard. I have therefore made enquiries with North Yorkshire County Council Mineral Planning with regards to the existing permissions for [the Quarry] and whether any noise limits would be applied to [the Property]. The reply from North Yorkshire County Council mineral planning advises that the conditions set out under the permission are the only conditions that they would refer to and enforce until such time that the permission may be subject to a review under the ROMP regulations or a variation, which at the present time is not applicable. They advised that the authority cannot impose new conditions which would consider any new development which may be nearer to [the Quarry] outside of these remits. The current planning permission names 2 properties were existing noise conditions apply. [The Property] is not one of those named" [14/95]

75. The Claimant's case is that neither the EHO nor the planning officer have considered the potential for the noise conditions to be expanded to include the Property on a review of the ROMP conditions, and that the risk of that happening and its consequences were not evaluated, assessed or taken into account by the Defendant.

76. The first point which Mr Lopez took in reply to this Ground was a highly technical point and one which I consider lacks merit. He referred me to the Order granting permission on this Ground, where John Howell QC sitting as a Deputy High Court Judge acknowledged that the planning officers considered the effect of the grant of planning permission on the Claimant's business pending the review of the Claimant's planning permission. Mr Lopez submitted that it follows from that that the Council has acted properly in relation to this issue in respect of the period between now and the ROMP review in 2025. He submitted that it would be open to the Defendant Council to issue a Noise Abatement Notice at any time between now and 2025, and that such a notice would address the same species of noise as would be addressed at a ROMP review. In the light of the permission order, Mr Lopez pointed out that the claimant could not argue that it would be wrong for the Council to issue an Abatement Notice at any stage during that period. He submitted that there was no qualitative difference

between an assessment of an actionable noise subject to an Abatement Notice, and the tasks to be undertaken in relation to noise on a ROMP review. Since the result of an Abatement Notice might be to require the quarrying activity to be restricted in some way in order to bring about a satisfactory noise scenario, and given that this could be done legitimately prior to the ROMP review, Mr Lopez submitted there is no qualitative distinction between that which the Claimant cannot challenge (i.e. a Noise Abatement Notice), and that which the Claimant seeks to challenge (the impact of the ROMP review).

77. Whilst I accept that the scope of an Abatement Notice would target the same noise complaint that might be of concern at ROMP, I do not accept that the two procedures necessarily produce the same result. By way of example, if the Defendant received a noise complaint, it would be entitled to consider, amongst other things, whether the issues could be properly addressed by requiring occupants of the Property to keep certain windows closed. A ROMP review is directed solely to the Claimant's operations, and not the actions of the occupants of any noise sensitive receptor. In any event, the issue here is whether the Council failed to have regard to the possible effects on the Claimant's business of a ROMP review occurring after the grant of the Permission in this case.

78. Mr Lopez' next point is that this is a wholly speculative complaint. He referred me to AP2 which shows the locations of a further four dwellings which have received planning consent since the Mineral Permission granted to the Claimant in this case. Notwithstanding those four dwellings, he pointed to the fact that the Minerals Planning Authority (the "MPA") has not caused a review to take place notwithstanding the erection of those further dwellings. He relied on the letter of North Yorkshire County Council dated 24 February 2016 which postpones the ROMP review until 3 April 2025 [25/171]. He submitted, therefore, that the indications are that the Quarry is not an issue in noise terms. On the contrary, he suggests this is good news, reflecting the way the Quarry is operating with regards to all those dwellings. Whilst Mr Lopez accepted that he cannot say that the MPA would not impose a condition, he submitted that the Claimant cannot say that the MPA would impose condition in the light of the above, and that the Claimant's Ground is purely speculative. He pointed out it is not for the EHO or the planning officer to crystal ball gaze or constrain the ROMP review. He submitted, therefore, that there was nothing more that the EHO or planning officer could do other than have regard to the fact that the powers are available to the MPA at the ROMP review.

79. In response to these points, Miss Wigley pointed out that the postponement of the ROMP review to 2025 is no indication that the MPA is content with the impact of noise in relation to the further dwellings which have been built since the Minerals Permission was granted in April 2000. AP2 was produced by the Defendant on the second day of the hearing, and whilst Miss Wigley has not objected to it, she pointed to the fact that the Claimant has had no opportunity to check the circumstances of the planning applications in respect of the four dwellings in question. She also pointed to the fact that they are all much further away from the Asphalt Plant than the Property is.

80. More significantly, she drew my attention to the statutory provisions which have resulted in the postponement of the ROMP review until April 2025. It is clear from the letter from North Yorkshire County Council, that the Claimant had requested a postponement of the periodic review of their mineral permission until 03/04/2025. It is

equally clear that the planning authority had not responded to that within three months from the date of the receipt of the request. The letter therefore confirms that in accordance with Schedules 13 and 14 of the Environment Act 1995 the request for postponement is approved. I have the relevant provisions at AB3. By paragraph 7(1) of Schedule 13 Environment Act 1995, a company such as the Claimant may apply to the Mineral Planning Authority for the postponement of the date specified for a first review. By paragraph 7(10), where the Mineral Planning Authority has not given notice of a decision on such an application within a period of three months, the Authority shall be treated as having (i) agreed to the specified date being postponed and (ii) having determined that date should be substituted as the date for the next review. Miss Wigley made the point that the postponement of the ROMP review was therefore automatic as a result of the failure of North Yorkshire County Council to respond to the Claimant's request for it to be postponed, and does not represent any substantive consideration of the merits of the position, and the noise environment in particular. She submitted that the fact that there are other properties which have been built in the vicinity has no relevance as North Yorkshire County Council has clearly not undertaken any substantive consideration in relation to the Minerals Permission since the relevant dwellings were erected or converted.

81. Miss Wigley submitted that it is not mere speculation to look at the existing Condition 17 in the Minerals Permission, and to recognise that the concerns which led to the imposition of that condition are likely to feed into a similar condition in relation to the Property. She submitted it is not outlandish speculation to consider that a similar condition would be imposed in relation to the Property which is very much closer to the Asphalt Plant than the two properties named in Condition 17. She submitted it is a clear indication of the MPA's stance and what the MPA considers necessary to protect the residential amenity near the Asphalt Plant. I accept that submission. In my judgment that is a possibility that could, and should, have been considered when considering this planning application, and the impact for Cemex under the third bullet point of Paragraph 123 of the NPPF.

82. Mr Lopez' next point related to a further document which was provided to me on the second day of the hearing. This is an elevation plan showing the elevations of the Property, with various windows shaded in yellow. This was referred to at the hearing as the yellow window plan. I shall refer to this as the "YWP", as shorthand for the yellow window plan. This was simply handed to me and there is no evidence as to its provenance. Miss Wigley accepted that the yellow highlighting on the YWP accurately indicates the windows which were required to have the trickle vents permanently closed as part of the planning permission. That is all she accepts in relation to the YWP. Mr Lopez told me that this was a document that Miss Snowball had in front of her when considering the issues in this case, but there is no evidence to support that.

83. Mr Lopez relied upon the YWP as showing that the blocked up trickle vents are all within the elevations fronting the Quarry. The property is set at an angle and both the north-west and south-west elevations front the Quarry. Within each of the habitable bedrooms, there are windows on other elevations away from the Quarry where the trickle vents are not blocked up. Mr Lopez submitted that there is no evidence that opening of windows in those elevations would cause an actionable noise event. He submitted, therefore, that the EHO was entitled to exercise her own planning judgement

and to conclude that there would be no noise issues on the elevations away from the Quarry, and that there is no merit in Ground 4.

84. Miss Wigley submitted that Mr Lopez had made an enormous leap from the Apex Report to the submission that because one window in each bedroom was not required to have the trickle vent removed, it meant that window could be opened without any unacceptable noise effects. In support of this she pointed to calculations in the Apex Report. In particular, she drew my attention to the fact that at Paragraph 8.21 in the section dealing with "calculated internal noise levels", the cumulative impact is considered through all windows to the room under assessment. In the table at Paragraph 8.24, the upper limit of internal noise levels in the first column is right up against the limit and is calculated quite clearly after mitigation levels including both the glazing and mechanical ventilation. The fact that those items are included is made clear in Paragraph 8.25. In those circumstances, Miss Wigley submitted that Mr Lopez cannot assert that it is fine to open the non-highlighted windows on the YWP without there being any unacceptable noise. I accept that submission.

85. Further, and in any event, Miss Wigley submitted that there is no evidence at all that any of this was considered at the time by the EHO. Miss Wigley made the points again about trickle vents being background ventilation and not as a substitute for purge ventilation, a submission I have already dealt with and accepted.

86. I accept the points made by Mr Lopez that there is no power or option for the EHO to second guess what the MPA would do. Mr Lopez suggested that when the MPA, North Yorkshire County Council, replied to the EHO indicating that there would be no breach of the current planning restrictions, there is nothing to suggest that the MPA was not also forward-looking about conditions it might impose. He pointed to the fact that North Yorkshire County Council did not object to the grant of planning permission in this case. It does not seem to me to be necessarily within the remit of Yorkshire County Council to object to the planning application. However, what clearly was within the remit of the EHO and the Defendant was to consider the third bullet point in NPPF paragraph 123, and to recognise that the Claimant should not have unreasonable restrictions put on them because of changes in nearby land uses since the business was established.

87. I recognise that there will be matters of planning judgement in considering what restrictions might be imposed in the future, and whether such restrictions might amount to unreasonable restrictions on the Claimant in the future. If it was clear from the documents that these matters had been considered, that would be one thing. However, in my judgment, whilst the documents do show that the EHO, and through her the planning officer, recognised that the quarry business needed protection, I am not satisfied that any consideration was given to the likely impact that the grant of planning permission for the Property might have on a ROMP review. Whilst in her Witness Statement Natalie Snowball asserts that all of these matters were considered, I am of the view that amounts to evidence seeking to plug the gaps in the decision-making process. I regard it as of no assistance to me.

88. Furthermore, Natalie Snowball's evidence is to the effect that the future position on a ROMP review was considered in the context of all the information before her including "… the adequacy of the proposed development in noise impacts and attenuation terms…" [28/199, paragraph 5]. Given the conclusions I have reached in relation to

Ground 3, and, in particular, the failure to have regard to the PPG relating to the reliance on keeping windows closed as a mitigation strategy, it follows, in my judgment, that failure would inevitably also feed through into the assessment which Natalie Snowball alleges she has undertaken. I recognise, as Mr Lopez repeatedly reminded me, that this is not a reasons challenge or an irrationality challenge. I equally appreciate that the comment I have made in this paragraph goes to the issue of reasons, but those being reasons which are provided ex post facto in the form of a Witness Statement. Had those reasons been provided in the OR, no doubt they would have been the subject of a challenge. As with Ground 3, there is no reasons challenge here precisely because the challenge is that nowhere in the OR is there any indication that the issues have been considered.

89. In my judgement Ground 4 is also made out. I am satisfied that the EHO set out to consider not only the current position as regards the Minerals Permission, but also to consider the future impact on the Quarry. However, based on the EHO reports and the OR, there is nothing to suggest that any consideration was in fact given as to whether a condition similar to Condition 17 of the Minerals Permission was likely to be imposed at ROMP, or that any consideration was given as to the risks such a condition would pose to the future operation of the Claimant's business, all matters which should have been considered as part of the consideration under paragraph 123 NPPF. I further note, in passing, that the EHO mentioned the 55dB being a limit in a fairly old permission and the absence of a tighter night time condition such as 42dB [38/440]. This formed no part of the Claimant's case before me and forms no part of my decision in this matter, but it appears nowhere in the consideration of these issues.

90. In relation to Ground 4, again I do not consider Section 31(2A) Senior Courts Act 1981 assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the likely future impact of a similar planning restriction to Condition 17 of the Minerals Permission been considered, it might be the case that this would have informed the adequacy of proposed noise mitigation measures. It could be the case that mechanical ventilation might have been required as recommended in the Apex Report, or even that mitigation going to the physical building and/or it's layout might have been considered. It is even possible that the conclusion might have been reached that the grant of planning permission would not be appropriate. These are all matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment of my own.

Ground 5

91. Ground 5 is the alleged irrational failure to take into account all relevant considerations when deciding not to include all the conditions recommended by the IP's own noise consultant.

92. The Claimant's case is that the conditions imposed in the Permission should have included conditions to ensure that the standard of glazing for the future was maintained and that those windows where the trickle vents were to be blocked up, could not have trickle vents reintroduced. The Claimant's case is that having required these factors to be included as noise mitigating measures, it is irrational not to include conditions in the Permission to ensure the mitigation measures are retained in place for the future.

Ground 5 is drafted to include an irrationality challenge for the failure to include mechanical ventilation as a condition, but it seems to me that more properly forms part of Ground 3. This Ground is really based on the premise that even if the Permission was unobjectionable on the application of PPG, nevertheless there is still a challenge based on the failure to incorporate appropriate conditions. The oral submissions were based on the failure to include conditions relating to glazing and the retention of the blocked trickle vents.

93. Miss Wigley submitted that there was no consideration by the Council as to the retention of the specified glazing properties for the windows, nothing to keep the removal of the trickle vents in the yellow highlighted windows in place, and nothing to prevent the introduction of new trickle vents. She submitted that the EHO's report and the OR are silent on these matters, showing that there has been no consideration as to how to secure that these requirements stay in place. She submitted that looking at the documents there is a clear lacuna in failing to ensure that the mitigation measures endure.

94. The Defendant seeks to rely on Condition 3 of the Permission which abrogates the usual permitted development rights, and requires what would otherwise be permitted development to be the subject of a formal application for planning permission. The reason given for that Condition is that it is in the interests of the appearance of the proposed development and to reserve the rights of the local planning authority with regard to those matters [11/80]]. Natalie Snowball deals with this in her Second Witness Statement where she asserts that any work involving the replacement of the existing windows or glazing, the introduction of new opening trickle vents, the removal of blocked up trickle vents, or the insertion of new windows not incorporating necessary noise mitigation measures required under condition 4 would require there to be a full planning application by reason of Condition 3 of the Permission. She expresses her opinion that any such works would materially affect the external appearance of the building, and so would amount to development. She asserts that the question of whether proposed works would materially affect the external appearance of the building is a question of planning judgement [29/206; paragraphs 6-12]. In reliance on that, Mr Lopez submitted that Ground 5 is wholly misconceived and must fail.

95. In response to this Miss Wigley submitted that a change of the windows would not amount to development. She submitted that I should disregard the evidence of Natalie Snowball on these issues for the following reasons. Firstly, she submitted that this is ex post facto rationalisation which should not be permitted. Secondly, she relied upon the fact that the reasons now suggested are different from the stated reason on the planning decision notice which relates to the appearance of the building and has nothing to do with noise mitigation measures. She further pointed to the fact that whilst in her first Witness Statement Natalie Snowball does rely on Condition 3 of the Permission, nowhere in that statement does she explain how she considers replacement windows would be development in any event. Miss Wigley submitted that Miss Snowball's thought processes were eked out over the course of the Witness Statements and are inherently unreliable. None of these reasons is given in the reports and she invited me to disregard them.

96. In response to this Mr Lopez submitted that these are quintessentially matters of planning judgement. He also pointed to Miss Snowball's evidence that the trickle vents had been permanently blocked and cannot be reopened. He denied that Condition 3 was

limited solely to the appearance of the building, pointing to the second part of Condition 3 which refers to the reservation of the relevant rights to the local planning authority with regard to the permitted development matters. I accept that submission in relation to the reasons given for the condition. He submitted that if I accept that submission, there is no reason to attach less weight to the evidence of Miss Snowball on this matter.

97. It is right that I should record that I mentioned that I was aware, from sitting on other cases, that not all planning officers necessarily regard a change of windows as amounting to development. I therefore suggested that a future planning officer might not take the same view as Miss Snowball as to whether windows amounted to development and whether Condition 3 applied. In response to that Mr Lopez pointed out that any planning decision taker imposing a condition cannot unduly or improperly bind the authority or other planning officers moving forwards. The planning decision taker must simply exercise his or her own planning judgement. Mr Lopez submitted that any concern I might have that a future person might reach a different view is irrelevant. It is a matter for the planning judgement of the relevant officer at the relevant time. It seems to me that must be correct. He further submitted that for this challenge to succeed, the Claimant would have to say that the planning officer's judgement in this case that a change to the windows would amount to development is irrational. He pointed to the fact that there is no evidence put forward on behalf of the Claimant to suggest that such a conclusion is irrational.

98. Whilst accepting that she has no evidence on that point, Miss Wigley did not accept that it was necessary. She submitted that it was plainly irrational for Miss Snowball to assert that any works to replace windows, for example simply with different glazing, or simply with a different slot vents, would always materially affect the external appearance of the building. She submitted that is irrational, and that Miss Snowball's evidence on this is simply not credible. She submitted that this simply was not considered at the time of the grant of the Permission and there no decision at all was taken which was designed to retain the mitigation measures for the future. She submitted it is not acceptable to rely on the convoluted evidence of Miss Snowball in seeking to plug the gaps, particularly where such a serious issue of noise exists.

99. In response to questions from me as to whether, rather than this being an issue of planning judgement, it was a matter of law as to the construction of Section 55 Town & Country Planning Act 1990 which defines development, Miss Wigley reminded me that if a future occupier wanted to assert that a change of windows would be lawful development, the procedure would be for the occupier to make an application for a Certificate of Proposed Lawfulness on the local planning authority. It would then be for the local planning authority to decide whether that amounted to lawful development, and any appeal against their decision would lie to a Planning Inspector.

100. Having considered the submissions, I do not consider I could properly conclude that Condition 3 is not capable of covering any future work in relation to the windows given that there is plainly a matter of planning judgement to be made as to whether or not any works proposed amount to lawful development. I recognise that Miss Snowball's evidence is once again ex post facto rationalisation. However, even if the need to keep the mitigation measures for the future was not addressed by the decision-makers, if there is a route by which they can properly address those issues in the future, then the fact they failed to consider them would make no difference.

101. I have come to the conclusion that Ground 5 is made out in that there is nothing on the face of the documents to suggest that any consideration was given to the retention of those noise mitigation measures which the EHO and the planning officer thought were necessary and sufficient in this case. I do consider that the evidence of Natalie Snowball is evidence attempting to plug the gaps in this case. However, in relation to this Ground, I would not grant relief on the basis that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. I consider that the fact that there are matters of planning judgement involved in the application of Condition 3 of the Permission means that Condition 3 can be used as a method to secure the retention of mitigation measures in the future. Indeed, it allows for a degree of flexibility in the future and for the imposition in future applications of measures which might not be available now, but which become available with advancements in technology, development materials and the like.

102. In summary, I reject Grounds 1 and 2. I accept Grounds 3, 4 and 5 are proved. I decline to give any relief on Ground 5 on the basis that Section 31 (2A) Senior Courts Act 1981 applies in relation to that Ground. However, I also find that Section 31 (2A) has no application when considering Grounds 3 and 4. It follows that the planning permission in this case must be quashed.

Neutral Citation Number: [2016] EWCA Civ 1265

Case No: C1/2015/0448

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR C.M.G. OCKELTON (sitting as a Deputy High Court Judge)
CO/4776/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2016

Before:

Lord Justice Tomlinson
and
Lord Justice Lindblom

Between:

Crystal Property (London) Ltd. — **Appellant**

and

(1) Secretary of State for Communities and Local Government
(2) London Borough of Hackney Council — **Respondents**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Christopher Jacobs (instructed by **Direct Access**) for the **Appellant**
Mr Richard Kimblin Q.C. (instructed by **the Government Legal Department**) for the **Respondents**

Hearing date: 12 October 2016

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this appeal we must consider whether an inspector, when determining an appeal under section 78 of the Town and Country Planning Act 1990, went wrong in his approach to the application for outline planning permission before him.

2. The appellant, Crystal Property (London) Ltd., appeals against the order dated 15 January 2015 of Mr C.M.G. Ockelton, sitting as a deputy judge of the High Court, by which he dismissed its application under section 288 of the 1990 Act challenging the decision of the inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to dismiss its appeal against the refusal by the second respondent, the London Borough of Hackney Council, to grant outline planning permission for a mixed use development of shops and offices on a site known as Morris House, adjoining 130 Kingsland High Street, London E8. The inspector's decision letter is dated 3 September 2014. At an oral hearing on 13 April 2016 I granted permission to appeal on only one of the six grounds of appeal in the appellant's notice, namely ground 6.

The issue in the appeal

3. The essential part of ground 6 can be extracted from paragraph 53 of the skeleton argument dated 21 March 2015 of Mr Christopher Jacobs, counsel for Crystal Property in this appeal. Mr Jacobs did not appear in the court below, where Crystal Property was represented by its agent, Mr Eric Walton. The issue is whether the inspector erred in the approach he took to the application for outline planning permission before him, neglecting the fact that all matters, including "scale", and thus the height and massing of the proposed building, were reserved for future consideration. Paragraph 53 of Mr Jacobs' skeleton argument states:

> "The Deputy Judge erred in holding that … the Inspector was correct in considering that he was being asked on this occasion to consider the height and massing according to the plan submitted. The planning application was an outline application with all matters reserved … . The Appellant was simply seeking to establish consent for a part 4[,] part 5 storey building as is clearly stated on page 1 of the form. The requirements set out by the Council include the provision of indicative drawings. The Appellant [simply] submitted the same drawings as had been used in the 1990 and 2003 applications and the Deputy Judge erred in effect in holding that had the Inspector allowed the appeal, the Appellant would have established planning consent for a building as depicted in the drawings. This is simply not the case[. Had] the Inspector allowed the appeal then the Appellant would have achieved an outline consent for a part 4[,] part 5 storey building with all matters including height, massing and elevations reserved."

Outline planning permission

4. Under the statutory scheme an outline planning permission may be sought for the erection of a building, with all matters reserved for later consideration. Section 62 of the 1990 Act, "Applications for planning permission", provides:

> "(1) A development order may make provision as to applications for planning permission made to a local planning authority.
> (2) Provision referred to in subsection (1) includes provision as to –
> (a) the form and manner in which the application must be made;
> (b) particulars of such matters as are to be included in the application;
> (c) documents or other materials as are to accompany the application.
> …
> (3) The local planning authority may require that an application for planning permission must include –
> (a) such particulars as they think necessary;
> (b) such evidence in support of anything in or relating to the application as they think necessary.
> …
> (5) A development order must require that an application for planning permission of such description as is specified in the order must be accompanied by such of the following as is so specified –
> (a) a statement about the design principles and concepts that have been applied to the development;
> (b) a statement about how issues relating to access to the development have been dealt with.
> … ."

Section 92, "Outline planning permission", provides in subsection (1) that "[in] this section and section 91 "outline planning permission" means planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority … or the Secretary of State of matters not particularised in the application ("reserved matters")".

5. Outline planning permission was introduced under the Town and Country Planning General Development Order and Development Charge Applications Regulations 1950 (S.I. 1950/729) ("the 1950 GDO"). An application for outline planning permission enables a local planning authority to decide whether, in principle, a particular form of development on a site is acceptable or not. The concept was explained very clearly in the Ministry of Town and Country Planning's Circular 87, which accompanied the 1950 GDO:

> "Since consideration at the approval stages is limited by the terms of the initial permission, it is essential that that permission should not take the form of a blank cheque, and, correspondingly, the authority must be furnished with sufficient information to enable them to form a proper judgment of what is proposed; there can be no question of entertaining propositions which are still in embryo. The application should indicate the character and approximate size of the building to be erected, and the use to which it is to be put (e.g., 'a three-bedroomed house', a

'two-storied factory for light industrial purposes with an aggregate floor-space of 30/35,000 square feet')."

6. When Crystal Property's application for planning permission was submitted to the council in September 2013, and at the time of the inspector's decision in September 2014, the arrangements for applications for outline planning permission were provided in the Town and Country Planning (Development Management Procedure) (England) Order 2010 (S.I. 2010/2184), as amended ("the Development Management Procedure Order"). The Development Management Procedure Order was replaced by the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015/595), with effect from 15 April 2015.

7. Article 2, "Interpretation", of the Development Management Procedure Order provided:

> "…
> "outline planning permission" means a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters;
> …
> "reserved matters" in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application –
> (a) access;
> (b) appearance;
> (c) landscaping;
> (d) layout; and
> (e) scale;
> "scale" means the height, width and length of each building proposed within the development in relation to its surroundings;
> … ."

Article 4, "Applications for outline planning permission", provided, in paragraph (1), that "[where] an application is made to a local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for [its] subsequent approval", and, in paragraph (2), that where the authority is "of the opinion that … the application ought not to be considered separately from all or any of the reserved matters", it is to "notify the applicant … , specifying the further details [it requires]". Article 5 provided the requirements for an "application for approval of reserved matters". Article 8 provided for the content of design and access statements, including, in paragraph (3)(a), the requirement that a design and access statement must "explain the design principles and concepts …".

8. Government guidance on "Outline planning applications" in paragraph 14-034-20140306 of the Planning Practice Guidance, under the heading "What details need to be submitted with an outline planning application?" (replacing the guidance given in Circular 01/2006 – "Guidance on changes to the development control system"), says that "[information] about the proposed *use* or uses, and the *amount* of development proposed for each use, is necessary to allow consideration of an application for outline planning permission". Paragraph 14-035-20140306, under the heading "Can details of reserved matters be

submitted with an outline application?" (reproducing advice to the same effect in paragraph 44 of the Annex to Circular 11/95 – "Use of conditions in planning permission"), confirms that an applicant can choose to submit details of any of the "reserved matters" as part of an outline application, but unless he has "indicated that those details are submitted "for illustrative purposes only" (or has otherwise indicated that they are not formally part of the application), the local planning authority must treat them as part of the development in respect of which the application is being made; the local planning authority cannot reserve that matter by condition for subsequent approval".

9. There is ample authority for the principle that where matters have been reserved for subsequent approval the reserved matters application must be within the scope of the outline planning permission (see, for example, the judgment of Willis J. in *Lewis Thirkwell v Secretary of State for the Environment* [1978] J.P.L. 844 and the decision of the Court of Appeal in *Slough Borough Council v Secretary of State for the Environment* (1995) 70 P. & C.R. 560).

10. At the time relevant in *Slough Borough Council* the statutory definition of "reserved matters" (in article 1(2) of the Town and Country Planning General Development Order 1988 ("the 1988 GDO")) included "siting", "design" and "external appearance", but not "scale". In that case the outline planning permission granted by the local planning authority did not incorporate the application for planning permission, and did not refer to the floor area of the development, which was specified in the application. Stuart-Smith L.J., with whom Morritt and Ward L.JJ. agreed, said (at p.567) that it was "possible when the detailed application is considered that the size of the development can properly be reduced, having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping".

11. In *R. v Newbury District Council, ex parte Chieveley Parish Council* [1997] J.P.L. 1137 the application and drawings had been incorporated into the outline planning permission. In the application form it had been indicated that both "siting" and "means of access" were to be considered "as part of this application". The total proposed floorspace in Class D2 use was stated (5,644 square metres). One of the conditions imposed on the permission – condition 1 – required "[full] details of the siting[,] design and external appearance of the building(s), … (the 'reserved matters')" to be submitted to the local planning authority within three years. The condition said it was to "apply notwithstanding any indications as to the reserved matters which have been given in the submitted application" (p.1149). One of the issues for the court was whether the indication of floorspace given in the application should be treated as fixed by the permission, or as remaining open for consideration as part of the reserved matters. Carnwath J., as he then was, acknowledged that the "size and scale of development – whether in terms of floor area, height or even number of buildings – are not as such defined as "reserved matters"" (p.1151). But he concluded that "[the] indication of floorspace given in the application was … an "indication as to reserved matters" within the meaning of [condition 1]", and that "the condition operated to reserve, as matters for subsequent approval, all aspects of design, including size and floorspace" (p.1152). He endorsed as "correct in law, and appropriate in practice" the Government's advice in paragraph 44 of the Annex to Circular 11/95 (p.1153). The floorspace indicated in the application was, he said, "an aspect of siting or design; it was clearly particularised in the application; accordingly it could not (without amendment) be reserved by condition for

the detailed stage". He concluded that condition 1 was "unlawful, in purporting to reserve for subsequent approval matters of which details had been given in the application" (p.1154). The Court of Appeal (Hobhouse, Pill and Judge L.JJ.) agreed with that conclusion. But Pill L.J. observed (at p.60) that, in his view, gross floorspace could not be brought within the concepts of "siting" and "design" as reserved matters under the 1988 GDO. He went on to say:

> "… If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith L.J. as having said more than that in [*Slough Borough Council*] when he said that "it is possible when [the] detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping." … I consider wrong [the] conclusion that … floor space is still to be determined. Floor space could not be treated as a reserved matter."

12. In *R. (on the application of Saunders) v Tendring District Council* [2003] EWHC 2977 (Admin) Sullivan J., as he then was, distinguished the case of an outline planning permission that specified the floorspace of the development from one that did not. He said (in paragraph 57 of his judgment):

> "There is an important distinction between [*ex parte Chieveley*] and the present case. In [*ex parte Chieveley*] the outline planning permission specified the permitted gross floor space. In those circumstances it is not surprising that the Court of Appeal concluded that the permitted floor space could not be cut down by means of a condition reserving design details for subsequent approval. The details to be approved would have to be details of a building of the permitted size. The present case would be analogous with [*ex parte Chieveley*] if the 1993, 1998 and 2002 outline planning permissions had specified the number of dwellings permitted on the site. They did not. No upper or lower limit was specified. In those circumstances, it was open to the local planning authority to control the number of dwellings to be erected on the site by controlling not merely their design, but also their siting, and indeed the amount of landscaping to be provided on the site. …".

13. The concept of "scale" as a reserved matter under article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995, as amended, was considered by Simon J., as he then was, in *MMF (UK) Ltd. v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin). Simon J. observed (in paragraph 11 of his judgment) that "at the most simple analysis, if one considers a building as a simple three-dimensional shape, a box, the size of the box, and importantly its relationship with other buildings, is a question of Scale".

The planning history of the appeal site

14. The site has a long planning history. In August 1990 the council granted outline planning permission for a five and six-storey building for retail and office use. Design and external appearance were reserved matters. That permission was never implemented. In June 2003 the council's Planning Committee resolved to grant outline planning permission for a building of six storeys, with Class A1 use on the ground floor and 41 flats above, subject to a section 106 agreement. All matters except siting and access were to be reserved for future approval. The section 106 agreement never came into existence, and the planning permission was not granted. In April 2012 the council refused an application for outline planning permission, with all matters reserved, for a six-storey building, with retail use on the ground floor, offices on four of the five floors above the ground floor, and apartments on the fifth. An appeal against that decision was dismissed by an inspector on 26 November 2012. Because the application was in outline with all matters reserved for future consideration, that inspector said he had considered the drawings submitted with it "on the basis that they are illustrative and show a possible, rather than a definitive, layout and design" (paragraph 1 of the decision letter). When considering the effect the development would have on the character and appearance of the surrounding area and the setting of the grade II listed Rio Cinema, he said (in paragraph 8):

> "The appearance and scale of the proposal are reserved matters but the application specifically refers to a six storey building. It would occupy the corner plot with the apartments at the highest level set back slightly and not covering the full footprint at that level. This set back would prevent views of the top floor from close to the site, although it would be visible in longer views along the Street. It is the height of the respective buildings that is important rather than the number of storeys. The proposal would be a similar height to the listed Cinema. However, even in views where the apartments at fifth floor could not be seen, the illustrative drawings indicate that the proposed building would appear significantly higher, some 2.1-2.5 metres, than its neighbours to the north and south, although the latter would be separated from the proposed building by the width of Sandringham Road. This would be at odds with the 4 storey building with a 5 storey feature at the corner anticipated by AAP Policy DTC-CA 01[A]."

15. The Dalston Area Action Plan was adopted by the council in January 2013. Policy DTC-CA 01, "KINGSLAND HIGH STREET CHARACTER AREA SITE-SPECIFIC POLICIES", states:

> "1) Each opportunity site within the Kingsland High Street Character Area is to be developed in a co-ordinated way and to a high design standard, ensuring a mix of suitable and complementary uses. The following site-specific planning policies are to be adhered to:
>
> a) SITE A: 130 KINGSLAND HIGH STREET AND SITE TO THE REAR 130A KINGSLAND ROAD (SITE AREA 1920 SQ.M./0.192 HECTARE)
>
> Site redevelopment for a 4 storey building to include retail, employment and residential with the potential for a key, high quality architectural feature at the corner of Sandringham Road and Kingsland High Street (up to 5 storeys) to complement the Rio Cinema diagonally opposite.

… ."

Crystal Property's application for outline planning permission

16. The application for outline planning permission with which these proceedings are concerned was submitted to the council on 3 September 2013. The application form was the form for an "Application for Outline Planning Permission with all matters reserved …". It was completed by Mr Walton. In part 3, "Description of the Proposal", the proposed development was described in this way:

> "Erection of a part 4 and part 5 storey building providing retail space on the ground floor, office space on the upper floors, car parking, cycle storage and waste storage in the basement".

Part 10, "All Types of Development: Non-residential Floorspace", asked the question "Does your proposal involve the loss, gain or change of use of non-residential floorspace?". Three answers were available: "Yes", "No" and "Unknown". The "Yes" box was ticked. The "[existing] gross internal floorspace …" in Class A1 use ("Shops") was stated to be 493.5 square metres, and the "[total] gross internal floorspace proposed …" 694.4 square metres, so that the "[net] additional gross internal floorspace following development …" was 200.9 square metres. As for Class B1(a) use ("Office (other than A2)"), the"[total] gross internal floorspace proposed …" was stated to be 2,323.2 square metres. The "[net] additional gross internal floorspace following development …" in that use was therefore 2,323.2 square metres, there being no office floorspace on the site at present. Thus the total "gross internal floorspace proposed …" was 3,017.6 square metres, and the total "[net] additional gross internal floorspace following development …" 2,523.2 square metres. In part 16, "Planning Application Requirements – Checklist", which warns that the application "will not be considered valid until all information required by the Local Planning Authority has been submitted", a tick was put in the box for "[the] original and 3 copies of other plans and drawings or information necessary to describe the subject of the application". Three drawings were submitted, for illustrative purposes. Two showed the elevations of the proposed building to Kingsland High Street and Sandringham Road, the third a view of the building in perspective and an axonometric image providing "site data".

17. In the council's decision notice refusing outline planning permission, dated 2 December 2013, the "Particulars of the Application" gave the number of the application and its date, and stated that the "Application Type" was "Outline Planning Application". The "Proposal" was described in this way:

> "Erection of a part 4-storey, part 5-storey building providing retail use on ground floor and offices on upper floors, with associated car parking, cycle parking and waste storage. (Outline planning application with all matters reserved)."

Two "Plan Numbers" were given: "1018 and 1019". These were the illustrative drawings showing the Kingsland High Street and Sandringham Road elevations of the proposed building. The reason for refusal, reflecting the officer's assessment of the proposal, was this:

"1. The proposed development, by reason of its excessive height and massing on this prominent corner junction, would result in a development that would relate poorly to the existing development on Kingsland High Street and Sandringham Road to the detriment of the streetscene and would unduly compromise and compete with the setting of the Grade 2 listed Rio Cinema opposite. The proposal is therefore contrary to Hackney Core Strategy 2010 policy 24 (Design) and 25 (Historic Environment), the Dalston Area Action Plan 2013, London Plan 2011 policies 7.4 (Local Character), 7.6 (Architecture) and 7.8 (Heritage assets and archaeology), and paragraphs 17, 64 and 133 of the National Planning Policy Framework ["NPPF"]."

The section 78 appeal

18. Crystal Property appealed against the council's decision on 11 December 2013. The appeal was determined on the parties' written representations. The lengthy "Grounds of Appeal" submitted to the Planning Inspectorate on behalf of Crystal Property confirmed, in paragraph 5, that the application on appeal was "an outline planning application with all matters reserved". Paragraph 12 stated:

> "12.The current application, the subject of this appeal, is for a part 4, part 5 storey building providing 694 square metres of retail space on the ground floor, 2,475 square metres of office accommodation on the upper floors and a basement car park providing 21 car parking spaces including 6 disabled spaces, 25 cycle storage spaces and a large waste storage area. … ."

In paragraph 20 it was stressed that "the indicative design of the proposed development is the same as that of the building which was approved in 1990 …". In a section headed "Conservation and Urban Design" paragraph 39 said this:

> "39. The application is outline with all matters reserved and the drawings submitted are only an indicative design. This is an important consideration as matters of detailed design remain for determination, and accordingly the Appellant need only demonstrate that a building of this general form would be acceptable on the site, subject to detailed design. The appellant is simply trying to establish the parameters of a building which is deemed acceptable for this site, especially as the LPA's officers and the Appellant and its counsel disagree with the interpretation of policy DTC-CA-01 … ."

Paragraph 42 stated:

> "42. The indicative design submitted, apart from a slight change to the corner element, is almost exactly the same as that submitted in application TP/99497/D/DCK which was granted in August 1990. At (P19) there is a copy of the 1990 design and at (P20-21) a copy of the current design, the pitched roof is steeper in the 1990 version making it slightly taller than the current proposal. The height of the 3rd floor windows in relation to the parapet of the adjoining building on both (P19-20) make comparison of the respective heights easy to judge. … There has been no change in the built environment of KHS, apart from the

> demolition of the buildings on sites D1 and D2, since the 1990 consent was granted. The Appellant therefore submits that the application should be treated in the same way and considered in keeping with the character of the area, given that the only change to the area has been the development of various sites with taller buildings."

In the following passages of the "Grounds of Appeal" there were numerous references to "the proposed building" – the building shown in the illustrative drawings submitted with the application for outline planning permission – in comparison with developments approved by the council on adjacent sites, including, in particular, sites known as C1, C2, D1 and D2. For example, in paragraph 45, it was pointed out that "[the] floor to ceiling heights in the proposed building … mirror those of the adjoining building", and that "[the] proposed buildings on D1, D2 and C2 have the same floor to ceiling heights as the adjoining buildings and as that of the proposed building on the appeal site".

The inspector's decision letter

19. At the beginning of his decision letter, the inspector noted that the appeal had been made "against a refusal to grant outline planning permission", and that "[the] development proposed is erection of a part 4 and part 5 storey building providing retail space on the ground floor, office space on the upper floors, car parking, cycle storage and waste storage in the basement". Under the heading "Preliminary Matters", he said (in paragraph 2):

> "The application is for outline permission with all matters reserved for subsequent approval. However, plans accompanying the application indicate the built form reflecting the description of development, although this is a possible rather than definitive layout and design. As the Council had regard to these indicative plans in determining the application, I have dealt with the appeal on the same basis."

20. The "main issue" in the appeal was, said the inspector, "the effect on the character and appearance of the surrounding area, and related to this, the effect on the setting of the nearby Rio Cinema, a Grade II listed building" (paragraph 5).

21. His attention had been drawn to "a recent appeal decision involving an outline application for erection of a six storey building on the appeal site". And, he said, given the relevance of that decision to the appeal before him, he had had regard to it (paragraph 7). This was the appeal decision of 26 November 2012.

22. The inspector referred (in paragraphs 8 to 12) to relevant policies in the Dalston Area Action Plan. In Policy DTC 04 the maximum building height for the appeal site, and others, was said to be "4 to 6 storeys". The front of the site was "also identified as a character sensitive area influencing building height" (paragraph 9). Policy DTC-CA 01, as he said, "requires site redevelopment for a 4 storey building with the potential for a key, high quality architectural feature at the corner of Sandringham Road and Kingsland High Street (up to 5 storeys) to complement the Rio Cinema diagonally opposite" (paragraph 10). He went on (in paragraph 11) to say this:

"11. … While the detailed design of the building is yet to be determined, to the extent that the proposal is for a 4 and 5 storey building I accept also that it reflects the numerical requirements of Policy DTC-CA 01. I note, however, that the appellant is seeking to establish the parameters of a building that would be considered acceptable on the appeal site. To my mind this reinforces the importance of the Inspector's comment in the previous appeal that it is the height of the respective buildings that is important rather than the number of storeys (paragraph 8)."

Policy DTC-CA 01 was, in the inspector's view, consistent with the NPPF, "particularly section 7 concerning good design". He gave it and the other relevant policies of the area action plan "considerable weight in this case" (paragraph 12).

23. The inspector discussed the merits of the development shown in the illustrative drawings (in paragraphs 13 to 16):

"13. To the immediate south of the appeal site is a four storey terrace, while the adjoining terrace to the north is three storeys high. The tallest building in the immediate vicinity is the Rio Cinema. The indicative drawings show a four storey building (excluding the basement) extending across the full site frontages on both the High Street and Sandringham Road. Above this, a fifth storey and pitched roof form covers the majority of the footprint, with insets adjacent to the northern and eastern boundaries.

14. A comparison of the current proposal with that in the previous appeal shows buildings of broadly similar height. This is despite the additional storey in the previous case and results from the larger storeys and roof form in the current proposal. I accept that the floor to ceiling heights appear to be similar to those of neighbouring buildings. However, it is the fact that the fifth storey and roof form covers much of the building's footprint that defines the overall height of the building and adds to the perception of a building of greater bulk and mass. The resulting effects would be a building that would dominate rather than complement this part of the street scene at the northern end of the town centre. The height, bulk and mass of the building would be particularly prominent in views from the south on the High Street due to the differences in ground levels.

15. Approaching from the north and the south along the High Street, the proposed building and the Rio Cinema would be the tallest buildings in the immediate street scene. However, the presence and height of the appeal proposal would detract from the appearance of the listed cinema as it would compete with and visually dominate this existing building. This would in large part be due to the extent of the fifth storey and roof form across much [of] the building, which in my view would not readily conform to the requirements of Policy DTC-CA 01 for a key architectural *feature* of up to 5 storeys on the corner of the two roads.

16. The appellant contends that views of the cinema, specifically the auditorium, are limited in relationship to the appeal site and proposed building. However, the cinema as a whole is a designated heritage asset and, as such and due to its

physical prominence, is recognised as a landmark building in the AAP. Furthermore, its relationship with the development of the appeal site is specifically defined in Policy DTC-CA 01 and my findings above are that there would be a clear visual relationship between the two buildings in views from the High Street. For these reasons, I give the appellant's contentions on these matters little weight."

24. The inspector then turned (in paragraphs 17 and 18) to consider recent grants of planning permission on other "Opportunity Sites". He observed that "[in] the case of the appeal site the more general policy provisions in the AAP are refined into specific requirements having particular regard to the unique relationship with a nearby landmark [listed] building, which is referred to in the policy", and that "[in] this respect, the permitted development on other sites cannot be seen as a direct precedent for development of the appeal site" (paragraph 17). The fact that these recent planning permissions had not been taken into account in the appeal decision of 26 November 2012 did "not invalidate that decision as a material consideration in this case". But he had reached his findings "on the merits of the proposal before [him] assessed against relevant national and local policies and other material considerations" (paragraph 18). As for the outline planning permission granted in 1990 and the council's decision to approve another scheme for the appeal site in 2003, he said (in paragraph 19):

> "19. Reference is also made to an outline approval in 1990 for an equally tall, if not taller, building on the appeal site … ; and a similar one, which was deemed acceptable but not formally permitted in 2003 … . The appellant contends that these are material to the current proposal, particularly as the development plan policies relied on at the time have effectively been carried forward into current plans. The AAP has, however, been adopted since those decisions and I am not aware that earlier plans included a site-specific policy akin to Policy DTC-CA 01, which now has the most significant bearing on the site's development. Moreover, the previous appeal and the Council's decision that led to it are more recent relevant decisions involving a proposal of broadly similar height to the current one, which were assessed against the provisions of the AAP. For these reasons, I give little weight to a direct comparison with these much earlier permissions."

25. The inspector concluded that the proposed development "would have an unacceptably harmful effect on the character and appearance of the surrounding area and on the setting of the listed Rio Cinema", and was therefore contrary to the area action plan, the corresponding policies in the NPPF, Policy 24 and Policy 25 of the Hackney Core Strategy 2010, and Policy 7.4 and Policy 7.8 of the London Plan 2011 (paragraph 20). Conscious of the requirement in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the setting of a listed building (paragraph 21), he found the harm to the significance of the listed Rio Cinema as a heritage asset "while unacceptable, would be less than substantial" under the policy in paragraph 134 of the NPPF. But in the absence of evidence to show that "a building of a different form" on the appeal site would not be viable, the harm was not outweighed by the "public benefits of the proposal" (paragraph 22). Only "limited weight" could be given to the contention that the proposal, as "sustainable development", earned the support of the presumption in paragraph 14 of the NPPF (paragraph 23). It followed that the appeal must be dismissed (paragraph 24).

The judgment in the court below

26. The issue with which we are concerned was one of several for the judge to decide. He dealt with it in paragraph 24 of his judgment:

> "There is a further point, which is this: the present decision is one which is specifically based on the height and massing of the proposed development. However, questions of height and massing were specifically reserved in the 2003 decision, so that decision cannot be read as consent for the height and massing, which is the subject of the present application, for a similar development. In the present application, the plans were not marked as illustrative, and given the 2012 decision where the application and appeal essentially failed because of the height, the inspector considered, obviously correctly, as I have said, that he was being asked to consider, on this occasion, the height and massing according to the plan submitted. The 2003 consent, therefore, although it relates to a building said to be identical to the one which was the subject of the 2013 application, is not, in truth, comparable at all: not only was it made subject to different policies but the decision itself is a decision on a different issue."

Did the inspector adopt an incorrect approach to the application for outline planning permission?

27. For Crystal Property, Mr Jacobs submitted that the judge's error was to conclude that the inspector was being asked to consider whether the height and massing of the proposed development shown in the illustrative drawings were acceptable. This was a misconception. The proposal before the inspector on appeal was an application for outline planning permission with all matters reserved. As the planning application form made clear, Crystal Property was seeking to secure the principle of the site's development with a part four, part five storey building – as was required by policy DTC-CA 01 of the area action plan. The council's requirements for applications for outline planning permission included the submission of indicative drawings. Crystal Property therefore submitted, though for purely illustrative purposes, drawings showing a development very similar to that for which planning permission had been granted in 1990. The inspector should have asked himself, but clearly did not, whether there was any reason to withhold outline planning permission for that development, leaving height and massing to be determined when the "scale" of the proposed building was considered at the reserved matters stage. And the judge should have seen the inspector's error. But he did not.

28. Mr Richard Kimblin Q.C., for the Secretary of State, opposed that argument. He submitted that the inspector's decision letter reflects a true understanding of the status of the application for outline planning permission, and of the illustrative drawings on which Crystal Property relied in the appeal. The inspector did not, in fact, mislead himself to a false approach. As is clear from paragraph 11 of his decision letter, he understood that Crystal Property was seeking to establish acceptable parameters for the development of the site, but that it was doing so firmly and solely on the basis of the proposal described in the application and shown in the illustrative drawings. The approach he took to the proposal before him was faultless.

29. The first question here concerns the status of the application for outline planning permission. Was it, as it purported to be, an application for outline planning permission with all matters reserved for future consideration? In my view it clearly was. The application form made that entirely plain. The form itself was the one provided by the council specifically for applications for outline planning permission "with all matters reserved". We were shown another form which is to be used in making outline applications "With Some Matters Reserved". Unlike the form for outline applications in which all matters were reserved, it includes in part 3, "Description of the Proposal", the request that the applicant "indicate all those reserved matters for which approval is being sought" and a box for each of the five matters that may or may not be reserved ("Access", "Appearance", "Landscaping", "Layout" and "Scale"). In this case there was never any indication, either when the application was before the council for determination or when it was before the inspector on appeal, that Crystal Property, as applicant, intended any of those five matters to be decided at this stage. The drawings submitted with the application, though not marked as "illustrative" or "indicative", could only sensibly be understood as having that purpose. Again, there was never any suggestion otherwise.

30. How then is one to understand the areas specified in part 10 of the application form as the floorspace for each of the uses – Class A1 ("Shops") and Class B1(A) ("Office …") – in the development? Are they part of the proposal for which outline planning permission was being sought? And if so, how do they relate to the "scale" of the development, a matter deliberately reserved for future consideration? Some caution is needed in tackling these questions, for three reasons. In the first place, the authorities to which I have referred in paragraphs 9 to 13 above are concerned with the interpretation of a local planning authority's grant of planning permission, an exercise to be conducted in accordance with the well-established principles referred to by the Supreme Court in *Trump International Golf Club Scotland Ltd. v Scottish Ministers* [2015] UKSC 74, whereas we are seeking to understand an application for planning permission that was never granted. Secondly, some of those cases were concerned with the legislative regime for outline planning permission as it was before the concept of "scale" was introduced to the definition of "reserved matters". And thirdly, in all of those cases the court's decision turned, as must ours in this appeal, on the particular circumstances of the case in hand, considered under the law, policy and guidance for outline planning permission current at the relevant time.

31. In this case, however, it seems entirely consistent with the law as it emerges from the authorities to regard the proposed floor areas – specified, use by use, in the application form – as being an essential component of the outline proposal. They quantified the floorspace of the proposed development in precise terms, identifying the amount of proposed "retail space on the ground floor" and the amount of proposed "office space on the upper floors", and thus refined the description of the development in part 3 of the application form as "a part 4 and part 5 storey building …". Such specificity as to floorspace is not inconsistent with the "scale" of the proposed development being reserved for future consideration. Floorspace and "scale" (as defined in article 2 of the Development Management Procedure Order) are not synonymous. There will necessarily be some relationship between them. But there is nothing incompatible between the floorspace of a proposed development being identified in an outline application and its "scale", including the dimensions of the proposed building – its "height, width and length … in relation to its surroundings" – being left for future determination as a reserved

matter. That is what would have been achieved in this case if outline planning permission had been granted and it had incorporated, as a grant of planning permission generally does, the application itself.

32. I see no reason to think that the council misunderstood the status of the application for outline planning permission when making its own decision. The description of the "Proposal" in its decision notice was accurate: an "[outline] planning application with all matters reserved". The illustrative drawings showing the elevations of the proposed building to Kingsland High Street and Sandringham Road were referred to. The reference in the single reason for refusal to the "excessive height and massing" of the proposed development does not conflict with the description of the proposal as an outline application with all matters reserved. It does not indicate that the council fell into the error of treating the "height" and "massing" of the proposed building shown in the illustrative drawings as if they were matters for determination at the outline stage. The council clearly recognized that the illustrative drawings represented a building, partly of four storeys, partly of five, accommodating the aggregate amount of floorspace specified in the application form for the two uses proposed.

33. The same may be said of the inspector as decision-maker in the appeal against the council's decision. He did not misunderstand the status of the proposal before him as an application for outline planning permission with all matters, including "scale", reserved. Paragraph 2 of the decision letter leaves no room for doubt about that. In that paragraph the inspector said, in the clearest possible terms, that "[the] application is for outline permission with all matters reserved for subsequent approval". He also noted, however, that the drawings accompanying the application "indicate the built form reflecting the description of development", though he recognized that this was a "possible rather than definitive layout and design". The council, he said, had "had regard to these indicative plans in determining the application" and he had "dealt with the appeal on the same basis". All of this is impeccable. And so are the inspector's observations in paragraph 11 of his letter, where he acknowledged that the "detailed design" of the proposed building was "yet to be determined", that in so far as the proposal was for a four and five storey building it reflected the "numerical requirements" of Policy DTC-CA 01, but that Crystal Property was also "seeking to establish the parameters of a building that would be considered acceptable on the appeal site".

34. Implicit in that last observation is the fact that the application for outline planning permission, while it reserved all matters, including "scale", for future consideration, had identified a specific floorspace for each of the uses in the proposed development and a total proposed floorspace for those uses, and that the illustrative drawings on which Crystal Property had relied in its "Grounds of Appeal" showed a building containing that much floorspace. Crystal Property's case on appeal was put to the inspector squarely on the basis that the illustrative drawings represented the proposal in the application for outline planning permission. It was that scheme, and only that scheme, on which Crystal Property depended in seeking to establish, as the inspector put it, "the parameters of a building that would be considered acceptable on the appeal site".

35. No other possible scheme was mooted, let alone described or illustrated. Nor was it suggested that the floor areas specified in the application form were to be regarded as other than integral to the proposal, that they were merely indicative or approximate or maximum floorspaces, or that they might change in some material way when the

reserved matters were submitted. Nor again was it suggested that the floorspace of the proposed development might be reduced by means of a condition attached to the outline planning permission, and, if so, by how much. Indeed, in paragraph 12 of the "Grounds of Appeal", to avoid any uncertainty on the point, it was unambiguously confirmed that the "application" on appeal was not merely for a building of four and five storeys, but "for a part 4, part 5 storey building providing 694 square metres of retail space on the ground floor, 2,475 square metres of office accommodation on the upper floors …". There was no suggestion that a building on this site with that number of storeys and that amount of floorspace might be designed so as to be materially different in its height and massing from the building shown in the illustrative drawings. This was not a matter for conjecture; it was a matter of basic geometry.

36. Can it be said, in these circumstances, that the inspector erred in his approach to the application and appeal? In my view it cannot. On a fair reading of his decision letter, he did not venture into a consideration of any of the reserved matters. He did not seek to determine that which was not before him for his decision. He took the scheme before him at face value. And he was right to do so. He considered the "height" of the proposed building, and its "bulk and mass", as Crystal Property clearly intended he should, with the aid of the "indicative" drawings. He was perfectly entitled to do that. He did it not to pre-empt the consideration of "scale" as a reserved matter which would be necessary if he allowed the appeal and granted outline planning permission. He did it to test the acceptability of the outline proposal itself.

37. Given the way in which the case for allowing the appeal had been presented to him, he could not sensibly have dealt with the main issue – the effects of the proposed development on the character and appearance of the area and on the setting of the listed Rio Cinema – in any other way. He concluded that the proposed building would "dominate rather than complement this part of the street scene at the northern end of the town centre", that the "height, bulk and mass of the building would be particularly prominent in views from the south on [Kingsland] High Street …" (paragraph 14), and that in views along Kingsland High Street the "presence and height" of the building "would detract from the appearance of the listed [Rio Cinema] as it would compete with and visually dominate this … building" (paragraph 15). Comparing the proposed building with the others nearby for which the council had recently granted planning permission, again with the benefit of the drawings illustrating the proposed building and the comments made in the "Grounds of Appeal", he was not persuaded to a different view of the merits of the proposal before him (paragraphs 17 and 18). He found he could give "little weight" to the suggested comparison between the height of the building now proposed and that of the buildings granted planning permission in 1990 and the subject of a resolution to approve in 2003, before the adoption of the area action plan. Not surprisingly, he saw more relevance in the more recent decisions to reject a "proposal of broadly similar height" (paragraph 19).

38. The inspector thus resolved the main issue in the appeal, as Crystal Property had effectively required him to do, on the basis of the proposal described in paragraph 12 of the "Grounds of Appeal". Unfortunately for Crystal Property, his conclusions on the merits of that scheme were contrary to those it had urged upon him. As he said when applying the policy in paragraph 134 of the NPPF, there was no evidence to show that "a building of a different form" from that proposed would be viable (paragraph 22). In the

end, he was left wholly unconvinced that the proposal before him could produce a satisfactory development of the site if outline planning permission were granted for it.

39. I see no error of law in the inspector's conclusions. In my view they embody a lawful exercise of planning judgment on the considerations relevant to deciding whether, in this particular case, outline planning permission ought to be granted, with all matters reserved. As the inspector plainly appreciated, Policy DTC-CA 01 does not contemplate the approval of any and every scheme for a building of four storeys on the appeal site, with an "architectural feature" at the corner of Sandringham Road and Kingsland High Street. That is not what the policy says. Some proposals for a building of four and five storeys will comply with the policy. Others will not. In this case, as is plain from the inspector's conclusions, he was not satisfied that a building of the floorspace proposed could be accommodated on the site in accordance with the policy. He did not have to speculate about the possible merits of some other, hypothetical proposal for the site. It was not up to him to redesign the development to comply with Policy DTC-CA 01, or to try to work out for himself how much floorspace an acceptable scheme might comprise. His task was to consider the merits of the development actually proposed in this application for outline planning permission, a building whose height and massing were shown in the illustrative drawings. And that is what he did.

40. It follows that in my view the inspector's decision is legally sound and, as the judge concluded, should therefore be upheld. It will be clear, however, that my reasoning to this conclusion is not the same as that of the judge in paragraph 24 of his judgment. It seems the judge may have thought that the "height and massing" of the proposed building were not within the scope of the reserved matters and were formally before the inspector for determination in the appeal. That is not correct. The height and massing of the building were shown, for illustrative purposes, in the "indicative" drawings. Those drawings clearly informed the inspector's decision, as they should. But as he very clearly recognized, they did not alter the status of the application as an application for outline planning permission with all matters reserved. His decision letter demonstrates an entirely lawful consideration of that outline scheme, on the correct understanding that none of the reserved matters fell for his determination in the appeal. In my view, therefore, the judge's decision was undoubtedly right, even if his reasons were not.

Conclusion

41. For the reasons I have given I would dismiss this appeal.

Lord Justice Tomlinson

42. I agree.

*560 Slough Borough Council v Secretary of State for the Environment and Oury

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
19 May 1995

Report Citation
(1995) 70 P. & C.R. 560

Court of Appeal

(Stuart-Smith , Morritt and Ward L.JJ.):

May 19, 1995

Town and Country Planning—Application for development with defined floor area—Outline planning permission granted but silent on floor area—Reserved matters application seeking larger floor area than original application for outline permission —Appeal to Secretary of State in absence of determination—Whether permissible to look at original application to determine scope of planning permission

The appellant, Slough Borough Council, owned land at the old Petrol Station, Hershel Street, Slough. On March 10, 1989 the Council resolved to seek outline planning permission for office development prior to selling the land. The application, which was given the number S/328, stated that permission was sought for, *inter alia* , the erection of new buildings with an additional floor area of 1055 m^2 . By resolution dated October 18, 1989, each page of which bore the application number S/00328/000, the Council resolved to grant outline planning permission for the proposed development of the land subject to reserved matters identified in the resolution. The resolution made no mention of any limit on the additional floor area of any new buildings to be erected on the land. Thereafter the Council sold the site. On July 4, 1991 the second respondent applied for detailed planning permission pursuant to the outline permission granted on October 18, 1989. That reserved matters application gave the reference number S/00328/000 and sought authorisation for, *inter alia* , the erection of new buildings with an additional floor area of 1530 m^2 . The Council was not prepared to approve as reserved matters a development which increased the floor area of the original proposal by some 45 per cent and failed to determine the application. On appeal the Inspector concluded that as the outline permission itself was silent on the question of floor area restriction, the reserved matters proposal did not fall outside the terms of the outline permission granted, and that the appeal should go forward to be determined on its merits. On September 23, 1992 the Council moved to quash that decision. That application for judicial review was dismissed by Schiemann J. on March 25, 1994 with leave to appeal.

Held, dismissing the appeal, that in construing a planning permission, regard may be had only to the permission itself, including the reasons stated for it, and the permission should not be construed along with the application. The application is just as much extrinsic evidence as any other document that may have passed between applicant and planning authority and the public should be able to rely upon the permission granted as a document which is plain on its face without being required to consider whether there is any discrepancy between the permission and the application. Although there are acknowledged exceptions to that well-established rule where the permission in question either is ambiguous, or has incorporated into it by reference the application itself—as opposed to merely the reference number of that application—neither exception was relevant to this case. Similarly, there was no question of mistake nor want of authority in this case such as might have permitted consideration of the application as part of the background circumstances to such an allegation. In any event, a challenge to the Council's resolution in 1989 on the basis that it could allow substantially more development than was applied for should have been made promptly; but no such challenge was brought.

Cases referred to:

(1) *Miller-Mead v. Minister of Housing and Local Government [1963] 2 Q.B. 196; [1963] 2 W.L.R. 225; 127 J.P. 122; 106 S.J. 1052; [1963] 1 All E.R. 459; 14 P. & C.R. 266; 61 L.G.R. 152; [1963] J.P.L. 151, C.A.; reversing in part [1962] 2 Q.B. 555; [1962] 3 W.L.R. 654; 126 J.P. 457; 106 S.J. 492; [1962] 3 All E.R. 99; 13 P. & C.R. 425; 60 L.G.R. 340, D.C.*
(2) *Clywd County Council v. Secretary of State for Wales and Welsh Aggregates [1982] J.P.L. 696* .
(3) *Wivenhoe Port v. Colchester Borough Council [1985] J.P.L. 396, C.A.; affirming [1985] J.P.L. 175* .
(4) *Slough Estates v. Slough Borough Council (No. 2) [1971] A.C. 958; [1970] 2 W.L.R. 1187; 114 S.J. 435; [1970] 2 All E.R. 216; 21 P. & C.R. 573* ; *sub. nom.Slough Estates v. Slough Corporation (No. 2), 68 L.G.R. 669, H.L.; affirming [1969] 2 Ch. 305; [1969] 2 W.L.R. 1157; 133 J.P. 479; 113 S.J. 307; [1969] 2 All E.R. 988; 20 P. & C.R. 363, C.A.; affirming [1968] Ch. 299; [1967] 2 W.L.R. 1511; 111 S.J. 374; [1967] 2 All E.R. 270* ; *sub. nom. Slough Estates v. Slough Corporation (1967) 18 P.C. 459* .
(5) *Wilson v. West Sussex County Council [1963] 2 Q.B. 764; [1963] 2 W.L.R. 669; 127 J.P. 243; 107 S.J. 114/638; [1963] 1 All E.R. 751; 14 P. & C.R. 301; 61 L.G.R. 287; [1963] R.V.R. 278/341, C.A.; affirming (1962) 13 P. & C.R. 310; [1962] C.L.Y. 2294, L.T.*
(6) *Wheatcroft (Bernard) Limited v. Secretary of State for the Environment [1982] 43 P. & C.R. 223; [1982] J.P.L. 37, C.A.; reversing (1980) 257 E.G. 934* .
(7) *Staffordshire Moorlands District Council v. Cartwright (1991) 63 P. & C.R. 285; [1992] J.P.L. 138, C.A.*
(8) *R. v. Elmbridge Borough Council, ex p. Oakimber* , *sub. nom. Oakimber v. Elmbridge Borough Council and Surrey County Council [1991] 3 P.L.R. 35; (1991) 62 P. & C.R. 594; [1992] J.P.L. 48; [1991] E.G.C.S. 33, C.A.; reversing (1991) 62 P. & C.R. 82* .
(9) *Co-operative Retail Services v. Taff-Ely Borough Council (1981) 42 P. & C.R. 1, H.L.; affirming (1979) 39 P. & C.R. 223* ; *sub. nom.Att.-Gen., ex rel. Co-operative Retail Services (1979) 250 E.G. 757; [1979] J.P.L. 466, C.A.; reversing (1978) 38 P. & C.R. 156* .

Appeal by the appellant, Slough Borough Council from the decision of Schiemann J. of March 25, 1994 whereby he dismissed an application by the appellant for judicial review of a decision of June 25, 1992 of the Inspector appointed by the Secretary of State for the Environment. By that decision the Inspector had determined an appeal by the second respondent, Mr Oury, for detailed planning permission by way of reserved matters application in relation to land known as the old Petrol Station site, Hershel, Slough, by concluding that the substance of the reserved matters application fell within the scope of outline permission granted on October 18, 1989 and should be determined on its merits.

The ground of the appeal was that Schiemann J. had been wrong to hold that the Inspector was entitled to determine the second respondent's appeal on the basis of the outline permission alone without reference to the contents of the application for that outline permission.

The facts are stated in the judgment of Stuart-Smith L.J.

Representation

Brian Ash, Q.C. , and Paul Stinchcombe for the appellants.
Rabinder Singh and Benedict Stephenson for the first respondent.
The second respondent did not appear and was not represented.

Stuart-Smith L.J.

By this appeal the appellants invite this court to resolve an important but controversial point of planning practice, namely, the extent to which it is permissible to have regard to the application in order to construe the scope of the planning permission which is granted.

The old Petrol Station site in Hershel Street, Slough was vested in the ***562** Borough Council. It was considered to be ripe for development. The Council did not desire to carry out any development themselves and preferred to sell the land with the

benefit of such planning permission as might be obtained. On March 10, 1989 the Council resolved pursuant to regulation 5(2) of the Town and Country Planning General Regulations 1976 "To seek permission for the following development in accordance with the accompanying particulars and plans."

The particulars there referred to were those contained in the Borough's Planning Application and the plans referred to were a site plan and a layout plan which was marked to be illustrative only. The planning application form required all questions to be answered. It was in two parts. Part 1 had a space at the top of the form which was for office use only upon which the Planning Office entered the application number which was S/328 and the Berkshire Ref. No. 513334 and other administrative details. In answer to the question, "What is the application for?", the information given was "Office development (Bla) reg. 5 (outline)".

Further questions elicited the answers that the application involved a change of use, a redevelopment and the erection of new buildings, the application being for outline permission which reserved the details of external appearance, siting, design, means of access and landscaping. Having given an affirmative answer to the question numbered 21 which enquired whether the proposal involved any non-residential building or use, the applicant was required to complete Part 2 of the form. Paragraph 24 on Part 2 required the applicant to "state the gross floor space in square meters (by external measurement) of all buildings to which this application refers". In answer it was declared that the class of use was B1(a) Office (other than A2) and the proposed additional floor space created by the new building was given as 1055. Part 1 (incorporating as it does in this case Part 2), concluded with these words: "I hereby apply for permission in respect of the particulars described above and in the attached plans and drawings."

A report was prepared for the committee considering the application. The application was identified by its number (and the addition of extra noughts adds nothing to it.) The proposal was for the "erection of B1a office development. Reg. 5 (Outline). Petrol Station Site, Hershel Street". The recommendation was to resolve "to authorise the carrying out of the development". That was duly done. At the top right-hand corner of the resolution the application number S/00328/000 and the Berkshire County number 513334 are clearly written.

The resolution then reads:

> In pursuance of their powers under the (Town and Country Planning Act 1971) and the (Town and Country General Regulations 1976), the Council of the Borough of Slough as the Local Planning Authority, hereby resolves by resolution which is hereby expressed to be passed for the purposes of regulation 5 of the Town and Country General Regulations 1976 to authorise the carrying out of:
>
> B1A Office Development. (Reg. 5) (Outline).
>
> Petrol Station Site Hershel Street.
>
> Subject to the following condition(s);
>
> 01. The developments shall be carried out in accordance with detailed plans showing the siting design and external appearance of the ***563*** building(s) the means of access thereto, and the landscaping of the site, hereinafter collectively referred to as the "reserved matters" which shall have been submitted to and approved by the Local Planning Authority before the commencement of the development.
>
> 01. *Reason:* to prevent the accumulation of planning permissions, to enable the Council to review the suitability of the development in the light of altered circumstances and to comply with the provisions of section 41 of the Town and Country Planning Act 1971 […]

The resolution is in fact typed over three pages, each page giving the application number and Berkshire County Number. It was dated October 18, 1989.

The site was then sold by the Council. On July 4, 1991 the second respondent applied for planning permission using the same form as we have described. He stated that the application involved the change of use, the re-development and the erection of new building and the type of application was for the approval of details/reserved matters, making reference to the relevant outline planning permission No. S/00328/000. He was also required to complete Part 2 but he stated that the proposed additional floor space to be created by the new building was 1530 m^2 .

The Council as Planning Authority were not prepared to approve as reserved matters a development which increased the floor area by some 45 per cent and there was some correspondence not placed before us as to whether or not the application was to be properly regarded as one for the approval of those matters or for a new full planning permission. Having failed to make a determination, the second respondent duly appealed on November 7, 1991.

Some of the correspondence passing between the first respondent and the second respondent's agent is before us. The Planning Inspectorate seemed inclined to treat the application as being one for full planning permission given the substantial difference in the amount of floor space included in the approved outline application and the amount proposed by. the second respondent. The Inspectorate took legal advice which confirmed that view.

The second respondent did not agree with those opinions. The Secretary of State then appointed the Inspector initially to determine as a preliminary issue whether the appeal should proceed as one for approval of reserved matters or whether it should be treated as a fresh application for full planning permission. He concluded that the application was intended to be for approval of details and there is no challenge to that part of his decision.

It therefore became necessary for him to decide whether the proposal was outside the terms of the original planning permission because of the increased floor area. That decision did not call for any consideration of the merits of the proposal. The Inspector set out his findings in his decision letter dated June 25 as follows:

> 12. I am in no doubt that the Local Planning Authority clearly intended to apply for and grant a permission in accordance with the Local Plan for office development limited to 1055 m^2 . That figure was given in the application, and in the report. However the permission itself is silent on the question of floor area restriction.
>
> 17. I accept that the floor area proposed by your client of 1530 sq. m., an increase of 475 m^2 , amounted to an increase of 45 per cent of floor area, is so substantial that I do not consider that it can be said to be in the ***564** same terms as the original application. The permission, although giving the application reference number, does not specifically state that it is in accordance with plans and applications submitted. The permission is unambiguous on the matter of floor area, since there is no reference to it whatsoever. The application, despite its clarity, does not justify a restricted interpretation of the unfettered (as far as floor area is concerned) outline permission given […]
>
> 18. The permission is the principal document, and I do not consider that this application for approval of details which relate to the same type of development on essentially the same site is outside the scope of that permission. I accept, as the Council have pointed out, that the outline permission dated October 18, 1989 does give the reference number. However I think that link with the original application of March 10, 1989 is, on its own, too tenuous a link to justify the assertion that the outline permission in this case incorporates the application. I also accept that the application is a public document. But I do not think that the ordinary reasonable man would consider that it would be necessary to refer to the application, in order to ascertain the limitation on floor space, in the light of what permission says.

> 21. I further conclude that the proposal, in terms of floor area does not fall outside the terms of the outline permission granted; and that the appeal should now therefore go forward to be determined on its merits, by having regard to Local Planning policies.

On September 23, 1992 the Local Authority moved to quash that decision and sought a declaration that the second respondent's application dated July 4, 1991 was outside the terms of the outline planning permission dated October 18, 1989. That application for judicial review was dismissed by Schiemann J. on March 25, 1994 and the Borough Council now appeals against that order with leave of the judge.

The question therefore for this court is in what circumstances is it permissible to look at an application for planning permission when deciding the scope of the permission granted pursuant to the application.

In the instant case the permission was clear, unambiguous and valid on its face; apart from the reference number, there was no mention of the application. The general rule is that, in construing a planning permission, regard may be had only to the permission itself, including the reasons stated for it. In *Miller-Mead v. Minister of Housing and Local Government* [1] the Court of Appeal rejected the submission that the permission should be construed along with the application. Lord Denning M.R. said [2] :

> A grant of permission runs with the land and may come into the hands of people who have never seen the application at all. It cannot be cut down by reference to the application.

Upjohn L.J. said [3] :

> It must always be remembered that the grant of permission runs with the land under section 18(4) of the Town and County Planning Act 1947 , and a successor in title is entitled to rely on the actual words of ***565** the grant: he will not have seen the application. But in any event the principle sought to be established seems to me unsound. The application may ask for too much or, as Mr Megarry submits in this case, too little, but it is entirely a matter for the planning authority to consider what permission is to be granted and I do not see how logically one can construe the permission by reference to the application made. I, therefore, reject that argument. In saying that I am dealing only with questions of construction. I express no view on Mr Megarry's argument that a permission granted in wider terms than the application might be *ultra vires* . That is not an issue before us.

Mr Ash, Q.C., submits that we should not follow *Miller-Mead's* case for two reasons.

First, he submits that the reasoning appears to be based on the proposition that the application is not available to be seen, whereas since the Town and Country Planning General Development Order 1988, art. 27 , it has to be included in the Register and is therefore available to be seen by anyone interested. Prior to this Order, the relevant General Development Orders had since 1948 merely required that certain particulars of the application, namely the name and address of the applicant, the date of application and brief particulars of the development forming the subject of the application should be included. In other words, the application itself was not on the Register. Prior to 1948 there was not even this requirement. Accordingly, Mr Ash submits that since the *raison d'être* of the rule has gone, the rule should go too. He relied in support of this submission on a *dictum* of Forbes J. in *Clywd County Council v. Secretary of State for Wales* [4] as reported in *Wivenhoe Court Ltd v. Colchester Borough Council* [5] as follows:

> The planning permission, which was the subject of debate in *Slough Estates* , was one which was granted under the planning legislation in force in 1965. There was then no requirement that a local planning authority had to keep a register of applications, as Lord Pearson points out at page 767F–G. The application in the *Slough Estates* case was not a public document. For a long time before the current provisions of the Town and Country Planning General Development Order 1977, art. 21 , there has been a permanent register containing records both of the application with its plans and of the planning permission. Lord Reid's objections therefore do not apply and he did not intend them to apply to the modern situation, but to the historical situation of planning application which was before him.

We do not accept Mr Ash's submission. It does not follow that simply because one of the reasons for the rule, even if it is the principal reason no longer exists, the rule itself should be abrogated. There is nothing to suggest that the change brought about by the 1988 General Development Order was for the purpose of altering the rule. Still less is there any legislative provision in subsequent Acts of Parliament to alter the rule which has been well-established since *Miller-Mead's* case.

The rule was affirmed by the House of Lords in *Slough Estates Ltd v. Slough Borough Council (No. 2)* . [6] The planning permission with which the ***566** court was concerned in that case was prior to the Town and Country Planning (General Development) Order 1948 which introduced the requirement for particulars of the planning permission to be included in the Register. This point was adverted to by Lord Pearson, with whose speech the other members of the House agreed. He said [7] :

> Under these relevant Acts and Orders of 1932–1945 what documents can properly be taken into account in construing the planning permission? If the purported planning permission had been on the face of it a complete and self-contained document, not incorporating by reference any other document, I should have been inclined to apply the rule, established under later acts by *Miller-Mead v. Minister of Housing and Local Government* [8] and *Wilson v. West Sussex County Council* , [9] that the application should not be taken into account in construing planning permission unless the planning permission incorporates the application by reference.

There is no hint of reservation or disapproval of the *Miller-Mead* decision and in particular no suggestion that it is permissible to look at such particulars of the application as do appear on the Register. On the contrary, it appears to us to be cited with approval. Lord Pearson in effect says that the present case was *a fortiori* . In our view, Lord Reid also approved the decision in *Miller-Mead* . He said [10] :

> Of course, extrinsic evidence may be required to identify a thing or place referred to, but that is a very different thing from using evidence of facts which were known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in such a document. Members of the public, entitled to rely on a public document, surely ought not to be subject to the risk of its apparent meaning being altered by the introduction of such evidence.

The application is just as much extrinsic evidence as any other document that may have passed between applicant and planning authority. It should be borne in mind that breach of planning permission may lead to criminal sanctions. The public should be able to rely on a document that is plain on its face without being required to consider whether there is any discrepancy between the permission and the application.

Secondly, Mr Ash submits that the Planning Authority lacked jurisdiction to grant permission for substantially more than had been applied for. This is the argument adverted to by Upjohn L.J. in *Miller-Mead* . Mr Ash submits that it is now clearly

established, whereas it was not in 1963, that the planning authority cannot grant substantially more than is applied for. He relies on the Inspector's decision in this case that the proposed development of 1530 m ^{2} is substantially more than those applied for. But we cannot see how want of authority or jurisdiction can affect the construction of the permission which is plain on its face.

It does not follow that an enlargement of the application site is *ipso facto* ****567*** invalid. The rationale for saying that it may be invalid was explained by Forbes J. in *Bernard Wheatcroft Ltd v. Secretary of State for the Environment and Harborough District Council* [11] in that if the enlargement is so substantial it would deprive those who should have been consulted of an opportunity to make representations and objections. But whether the enlargement is so substantial must in the first place be a decision of the planning authority which can only be challenged on well-known principles applicable to judicial review. It would, in our judgment, be highly unsatisfactory if a prospective purchaser, seeing that there is some discrepancy between the application and permission, had then to perform a mental judicial review to determine whether the permission was valid or not. We agree with Schiemann J. that if the validity of the permission is to be challenged on the grounds that it substantially exceeds what was applied for, such challenge must be made promptly, otherwise the permission is taken to be valid. The time for challenge in this case has long since passed. In any event, the application for 1530 square metres development is irrelevant; the real question at this stage is whether the permission as granted is invalid, having regard to the application which was limited to 1055 m ^{2} . It is possible when the detailed application is considered that the size of the development can properly be reduced, having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping.

In our judgment, the general rule stated in *Miller-Mead* is well-established. There are recognised exceptions to it. The first is where the planning permission incorporates by reference the application and accompanying plans, thus enabling those documents to be referred to: *Wilson v. West Sussex County Council* , [12] *Slough Estates* [13] case. The exception is in fact more apparent than real, since the incorporation makes the documents incorporated part of the permission. It simply avoids the necessity of the planning authority repeating these matters in the permission.

The second exception is where the permission is ambiguous on its face. The case of *Staffordshire Moorlands District Council v. Cartwright* [14] must be regarded as an example of this. Mr Ash sought to derive a much wider principle from this case. He relied upon a passage in the judgment of Purchas L.J. where he said [15] :

> The terms of the planning consent had to be construed in the factual context of the application as a result of which the permission was granted. Any exchange between the applicant and the planning authority might form part of the evidential matrix: see *Oakimber Ltd v. Elmbridge Borough Council and Surrey County Council* . [16] In this case the relevant documents were the permission itself, which was to be construed where ambiguous in the context of the correspondence and plans submitted by Jackson and letters written by Cheadle in response.

Although the first part of this passage suggests that Purchas L.J. was ****568*** stating a wide general proposition, we do not think he can have intended to do so without any consideration of. the cases of *Miller-Mead* and *Slough Estates* . The second part of the passage makes it clear that he regarded the case as one of ambiguity. In the *Oakimber* case it appears to have been conceded by counsel that in considering the approval reference can be made to the application, and Purchase L.J. cited *Wilson's* case as authority for this proposition. It is not clear on what basis the concession was made; but *Wilson's* case was an incorporation case. *Oakimber's* case cannot be taken as authority for the general proposition that the application can be referred to in all cases to construe the permission, since this is contrary to binding authority of this court.

A further exception arises where the validity of the planning permission is challenged on the grounds of want of authority or mistake. In such circumstances it is permissible to look at the background circumstances: *Co-operative Retail Services v. Taff-Ely Borough Council* . [17] But no question of that sort arises in this case.

Mr Ash's second main submission is that the mere inclusion of the reference number of the application on the permission is a sufficient incorporation of the application. We do not agree. It is not sufficient to inform a reasonable reader that the application forms part of the permission. Some such words as "in accordance with the plans and application" would in our view be necessary. There can be no doubt about the position. For this part of his appeal Mr Ash relied on the statement of Lord Pearson in *Slough Estates v. Slough B.C.* where he observed [18] :

> But in the present case the purported planning permission was not complete or self-contained on the face of it, because it incorporated by reference "the plan submitted". Also it referred in the top right hand corner to "Application No. U.L. 21".

We do not regard this statement as indicating that in the view of Lord Pearson a reference to the application number alone would have sufficed; rather that the reference number was, on the facts of the case, a relevant consideration in the identification of the plan in question.

The appeal is dismissed.

Representation

Solicitors—Solicitor for Slough Borough Council; Treasury Solicitor .

Order

Reporter —Christopher Murgatroyd.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused. ***569**

Footnotes

1 *[1963] 2 Q.B. 196* .
2 *ibid.* , at 215.
3 *ibid.* , at 223–224.
4 *[1982] J.P.L. 696* .
5 *[1985] J.P.L. 396* , 401.
6 *[1971] A.C. 958* .
7 *ibid.* , at 967.
8 *[1963] 2 Q.B. 196* .
9 *[1963] 2 Q.B. 764* .
10 *[1971] A.C. 958* , 962.
11 *(1982) 43 P. & C.R. 223* .
12 *[1963] 2 Q.B. 764* .
13 *[1971] A.C. 958* .

14 *[1992] J.P.L. 138* .
15 *ibid.* , at 139.
16 *[1992] J.P.L. 48* .
17 *(1979) 39 P. & C.R. 223, C.A.* ; *(1981) 42 P. & C.R. 1, H.L.*
18 *[1971] A.C. 958* , 968B.

IN THE SUPREME COURT OF JUDICATURE QBC0F 96/1605/D
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(Mr. Robin Purchas Q.C.
sitting as Deputy High Court Judge)

Royal Courts of Justice
Friday, 7th November 1997

Before:

LORD JUSTICE HIRST
LORD JUSTICE SWINTON THOMAS
LORD JUSTICE PILL

WEST MIDLANDS PROBATION COMMITTEE Appellant

-v-

(1) SECRETARY OF STATE FOR THE ENVIRONMENT
(2) WALSALL METROPOLITAN BOROUGH COUNCIL Respondents

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited,
180 Fleet Street, London, EC4A 2HD.
Telephone No: 0171-421 4040.
Shorthand Writers to the Court.)

MR. R. GRIFFITHS Q.C. (instructed by Messrs Wragge & Co., Birmingham) appeared on behalf of the Appellant/Appellant.

MR. M. BEDFORD (instructed by the Treasury Solicitor) appeared on behalf of the Respondent/Respondent.

J U D G M E N T
(As approved by the Court)

Pill LJ:

This is an appeal from a decision of Mr Robin Purchas QC sitting as a Deputy High

Court Judge on 20 August 1996. The judge dismissed an application to quash a decision of the Secretary of State for the Environment ("the Secretary of State") whereby he dismissed an appeal by West Midlands Probation Committee ("the Committee") against a refusal by Walsall Metropolitan Borough Council ("the Council") to grant planning permission in respect of the extension of a bail and probation hostel at Stonnall Road, Aldridge, West Midlands. The appeal was determined by an Inspector appointed by the Secretary of State and was announced by letter dated 7 December 1995 following a local public inquiry.

Planning permission was granted in 1980 for the erection of a secure unit for severely disturbed adolescents. The unit formed part of the Druids Heath Community House complex, most of which had later been transformed into a nursing home. The unit was converted in 1989 to a bail hostel, it being determined, given the existing permission, that planning permission was not required for the conversion. Bail and probation hostels were treated by the Council, without objection, as a *sui generis* use, outside the specified use classes in the Use Classes Order.

The hostel provides accommodation for up to 12 bailees, a typical stay being about 4 weeks. They are required to reside at the hostel by virtue of a condition of residence imposed by the court when granting bail. A curfew operates between 11 pm and 6 am. During the day bailees are normally supervised by 2 professional officers and up to 4 administrative or domestic staff are also involved in running the hostel. At night, an assistant warden and a relief supervisor are present at the hostel.

The Committee is a body corporate established under the Probation Services Act 1993 and its responsibilities with respect to the probation service are set out in the Act.

Pursuant to s 7 of the Act, the Committee is empowered to provide hostels to accommodate those remanded on bail with a condition of residence at an approved bail or bail and probation hostel, those subject to a probation order including a condition to reside at such a hostel and prisoners released on licence from custody with a condition of residence at such a hostel. S 27 of the Act empowers the Home Secretary to approve a hostel and he is also empowered to make grants for expenditure in providing bail and probation hostels under s 7 of the Act. In December 1992, the Home Office issued a Guidance Note entitled "Approved Bail and Probation/Bail Hostels Development Guide". It included guidelines on site selection.

Aldridge is described by the Inspector as a modest town and is 2 miles from Walsall. The hostel is described as being at the very edge of Aldridge and within the West Midlands Green Belt. Opposite, the Inspector found, stand the neat houses and bungalows of a suburban estate. Adjacent to the hostel is a large nursing home in extensive grounds and a substantial dwelling. The proposal involved a two-storey extension to the side of the building. It would accommodate an additional 8 bailees and there would be some increase in staffing.

Planning permission was refused by the Council on 3 January 1995, contrary to the advice of the Director of Engineering and Town Planning. The reason given was:

> "The residents of the area and the adjoining properties now experience severe and material problems and incidents arising from the existing use of the premises, which are incompatible with the surrounding residential area. The further expansion of a use which, in the considered view of the Local Planning Authority, is unsuitable for that area has the potential to further exacerbate these problems, to the detriment of the amenities which local residents could reasonably be expected to enjoy."

The Inspector defined the issues in the case as follows:

> "1. Whether the scheme would noticeably impair the living conditions that nearby residents might reasonably expect to enjoy in an area like this and, if so,
>
> 2. Whether the need to provide more places in bail hostels throughout the West Midlands would provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road."

On the first issue, the Inspector found that the hostel had attracted numerous police visits, many late at night or early in the morning. Some of the visits involved arrests, personal injuries or the breach of bail conditions. The Inspector stated that:

> "It is not surprising that local residents living in such a quiet, sylvan and suburban street should be seriously disturbed by the noise of police cars, police radios and the impact of flashing lights close to their homes, particularly when events occur at times of relative peace and quiet or when police cars have to wait in the street while the hostel gates are opened. The evidence demonstrates that residents might well have to endure such occurrences at fairly regular and frequent intervals. And, of course, the need for ambulances or other vehicles to attend in emergencies must add to this intrusive impact."

The Inspector went on to consider the implications of an expansion of the hostel. He concluded:

> "I consider that the proposed expansion of this hostel would be likely to significantly increase the disturbance endured by those living nearby."

He next considered the apprehensiveness and insecurity of residents living in the vicinity of the hostel and stated that:

> "Such harmful effects would be capable of being a material consideration provided, of course, that there were reasonable grounds for entertaining them; unsubstantiated fears - even if keenly felt - would not warrant such consideration, in my view."

The Inspector found that residents' apprehensions had some justification. Having considered the evidence, he referred to bailees fighting in the street, or moaning and mutilating themselves, or smashing crockery in private driveways and milk bottles in the road. These he described as "disturbing incidents". Bailees had committed robberies

in the area and had broken into cars. Reference is made to "drunken, intimidating or loutish behaviour". The Inspector stated:

> "I consider that such occurrences give reasonable grounds for residents to feel apprehensive; and, the cumulative effect of such events could reasonably be expected to fuel a genuine 'fear of crime'. That is recognised as a significant problem in its own right particularly if affecting the more vulnerable sections of the community, like some of the relatively elderly people here (Circular 5/94). I think that expansion of the hostel would increase the potential frequency of those occurrences and so exacerbate the 'fear of crime' that already exists."

He noted that:

> "Rowdy or raucous activity is particularly noticeable amongst the quiet drives and avenues of this neat suburban estate ¼ It would be hard to imagine a more incongruous juxtaposition. Quite apart from the fact that there are numerous instances where the identity of an occupant is crucial to the acceptability of a planning proposal (as Circular 11/95 clearly demonstrates), a defining characteristic of using land for a 'probation and bail hostel' is that it may provide accommodation for probationers or a particular category of bailee. The proposed extension inevitability increases the possibility of residents encountering more bailees. I consider that local people would thus have good reason to feel more apprehensive than they do now."

The Inspector concluded as follows:

> "Taking all those matters into account, I conclude that the expansion of this hostel would be likely to exacerbate the disturbance, and accentuate the fears of those living nearby, and so noticeably impair the living conditions that residents might reasonably expect to enjoy in an area like this."

On the first issue, Mr Robert Griffiths QC, for the Committee, submits that apprehension and fear are not material planning considerations since they do not relate to the character of the use of land. Anti-social and criminal behaviour of some of the hostel residents on or near the land was not a material planning consideration. As Mr Griffiths put it, the isolated and idiosyncratic behaviour of some of the residents did not stamp their identity onto the use of the land. A distinction has to be drawn between the use of land and behaviour of people on and off the land. Moreover, apprehension and

fear cannot be measured objectively and provide no basis for establishing that there is demonstrable harm to interests of acknowledged importance. Anti-social or criminal behaviour should not be taken into account; the application should be considered on the assumption that the use of the land would be lawful and activities on it would not involve breaches of the law.

It is also submitted that, by his reference to "the identity of an occupant", the Inspector misunderstood Circular 11/95. The Circular is concerned with planning conditions and provides only that, sometimes and exceptionally, the identity of the occupier of land may be relevant for the purpose of granting permission by attaching an occupancy condition where otherwise permission would have to be refused. It contains no warrant for refusing planning permission by reason of the identity of the occupier.

I say at once that I accept Mr Griffiths' submission that, in the present context, reference to Circular 11/95 was inappropriate. Under the heading "Occupancy: general conditions", paragraph 92 provides:

> "Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission."

The following paragraphs of the Circular deal with a series of situations in which permission for development would normally be refused but there are grounds for granting it to meet a particular need. Examples are "granny" annexes ancillary to the main dwelling house, permission for a dwelling to meet an identified need for staff accommodation and permission to allow a house to be built to accommodate an

agricultural or forestry worker. Planning conditions which tie the occupation of the dwelling to the identified need will be appropriate. That principle has, in my view, no bearing upon the present issue as to whether permission can be refused because of the behaviour of bailees and I disagree with the judge on that point. However, I regard the Inspector's reference to the Circular as merely an aside which does not affect the acceptability of his reasoning.

S 70(2) of The Town and Country Planning Act 1990 requires a planning authority upon an application for planning permission to have regard *inter alia* to "material considerations". In *Stringer* v *Minister of Housing and Local Government* [1970] 1 WLR 1281 Cooke J stated at p 1295:

> "In principle it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances. However, it seems to me that in considering an appeal the Minister is entitled to ask himself whether the proposed development is compatible with the proper and desirable use of other land in the area. For example if permission is sought to erect an explosives factory adjacent to a school, the Minister must surely be entitled and bound to consider the question of safety. That plainly is not an amenity consideration."

Cooke J cited the statement of Widgery J in *Fitzpatrick Developments Ltd* v *Minister of Housing and Local Government* (unreported) May 25 1965 that "An essential feature of planning must be the separation of different uses or activities which are incompatible the one with the other".

In *Westminster Council* v *Great Portland Estates plc* [1985] AC 661 at 670 Lord Scarman stated that:

> "The test, therefore, of what is a 'material consideration' in the preparation of plans or in the control of development ¼ is whether it serves a planning purpose:

> see *Newbury District Council* v *Secretary of State for the Environment* [1981] AC 578, 599 per Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of the land."

Mr Bedford, for the Secretary of State, relies on two other authorities to demonstrate circumstances in which the impact of a development upon neighbouring land may operate as a material consideration. In *Finlay* v *Secretary of State for the Environment & Anor* [1983] JPL 802 the Secretary of State refused planning permission for use of premises as a private members club where sexually explicit films were shown. The Secretary of State regarded as an important consideration the fact that the residential use of a maisonette above the appeal site "shared its entrance with the exit from the cinema club. This fact, particularly in view of the nature of the films being shown, is likely to deter potential occupiers and could effectively prevent the occupation of this residential accommodation". It was submitted that the Secretary of State had taken into account an immaterial consideration, namely the nature of the films being shown. Forbes J is reported as stating that:

> "The Secretary of State was not saying 'I dislike pornographic films' what he was saying was a pure planning matter, namely if people show pornographic films downstairs, it was likely to be a deterrent to potential occupiers of the residential accommodation upstairs. That may mean that the accommodation may be difficult to let or use for residential purposes.
> That seemed to him [Forbes J] to be a wholly unexceptionable way of looking at it from a planning point of view. In other words, that took, in his view, a planning judgment made by the Secretary of State with which the court should not interfere."

In *Blum* v *The Secretary of State for the Environment & Anor* [1987] JPL 278, an enforcement notice was served in respect of a riding school. Upon an application for planning permission, the Inspector identified as the main issue whether or not a riding school use caused significant harm to the bridleway network in the adjoining public

open land and detracted from its visual amenities as part of a conservation area. He found that the very poor state of the network was attributable in large part to horses coming from the appeal site. Simon Brown J stated, at p 281, that he:

> "recognised that a planning authority might very well place greater weight on questions of, for instance, highway danger, and to considerations of purely visual amenity but that was a very far cry from holding it immaterial and impermissible and an abuse of planning powers to have regard to the environmental impact of a development of this character upon the visual amenities of surrounding land."

The relevance of public concern was considered by this Court in *Gateshead MBC* v *Secretary of State for the Environment* [1994] 1 PLR 85. A clinical waste incinerator was proposed and there was public concern about any increase in the emission of noxious substances, especially dioxins, from the proposed plant. Glidewell LJ, with whom Hoffman LJ and Hobhouse LJ, agreed stated:

> "Public concern is, of course, and must be recognised by the Secretary of State to be, a material consideration for him to take into account. But, if in the end that public concern is not justified, it cannot be conclusive. If it were, no industrial - indeed very little development of any kind - would ever be permitted."

In the recent decision of this Court in *Newport CBC* v *Secretary of State for Wales & Anor* (transcript 18 June 1997) an award of costs by the Secretary of State was challenged on the basis that the Inspector had been inconsistent in his reasoning on the question of public perception of danger from a proposed chemical waste treatment plant. Hutchison LJ stated that the Secretary of State had made an error of law in reaching a decision "on the basis that the genuine fears on the part of the public, unless objectively justified, could never amount to a valid ground for refusal". (p 14E). Aldous LJ stated (p 15D) that the planning authority should have accepted "that the perceived fears, even though they were not soundly based upon scientific or logical fact, were a

relevant planning consideration".

Mr Bedford relies upon the above statements to support his submission that public concern about the effect of a proposed development is a material planning consideration. The difference between Glidewell LJ, on the one hand, and Hutchison and Aldous LJJ on the other, need not be resolved in the present case because the Inspector found that the fears were justified. Mr Griffiths submits that there is a distinction between fear of noxious substances emanating from a site and fear of antisocial behaviour. He also submits that the concession made in the *Newport* case that public perception is relevant to the decision whether planning permission should be granted (p 11A) should not have been made.

The manner in which the Inspector dealt with the second issue he identified, that of need, is also challenged in this appeal. It is submitted that the Inspector erred in going behind the judgment of the Committee and of the Home Office. Their view that there was a compelling need to provide more hostel places in the West Midlands should not have been subjected to investigation. The Chief Probation Officer for the West Midlands Probation Service gave evidence.

The Committee's evidence, as summarised by the Inspector, was that demand for places exceeded supply by almost 13%. The Home Office had compelled the Committee to close two existing hostels with the loss of 31 beds. The Home Office had agreed with the proposed extension at Stonnall Road. It was one of the hostels identified for expansion. Extension would be physically possible at reasonable cost, the demand from local courts was high and the hostel is conveniently located. The other options were to create "cluster units", where bailees are not under direct supervision or to

countenance less onerous bail conditions. Either possibility could expose the community to more risk from criminal elements.

The Inspector stated that he was not convinced that the inability to find accommodation for some of those referred necessarily indicated that there was a pressing need for additional hostel space. He did not find a compelling requirement to replace some of the 31 bed-spaces lost in the closure of the other hostels. He thought it inconsistent to claim that the spaces were essential when the Committee and the Home Office had implemented the closure without any guarantee that replacement spaces could easily be found. The lack of bed-spaces could not be regarded as an unacceptable impediment "since it must have been realised that an inevitable consequence of the hostel closures would be to deprive the courts of their capacity for however long it took to find suitable replacements". The need for planning permission did not appear to have been countenanced.

Having made his analysis of need, the Inspector stated that "even if there is a need for more hostel space in the West Midlands I consider that there is little justification for providing more of it at Stonnall Road". He concluded that the need to provide more places in bail hostels throughout the West Midlands would not provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road.

Mr Griffiths accepts that the Inspector was entitled to balance need for additional hostel spaces with other material considerations and to decide whether the need should be met on this particular site. What he was not entitled to do, Mr Griffiths submits, was to challenge the Committee's assessment of the need itself. That was a wrongful intrusion into matters within the sphere of the Home Office and the Secretary of State

for the Environment (represented by the Inspector) should not thwart the policy of the Home Office.

A further, and separate, point taken by Mr Griffiths is that the Inspector should not have had regard to the "site selection" criteria in the Home Office Guidance Note. Paragraph 2.0.3 reads:

> "Finding a site in a suitable location for a hostel is not easy and can be very time consuming. The purpose of hostels is to enable residents to remain under supervision in the community so, as far as possible, hostels should be sited in areas where they can have good access to public transport, employment, social, recreational and other community facilities. This may not always be possible, but any selection of a site should take into account the possible impact of the hostel on local surroundings."

The guidance was not intended for the Inspector, it is submitted, but for the Committee and was irrelevant to the Inspector's function as a planning inspector. The Inspector formed the view that the Home Office's own criteria were not met at the appeal site. In the Inspector's opinion, for example, there was not "good access to public transport, employment, social, recreational and other community facilities". (It is not submitted by the Secretary of State that the last sentence in paragraph 2.0.3 is relevant to the first issue in this appeal).

The Inspector also referred to Circular 5/94 when considering fear of crime. The Circular does not in my view throw light on whether such fear is a "material consideration" under the Planning Acts. The Circular is entitled "Planning out Crime" and is said to provide "fresh advice about planning considerations in crime prevention, particularly through urban design measures". The Inspector, in the paragraph already set out, echoes the wording of paragraph A1 of the Circular where it is stated: "Fear of crime, whether warranted or not, is a significant problem in its own right, particularly

among those in the more vulnerable sectors of society, such as the elderly, women and ethnic minorities". I regard that as an uncontestable statement but not one which throws light upon the present issue. As the title indicates, the Circular is concerned with the importance of security in the design of development. It is stated in paragraph 3 that "there should be a balanced approach to design which attempts to reconcile the visual quality of a development with the need for crime prevention". That consideration has no bearing upon the present issue and the Inspector's adoption of a part of the narrative in the Circular does not involve a misdirection upon the point at issue.

In considering the evidence in this case, I do not consider that the "disturbing incidents" and "occurrences" found by the Inspector to have occurred can be divorced or treated as a separate consideration from the concerns and fears of residents which he also found to be present. The fears arise from the disturbances and the Inspector was entitled to link them in the way he did in his conclusions. It is the impact of the occurrences upon the use of neighbouring land which is said to be relevant.

These propositions, relevant to the first issue, emerge from the authorities:

1. The impact of a proposed development upon the use of and activities upon neighbouring land may be a material consideration.

2. In considering the impact, regard may be had to the use to which the neighbouring land is put.

3. Justified public concern in the locality about emanations from land as a result of its proposed development may be a material consideration.

The contentious point in the present case is whether behaviour on and emanating from the development land in present circumstances attracts the operation of those

principles. The "particular purpose of a particular occupier" of land is not normally a material consideration in deciding whether the development should be permitted. (*East Barnet UDC* v *British Transport Commission* [1962] 2 QB per Lord Parker CJ at p 491).

A significant feature of the present case is the pattern of conduct and behaviour found by the Inspector to have existed over a substantial period of time. I include as part of that pattern the necessary responses of the police to events at the hostel. That behaviour is intimately connected with the use of the land as a bail and probation hostel. As analysed by the Inspector, it was a feature of the use of the land which inevitably had impact upon the use of other land in the area. On the evidence, the Inspector was entitled not to dismiss it as isolated and idiosyncratic behaviour of particular residents. The established pattern of behaviour found by the Inspector to exist, and to exist by reason of the use of the land as a bail and probation hostel, related to the character of use of the land, use as a bail and probation hostel. Given such an established pattern, I would not distinguish for present purposes the impact of the conduct upon the use of adjoining land from the impact of, for example, polluting discharges by way of smoke or fumes or the uses in *Finlay* and *Blum*. There can be no assumption that the use of the land as a bail and probation hostel will not interfere with the reasonable use of adjoining land when the evidence is that it does. Fear and concern felt by occupants of neighbouring land is as real in this case as in one involving polluting discharges and as relevant to their reasonable use of the land. The pattern of behaviour was such as could properly be said to arise from the use of the land as a bail and probation hostel and did not arise merely because of the identity of the particular occupier or of particular

residents.

If that is right, it is a question of planning judgment what weight should be given to the effect of the activity upon the use of the neighbouring land. (*Tesco Stores* v *Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Hoffman at p 780F). The weight to be given in that context to the more intensive use of the hostel proposed by the development at issue is also a question of planning judgment.

Before expressing general conclusions, I turn to the second issue. Had the proposal been by a private developer for residential or shopping use, for example, it would have been open to the Inspector to consider need as a material consideration. Mr Griffiths relies on the fact that the Committee are a statutory body acting under the statute and Government guidelines and he submits that different considerations apply.

I regard it as a significant feature of the present case that, neither in their evidence given by the Chief Probation Officer, nor in their submissions, did the Committee seek to limit the scope of the Inspector's investigation of need. The witness was cross-examined upon need in the usual way. It is not suggested that a statement of Government policy, not susceptible to challenge, was placed before the public local inquiry. That being so, I am not surprised that the Inspector conducted enquiries into need as he did.

The question of the extent to which policy matters may be investigated at a public local inquiry was considered by the House of Lords, in the context of road proposals, and in different circumstances, in *Bushell* v *Secretary of State for the Environment* [1981] AC 75. In the present context, there is a potential clash of interest between the Secretary of State for the Environment and the Secretary of State for the

Home Department and it may fall for consideration whether there are matters of Home Office policy which ought not to be subject to challenge at a local public inquiry into a planning appeal. Upon the procedure followed in this case, however, I do not consider that the Inspector can be criticised for adopting the course he did.

In any event, the Inspector directed his attention to development on the particular site and, subject to the Committee's subsidiary point, he stated his conclusion in terms that, even if the need existed, there was "little justification for providing more of it at Stonnall Road". He added, in relation to meeting the need, that "a location like this one, on the very edge of a small town and in the sort of quiet suburb where the impact of the hostel must be particularly apparent, would be incongruous". That was a proper approach for a planning inspector to take. I could not envisage a Home Office policy statement which in effect directed the Secretary of State for the Environment to provide for the need at a particular location as distinct from identifying the need. I do express the view that the extent of the Inspector's assumed power to challenge Home Office policy, and indeed criticise it as inconsistent, may be scrutinised in a future case. His conduct does not however invalidate the conclusion he reached in this case. His finding was based upon the application of planning criteria to a particular site and followed a procedure at the Inquiry to which no objection was taken.

The Committee's further submission is in relation to the use made by the Inspector of the site selection criteria, already cited, in the Home Office Guidance Note. The criteria included matters which an Inspector may properly regard as material planning considerations. They may be intended for guidance of committees seeking to establish hostels but, in so far as the considerations set out are material planning

considerations, I see no reason why the Inspector should not adopt them, if he sees fit, in considering whether the development on the site should be permitted. He is not obliged to assume that the particular site, from the planning point of view, meets the planning criteria stated by the Home Office.

The Inspector's application of the criteria in the Guidance Note to the appeal site was also attacked on *Wednesbury* grounds. His conclusions were in my view within the range permitted as a matter of planning judgment.

The Inspector expressed as his general conclusion that "the need to provide more places in bail hostels throughout the West Midlands would not provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road". For the reasons I have given, and in agreement with the judge, that was in my judgment a conclusion he was entitled to reach and I would dismiss this appeal.

SWINTON THOMAS LJ

I agree.

HIRST LJ

I also agree.

Order: Appeal dismissed with costs; application for leave to appeal to the House of Lords refused.

Order not part of the judgment of the court

[HOUSE OF LORDS]

WESTMINSTER CITY COUNCIL . . . . . APPELLANTS

AND

GREAT PORTLAND ESTATES PLC. . . . . RESPONDENTS

1984 July 16, 17; Oct. 31

Lord Fraser of Tullybelton, Lord Wilberforce, Lord Scarman, Lord Roskill and Lord Bridge of Harwich

Town Planning—Development—Local authority's development plan—Protection of specific industrial activities—Office development subject to non-statutory guidelines—Whether interests of individual occupiers irrelevant to formulation of industrial policy—Whether reliance on non-statutory guidelines invalid—Inspector's recommendation following public inquiry rejected—Whether duty to give reasons—Town and Country Planning Act 1971 (c. 78), Sch. 4, para. 11[1] (as substituted by Town and Country Planning (Amendment) Act 1972 (c. 42), s. 4(1), Sch. 1)

The City of Westminster's district plan, adopted by the city council in April 1982 embodied in paragraphs 11.22 to 11.26 the council's industrial policy which provided for the protection of specific industrial activities with important linkages with central London activities. They were specified as long established industries such as clothing, fur and leather, and paper, printing and publishing whose central London location, necessary to maintain the required services, made them vulnerable to pressure for redevelopment from other more financially profitable uses.

In relation to office development, the city council in paragraphs 10.21 to 10.23 drew a distinction between a "central activities zone," in which office development was to be encouraged, and the rest of the city, where planning permission for office development would not be granted save in exceptional or special circumstances not outlined in the plan but expressed to be the subject of "non-statutory guidance . . . prepared after consultation following adoption of the plan." Objection was taken to the city council's office policy and a public inquiry was held. The inspector's report recommended that a policy of office development outside the central activities zone should be incorporated into the plan and not left to guidance outside it. The city council did not accept the inspector's report.

The applicants, a property company, applied under section 244(1) of the Town and Country Planning Act 1971 to quash paragraphs 11.22 to 11.26 on the ground that the provisions were not within the powers of Schedule 4, paragraph 11(2) of the Act of 1971, in that they were concerned with particular users of land rather than the development and use of land; and that the city council, in formulating the industrial policies, had had regard to an irrelevant consideration, the interests of individual occupiers of industrial premises within the city. The applicants applied to quash paragraphs 10.21 to 10.23 on the grounds that the city council's comment upon the inspector's report was not an adequate statement of their reasons for rejecting it, and that by relying upon non-statutory guidelines to

[1] Town and Country Planning Act 1971, Sch. 4, para. 11 (as substituted): see post, p. 666F–G.

indicate what would constitute the exceptional circumstances for office development outside the central activities zone, the city council had failed to comply with the requirement in Schedule 4 that the plan must contain their proposals for the development and use of land.

Woolf J. dismissed the application but the Court of Appeal held that paragraphs 10.21 to 10.23 and 11.22 to 11.26 of the plan should be quashed.

On appeal by the city council:—

Held, allowing the appeal in part, (1) that the test of what was a material consideration in the preparation of local plans or in the control of development was, as in the grant or refusal of planning permission, whether it served a planning purpose which related to the character of the use of the land; that on their true construction, the industrial policies of the plan were concerned not with the protection of existing occupiers but with a genuine planning purpose, the continuation of industrial use important to the character and functioning of the city and, accordingly, paragraphs 11.22 to 11.26 of the plan should stand (post, pp. 670C–D, 671C–D).

East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B. 484, D.C. and *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, H.L.(E.) applied.

(2) That notwithstanding the duty on a public body to give reasons, when so required by statute, that were proper, adequate and intelligible, those reasons could be briefly stated; and the city council's reasoning with respect to the office policies had been adequately explained in paragraphs 10.21 to 10.23 and by its comment on the inspector's report (post, p. 673D–G).

In re Poyser and Mills' Arbitration [1964] 2 Q.B. 467 and *Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment* (1982) 264 E.G. 926 approved.

But (3) that the adoption by a local planning authority of non-statutory guidelines for the development and use of land in its area constituted a failure to comply with Schedule 4, paragraph 11 of the Act of 1971 and accordingly the order that paragraphs 10.21 to 10.23 of the plan should be quashed would be upheld (post, p. 674D–G).

Per curiam. Rights relating to the use and development of land, including those of landlords and others interested in land, take effect subject to the controls imposed by planning law (post, p. 671E).

Decision of the Court of Appeal (1983) 82 L.G.R. 44 varied.

The following cases are referred to in the opinion of Lord Scarman:

Bradley (Edwin H.) and Sons Ltd. v. Secretary of State for the Environment (1982) 264 E.G. 926

East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B. 484; [1962] 2 W.L.R. 134; [1961] 3 All E.R. 878, D.C.

Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)

Poyser and Mills' Arbitration, In re [1964] 2 Q.B. 467; [1963] 2 W.L.R. 1309; [1963] 1 All E.R. 612

Westminster City Council v. British Waterways Board (1983) 82 L.G.R. 44, C.A.; [1985] A.C. 676; [1984] 3 W.L.R. 1047; [1984] 3 All E.R. 737, H.L.(E.)

A No additional cases were cited in argument.

APPEAL from the Court of Appeal.

This was an appeal by the appellants, Westminster City Council, by leave of the Court of Appeal (Lawton, Dillon and Purchas L.JJ.) on 6 December 1983 reversing the decision of Woolf J. on 25 February 1983 whereby he dismissed an application by the respondents, Great Portland B Estates Plc., for an order that the City of Westminster district plan be quashed in so far as it related to office development outside the central activities zone and to the protection of specific industrial activities. The Court of Appeal ordered that paragraphs 10.21 to 10.23 and 11.22 to 11.26 of the plan be quashed.

The facts are stated in the opinion of Lord Scarman.

C *Michael Barnes Q.C., Christopher Lockhart-Mummery* and *Anne Williams* for the appellants. The duty of a local planning authority to decide applications for planning permission is derived from section 29(1) of the Town and Country Planning Act 1971, which provides that in dealing with the application the authority shall have regard to the development plan, so far as material to the application, and to any other D material considerations. There is nothing express in the legislation to cut down the generality of the phrase "other material considerations." When a local planning authority consider an application it will be obvious that if permission is granted and then implemented the likely result is that an existing occupier of the premises (usually a tenant) will be displaced and the premises will not thereafter be available for occupation by that or any other potential occupier in their existing state. The premises will E cease to be available for occupation by the class or category of persons who desire to occupy premises of their particular age, type and location. The loss of such premises which, if they remained, would fulfil or cater for the needs of a particular category of occupier, can be a material consideration. It was to considerations of that kind that paragraphs 11.22 to 11.26 of the district plan were directed.

F The desirability of keeping premises in their existing state is a proper planning consideration, as is the question of the hardship that may be caused to an existing occupier. The approach of the courts below to the question of the validity of those paragraphs should have been to ask (1) whether the policies contained in them were proposals for the development or use of land and (2) if so, did they require the local planning authority to take into account considerations that were not G lawful. Here, the policies were plainly proposals for the development or use of land and the desirability of keeping premises in their existing physical state, to meet a need for premises in such a state, is a lawful consideration. It is accepted that that affords to some occupiers a protection they would not have if the policy did not exist, but that is not a vitiating factor.

H The Court of Appeal relied on *Westminster City Council v. British Waterways Board* [1985] A.C. 676. That case was wrongly decided in so far as it was held that it was not a material consideration in refusing planning permission that the implementation of that permission would extinguish the use of the land as a street cleansing depot or that the

occupiers of the land for that purpose would be displaced and would not be able to find alternative premises. If it were the law that the particular needs and circumstances of actual or potential occupiers of land were not relevant serious consequences would flow, for example (1) the need to preserve an existing use of land so as to keep it available for potential occupiers would not be a good reason for refusing permission to change the use, and (2) the hardship which would be caused to an occupier of neighbouring land with special needs could not be a material consideration. The law as it stands allows a very wide category of cases to be taken into account, including preserving an existing use, the effect on occupiers of adjoining properties, the "precedent effect" if planning permission is granted, the financial viability of the development, the availability of alternative sites, the question whether, in cases where a planning permission is applied for and there is already in existence a previous planning permission, that previous permission can be used, and the personal circumstances of the applicant.

In relation to paragraphs 10.21 to 10.23 of the plan, relating to office development, the main defect alleged is the use of non-statutory guidelines. The question to be asked is whether any reasonable council would have done so. Applying that test, the council, in deciding not to put such detail in the plan, had not acted unreasonably. On the contrary, it would have been unreasonable to put into the plan all the details for every area; the plan would have been too big. Further, the appellants, in their comment upon the inspector's report where they rejected his views and recommendations, had not failed to comply with the requirement to give reasons imposed by regulation 17 of the Town and Country Planning (Local Plans for Greater London) Regulations 1974. Their comment is an adequate statement of their reasons for rejecting the views.

David Woolley Q.C. and *William Hicks* for the respondents. The appellants state that the "industrial" policy in paragraphs 11.22 to 11.26 of the district plan is to preserve certain buildings in the physical state in which they are in today so that their presence in the areas where they are located is assured. The purpose and consequences are one and the same—to protect the occupation of existing occupiers. If the purpose of the policy is to preserve the buildings in their physical state, there is no reference to that in the plan. It would have been easy for the council to limit the occupations that could be used in the premises on redevelopment. But it is only to the trade and not to the individual that the council can offer protection. To go beyond that would invalidate the industrial policies. Small traders are essential to the quality of local life but it does not follow that because a small trader says he is satisfied with the 150 year old premises that the owners wish to redevelop, that he is right. It is not accepted that redevelopment automatically prices the small trader out of the market.

The council's objectives can be achieved by the imposition of conditions on the planning permission, and if the physical character of a building is important, it is open to the Secretary of State for the Environment to list the building; or there are other means, such as the creation of conservation areas.

A Dealing with the "office policy" in paragraphs 10.21 to 10.23 of the plan, we are not told why the non-statutory guidelines are necessary. Provisions as large as these precluding office development cannot be precluded from inquiry by means of non-statutory guidelines. Any policy dealing with half the City of Westminster must be included in the plan. Further, regulation 17 of the Town and Country Planning (Local Plans for Greater London) Regulations 1974 required the appellants to B give reasons for its decision to reject the independent inspector's recommendations as to their plan. The reasons must be clear and intelligible and deal with the substantial points that have been raised: *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478 per Megaw J. The council did not attempt to grapple with the reasoning of the inspector.

C *Barnes Q.C.* in reply. The aim of the industrial policies is to state that there are certain types of uses within central London which need to be there. In relation to the office policies, a construction of paragraph 11 of Schedule 4 to the Act of 1971 which would result in everything, whatever the level of particular detail, having to go into the plan, cannot be accepted. The planning authority should not have to deal with every detail at the outset.

D

Their Lordships took time for consideration.

31 October. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Scarman, and I agree with it. For the reasons given E by him I would vary the order of the Court of Appeal as he suggests.

LORD WILBERFORCE. My Lords, I concur.

LORD SCARMAN. My Lords, in these proceedings Great Portland Estates Plc. challenge certain parts of the City of Westminster district plan. They made their challenge by application to the High Court F pursuant to section 244 of the Town and Country Planning Act 1971. Woolf J. dismissed the application, but on appeal the Court of Appeal upheld the challenge and quashed part of the policies for industrial and office development embodied in the plan. The City of Westminster, who are the local planning authority responsible for the plan, appeal with the leave of the Court of Appeal to your Lordships' House.

G Section 244(1) of the Act of 1971 enables a person aggrieved to question the validity of a structure plan or a local plan on two grounds: either that it is not within the powers conferred by Part II of the Act of 1971 or that any requirement of Part II or of any regulations made thereunder have not been complied with in relation to the approval or adoption of the plan. The respondent company's case, which prevailed in the Court of Appeal, consists of two quite separate challenges. The H first is that one aspect of the industrial policies embodied in the plan is not within the powers conferred by Part II of the Act of 1971. The second, which relates to the plan's policy for office development, is that in adopting the plan the City of Westminster failed to comply with

certain requirements of the Act of 1971 and of the regulations made under it.

Section 244(2) of the Act of 1971 sets out the powers of the High Court. The court may grant interim relief by suspending the operation of the plan. The respondent company did seek such relief, but no question of an interim order now arises for consideration. Upon final determination of an application the court, if satisfied either that the plan is wholly or to any extent ultra vires or that the applicant's interests have been substantially prejudiced by failure to comply with a statutory requirement, may wholly or in part quash the plan. The subsection, therefore, confers upon the court a power to be exercised at its discretion. It would be surprising if a court were to refuse to quash if satisfied that the plan or part of it was ultra vires; but clearly discretion may bulk large in deciding whether or not to quash upon the second ground. In the instant case the appellant authority accepts that if any part of the plan is ultra vires it must be quashed. If, however, the House should hold that in respect of the office development policy there had been a failure to comply with a requirement in relation to the adoption of the plan, the appellant submits that the discretion should be exercised against making an order to quash the part of the plan affected by that failure.

Part II of the Act of 1971 makes provision for the preparation, adoption, and approval of development plans. Section 19 provides that in relation to Greater London Part II shall have effect subject to the provisions of Schedule 4 to the Act of 1971. The Schedule provides for a structure plan for Greater London. London borough councils may prepare local plans: the appellants, being a local planning authority, prepared and in April 1982 adopted a local plan for their area, namely the City of Westminster district plan. The general provisions set out in paragraph 11 of the Schedule (as substituted by the Town and Country Planning (Amendment) Act 1972, section 4(1) and Schedule 1) apply to the plan. So far as material to this appeal, the paragraph provides:

> "(2) The plan shall consist of a map and a written statement and shall—(*a*) formulate in such detail as the council think appropriate their proposals for the development and other use of land in the area . . . or for any description of development and other use of such land . . . (4) In formulating their proposals in the plan the council shall—(*a*) secure that the proposals conform generally to the Greater London development plan . . . and (*b*) have regard to any information and any other considerations which appear to them to be relevant . . ."

The Greater London structure plan lays down the general strategy for the development and use of land in London. A local plan applies and may adjust this strategy to meet the planning needs of its area. A local plan's proposals, though they must conform generally to the structure plan, can deviate from it; and, if they do, the provisions of the local plan prevail for all purposes: section 14(8) of the Act of 1971.

When a London council proposes to prepare a local plan, it must secure adequate publicity so as to ensure that adequate opportunity is

given for making representations (including, of course, objections) and the council "shall consider any representations made to them within the prescribed period": paragraph 12(1) of Schedule 4. And before the council adopts the plan it must make copies available for public inspection, and send copies to the Greater London Council and the Secretary of State. The Secretary of State has extensive powers (which include the giving of directions and the suspension of operation) in respect of local plans which it is not necessary to consider because none were exercised. The Greater London Council have a right to be consulted before a local plan is prepared.

Section 13 of the Act of 1971 makes provision for inquiries in respect of draft local plans. In the case of objections put forward in accordance with regulations made under Part II of the Act the council must cause a local inquiry to be held by a person appointed by the Secretary of State: section 13(1) of the Act of 1971. Section 14 (as amended by section 3(2) of the Town and Country Planning (Amendment) Act 1972) empowers the local planning authority after considering objections so made to adopt the plan entire as originally prepared or as modified so as to take account of objections or other material considerations.

Unless, therefore, the Secretary of State intervenes (which in this case he has not), the council as local planning authority has the power of decision. But the power is subject to a requirement which is to be found in regulation 17(1) of the Town and Country Planning (Local Plans for Greater London) Regulations 1974 (S.I. 1974 No. 1481). Where a local inquiry to consider objections has been held, the local planning authority shall:

> "consider the report of the person appointed to hold the inquiry . . . and decide whether or not to take any action as respects the plan in the light of the report and each recommendation, if any, contained therein; and that authority shall prepare a statement of their decisions, giving their reasons therefor."

Within the statutory frame which I have outlined it is now necessary to consider the two challenges made by the respondents to the district plan. I will deal first with the challenge to the industrial policies embodied in the plan: and secondly with the challenge to the plan's policy for office development.

The "industrial" challenge

The industrial policy under challenge is in paragraphs 11.21 to 11.26 of the plan. The general policy is that applications for planning permission for new industrial floor-space and the creation of new industrial employment will, subject to other policies, be encouraged. The plan, however, goes on to protect "specific industrial activities." The council explains what it means by these words in paragraph 11.22, which, because of its importance, I quote:

> "*Purpose.* The city council considers that those industrial activities with important linkages with central London activities, particularly in the central activities zone, should be maintained."

The critical words are "important linkages with central London activities," since they define the planning purpose of the policy of protection. Paragraph 11.23 gives the reasons for the policy:

> "In 1971 about half the industrial floorspace in Westminster was located in the central activities zone. The greater proportion of this floorspace was occupied by firms which had been long established in the area, such as clothing, fur and leather, and paper, printing and publishing. Many of these industries need a central location in order to maintain the services required, but this central location also makes them vulnerable to pressure from other more financially profitable uses. The city council feels that the loss of these supporting industrial activities may threaten the viability of other important central London activities."

The reason, therefore, for the policy of protection is that, in the opinion of the council as local planning authority, the loss of the specified industrial activities may threaten the viability of other important central London activities.

In paragraph 11.24 the council makes the comment that while it cannot influence "internal changes in the operation of a firm" (which I take to be a reference to such matters as a business's financial viability, its market success or failure, and its management) it can influence "external pressures" which could interfere with "established linkages." The point is clear, though the jargon may strike some as unattractive: by the exercise of its planning powers the council can protect the specified industrial activities from disappearance in the face of the competitive pressure to redevelop their sites for other more profitable uses which, however, do not assist the viability of other important central London activities.

Paragraph 11.25 offers the explanation which I have just summarised of the term "external pressures." In a critical passage the paragraph then reveals the approach which the council proposes to take towards applications for the grant of planning permission for redevelopment in such cases. The passage is in the following terms:

> "This source of conflict is particularly severe in the central activities zone. Here, many of the longer established industrial firms are often located in premises which are old and subject to historic rents or nearing the end of leases, and as a result are particularly susceptible to change and consequent displacement. Notwithstanding the need for modern industrial premises already identified in para. 11.19, where the existing occupants of premises in, or including, industrial use are satisfied with that accommodation and in the city council's view no apparent case can be made for development or major rehabilitation, then it would be against the aim of retaining such industry readily to grant permission for redevelopment, or in some cases, major rehabilitation."

In the paragraphs 11.21 to 11.25, therefore, the council explains the planning problem, states its planning purposes and the reasons for it, and indicates what will be its approach to applications for planning

permission to redevelop the sites where there are presently carried on the industrial activities which in its judgment are so important to the life of central London. In paragraph 11.26 the council formulates its policy to meet the problem:

> "11.26 In order to ensure so far as possible, the continuation of those industrial uses considered important to the diverse character, vitality and functioning of Westminster, the city council has the following policies in addition to those set out above in para. 11.21: (i) Planning permission for major rehabilitation or the redevelopment of industrial premises containing industrial use will not normally be granted where it is considered that such development could be to the disadvantage of existing or potential industrial activities. In implementing this policy the city council will have regard to the need to seek improvement in the environment, and the impact on other occupiers of the premises."

Clearly the policy in 11.26 conflicts with the general policy in 11.21 for industrial development. Paragraph 11.12 takes care of the conflict by providing that the 11.26 policy to protect the specified existing industrial activities will normally be accorded precedence over the policy set out in 11.21.

The respondents challenge the 11.26 policy as being outside the powers conferred by Part II of the Act of 1971. The essence of the argument is that the 11.26 policy of protecting certain specified industrial activities is concerned not with the development and use of land but with the protection of particular users of land. The plan, it is submitted, has regard to an irrelevant factor, namely the interests of individual occupiers. The respondents seek to support this case by reference to the Landlord and Tenant Act 1954. One of the grounds on which a landlord may oppose a tenant's application for a new tenancy is that on termination of the current tenancy he intends to demolish or reconstruct the premises: section 30(1)(*f*). If there be a planning policy protecting the occupation of the tenant, its effect will be to deny the landlord the opportunity of invoking section 30(1)(*f*) in opposition to a tenant's application for a new tenancy since he will be unable to show that he will be likely to obtain planning permission for redevelopment.

My Lords, the principle of the law is now well settled. It was stated by Lord Parker C.J. in one sentence in *East Barnet Urban District Council v. British Transport Commission* [1962] 2 Q.B. 484. The issue in that case was whether the use of a parcel of land constituted development for which planning permission was required. The justices found that it did not and the Divisional Court, holding that the question of change of use was one of fact and degree, refused to intervene. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J. said, at p. 491, that when considering whether there has been a change of use "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier." These words have rightly been recognised as extending beyond the issue of change of use: they are accepted as a statement of general principle

in the planning law. They apply to development plans as well as to planning control.

Development plans formulate policies and proposals for the development and other use of land: sections 7(3) and 11(3) of the Act of 1971. When adopted or approved they constitute an authoritative general guide to the approach which will be followed by local planning authorities when dealing with applications for planning permission. Plans are concerned with the use of land and more particularly with its "development," a term of art in the planning legislation which includes now, and has always included, the making of a material change in the use of land: section 22 of the Act of 1971.

It is a logical process to extend the ambit of Lord Parker C.J.'s statement so that it applies not only to the grant or refusal of planning permission and to the imposition of conditions but also to the formulation of planning policies and proposals. The test, therefore, of what is a material "consideration" in the preparation of plans or in the control of development (see section 29(1) of the Act of 1971 in respect of planning permission: section 11(9), and Schedule 4 paragraph 11(4) in respect of local plans), is whether it serves a planning purpose: see *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, 599 *per* Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land. Finally, this principle has now the authority of the House. It has been considered and, as I understand the position, accepted by your Lordships not only in this appeal but also in *Westminster City Council v. British Waterways Board* [1985] A.C. 676 in which argument was heard by your Lordships immediately following argument in this appeal.

However, like all generalisations Lord Parker C.J.'s statement has its own limitations. Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exceptions cannot be wholly excluded from consideration in the administration of planning control.

Accordingly, I agree with Dillon L.J., who delivered the first judgment in the Court of Appeal that the respondents' challenge to the industrial policies of the plan is a question of the construction to be put upon paragraph 11.26 of the district plan. Of course, the paragraph cannot be considered in isolation from its context. One must look also at

the other paragraphs to which I have referred. At first instance, Woolf J., adopting this approach, concluded that

> "the plan does not fall foul of the statement made by Lord Parker C.J. in *East Barnet Urban District Council v. British Transport Commission* [1962] 2 Q.B. 484, 491. It contains provisions designed to assist the position of a particular class of user of property which it is the policy of the City of Westminster, for planning reasons, to encourage to remain in the city."

And he went on to comment that the plan was formulated so as to afford room, nevertheless, for any specific proposal of industrial development to be considered on its merits. The Court of Appeal disagreed. In their view, as expressed by Dillon L.J., "the council's real concern is with the protection of existing occupiers."

I have no hesitation in accepting the view of Woolf J. A fair interpretation of this part of the plan is that the council was concerned to maintain, as far as possible, the continuation of those industrial uses "considered important to the diverse character, vitality and functioning of Westminster." Here was, in paragraph 11.26 of the plan, a genuine planning purpose. It could be promoted and perhaps secured by protecting from redevelopment the sites of certain classes of industrial use. Inevitably this would mean that certain existing occupiers would be protected: but this was not the planning purpose of the plan, though it would be one of its consequences. In my view, the council makes a strong planning case for its proposal: the "linkage" argument stated in paragraphs 11.23 and 11.24 is a powerful piece of positive thinking within a planning context.

There remains the point on the Landlord and Tenant Act 1954. It is, in my judgment, based upon a misconception of the relationship between the planning legislation and private law. Rights to the use and development of land are now subject to the control imposed by the planning law. The rights of landlords, as of others interested in land, take effect subject to planning control.

For these reasons, therefore, I think that the appellant council succeeds against the challenge to the industrial policies embodied in the plan.

The challenge to the "office policies"

The challenge is to paragraphs 10.21 to 10.23 of the plan. The plan divides the City of Westminster into two zones: the central activities zone which includes the West End and Whitehall and the rest of the city where in the council's view there is an overriding need that land use and development should be compatible with residential use. Paragraph 10.21 indicates that the policy of the plan is "to guide office development to locations within the central activities zone." I set out in full paragraphs 10.22 and 10.23 as being critical for the consideration of the respondents' challenge:

> "10.22 Outside the central activities zone office development will not normally be appropriate since the overriding need will be for the activities in residential areas to be wholly compatible with, and

to serve the needs of, those areas. The exceptional circumstances in which such office development may be permitted are best dealt with by non-statutory guidance for different locations in the city; these will be prepared after consultation following adoption of the plan.

"10.23 Bearing in mind the need in central London to guide new offices to areas where such development will be most advantageous and the protection of residential uses throughout the city, the city council's general policies on the location of offices are set out below. In implementing these policies the city council will not accept that proximity to significant facilities for passenger interchange is, in itself, a reason for granting permission for office use. (i) Office development may, in accordance with the Greater London Development Plan . . . be acceptable on individual sites within the central activities zone . . . (ii) Outside the central activities zone planning permission for office development will not be granted except in special circumstances."

This policy of prohibition of office development outside the central activities zone save in "exceptional" (paragraph 10.22) or "special" (paragraph 10.23) circumstances drew objections from many including the respondents who, as is well known, are substantial landowners in the City of Westminster. An independent public inquiry was held pursuant to sections 13 and 14 of the Act of 1971 to consider the objections. The inspector reported adversely to the plan's proposal in respect of office development outside the central activities zone. He reported that in his view the policy of "virtual proscription" of office development outside the zone was wrong. He noted that it did not conform with the Greater London structure plan. He argued that there must be occasions (his word) in the environment of a capital city when offices can be developed beyond the innermost core without harm to the structure of the city or the people who live there. He praised the council's proposals for protecting the central activities zone while allowing in it office and some industrial development and saw no reason why such protection should not be effective if extended to the rest of the city. He concluded that "offices should be an accepted use in the areas beyond the boundary of the central activities zone." His recommendation was:

"That consideration be given to modifying those parts of the plan concerned with office development beyond the boundaries of the central activities zone. This consideration should extend to the incorporation in the plan of policy statements indicating the opportunities for office development for central London activities to take place in areas outside the central activities zone."

In the Court of Appeal, Dillon L.J., who gave the leading judgment, summarised the objections of the inspector to the plan. They were two: (1) that the policy of virtual proscription of offices was wrong, particularly in the areas of Paddington and Marylebone stations; and (2) that a policy of office development outside the central activities zone should be incorporated in policy statements to be included in the plan and not left to guidance outside the plan.

A The council considered the inspector's report and recommendation. Its comment was brief and, as Dillon L.J. said, terse:

> "Not accepted. It is considered that the opportunities for office development to take place outside the central activities zone can be appropriately indicated in the non-statutory guidelines to be prepared in accordance with the plan, para. 10.22."

B The respondents submit that the council's comment upon the inspector's report is not an adequate statement of their reasons for rejecting the views expressed in the report or the recommendation, and so fails to comply with the requirement to give reasons imposed by regulation 17 of the Town and Country Planning (Local Plans for Greater London) Regulations 1974 which were made under Part II of C the Act of 1971. They further submit that by relying upon non-statutory guidelines to indicate what would constitute the exceptional or special circumstances in which it would permit office development outside the central activities zone the council failed to comply with the requirement of Schedule 4, paragraph 11 of the Act of 1971 that the plan must contain the council's proposals for the development and use of land.

D (i) *Failure to give reasons.* When a statute requires a public body to give reasons for a decision, the reasons given must be proper, adequate, and intelligible. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, Megaw J. had to consider section 12 of the Tribunals and Inquiries Act 1958 which imposes a duty upon a tribunal to which the Act applies or any minister who makes a decision after the holding of a statutory inquiry to give reasons for their decision, if requested. Megaw J. E commented, at p. 478:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

F He added that there must be something "substantially wrong or inadequate" in the reasons given. In *Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment* (1982) 264 E.G. 926, 931 Glidewell J. added a rider to what Megaw J. had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases. However, I also agree with Woolf J. that in this case the G council's reasoning in support of its view is made perfectly clear in paragraphs 10.21 to 10.23 of the plan and by its refusal to accept the inspector's report and recommendation. Accordingly, I reject this submission. This challenge to the plan, therefore, fails.

(ii) *The non-statutory guidelines.* Woolf J. rejected this challenge to the validity of the plan, holding that there was nothing in the Act which requires a local plan to elaborate what will be regarded as exceptional or H special circumstances: "the range" he said "of such circumstances can be regarded almost as never-ending."

The Court of Appeal took a different view. Dillon L.J. examined the non-statutory guidelines promulgated by the council and found that they

represented an endeavour to meet the point of principle expressed in the inspector's report that the policy of total proscription of office development outside the central activities zone was wrong and not in conformity with the Greater London structure plan. It is unnecessary for me to say more of the guidelines than that the council uses them to set out certain "non-statutory policies": paragraph 3.2 of the guidelines. In paragraphs 3.3 and 3.4 of the guidelines the council states what those policies are. In the view of the Court of Appeal the exclusion of those policies from the plan constituted a failure to comply with the requirements of Schedule 4, paragraph 11 of the Act of 1971.

My Lords, I find the point one of some difficulty. Development plans are no inflexible blueprint establishing a rigid pattern for future planning control. Though very important, they do not preclude a local planning authority in its administration of planning control from considering other material considerations: section 29(1) of the Act of 1971. Further, it is accepted that exceptional hardship to individuals or other special circumstances may be treated in some cases as a material consideration. A reference, therefore, to exceptional or special circumstances in a plan is not improper, though, strictly, it is never necessary. But what is the position if it can be shown, as in this case, that the reference to exceptional or special circumstances is a cover for policies excluded from the plan?

The statute requires that a local plan shall formulate in such detail as the council thinks appropriate their proposals for the development and use of land: section 11 and Schedule 4, paragraph 11(2) of the Act of 1971. If a local planning authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgment, failing in its statutory duty. An attempt was made to suggest that the non-statutory guidance in this case went only to detail, as to which the council is given a discretion. But the council provides the answer to this point: it speaks in its guidelines of its non-statutory policies. In the Court of Appeal, Dillon L.J. demonstrated by his quotations from paragraphs 3.2, 3.3 and 3.4 of the non-statutory guidelines that they do indeed, as the council itself says, contain matters of policy relating to the control of office development outside the central activities zone.

It was the duty of the council under Schedule 4 of the Act of 1971 to formulate in the plan its development and land use proposals. It deliberately omitted some. There was therefore a failure on the part of the council to meet the requirement of the Schedule. By excluding from the plan its proposals in respect of office development outside the central activities zone the council deprived persons such as the respondents from raising objections and securing a public inquiry into such objections.

The council submits finally, that, if there was such a failure, the discretion of the court, which undoubtedly exists, to refuse an order to quash should be exercised in its favour. In the present case the discretion fell to be exercised by the Court of Appeal. The court made the order to quash because, in its view, it was wholly unreasonable and improper to put into extra-statutory guidelines matters which ought to have been

in the plan so that all interested persons might know what the policy of the council would be in granting permission for office development outside the central activities zone. I agree: but, even if I did not, I would not interfere: for this was a matter for the Court of Appeal, and I know of nothing which would justify the House in interfering with the exercise of their discretion in the present case.

In my judgment, therefore, the appeal is only partly successful. I would vary the order of the Court of Appeal so as to delete paragraphs 11.22 to 11.26 from the order quashing parts of the plan. The order to quash paragraphs 10.21 to 10.23 of the plan stands. I propose that there be no order for costs either in your Lordships' House or below.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I agree with it and for the reasons he gives I, too, would vary the order of the Court of Appeal as he proposes. I would make no order for costs in your Lordships' House or in the courts below.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend Lord Scarman with which I agree, I would vary the order of the Court of Appeal as he proposes.

Appeal allowed in part.
Order of Court of Appeal varied.
No order as to costs.

Solicitors: Solicitor, Westminster City Council; Nabarro Nathanson.

C. T. B.

Case No: C1/2015/0448

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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR C.M.G. OCKELTON (sitting as a Deputy High Court Judge)
CO/4776/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2016

Before:

Lord Justice Tomlinson
and
Lord Justice Lindblom

- -

Between:

Crystal Property (London) Ltd.	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government	
(2) London Borough of Hackney Council	**Respondents**

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Mr Christopher Jacobs (instructed by **Direct Access**) for the **Appellant**
Mr Richard Kimblin Q.C. (instructed by **the Government Legal Department**) for the **Respondents**

Hearing date: 12 October 2016

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Judgment

Lord Justice Lindblom:

Introduction

1. In this appeal we must consider whether an inspector, when determining an appeal under section 78 of the Town and Country Planning Act 1990, went wrong in his approach to the application for outline planning permission before him.

2. The appellant, Crystal Property (London) Ltd., appeals against the order dated 15 January 2015 of Mr C.M.G. Ockelton, sitting as a deputy judge of the High Court, by which he dismissed its application under section 288 of the 1990 Act challenging the decision of the inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to dismiss its appeal against the refusal by the second respondent, the London Borough of Hackney Council, to grant outline planning permission for a mixed use development of shops and offices on a site known as Morris House, adjoining 130 Kingsland High Street, London E8. The inspector's decision letter is dated 3 September 2014. At an oral hearing on 13 April 2016 I granted permission to appeal on only one of the six grounds of appeal in the appellant's notice, namely ground 6.

The issue in the appeal

3. The essential part of ground 6 can be extracted from paragraph 53 of the skeleton argument dated 21 March 2015 of Mr Christopher Jacobs, counsel for Crystal Property in this appeal. Mr Jacobs did not appear in the court below, where Crystal Property was represented by its agent, Mr Eric Walton. The issue is whether the inspector erred in the approach he took to the application for outline planning permission before him, neglecting the fact that all matters, including "scale", and thus the height and massing of the proposed building, were reserved for future consideration. Paragraph 53 of Mr Jacobs' skeleton argument states:

> "The Deputy Judge erred in holding that … the Inspector was correct in considering that he was being asked on this occasion to consider the height and massing according to the plan submitted. The planning application was an outline application with all matters reserved … . The Appellant was simply seeking to establish consent for a part 4[,] part 5 storey building as is clearly stated on page 1 of the form. The requirements set out by the Council include the provision of indicative drawings. The Appellant [simply] submitted the same drawings as had been used in the 1990 and 2003 applications and the Deputy Judge erred in effect in holding that had the Inspector allowed the appeal, the Appellant would have established planning consent for a building as depicted in the drawings. This is simply not the case[. Had] the Inspector allowed the appeal then the Appellant would have achieved an outline consent for a part 4[,] part 5 storey building with all matters including height, massing and elevations reserved."

Outline planning permission

4. Under the statutory scheme an outline planning permission may be sought for the erection of a building, with all matters reserved for later consideration. Section 62 of the 1990 Act, "Applications for planning permission", provides:

> "(1) A development order may make provision as to applications for planning permission made to a local planning authority.
> (2) Provision referred to in subsection (1) includes provision as to –
> (a) the form and manner in which the application must be made;
> (b) particulars of such matters as are to be included in the application;
> (c) documents or other materials as are to accompany the application.
> …
> (3) The local planning authority may require that an application for planning permission must include –
> (a) such particulars as they think necessary;
> (b) such evidence in support of anything in or relating to the application as they think necessary.
> …
> (5) A development order must require that an application for planning permission of such description as is specified in the order must be accompanied by such of the following as is so specified –
> (a) a statement about the design principles and concepts that have been applied to the development;
> (b) a statement about how issues relating to access to the development have been dealt with.
> … ."

Section 92, "Outline planning permission", provides in subsection (1) that "[in] this section and section 91 "outline planning permission" means planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority … or the Secretary of State of matters not particularised in the application ("reserved matters")".

5. Outline planning permission was introduced under the Town and Country Planning General Development Order and Development Charge Applications Regulations 1950 (S.I. 1950/729) ("the 1950 GDO"). An application for outline planning permission enables a local planning authority to decide whether, in principle, a particular form of development on a site is acceptable or not. The concept was explained very clearly in the Ministry of Town and Country Planning's Circular 87, which accompanied the 1950 GDO:

> "Since consideration at the approval stages is limited by the terms of the initial permission, it is essential that that permission should not take the form of a blank cheque, and, correspondingly, the authority must be furnished with sufficient information to enable them to form a proper judgment of what is proposed; there can be no question of entertaining propositions which are still in embryo. The application should indicate the character and approximate size of the building to be erected, and the use to which it is to be put (e.g., 'a three-bedroomed house', a

‘two-storied factory for light industrial purposes with an aggregate floor-space of 30/35,000 square feet’).”

6. When Crystal Property’s application for planning permission was submitted to the council in September 2013, and at the time of the inspector’s decision in September 2014, the arrangements for applications for outline planning permission were provided in the Town and Country Planning (Development Management Procedure) (England) Order 2010 (S.I. 2010/2184), as amended (“the Development Management Procedure Order”). The Development Management Procedure Order was replaced by the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015/595), with effect from 15 April 2015.

7. Article 2, “Interpretation”, of the Development Management Procedure Order provided:

> “…
> “outline planning permission” means a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters;
> …
> “reserved matters” in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application –
> (a) access;
> (b) appearance;
> (c) landscaping;
> (d) layout; and
> (e) scale;
> “scale” means the height, width and length of each building proposed within the development in relation to its surroundings;
> … .”

Article 4, “Applications for outline planning permission”, provided, in paragraph (1), that “[where] an application is made to a local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for [its] subsequent approval”, and, in paragraph (2), that where the authority is “of the opinion that … the application ought not to be considered separately from all or any of the reserved matters”, it is to “notify the applicant … , specifying the further details [it requires]”. Article 5 provided the requirements for an “application for approval of reserved matters”. Article 8 provided for the content of design and access statements, including, in paragraph (3)(a), the requirement that a design and access statement must “explain the design principles and concepts …”.

8. Government guidance on “Outline planning applications” in paragraph 14-034-20140306 of the Planning Practice Guidance, under the heading “What details need to be submitted with an outline planning application?” (replacing the guidance given in Circular 01/2006 – “Guidance on changes to the development control system”), says that “[information] about the proposed *use* or uses, and the *amount* of development proposed for each use, is necessary to allow consideration of an application for outline planning permission”. Paragraph 14-035-20140306, under the heading “Can details of reserved matters be

submitted with an outline application?" (reproducing advice to the same effect in paragraph 44 of the Annex to Circular 11/95 – "Use of conditions in planning permission"), confirms that an applicant can choose to submit details of any of the "reserved matters" as part of an outline application, but unless he has "indicated that those details are submitted "for illustrative purposes only" (or has otherwise indicated that they are not formally part of the application), the local planning authority must treat them as part of the development in respect of which the application is being made; the local planning authority cannot reserve that matter by condition for subsequent approval".

9. There is ample authority for the principle that where matters have been reserved for subsequent approval the reserved matters application must be within the scope of the outline planning permission (see, for example, the judgment of Willis J. in *Lewis Thirkwell v Secretary of State for the Environment* [1978] J.P.L. 844 and the decision of the Court of Appeal in *Slough Borough Council v Secretary of State for the Environment* (1995) 70 P. & C.R. 560).

10. At the time relevant in *Slough Borough Council* the statutory definition of "reserved matters" (in article 1(2) of the Town and Country Planning General Development Order 1988 ("the 1988 GDO")) included "siting", "design" and "external appearance", but not "scale". In that case the outline planning permission granted by the local planning authority did not incorporate the application for planning permission, and did not refer to the floor area of the development, which was specified in the application. Stuart-Smith L.J., with whom Morritt and Ward L.JJ. agreed, said (at p.567) that it was "possible when the detailed application is considered that the size of the development can properly be reduced, having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping".

11. In *R. v Newbury District Council, ex parte Chieveley Parish Council* [1997] J.P.L. 1137 the application and drawings had been incorporated into the outline planning permission. In the application form it had been indicated that both "siting" and "means of access" were to be considered "as part of this application". The total proposed floorspace in Class D2 use was stated (5,644 square metres). One of the conditions imposed on the permission – condition 1 – required "[full] details of the siting[,] design and external appearance of the building(s), … (the 'reserved matters')" to be submitted to the local planning authority within three years. The condition said it was to "apply notwithstanding any indications as to the reserved matters which have been given in the submitted application" (p.1149). One of the issues for the court was whether the indication of floorspace given in the application should be treated as fixed by the permission, or as remaining open for consideration as part of the reserved matters. Carnwath J., as he then was, acknowledged that the "size and scale of development – whether in terms of floor area, height or even number of buildings – are not as such defined as "reserved matters"" (p.1151). But he concluded that "[the] indication of floorspace given in the application was … an "indication as to reserved matters" within the meaning of [condition 1]", and that "the condition operated to reserve, as matters for subsequent approval, all aspects of design, including size and floorspace" (p.1152). He endorsed as "correct in law, and appropriate in practice" the Government's advice in paragraph 44 of the Annex to Circular 11/95 (p.1153). The floorspace indicated in the application was, he said, "an aspect of siting or design; it was clearly particularised in the application; accordingly it could not (without amendment) be reserved by condition for

the detailed stage". He concluded that condition 1 was "unlawful, in purporting to reserve for subsequent approval matters of which details had been given in the application" (p.1154). The Court of Appeal (Hobhouse, Pill and Judge L.JJ.) agreed with that conclusion. But Pill L.J. observed (at p.60) that, in his view, gross floorspace could not be brought within the concepts of "siting" and "design" as reserved matters under the 1988 GDO. He went on to say:

> "… If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith L.J. as having said more than that in [*Slough Borough Council*] when he said that "it is possible when [the] detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping." … I consider wrong [the] conclusion that … floor space is still to be determined. Floor space could not be treated as a reserved matter."

12. In *R. (on the application of Saunders) v Tendring District Council* [2003] EWHC 2977 (Admin) Sullivan J., as he then was, distinguished the case of an outline planning permission that specified the floorspace of the development from one that did not. He said (in paragraph 57 of his judgment):

> "There is an important distinction between [*ex parte Chieveley*] and the present case. In [*ex parte Chieveley*] the outline planning permission specified the permitted gross floor space. In those circumstances it is not surprising that the Court of Appeal concluded that the permitted floor space could not be cut down by means of a condition reserving design details for subsequent approval. The details to be approved would have to be details of a building of the permitted size. The present case would be analogous with [*ex parte Chieveley*] if the 1993, 1998 and 2002 outline planning permissions had specified the number of dwellings permitted on the site. They did not. No upper or lower limit was specified. In those circumstances, it was open to the local planning authority to control the number of dwellings to be erected on the site by controlling not merely their design, but also their siting, and indeed the amount of landscaping to be provided on the site. …".

13. The concept of "scale" as a reserved matter under article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995, as amended, was considered by Simon J., as he then was, in *MMF (UK) Ltd. v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin). Simon J. observed (in paragraph 11 of his judgment) that "at the most simple analysis, if one considers a building as a simple three-dimensional shape, a box, the size of the box, and importantly its relationship with other buildings, is a question of Scale".

The planning history of the appeal site

14. The site has a long planning history. In August 1990 the council granted outline planning permission for a five and six-storey building for retail and office use. Design and external appearance were reserved matters. That permission was never implemented. In June 2003 the council's Planning Committee resolved to grant outline planning permission for a building of six storeys, with Class A1 use on the ground floor and 41 flats above, subject to a section 106 agreement. All matters except siting and access were to be reserved for future approval. The section 106 agreement never came into existence, and the planning permission was not granted. In April 2012 the council refused an application for outline planning permission, with all matters reserved, for a six-storey building, with retail use on the ground floor, offices on four of the five floors above the ground floor, and apartments on the fifth. An appeal against that decision was dismissed by an inspector on 26 November 2012. Because the application was in outline with all matters reserved for future consideration, that inspector said he had considered the drawings submitted with it "on the basis that they are illustrative and show a possible, rather than a definitive, layout and design" (paragraph 1 of the decision letter). When considering the effect the development would have on the character and appearance of the surrounding area and the setting of the grade II listed Rio Cinema, he said (in paragraph 8):

> "The appearance and scale of the proposal are reserved matters but the application specifically refers to a six storey building. It would occupy the corner plot with the apartments at the highest level set back slightly and not covering the full footprint at that level. This set back would prevent views of the top floor from close to the site, although it would be visible in longer views along the Street. It is the height of the respective buildings that is important rather than the number of storeys. The proposal would be a similar height to the listed Cinema. However, even in views where the apartments at fifth floor could not be seen, the illustrative drawings indicate that the proposed building would appear significantly higher, some 2.1-2.5 metres, than its neighbours to the north and south, although the latter would be separated from the proposed building by the width of Sandringham Road. This would be at odds with the 4 storey building with a 5 storey feature at the corner anticipated by AAP Policy DTC-CA 01[A]."

15. The Dalston Area Action Plan was adopted by the council in January 2013. Policy DTC-CA 01, "KINGSLAND HIGH STREET CHARACTER AREA SITE-SPECIFIC POLICIES", states:

> "1) Each opportunity site within the Kingsland High Street Character Area is to be developed in a co-ordinated way and to a high design standard, ensuring a mix of suitable and complementary uses. The following site-specific planning policies are to be adhered to:
>
> a) SITE A: 130 KINGSLAND HIGH STREET AND SITE TO THE REAR 130A KINGSLAND ROAD (SITE AREA 1920 SQ.M./0.192 HECTARE)
>
> Site redevelopment for a 4 storey building to include retail, employment and residential with the potential for a key, high quality architectural feature at the corner of Sandringham Road and Kingsland High Street (up to 5 storeys) to complement the Rio Cinema diagonally opposite.

… ."

Crystal Property's application for outline planning permission

16. The application for outline planning permission with which these proceedings are concerned was submitted to the council on 3 September 2013. The application form was the form for an "Application for Outline Planning Permission with all matters reserved …". It was completed by Mr Walton. In part 3, "Description of the Proposal", the proposed development was described in this way:

> "Erection of a part 4 and part 5 storey building providing retail space on the ground floor, office space on the upper floors, car parking, cycle storage and waste storage in the basement".

Part 10, "All Types of Development: Non-residential Floorspace", asked the question "Does your proposal involve the loss, gain or change of use of non-residential floorspace?". Three answers were available: "Yes", "No" and "Unknown". The "Yes" box was ticked. The "[existing] gross internal floorspace …" in Class A1 use ("Shops") was stated to be 493.5 square metres, and the "[total] gross internal floorspace proposed …" 694.4 square metres, so that the "[net] additional gross internal floorspace following development …" was 200.9 square metres. As for Class B1(a) use ("Office (other than A2)"), the"[total] gross internal floorspace proposed …" was stated to be 2,323.2 square metres. The "[net] additional gross internal floorspace following development …" in that use was therefore 2,323.2 square metres, there being no office floorspace on the site at present. Thus the total "gross internal floorspace proposed …" was 3,017.6 square metres, and the total "[net] additional gross internal floorspace following development …" 2,523.2 square metres. In part 16, "Planning Application Requirements – Checklist", which warns that the application "will not be considered valid until all information required by the Local Planning Authority has been submitted", a tick was put in the box for "[the] original and 3 copies of other plans and drawings or information necessary to describe the subject of the application". Three drawings were submitted, for illustrative purposes. Two showed the elevations of the proposed building to Kingsland High Street and Sandringham Road, the third a view of the building in perspective and an axonometric image providing "site data".

17. In the council's decision notice refusing outline planning permission, dated 2 December 2013, the "Particulars of the Application" gave the number of the application and its date, and stated that the "Application Type" was "Outline Planning Application". The "Proposal" was described in this way:

> "Erection of a part 4-storey, part 5-storey building providing retail use on ground floor and offices on upper floors, with associated car parking, cycle parking and waste storage. (Outline planning application with all matters reserved)."

Two "Plan Numbers" were given: "1018 and 1019". These were the illustrative drawings showing the Kingsland High Street and Sandringham Road elevations of the proposed building. The reason for refusal, reflecting the officer's assessment of the proposal, was this:

"1. The proposed development, by reason of its excessive height and massing on this prominent corner junction, would result in a development that would relate poorly to the existing development on Kingsland High Street and Sandringham Road to the detriment of the streetscene and would unduly compromise and compete with the setting of the Grade 2 listed Rio Cinema opposite. The proposal is therefore contrary to Hackney Core Strategy 2010 policy 24 (Design) and 25 (Historic Environment), the Dalston Area Action Plan 2013, London Plan 2011 policies 7.4 (Local Character), 7.6 (Architecture) and 7.8 (Heritage assets and archaeology), and paragraphs 17, 64 and 133 of the National Planning Policy Framework ["NPPF"]."

The section 78 appeal

18. Crystal Property appealed against the council's decision on 11 December 2013. The appeal was determined on the parties' written representations. The lengthy "Grounds of Appeal" submitted to the Planning Inspectorate on behalf of Crystal Property confirmed, in paragraph 5, that the application on appeal was "an outline planning application with all matters reserved". Paragraph 12 stated:

> "12.The current application, the subject of this appeal, is for a part 4, part 5 storey building providing 694 square metres of retail space on the ground floor, 2,475 square metres of office accommodation on the upper floors and a basement car park providing 21 car parking spaces including 6 disabled spaces, 25 cycle storage spaces and a large waste storage area. … ."

In paragraph 20 it was stressed that "the indicative design of the proposed development is the same as that of the building which was approved in 1990 …". In a section headed "Conservation and Urban Design" paragraph 39 said this:

> "39. The application is outline with all matters reserved and the drawings submitted are only an indicative design. This is an important consideration as matters of detailed design remain for determination, and accordingly the Appellant need only demonstrate that a building of this general form would be acceptable on the site, subject to detailed design. The appellant is simply trying to establish the parameters of a building which is deemed acceptable for this site, especially as the LPA's officers and the Appellant and its counsel disagree with the interpretation of policy DTC-CA-01 … ."

Paragraph 42 stated:

> "42. The indicative design submitted, apart from a slight change to the corner element, is almost exactly the same as that submitted in application TP/99497/D/DCK which was granted in August 1990. At (P19) there is a copy of the 1990 design and at (P20-21) a copy of the current design, the pitched roof is steeper in the 1990 version making it slightly taller than the current proposal. The height of the 3rd floor windows in relation to the parapet of the adjoining building on both (P19-20) make comparison of the respective heights easy to judge. … There has been no change in the built environment of KHS, apart from the

> demolition of the buildings on sites D1 and D2, since the 1990 consent was granted. The Appellant therefore submits that the application should be treated in the same way and considered in keeping with the character of the area, given that the only change to the area has been the development of various sites with taller buildings."

In the following passages of the "Grounds of Appeal" there were numerous references to "the proposed building" – the building shown in the illustrative drawings submitted with the application for outline planning permission – in comparison with developments approved by the council on adjacent sites, including, in particular, sites known as C1, C2, D1 and D2. For example, in paragraph 45, it was pointed out that "[the] floor to ceiling heights in the proposed building … mirror those of the adjoining building", and that "[the] proposed buildings on D1, D2 and C2 have the same floor to ceiling heights as the adjoining buildings and as that of the proposed building on the appeal site".

The inspector's decision letter

19. At the beginning of his decision letter, the inspector noted that the appeal had been made "against a refusal to grant outline planning permission", and that "[the] development proposed is erection of a part 4 and part 5 storey building providing retail space on the ground floor, office space on the upper floors, car parking, cycle storage and waste storage in the basement". Under the heading "Preliminary Matters", he said (in paragraph 2):

> "The application is for outline permission with all matters reserved for subsequent approval. However, plans accompanying the application indicate the built form reflecting the description of development, although this is a possible rather than definitive layout and design. As the Council had regard to these indicative plans in determining the application, I have dealt with the appeal on the same basis."

20. The "main issue" in the appeal was, said the inspector, "the effect on the character and appearance of the surrounding area, and related to this, the effect on the setting of the nearby Rio Cinema, a Grade II listed building" (paragraph 5).

21. His attention had been drawn to "a recent appeal decision involving an outline application for erection of a six storey building on the appeal site". And, he said, given the relevance of that decision to the appeal before him, he had had regard to it (paragraph 7). This was the appeal decision of 26 November 2012.

22. The inspector referred (in paragraphs 8 to 12) to relevant policies in the Dalston Area Action Plan. In Policy DTC 04 the maximum building height for the appeal site, and others, was said to be "4 to 6 storeys". The front of the site was "also identified as a character sensitive area influencing building height" (paragraph 9). Policy DTC-CA 01, as he said, "requires site redevelopment for a 4 storey building with the potential for a key, high quality architectural feature at the corner of Sandringham Road and Kingsland High Street (up to 5 storeys) to complement the Rio Cinema diagonally opposite" (paragraph 10). He went on (in paragraph 11) to say this:

"11. … While the detailed design of the building is yet to be determined, to the extent that the proposal is for a 4 and 5 storey building I accept also that it reflects the numerical requirements of Policy DTC-CA 01. I note, however, that the appellant is seeking to establish the parameters of a building that would be considered acceptable on the appeal site. To my mind this reinforces the importance of the Inspector's comment in the previous appeal that it is the height of the respective buildings that is important rather than the number of storeys (paragraph 8)."

Policy DTC-CA 01 was, in the inspector's view, consistent with the NPPF, "particularly section 7 concerning good design". He gave it and the other relevant policies of the area action plan "considerable weight in this case" (paragraph 12).

23. The inspector discussed the merits of the development shown in the illustrative drawings (in paragraphs 13 to 16):

"13. To the immediate south of the appeal site is a four storey terrace, while the adjoining terrace to the north is three storeys high. The tallest building in the immediate vicinity is the Rio Cinema. The indicative drawings show a four storey building (excluding the basement) extending across the full site frontages on both the High Street and Sandringham Road. Above this, a fifth storey and pitched roof form covers the majority of the footprint, with insets adjacent to the northern and eastern boundaries.

14. A comparison of the current proposal with that in the previous appeal shows buildings of broadly similar height. This is despite the additional storey in the previous case and results from the larger storeys and roof form in the current proposal. I accept that the floor to ceiling heights appear to be similar to those of neighbouring buildings. However, it is the fact that the fifth storey and roof form covers much of the building's footprint that defines the overall height of the building and adds to the perception of a building of greater bulk and mass. The resulting effects would be a building that would dominate rather than complement this part of the street scene at the northern end of the town centre. The height, bulk and mass of the building would be particularly prominent in views from the south on the High Street due to the differences in ground levels.

15. Approaching from the north and the south along the High Street, the proposed building and the Rio Cinema would be the tallest buildings in the immediate street scene. However, the presence and height of the appeal proposal would detract from the appearance of the listed cinema as it would compete with and visually dominate this existing building. This would in large part be due to the extent of the fifth storey and roof form across much [of] the building, which in my view would not readily conform to the requirements of Policy DTC-CA 01 for a key architectural *feature* of up to 5 storeys on the corner of the two roads.

16. The appellant contends that views of the cinema, specifically the auditorium, are limited in relationship to the appeal site and proposed building. However, the cinema as a whole is a designated heritage asset and, as such and due to its

physical prominence, is recognised as a landmark building in the AAP. Furthermore, its relationship with the development of the appeal site is specifically defined in Policy DTC-CA 01 and my findings above are that there would be a clear visual relationship between the two buildings in views from the High Street. For these reasons, I give the appellant's contentions on these matters little weight."

24. The inspector then turned (in paragraphs 17 and 18) to consider recent grants of planning permission on other "Opportunity Sites". He observed that "[in] the case of the appeal site the more general policy provisions in the AAP are refined into specific requirements having particular regard to the unique relationship with a nearby landmark [listed] building, which is referred to in the policy", and that "[in] this respect, the permitted development on other sites cannot be seen as a direct precedent for development of the appeal site" (paragraph 17). The fact that these recent planning permissions had not been taken into account in the appeal decision of 26 November 2012 did "not invalidate that decision as a material consideration in this case". But he had reached his findings "on the merits of the proposal before [him] assessed against relevant national and local policies and other material considerations" (paragraph 18). As for the outline planning permission granted in 1990 and the council's decision to approve another scheme for the appeal site in 2003, he said (in paragraph 19):

> "19. Reference is also made to an outline approval in 1990 for an equally tall, if not taller, building on the appeal site … ; and a similar one, which was deemed acceptable but not formally permitted in 2003 … . The appellant contends that these are material to the current proposal, particularly as the development plan policies relied on at the time have effectively been carried forward into current plans. The AAP has, however, been adopted since those decisions and I am not aware that earlier plans included a site-specific policy akin to Policy DTC-CA 01, which now has the most significant bearing on the site's development. Moreover, the previous appeal and the Council's decision that led to it are more recent relevant decisions involving a proposal of broadly similar height to the current one, which were assessed against the provisions of the AAP. For these reasons, I give little weight to a direct comparison with these much earlier permissions."

25. The inspector concluded that the proposed development "would have an unacceptably harmful effect on the character and appearance of the surrounding area and on the setting of the listed Rio Cinema", and was therefore contrary to the area action plan, the corresponding policies in the NPPF, Policy 24 and Policy 25 of the Hackney Core Strategy 2010, and Policy 7.4 and Policy 7.8 of the London Plan 2011 (paragraph 20). Conscious of the requirement in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the setting of a listed building (paragraph 21), he found the harm to the significance of the listed Rio Cinema as a heritage asset "while unacceptable, would be less than substantial" under the policy in paragraph 134 of the NPPF. But in the absence of evidence to show that "a building of a different form" on the appeal site would not be viable, the harm was not outweighed by the "public benefits of the proposal" (paragraph 22). Only "limited weight" could be given to the contention that the proposal, as "sustainable development", earned the support of the presumption in paragraph 14 of the NPPF (paragraph 23). It followed that the appeal must be dismissed (paragraph 24).

The judgment in the court below

26. The issue with which we are concerned was one of several for the judge to decide. He dealt with it in paragraph 24 of his judgment:

> "There is a further point, which is this: the present decision is one which is specifically based on the height and massing of the proposed development. However, questions of height and massing were specifically reserved in the 2003 decision, so that decision cannot be read as consent for the height and massing, which is the subject of the present application, for a similar development. In the present application, the plans were not marked as illustrative, and given the 2012 decision where the application and appeal essentially failed because of the height, the inspector considered, obviously correctly, as I have said, that he was being asked to consider, on this occasion, the height and massing according to the plan submitted. The 2003 consent, therefore, although it relates to a building said to be identical to the one which was the subject of the 2013 application, is not, in truth, comparable at all: not only was it made subject to different policies but the decision itself is a decision on a different issue."

Did the inspector adopt an incorrect approach to the application for outline planning permission?

27. For Crystal Property, Mr Jacobs submitted that the judge's error was to conclude that the inspector was being asked to consider whether the height and massing of the proposed development shown in the illustrative drawings were acceptable. This was a misconception. The proposal before the inspector on appeal was an application for outline planning permission with all matters reserved. As the planning application form made clear, Crystal Property was seeking to secure the principle of the site's development with a part four, part five storey building – as was required by policy DTC-CA 01 of the area action plan. The council's requirements for applications for outline planning permission included the submission of indicative drawings. Crystal Property therefore submitted, though for purely illustrative purposes, drawings showing a development very similar to that for which planning permission had been granted in 1990. The inspector should have asked himself, but clearly did not, whether there was any reason to withhold outline planning permission for that development, leaving height and massing to be determined when the "scale" of the proposed building was considered at the reserved matters stage. And the judge should have seen the inspector's error. But he did not.

28. Mr Richard Kimblin Q.C., for the Secretary of State, opposed that argument. He submitted that the inspector's decision letter reflects a true understanding of the status of the application for outline planning permission, and of the illustrative drawings on which Crystal Property relied in the appeal. The inspector did not, in fact, mislead himself to a false approach. As is clear from paragraph 11 of his decision letter, he understood that Crystal Property was seeking to establish acceptable parameters for the development of the site, but that it was doing so firmly and solely on the basis of the proposal described in the application and shown in the illustrative drawings. The approach he took to the proposal before him was faultless.

29. The first question here concerns the status of the application for outline planning permission. Was it, as it purported to be, an application for outline planning permission with all matters reserved for future consideration? In my view it clearly was. The application form made that entirely plain. The form itself was the one provided by the council specifically for applications for outline planning permission "with all matters reserved". We were shown another form which is to be used in making outline applications "With Some Matters Reserved". Unlike the form for outline applications in which all matters were reserved, it includes in part 3, "Description of the Proposal", the request that the applicant "indicate all those reserved matters for which approval is being sought" and a box for each of the five matters that may or may not be reserved ("Access", "Appearance", "Landscaping", "Layout" and "Scale"). In this case there was never any indication, either when the application was before the council for determination or when it was before the inspector on appeal, that Crystal Property, as applicant, intended any of those five matters to be decided at this stage. The drawings submitted with the application, though not marked as "illustrative" or "indicative", could only sensibly be understood as having that purpose. Again, there was never any suggestion otherwise.

30. How then is one to understand the areas specified in part 10 of the application form as the floorspace for each of the uses – Class A1 ("Shops") and Class B1(A) ("Office …") – in the development? Are they part of the proposal for which outline planning permission was being sought? And if so, how do they relate to the "scale" of the development, a matter deliberately reserved for future consideration? Some caution is needed in tackling these questions, for three reasons. In the first place, the authorities to which I have referred in paragraphs 9 to 13 above are concerned with the interpretation of a local planning authority's grant of planning permission, an exercise to be conducted in accordance with the well-established principles referred to by the Supreme Court in *Trump International Golf Club Scotland Ltd. v Scottish Ministers* [2015] UKSC 74, whereas we are seeking to understand an application for planning permission that was never granted. Secondly, some of those cases were concerned with the legislative regime for outline planning permission as it was before the concept of "scale" was introduced to the definition of "reserved matters". And thirdly, in all of those cases the court's decision turned, as must ours in this appeal, on the particular circumstances of the case in hand, considered under the law, policy and guidance for outline planning permission current at the relevant time.

31. In this case, however, it seems entirely consistent with the law as it emerges from the authorities to regard the proposed floor areas – specified, use by use, in the application form – as being an essential component of the outline proposal. They quantified the floorspace of the proposed development in precise terms, identifying the amount of proposed "retail space on the ground floor" and the amount of proposed "office space on the upper floors", and thus refined the description of the development in part 3 of the application form as "a part 4 and part 5 storey building …". Such specificity as to floorspace is not inconsistent with the "scale" of the proposed development being reserved for future consideration. Floorspace and "scale" (as defined in article 2 of the Development Management Procedure Order) are not synonymous. There will necessarily be some relationship between them. But there is nothing incompatible between the floorspace of a proposed development being identified in an outline application and its "scale", including the dimensions of the proposed building – its "height, width and length … in relation to its surroundings" – being left for future determination as a reserved

matter. That is what would have been achieved in this case if outline planning permission had been granted and it had incorporated, as a grant of planning permission generally does, the application itself.

32. I see no reason to think that the council misunderstood the status of the application for outline planning permission when making its own decision. The description of the "Proposal" in its decision notice was accurate: an "[outline] planning application with all matters reserved". The illustrative drawings showing the elevations of the proposed building to Kingsland High Street and Sandringham Road were referred to. The reference in the single reason for refusal to the "excessive height and massing" of the proposed development does not conflict with the description of the proposal as an outline application with all matters reserved. It does not indicate that the council fell into the error of treating the "height" and "massing" of the proposed building shown in the illustrative drawings as if they were matters for determination at the outline stage. The council clearly recognized that the illustrative drawings represented a building, partly of four storeys, partly of five, accommodating the aggregate amount of floorspace specified in the application form for the two uses proposed.

33. The same may be said of the inspector as decision-maker in the appeal against the council's decision. He did not misunderstand the status of the proposal before him as an application for outline planning permission with all matters, including "scale", reserved. Paragraph 2 of the decision letter leaves no room for doubt about that. In that paragraph the inspector said, in the clearest possible terms, that "[the] application is for outline permission with all matters reserved for subsequent approval". He also noted, however, that the drawings accompanying the application "indicate the built form reflecting the description of development", though he recognized that this was a "possible rather than definitive layout and design". The council, he said, had "had regard to these indicative plans in determining the application" and he had "dealt with the appeal on the same basis". All of this is impeccable. And so are the inspector's observations in paragraph 11 of his letter, where he acknowledged that the "detailed design" of the proposed building was "yet to be determined", that in so far as the proposal was for a four and five storey building it reflected the "numerical requirements" of Policy DTC-CA 01, but that Crystal Property was also "seeking to establish the parameters of a building that would be considered acceptable on the appeal site".

34. Implicit in that last observation is the fact that the application for outline planning permission, while it reserved all matters, including "scale", for future consideration, had identified a specific floorspace for each of the uses in the proposed development and a total proposed floorspace for those uses, and that the illustrative drawings on which Crystal Property had relied in its "Grounds of Appeal" showed a building containing that much floorspace. Crystal Property's case on appeal was put to the inspector squarely on the basis that the illustrative drawings represented the proposal in the application for outline planning permission. It was that scheme, and only that scheme, on which Crystal Property depended in seeking to establish, as the inspector put it, "the parameters of a building that would be considered acceptable on the appeal site".

35. No other possible scheme was mooted, let alone described or illustrated. Nor was it suggested that the floor areas specified in the application form were to be regarded as other than integral to the proposal, that they were merely indicative or approximate or maximum floorspaces, or that they might change in some material way when the

reserved matters were submitted. Nor again was it suggested that the floorspace of the proposed development might be reduced by means of a condition attached to the outline planning permission, and, if so, by how much. Indeed, in paragraph 12 of the "Grounds of Appeal", to avoid any uncertainty on the point, it was unambiguously confirmed that the "application" on appeal was not merely for a building of four and five storeys, but "for a part 4, part 5 storey building providing 694 square metres of retail space on the ground floor, 2,475 square metres of office accommodation on the upper floors …". There was no suggestion that a building on this site with that number of storeys and that amount of floorspace might be designed so as to be materially different in its height and massing from the building shown in the illustrative drawings. This was not a matter for conjecture; it was a matter of basic geometry.

36. Can it be said, in these circumstances, that the inspector erred in his approach to the application and appeal? In my view it cannot. On a fair reading of his decision letter, he did not venture into a consideration of any of the reserved matters. He did not seek to determine that which was not before him for his decision. He took the scheme before him at face value. And he was right to do so. He considered the "height" of the proposed building, and its "bulk and mass", as Crystal Property clearly intended he should, with the aid of the "indicative" drawings. He was perfectly entitled to do that. He did it not to pre-empt the consideration of "scale" as a reserved matter which would be necessary if he allowed the appeal and granted outline planning permission. He did it to test the acceptability of the outline proposal itself.

37. Given the way in which the case for allowing the appeal had been presented to him, he could not sensibly have dealt with the main issue – the effects of the proposed development on the character and appearance of the area and on the setting of the listed Rio Cinema – in any other way. He concluded that the proposed building would "dominate rather than complement this part of the street scene at the northern end of the town centre", that the "height, bulk and mass of the building would be particularly prominent in views from the south on [Kingsland] High Street …" (paragraph 14), and that in views along Kingsland High Street the "presence and height" of the building "would detract from the appearance of the listed [Rio Cinema] as it would compete with and visually dominate this … building" (paragraph 15). Comparing the proposed building with the others nearby for which the council had recently granted planning permission, again with the benefit of the drawings illustrating the proposed building and the comments made in the "Grounds of Appeal", he was not persuaded to a different view of the merits of the proposal before him (paragraphs 17 and 18). He found he could give "little weight" to the suggested comparison between the height of the building now proposed and that of the buildings granted planning permission in 1990 and the subject of a resolution to approve in 2003, before the adoption of the area action plan. Not surprisingly, he saw more relevance in the more recent decisions to reject a "proposal of broadly similar height" (paragraph 19).

38. The inspector thus resolved the main issue in the appeal, as Crystal Property had effectively required him to do, on the basis of the proposal described in paragraph 12 of the "Grounds of Appeal". Unfortunately for Crystal Property, his conclusions on the merits of that scheme were contrary to those it had urged upon him. As he said when applying the policy in paragraph 134 of the NPPF, there was no evidence to show that "a building of a different form" from that proposed would be viable (paragraph 22). In the

end, he was left wholly unconvinced that the proposal before him could produce a satisfactory development of the site if outline planning permission were granted for it.

39. I see no error of law in the inspector's conclusions. In my view they embody a lawful exercise of planning judgment on the considerations relevant to deciding whether, in this particular case, outline planning permission ought to be granted, with all matters reserved. As the inspector plainly appreciated, Policy DTC-CA 01 does not contemplate the approval of any and every scheme for a building of four storeys on the appeal site, with an "architectural feature" at the corner of Sandringham Road and Kingsland High Street. That is not what the policy says. Some proposals for a building of four and five storeys will comply with the policy. Others will not. In this case, as is plain from the inspector's conclusions, he was not satisfied that a building of the floorspace proposed could be accommodated on the site in accordance with the policy. He did not have to speculate about the possible merits of some other, hypothetical proposal for the site. It was not up to him to redesign the development to comply with Policy DTC-CA 01, or to try to work out for himself how much floorspace an acceptable scheme might comprise. His task was to consider the merits of the development actually proposed in this application for outline planning permission, a building whose height and massing were shown in the illustrative drawings. And that is what he did.

40. It follows that in my view the inspector's decision is legally sound and, as the judge concluded, should therefore be upheld. It will be clear, however, that my reasoning to this conclusion is not the same as that of the judge in paragraph 24 of his judgment. It seems the judge may have thought that the "height and massing" of the proposed building were not within the scope of the reserved matters and were formally before the inspector for determination in the appeal. That is not correct. The height and massing of the building were shown, for illustrative purposes, in the "indicative" drawings. Those drawings clearly informed the inspector's decision, as they should. But as he very clearly recognized, they did not alter the status of the application as an application for outline planning permission with all matters reserved. His decision letter demonstrates an entirely lawful consideration of that outline scheme, on the correct understanding that none of the reserved matters fell for his determination in the appeal. In my view, therefore, the judge's decision was undoubtedly right, even if his reasons were not.

Conclusion

41. For the reasons I have given I would dismiss this appeal.

Lord Justice Tomlinson

42. I agree.

Guidance

Coronavirus (COVID-19): Meeting with others safely (social distancing)

Updated 7 January 2021

Contents

- Hands. Face. Space.
- Social distancing
- Letting fresh air in (ventilation)

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There is different guidance on social distancing in Wales, Scotland and Northern Ireland.

National lockdown: stay at home

You must stay at home. This is the single most important action we can all take to protect the NHS and save lives. You must not leave your home unless necessary.
Find out what you can and cannot do.

Hands. Face. Space.

Approximately 1 in 3 people who have coronavirus have no symptoms and could be spreading it without realising it.

It is critical that everybody observes the following key behaviours:

- HANDS - Wash your hands regularly and for 20 seconds.
- FACE - Wear a face covering in indoor settings where social distancing may be difficult, and where you will come into contact with people you do not normally meet.
- SPACE - Stay 2 metres apart from people you do not live with where possible, or 1 metre with extra precautions in place (such as wearing face coverings or increasing ventilation indoors).

It is important to meet people you do not live with outdoors where possible. If you meet people you do not live with indoors, such as someone working in your home, you should make sure you let as much fresh air in as you can without getting uncomfortably cold (for example by opening windows).

Social distancing

To reduce the risk of catching or spreading coronavirus, you should minimise time spent with people you do not live with, and when around other people ensure that you are two metres apart from anyone not in your household or support bubble. Social distancing is essential to stop the spread of the virus, as it is more likely to spread when people are close together. An infected person can pass on the virus through talking, breathing, coughing or sneezing even if they do not have any symptoms.

When with people you do not live with, you should also avoid: physical contact; being close and face-to-face; and shouting or singing close to them. You should also avoid crowded areas with lots of people; and touching things that other people have touched.

Where you cannot stay 2 metres apart you should stay more than 1 metre apart, and take additional steps to stay safe. For example:

- wear a face covering: on public transport and in many indoor spaces, you must wear a face covering by law, unless you are exempt
- go outdoors, where it is safer and there is more space
- if indoors, make sure rooms have a flow of fresh air by keeping windows and doors open

You do not need to be socially distanced from anyone in your household, meaning the people you live with. You also do not need to be socially distanced from anyone in your support bubble, if you are in one, but maintaining social distance will help reduce transmission.

You should try to maintain social distancing if providing informal childcare within a childcare bubble. You must not meet socially with your childcare bubble and must avoid seeing members of your childcare and support bubbles at the same time.

However, when providing care to a young child, or person with a disability or health condition who is not in your household or support bubble, it may not always be possible or practicable to maintain social distancing. You should still limit close contact as much as possible when providing these types of care, and take other precautions such as washing hands and opening windows for ventilation.

Letting fresh air in (ventilation)

COVID-19 spreads from person to person through small droplets, clouds of tiny airborne particles known as aerosols and through direct contact.

In addition to social distancing and other measures, you can also reduce the risk of spreading COVID-19 if you:

- avoid coming into contact with people in spaces with limited flow of fresh air such as rooms with windows that are never opened
- reduce the amount of time you spend indoors with people you do not live with
- make sure you let plenty of fresh air into your home without getting uncomfortably cold if you have people working in or visiting your house (only where permitted). You should do this during their visit and after they leave

To increase the flow of air you can:

- open windows as much as possible
- open doors
- make sure that any vents (for example at the top of a window) are open and airflow is not blocked
- leave extractor fans (for example in bathrooms) running for longer than usual with the door closed after someone has used the room

If your home has a mechanical ventilation system which circulates air through vents and ducts, ensure it is working and increase its flow rate when you have visitors (for example, if someone is viewing your house to buy) or if someone in your home is sick.

Let fresh air in while keeping warm

You can wear warm clothes or layers if you’re cold.

In colder weather opening the window a small amount can still help.

If windows have openings at both high and low levels (such as sash windows) using just the top opening can help avoid cold draughts.

If you’re concerned about noise, security or the costs of heating, opening windows for shorter periods of time can still help to reduce the risk of the virus spreading.

There is further advice on what to do if you are struggling to pay your energy bills as a result of the coronavirus pandemic from Ofgem.

Letting fresh air into your home does not eliminate the risk of catching or spreading coronavirus. You should continue to follow other precautions, and follow the rules on meeting with people who are not in your household.

Advice on reducing the risk of coronavirus transmission in the home from the Scientific Advisory Group for Emergencies (SAGE) has been published to help you safely plan for gatherings in the home.