

MID SUSSEX DISTRICT COUNCILPlanning Department
Oaklands Road
Haywards Heath
RH16 1SS

28 July 2026

Dear Katherine Williams

DM/26/1424 – DEMOLITION OF AGRICULTURAL BUILDING AND REPLACEMENT WITH SINGLE RESIDENTIAL DWELLING WITH ASSOCIATED GARAGE AT ALDERS FARM, BRIGHTON ROAD, HURSTPIERPOINT, HASSOCKS, WEST SUSSEX, BN6 9EE.

I am writing in response to your email dated 23 July 2026, which confirmed that Mid Sussex District Council is presently unable to support the above-referenced application because of an objection to the principle of development. Your email also requested amended plans in relation to the proposed garage to address the comments made by West Sussex County Council.

In response to the latter point, we enclose the following amended plans, which should replace the corresponding documents currently before the Council:

Original Plan	New Plan
Proposed Floor and Roof Plans 26 03 / 110 A (Superseded)	Proposed Floor and Roof Plans 26 03 / 110 B
Block Plan 26 03 / 100 C (Superseded)	Block Plan 26 03 / 100 D
Proposed Elevations 26 03 / 120 A (Superseded)	Proposed Elevations 26 03 / 120 B

Turning to the principle of development, the Council's position appears to be that the proposal does not fall within one of the forms of countryside housing expressly supported by Policy DP15, and that the approved Class Q conversion is materially different from the new dwelling now proposed. The Council has nevertheless acknowledged that it remains open to the applicant to complete the Class Q development in accordance with DM/24/1662.

With respect, we consider that the Council's conclusion does not give sufficient consideration or weight to the fallback position. Section 70(2) of the Town and Country Planning Act 1990 requires the Council to have regard to the provisions of the development plan and to any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires the application to be determined in accordance with the development plan unless material considerations indicate otherwise. The lawful and realistic Class Q fallback under DM/24/1662 is an important material consideration, and the consequence of that development must be compared with that of the proposed development.

The Fallback Position

The legal approach to fallback development is established by *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, enclosed at Enclosure 1. The Court of Appeal confirmed that a fallback represents a material consideration where there is a real prospect of it occurring. That prospect does not need to be probable or likely; a possibility will suffice, provided that it is more than merely theoretical. The assessment is fact-specific, and the weight attributed to the fallback is a matter of planning judgement. Importantly, the Court concluded at paragraph 28 that it had been necessary for the decision-maker to take the available Class Q fallback into account.

The earlier decision in *R v Secretary of State for the Environment, ex parte P F Ahern (London) Ltd* [1998] Env LR 189 provides a useful practical framework for that assessment, although the questions should not be treated as an inflexible legal test. The relevant matters are:

- whether there is a lawful ability to undertake the fallback development;
- whether there is a real, rather than merely theoretical, prospect of it occurring; and
- if so, how the planning effects of the fallback compare with those of the application proposal.

Test 1 - Lawful fallback

There is an extant Prior Approval through DM/24/1662 for the conversion of the existing barn to form a new dwelling. No further approvals are required for this development to take place. This is acknowledged within your email, which states *"It is open to your client to implement this prior approval in accordance with the requirements of this consent"*.

Test 2 – Real prospect of implementation

DM/24/1662 was granted on 2 September 2024. The Class Q development remains capable of completion until 2 September 2027, leaving approximately 13 months from the date of this letter in which to undertake the approved works.

The existing building remains available for conversion, and no physical, legal, or technical impediment to completion of the approved development has been identified. The Council has itself acknowledged that it remains open to the applicant to implement the Prior Approval in accordance with its requirements.

The applicant confirms that, if planning permission for DM/26/1424 is refused, they intend to proceed with and complete the Class Q development within the required period. The Class Q scheme is therefore not simply a lawful theoretical possibility, but a genuine alternative that would be pursued if the preferable development now proposed is not permitted.

Test 3 – Comparative planning effects

Once the previous two tests are passed, a comparison must be made between the proposed development and the fallback position.

Within your email, you stated that *“The Class Q conversion of the barn is noted; however, this form of development is materially different from the development currently proposal and is not considered to be justification for the conflict with the development plan”*.

There are clear parallels between the extant Class Q approval and the proposed development. Both schemes would result in a single residential dwelling within the same site. The table below undertakes a comparison of the fallback scheme (DM/24/1662) and the proposed development (DM/26/1424) against key considerations.

Consideration	Fallback	Proposed Development
Use	Residential (C3)	Residential (C3), the same residential use as the Class Q fallback.
Quantum	One 4 bedroom dwelling, utilising the entirety of the building extending to approximately 450 square metres (GEA) including parking.	One 2 bedroom dwelling occupying a modest footprint of approximately 125.3 square metres (GIA), with an associated garage of 40.8 square metres (GIA). The proposed development provides the same number of residential dwellings as the extant Prior Approval. The proposed dwelling is actually smaller, with a reduced number of bedrooms over a substantially smaller footprint. Notwithstanding the reduction in size, the proposal remains for a single dwelling which cannot be considered materially different.
Siting	Conversion of the existing building in situ, retaining its current position and relationship with the existing access.	The proposed dwelling would be broadly in the same location, with the new building overlapping with the existing footprint. The proposed development therefore results in a dwelling in a similar location, retaining the same fundamental spatial relationship with the surrounding area. It is also noted that the proposal would, if completed, prevent the extant prior approval from being brought forward as the locations overlap and this application requires the removal of the barn.
Scale and Massing	Conversion of the existing agricultural building. The result would be a very large and dominant dwelling.	The proposed dwelling is design response to the site and location. It adopts a style meant to imitate a small collection of rural buildings through the roof arrangement, comprising three staggered pitched roof forms. The design reduces the bulk and visual impact of the fallback scheme to provide a more sympathetic dwelling. In particular, the reduced scale, broken roof profile and massing results in a more sympathetic relationship with the surrounding landscape. The proposal would therefore not give rise to greater adverse effects relating to its scale and massing when compared with the extant Prior Approval.

Consideration	Fallback	Proposed Development
Design and appearance	Retention of the existing utilitarian steel portal-framed building, clad in box profile corrugated sheets.	The proposed development represents a sensitive reinterpretation of the existing building, retaining its agricultural character through the use of a range of materials, including standing seam zinc and hardwood timber cladding. Whilst the design differs from the extant Class Q approval, it has been informed by the existing building's rural character and the overarching design will represent a collection of smaller rural buildings.
Highways / transport	Traffic associated with one four bedroom dwelling.	Traffic associated with one two-bedroom dwelling. Both schemes would result in a single dwelling using the same fundamental access arrangements. The reduction from four bedrooms to two may result in a modest reduction in travel demand, but in any event the proposal would not generate materially greater highway or transport effects than the Class Q fallback.

The two schemes are different in their physical form, that is not disputed. The relevant planning question is whether those differences would produce materially different or greater planning effects.

They would not. Both schemes would provide one dwelling in the same countryside location, using the same fundamental access arrangements. The proposed dwelling would overlap the building benefiting from DM/24/1662 and could not be constructed without that building being removed. The proposal would therefore deliver an alternative to the approved dwelling, rather than an additional dwelling.

The differences between the schemes are principally beneficial. The proposal would provide substantially less floorspace, fewer bedrooms, reduced scale and massing, and a more considered architectural and landscape response.

This comparison demonstrates that, although the schemes differ in their physical form, they would have the same numerical and locational residential consequence. The proposal would not generate materially greater effects and would instead provide significant comparative betterment. We therefore respectfully request that the Council reconsider its conclusion that the differences between the schemes prevent the Class Q approval from providing a material justification for the proposal.

The fallback must be taken into account. For the reasons set out above, including the applicant's confirmed intention to complete it if permission is refused, the same single-dwelling outcome and the comparative benefits of the proposal, we consider that it warrants significant weight in this case.

Compliance with the Development Plan

We believe that there are two potential routes to properly consider this scheme, both of which in our view result in the balance coming down in favour of granting permission.

a) New Dwelling (DP15 & Material Considerations)

Your email cites Policy DP15 as the primary policy being considered and states that it “*sets out the special justification for new dwellings within the countryside, which is reflected in the requirements of the NPPF*”. It goes on to confirm that, because the proposal would involve the construction of a new dwelling and does not fall within any of the listed exceptions, it is not acceptable in principle.

We acknowledge that the proposal does not fall neatly within one of the forms of countryside housing expressly identified in Policy DP15. There is therefore conflict with the wording of that policy insofar as it relates to the principle of constructing a new dwelling. However, the nature and extent of that conflict must be properly understood.

In *R (Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, the Court of Appeal confirmed that accordance must be assessed against the development plan as a whole. The Court also endorsed the approach in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 that, where conflict is identified, the decision-maker must understand the nature and extent of the departure before deciding whether it is justified by other material considerations.

Here, there is conflict with the express wording of Policy DP15 and, consequentially, with Policy DP12 insofar as the development is not necessary for agriculture or expressly supported by another development plan policy. However, the nature and extent of that conflict are limited to the principle of providing a newly constructed dwelling in the countryside. The proposal would not create the locational consequence that those policies seek to prevent because one dwelling can already be completed on the site under DM/24/1662.

In terms of its actual effects, the proposal would maintain or enhance rural and landscape character through its reduced scale and improved design, would have no materially greater transport effects, and would provide the same number of dwellings as the fallback. It therefore supports the relevant objectives of Policies DP12, DP18, DP21, and DP26.

Against that policy position, section 38(6) requires the Council to consider whether the realistic Class Q fallback and the comparative betterment offered by the proposal justify permission. The relevant appeal decisions demonstrate how that exercise should be undertaken.

The closest local comparator is Great Wapses Farm, Hurstpierpoint Road, Henfield (APP/D3830/W/16/3156030), enclosed at Enclosure 4. Although determined under an earlier development-plan context, its factual reasoning remains directly relevant. The appeal concerned Mid Sussex District Council’s refusal of a new dwelling proposed as an alternative to an extant Class Q conversion.

At paragraph 12, the Inspector described the Class Q permission as being “*of critical importance*”. At paragraph 13, the Inspector recognised that the proposal was for a differently designed dwelling in place of the permitted conversion and would therefore result in no net addition to the number of dwellings in the location. Although the proposed dwelling had an additional bedroom and was two storeys rather than one, the Inspector found at paragraphs 18-20 that the differences in the intensity of use and vehicle movements would be highly

limited. The conflict with the countryside and accessibility policies was consequently outweighed by the fallback.

The factual comparison at Alders Farm is at least as favourable. The proposal would provide the same number of dwellings as the fallback but would reduce the accommodation from four bedrooms to two and substantially reduce the scale of residential development.

Muddleswood Barn, Brighton Road, Newtimber (APP/D3830/W/24/3351833), enclosed at Enclosure 5, provides an important contrasting decision. It concerned the same Council, the same development-plan policies, and the same wider Brighton Road locality. At paragraphs 6-11, the Inspector found the proposed two-bedroom dwelling acceptable in locational terms and concluded that it met the aims of Policies DP6, DP12, DP15, and DP21 – exactly the in principle point now being raised by the LPA.

The determinative harm in Muddleswood arose from the design and landscape comparison. At paragraphs 14-18 the proposed dwelling was found to be notably larger than the permitted schemes, closer to a neighbouring dwelling, cramped and bulky in its T-shaped form, extended further into the countryside, and introduced an urban form of development. The fallback was therefore insufficient to outweigh the identified character and appearance harm.

Those circumstances are materially different from Alders Farm. The present proposal would be substantially smaller than the Class Q outcome, would overlap the existing agricultural building, and would not materially extend residential development further into the countryside. Its staggered roof forms break down the massing, while the proposed materials retain a functional agricultural reference. The proposal therefore avoids the specific comparative harms that led to the dismissal of Muddleswood.

The allowed appeal at Hill's End, Low Friarside Lane, Burnopfield (APP/X1355/W/25/3365870), enclosed at Enclosure 6, provides further support. Although the Inspector found the site unsuitable for housing under the local settlement and sustainable transport policies, the Class Q fallback would deliver the same number of dwellings with the same locational and accessibility effects. Significant weight was attributed to the fallback, and the appeal was allowed despite the proposed dwelling being larger than the Class Q scheme.

The paired decisions at Cricks Farm, Pebmarsh (APP/Z1510/W/24/3343135 and APP/Z1510/W/23/3329329), enclosed at Enclosure 7, similarly demonstrate that design is important. Significant weight was given to the Class Q fallback in both appeals. The modest, single-storey proposal was allowed because it sat comfortably within the farmstead and caused no landscape harm, while the taller and bulkier alternative was dismissed as dominant and incongruous. Alders Farm falls within the former category.

At Crossways Farm, Stoke St Gregory (APP/W3330/W/20/3248009), enclosed at Enclosure 8, the Inspector found conflict with the development plan because of the site's limited accessibility. However, the Class Q fallback would have delivered the same number of dwellings in the same location. The Inspector gave significant weight to the visual improvements over the fallback, which outweighed the policy conflict.

These decisions are not binding precedents, but they demonstrate a consistent line of planning reasoning. A Class Q fallback is determinative where the planning consequences of the proposed development are no more harmful than the fallback. Where the new dwelling would cause no greater locational harm and would deliver a better design and landscape outcome, the fallback should outweigh the conflict with the countryside settlement strategy and related policies.

That is the position at Alders Farm:

- both schemes would deliver one dwelling in the same countryside location;
- the proposal requires the removal of the building benefiting from DM/24/1662, so the two outcomes could not coexist;
- both would have the same fundamental relationship with services, facilities, and the highway network;
- the proposal would reduce the accommodation from four bedrooms to two;
- the proposed dwelling would be substantially smaller; and
- the proposal would deliver reduced massing and a more sympathetic architectural and landscape response.

The conflict with Policy DP15 is therefore confined to the absence of an express policy exception. Refusal would not prevent the establishment of a dwelling at the site but would leave the applicant free to complete the substantially larger Class Q scheme. Consistent with the appeal decisions above, the fallback and comparative betterment warrant significant weight and justify permission under section 38(6).

b) Replacement Dwelling (DP15 & Material Considerations)

In the alternative, Policy DP15 sets out the criteria applicable to replacement dwellings in the countryside. Although the Class Q approval has not yet been implemented, and the existing building has therefore not physically become a dwelling, the replacement-dwelling criteria provide an appropriate and directly relevant framework for comparing the proposed development with the approved fallback.

This approach is supported by the recent appeal decision at Rosevean, Halvasso, Penryn, Cornwall (APP/D0840/W/25/3368365), dated 9 December 2025 and enclosed at Enclosure 9. That appeal concerned the demolition of an agricultural building and construction of a new dwelling in place of an extant Class Q conversion.

At paragraph 5, the Inspector concluded that, because the Class Q approval had not been implemented, the proposal could not technically be regarded as a replacement dwelling for the purposes of the relevant countryside housing exception. However, the Inspector did not treat this as determinative. At paragraph 7, the proposed dwelling was recognised as an alternative to the Class Q permission because it involved demolishing the building that was to be converted and constructing a new dwelling in its place.

At paragraph 10, the Inspector gave substantial weight to the fallback because either development outcome would provide a single dwelling in the countryside. Crucially, paragraph 11 confirms that it was appropriate to compare the proposed development with the Class Q fallback using the principles contained within the relevant policy for replacement dwellings.

The same approach can be applied here. The proposed development and the Class Q fallback cannot both be completed because their footprints overlap and the proposed development requires the removal of the building that benefits from the Prior Approval. The proposal would therefore replace the approved residential development outcome in practical terms. It would not result in an additional dwelling or establish residential development in a location where such development could not otherwise occur.

The relevant requirements of Policy DP15 also provide an appropriate framework for comparing the proposal with the Class Q fallback:

DP15 requirement	Proposed Development
The residential use has not been abandoned	This criterion is not directly engaged because the residential use authorised by DM/24/1662 has not yet commenced. Nevertheless, the Prior Approval remains extant and capable of completion by 2 September 2027. The proposal is not seeking to revive an abandoned residential use but represents an alternative means of delivering the same approved residential outcome.
Highway, access and parking requirements can be met	The proposal would retain the same fundamental access arrangements and provides suitable parking and garaging within the site. It would provide one two-bedroom dwelling in place of the approved four-bedroom dwelling and would not result in any greater highway or transport effects than the Class Q fallback.
The replacement dwelling maintains or where possible enhances the quality of the natural and/or built landscape particularly in the High Weald Area of Outstanding Natural Beauty, especially if a significant change in scale from the existing dwelling is proposed.	The proposed dwelling would represent a clear improvement over the Class Q fallback. It would replace the approximately 450-square-metre utilitarian agricultural building with a substantially smaller dwelling of approximately 125.3 square metres (GIA) and an associated garage of 40.8 square metres (GIA). Its staggered pitched-roof forms, reduced scale and massing, standing-seam zinc, and hardwood timber cladding would retain an appropriate agricultural character whilst providing a more coherent and sympathetic response to the rural setting.

The comparative approach undertaken in Rosevean is particularly relevant. At paragraphs 12–18, the Inspector considered the appearance of the agricultural building, the design and scale of the proposed dwelling, its external materials, landscaping, and its relationship with the surrounding countryside. Although the appeal dwelling in that case was larger than the Class Q fallback, its improved design and materials meant that it would have a less harmful effect on the character and appearance of the area.

The quantitative case for betterment is stronger in the present application. Unlike Rosevean, the proposed dwelling would be substantially smaller than the Class Q fallback, reducing from approximately 450 square metres and four bedrooms to approximately 160 square metres and two bedrooms. Its reduced scale, broken roof profile, improved materials, and more considered architectural treatment would produce a considerably more sympathetic landscape and design outcome than the retention and conversion of the existing utilitarian building.

Rosevean therefore demonstrates that, even where an unimplemented Class Q approval means that a proposal cannot technically benefit from a replacement-dwelling exception, the replacement-dwelling policy criteria remain relevant to the comparative assessment. Where the result would be the same number of dwellings and the proposed development provides an improved planning outcome, the fallback can attract substantial weight sufficient to justify permission notwithstanding the identified conflict with the countryside settlement strategy.

Final Remarks

Read as a whole, the principal conflict with the development plan arises from the express wording of Policy DP15 and, consequentially, Policy DP12. The extent of that conflict is nevertheless limited because the proposal would not introduce residential development into a location where a dwelling could otherwise be prevented and would not result in any net additional dwelling when compared with the realistic Class Q fallback.

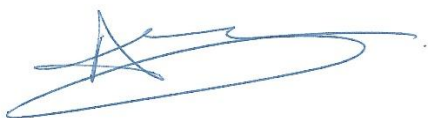
On the primary approach, DM/24/1662 and the substantial comparative betterment offered by the proposal are material considerations that outweigh the identified policy conflict and justify permission under section 38(6). Refusing permission would leave the applicant free to complete a substantially larger four-bedroom dwelling through the Class Q approval.

In the alternative, even if the proposal cannot technically be treated as a replacement dwelling because the residential use authorised by DM/24/1662 has not commenced, Rosevean confirms that the replacement-dwelling principles provide an appropriate framework for comparing the two outcomes. Applying that framework, the proposal would deliver the same single-dwelling outcome through a substantially smaller, better-designed, and more sympathetic form of development.

Taken together, the realistic fallback, the absence of any net additional dwelling, the substantial design and landscape betterment, and the satisfaction of the underlying replacement-dwelling principles provide a compelling basis for granting permission. The delivery of one dwelling also makes a modest contribution to housing supply in circumstances where the Council accepts that it cannot demonstrate a five-year housing land supply, which attracts limited positive weight in the overall balance.

We therefore respectfully request that the Council reconsider its position and proceed towards the grant of planning permission, subject to any necessary conditions.

Yours sincerely,



Alexandra Young

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Enclosure 1 – Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314
Enclosure 2 – R (Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878
Enclosure 3 – Tesco Stores Ltd v Dundee City Council [2012] UKSC 13
Enclosure 4 – Great Wapses Farm, APP/D3830/W/16/3156030
Enclosure 5 – Muddleswood Barn, APP/D3830/W/24/3351833
Enclosure 6 – Hill's End, APP/X1355/W/25/3365870
Enclosure 7 – Cricks Farm, APP/Z1510/W/24/3343135 and APP/Z1510/W/23/3329329
Enclosure 8 – Crossways Farm, APP/W3330/W/20/3248009
Enclosure 9 – Rosevean, APP/D0840/W/25/3368365



Neutral Citation Number: [2017] EWCA Civ 1314

Case No: C1/2016/4488

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE GARNHAM
[2016] EWHC 2832 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2017

Before:

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

Between:

Michael Mansell

Appellant

- and -

Tonbridge and Malling Borough Council

Respondent

- and -

(1) Croudace Portland
(2) The East Malling Trust

Interested
Parties

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

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

The interested parties did not appear and were not represented

Hearing date: 4 July 2017

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

Lord Justice Lindblom:

Introduction

1. Should the judge in the court below have quashed a local planning authority’s grant of planning permission for the redevelopment of the site of a large barn and a bungalow to provide four dwellings? That is what we must decide in this appeal. It is contended that the authority misdirected itself in considering a “fallback position” available to the landowner, and also that it misapplied the “presumption in favour of sustainable development” in the National Planning Policy Framework (“the NPPF”) – a question that can now be dealt with in the light of this court’s recent decision in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893.
2. The appellant, Mr Michael Mansell, appeals against the order of Garnham J., dated 10 November 2016, dismissing his claim for judicial review of the planning permission granted on 13 January 2016 by the respondent, Tonbridge and Malling Borough Council, for development proposed by the first interested party, Croudace Portland, on land owned by the second interested party, the East Malling Trust, at Rocks Farm, The Rocks Road, East Malling. The proposal was to demolish the barn and the bungalow on the land and to construct four detached dwellings, with garages and gardens. Mr Mansell lives in a neighbouring property, at 132-136 The Rocks Road – a grade II listed building. He was an objector.
3. It was common ground that the proposal was in conflict with the development plan. Rocks Farm is outside the village of East Malling to its south-east, within the “countryside” as designated in the Tonbridge and Malling Borough Core Strategy. The site of the proposed development extends to about 1.3 hectares. The barn, about 600 square metres in area, had once been used to store apples. The bungalow was lived in by a caretaker. The application for planning permission came before the council’s Area 3 Planning Committee on 7 January 2016. In his reports to committee the council’s planning officer recommended that planning permission be granted, and that recommendation was accepted by the committee. The officer guided the members on the “fallback position” that was said to arise, at least partly, through the “permitted development” rights for changes of use from the use of a building as an agricultural building to its use as a dwelling-house, under Class Q in Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (“the GPDO”).
4. Mr Mansell’s challenge to the planning permission attacked the officer’s approach to the “fallback position” and his assessment of the proposal on its planning merits. Garnham J. dismissed the claim for judicial review on all grounds. Permission to appeal was granted by McCombe L.J. on 21 February 2017.

The issues in the appeal

5. The appeal raises three main issues:
 - (1) whether the council correctly interpreted and lawfully applied the provisions of Class Q in the GPDO (ground 1 in the appellant’s notice);

- (2) whether the council was entitled to accept there was a real prospect of the fallback development being implemented (ground 2); and
- (3) whether the council misunderstood or misapplied the “presumption in favour of sustainable development” (ground 3).

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

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

“Q. Permitted development

Development consisting of –

- (a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order; and
- (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwellinghouses) of that Schedule.

Q.1 Development not permitted

Development is not permitted by Class Q if –

- ...
 - (b) the cumulative floor space of the existing building or buildings changing use under Class Q within an established agricultural unit exceeds 450 square metres;
 - (c) the cumulative number of separate dwellinghouses developed under Class Q within an established agricultural unit exceeds 3;
- ...
 - (g) the development would result in the external dimensions of the building extending beyond the external dimensions of the existing building at any given point;
 - (h) the development under Class Q (together with any previous development under Class Q) would result in a building or buildings having more than 450 square metres of floor space having a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order;
-”

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

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

“6.14 In practical terms for this site, the new permitted development rights mean that the existing agricultural barn could be converted into three residential units. Some representations point out that only a proportion of the barn could be

converted in such a manner (up to 450sqm) but the remainder – a small proportion in terms of the overall footprint – could conceivably be left unconverted and the resultant impacts for the site in terms of the amount of residential activity would be essentially the same. The building could be physically adapted in certain ways that would allow for partial residential occupation and the extensive area of hardstanding which exists between the building and the northern boundary could be used for parking and turning facilities.

- 6.15 The existing bungalow within the site could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building. Such a scenario would, in effect, give rise to the site being occupied by a total of four residential units albeit of a different form and type to that proposed by this application. This provides a realistic fallback position in terms of how the site could be developed.
- 6.16 I appreciate that discussion concerning realistic ‘fallback’ positions is rather complicated but, in making an assessment of any application for development, we are bound to consider what the alternatives might be for a site: in terms of what could occur on the site without requiring any permission at all (historic use rights) or using permitted development rights for alternative forms of development.
- 6.17 In this instance a scheme confined to taking advantage of permitted development would, in my view, be to the detriment of the site as a whole in visual terms. Specifically, it would have to be developed in a contrived and piecemeal fashion in order to conform to the requirements of the permitted development rights, including the need to adhere to the restrictions on the floor space that can be converted using the permitted development rights.
- 6.18 I would also mention that should the applicant wish to convert the entire barn for residential purposes, above the permitted development thresholds, such a scheme (subject to detailed design) would wholly accord with adopted policy. Again, this provides a strong indicator as to how the site could be developed in an alternative way that would still retain the same degree of residential activity as proposed by the current application but in a more contrived manner and with a far more direct physical relationship with the nearest residential properties.
- 6.19 The current proposal therefore, in my view, offers an opportunity for a more comprehensive and coherent redevelopment of the site as opposed to a more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights.”
8. For Mr Mansell, Ms Annabel Graham Paul submitted to us, as she did to the judge, that the officer’s advice in those six paragraphs betrays a misunderstanding of the provisions of Class Q in the GPDO, in particular sub-paragraphs Q.1(b) and Q.1(h). She argued that the restriction to 450 square metres in sub-paragraph Q.1(b) applies to the total floor space of the agricultural building or buildings in question, not to the floor space actually “changing use”. Before the judge, though not in her submissions in this court, Ms Graham Paul sought to bolster that contention with a passage in an inspector’s decision letter

relating to a proposal for development on a site referred to by the judge as “Mannings Farm”. The inspector had observed that “[the] floor space of the existing building ... far exceeds the maximum permitted threshold, of 450 sq m, as set out in [sub-paragraph] Q.1(b)”, and that “the intention is to reduce the size of the building as part of the proposal but Q.1(b) clearly relates to existing floorspace and there is no provision in the GPDO for this to be assessed on any other basis”.

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

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

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

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

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

12. Ms Graham Paul submitted that this interpretation of the relevant provisions would render sub-paragraph Q.1(b) of Class Q redundant, because sub-paragraph Q.1(h) already limits the residential floor space resulting from the change of use under Class Q to a maximum of 450 square metres. The statutory provisions for permitted development rights in the GPDO ought to be interpreted consistently. The interpretation favoured by the judge, submitted Ms Graham Paul, depends on reading into sub-paragraph Q.1(b) the additional words “any part of a building” after the words “the existing building or buildings”, which, she said, is wholly unnecessary. Statutory provisions ought to be construed on the

assumption that the draftsman was intending to add something of substance in each provision. The judge's interpretation offends that principle, said Ms Graham Paul, because it would, in effect, subsume sub-paragraph Q.1(b) into sub-paragraph Q.1(h). Only her interpretation of sub-paragraph Q.1(b) would enable sub-paragraph Q.1(h) to add something of substance to the provisions of Class Q. And in principle, Ms Graham Paul argued, it makes good sense to prevent, without an express grant of planning permission, the partial conversion of large agricultural buildings to accommodate residential use, leaving other parts of the building either in active agricultural use or simply vacant.

13. Ms Graham Paul sought to reinforce these submissions by pointing to other provisions of the GPDO where similar wording is used: Class M, which provides permitted development rights for changes of use of buildings in retail or betting office or pay day loan shop use to Class C3 use, and states in sub-paragraph M.1(c) that development is not permitted if "the cumulative floor space of the existing building changing use under Class M exceeds 150 square metres"; and Class N, which provides permitted development rights for changes of use from specified sui generis uses, including use as an amusement arcade or centre, and use as a casino, to Class C3 use, and states in sub-paragraph N.1(b) that development is not permitted if "the cumulative floor space of the existing building changing use under Class N exceeds 150 square metres".
14. I cannot accept Ms Graham Paul's argument. I think the judge's understanding of Class Q was correct. The provisions of Class Q relating to the scope of permitted development rights should be given their literal meaning. When this is done, they make perfectly good sense in their statutory context and do not give rise to any duplication or redundancy.
15. The focus here is on the provisions as to development that is "not permitted" under paragraph Q.1, and in particular the provisions of sub-paragraphs Q.1(b) and Q.1(h). Sub-paragraph Q.1(b) establishes the "cumulative floor space of the existing building or buildings" that is "changing use under Class Q ...". The limit on such "cumulative floor space ..." is 450 square metres. This restriction is stated to be a restriction on the change of use, not on the size of the building or buildings in which the change of use occurs. Sub-paragraph Q.1(b) relates to a single act of development in which the building in question, or part of it, is "changing use". The floor space limit set by it relates not to the total floor space of the building or buildings concerned. It relates, as one would expect, to the permitted development rights themselves, which apply to the "cumulative" amount of floor space actually "changing use under Class Q". The use of the word "cumulative" in this context – as elsewhere in the GPDO – is perfectly clear. It connotes, in relevant circumstances, the adding together of separate elements of floor space within a building or buildings, or, again in relevant circumstances, a single element of floor space, which in either case must not exceed 450 square metres. The total floor space of the building or buildings concerned may itself be more than 450 square metres. But the cumulative amount of floor space whose use is permitted to be changed within that total floor space must not exceed 450 square metres.
16. This interpretation of sub-paragraph Q.1(b) avoids arbitrary consequences in the application of the permitted development rights under Class Q. It does not make the availability of those rights for a qualifying "agricultural building" depend on the total floor space of the building itself. It would not, therefore, create a situation in which the permitted development rights under Class Q would be available for a building whose total floor space was 450 square metres, but not for a building with a floor space of 451 square

metres or an area greater than that. If the consequence is that the permitted development rights, when fully used, would result in a building partly in use as a dwelling-house and partly still in agricultural use, that is an outcome contemplated by the GPDO. I see no difficulty in that.

17. Had the draftsman intended to confer permitted development rights under Class Q only to a building or buildings whose total floor space was not more than 450 square metres, the relevant provision would have been framed differently. There would have been no need to use the word “cumulative” or some other such word. The provision would simply have stated, for example, “the total floor space of the existing building or buildings within an established agricultural unit in which the change of use under Class Q is being undertaken does not exceed 450 square metres”. But that is not what sub-paragraph Q.1(b) says, or, in my view, what it means.
18. Nor can I see how an interpretation of sub-paragraph Q.1(b) in which the restriction of 450 square metres applies not to the floor space actually changing use but to the total floor space of the building or buildings in which the change of use is taking place can be reconciled with the definition of “building” in paragraph 2 of the GPDO as including “part of a building”. Unless one disapplies that part of the definition of a building to sub-paragraph Q.1(b), one must read that provision as meaning “the cumulative floor space of the existing building or buildings or part of a building changing use under Class Q ... exceeds 450 square metres” (my emphasis). That understanding of sub-paragraph Q.1(b) would not sit happily with the concept that the restriction of 450 square metres applies not to the floor space changing use but to the total floor space of the building itself.
19. My interpretation of sub-paragraph Q.1(b) does not leave sub-paragraph Q.1(h) redundant. Sub-paragraph Q.1(h) achieves a different purpose. It prevents, for example, a change of use as “permitted development” in an agricultural building of which part is already in Class C3 use, or an aggregation of successive changes of use through separate acts of development, that would result in more than 450 square metres of floor space in a building or buildings being in Class C3 use. Neither of those outcomes would necessarily be prevented by sub-paragraph Q.1(b).
20. Finally, there is nothing in the provisions of Class M and Class N, or in any other provision of the GPDO, to suggest a different understanding of Class Q. The provisions in sub-paragraphs M.1(c) and N.1(b) also contain the word “cumulative” in referring to the floor space “changing use”, not to the total floor space of the “existing building or buildings” in which the change of use is taking place. And in both Class M and Class N the draftsman has also included a provision – respectively in sub-paragraphs M.1(d) and N.1(c) – stating that “the development (together with any previous development under [the relevant class]) would result in more than 150 square metres of floor space in the building having changed use under [the relevant class]”. Although we are not deciding those questions, it seems to me that the same analysis would hold good for those provisions too.
21. In my view, therefore, the officer did not misrepresent the permitted development rights under Class Q in his advice to the committee on the “fallback position”. The provisions of Class Q were correctly interpreted and lawfully applied.

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

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

“36. In paragraph 6.15 of the report the Officer concluded that the fall back position was “realistic”. In my judgment he was entitled so to conclude. The evidence establishes that there had been prior discussions between the Council and the Planning Agent acting for the East Malling Trust who owns the site. It was crystal clear from that contact that the Trust were intending, one way or another to develop the site. Alternative proposals had been advanced seeking the Council’s likely reaction to planning applications. It is in my view wholly unrealistic to imagine that were all such proposals to be turned down the owner of the site would not take advantage of the permitted development provided for by Class Q to the fullest extent possible.

37. It was not a precondition to the Council’s consideration of the fall back option that the interested party had made an application indicating an intention to take advantage of Class Q. There was no requirement that there be a formulated proposal to that effect. The officer was entitled to have regard to the planning history which was within his knowledge and the obvious preference of the Trust to make the most valuable use it could of the site.”

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

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

24. Ms Graham Paul criticized the judge’s approach. She said it would enable permitted development rights under the GPDO to be relied on as a fallback even where there was no evidence that the landowner or developer would in fact resort to such development. The judge did not consider whether the council had satisfied itself that there was a “real prospect” of the fallback development being implemented (see the judgment of Sullivan L.J. in *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* [2009] J.P.L. 1326, at paragraph 21). The “real prospect”, submitted Ms Graham Paul, must relate to a particular fallback development contemplated by the

landowner or developer, not merely some general concept of development that might be possible on the site. Only a specific fallback makes it possible for a comparison to be made between the planning merits of the development proposed and the fallback development. The relevance of a fallback depends on there being a “finding of actually intended use as opposed to a mere legal or theoretical entitlement” (see the judgment of Mr Christopher Lockhart-Mummery Q.C., sitting as a deputy judge of the High Court, in *R. v Secretary of State for the Environment and Havering London Borough Council, ex parte P.F. Ahern (London) Ltd.* [1998] Env. L.R. 189, at p.196).

25. Ms Graham Paul said there was nothing before the council to show that either the East Malling Trust or Croudace Portland contemplated the site being developed in the way the officer described in his report. On the contrary, the conversion of the barn for residential use – as opposed to its demolition and replacement with new dwellings – seems to have been regarded as impracticable or uneconomic. The East Malling Trust’s planning consultant, Broadlands Planning Ltd., had submitted a “Planning Statement” to the council in December 2013, seeking the council’s advice before the submission of an application for planning permission. In that document two possible schemes for the site were referred to (at paragraph 26). Neither could have been achieved using permitted development rights. One involved the retention of the barn and its conversion to four dwelling-houses, the other a “wholesale redevelopment of the site”, perhaps with the replacement of the bungalow, to create five new dwellings. In a letter to Broadlands Planning Ltd. dated 30 January 2014 the council’s Senior Planning Officer, Ms Holland, said she was “not convinced that the proposal would result in the building being converted, but rather [that] large portions would be removed and a new building created”. And the East Malling Trust’s marketing agent, Smiths Gore, in a letter to potential developers dated 27 February 2014, suggested it was “unlikely that a developer would contemplate the conversion of the Apple Store”. There was, said Ms Graham Paul, no other contemporaneous evidence to lend substance to the fallback scheme to which the officer referred in his report, and no evidence of the council trying to find out what, if anything, was actually contemplated. The evidence did not demonstrate a “real prospect” – as opposed to a merely “theoretical” prospect – of such a development being carried out. The judge should have recognized that the fallback development referred to in the officer’s report was not a material consideration.
26. I cannot accept that argument. In my view the officer did not misunderstand any principle of law relating to a fallback development. His advice to the members was sound.
27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
 - (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.
 - (2) The relevant law as to a “real prospect” of a fallback development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.’s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As

Sullivan L.J. said in his judgment in *Samuel Smith Old Brewery*, in this context a “real” prospect is the antithesis of one that is “merely theoretical” (paragraph 20). The basic principle is that “... for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice” (paragraph 21). Previous decisions at first instance, including *Ahern* and *Brentwood Borough Council v Secretary of State for the Environment* [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, “... “fall back” cases tend to be very fact-specific” (ibid.). The role of planning judgment is vital. And “[it] is important ... not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge’s response to the facts of the case before the court” (paragraph 22).

- (3) Therefore, when the court is considering whether a decision-maker has properly identified a “real prospect” of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the “real prospect” will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker’s planning judgment in the particular circumstances of the case in hand.
28. In this case, in the circumstances as they were when the application for planning permission went before the committee, it was plainly appropriate, indeed necessary, for the members to take into account the fallback available to the East Malling Trust as the owner of the land, including the permitted development rights arising under Class Q in the GPDO and the relevant provisions of the development plan, in particular policy CP14 of the core strategy. Not to have done so would have been a failure to have regard to a material consideration, and thus an error of law.
29. That the East Malling Trust was intent upon achieving the greatest possible value from the redevelopment of the site for housing had by then been made quite plain. The “Planning Statement” of December 2013 had referred to two alternative proposals for the redevelopment of the site (paragraph 26), pointing out that both “[the] redevelopment and replacement of [the] bungalow” and “[the] conversion of the existing storage and packing shed” were “permissible in principle” (paragraph 35). The firm intention of the East Malling Trust to go ahead with a residential development was entirely clear at that stage.
30. In my view it was, in the circumstances, entirely reasonable to assume that any relevant permitted development rights by which the East Malling Trust could achieve residential development value from the site would ultimately be relied upon if an application for planning permission for the construction of new dwellings were refused. That was a simple and obvious reality – whether explicitly stated by the East Malling Trust or not. It was accurately and quite properly reflected in the officer’s report to committee. It is

reinforced by evidence before the court – in the witness statement of Mr Humphrey, the council’s Director of Planning, Housing and Environmental Health, dated 18 March 2016 (in paragraphs 6 to 24), in the witness statement of Mr Wilkinson, the Land and Sales Manager of Croudace Portland, also dated 18 March 2016 (in paragraphs 4 to 7), in the first witness statement of Ms Flanagan, the Property and Commercial Director of the East Malling Trust, dated 17 March 2016 (in paragraphs 4 to 6), and in Ms Flanagan’s second witness statement, dated 17 June 2016 (in paragraphs 2 to 5).

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

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

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

“4. ... This letter ... states that at that time [Smith Gore’s] opinion was that it was unlikely that a scheme of conversion would be contemplated by any developer. However, this letter pre-dated the permitted development rights that subsequently came into effect in April 2014. By the time the planning application had formally been submitted, these permitted development rights were in effect.

5. Had no other scheme proven acceptable in planning terms, and if planning permission had been refused for the development the subject of the planning application, the Trust would have built out a “permitted development” scheme to the fullest extent possible in order to realise the highest value for the land, in order to thereafter seek disposal to a developer.”

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

33. I do not see how it can be said that the officer’s assessment of the “fallback position”, which the committee adopted, offends any relevant principle in the case law – in particular the concept of a “real prospect” as explained by Sullivan L.J. in *Samuel Smith Old*

Brewery. It was, in my view, a faithful application of the principles in the authorities in the particular circumstances of this case. It also demonstrates common sense.

34. The officer did not simply consider the fallback in a general way, without regard to the facts. He considered it in specific terms, gauging the likelihood of its being brought about if the council were to reject the present proposal. In the end, of course, these were matters of fact and planning judgment for the committee. But the officer's advice in paragraphs 6.14 to 6.19 of his report was, I believe, impeccable. He was right to say, in paragraph 6.14, that the "new permitted development rights" – under Class Q in the GPDO – would enable the barn to be converted into three residential units; in the same paragraph, that the building "could be physically adapted in certain ways that would allow for partial residential occupation ..."; and, in paragraph 6.15, that the bungalow "could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building". He was also right to say, therefore, that the site could be developed for "four residential units albeit of a different form and type to that proposed by this application". All of this was factually correct, and represented what the council knew to be so. It did not overstate the position. It went no further than the least that could realistically be achieved by way of a fallback development – through the use of permitted development rights under Class Q and an application for planning permission complying with policy CP14.
35. The officer also guided the committee appropriately in what he said about the realism of the "fallback position". At the end of paragraph 6.15 of his report he said that the fallback development he had described was "a realistic fallback position in terms of how the site could be developed". He was well aware of the need to take into account only a fallback development that was truly "realistic", not merely "theoretical". He came back, in paragraph 6.16, to the question of "realistic 'fallback' positions", again reminding the members that this was what had to be considered. He went on to acknowledge, rightly, that the council had to consider what could be achieved "using permitted development rights for alternative forms of development". The context for this advice was that in his view, as he said in paragraph 6.15, he was dealing with "a realistic fallback position". He went on in paragraph 6.17 to consider what "would" happen if a scheme taking advantage of permitted development rights came forward. And in paragraph 6.18 his advice was that a redevelopment involving the conversion of "the entire barn for residential purposes, above the permitted development thresholds ... would wholly accord with adopted policy". That was a legally sound planning judgment. The same may also be said of the officer's conclusion in paragraph 6.19, where he compared the proposal before the committee with the "more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights".
36. In short, none of the advice given to the council's committee on the "fallback position" can, in the particular circumstances of this case, be criticized. It was, I think, unimpeachable.
37. In my view, therefore, the council was entitled to accept that there was a "real prospect" of the fallback development being implemented, and to give the weight it evidently did to that fallback as a material consideration. In doing so, it made no error of law.

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

38. Paragraph 14 of the NPPF states:

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

...

For decision-taking this means:

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
 - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
 - specific policies in [the NPPF] indicate development should be restricted.”

39. In *Barwood v East Staffordshire Borough Council* this court stated its understanding of the policy for the “presumption in favour of sustainable development” in the NPPF, and how that presumption is intended to operate (see paragraphs 34 and 35 of my judgment). In doing so, it approved the relevant parts of the judgment of Holgate J. in *Trustees of the Barker Mill Estates v Secretary of State for Communities and Local Government* [2016] EWHC 3028 (Admin) (in particular paragraphs 126, 131, 136, and 140 to 143). Three simple points emerged (see paragraph 35 of my judgment). The first and second of those three points need not be set out again here. The third, however, is worth repeating – because it bears on the issue we are considering now. I shall emphasize the most important principle for our purposes here:

“ ...

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

74 of the judgment in [*Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin)].”

40. The judgments in this court in *Barwood v East Staffordshire Borough Council* entirely supersede the corresponding parts of several judgments at first instance – including, most recently, *Reigate and Banstead Borough Council v Secretary of State for Communities and Local Government* [2017] EWHC 1562 (Admin). In those cases, judges in the Planning Court have offered various interpretations of NPPF policy for the “presumption in favour of sustainable development”, and have explained how, in their view, the presumption should work. There is no need for that to continue. After the decision of the Court of Appeal in *Barwood v East Staffordshire Borough Council*, it is no longer necessary, or appropriate, to cite to this court or to judges in the Planning Court any of the first instance judgments in which the meaning of the presumption has been considered.
41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a “doctrinal controversy”. But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker’s own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain – because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see paragraph 22 of my judgment in *Barwood v East Staffordshire Borough Council*). That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court’s interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court’s review of a planning decision, not the hypercritical approach the court is often urged to adopt.
42. The principles on which the court will act when criticism is made of a planning officer’s report to committee are well settled. To summarize the law as it stands:
 - (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of*

Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin), at paragraph 15).

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

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

44. In paragraph 6.1 of his report the officer said:

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

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

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

and in paragraph 6.7:

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

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

“6.10 With this in mind, it must be noted that paragraph 49 of the NPPF states that applications for new housing development should be considered in the context of the presumption in favour of sustainable development. Paragraph 50 of the NPPF emphasises the importance of providing a wide choice of high quality homes, to widen opportunities for home ownership and create sustainable, inclusive and mixed communities. Paragraph 55 states that in order to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities.

6.11 These criteria all demonstrate a clear government momentum in favour of sustainable development to create new homes and drive economic development. The proposed development would create four high quality new homes on the very edge of an existing village settlement.

6.12 A further indicator of such emphasis is borne out of the recent changes to the regime of permitted development rights set out by national government by the Town and Country Planning (General Permitted Development) Order 2015. This allows for far more development to take place without the need for planning permission from Local Authorities and generally provides a steer as to government’s thinking on how to boost the country’s economy through the delivery of new homes.

6.13 Such continued emphasis from government is a material consideration that must be balanced against the policy context set out in the TMBCS.”

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

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

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

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

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

49. In recording the argument on this issue in the court below, Garnham J. noted Ms Graham Paul's submission that "the presumption in favour of sustainable development set out in paragraph 14 of [the NPPF] was not operative" in this case – because the development plan was in place and up-to-date and the council was able to demonstrate a five-year supply of deliverable housing sites (paragraph 43 of the judgment). Ms Graham Paul had conceded that "sustainability may be capable of being a material consideration in considering a conflict with a development plan". What the officer had done in paragraph 6.10 of his report, said the judge, had been "to invite the committee to note the effect of paragraphs 49, 50 and 55 [of the NPPF]". It was not suggested that those paragraphs of the

NPPF had been misrepresented. Nor was it suggested that the officer had failed to point out that the proposed development “fell outside the local plan”; he had done that in paragraph 6.6 of his report. In those circumstances, said the judge, “it cannot sensibly be argued that the officer misled the committee in any material respect” (paragraph 47). The judge also rejected the submission that paragraphs 49, 50 and 55 of the NPPF were irrelevant. He observed that the NPPF “provides for a presumption in favour of sustainable development which it says should be seen “as a golden thread” running through decision-taking”. He added that “[the] weight to be given to those considerations in any given case is a matter for the planning authority but it cannot, at least on facts such as the present, be said that the underlying principle is irrelevant” (paragraph 48). He rejected the submission that the officer had not justified the departure from the development plan. The officer’s report, he said, “accurately and fairly sets out the competing considerations and it was a matter for the judgment of the planning authority how those considerations were resolved” (paragraph 49).

50. In the submissions they made to us at the hearing, though not in their respective skeleton arguments, both Ms Graham Paul and Mr Lopez recast their arguments in the light of what this court has now said about the “presumption in favour of sustainable development” in *Barwood v East Staffordshire Borough Council*, including the basic point that the presumption is contained solely in paragraph 14 of the NPPF (see paragraph 35 of my judgment in that appeal). They were right to do so.
51. It was common ground before us, as it was in the court below, that the “presumption in favour of sustainable development” did not apply to the proposal. And the council’s officer did not advise the committee that it did. As Ms Graham Paul acknowledged, the only reference to the “presumption in favour of sustainable development” in the officer’s report is in the first sentence of paragraph 6.10. But, she submitted, in view of what the officer said in that paragraph of the report, and also in paragraph 6.42, we should conclude that the committee took the presumption into account as a material consideration, which it ought it not to have done. Ms Graham Paul did not submit that the proposal was given the benefit of the so called “tilted balance”. But she argued that the effect of the officer’s advice was that the “presumption in favour of sustainable development” was one of the “requirements set out within the NPPF ...”, which the officer treated as “an important material consideration” and a significant factor weighing in favour of the proposal in the planning balance.
52. I disagree. In my view the argument fails on a straightforward reading of the officer’s report, in the light of the judgments in this court in *Barwood v East Staffordshire Borough Council*. I do not accept that the officer counted the “presumption in favour of sustainable development” as a material consideration weighing in favour of planning permission being granted.
53. The reference to the “presumption in favour of sustainable development” in paragraph 6.10 of the officer’s report is a quotation of the first sentence of paragraph 49 of the NPPF, not of paragraph 14. The quotation is correct. In the same paragraph of the report the officer also referred to two other passages of policy in the NPPF, namely paragraphs 50 and 55. The policies are correctly summarized. The common factor in those three passages of NPPF policy is not the “presumption in favour of sustainable development”. It is the promotion, in national planning policy, of sustainable housing development. That this is

what the officer had in mind in this part of the report is very clear from what he went on to say in paragraphs 6.11, 6.12 and 6.13, and then in paragraph 6.24.

54. In those paragraphs the officer was not purporting to apply the “presumption in favour of sustainable development” to the proposal. Nor did he advise the committee that the presumption was engaged, or that it was, in itself, a material consideration weighing in favour of the proposal. He referred, in paragraph 6.11, to “[these] criteria” – meaning the matters to which he had referred in paragraph 6.10 – as demonstrating “a clear government momentum in favour of sustainable development to create new homes and drive economic development”; in paragraphs 6.12 and 6.13 respectively, to “such emphasis” and “[such] continued emphasis from government”; and in paragraph 6.24 to “the emphasis contained within the NPPF concerning sustainable development generally ...” (my underlining). The language in those paragraphs is very distinctly not the language one would have expected the officer to have used if he thought he was applying the “presumption in favour of sustainable development”. The intervening and subsequent assessment, culminating in his final conclusion on the planning merits of the proposal in paragraph 6.42, is concerned with its credentials and benefits – and advantages when compared with the fallback – as sustainable development.
55. Paragraph 6.42 of the officer’s report does not, in my view, betray a misunderstanding of NPPF policy for the “presumption in favour of sustainable development”. The advice given to the committee in that paragraph was not inaccurate or misleading. The officer did not undertake the planning balance in terms of the policy for “decision-taking” in paragraph 14 of the NPPF. There can be no suggestion that, contrary to his earlier conclusion and advice in paragraphs 6.6 and 6.7 of his report, he was treating this as a case in which the proposal accorded with the development plan, so that it was to be approved “without delay” under the first limb of the policy for “decision-taking” in paragraph 14. Nor can it be suggested that, contrary to the whole tenor of his assessment of the proposal in paragraphs 6.1 to 6.41, this was a case in which the development plan was “absent” or “silent” or any “relevant policies” of it were “out-of-date”, so that the second limb of the policy for “decision-taking” in paragraph 14 applied.
56. This case is clearly and materially different from *Barwood v East Staffordshire Borough Council* – a case that shows what can go wrong when a decision-maker is misled as to the meaning and effect of government policy for the “presumption in favour of sustainable development”. Here the officer did not commit an error of the kind made by the inspector – and conceded by the Secretary of State – in that case: the mistake of discerning a “presumption in favour of sustainable development” outside paragraph 14 of the NPPF and treating that wider presumption as a material consideration weighing in favour of the proposal (see paragraphs 43 to 48 of my judgment in *Barwood v East Staffordshire Borough Council*). The officer did not say, as the inspector did in *Barwood v East Staffordshire Borough Council*, that “where a proposal is contrary to the development plan [the “presumption in favour of sustainable development”] is a material consideration that should be taken into account” (paragraph 12 of the decision letter in that case). Unlike the inspector in that case (in paragraphs 37 to 41 of his decision letter), he did not bring the “presumption in favour of sustainable development” into the balancing exercise as a material consideration (see paragraphs 26 and 29 of my judgment). And, in my opinion, it cannot realistically be suggested that the members would have thought they were being invited to apply that presumption in government policy, or to give it weight as a material consideration, in their assessment of the proposal.

57. The “presumption in favour of sustainable development” did not, in fact, feature as a material consideration to which the officer gave any positive weight when undertaking the planning balance. The exercise he conducted in paragraph 6.42 of his report was an entirely conventional and lawful balance of other material considerations against the identified conflict with the development plan, as section 38(6) of the Planning and Compulsory Purchase Act 2004 requires. It was, in fact, a classic example of that provision in practice. This is not to say that in his assessment of the proposal he had to refrain from considering the extent to which it complied with relevant NPPF policies – in particular, in the specific respects to which he referred, the sustainability of the proposed development in the light of NPPF policy, as well as its compliance with relevant policies of the development plan. That was a perfectly legitimate, and necessary, part of the planning assessment in this case. Had the officer left it out, he would have been in error, because he would then have been failing to have regard to material considerations. But he did not make that mistake. He assessed the proposal comprehensively on its planning merits, exercising his planning judgment on the relevant planning issues. He took into account the sustainability of the proposed development in the light of NPPF policy, but without giving it the added impetus of the “presumption in favour of sustainable development”. I cannot fault the advice he gave.
58. Finally on this issue, I do not accept the suggestion made by Ms Graham Paul in reply that the council’s response to Mr Mansell’s solicitors’ pre-application protocol letter, in its solicitors’ letter dated 22 February 2016, can be read as conceding the error for which Ms Graham Paul contended. In fact, it squarely denied that error. Having referred to the quotation of the first sentence of paragraph 49 of the NPPF in paragraph 6.10 of the officer’s report, it acknowledged that the proposal was a “departure from the development plan” and that the development plan was not “absent” or “silent” nor were relevant policies “out-of-date”. It then said that neither the officer nor the committee had treated the “presumption in favour of sustainable development” under paragraph 14 of the NPPF as “operative” in this case. It acknowledged, therefore, that neither of the limbs of the policy for “decision-taking” in paragraph 14 of the NPPF could have applied here. And it said that the officer’s report “does not begin to suggest otherwise”. I agree.
59. It follows that this ground of appeal must also fail.

Conclusion

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

Lord Justice Hickinbottom

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

The Chancellor of the High Court

62. I too agree with Lord Justice Lindblom's judgment, but would add a few words from a more general perspective. In the course of the argument, one could have been forgiven for thinking that the contention that the presumption in favour of sustainable development in the NPPF had been misapplied in the planning officer's report turned on a minute legalistic dissection of that report. It cannot be over-emphasised that such an approach is wrong and inappropriate. As has so often been said, planning decisions are to be made by the members of the Planning Committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and the courts must give them space to undertake that process.
63. Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a planning officer's report. An appeal will only succeed, as Lindblom L.J. has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common-sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied.
64. It is also appropriate to reiterate what Lindblom L.J. said at paragraph 35 of the *East Staffordshire* case to the effect that planning decision-makers have to exercise planning judgment as much when the presumption in favour of sustainable development is applicable as they do when it is not. The presumption may be rebutted when it is applicable, and planning permission may be granted where it is not. In each case, the decision-makers must use their judgment to decide where the planning balance lies based on material considerations. It is not for the court to second guess that planning judgment once it is exercised, unless as I have said it is based on a distinct and material defect in the report.
65. I agree that this appeal should be dismissed.



Neutral Citation Number: [2014] EWCA Civ 878

Case No: C1/2014/0147

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Hickinbottom
[2013] EWHC 3947 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2014

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE RICHARDS
and
LORD JUSTICE CHRISTOPHER CLARKE

Between :

**The Queen (on the application of
Hampton Bishop Parish Council)**

**Claimant/
Appellant**

- and -

Herefordshire Council

**Defendant/
Respondent**

and

**(1) Herefordshire Rugby Football Club
(2) Bloor Homes Limited**

**Interested
Parties**

Sasha White QC and Andrew Byass (instructed by Clyde & Co LLP) for the Appellant
Richard Kimblin and Nina Pindham (instructed by Herefordshire Council Legal Services)
for the Respondent
Ian Dove QC and Jack Smyth (instructed by Wragge & Co LLP) for the Interested Parties

Hearing date : 17 June 2014

Approved Judgment

Lord Justice Richards :

1. The broad context of the present case was described in these terms by Hickinbottom J in the judgment under appeal:

“2. It concerns Hereford Rugby Club’s proposal to relocate from their current modest ground on the banks of the River Wye near Hereford City Centre, to an out-of-city ground with all the facilities required by a regional rugby club. The club is amateur, and has no significant funds; and so the proposed development includes nearly two hundred dwellings which will financially enable the new sports facilities to be built. Over half of the new houses will be open market; but 35% will be affordable, i.e. accommodation for households whose needs are not met by the market. On any view, the proposed development is substantial, occupying over 20 hectares. It is not only outside the development boundary for Hereford and in open countryside, it is in an area of orchards, which provide an important local landscape on a route into the city. Once the club has moved, it is proposed to give the old ground to the Council.”
2. On 17 September 2012 Herefordshire Council (“the Council”) granted outline planning permission to Hereford Rugby Club (“the Rugby Club”) for the proposed development, briefly described as a “development of grass and all weather sports pitches, clubhouse, indoor training building, car parking and landscaping supported by enabling residential development of 190 units”. The site is about 3 km from Hereford City Centre, on land to the east of Holywell Gutter Lane, Hampton Bishop, in an area for which Hampton Bishop Parish Council (“the Parish Council”) is the parish council.
3. The Parish Council brought judicial review proceedings against the Council to challenge the grant of planning permission. The Rugby Club and Bloor Homes Limited, a construction company with a commercial interest in building the housing which forms part of the proposed development, took part in the proceedings as interested parties. In a judgment handed down following a rolled-up hearing, Hickinbottom J granted permission to apply for judicial review but dismissed the substantive claim.
4. The Parish Council now appeals against the judge’s order. Permission to appeal was granted by Beatson LJ on limited grounds. In the result there are two issues before this court: (1) whether the Council failed to comply with the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) to determine a planning application in accordance with the development plan unless material considerations indicate otherwise; and (2) whether the Council acted in breach of regulation 122 of the Community Infrastructure Levy Regulations 2010 (“the CIL Regulations”) in taking into account as a material consideration a planning obligation entered into pursuant to section 106 of the Town and Country Planning Act 1990 (“the 1990 Act”) to transfer the Rugby Club’s existing ground to the Council for the nominal sum of £1 on completion of the move to the new site.

The facts

5. I propose to summarise the factual material in some detail because, as will appear in due course, it is central to the resolution of the issues.
6. The Rugby Club lodged its application for planning permission in November 2010. The application was supported by a planning statement and an environmental statement. It was based at that time on 250 enabling residential units. No reference was made to the Rugby Club's existing ground being transferred to the Council once the club had moved to the new site.
7. The application was the subject of major revisions in July 2011, including a reduction in the number of residential units from 250 to 190, 35% of which would be affordable housing. The revised proposal was supported by an addendum planning statement.
8. A lengthy planning officer's report ("the first report") was prepared for the purposes of a meeting of the Council's Planning Committee on 31 August 2011 at which the application was due to be considered.
9. Section 6 of the first report gave the officers' appraisal of the proposal. As part of that, it stated at paragraph 6.10 that the starting point for consideration of the development proposals was the adopted development plan, namely the Herefordshire Unitary Development Plan ("the UDP") and the Regional Spatial Strategy for the West Midlands. I can focus on the UDP since nothing turns on the provisions of the Regional Spatial Strategy.
10. Consideration was given first to the UDP policies in respect of housing:

"6.12 The UDP policies in general are aimed at strictly controlling new development outside of the defined settlements, the presumption being that such development should only be permitted in exceptional circumstances where specific criteria are met. In this instance, Policy H1 stipulates that any new housing within Hereford and the market towns should be restricted to within the defined settlement boundary whilst Policy H7 defines the criteria under which new housing can be permitted in open countryside. However, this policy is primarily geared towards smaller scale developments such as new farm workers dwellings or conversion of rural buildings rather than large scale residential developments such as this. The development is therefore contrary to the relevant housing policies within the UDP."
11. The report referred next to the UDP policies concerning sport and recreational facilities. It said that Policies RST1 and RST10, in particular, were relevant. Policy RST1 set criteria against which new sport and recreational development should be assessed, and confirmed that such development could be permitted in the countryside but only where the countryside was the primary resource for the proposal, which was not the case here. Policy RST10, however, allowed for major sports facilities on the edge of Hereford where they were meeting identified regional or sub-regional needs; it required such schemes to be acceptable in terms of their environmental impact and

that they be located in a sustainable and accessible location; and it was also subject to the requirement that it be demonstrated that there were no suitable sites available within the urban area to accommodate development. Having examined the question of suitable alternative sites within and around the city, including the availability and viability of such alternatives, the report stated:

“6.24 The site lies in open countryside where the adopted UDP policies [seek] to control large scale new residential development and only permit large scale sports developments where a regional or sub-regional need is demonstrated. There are many sequentially preferable sites within and around the city that could accommodate either the development as a whole or the development in its disaggregated form but none of these sites would provide the required opportunity to develop the club’s facilities due to their financial circumstances. This consideration should not override longstanding land use considerations. The principle of development is therefore contrary to adopted policy.

...

6.26 Section 38 of the Planning and Compulsory Purchase Order Act 2004 stipulates that all development should be considered in accordance with adopted policy unless material considerations indicate otherwise. This report will now consider the other planning considerations and whether they are sufficient to outweigh the normal policies which control new development in the open countryside.”

12. Traffic, access and accessibility issues were examined and were considered acceptable. Examination of landscape and visual impacts, however, led to the conclusion at paragraph 6.56 that the development would be contrary to the requirements of Policy LA2 of the UDP (which provided that proposals for new development that would adversely affect either the overall character of the landscape or its key attributes or features would not be permitted). It is apparent from a later passage in the report that the development was also considered to be contrary on landscape grounds to Policy LA3 (which provided that development outside built up areas which was acceptable in terms of other UDP policies would only be permitted where it would not have an adverse effect upon the landscape setting of the settlement concerned) and to Policy S7 (which related to natural and historic heritage). Consideration was then given to a range of other matters, none of which was found to give rise to serious concerns, though it was noted that there would be an adverse impact on biodiversity at least in the short term (which, as appeared later, was considered to be contrary to Policy NC6). There was also a discussion of the proposed agreement under section 106 of the 1990 Act, which at that stage included no provision in respect of the Rugby Club’s existing ground.
13. In a concluding section (paragraphs 6.150-6.156), the report repeated that the policies within the UDP were the relevant tests against which the development had to be judged; summarised the points already considered in detail; and concluded that although there were a number of positive elements to the development which could be

given significant weight, on balance they were not considered sufficient to outweigh the significant negative landscape and visual impacts and the associated conflict with adopted policy requirements. It was therefore recommended that the application be refused for the reason that, in summary, it was contrary to Policies LA2, LA3, H7 and RST10 (to which list were added Policies S7 and NC6 at the meeting on 31 August 2011).

14. An update prepared after the first report but circulated before the meeting on 31 August recorded that the Rugby Club had offered to transfer the existing ground to the Council for £1.
15. At the meeting of the Planning Committee on 31 August the application was described as being “finely balanced between the requirements of the Unitary Development Plan policies and the housing needs of the County”. Members resolved, contrary to the recommendation in the first report, that officers acting under delegated powers be authorised to issue planning permission in respect of the proposed development, subject to conditions considered necessary by officers and subject to (1) there being no further representations or consultations raising new material planning considerations by the end of the amended plan consultation period, (2) the resolution of an outstanding objection from Natural England, (3) the resolution of other issues identified in the officer’s appraisal, and (4) the completion of a section 106 planning obligation in accordance with the matters raised in the officer’s appraisal and any additional matters considered necessary by officers.
16. In the event, however, planning permission was not granted pursuant to that resolution. On 27 June 2012 the application was brought back before the Planning Committee in order to draw members’ attention to various points of updating and in particular to give them an opportunity to consider whether the newly introduced National Planning Policy Framework (“the NPPF”) materially changed the planning policy considerations.
17. A further officer’s report (“the second report”) was produced for the purposes of the meeting. The officer’s appraisal commenced with the observation that the competing factors to be assessed resulted in “a very finely balanced decision”. Among matters noted by way of update were that Natural England had withdrawn their objection and that a section 106 agreement had been agreed by all parties and was awaiting signature. The agreement included provision for “Freehold transfer of Hereford Rugby Club’s existing grounds and buildings to the Council at no cost upon completion of their new facilities”. It also included a full ecological management plan.
18. The report stated that there had been two other notable changes since previous consideration of the application by the Planning Committee. One was the introduction of the NPPF:

“7.14 At the heart of the NPPF is a general presumption in favour of sustainable development and applications for housing should be considered in this context. It has previously been accepted that the development can be regarded as sustainable in terms of its location, accessibility, design and construction standards to be achieved. However, this presumption does not

override normal, site specific planning considerations and the need to comply with the relevant Unitary Development Plan policies where they are consistent with the NPPF. In this regard, the site remains contrary to policy H7 being located in the open countryside.

7.15 Whilst the additional documents such as the design code and ecological management plan do go some way to mitigating the negative impacts of the development, in your officer's opinion, the loss of orchard and adverse visual and landscape impact of the development cannot be fully mitigated and therefore the development remains in conflict with the UDP policies listed in 7.13 above [i.e. those identified in the first report]"

19. The other, related change was the publication of the Council's latest Annual Monitoring Report which included an analysis of the current supply of deliverable housing land. The point made in relation to that was that the NPPF required local planning authorities to identify a five year supply of housing, with an additional 5% buffer, to ensure choice and competition in the market for land; the Council currently had a shortfall; and the need for the Council to provide for additional deliverable housing sites was therefore more explicit than was the case previously and had to be considered a material consideration in favour of the development.
20. The report had a concluding section broadly similar to that of the first report but with a number of additional points. It factored in references to the NPPF, noting that the sustainability of the development and the delivery of additional housing should be given particular weight. It also observed that the transfer of the Rugby Club's existing site to the Council would be a significant sport and community asset for the benefit of the city. It ended with a recommendation that planning permission be refused for the following reason:

"The site is within open countryside outside of the settlement boundary for Hereford as defined by the adopted Herefordshire Unitary Development Plan (UDP). The residential element of the development does not satisfy any of the exception criteria within policy H7 and the presumption against new housing development within the open countryside therefore applies. UDP policy RST10 only permits major sports facilities on the edge of Hereford where they are acceptable in terms of their environmental impact. It is considered the development will be visually intrusive, will result in the permanent loss of a significant area of orchard which is a Biodiversity Action Plan habitat, and will adversely erode the landscape character of the site and setting of the city. As such the development is contrary to policies S7, LA2, LA3, NC6, H7, and RST10 of the UDP. The requirements of the National Planning Policy Framework are not considered sufficient to outweigh the conflict with adopted policies."

21. The minutes of the meeting of the Planning Committee on 27 June 2012 show that there was considerable discussion of the UDP policies referred to in the officer's reports. Members making comments in support of the application considered that there was in fact compliance with various of the policies in question. One of the members then moved that the application be approved contrary to the officer's recommendation, identifying policies that supported the application. The debate continued. Towards the end the member who had moved the motion confirmed the following, which therefore became the basis on which the motion was moved:

“That he accepted that by approving the application the application would be considered as a departure from Policy H7 of the UDP, but that this was justified through the NPPF, through the provision of affordable housing and the lack of a five year housing land supply.

That the application conformed to the criteria as set out in policies LA2 and LA3 of the UDP as it would not adversely affect the landscape setting and character due to the comprehensive Ecological Management Plan and layout.

That in respect of policy RST10, the environmental impact was deemed as acceptable with any concerns outweighed by the provision of regional sporting facility on a suitable, viable and affordable site. This was reiterated through the withdrawal of an objection by Natural England.

That the proposed Ecological Management Plan and the withdrawal of Natural England's objection addressed Policies S7 and NC6.

That he adopted the reasoning on the other planning issues as set out in the report.”

The motion was carried by 14 votes to 4.

22. There followed, on 17 September 2012, the completion of the section 106 agreement and the formal grant of planning permission pursuant to the Planning Committee's resolution.
23. The grant contained two and a half pages of summary reasons for approval. It said that regard had been had *inter alia* to the NPPF and numerous listed policies of the UDP. It referred to the fact that the site lay in open countryside and the development did not satisfy any of the exceptions listed in Policy H7, so that approval was a departure from the requirements of the policy. It then said that “the following material planning considerations were given weight in departing from Policy H7”. The matters that followed included:
- i) Regard had been had to the requirements of section 6 of the NPPF and the need to consider housing applications in the context of a presumption in favour of sustainable development.

- ii) The was a need for new sports facilities and there were no suitable sites within the urban area to accommodate the facilities. The environmental impact of the proposed facilities was acceptable, and the site was readily accessible by a choice of means of transport as required by Policies S8 and RST10. The community health and well-being benefits that the facilities would offer would meet the aims of section 8 of the NPPF.
- iii) The visual and landscape impact of the development on the site and the setting of the city was acceptable in accordance with Policies S7, LA2 and LA3. The ecological management plan ensured that the development was also compliant with Policy NC6.
- iv) The matters secured through the section 106 agreement, including the safeguarding of additional publicly owned sports and recreation facilities, were material considerations in favour of the development.
- v) It had been determined that the development would not have any likely significant effect on the Special Area of Conservation, meeting the requirements of Policy S7 and the Habitats Regulations.
- vi) In various other respects the proposal was considered to comply with UDP policies and the NPPF. Reference was made in particular to Policies T8, DR4, DR5 and DR7.

24. The summary of reasons concluded, in its last substantive paragraph:

“In summary, the approval of the development is a departure from Herefordshire Unitary Development Plan Policy H7. However, having regard [to] the requirements of the National Planning Policy Framework and its presumption in favour of sustainable development, compliance with other Herefordshire Unitary Development Plan policies and particularly the creation of new sports facilities meeting an identified need, the delivery of additional housing and affordable housing in the context of current shortfall in the Council’s deliverable housing land, the sustainability of the development and the sustainable location of the site, the provisions of the planning obligation and the acceptable environmental, landscape and biodiversity impact of the proposals, the development is considered acceptable.”

The first issue: the application of section 38(6) of the 2004 Act

- 25. By section 70(2) of the 1990 Act, in dealing with an application for planning permission local planning authorities must have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Section 38(6) of the 2004 Act provides that if regard is to be had to the development plan for the purpose of any determination, the determination must be made in accordance with it unless material considerations indicate otherwise.
- 26. The correct general approach to the application of section 38(6) was set out by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR

1447, by reference to a corresponding section of the Scottish legislation (section 18A of the Town and Country Planning (Scotland) Act 1972). Lord Clyde stated that the section “has introduced a priority to be given to the development plan in the determination of planning matters” (1458B); in a speech agreeing with him, Lord Hope referred to it as introducing a “presumption in favour of the development plan” (1449H). Lord Clyde went on to describe what this meant in practice. The passage (at 1459D-G) has been cited frequently but it bears repetition:

“In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the application”

27. Lord Clyde referred next to a suggestion by counsel for the Secretary of State that in the practical application of the section two distinct stages should be identified, namely (1) the decision-maker should first decide whether the development plan should or should not be accorded its statutory priority; and (2) if he decides that it should not be given that priority, it should be put aside and attention concentrated upon the material factors which remain for consideration. Lord Clyde commented as follows on that suggestion (at 1459H-1460C):

“But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to

make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.”

28. That passage was evidently not intended to qualify Lord Clyde’s earlier observations about the general approach required by the section. It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. I say “as a general rule” because there may be exceptional cases where it is possible to comply with the section without a decision on that point: I have in mind in particular that if the decision-maker concludes that the development plan should carry no weight at all because the policies in it have been overtaken by more recent policy statements, it may be possible to give effect to the section without reaching a specific decision on whether the development is or is not in accordance with the development plan. But the possibility of exceptional cases should not be allowed to detract from the force of the general rule.
29. Our attention was drawn to a number of later authorities which for present purposes do not add materially to the principles set out in the *City of Edinburgh* case. It may be helpful, however, to mention two of them. In *R v Rochdale Metropolitan Borough Council, ex p. Milne* [2001] JPL 470, at paragraph 50, Sullivan J (as he then was) emphasised that it is enough that the proposal accords with the development plan as a whole; it does not have to accord with each and every policy therein. In *Tesco Stores v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, at paragraph 22, Lord Reed JSC observed that “Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations”.
30. The relevant principles were not affected by the introduction of the NPPF. That document refers in terms, at paragraphs 11-13, to section 38(6) of the 2004 Act and states that the NPPF does not change the statutory status of the development plan as the starting point for decision making: proposed development that accords with an up-to-date local plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It states

that the NPPF constitutes guidance for local planning authorities and decision-makers both in drawing up plans and as a material consideration in determining applications. Whilst it is clear from other passages that the policies in the NPPF may affect the *weight* to be given to policies in the development plan, the duty to determine applications in accordance with the development plan unless material considerations indicate otherwise remains the same.

31. Consideration of the section 38(6) issue in the court below appears to me to have become over-elaborate. The judge understood Mr White QC, for the Parish Council, to be arguing for a two-stage process of the kind suggested by counsel for the Secretary of State in the *City of Edinburgh* case. I think that that was a misunderstanding on the judge's part. It led to a detailed analysis in the course of which the judge referred to the passages of the NPPF concerning housing provision as an example of "how, in a more complex planning application such as this, it is difficult if not impossible to keep policies and thus material considerations found within the parameters of the development plan separate from material considerations found outside it" (paragraph 127). In my view that observation needs to be viewed with caution: I acknowledge the practical problem but I think that even in a complex case it is necessary, in order to give proper effect to section 38(6), to keep firmly in mind the distinction between development plan policies and other material considerations (including considerations that affect the weight to be given to the development plan policies).
32. The judge went on to cite the passage from Lord Clyde's speech in the *City of Edinburgh* case in which the particular two-stage process suggested by counsel for the Secretary of State was rejected. He said that that passage provided a conclusive answer to Mr White's submission, which of course it would have done if that had been the submission Mr White was making. Then, in further reference to the same passage from Lord Clyde's speech, he said this (at paragraph 129):

"Whilst of course they must (i) identify and engage with the relevant policies in the development plan, properly understood and considered as a whole and (ii) pay proper regard to the statutory priority given to the development plan, there is no legal or practical requirement for planning decision-makers specifically to determine whether a development proposal is or is not in accordance with the development plan."
33. I respectfully disagree with a proposition formulated in those terms. It will be clear from what I have said above that in my view compliance with the duty under section 38(6) *does* as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Reed in *Tesco Stores v Dundee City Council* (see paragraph 29 above), they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations.
34. Whilst I have indicated my concerns about those aspects of the judgment below, I do not think that the appeal on the section 38(6) issue turns on them. Mr White's

essential submission to this court is that because of a failure in the officer's reports to set the issues clearly within the framework of section 38(6), the members of the Planning Committee did not have in mind the importance of the development plan and the priority to be given to it; they did not distinguish between the development plan and material considerations; they were utterly confused. Whether that submission is correct can be determined by reference to the factual material in the case (the officer's reports, the minutes of meetings and the summary reasons for granting planning permission) without the need for more refined analysis. I have summarised the relevant material at some length earlier in this judgment. In my judgment it shows Mr White's submission to be unfounded.

35. The officer's first report (see paragraphs 8-13 above) spelled out in paragraph 6.10 that the development plan was the starting point for consideration of the proposal and identified the UDP as a key part of the development plan. It then considered the application of the UDP policies concerning housing and sport and recreation, concluding at the end of paragraph 6.24 that the principle of development "is therefore contrary to adopted policy". This was followed by the statement at paragraph 6.26 that section 38 of the 2004 Act "stipulates that all development should be considered in accordance with adopted policy unless material considerations indicate otherwise" and that the report would go on to consider whether other planning considerations were sufficient to outweigh the normal policies controlling new development in the countryside. To my mind, that was more than enough to make clear to members the importance of the development plan and the statutory priority to be accorded to it by section 38(6) – matters with which all or most of them can be expected to have been familiar already. The remainder of that section of the report did nothing to undermine that basic message. It examined a number of other relevant UDP policies, finding an additional conflict with the landscape policies in particular, and a variety of other material considerations. The concluding section repeated that the UDP policies were the relevant tests against which the development had to be judged, that the development was contrary to a number of those policies, and that other elements were not considered sufficient to outweigh the negative landscape and visual impacts and the associated conflict with policy requirements. The whole exercise involved a proper application of section 38(6).
36. The second report (see paragraphs 17-20 above) built on the first report, drawing attention to updates and new points. Again it put the development plan at the forefront of the exercise, whilst recognising that the NPPF and the shortfall from a five year supply of housing provided material considerations in favour of the development. This appears very clearly from the reason why it was recommended that planning permission be refused. The stated reason identified various conflicts with the UDP policies and concluded: "As such the development is contrary to policies S7, LA2, LA3, NC6, H7 and RST10 of the UDP. The requirements of the National Planning Policy Framework are not considered sufficient to outweigh the conflict with adopted policies". That was a straightforward application of section 38(6) and cannot have left members in any doubt about the approach they were required to follow.
37. The minutes of the Planning Committee on 27 June 2012 (see paragraph 21 above) show that members understood perfectly well the importance of the UDP policies. In the case of several of those policies, however, the majority disagreed with the

officer's assessment that the development would not be in compliance with them. That was a planning judgment properly open to them, as Mr White had to accept in this court. Members did agree with the officer's assessment that the development would be contrary to Policy H7, the key policy in respect of new housing in the countryside, and that the development would in that respect be a departure from the development plan. The departure was considered to be outweighed by the NPPF and other considerations. In all of this one sees the general approach of the officer's reports carried through into the decision-making process, albeit with a difference of planning judgment on the question of compliance with certain of the policies.

38. The views of the majority at the meeting were then reflected in the summary reasons given in the grant of planning permission itself (see paragraphs 22-23 above). The summary acknowledged the departure from Policy H7 but identified "material planning considerations" to which weight was given and in the light of which the development was considered acceptable.
39. The one respect in which the summary may be open to criticism is in referring to instances of compliance with other UDP policies as "material planning considerations" to be given weight in departing from Policy H7. Mr White relied in that respect on a passage in the judgment of Kenneth Parker J in *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin), at paragraph 23. In rejecting an argument that certain benefits would always constitute a material consideration relevant to the grant of permission and should therefore be "read into" the relevant policies of the development plan, Kenneth Parker J said this:

"... it is a fundamental and long established principle of planning law that something identified as a 'material consideration' (such as the putative economic and environmental benefit in the present context) is conceptually distinct from considerations identified in the development plan and does not *ceteris paribus* carry the same weight as an aim or consideration identified in the development plan itself. It is, therefore, essential, both analytically and in policy terms, to separate objectives or considerations specifically set out in the development plan from something else than can count only as another 'material consideration'."

40. In my view that passage does not give Mr White much help. It would obviously have been better for the summary reasons in this case to draw a clearer separation between the UDP policies and other material considerations. I do not accept, however, that the way in which the UDP policies were dealt with evidences any real confusion on the part of the Planning Committee as to the approach required under section 38(6). What was being said in substance (reflecting what had been said at the meeting on 27 June 2012) was that the proposed development complied with all the relevant UDP policies except Policy H7 and that the departure from Policy H7 was justified by material considerations.
41. Surprisingly, neither Mr Kimblin nor Mr Dove QC, appearing respectively for the Council and for the interested parties, was willing to be pinned down on whether the members of the Planning Committee decided that the proposed development was in accordance with the development plan or whether they decided that it was not in

accordance with the development plan. I do not know why they were so cautious on that point. The court can operate only on the basis of the material before it, and on that basis it seems to me that the members decided that the proposed development was *not* in accordance with the development plan. There was no suggestion that this was a case where development plan policies pulling in different directions required a potentially difficult overall judgment to be made as to whether the development accorded or did not accord with the development plan as a whole (cf. *R v Rochdale Metropolitan Borough Council, ex p. Milne*, cited above). Policy H7 stood out as a key policy. It meant that the building of 190 residential units in open countryside was a major departure from the development plan. The members put this at the forefront of their reasons. I have no difficulty in concluding that they decided on account of it that the development was not in accordance with the development plan but they considered that the departure from the development plan was justified by other material considerations.

42. Even if I were wrong about that, it would make no practical difference to the outcome. On any view, the members found that the only departure from the development plan was in relation to Policy H7, which they took fully into account. That was the sole (but obvious) basis on which the proposed development could be found not to be in accordance with the development plan. The only alternative logically open to them was that the proposed development was in accordance with the development plan taken as a whole, i.e. setting the fact of compliance with various UDP policies against the fact of non-compliance with Policy H7. As I have said, there is nothing to suggest that members followed that approach. Had they done so, however, it would necessarily have led them in the circumstances to the same ultimate decision, that planning permission should be granted.
43. In conclusion on this issue, I am satisfied that the members of the Planning Committee approached their decision in the way required by section 38(6) and were not in a state of confusion as submitted by Mr White. If there was an error in the formulation of their summary reasons for the grant of planning permission, it was not material.

The second issue: the transfer of the Rugby Club's existing ground to the Council

44. In my account of the facts I have explained that one of the planning obligations entered into under section 106 of the 1990 Act was for the transfer of the Rugby Club's existing ground to the Council for £1 on completion of the move to the new site. That proposed obligation was taken into account by the Council as a material consideration weighing in favour of the grant of planning permission. The issue here is whether the Council thereby acted in breach of regulation 122 of the CIL Regulations.
45. Regulation 122 provides:

“122(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

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

- (a) necessary to make the development acceptable in planning terms;
- (b) directly related to the development; and
- (c) fairly and reasonably related in scale and kind to the development.

(3) In this regulation –

‘planning obligation’ means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation”

I have omitted the elaborate definition of “relevant determination”. It is common ground that the decision to grant planning permission in this case was a relevant determination.

46. Regulation 122 can be seen in part as a codification of principles developed in the case law. For example, in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770A-B, Lord Keith of Kinkel stated the position as follows:

“An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development, which is not de minimis, then regard must be had to it.”

A classic example of an offer that cannot properly be taken into account as a material consideration was given by Staughton LJ in *R v Westminster Council, ex p. Monahan* [1990] 1 QB 87, 122C, namely that of a developer who wishes to erect an office building at one end of the town and offers to build a swimming-pool at the other end, which Staughton LJ described as being little different from offering the planning authority a cheque so that it can build the swimming-pool for itself provided the developer has permission for his office development. In such a case, as Lord Collins of Mapesbury JSC indicated in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437, paragraph 70, there is no real connection between the benefits and the development. In the same passage, however, Lord Collins made clear that off-site benefits which are related to or are connected with the development will be material.

47. Mr White's primary submission is that the obligation to transfer the existing ground to the Council was not “directly related to the development” within the meaning of paragraph (2)(b) of the regulation. The development would be several kilometres away from the existing ground. The users of the development would have no

continuing connection with the ground. The obligation related simply to the transfer of the freehold interest in the ground to the Council, with no restriction on use. There were representations in support of the continued use of the existing ground for sports but it was not said that the Council needed to take on ownership of the ground for that purpose or that the mere transfer of ownership to the Council would achieve that result. The Rugby Club itself did not argue that the transfer was necessary in order to secure the future of the ground. The transfer proposal had formed no part of the Rugby Club's original application for planning permission but emerged, in a way that has never been explained, between the date of the planning officer's first report (with its strong recommendation against the grant of planning permission) and the first meeting of the Planning Committee.

48. In holding that the obligation in the present case was directly related to the development, the judge said this:

“30. ... In this case, the existing ground was of course some distance away from the Site, and the development of the existing ground formed no part of the planning application. However, the future use of that ground was nevertheless in play. Sport England had stressed the importance of the existing ground not being lost as a public amenity ..., as had the Council's own Parks & Countryside Manager The whole purpose of the proposed development is to enable the Rugby Club to relocate to the new development, once complete. It will then have no need for its existing ground at all, and will vacate it. In those circumstances, it was perfectly proper for the Planning Committee to consider the future use of that land, as a material consideration for the proposed development. Placing the existing ground into the responsible ownership of a body which would be able to secure the continued use and operation of the ground as a public amenity, namely the Council, was in the public interest; and, on the unusual facts of this case, was clearly ‘directly related’ to the development.”

49. At paragraph 31 the judge rejected Mr White's criticisms of the circumstances in which the offer to transfer the existing ground arose. He said that there was no evidence or basis for any suggestion of anything sinister or unlawful; only a local authority doing its duty and looking after the public interest; and a rugby club, having no use for its existing ground once its new facilities were available to it, being willing to gift that ground to the Council for continued public benefit. At paragraph 32 the judge gave reasons for rejecting Mr White's reliance on the absence of a restriction on the use of the ground following transfer as indicative that the transfer was a gift of potentially valuable land near the city centre with a view to “buying” planning permission. The judge did not consider such a restriction on use to be necessary or appropriate, pointing *inter alia* to the fact that the use of the existing ground as playing fields was protected by the UDP and that the location of the ground within a functional floodplain meant that it could not be used for higher value development in any event.
50. In my view the judge was right, for the reasons he gave, to reject Mr White's various submissions and to find that the transfer obligation was directly related to the

development. The heart of the matter, as it seems to me, is that the existing ground was going to be released as a direct result of the development for which planning permission was being sought. The future use of the ground was therefore one of the land use consequences of the very decision that the Council was taking. The continuation of the ground's existing use for sport and recreation might have been a practical likelihood in any event but the transfer to the Council, even without restriction, would help in practice to safeguard that outcome. All this is far removed from "buying" planning permission. It fits comfortably within the requirement that the planning obligation be directly related to the development.

51. Mr White had a secondary argument, though not developed in his oral submissions, that the obligation to transfer the existing ground to the Council was not "necessary to make the development acceptable in planning terms", within paragraph (2)(a) of regulation 122. He says that officers did not advise members about the terms of the regulation or advise them that the obligation as to transfer of the existing ground was necessary, nor is there evidence that members concluded that it was necessary.
52. The judge accepted (in paragraph 37 of his judgment) that it would have been helpful if the officer's reports and the members' summary reasons had been explicit about the requirements of regulation 122, but he said that there was no evidence that the Planning Committee failed to approach their decision on a proper basis. The judge drew particular attention to the fact that the decision whether to grant planning permission was finely balanced, observing that "It can be said that, in this finely balanced matter, with the Section 106 obligations as agreed, the proposal was acceptable in planning terms; and, without them, as it stood it would not have been". It is of course impossible to isolate the weight actually placed by the Planning Committee on the obligation to transfer the existing ground to the Council: Mr White's skeleton argument described it as playing "a major part" in the members' decision, which does not sit happily with his argument that the obligation was not necessary to make the development acceptable. But it plainly did weigh in the balance as one of the material considerations justifying a departure from Policy H7. In my judgment, again in agreement with the judge, the conclusion can and should be drawn that the obligation was necessary to make the development acceptable.
53. If and in so far as Mr White intended to maintain other points that were referred to in his written material but were not developed orally (I have in mind, in particular, an argument that the obligation to transfer the existing ground to the Council did not comply with paragraph (2)(c) of regulation 122, and an argument that it was perverse of the Council to require the obligation), in my view they were not covered by the grounds of appeal for which permission was granted and were not points of any substance in any event.

Conclusion

54. For the reasons given I would dismiss the appeal.

Lord Justice Christopher Clarke :

55. I agree.

The Chancellor of the High Court :

56. I also agree.



Hilary Term
[2012] UKSC 13
On appeal from: [2011] CSIH 9

JUDGMENT

Tesco Stores Limited (Appellants) v Dundee City Council (Respondents) (Scotland)

before

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

JUDGMENT GIVEN ON

21 March 2012

Heard on 15 and 16 February 2012

Appellants

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

Respondents

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

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

LORD REED (with whom Lord Brown, Lord Kerr and Lord Dyson agree)

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

The legislation

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

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

Section 25 provides:

“Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise –

(a) to be made in accordance with that plan...”

The development plan

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

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

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

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

“In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that:

- no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres;
- individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres;
- the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres;
- the site is readily accessible by modes of transport other than the car;
- the proposal is consistent with other Structure Plan policies.”

5. The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues, at para 52.2:

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

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

“The City Centre and District Centres will be the locations of first choice for new or expanded retail developments not already identified in the Local Plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that:

- a) no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centres; and

- b) individually or cumulatively it would not prejudice the vitality and viability of the City Centre or District Centres; and
- c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and
- d) the site is readily accessible by modes of transport other than the car; and
- e) the proposal is consistent with other Local Plan policies.”

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

“12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses ... First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge-of-centre sites, and only then by out-of-centre sites in locations that are, or can be made easily accessible by a choice of means of transport ...

13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre ...

14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town

centre which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time ...

15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out-of-centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an out-of-centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable ...”

The consideration of the application

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

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

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

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

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

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

11. The Director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and retailing

policies. There were however other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

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

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

The present proceedings

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

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

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

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

Discussion

17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 219, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it

cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:

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

18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as “a proper interpretation” of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a “proper interpretation” of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted

objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

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

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

By way of illustration, Brooke LJ referred to the earlier case of *Northavon DC v Secretary of State for the Environment* [1993] JPL 761, which concerned a policy applicable to “institutions standing in extensive grounds”. As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of *R (Heath and Hampstead Society) v Camden LBC* [2008] 2 P & CR 233, where a planning authority’s decision that a replacement dwelling was not “materially larger” than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase “materially larger” referred to the size of the new building compared with its predecessor, rather than

requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in *City of Edinburgh Council v Scottish Ministers* 2001 SC 957 the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

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

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

23. In the present case, the Lord Ordinary rejected the appellants' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in

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

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

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

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

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

28. I said earlier that it was necessary to qualify the statement that the Director and the respondents proceeded, and were correct to proceed, on the basis that “suitable” meant “suitable for the development proposed by the applicant”. As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers’ and retailers’ taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc and Redcar and Cleveland BC* [1998] JPL 23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing

development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

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

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

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

the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

Conclusion

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

LORD HOPE

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

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

35. I see no reason to question these propositions, to which Mr Kingston QC for the appellants drew our attention in his reply to Mr Armstrong’s submissions for the respondents. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the

respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128, para 23, is the interpretation of the policy which it sets out primarily a matter for the decision maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents' decision to follow the Director's recommendation and approve the proposed development is not that it was *Wednesbury* unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.

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

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

38. The context in which the word "suitable" appears supports this interpretation. It is identified by the opening words of the policy, which refer to "proposals for new or expanded out of centre retail developments" and then set out

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

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

Appeal Decision

Site visit made on 20 December 2016

by Thomas Bristow BA MSc MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 January 2017

Appeal Ref: APP/D3830/W/16/3156030

Great Wapses Farm, Hurstpierpoint Road, Henfield BN5 9BJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended against a refusal to grant planning permission.
 - The appeal is made by Mr Jonathan Bodansky against the decision of Mid Sussex District Council.
 - The application Ref DM/16/1940, dated 4 May 2016, was refused by notice dated 18 July 2016.
 - The development proposed is described in the application form as the 'erection of 1 new build dwelling; in the alternative to permission granted under DM/15/4411, 'change of use from agricultural building to 1 dwelling'.
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Decision

1. The appeal is allowed and planning permission is granted for the erection of 1 new build dwelling; in the alternative to permission granted under DM/15/4411, 'change of use from agricultural building to 1 dwelling' at Great Wapses Farm, Hurstpierpoint Road, Henfield BN5 9BJ, in accordance with the terms of the application Ref DM/16/1940, dated 4 May 2016, subject to the schedule of conditions in this decision.

Application for Costs

2. An application for costs was made by Mr Jonathan Bodansky against Mid Sussex District Council which is the subject of a separate decision.

Procedural Matter

3. There is some ambiguity on the combined Location Plan and Block Plan supporting application Ref DM/15/4411, entitled '000', as to the precise location of the appeal site. The appellant has clarified at appeal, however, that the location of the proposed dwelling as indicated on the Location Plan is an error. I have therefore disregarded the Location Plan in determining this appeal, and address this matter in greater detail subsequently.

Main Issues

4. On the basis of the information before me the main issues in this appeal are whether or not the appeal site is an appropriate location for the development
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proposed, and the effect of the proposal on the character and appearance of the area.

Reasons

Location

5. The appeal site is part of an expansive farm estate accessed via a lengthy track spurring off Hurstpierpoint Road. It falls within the rolling open countryside which I understand is subject to no specific protective landscape designations relevant to this appeal. The nearest services and facilities catering for day-to-day needs are at quite some distance, and the future occupants of the dwelling proposed are therefore highly likely to be reliant on the use of private vehicles.
6. I understand that there are presently three established dwellings within Great Wapses Farm which fall close-by to the appeal site: Grade II Listed Great Wapses Farmhouse, Stable Cottage and Barn Cottage. A fourth dwelling has recently been approved via permission Ref DM/16/0063. Therefore whilst originally a working farm, the estate is now partially residential in character.
7. Saved policy C1 of the Mid Sussex Local Plan adopted originally on 27 May 2004 (the 'Local Plan') sets out that outside of defined built-up area boundaries the countryside will be protected for its own sake. Similarly policy DP10 'Protection and enhancement of the countryside' of the emerging Mid Sussex District Plan 2031 (the 'emerging plan') recognises the intrinsic character and beauty of the countryside and restricts development therein.
8. The National Planning Policy Framework (the 'Framework') establishes that planning should recognise the intrinsic character and beauty of the countryside, and that isolated new homes in the countryside should be avoided other than in special circumstances. Therefore saved policy C1 of the Local Plan and policy DP10 of the emerging plan appear largely consistent with the approach within relevant elements of the Framework.¹
9. Saved policy T4 of the Local Plan seeks to ensure that development is located within built-up areas and to maximise the use of sustainable modes of transport, which is reiterated in policy DP19 of the emerging plan. Again these policies broadly accord with the approach in the Framework to ensuring that planning should actively manage patterns of growth to make the fullest possible use of sustainable modes of transport.
10. However the weight that can be accorded to saved policies C1 and T4 must be tempered by the acknowledged lack of a demonstrable five year land supply of deliverable housing sites as required by paragraph 49 of the National Planning Policy Framework (the 'Framework'). Furthermore, I cannot accord the approach in policies DP10 or DP19 of the emerging plan full weight given that the plan has yet to be adopted following examination.
11. Nevertheless, as described above, the appeal site is within a comparatively isolated location in the open countryside and distant from nearby services and

¹ With reference to paragraphs 215 and 216 of the Framework.

- facilities. On the face of it the proposal would therefore conflict with the approach in the policies cited above and with relevant elements of the Framework.
12. However of critical importance to this appeal is that prior approval was granted by the Council for the change of use of an agricultural building to a dwelling at Great Wapses Farm on 22 December 2015 (the '2015 permission').² I understand that the 2015 permission remains extant and there is no evidence before me to indicate that it is unlikely to come forward were this appeal to be dismissed.
 13. As set out in the application form to which this appeal relates the proposal before me is for a differently designed dwelling in place of that permitted via the 2015 permission rather than for an additional dwelling. Consequently the appeal proposal, if allowed, would result in no net addition of dwellings in this location.
 14. I accept that development proposed in respect of the relevant provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the 'GPDO') entails different planning considerations to those relevant to applications for planning permission.³ However the first reason given by the Council in refusing permission for the proposal to which this appeal relates to the acceptability of the location for the development proposed.
 15. Plan 1990S.A supporting the 2015 permission included within the appeal site an agricultural barn and an associated area of curtilage around it. Plan 1990.2.A supporting the 2015 permission illustrates that the permitted conversion of the barn would essentially retain the form thereof whilst its elevations would be variously altered to render the barn fit for habitation. The barn is a utilitarian steel-portal structure with walls and roof of corrugated sheeting. As such it is of no particular architectural merit save for being consistent aesthetically with functional agricultural buildings.
 16. As highlighted in paragraph 3 of this decision there is some ambiguity within plan 000 supporting application Ref DM/16/1940 compared with Plan 1990S.A supporting application the 2015 permission as to the location of the appeal site.
 17. The Block Plan element of plan 000 shows the dwelling proposed via this appeal located in part over the footprint of the existing barn, however the Location Plan shows the appeal site as a separate parcel of land. I am satisfied on the basis of the information before me, however that the proposal is to erect the proposed dwelling in the location indicated on the Block Plan not the Location Plan.⁴
 18. The proposal before me is for a differently designed dwelling to that permitted, with accommodation provided for in three bedrooms arranged over two storeys as opposed to two bedrooms arranged at ground floor level alone as is the

² Planning permission Ref DM/15/4411.

³ Notably with reference to Schedule 2, Part 3, paragraph W(10)(b) of the GPDO which specifies the regard that may be had to the National Planning Policy Framework (the 'Framework').

⁴ The appellant's appeal statement sets out that 'the proposed building [is] to be demolished and rebuilt to over the same footprint to a reduced volume and footprint (sic.)'. I would further note that this appears to leave the associated area of open residential land undefined, a matter I will return to subsequently in this decision.

permitted scheme. Thus the central difference between the development proposed here and that permitted in relation to suitability of location is essentially confined to the provision of one additional bedroom.

19. In my view the effect of this change in respect of the intensity of domestic use and consequently use of private vehicles is likely to be highly limited. Indeed works that affect only the interior of a building are not development, and as such there is nothing before me to indicate that a third bedroom within the permitted dwelling could not have been created without the need for express planning consent in any event. The Council furthermore accept that in respect of overall size the current proposal and permitted scheme are similar.⁵
20. For the above reasons the proposal before me would result in no significant effects in relation to the suitability of the location for residential development compared with the scheme permitted via the 2015 permission. Therefore although conflict would arise with the relevant provisions of saved policies C1 and T4 of the Local Plan and policies DP10 and DP19 of the emerging plan and with relevant elements of the Framework, the harm arising from this conflict is outweighed by the existence of the 2015 permission. I cannot therefore conclude other than that the appeal site is an appropriate location for the development proposed.

Character and appearance

21. Although the Council's officer report sets out that 'it is recognised that the proposed house has been sympathetically designed to reflect the style of the adjacent barns...' nevertheless concern is therein raised in respect of the effect of the proposal on the character and appearance of the area with regards its size, orientation and design. The Council are not of the view that the proposal would fail to preserve the setting of the Listed Farmhouse, and there is no information before me to arrive at a different assessment in this respect given the separation distance between the proposal and the Farmhouse and the mixed character of the estate.
22. The Council cite that the proposal would in respect of design conflict with policy TNP1 'Delivery of Housing' of the Twineham Neighbourhood Plan (the 'TNP'), which having been made on 24 March 2016 forms part of the statutory development plan. Policy TNP1 accords support to new housing development where it respects or enhances the character of the area, and policy TNP2 'Design' of the TNP further sets out that development should contribute positively to its setting. The Framework similarly sets out that planning should always seek to ensure high quality design, recognise the intrinsic character of the countryside and that it is appropriate to seek to promote or reinforce local distinctiveness.
23. The proposal is to demolish the existing barn and erect in its place a dwelling with a central half-hipped roof form with two-storey gabled element and single storey wing. Whilst accommodation would be arranged over two storeys, this would be within the roof pitch at first storey level which in my view would not result in a building of significantly greater bulk to that of the existing barn.

⁵ As referred to within the Council's officer report associated with application Ref DM/16/1940.

24. The overall form of the dwelling is clearly more intricate, and thus to some extent more domestic in appearance, than the permitted scheme which makes use of the existing understated barn structure. It is also differently orientated to that of the permitted scheme, broadly facing Stable Cottage as opposed to the barn permitted for conversion via permission Ref DM/16/0063.
25. However as identified above there are a number of dwellings within the immediate environs of the appeal site (either established or permitted), and as such the proposal would not appear incongruous in this context. The proposed dwelling in my view references a rural aesthetic through the materials proposed and scale and arrangement of windows and doors, which within various elevations are reminiscent of the arrangement and proportions of such found in certain agricultural buildings.
26. Moreover on account of its long private driveway, the rolling topography of the countryside, and the presence of hedgerows and patches of woodland in the landscape, the appeal site is not prominent. I observed during my site visit that there are few public vantage points from which the dwelling proposed would be readily apparent, with any such views being from a significant distance where the proposal would represent a barely perceptible element of the wider landscape.
27. Therefore whilst the proposal would to some extent lead to a domestication of the countryside this would not be demonstrably detrimental given the sensitive design of the proposal and as it would not be prominent in the landscape. Moreover the proposal would represent only a slight differential visual impact from that which has been permitted, appreciably only essentially from within Great Wapses Farm, which is already mixed in character.
28. For the above reasons I therefore conclude that the proposal would result in no unacceptable effect on the character and appearance of the area, and consequently that it would comply with the relevant provisions of policies TNP1 and TNP2 of the TNP and with relevant elements of the Framework.

Conclusion

29. For the above reasons I conclude that no substantive conflict arises with the development plan taken as a whole or with the approach in the Framework. Having taken account of the extant permission and all other material considerations, I therefore conclude that the appeal should be allowed.

Conditions

30. I have imposed conditions requiring compliance with the relevant elements of the associated plans for the avoidance of doubt and in the interests of proper planning, and that an agreed schedule of external materials is used to ensure that the proposal safeguards the character and appearance of the area. It is sufficient that this latter condition applies only to activities other than demolition, groundworks and site preparation as these do not bear upon external facing materials.

31. I agree with the Council that in order to ensure adequate provision for the parking of vehicles and bicycles associated with the dwelling proposed it is necessary to impose conditions requiring that such provision is made before the dwelling hereby permitted is first occupied and retained as such thereafter.
32. As a consequence of the error within plan 000 supporting the application as referred to in paragraphs 3 and 17 of this decision, there is a lack of clarity as to what land would be used in conjunction with the dwelling proposed. However the development proposed is clearly stated within the application form to be a replacement to that permitted via planning permission Ref DM/15/4411, and no different area of residential land is proposed within the information before me related to this appeal.
33. In this context I have therefore imposed a condition setting out for clarity that the residential land permitted via this appeal is the same in extent and location as the footprint of the dwelling proposed here and the residential land permitted via planning permission Ref DM/15/4411. I would note in the case of the latter that such land would have been capable of being used for residential purposes irrespective of the outcome of this appeal as part of the permitted scheme. Furthermore in the absence of this condition the dwelling hereby permitted would benefit from no outside space, which is clearly not the intention with reference to the description of development within the application form.
34. In imposing conditions I have had regard to the tests within the Framework, the Planning Practice Guidance, and relevant statute,⁶ and have accordingly amended the wording of certain conditions proposed by the Council without altering their aim.

Thomas Bristow

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: 001, 002 and 000 excluding the Location Plan within plan 000.
- 3) No works other than demolition, site preparation and groundworks related to the development hereby permitted shall take place until a schedule of materials and finishes to be used for external walls, roofs and fenestration of the dwelling hereby permitted have been approved in writing by the local planning authority. Development shall be carried out in accordance with the schedule thus agreed.

⁶ Including paragraph 206 of the Framework, Guidance Reference ID: 21a-004-20140306 and Article 35(1)(a) of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

- 4) The dwelling hereby permitted shall not be occupied until the associated car parking spaces and secure bicycle parking spaces shown on the approved plans or as previously agreed in writing by the local planning authority have been provided. Once provided these spaces shall thereafter be retained at all times for such purposes.
- 5) No land other than the footprint of the dwelling hereby permitted as illustrated on the approved plans and that land annotated as 'proposed curtilage' on plan 1990S.A associated with planning permission Ref DM/15/4411 shall be used for domestic purposes associated with the dwelling hereby permitted.

Mr Jonathan Bodansky
Mr Phil Rowe
Melton Lodge
Rusper Road
Newdigate
Dorking
Surrey
RH5 5BX

TOWN AND COUNTRY PLANNING ACT 1990
TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE)
(ENGLAND) ORDER 2015

REFUSAL

REFERENCE: DM/16/1940

DESCRIPTION: ERECTION OF 1 NEW BUILD TWO STOREY DETACHED DWELLING.

LOCATION: GREAT WAPSES FARM, HURSTPIERPOINT ROAD, HENFIELD, WEST SUSSEX

DECISION DATE: 18 JUL 2016

The Council hereby notify you that they **REFUSE** to permit the above development as shown in the submitted application and plans.

The reasons for the Council's decision are:-

1. The proposed development is located within the countryside area of development restraint remote from the nearest settlement. As such the proposal to develop a new house on this site will be an unsustainable form of development that harms the character and appearance of the surrounding rural area and the would be out of keeping with the rural character of the area. In addition, the proposal is in an isolated and unsustainable location, where occupants would be reliant on the use of a private car to gain access to local services. The development therefore conflicts with Policies C1 and T4 of the Mid Sussex Local Plan and Policies DP10 and DP19 of the Pre-Submission District Plan, Policy TNP1 of the Twineham Neighbourhood Plan and paragraphs 7, 14, 17 and 55 of the NPPF.

Plans Referred to in Consideration of this Application

The following plans and documents were considered when making the above decision:

Plan Type	Reference	Version	Submitted Date
Location and Block Plan	000		10.05.2016
Existing Floor and Elevations Plan	1990.1.A		04.05.2016
Proposed Floor and Elevations Plan	1990.2.B		04.05.2016
Proposed Elevations	001		04.05.2016
Proposed Floor Plans	002		04.05.2016

N. Rogers

Development Manager

REFULZ

APPEALS TO THE SECRETARY OF STATE

Notes for Applicants

If you are aggrieved by the decision of your Local Planning Authority to refuse permission for the proposed development or to grant it subject to conditions, then you can appeal to the Secretary of State for the Environment under Section 78 of the Town and Country Planning Act 1990.

If you want to appeal against your local planning authority's decision then you must do so within 6 months of the date of this notice;

However, if

- (i) this is a decision on a planning application relating to the same or substantially the same land and development as is already the subject of an enforcement notice, and you want to appeal against your local planning authority's decision on your application, then you must do so within 28 days of the date of this notice; or
- (ii) an enforcement notice is subsequently served relating to the same or substantially the same land and development as in your application and if you want to appeal against your local planning authority's decision on your application, then you must do so within:
 - 28 days of the date of service of the enforcement notice, or
 - within 12 weeks in the case of a householder appeal of the date of this notice, whichever period expires earlier.

Appeals must be made using a form which you can get from the Secretary of State at Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6PN (Tel: 0303 444 5000) or online at www.planningportal.gov.uk/pcs.

The Secretary of State can allow a longer period for giving notice of an appeal but will not normally be prepared to use this power unless there are special circumstances which excuse the delay in giving notice of appeal.

The Secretary of State need not consider an appeal if it seems to the Secretary of State that the local planning authority could not have granted planning permission for the proposed development or could not have granted it without the conditions they imposed, having regard to the statutory requirements, to the provisions of any development order and to any directions given under a development order.

DELEGATED APPLICATIONS

ASSESSMENT SHEET

APPLICATION NO./ADDRESS:

NC/16/0018
Great Wasps Farm, Hurstpierpoint Road, Henfield, West Sussex, ,

DESCRIPTION:

Erection of 1 new build two storey detached dwelling

DETAILED DESCRIPTION:

The application seeks full planning permission for the demolition of an existing agricultural building, subject to consent for conversion, with a two storey dwelling rebuilt over a similar footprint. The proposal would form an 'L' shaped dwelling comprising a two storey element, and a single storey front projection. The dwelling would extend to a total depth of 18m and a width of 14m, and would be built of a barn style vernacular, incorporating cat-slide hipped roof features.

SITE AND SURROUNDINGS:

Great Wasps Farm lies to the north of Henfield Road, outside of any designated built-up area and as such is within a countryside location. The site is accessed via a private track which is utilised by a number of farms and individual dwellings, with the wider rural surrounding characterised by open countryside.

RELEVANT PLANNING HISTORY:

No relevant planning history

RELEVANT PLANNING POLICIES

The following Policies are considered to be relevant to the assessment of this application:

National Planning Policy Framework:

- NPPF6 - Delivering a wide choice of high quality homes
- NPPF7 - Requiring good design
- NPPF11 - Conserving and enhancing the natural environment
- NPPF14 - Presumption in favour of sustainable development

Horsham District Planning Framework (HDPF 2015)

- HDPF1 - Strategic Policy: Sustainable Development
- HDPF2 - Strategic Policy: Strategic Development
- HDPF3 - Strategic Policy: Development Hierarchy
- HDPF15 - Strategic Policy: Housing Provision
- HDPF25 - Strategic Policy: The Natural Environment and Landscape Character
- HDPF26 - Strategic Policy: Countryside Protection
- HDPF32 - Strategic Policy: The Quality of New Development
- HDPF33 - Development Principles

REPRESENTATIONS AND CONSULTATION RESPONSES:

Consultations:

N/A

Representations:

There were no letters of representation.

PUBLICITY:

Advertisement

The nature of the proposal did not require the application be the subject of press advertisement.

Site Notice

The nature of the proposal did not require a site notice to be posted.

MEMBER COMMENTS:

No comments received

HUMAN RIGHTS:

Article 8 (right to respect of a private and family life) and Article 1 of The First Protocol (protection of property) of the Human Rights Act 1998 are relevant to the application. Consideration of human rights is an integral part of the planning assessment set out below.

PLANNING ASSESSMENT:

The application site lies to the north of Hurstpierpoint Road, outside of any designated built up area. As such, the proposal is considered to be within a countryside location. Whilst noted that there are individual dwellings positioned within the vicinity, and in particular along the access track, the site lies within a rural, countryside location.

As stated within paragraph 55 of the National Planning Policy Framework,

"to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities...Local Planning Authorities should avoid isolated homes in the countryside unless there are special circumstances such as:

- the essential need for a rural worker to live permanently at or near their place of work in the countryside; or*
- where such development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets; or*
- where the development would re-use redundant or disused buildings and lead to an enhancement to the immediate setting; or*
- the exceptional quality or innovative nature of the design of the dwelling."*

The proposed location of the dwelling is positioned at a distance from any built up area, and is surrounded by rural countryside. Whilst the proposal would be set within proximity to other individual dwellings, there is concern regarding the sustainability of the proposed development.

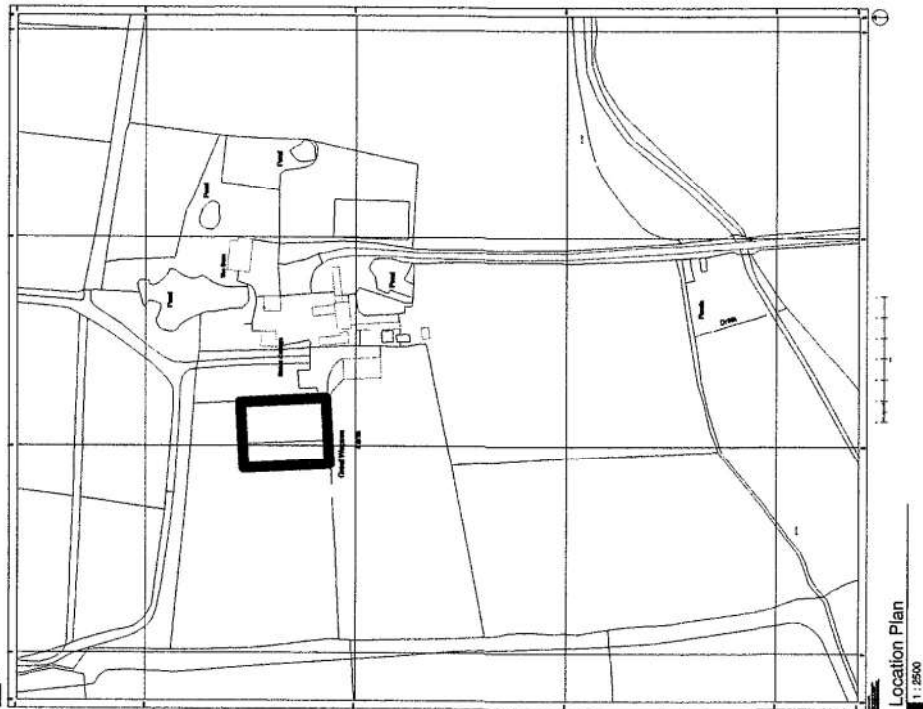
Whilst noted that there is an extant permission for conversion of the existing agricultural barn to residential, the demolition of the building and replacement with a new dwelling would not re-use redundant or disused buildings, or meet any of the other special circumstances as detailed within paragraph 55 of the National Planning Policy Framework. As such, an objection would be raised in principle to the proposal as it is not considered to be a form of sustainable development within the countryside. However, the sustainability issues raised would need to be weighed against the existing use of the adjacent buildings and other relevant planning policies adopted by the Local Planning Authority.

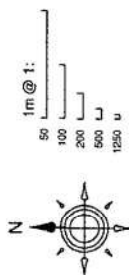
It is not considered that the proposal would result in any adverse impact upon the Horsham District, however an objection is raised in principle as the proposal is not considered to accord with national planning policy.

DELEGATED

Case Officer sign/initial _____ Date: _____

Authorising Officer sign/initial _____ Date: _____





MANORWOOD
building on tradition

Client

Jonathan Bodansky

Job _____

Great Wapses Farm
Off Henfield Road
Henfield
Sussex

Drawing

Location and Block Plan

Drawn By _____ Date _____ Scale @A3

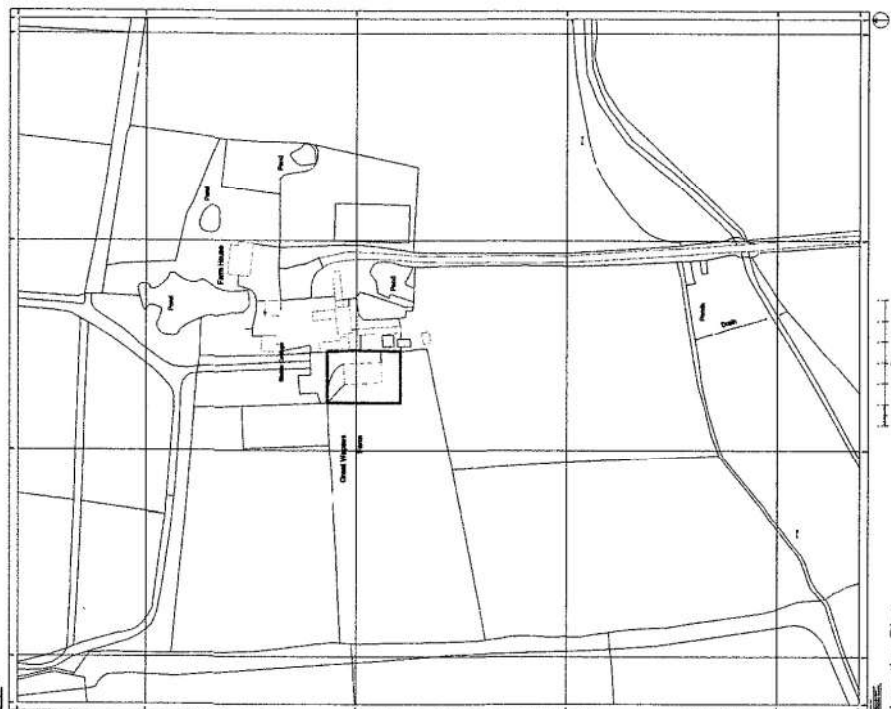
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indicated

Job No.	Drawing No.	Revision
10001	000	

Status

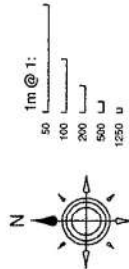
For Comment



Location Plan

1 : 2500

NOTE: 1. All dimensions are in millimetres unless otherwise stated.
2. The architect is not responsible for the construction of the building.
3. The architect is not responsible for the construction of the building.
4. The architect is not responsible for the construction of the building.



Revisions



Client

Jonathan Bodansky

Job

Great Waples Farm
Off Henfield Road
Henfield
Sussex

Drawing

Elevations

Drawn By

MD

Date

18.04.16

Scale @A3

1 : 100

Job No.

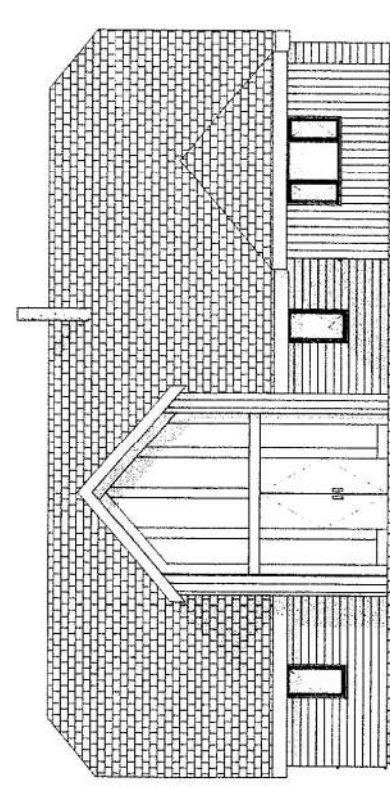
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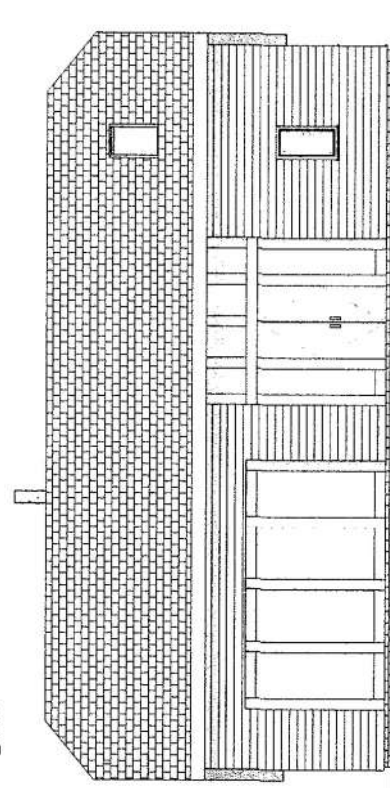
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Status

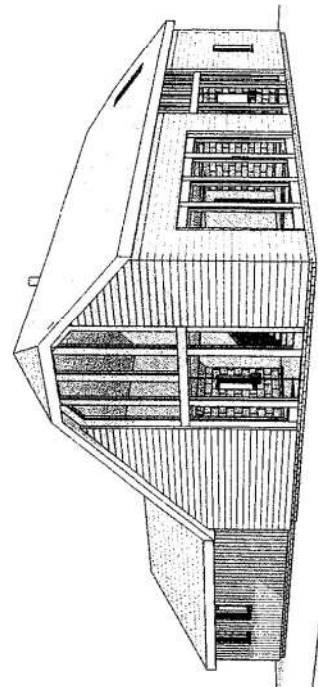
For Comment



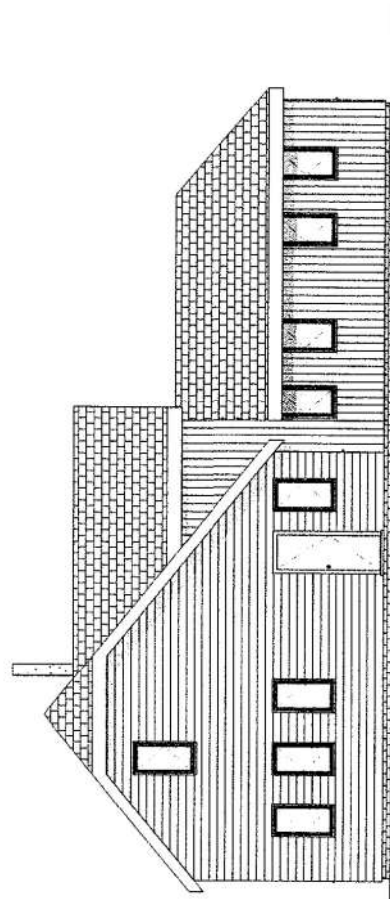
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1 : 100



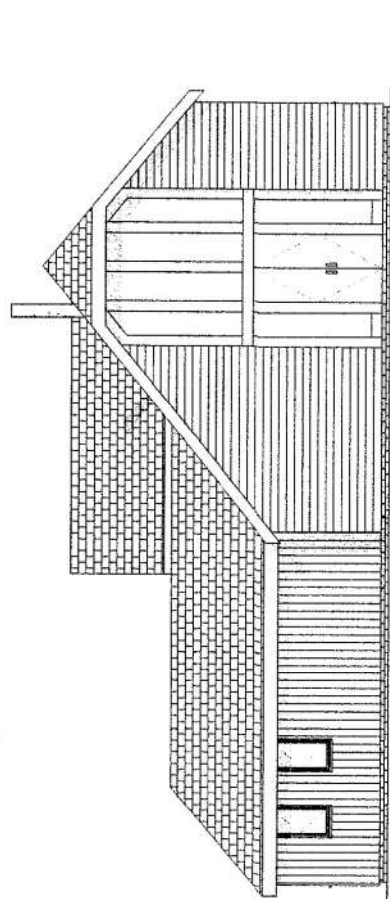
South
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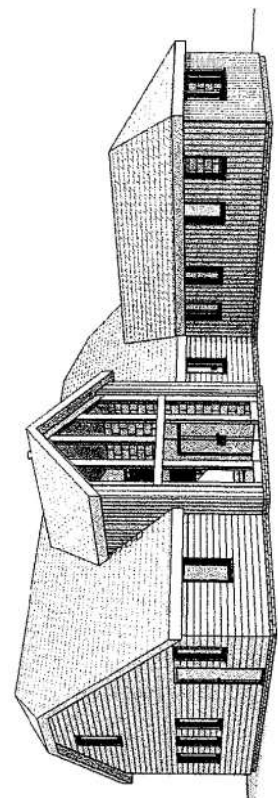
West
1 : 100



East
1 : 100

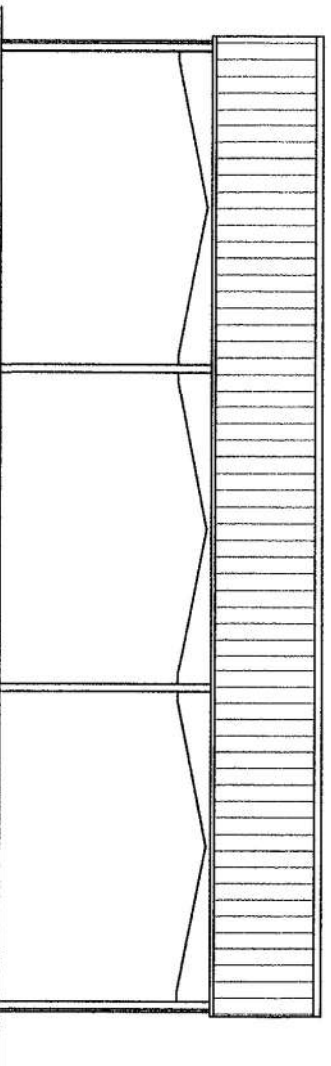
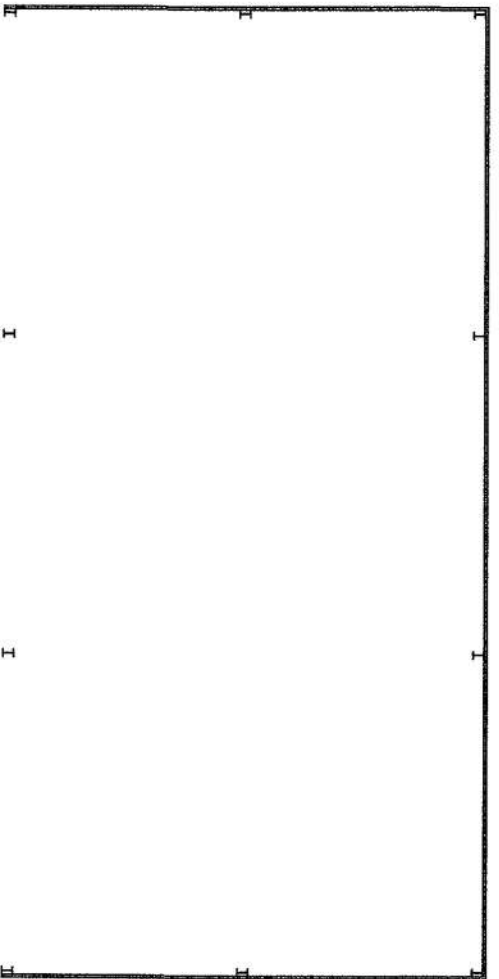


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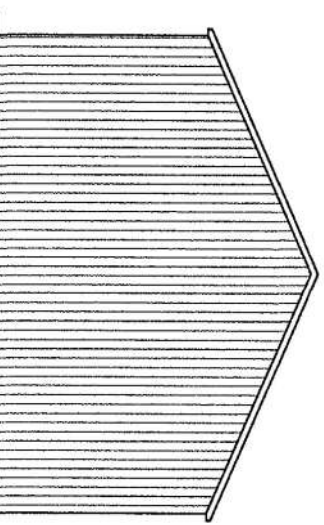


Side
1 : 100

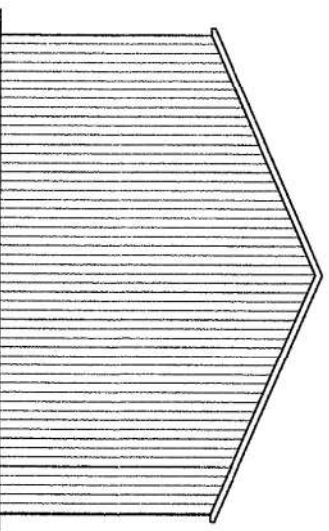
EXISTING



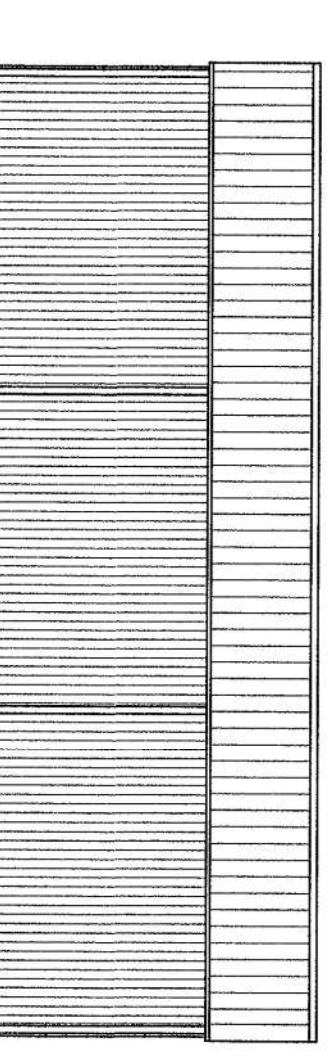
east elevation



north elevation



south elevation



west elevation

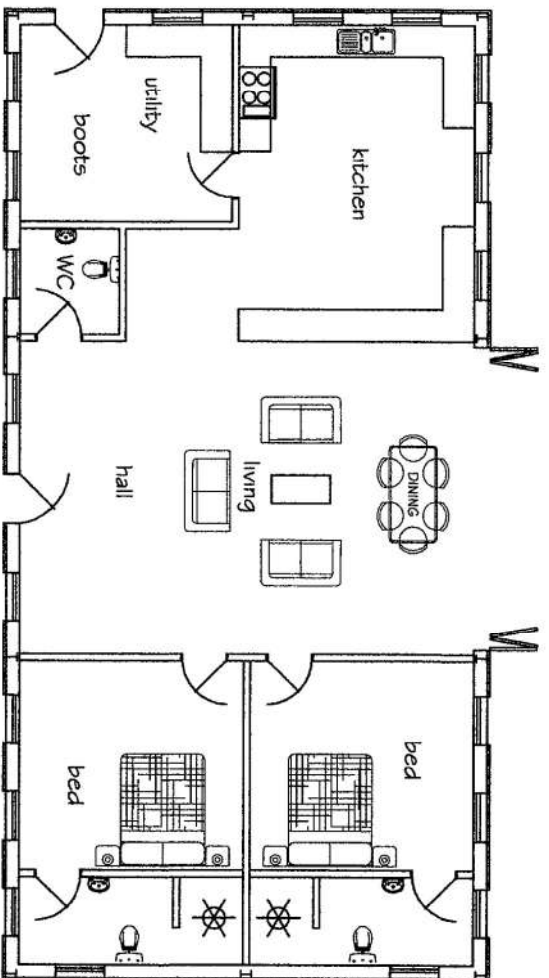
Great Wapses Farm

Scale
1:100 @ A3

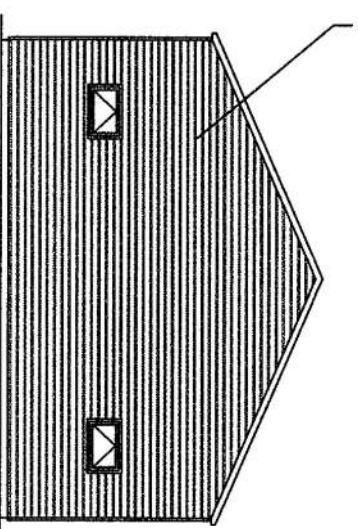
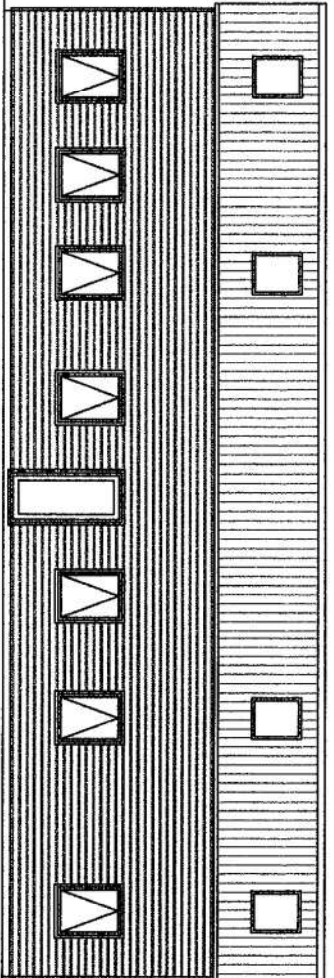
Date
Oct 2015

Dwg number
1990.1A

PROPOSED



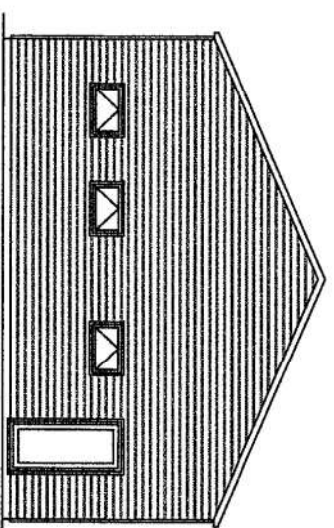
open larch cladding



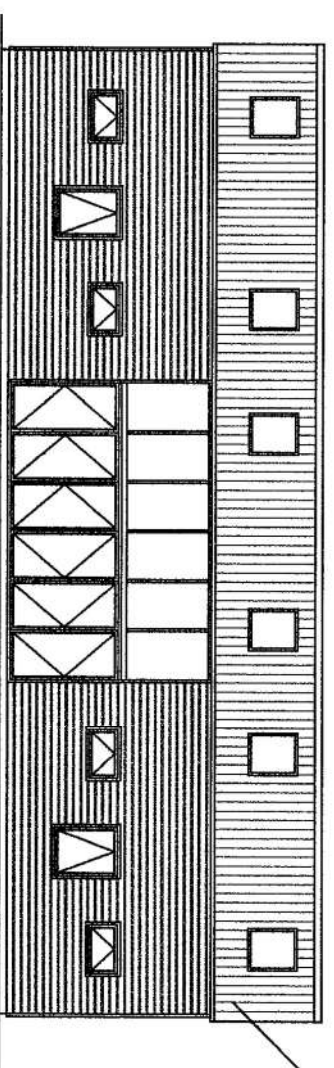
east elevation

north elevation

seamed zinc roof



south elevation



west elevation

Great Wapses Farm

Scale 1:100 @ A3
Date Oct 2015
Dwg number 1890.2B



Appeal Decision

Site visit made on 19 May 2025

by **J E Jolly BA (Hons) MA MSc MCIH MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 28th May 2025

Appeal Ref: APP/D3830/W/24/3351833

Muddleswood Barn, Brighton Road, Newtimber, Hassocks, BN6 9BP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Mr A Clay against the decision of Mid Sussex District Council.
 - The application Ref is DM/24/0428.
 - The development proposed is for the demolition of an agricultural building and the erection of a dwelling to include relocation of a log store building and a container unit.
-

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The National Planning Policy Framework (the Framework) was revised in December 2024. The parties have had the opportunity to comment on the new document. Consequently, in reaching my decision I have therefore had regard to the new Framework, and any reference to Paragraph numbers are to this version.
3. The Council has updated its District Plan. However, unresolved objections remain that need to be resolved before it can be adopted. Therefore, at this stage only minimal weight can be given to the new plan. As such, the Council has relied upon the extant Mid Sussex District Plan, 2018 (MSDP) on its decision notice. I have dealt with the appeal on the same basis.

Background and Main Issues

4. The appellant submitted information to the Council as part of its Statement of Case relevant to the proposed scheme's use of water, materials and energy efficiency measures. As a result, subject to conditions, the Council no longer wish to contest its third reason for refusal given on its decision notice.
5. Therefore, the main issues in this appeal are:
 - whether the proposal would be in a suitable location; and,
 - the effect of the proposal on the character and appearance of the area.

Reasons

Suitable location

6. The appeal site is set back from the B2118 highway near to the junction with Brighton Road which provides transport connections, including a bus route, to the day-to-day services of nearby hamlets and village type settlements as well as the town of Burgess Hill.
7. The proposed development would be located in the countryside beyond any recognised settlement boundary. I acknowledge a previous appeal decision¹ which concluded that the site was an unsuitable location for housing; primarily because day to day services would be accessed by reliance on a private motor vehicle.
8. However, while a scheme is yet to be completed, the appellant has brought to my attention that since that time two housing type schemes², including a prior approval development, have been found to be acceptable on the site.
9. Therefore, as access to local services would be less than ideal on foot or by public transport and the permitted schemes include parking, it can only be concluded that it was agreeable to the Council for those services to be accessed by future occupiers from time to time by using a private motor vehicle. It is also likely that this is the preferred method of transport to access local services chosen by most of the existing occupiers living in the nearby properties on Brighton Road.
10. Consequently, and bearing in mind Paragraph 115 of the Framework says that developments should be of safe and suitable access for all users; for example those with mobility needs, and it is unclear why the Council sought to apply planning policy in a different way to other housing schemes, I see no reason why the proposed scheme for the two-bedroom dwelling before me should be subject to different arrangements, particularly as the number of journeys generated by one new dwelling would be relatively modest.
11. It follows then, in respect of a suitable location, that the proposal meets the aims of Policies DP6, DP12, DP15 and DP21 of the MSDP which say, amongst other things, that development should provide opportunities for people to live and work within their communities.

Character and appearance

12. The proposal is to partially demolish the open-fronted barn and to construct a residential dwelling with a garage and a cycle store. An existing store building and a storage container would be relocated near to an existing hardstanding to the rear of the appeal site.
13. I acknowledge the appellant's reference to a 'fallback position' which relates to the aforementioned prior approval scheme to convert an open fronted barn on the appeal site to a dwelling. The appellant has also cited several other schemes elsewhere in support of his case³. However, given the size constraints of Class Q as it applies to the prior approval scheme, I cannot be certain if it represents a 'real prospect'⁴ for construction.

¹ APP/D3830/W/21/3272298

² DM/23/2149 and DM/24/2457

³ APP/W1525/W/21/3278018, APP/K0235/W/17/3189914 and APP/E2530/W/17/3175132

⁴ Gambone v SSCLG

14. Indeed, whether there is a 'greater than theoretical possibility' to construct the previously approved scheme/s on the site or not, and while mindful that the fallback position allows for repositioning of a building if it provides a clear enhancement, the fact remains that the proposal before me would be notably larger in scale and mass than those schemes and would span across most of the width of the central section of the site. As such, the proposal would be in close proximity to the neighbouring dwelling of Muddleswood Barn, which is sited to one side of a part made access track that looks towards the open fronted barn. Accordingly, the width and depth of the proposed development would result in a cramped and bulky 'T' shaped addition to the site in comparison to the permitted scheme/s, which if completed would be set further apart from Muddleswood Barn.
15. Moreover, the permitted scheme/s would reflect the former use of the open barn as a modest stable type building. Whereas the development would extend further into the countryside than the permitted scheme/s and the existing built form nearby. Hence, the proposal would be an incongruous addition in a setting defined by rural type structures and low-level hardstanding's and access ways, which help to create a feeling of spaciousness between the surrounding built form and the countryside beyond.
16. Nonetheless, the appellant contends that the proposal would be a visual improvement over the Class Q scheme, offer better lay out, parking and turning arrangements that would benefit the existing business on site. Further, that it would not result in any additional harm to the site.
17. However, I find to the contrary. The proposed use of non-traditional materials, including a slate low pitch roofed dwelling with vertical boarded elevations and fenced boundary treatments, would introduce a distinctively modern and urban form of development on the site. This would be out of keeping with the rural character of the area and be in stark contrast to the simple terraced dwellings known as Nos 1-3 Muddleswood Cottages and the traditional type-appearance of Muddleswood Farm, which is set on a more generous plot. Landscaping would not be adequate mitigation.
18. Therefore, I attribute limited weight to the claimed 'fallback' position in this case, which does not outweigh the harm to the character and appearance of the area.
19. Overall, in respect of the character and appearance of the area, I conclude that the development would be contrary to Policy DP26 of the MSDP, as supported by the Mid Sussex Design Guide SPD, which says, amongst other things, that developments are required to create a sense of place while addressing the character and scale of the surrounding buildings and landscape.

Planning Balance

20. Paragraph 11(d) of the Framework indicates that the presumption in favour of sustainable development is engaged where the policies which are most important for determining the application are deemed out-of-date. This includes situations where the Council cannot demonstrate a five-year supply of deliverable housing sites. The Council concedes that it cannot demonstrate a five-year Housing Land Supply (HLS) to meet the requirements of the revised Framework. Therefore, Paragraph 11 (d) is engaged. In such cases, Paragraph 11(d) states that permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

21. Economic benefits would include employment opportunities connected to the construction of the new dwelling and improvements to the facilities and infrastructure related to the log business on site. There would also be patronage of local services by the new occupiers. I afford these benefits moderate weight, even though the construction employment opportunities are likely to be short-term.
22. The provision of an electric car charging point and other sustainability, and energy efficiency measures incorporated into the development, such as solar panels and an air source pump, if secured by condition, would provide a modest environmental benefit. Any measures that simply mitigate the environmental impacts of the development such as use of water, materials and landscaping would be neutral in the planning balance as they are a standard requirement under Council policies including Policy DP39 of the MSDP.
23. Subsequently, even when considered in combination, the adverse impacts of the proposal would thus significantly and demonstrably outweigh the limited benefits. Accordingly, Paragraph 11(d)(ii) of the Framework indicates that the presumption in favour of sustainable development does not apply in this instance.

Conclusion

24. Whilst I have found in favour of the appellant on the first main issue, the proposed development would conflict with the adopted development plan in respect of the second main issue, and having considered all matters raised in support of the proposal, I find that the other considerations in this case do not clearly outweigh the substantial and demonstrable harm to the character and appearance of the area that I have identified above. Therefore, I conclude that the appeal should be dismissed.

J E Jolly

INSPECTOR

Appeal Decision

Site visit made on 5 August 2025

by **L Clark BA(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 10 November 2025

Appeal Ref: APP/X1355/W/25/3365870

Hill's End, Low Friarside Lane, Burnopfield, Durham NE16 6BR

Eastings: 415854 Northing: 557320

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Mr Darren Hilling against the decision of Durham County Council.
 - The application Ref is DM/23/03859/FPA.
 - The development proposed is replacement of an existing barn with a family home.
-

Decision

1. The appeal is allowed and planning permission is granted for a replacement of an existing barn with a family home at Hill's End, Low Friarside Lane, Burnopfield, Durham NE16 6BR in accordance with the terms of the application, Ref DM/23/03859/FPA, subject to the conditions in the attached schedule.

Preliminary Matters

2. The Council refused the application for three reasons as set out in the decision notice. The third of these reasons related to the failure to make necessary financial contributions towards the provision of Open Space in County Durham (open space). The appellant submitted a signed Unilateral Undertaking (UU) alongside their appeal, agreeing to pay £1,739.10 to the Council towards open space. The Council have confirmed that this addresses its third reason for refusal. I have therefore proceeded on that basis.
3. The proposal is for the replacement of an existing barn with a family home. The Council has indicated that it has no objections to the proposed demolition of the barn and, based on the evidence and observations on site, I have no reason to take a different view. The dispute between the parties, therefore, relates to the proposed new dwelling, and this shall be the focus of my assessment.
4. The grid reference in the banner heading is taken from the application form. This locates the site as shown on the submitted drawings and has been added for completeness.

Main Issues

5. The main issues are:
 - whether or not the site is in a suitable location for housing, having regard to the spatial strategy set out in the development plan, and accessibility to services and facilities, and;
 - if any harm is identified, whether that harm would be outweighed by the presence of a fallback position for alternative proposed developments.

Reasons

Whether a suitable location for housing

6. The appeal site is accessed from Front Street via Low Friarside Lane (the Lane). The Lane is predominantly single track, the majority of which has no dedicated footpath or street lighting, with limited passing places. Ground levels at the section of the Lane where it joins Front Street are significantly steep, which plateaus and then steepens towards the appeal site.
7. The appeal site is close to a number of existing dwellings and is therefore not physically or geographically isolated. It does, however, lie outside of a defined settlement boundary and in the countryside. These matters are not disputed by the appellant.
8. Policy 10 of the County Durham Plan 2020 (the CDP) states, amongst other things, that development in the countryside would not be permitted unless allowed by specific policies in the plan, or where the proposal meets one of the exceptions set out within the policy. Given that the proposal seeks the demolition of the existing barn to facilitate the rebuild, the proposed development falls outside the scope of those exceptions listed.
9. CDP Policy 10 further states that new development in the countryside must accord with all other relevant development plan policies and, by virtue of their siting, scale, design and operation, must meet criterion I - t.
10. The decision notice has not specified which criteria of CDP Policy 10 it relies upon; however, it is clear from its officer report that it relies upon criterion p, which states, amongst other matters, that development in the countryside must not be solely reliant upon unsustainable modes of transport. It also states that new development in countryside locations that are not well served by public transport must exploit any opportunities to make a location more sustainable, including improving the scope for access on foot, by cycle or by public transport.
11. CDP Policy 21 relates to delivering sustainable transport and requires that all development deliver safe, sustainable modes of transport by, amongst others matters, providing appropriate, well-designed, permeable and direct routes for walking and cycling, so that new developments clearly link to existing services and facilities together with existing routes for the convenience of all users.
12. The appellant does not dispute that the site, would not ordinarily be considered a sustainable location for residential development, with it being approximately 1km from the nearest bus stop, retail outlet and community facilities (community centre, medical centre and pharmacy), and slightly further from additional services, but contends that it would not be unreasonable for future occupiers to walk or cycle to these services.
13. I note that the Council contends that it has no concerns with regard to highway safety and that additional measures to improve the sustainability of the site, such as cycle parking and EV charging points, would help offset the locational issues. However, given its location, together with the length, topography and unlit nature of the Lane, it would, in my mind unlikely be utilised by pedestrians or cyclists during the hours of darkness or in inclement weather.

14. For the reasons given above, the site would not be an appropriate location for the proposed development, having regard to the settlement strategy and access to facilities and services. It would therefore not accord with CDP Policies 10 and 21, which collectively seek to deliver sustainable development.

Fallback position

15. My attention has been drawn to two prior approval¹ applications for the appeal site under the provisions of Class Q of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). These have approved permission for a change of use of an agricultural building into a Class C3 residential dwelling (Class Q).
16. The appellant has drawn my attention to the decision of the court² with particular regard to a fallback position. For significant weight to be afforded to a fallback position, there not only needs to be a real possibility of it being carried out, but it would also need to be equally or more harmful than the appeal scheme.
17. The appeal site has two extant prior approval schemes to create a residential dwelling in the countryside and, without any evidence to the contrary, I have no reason to doubt that there is more than a theoretical prospect of either scheme coming forward if I were to dismiss the appeal. I must therefore assess whether either of the fallbacks would be equally or more harmful than the appeal scheme.
18. There is no dispute that the proposal seeks the demolition of the existing agricultural building to facilitate the proposed dwelling. I am therefore satisfied that the proposal would not result in the creation of any additional dwellings above and beyond the one created by the Class Q approval.
19. With regard to the main issue, the Class Q permissions would result in one dwelling within the countryside. This is the same number of dwellings as the appeal before me. The appellant's fallback position would therefore likely result in future occupiers being reliant upon private car travel to access services and facilities. Given this, the fallback position would have similar effects as the proposed dwelling and therefore attach significant weight to this in my assessment.

Planning Obligation

20. The appellant has submitted a signed UU which would make a financial contribution of £1,739.10 towards the provision of open space in County Durham, which would be paid prior to commencement of development. Whilst the Council has advised that they are satisfied that the UU secures the required open space contribution, it is necessary for me to consider this obligation against the tests in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (CILS Regs).
21. The Council's Supplementary Planning Document - Development Viability, Affordable Housing, and Financial Contributions 2024 requires a financial contribution towards green infrastructure (including open space and sports & recreation). CDP Policy 26 requires proposals for new residential development to make provision for open space to meet the needs of future residents, having regard to the standards of open space provision set out in the Open Space Needs Assessment.

¹ DM/23/03846/PN56 and DM/25/00563/PN56

² Mansell v Tonbridge and Malling BC [2017] EWCA Civ. 1314

22. I am satisfied that the UU would achieve the desired objective of securing a financial contribution towards open space. I am also satisfied that the undertaking would meet the tests set out in the CIL Regs and paragraph 58 of the Framework, which state that a planning obligation must be necessary to make the development acceptable in planning terms, directly related to and fairly and reasonably related in scale and kind to the development.

Other Matters

23. I acknowledge that the overall height of the proposed dwelling would be slightly higher than the existing structure of the barn, and the footprint would be significantly larger than either of the dwellings permitted under the Class Q prior approvals. However, whilst the proposed dwelling would be materially larger than the fallback, the resultant number of dwellings would remain the same. Whether or not the appeal proposal shows 5 bedrooms rather than the 4 stated in the appellant's statement, or that the larger dwelling can accommodate additional visitors, has little weight in my assessment. I have considered this appeal proposal on its own merits and concluded that it would not cause harm for the reasons set out above.
24. The Council has drawn my attention to CDP Policy 10 criterion h.2, with regard to the immediate setting of the appeal site. This criterion relates to the development of existing buildings. As the proposed development seeks demolition and rebuild, this criterion is not applicable to the main issue.

Planning Balance

25. Section 38(6) of the Planning and Compulsory Purchase Act 2004, requires that all applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. As detailed above, the proposal is contrary to CDP Policies 10 and 21, and thus this appeal turns on whether there are material considerations which outweigh this conflict.
26. I have found there to be more than a theoretical prospect of the appellant's Class Q prior approval taking place, and the extant Class Q permissions would result in the same number of dwellings in the countryside as the appeal proposal. I have therefore attached significant weight to the prospect of the fallback position in favour of the proposal.
27. Whilst I have found conflict with CDP Policies 10 and 21 for the reasons detailed above, I conclude that in this instance there are material considerations in favour of the proposal that outweigh this conflict and indicates that I make a decision which is not in accordance with the development plan. I therefore conclude that the proposed development is suitable for the site.

Conditions

28. The Council has suggested several conditions, some of which I have amended for the sake of clarity and precision. I have also had regard to the Framework and the PPG.
29. In addition to the standard implementation condition (1), it is necessary to define the plans for certainty (2). In the interests of the character and appearance of the area, conditions are necessary to ensure appropriate external materials (3), boundary treatments (5), a landscaping scheme and hard surfaces for the site (6 and 7).

30. To ensure the development is carried out in accordance with the appropriate best practice guidance to protect the amenity value of trees, a condition is necessary to ensure the implementation of the Tree Protection Plan (4).
31. Conditions relating to land contamination and remediation, construction and demolition hours are required to protect the living conditions of occupiers of the nearest residential properties (8, 9, 13 and 14). A condition requiring approval of a foul and surface water drainage scheme is also necessary to ensure suitable drainage and pollution prevention (12).
32. To mitigate risks associated with previous coal mining activity, conditions are necessary to require a scheme of intrusive investigations to be carried out, that any remediation works, or mitigation have been implemented; and a statement confirming that the site is safe and stable for the development (15 and 16). I have added the recorded on-site mine entries as stated on the Coal Authority consultee comments dated 18 June 2024 for precision, as these were omitted from the Council's suggested condition.
33. Conditions relating to details and the subsequent approval of cycle parking (11) and electric charging points (10) are required to encourage modes of sustainable transport and combat climate change.
34. With regard to biodiversity net gain, given that the planning application was received by the Council prior to the set trigger date, I do not consider it necessary to impose those conditions suggested by the Council. However, given that the submitted Bat Survey & Ecological Assessment prepared by E3 Ecology (Rev R02) outlined the potential impact upon species of wildlife, I do consider it necessary to impose a condition requiring details to be submitted of a precautionary method statement with particular regard to hedgehog and amphibians, together with details of their hibernacula and that bat and bird boxes are provided (17 and 18).

Conclusion

35. For the reasons given above, I conclude that the appeal should be allowed.

L Clark

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
- 2) The development hereby permitted shall be carried out in material accordance with the following approved drawings:

XX-XX-SI-0001 Rev P02 Location Plan

XX-XX-SI-0010 Rev P06 Pr_Site_Plan

XX-XX-GA-1000 Rev P05 Pr_GF-and_01_Plans

XX-XX-EL-3000 Rev P05 – Pr_Elevations
- 3) Notwithstanding Condition 2, prior to the construction of any external surfaces of the development hereby permitted, details of the materials to be used in the construction of all new external surfaces, shall have been submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved details.
- 4) No site clearance, preparatory work including any site cabins, materials or machinery brought on site, or development shall take place until the tree and hedge protection fencing, and any other protection measures, contained within the submitted 'Tree Protection Plan, prepared by Woodsman Arboricultural Consultancy, dated 02.10.2023' have been erected on site in accordance with these approved details. Fencing shall be placed as indicated on the approved plan and comprise a vertical and horizontal framework of scaffolding, well braced to resist impacts, and supporting temporary welded mesh fencing panels or similar in accordance with British Standard BS 5837 2012 Trees in Relation to Design, Demolition and Construction - Recommendations (or in an equivalent British Standard if replaced). The scheme for the protection of the retained trees shall be carried out as approved and retained for the duration of the construction works.
- 5) Prior to the first occupation of the development hereby permitted, details of the position, height, design, materials and colour finish of boundary treatment to be erected shall be submitted to and approved by the local planning authority. The boundary treatment shall be completed in accordance with the approved details before the building is first occupied and retained thereafter.
- 6) Notwithstanding the submitted information, prior to the first occupation of the development hereby approved, details of soft landscape works shall be submitted to and approved in writing by the local planning authority. These details shall include: details soft landscaping including planting species, sizes, layout, densities, numbers; details of planting procedures and/or specification; finished topsoil levels and depths; details of temporary topsoil and subsoil storage provision. The landscaping works shall be carried out in accordance with the approved details in the first planting season following the first occupation of the buildings or the practical completion of the development, whichever is the sooner. Any approved replacement tree or hedge planting shall be carried out within 12 months of the felling or removal of any existing tree or hedge. All landscape planting shall be maintained for a minimum of five years. Any trees or plants which are removed, die, fail to become established, or become seriously damaged or diseased within a

period of five years from the completion of the development shall be replaced in the next planting season with others of a similar size and species to those originally planted. Replacement planting will be subject to the same conditions.

- 7) Notwithstanding the submitted information, prior to the first occupation of the development hereby approved, details of hard landscaping shall be submitted to and approved in writing by the local planning authority. The hard surfaces shall be constructed in accordance with the approved details prior to the development being first occupied and retained thereafter.
- 8) No development shall take place until a land contamination scheme has been submitted to and approved in writing by the Local Planning Authority. The submitted scheme shall be compliant with the YALPAG guidance and include a Phase 2 site investigation, which shall include a sampling and analysis plan. If the Phase 2 identifies any unacceptable risks, a Phase 3 remediation strategy shall be produced, and where necessary, include gas protection measures and method of verification.
- 9) Remediation works shall be carried out in accordance with the approved remediation strategy. The development shall not be brought into use until such time as a Phase 4 verification report related to that part of the development has been submitted to and approved in writing by the Local Planning Authority.
- 10) No development above ground level shall take place until a scheme (including a timetable for implementation) to minimise greenhouse gas emissions, with the aim of achieving as close as possible a zero-carbon development, has been submitted and approved in writing by the Local Planning Authority. The scheme shall include, but not limited to, provision of renewable and low carbon energy generation and electrical car charging points. The renewable and low carbon energy measures shall be implemented and retained thereafter in operation.
- 11) Notwithstanding Condition 2, prior to the first occupation of the dwelling hereby approved, details of secure cycle parking within the site shall be submitted to and approved in writing by the Local Planning Authority. These details shall include plans at a minimum scale of 1:50 to show the location of cycle parking and include the type of stands to be installed. The development shall be carried out in accordance with the approved details and the space(s) shall be made available for use and thereafter be retained as secure cycle parking for the occupiers of the approved development.
- 12) No development shall take place until a scheme for the provision of foul and surface water drainage works for the site has been submitted to and approved in writing by the Local Planning Authority. The scheme shall be developed in accordance with the Council's Sustainable Drainage Systems (SuDS) Adoption Guide 2016 (or in an equivalent document if replaced). The development shall be carried out in accordance with the approved details and agreed timetable and retained thereafter.
- 13) No development shall take place, including demolition, until a Construction Method Statement has been submitted to, and approved in writing by the local planning authority. The Statement shall provide for:
 - a. A Dust Action Plan including measures to control the emission of dust and dirt during construction.

- b. Details of methods and means of noise reduction and suppression.
- c. Where construction involves penetrative piling, details of methods for piling of foundations including measures to suppress any associated noise and vibration.
- d. Details of measures to prevent mud and other such material migrating onto the highway from all vehicles entering and leaving the site.
- e. Designation, layout and design of construction access and egress points.
- f. Details for the provision of directional signage (on and off site).
- g. Plan based details of the position, and heights relative to ground level, of security fencing, contractors' compounds, and temporary infrastructure, including cranes, plant, and other equipment, and storage arrangements for materials.
- h. Details of provision for all site operatives for the loading and unloading of plant, machinery and materials, to including the timings of deliveries and the types of delivery vehicle(s) to be used.
- i. Details of provision for all site operatives, including visitors and construction vehicles, for parking and turning within the site during the construction period.
- j. Routing agreements for construction traffic.
- k. Details of the erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate.
- l. Waste audit and scheme for waste minimisation and recycling/disposing of waste resulting from demolition and construction works.
- m. Management measures for the control of pest species as a result of demolition or construction works.
- n. Details of measures for liaison with the local community and procedures to deal with any complaints received. The management strategy shall have regard to BS 5228 "Noise and Vibration Control on Construction and Open Sites" (or an equivalent British Standard if replaced) during the planning and implementation of site activities and operations.

The approved Construction Method Statement shall be adhered to throughout the construction period of the development.

- 14) Demolition and external construction works (including deliveries, external running of plant and equipment) shall take place only between the hours of 0730 to 1800 on Monday to Friday and 0730 to 1400 on Saturday. No internal works audible outside the site boundary shall take place on the site other than between the hours of 0730 to 1800 on Monday to Friday and 0800 to 1700 on Saturday. There shall be no construction works, works of demolition whatsoever, including deliveries, external running of plant and equipment, or internal works, whether or not audible outside the site boundary, take place on Sundays or Public/Bank Holidays. For the purposes of this condition, construction works are defined as: The carrying out of any building, civil engineering or engineering construction work involving the use of plant and machinery, including hand tools.

15) No above-ground development shall commence until:

a. A scheme of intrusive investigations has been carried out on site to establish the risks posed to the development by past coal mining activity (on-site mine entries 415557-005 and 415557-006); and

b. Any remediation works and/or mitigation measures to address land instability arising from coal mining legacy, as may be necessary, have been implemented on site in full in order to ensure that the site is made safe and stable for the development hereby permitted.

The intrusive site investigations and remedial works shall be carried out in accordance with authoritative UK guidance.

16) Prior to the first occupation of the development hereby approved, a signed statement or declaration prepared by a suitably competent person confirming that the site is, or has been made, safe and stable for the development shall be submitted to and approved in writing by the Local Planning Authority. This document shall confirm the methods and findings of the intrusive site investigations and the completion of any remedial works and/or mitigation necessary to address the risks posed by past coal mining activity.

17) No site clearance, preparatory work, including any site cabins, materials or machinery shall be brought on site until precautionary method statements identified in the Bat Survey & Ecological Assessment prepared by E3 Ecology (Rev R02) with regard to hedgehogs and amphibians, and details of hibernacula have been submitted and approved in writing by the Local Planning Authority. The hibernacula shall be available for use prior to the dwelling first being occupied and retained thereafter.

18) Prior to the first occupation of the development hereby approved, details of the location and specification of integrated bat boxes and bird boxes shall be submitted to and approved in writing by the Local Planning Authority. The bat boxes and bird boxes shall be completed in accordance with the approved details before the building is occupied and retained thereafter.

***** END OF CONDITIONS *****



Appeal Decisions

Site visit made on 25 June 2024

by L Francis BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 September 2024

Appeal A Ref: APP/Z1510/W/24/3343135

Cricks Farm, Hill House Road, Pebmarsh CO9 2NP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by J R Crayston & Sons against the decision of Braintree District Council.
 - The application Ref is 23/02756/FUL.
 - The development proposed is the demolition of two silos with prior approval for the conversion into two dwellings subject of application 23/00068/COUPA and the erection of a self-build replacement bungalow.
-

Appeal B Ref: APP/Z1510/W/23/3329329

Cricks Farm, Hill House Road, Pebmarsh CO9 2NP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by J R Crayston & Sons against the decision of Braintree District Council.
 - The application Ref is 23/01395/FUL.
 - The development proposed is replacement dwelling (in lieu of Prior Approval for two dwellings, subject of application 23/00068/COUPA).
-

Decisions

1. Appeal A is allowed and planning permission is granted for the demolition of two silos with prior approval for the conversion into two dwellings subject of application 23/00068/COUPA and the erection of a self-build replacement bungalow at Cricks Farm, Hill House Road, Pebmarsh CO9 2NP in accordance with the terms of the application, Ref 23/02756/FUL, subject to the conditions in the attached schedule.
2. Appeal B is dismissed.

Preliminary Matters

3. As set out above there are two appeals on the appeal site. They differ in the detailed design, bulk and height of the proposed houses. I have considered each proposal on its individual merits. However, to avoid duplication I have dealt with the two schemes together, except where otherwise indicated.
4. The appeal site falls within the Zone of Influence of European designated sites scoped into the Essex Coast Recreational disturbance Avoidance Mitigation Strategy (the Essex Coast RAMS). Although not forming part of the Council's reasons for refusal, it is incumbent on me as competent authority to consider

whether the proposal would be likely to have a significant effect on the integrity of the sites. It is necessary to consider this matter as a main issue.

5. There is an extant prior approval¹ for two dwellings under Class Q of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) for the conversion of the two silos on the appeal site into two one-bedroom dwellings. The appellant presents this as a fallback scheme.
6. The appellant has also submitted a structural report confirming the capability of the silos to be converted. The layout of the conversion scheme would provide a good standard of accommodation with a living/kitchen/dining area and WC at ground floor and with a bedroom and bathroom at first floor. I consider the appellant has demonstrated a greater than theoretical possibility that the development would be undertaken. It therefore represents a realistic fallback position and is a material consideration.

Main Issues

7. The main issues for both Appeals A and B are:
 - the effect of the proposals on the character and appearance of the countryside;
 - whether the site is a suitable site for housing having regard to the adopted spatial strategy, with particular regard to the extent to which the proposal would contribute to the objectives of limiting the need to travel and offering a genuine choice of transport modes; and,
 - the integrity of the European designated sites.

Reasons

Character and appearance

8. The appeal site comprises two adjacent grain silos on Cricks Farm. The cylindrical silos are metal-clad. They form part of a collection of agricultural buildings which stand alongside a single storey house occupied by the appellant. These buildings form a cluster set around a central green space and hardstanding with the arable fields beyond. The local area is an undulating, agrarian landscape, interspersed with villages and small patches of woodland.
9. Views of the silos when approaching from the north are largely obscured by the bulk of the existing barns and tree coverage adjacent to the existing house. Approaching from the south, the silos are clearly visible in long views, although they are set against the larger barns immediately to the north. Due to the topography, views looking northwards closer to the appeal site are more restricted until the flatter land separating the appeal site from the road is reached.

Appeal A: single storey dwelling

10. The two silos would be demolished and replaced by a single storey dwelling with two bedrooms. The dwelling proposed would have a comparable length to the existing silos, but would be around 2.8m deeper. The ridge height would be around 0.7m below the height of the silos. Parking would be provided to the

¹ Ref 23/00068/COUPA dated 2 March 2023.

north side of the dwelling, along with a rear garden. Access would be provided from the main farm access from the highway. It would reflect the style of the existing single storey house in this collection of farm buildings, and would not be a dominant presence in the site.

11. The proposed house would be of a more overtly domestic appearance than the fallback scheme. It would however comprise a reduced height relative to the fallback position and would sit comfortably in long views from the south set against the bulk of the existing cluster of agricultural buildings. Given the relatively restricted views, height and location in relation to the other larger buildings on site, the proposed single storey dwelling would not be harmful to the character and appearance of the surrounding landscape.
12. A small garden is proposed which would reference the domestic garden area of the existing dwelling at the farm. The proposed drawings indicate an open boundary to the garden where it abuts the adjacent field. It would be necessary to maintain an open boundary here in the interest of preserving the open aspect to the surrounding countryside, which could be achieved through an appropriate planning condition.
13. I acknowledge the silos are read as two separate structures and their form is broken up, which provides some visual permeability particularly at roof level. Whilst this may be the case, in long views from the south, this broken-up form is only legible in close views due to the orientation of the highway relative to the position of the silos. Although the roof form of the proposed dwelling would not have the same permeability, the lower ridge height would provide mitigation in this respect.
14. Although the dwelling would be set slightly further away from the access road than the existing silos, it would not appear as isolated from other buildings. This would be particularly so in views from the south where the dwelling would be viewed against the bulk of the other agricultural buildings on the farmstead.
15. I conclude therefore that the proposal would be in accordance with the overall aims of the Local Plan Section 2, Adopted 2022 (the Section 2 LP) Policy LPP52 insofar as it seeks to achieve development that is in harmony with the character and appearance of the area.

Appeal B: two storey dwelling

16. The two silos would be demolished and replaced by a two-storey barn style dwelling with two bedrooms. Again, two car parking spaces would be provided to the north side of the dwelling, a garden to the rear and access would be provided from the main farm access.
17. The ridge height of the house would be around 0.5m higher than the existing silos; it would appear as an imposing and bulky addition to the collection of buildings around the appeal site. Full height glazing to the double height reception area facing the highway would be an intrusive and incongruous feature which would be highly visible and discordant with the character and appearance of the landscape. Whilst I note the house is designed to reflect the features of an Essex barn, the front glazing reaching to the gable ridge would not reflect typical barn fenestration and would not sit comfortably within the agricultural context of the site. The overall height, scale, design and bulk of the house would have the effect of making it an overly dominant feature.

18. For the above reasons, the two-storey barn style dwelling would harm the character and appearance of the local landscape and would conflict with the aims of Policy LPP52 of the Section 2 LP.

Location

19. The spatial strategy for North Essex is set out by Policy SP3 of the Braintree District Local Plan 2013-2033 Section 1, Adopted 2021 (the Section 1 LP). It states that existing settlements will be the principal focus for additional growth across the North Essex Authorities area. The policy goes on to state that in Section 2 of its Local Plan each local planning authority will identify a hierarchy of settlements where new development will be accommodated according to the role of the settlement, sustainability, its physical capacity and local needs. Policy SP1 of the Section 1 LP states that the authorities will apply the presumption in favour of sustainable development, where development that complies with the plan will be approved without delay, unless material considerations indicate otherwise. Policy LPP1 of the Section 2 LP directs development to within development boundaries, although it does not specifically state that development outside settlement boundaries will be refused.
20. The site is located outside any development boundary and is approximately 1km from the nearest village of Pebmarsh. The Section 2 LP categorises Pebmarsh as a third-tier settlement, the smallest villages in the district. Within the village, there are facilities including a primary school, shop, village hall, church, pub and a limited, book in advance bus service. Even if residents were to use the bus service, they would still need to get into Pebmarsh itself to get to the bus stops. I accept that cycling would be possible as a form of sustainable transport, but given the nature of the narrow rural lanes, this would likely only be an option for a limited selection of people. Although it would be a relatively short journey to access the village facilities the rural lanes are unlit and without any footway. Therefore, although a travel pack could be secured by condition to try to encourage journeys made other than by car, any future residents at the appeal site would likely be heavily reliant on private vehicles.
21. I conclude therefore that the proposed housing would conflict with Policies SP1, SP3 and SP7 of the Section 1 LP and Policies LPP1 and LPP42 of the Section 2 LP, which, taken together, apply a presumption in favour of sustainable development, seek to locate new housing within existing settlements and create places which prioritise pedestrians, cyclists and public transport over the private car.

Designated sites

22. The appeal site falls within the Zone of Influence of the Blackwater Estuary Special Protection Area (SPA)/Ramsar site and the Essex Estuaries SPA, which are scoped into the Essex Coast RAMS. The sites are designated due to the internationally important numbers of breeding and non-breeding birds and their coastal habitats.
23. The Conservation of Habitats and Species Regulations 2017 (as amended) (the Habitats Regulations) requires the decision maker to undertake an Appropriate Assessment (AA) where there are likely significant effects from the proposal,

either alone or in combination with other plans or projects. This responsibility falls to me as the competent authority in the context of this appeal.

24. It would be a reasonable assumption that occupiers of the proposed dwellings would be likely to visit local European protected coastal areas for recreation, as evidenced by the visitor research carried out in support of the Essex Coast RAMS Supplementary Planning Document 2020. Any increase in visitor numbers to these sites would result in recreational pressure requiring mitigation. I therefore consider that the effects of the proposed dwellings, both on their own and in combination with other development projects, is such that they are likely to have significant effects on the integrity of the sites.
25. The Essex Coast RAMS sets out a strategic approach to mitigation by several councils across the wider area. It details mitigation measures that would be funded by financial contributions at a specified tariff per dwelling. Since these include a range of habitat-based measures such as education, communication and monitoring, and have been endorsed by Natural England, I am satisfied that the measures would adequately overcome any adverse effects of the appeal schemes on the SPA and Ramsar sites.
26. The Council has confirmed that the appellant has made a contribution of £156.76 to fund the Essex Coast RAMS for the single additional dwelling proposed under each appeal. Although there is no obligation on the Council to spend the money as envisaged and within a particular timescale, it is the organisation responsible for administering the mitigation strategy. There is therefore no reason to believe that the funds would not be spent appropriately. I am consequently satisfied that the mitigation measures have been secured and would be used for their intended purpose.
27. The contribution would be necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development, in accordance with Regulation 122 of the Community Infrastructure Levy Regulations 2010. As such, the contribution toward the mitigation schemes would count as mitigation toward maintaining the integrity of the sites.
28. I am therefore satisfied that with the funding for the proposed mitigation measures in place, neither appeal scheme would have an adverse effect on the integrity of the SPA and Ramsar sites identified, either alone or in combination with other plans or projects. The proposals would therefore comply with the Habitats Regulations.

Other Matters

29. The proposed house in each appeal would comply with the relevant space standards set out in the Nationally Described Space Standards. In terms of the effect of the proposals upon the living conditions of any residents nearby, given the location of the proposed house and its distance from other dwellings, there would be no material effect upon the degree of overlooking, loss of outlook or loss of daylight or sunlight to any other dwelling.
30. I note that the Highway Authority has not raised any objection to the principle of a new dwelling in this location and that the proposed parking spaces are appropriate. I have no reason to disagree with the Council's assessment that

the proposal would not have any material impact upon the safety or operation of the public highway.

Planning Balance

31. Planning law and the National Planning Policy Framework (the Framework) require proposals to be determined against the development plan unless material considerations indicate otherwise. I have identified that the proposals would conflict with the development plan's spatial strategy for housing growth and sustainable transport objectives. However, I attach significant weight to the appellants' fallback position and I consider that there is a reasonable prospect of it being built out. Irrespective of the outcome of the appeals before me, the prior approval would have the effect of allowing two new dwellings in this rural location. Given the appeal schemes would each replace the silos with one house, there would consequently be a reduction in number of dwellings compared to the fallback position in what the development plan indicates would be an unsustainable location. I therefore afford the conflict with the spatial strategy of the development plan limited weight.
32. The proposals would each offer the benefit of an additional dwelling which would boost the housing stock. This benefit is small, particularly given the fallback scheme would offer the benefit of two additional dwellings. The appeal schemes are each said to be self-build housing, for which there is particular support within the Framework. I have however attached limited weight to this benefit as no mechanism for guaranteeing self-build has been put forward. There would also be socio-economic benefits through new residents using local services.
33. The revised housing land supply position of the Council indicates that a supply of 5.8 years of deliverable sites can be identified. I note this is not a cap on development, or a significant oversupply, nor does it diminish the benefits of each appeal scheme. Nevertheless, it means that the provisions of Framework paragraph 11d are not enacted and the appeal schemes do not benefit from the presumption in favour of sustainable development.
34. The Council cites Section 2 LP Policy LPP71 in their reason for refusal for each appeal, which sets out that applicants will be expected to demonstrate that measures to lower carbon emissions, increase renewable energy provision and adapt to climate change have been incorporated into their schemes. Limited evidence has been provided in support of this by either main party. In any event, I note that in terms of energy efficiency, the appellant indicates that a new build dwelling would be subject to the Building Regulations as amended in 2022. I consider this a neutral matter to which I attach limited weight.
35. The fallback position significantly mitigates the harm that I have identified arising from the conflict with the aims of the development plan insofar as they relate to the location of housing growth and prioritising sustainable means of travel. As I have found Appeal A would be in accordance with the development plan in all other respects, the material considerations outweigh this conflict.
36. In respect of Appeal B, given that I have found harm to the character and appearance of the landscape as well as the harm arising from the conflict with the spatial strategy, the material considerations do not outweigh this conflict with the development plan.

Conditions

37. In relation to Appeal A, the Council has provided some suggested conditions which I have considered against advice in the Framework and Planning Practice Guidance; as a consequence I have amended or omitted some of the suggested wording. I have omitted the Council's suggested condition 3 regarding the pre-commencement submission of finished floor levels above ordnance datum as there is little substantive evidence that this would be necessary or reasonably required to make the proposed development acceptable.
38. I have attached the standard time limit condition (1) and a plans condition (2) as this provides certainty. Condition 3 restricts hours of construction works and is necessary to protect the living conditions of nearby residents. Condition (4) concerning materials is necessary to ensure a satisfactory appearance.
39. The effect of the Council's proposed wording of Condition 5 would be to remove the permitted development rights in relation to the erection of means of enclosure by gates/fences/walls. I have amended the wording of the condition to specifically remove the permitted development rights pursuant to Class A, Part 2 of the GPDO in the interests of precision. The condition is necessary to maintain the openness of the landscape.
40. Condition 6 (the Council's suggested condition 7) has the effect of removing permitted development rights insofar as they relate to extensions. This is reasonably required and necessary on the basis that the proposed dwelling broadly reflects the floorspace of the fallback position, and any additional bulk and height from extensions would need to be subject to control to preserve the character and appearance of the area.
41. I am mindful of the advice contained within the Planning Practice Guidance² regarding the use of conditions removing permitted development rights, which states that their scope needs to be precisely defined by reference to the relevant provisions of the GPDO otherwise they may not meet the tests of reasonableness or necessity. However, as the dwelling under Appeal A would only be acceptable based on the submitted drawings without any additional extensions or means of enclosure carried out under permitted development, I conclude that removing permitted development rights as set out in conditions 5 and 6 is both reasonable and necessary.
42. The Highway Authority's suggested condition regarding the provision of a residential travel information pack prior to occupation of the dwelling is not necessary to make the proposal acceptable in planning terms given my conclusions in relation to the reliance on motor vehicles in this location.

Conclusions

43. Appeal A would not accord with the development plan as a whole, but material considerations outweigh this conflict. Appeal A should therefore be allowed.
44. For the above reasons, I conclude Appeal B should be dismissed.

L Francis

INSPECTOR

² Paragraph: 017 Reference ID: 21a-017-20190723 revision date 23.07.19

Schedule:

Conditions for Appeal A, APP/Z1510/W/24/3343135

1. The development hereby permitted shall begin not later than three years from the date of this decision.
2. The development hereby permitted shall be carried out in accordance with the following approved plans: site location plan; CCF-04 rev B.
3. Demolition or construction works shall take place only between 08.00 to 18.00 on Monday to Friday, 08.00 to 13.00 on Saturday, and shall not take place at any time on Sundays or on Bank or Public Holidays.
4. Prior to the commencement of above ground works, full details of the external facing materials shall be submitted to and approved in writing by the local planning authority. The development shall be carried out according to the approved details and thereafter maintained for the lifetime of the development.
5. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification) no development permitted by Class A, Part 2 of Schedule 2 to the Order shall be undertaken.
6. Notwithstanding the provisions of The Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking and re-enacting that Order with or without modification) no development permitted by Classes A, AA, B and D of Part 1 of Schedule 2 to the Order shall be undertaken.

END OF SCHEDULE

APPEAL DECISIONS – 29 OCTOBER 2020

Site: CROSSWAYS FARM, SLOUGH LANE, STOKE ST GREGORY,
TAUNTON, TA3 6ES

Proposal: Replacement of agricultural buildings with the erection of 2 No. dwellings and associated works on land at Crossways Farm, Slough Lane, Stoke St Gregory (resubmission of 36/18/0043)

Application number: 36/19/0029

Reason for refusal: Allowed

Planning Application Decision: Chair – Refused



The Planning Inspectorate

Appeal Decision

Site visit made on 21 August 2020 **by L**

McKay MA MRTPI

Inspector appointed by the Secretary of State

Decision date: 29 September 2020

Appeal Ref: APP/W3330/W/20/3248009

Crossways Farm, Slough Lane, Stoke-St-Gregory, Taunton, Somerset TA3 6ES

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr P Broom against the decision of Somerset West and Taunton Council.
 - The application Ref 36/19/0029, dated 4 October 2019, was refused by notice dated 16 December 2019.
 - The development proposed is described as 'Replacement of agricultural buildings and erection of 2 no. dwellings with associated works (following previous prior approval under Class Q – Ref 36/18/0008/CQ)'
-

Decision

1. The appeal is allowed and planning permission is granted for replacement of agricultural buildings and erection of 2 no. dwellings with associated works at Crossways Farm, Slough Lane, Stoke-St-Gregory, Taunton, Somerset

TA3 6ES in accordance with the terms of the application, Ref 36/19/0029, dated 4 October 2019, and the plans submitted with it, subject to the conditions in the following Schedule.

Main Issues

2. The main issues are

- i) whether the appeal site is an appropriate location for the proposed development having regard to the settlement strategy, access to facilities and services and the effect of the proposed development on the character and appearance of the area and on the significance of designated heritage assets; and
- ii) whether there are any material considerations which indicate a decision otherwise than in accordance with the development plan.

Reasons

Location

3. The appeal site is outside the settlement boundary of Stoke St Gregory as defined in the Taunton Deane Borough Council Core Strategy (2012) (CS). CS Policy SP1 and Policy SB1 of the Council's Site Allocations and Development Management Plan 2016 (SADMP) set out that such proposals will be treated as being in the open countryside. In such locations, Policy SB1 states that proposals will be assessed against CS Policies CP1, CP8 and DM2, and in all cases, must be designed and sited to minimise landscape and other impacts.

-
4. CS Policy DM2 supports specific types of development in the countryside, none of which apply to the appeal proposal. However, as acknowledged at previous appeals¹, it does not state that other types of development will be refused. As such, while the appeal proposal does not benefit from any support from this Policy, neither does it conflict with it.
 5. Other uses should be determined against CS Policy CP8, which deals with all development and seeks to conserve and enhance the natural and historic environment. Policy CP8 permits development outside of settlement boundaries where it meets a number of criteria, which I will consider in turn.

National, regional and local policies for development in rural areas

6. The proposal would deliver housing, which is supported by the vision for rural areas set out in CS Policy SP4. There are however only limited services and facilities in Stoke St Gregory, and there is no evidence before me that public transport is available nearby. Furthermore, the route to those services is via narrow, unlit lanes which are likely to discourage cycling after dark, or walking at any time. Consequently, future occupiers of the proposed dwellings would be reliant on the private car. The appeal site is not therefore in an accessible location. Accordingly, the proposal would conflict with CS Policy CP1a, which seeks to address climate change and create a sustainable environment, including by reducing the need to travel through locational decisions.

¹ APP/D3315/W/17/3179264, APP/D3115/W/19/3220853

7. The proposal is not for housing for rural workers, and as such would not benefit from the support for such development in SADMP Policy H1a, but neither would it conflict with that Policy. CS Policy SP1 seeks to focus development on the most accessible and sustainable locations, but does not preclude development outside those areas. Therefore, although the proposal would not be in an accessible location, I find no direct conflict with that Policy.
8. The site is part of a cluster of dwellings and close to other development along Slough Lane, and as such, it is not an isolated location. The proposal would not therefore conflict with paragraph 79 of the National Planning Policy Framework (the Framework). However, given the limited access to local services and facilities, it has not been demonstrated that the proposal would be located where it would enhance or maintain the vitality of rural communities, as required by Framework paragraph 78.
9. Accordingly, the site would not be a sustainable location for new housing development and would not accord with local and national policies relating to development within rural areas. It would therefore conflict with the first criterion of Policy CP8.

Design, character and appearance

10. The appeal site is set behind Crossway Farm, a Grade II listed farmhouse, and various brick buildings, some of which have been converted into dwellings. This group of buildings is set in a relatively open, agricultural landscape of fields with sporadic clusters of dwellings and other buildings, and larger agricultural developments.
 11. Although partially enclosed by hedging, the existing agricultural buildings on the site can be seen from various public viewpoints, including the proposed access track across the gardens of neighbouring properties, the public footpath to the east, and St Gregory's Church to the south-west. The existing buildings are typical modern agricultural structures of the type commonly seen in such a landscape, however they are somewhat dilapidated and as such detract from their otherwise well-kept surroundings. Consequently, their removal would enhance the appearance of the site.
12. The proposed dwellings would broadly reflect the scale and form of the smaller of the existing barns and would be sited close to the footprint of that building. Their detached form and associated garden areas and parking would nevertheless give the site a domestic appearance, in contrast to the clearly agricultural nature of the existing site. However, the retention of the rear walls of the barn would screen the windows of the dwellings from view from the footpath. As a result, with careful material choices the residential nature of the proposal would not be obvious from that viewpoint. Substantial areas of landscaping are also proposed in front of the proposed dwellings, which would soften the appearance of the site and screen the parking areas. This landscaping would significantly enhance the appearance of the site and mean that the proposed dwellings would not be conspicuous in the landscape.
13. The proposal would also be seen in conjunction with the adjacent converted barns. While they have been sympathetically converted, features such as gate piers, driveways and landscaped gardens are all visible from the road, which give them a domestic appearance. The proposal would not therefore appear significantly different to the neighbouring development, and with the proposed landscaping it would have a rural, rather than suburban, appearance.

14. Consequently, the proposal would be appropriate in terms of scale, siting and design and would enhance the appearance of the site. Although it would result in a significant change to the character of the site, given the contained nature of the site, and with the hard and soft landscaping proposed, the impacts of that change would be limited to the immediate area. Therefore, it would not harm the rural character of the surrounding landscape. I therefore find no conflict with the second and third criteria of Policy CP8, or the requirements of criteria A and B of SADMP Policy D7 to create places with locally inspired characteristics and reflect the site and its context.

Designated heritage assets

15. Crossway Farmhouse is a substantial thatched building with a walled front garden, which is seen together with the traditional red brick buildings arranged around its farmyard. The listed building derives considerable significance from its architecture and from its functional relationship with the existing and former traditional farm buildings. This group of buildings and the rural surroundings forms the setting of the listed building and make an important contribution to its significance. The conversion of several of the buildings to dwellings has however introduced some domestic elements into that setting.
16. The existing buildings on the appeal site and the farmhouse are not seen together from the road or footpath because of the intervening buildings and hedging. While they are seen in close proximity to each other in wider views, including from the nearby church, modern farm buildings are not unusual in the context of traditional farmhouses and they reflect its relationship to the farm. As such, the existing buildings do not significantly detract from the setting of the listed building.
17. The proposed dwellings would be significantly smaller than the existing barns, and due to the intervening buildings and vegetation there would be little or no intervisibility between them and the listed building. In wider views, the proposed landscaping of the site would provide significant screening, such that the domestic nature of the proposed development would not be particularly evident. Accordingly, while the proposal would result in a change to the appearance of the site, the nature of that change would not harmfully alter the setting of the listed building.
18. Consequently, the proposal would preserve the setting, and thereby the significance, of the listed building, and would not harm any features of special architectural and historic interest that it possesses. I therefore find no conflict with the requirement of CS Policy CP8 to conserve or enhance the interests of historic assets or criterion B of SADMP Policy D7 which requires development to reflect its historic context.

Flood risk, habitats and mitigation

19. Subject to the provision of appropriate drainage measures, which could be secured by planning condition, there is no substantive evidence before me to demonstrate that the proposal would adversely affect water resources or contribute to flood risk.
20. The evidence before me is that protected species are not known to be using the site or buildings proposed to be demolished. However, if any were found during site clearance, demolition or construction, harm could be avoided through appropriate working methods, which could be secured by condition. Therefore, the proposal would protect habitats and species and, with the proposed landscaping, would offer opportunities to achieve net gains in biodiversity. As such, there would be no conflict with the final three criteria of CS Policy CP8.

Overall conclusion on main issue

21. While I have found that the proposal would enhance the appearance of the site and would not harm the character of the area or the significance of designated heritage assets, it would conflict with CS Policies CP1 and CP8 in relation to access to services and facilities, and as such with the overall settlement strategy set out in the development plan. Therefore, the appeal site is not an appropriate location for the proposed development.

Other considerations – existing planning permissions

22. The Council granted prior approval in 2018 for conversion of the smaller of the existing barns to two dwellings pursuant to Class Q of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)². The appellant suggests that this permission would be implemented should this appeal not succeed. From the evidence before me, I consider that there is a real prospect of this occurring.

23. There is also an extant planning permission for change of use of the remainder of the appeal site for use in conjunction with the Class Q dwellings³, including a similar landscaping scheme to that now proposed.

24. National and local policies support re-use of existing buildings, including those in the countryside. Conversion of existing buildings can be more resource efficient than new build, recognising the embedded energy already expended in constructing the building. In this case, the appellant has not sought to suggest that the existing building is not capable of conversion, but instead suggests that the proposed buildings would be better insulated, and therefore more energy efficient than the conversion under Class Q. There is however no detailed comparison of the two schemes before me in terms of their resource use, so it has not been demonstrated that the proposal would be more resource efficient than the approved scheme. Consequently, this does not weigh in favour of the proposal.

25. Class Q does not allow for consideration of the sustainability of the location of the site. Nevertheless, both the appeal proposal and the approved scheme would result in 2 dwellings in the same unsustainable location. Therefore, the proposal would not have a greater impact than the approved scheme in relation to the development plan strategy for housing in the countryside. Both schemes would also make similarly efficient use of land and would provide sufficient parking and suitable access for the proposed dwellings, without harm to the living conditions of neighbours. As such, there would be little difference between them in these respects.

26. The approved plans for the Class Q permission show the intention to demolish the other barns on the site, however no conditions have been imposed to require that demolition to take place within a specified timescale. It also appears that other conditions of the permission, such as parking, could be complied with without demolishing the barns. Moreover, although there is a landscaping condition on the change of use permission, it does not specify a timescale by which the landscaping must be completed. I therefore cannot be certain that the Council could enforce that condition and require the landscaping to be provided. Consequently, if those permissions were implemented, there is no certainty that they would actually deliver

² Council Ref. 36/18/0008/CQ ³
Council Ref. 36/19/0018

the significant benefits to the appearance of the site that would result from removal of the existing buildings and landscaping.

27. However, those benefits could be secured by conditions if I were minded to allow this appeal. Therefore, the proposal would result in significant enhancements to the appearance of the site compared to the existing permissions. Accordingly, although there is potential for the appeal proposal to use more resources than the approved scheme, overall, I consider that it would be a significant improvement on what has previously been permitted.

Planning Balance and Conclusion

28. I have found that the appeal proposal would enhance the appearance of the site and would not harm the character of the area or designated heritage assets. It would also comply with other development plan policies in relation to parking, highway safety and the living conditions of neighbours. It would not however be an appropriate location for housing given the limited access to services and facilities. As such, the proposal would conflict with the development plan taken as a whole.
29. However, there is a realistic fallback position which would result in the same amount of housing being delivered in the same location, and in these circumstances I afford the conflict with the development plan moderate weight. The appeal proposal would however deliver significant benefits to the appearance of the site compared to that fallback position, and this carries significant weight in favour of the appeal proposal.
30. Overall, taking account of the Framework and the above considerations, I find that the benefits of the proposed development compared to the identified fallback position are a material consideration which outweighs the conflict with the development plan and justifies granting planning permission for the proposal. Consequently, I conclude that the appeal should be allowed.

Conditions

31. I have had regard to the conditions suggested by both main parties, and consider that additional conditions are necessary as set out below, which the parties have had the opportunity to comment on.
32. Conditions are necessary to ensure the implementation of the development and compliance with the approved plans, in the interests of certainty. Mitigation of potential impacts on protected species is required to be in place prior to commencement of development as all site clearance, demolition or construction works have the potential to impact reptiles if present. The appellant has not raised any objections to these pre-commencement conditions within the relevant timeframe.
33. Details of any external lighting proposed are required in order to safeguard bats from disturbance, and ecological enhancements are needed to ensure a net gain in biodiversity. Given the site's history, investigation of potential contamination and remediation as appropriate are necessary in the interests of human health. Details of drainage and foul sewage are also needed to ensure the proposal does not increase flood risk or result in pollution.
34. Details of materials are required to ensure the development has an appropriate appearance. A hard and soft landscaping scheme and demolition of the existing buildings are necessary to secure the enhancements set out above. I have however reworded the suggested conditions to secure landscaping for the whole site and

require demolition prior to first occupation of any dwelling, as it is not necessary for this to take place prior to commencement of any other part of the development.

35. Conditions to secure provision of car parking and turning areas are required to prevent parking on the adjacent narrow lane, in the interests of highway safety.
Cycle parking is needed to encourage use of sustainable transport modes. However, the Council's suggested condition in relation to garages is not necessary as none are proposed. Provision for broadband is necessary to support home working and reduce the need to travel, as required by CS Policy DM1g and supported by Framework paragraph 112.
36. The Council has suggested that permitted development rights be removed, however given the design of the proposed dwellings, it is unlikely that the type of alterations that could be carried out as permitted development would adversely affect the character and appearance of the area. Furthermore, given the small size of the proposed rear gardens, rear extensions and outbuildings of any significant size would require planning permission, as would any to the front of the proposed dwellings. As such, the suggested condition is not necessary.

L McKay

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: 31117/19 Rev A, 31117/20 Rev A, 31117/25 Rev A, 31117/27,
- 3) No development shall commence, including demolition and site clearance, until all site operatives have been inducted by a licensed bat ecologist to make them aware of the possible presence of bats and other protected species, their legal protection, working practices to avoid harming bats, the working strategy for the project and the procedure should any protected species be encountered.
Written confirmation of the induction shall be submitted to the local planning authority by the licensed bat ecologist within one week of the toolbox talk.
- 4) No development shall take place, including site clearance and demolition, other than as required by this condition, until any vegetation in the construction area has been reduced by hand to a height of 10 centimetres above ground level, brushings and cuttings removed and the remainder left for a minimum period of 48 hours of fine warm weather (limited rain and wind, with temperatures above 10°C) before clearing. Once cut, vegetation should be maintained at a height of 10cm or less for the duration of the construction period. Written notification of these operations shall be submitted to the local planning authority prior to the work taking place.
- 5) No development, other than demolition of existing buildings, shall take place until the history and current condition of the site has been investigated to determine the likelihood of the existence of contamination arising from previous

uses and a written report has been submitted to the Local Planning Authority, which shall include details of the previous uses of the site for at least the last 100 years and a description of the current condition of the site with regard to any activities that may have caused contamination. The report shall confirm whether or not it is likely that contamination may be present on the site.

If the report indicates that contamination may be present on or under the site, or if evidence of contamination is found, a more detailed site investigation and risk assessment shall be carried out in accordance with

DEFRA and Environment Agency's "Model Procedures for the Management of Land Contamination CLR11" and other authoritative guidance (or guidance/procedures which may have superseded or replaced this). A report detailing the site investigation and risk assessment shall be submitted to and approved in writing by the Local Planning Authority.

If the report indicates that remedial works are required, full details shall be submitted to the Local Planning Authority and approved in writing and thereafter implemented prior to the commencement of any development other than demolition, or at some other time that has been agreed in writing by the local planning authority. No dwelling hereby permitted shall be occupied until any required remedial works are complete and written confirmation that the works have been completed in accordance with the agreed remediation strategy has been provided to the Local Planning Authority.

- 6) No works to or demolition of buildings or structures shall take place between 1 March and 31 August inclusive, unless a competent ecologist has undertaken a careful, detailed check of vegetation and the buildings for active birds' nests immediately before work commences, and provided written confirmation that no birds will be harmed and/or that there are appropriate measures in place to protect nesting bird interest on site. Any such written confirmation shall be submitted to the local planning authority by the ecologist.
- 7) No construction shall take place above slab level of any dwelling hereby permitted until details of the materials to be used in the construction of the external surfaces of that dwelling have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 8) No dwelling hereby permitted shall be occupied until details of both hard and soft landscape works have been submitted to and approved in writing by the local planning authority. These details shall include: i) boundary treatments; ii) hard surfacing materials; iii) planting plans;
 - iv) written specifications (including cultivation and other operations associated with plant and grass establishment);
 - v) schedules of plants noting species, plant supply sizes and proposed numbers/densities;
 - vi) an implementation programme.

The landscaping works shall be carried out in accordance with the approved details, including the agreed implementation programme. Any trees or plants which within a period of 5 years from the completion of the development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species.

- 9) No dwelling hereby permitted shall be occupied until the buildings shown on drawing No 31117/25 Rev A to be demolished have been demolished and the resulting materials removed from the site.
- 10) No dwelling hereby permitted shall be occupied until high speed broadband connectivity has been made available to that dwelling.
- 11) No dwelling hereby permitted shall be occupied until works for the disposal of sewage and surface water drainage have first been provided on the site to serve that dwelling, in accordance with details that shall have first been submitted to and approved in writing by the local planning authority. The works shall thereafter be retained and maintained in accordance with the approved details.
- 12) No dwelling hereby permitted shall be occupied until space has been laid out, drained and surfaced in accordance with the approved plans, for the parking and turning of vehicles for that dwelling. Such areas shall not thereafter be used for any purpose other than the parking and turning of vehicles associated with that dwelling.
- 13) No dwelling hereby permitted shall be occupied until cycle parking has first been provided for that dwelling in accordance with the standards set out in Appendix E of the Taunton Deane Adopted Site Allocations and Development Management Plan 2016. Such provision shall thereafter be retained for that purpose.
- 14) No dwelling hereby permitted shall be occupied until the following ecological enhancement measures have first been integrated into the permitted dwellings or mounted upon suitable trees or buildings, and photographic evidence of their installation has been submitted to the local planning authority:
 - i) one Habitat 001 bat box or similar, built into a structure at least four [4] metres above ground level and away from windows on the west elevation of Plot 1;
 - ii) a cluster of five [5] Schwegler 1a swift bricks or similar, built into the wall at least 60cm apart, at least five [5] metres above ground level on the north facing elevation of Plot 1;
 - iii) one Vivara Pro Woodstone Nest Box (32mm hole version) installed mounted on the northerly facing aspect of a suitable tree;
 - iv) one bee brick built into the wall about 1 metre above ground level on the east elevation of both dwellings;
 - v) accessible hedgehog holes measuring 13cm by 13cm in any new fencing installed within or around the site.
- 15) No external lighting shall be installed on any building hereby permitted, or elsewhere within the site, unless in accordance with details that have been submitted to and approved in writing by the local planning authority. The details shall show how and where external lighting will be installed, including through the provision of technical specifications, so that it can be clearly demonstrated that areas to be lit will not disturb or prevent bats using their territory or having access to their resting places. Any external lighting installed shall thereafter be maintained in accordance with the approved details.



Appeal Decision

Site visit made on 2 December 2025

by Nick Davies BSc(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 December 2025

Appeal Ref: APP/D0840/W/25/3368365

Rosevean, Halvasso, Penryn, Cornwall TR10 9BY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Mr F Roebuck against the decision of Cornwall Council.
 - The application Ref is PA24/06879.
 - The development proposed is demolition of the agricultural barn, the erection of a replacement dwelling in lieu of a Class Q change of use (PA23/08531), the change of use of the surrounding land to garden together with associated works.
-

Decision

1. The appeal is allowed and planning permission is granted for demolition of the agricultural barn, the erection of a replacement dwelling in lieu of a Class Q change of use (PA23/08531), the change of use of the surrounding land to garden together with associated works at Rosevean, Halvasso, Penryn, Cornwall TR10 9BY in accordance with the terms of the application, Ref PA24/06879, and the plans submitted with it, subject to the conditions in the attached schedule.

Preliminary Matters

2. The other appeal on the site, regarding the variation of the planning condition attached to the Class Q permission, under reference APP/D0840/W/25/3368371, is the subject of a separate decision.

Main Issues

3. The main issues are:
 - a) Whether the site is suitable for a new dwelling, bearing in mind the settlement policies of the development plan; and, if not,
 - b) Whether there are other considerations which justify the proposal, having regard to its effect on the character and appearance of the area.

Reasons

Settlement policies

4. The settlement strategy for the area is set out in Policies 2 and 3 of the Cornwall Local Plan Strategic Policies 2010 – 2030 (the Local Plan). It seeks to direct most development to named settlements, but also makes provision for the organic growth of smaller towns and villages. The appeal site is not within or adjacent to any settlement, and it is not a matter of dispute that it is in the countryside. Consequently, the provision of a new dwelling here would not be supported by

Policies 2 and 3. The site also lies outside the settlement boundary for Mabe Burnthouse, as identified by the Mabe Neighbourhood Development Plan 2022-2030 (the Neighbourhood Plan). Policy 14 only supports residential development outside this boundary where the proposal is for affordable or low impact housing, or accords with Policy 3 or 7 of the Local Plan.

5. Policy 7 of the Local Plan states that the development of new homes in the countryside will only be permitted where there are special circumstances. The proposal is not for the subdivision of an existing dwelling, re-use of a building, or to provide accommodation for agricultural or seasonal workers. Furthermore, although there is a building on the site that benefits from a confirmed permitted development right for change of use to a dwelling, this has not been implemented. Consequently, the proposal is not for a replacement dwelling. Therefore, none of the special circumstances apply and the proposal would be contrary to Policy 7.
6. Having regard to the settlement policies of the development plan, the site is not suitable for a new dwelling. The proposal would be contrary to Policies 2, 3 and 7 of the Local Plan, and Policy 14 of the Neighbourhood Plan, which seek to direct development to settlements where services are accessible, and to limit new homes in the countryside.

Other considerations/Character and appearance

7. It is not disputed that, following an application for Prior Approval¹, there is an extant planning permission to convert the existing building on the site to a dwelling, which is granted by Class Q, Part 3, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). The proposal is an alternative to that planning permission, as it would involve the demolition of the building, and the construction of a new dwelling in its place. The appellant contends that the extant permission represents a fallback position as, regardless of my decision on this appeal, a new dwelling could be provided on the site, so the proposal would not undermine the spatial strategy of the development plan.
8. Case law² has held that a fallback position is a material planning consideration where there is a “real prospect” of it being implemented, and that the decision-maker should exercise their planning judgment as to whether that would be the case depending on the particular circumstances. More recently, it has been held that “the prospect of the fall-back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect³. In *Gambone v SSCLG*⁴ a two-stage approach was set out, where a determination must first be made concerning whether the fallback position is a material consideration, before weight is ascribed.
9. The Council contends that the lack of progress on implementing the permitted development, including the lack of any Building Regulations application, indicates that there is no desire to pursue the fallback scheme. However, it seems entirely logical that the appellant should await the outcome of this appeal before investing in the alternative proposal. In the event that I was minded to dismiss the appeal, there would still be approximately 12 months left to complete the approved

¹ Local Planning Authority reference: PA23/08531

² *Mansell v Tonbridge and Malling BC & others* [2017] EWCA Civ 1314

³ *Schneck v SSHCLG & West Berkshire DC* [2022] EWHC 3335 (Admin)

⁴ *Raffaele Gambone v SSCLG v Wolverhampton City Council* [2014] EWHC 952 (Admin)

scheme, which would be readily achievable. The evidence indicates that the appellant intends to live on the site, and has already invested in a new access track to the building. Consequently, there is a more than theoretical prospect that the fallback scheme would be implemented if this appeal were dismissed. It is, therefore, a material consideration.

10. The outcome of either the fallback scheme or the appeal proposal would be a single new dwelling in the countryside. Consequently, I give substantial weight to the fallback position as a material consideration insofar as it relates to the appeal scheme's conflict with the settlement strategy of the development plan.
11. In assessing the impact of the appeal scheme on the character and appearance of the area, the Council compared it with the fallback scheme using the principles outlined in Policy 7 of the Local Plan for replacement dwellings. This approach accords with the Chief Planning Officer's Advice Note: Barn Conversions/ Replacement dwellings in the countryside (February 2023) (the CPOAN), which recognises a Class Q permission as a fallback position.
12. The existing building is a modest, utilitarian structure, clad in cream coloured steel sheeting. It is single storey, with a low-pitched roof, and it is set well back from the road. However, it is set in a flat, open landscape, with low hedges, so it is readily visible from the road to the east. It is not a traditional, historic agricultural building, and does not possess any locally distinctive features. It does not, therefore, contribute positively to the character and appearance of the countryside. The permitted fallback scheme would do little to change this, as the general form of the building and its external materials would be retained. The only alterations would be the addition of an assortment of windows and rooflights, which would give it a more domestic appearance, but would not result in any significant enhancement.
13. Policy 7 of the Local Plan requires replacement dwellings in the countryside to be broadly comparable to the size, scale and bulk of the dwelling being replaced and of an appropriate scale and character to their location. The CPOAN provides advice on how to interpret these requirements, and also introduces the potential for betterment in design, or in terms of being more appropriate in scale and character within its context.
14. The proposed dwelling would have a larger footprint, a higher roof, and a more extensive domestic curtilage than the fallback scheme. In terms of the footprint, however, the majority of the increase would be on the western side of the building. As the site is only readily visible from the road to the east, this increase would not be easily discernible, and the proposed structure would be perceived as being broadly comparable with the approved scheme in this respect. The roof would be considerably higher, but it would be traditionally proportioned and covered in natural slate, so it would be more appropriate within its rural context than the low-pitched steel-clad roof. Its darker colour would also be more recessive, so reducing the visual impact of the increased height and volume.
15. The east elevation of the dwelling would be faced in granite, with an oak-framed porch and traditionally proportioned windows. So, although higher, and slightly wider, the design of this most prominent elevation would represent a significant betterment over the cream-painted, steel-clad fallback scheme, with its shallow-pitched roof and ill-proportioned windows. Whilst it may have the appearance of a new-build bungalow, rather than a traditional dwelling or barn conversion, it would

be appropriate in scale and character within its context, alongside the scatter of other sporadic dwellings in the locality, some of which are of stone construction, and all of which have pitched slate roofs.

16. Unlike the fallback scheme, the proposal includes the provision of a new native hedgerow alongside the access track and to the east of the dwelling. As well as benefitting biodiversity, this feature would also help to assimilate the development into its surroundings when viewed from the road.
17. The extended garden would also be largely to the west of the building, so would be hidden from public view behind the house. It is contended that the garden area would cut across an ancient field boundary, but that feature is no longer in existence. The proposed garden area is enclosed by existing hedges and banks, so any domestic paraphernalia would be well-concealed, and would have little impact on the surrounding countryside. The enlarged area would also represent a betterment in design, as it would provide a reasonably proportioned garden for residents, unlike the fallback scheme where there would be little outdoor space around the building, resulting in it having a cramped and incongruous appearance in its otherwise open rural surroundings.
18. To conclude, whilst the proposed building would be more extensive, it would not be easily discerned as such from public viewpoints. Its increased height would result from the provision of a traditional slate roof, which would be more appropriate in its surroundings. It would be of a higher standard of design than the fallback scheme, and would use materials that are more characteristic of its rural context. Hedge planting could be secured, which would help to assimilate the building into its rural surroundings. Furthermore, the larger garden would not be harmful to the landscape. Consequently, its impact on the character and appearance of the area would be less harmful than the retention and conversion permitted under the fallback scheme.
19. Therefore, the proposal would accord with Policy 7 of the Local Plan, and with the advice in the CPOAN regarding replacement dwellings. There would also be no conflict with Policies 12 and 23 of the Local Plan and Policy 18 of the Neighbourhood Plan, which, taken together, seek to ensure high quality design and the protection of the natural environment.

Other Matters

20. Concerns have been raised in representations regarding the potential for flooding as a result of the surface water drainage proposals. However, there is no evidence from statutory consultees to indicate that a suitable scheme for drainage could not be achieved under the Building Regulations.

Conditions

21. In accordance with the legislation, I have imposed a condition limiting the period within which the development must commence. I have also included a condition specifying the relevant plans, as this provides certainty. The Council has submitted a schedule of suggested conditions to cover other matters, and the appellant has not contested any of these. Nevertheless, I have considered them against the advice in the Planning Practice Guidance. Whilst I have agreed that they meet the relevant tests, I have altered some of them, in the interests of clarity and precision, to better reflect the guidance.

22. To ensure that the dwelling has an acceptable impact on its rural surroundings, conditions securing hedge planting and appropriate external materials are reasonable and necessary. The fallback scheme would not benefit from permitted development rights under Part 1 of Schedule 2 of the GPDO. It would therefore be reasonable to impose a condition preventing the exercise of these rights, so that the proposed dwelling does not have a greater impact than the fallback scheme in the future. Conditions are also necessary to ensure that the development complies with development plan policies regarding energy and water efficiency. To ensure that biodiversity net gain is achieved it is also necessary to impose a condition to secure the installation of a bee brick, bat box, and bird box.

Conclusion

23. For the reasons given above, I conclude that the appeal should be allowed.

Nick Davies

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with drawing nos 23154/001 PL1 – Existing Floor Plan; 23154/002 PL1 - Existing Elevations; 23154/100 PL1 - Existing Site Plan; 23154/102 PL5 – Location and Block Plan; 23154/101 PL2 - Proposed Site Plan; 23154/010 PL2 – Proposed Floor Plan and Elevations; 23154/020 PL1 – Proposed Section.
- 3) No development above ground level shall take place until details / samples of the materials to be used in the construction of the external surfaces of the dwelling hereby permitted have been submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved details / samples.
- 4) Prior to the occupation of the dwelling hereby permitted, the new hedgerow shown on approved plan reference 23154/101 PL2 shall be planted, in accordance with the guidance for new hedgerows outlined within the submitted Preliminary Ecological Appraisal (prepared by Bright Environment and dated 6 July 2024). The hedge shall be permanently retained thereafter.
- 5) Prior to the occupation of the dwelling hereby permitted, a minimum of one bee brick, bat box and bird box shall be installed on/around the site, in accordance with the guidance outlined within section 5.5 of the submitted Preliminary Ecological Appraisal (prepared by Bright Environment and dated 6 July 2024). These features shall be permanently retained thereafter.
- 6) Prior to the occupation of the dwelling hereby permitted, the measures outlined within the submitted Energy Statement (and relevant accompanying documents), prepared by Energy Access Building Compliance Consultants

and dated 11 September 2024, shall be completed. The measures shall be permanently retained thereafter.

- 7) The dwelling hereby permitted shall not be occupied until the Building Regulations optional requirement of a water consumption rate of no more than 110 litres per person per day has been complied with.
- 8) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no development permitted by virtue of Part 1 of Schedule 2 to the Order shall be undertaken.

END OF SCHEDULE