Neutral Citation Number: [2019] EWHC 276 (Admin)

Case No: C0/3981/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2019

**Before** :

**NEIL CAMERON QC**
(Sitting as a Deputy High Court Judge)

- - - - - - - - - - - - - - -

**Between :**

**VISAO LIMITED** **Claimant**

**- and -**
**THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** **Defendant**

**-and-**

**CHILTERN DISTRICT COUNCIL**

**Interested Party**

- - - - - - - - - - - - - - - - - - - - -

**Anjoli Foster** (Licensed Access by **Consensus Planning Ltd**) for the **Claimant**
**Isabella Tafur** (instructed by **the Government Legal Department**) for the **Defendant**
The interested Party did not appear and was not represented

Hearing dates: 5th February 2019

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# APPROVED

**Judgment Approved by the court for handing down.**

**The Deputy Judge (Neil Cameron QC):**

## Introduction

1. This is an application made by the Claimant for an order pursuant to **section 288 of the Town and Country Planning Act 1990** ("the 1990 Act") to quash a decision made by letter dated 30th August 2018 of an inspector appointed by the Secretary of State for Housing, Communities and Local Government. By that decision, the inspector dismissed the Claimant's appeal against the decision by the Interested Party to refuse to grant planning permission to develop land at 274 and 274A Chartridge Lane, Chesham, Buckinghamshire HP5 2SG by extending two existing dwellings and constructing four additional dwellings with associated car ports, parking, landscaping and alterations to the existing vehicular access.

2. By an order dated 12th December 2018 HH Judge Jarman QC sitting as High Court Judge ordered that the case be listed as a 'rolled up hearing'.

3. The Claimant relies upon two grounds of claim:

   i) The Defendant's inspector failed to have regard to drawing ITL12517-SK-012 Revision A ("Drawing 12A") as the correct site access plan.

   ii) In the event that it is held that the Defendant's inspector did have regard to Drawing 12A, his reasoning was deficient in that he failed to provide clear and cogent reasons for departing from the views expressed by Buckinghamshire County Council as highway authority.

## The Background Facts

4. By an application received on 24th August 2017 the Claimant applied to the Interested Party for planning permission to develop land at 274 and 274A Chartridge Lane, Chesham, Buckinghamshire HP5 2SG ("the Site") by extending two existing dwellings and constructing four additional dwellings with associated car ports, parking, landscaping and alterations to the existing vehicular access ("the Planning Application").

5. By a decision notice dated 9th November 2017 the Interested Party refused to grant planning permission. The following 5 reasons for refusal were set out in the decision notice:

   1. The proposed development of six dwellings would require the use of an existing sub-standard private vehicular access drive (shared surface) to serve the development, with no clearly defined pedestrian link and no potential passing points of adequate width. It is considered that this would result in both potential manoeuvring and access issues for vehicles and conflict with pedestrians, cyclists and other users. As such the proposed development would fail to comply with Policy TR2 of The Chiltern District Local Plan Adopted 1 September 1997 (including alterations adopted 29 May 2001) Consolidated September 2007 & November 2011, Policy CS26 of the Core Strategy for Chiltern District - Adopted November 2011 and Paragraphs 32, 35 and 64 of the National Planning Policy Framework.

   2. By reason of the scale and siting of the proposed dwelling 6, it is considered that the property would appear overbearing and intrusive when viewed from the rear amenity space of

No.54 and would be harmful to the amenity by reason of harm to the outlook from the main habitable room windows located in the south-east elevation of No.54 The Warren which would result in harm to the amenity of the occupiers of that dwelling contrary to Policies GC3, H3 and the principles identified in H13 and H14 of The Chiltern District Local Plan Adopted 1 September 1997 (including alterations adopted 29 May 2001) Consolidated September 2007 & November 2011.

3. By reason of the siting of the area of parking along the north eastern part of the site and through the garden size proposed for Plot 3, the layout and design is not considered to be in keeping with the character and design of the surrounding properties and as such would not comply with Policies GC1 and H3 of the Chiltern District Local Plan Adopted 1 September 1997 (including alterations adopted 29 May 2001) Consolidated September 2007 & November 2011 and section 7 of the National Planning Policy Framework which seek high quality of design in new development.

4. By reason of the size and siting of the proposed rear amenity space for Plot 3, the proposed dwelling would not provide an appropriate level of private amenity space for the occupiers of the proposed dwelling which would be exacerbated by the small area being north-west facing. As such, the amenity space for Plot 3 would be contrary to Policies GC3 and H12 of The Chiltern District Local Plan Adopted 1 September 1997 (including alterations adopted 29 May 2001) Consolidated September 2007 & November 2011.

5. Whilst individual bin storage facilities are provided for each dwelling within each respective curtilage, there would be no adequate main bin collection area or facility which would be required due to the extended length of the access road and the response from the Waste Management Service that the bins would not be collected from within the site. Notwithstanding the above, the scheme proposed would not be able to make the provision of a bin storage collection facility due to the length and narrow width of the main access drive. This would lead to the need to place bins from six properties on the highways verge on refuse and recycling days providing a potential hazard and causing harm to the character of the street scene. The proposal would therefore be of poor design that would fail to improve the quality of the area and the way it functions contrary to the requirements of Paragraph 64 of the National Planning Policy Framework.

6. In December 2017 the Claimant appealed against the First Interested Party's decision to refuse to grant planning permission. The appeal was determined under the written representations procedure.

7. In support of its appeal the Claimant submitted an Appeal Statement with 46 Appendices. In that statement the Claimant:

   i) Set out a chronology of the submission of plans, drawings and other documents submitted in support of the Planning Application. That chronology included:

      a) The submission, on 7th September 2017 of a Technical Note prepared by i-Transport dated 6th September 2017. That Technical Note included drawing ITL12517-SK-010A ("Drawing 10A") which showed an improvement to the access road connecting the main part of the Site to Chartridge Lane. That drawing showed the access road as being 4.10m wide at the point that it entered the main part of the Site (the north-western end) and 4.8m wide at its south-eastern end. The central part of the access road is shown as being 3.7m wide consisting of a carriageway of 2.75m in width and a pedestrian refuge of 0.95m in width. Drawing

10A is marked 'For Information'. The Technical Note, including Drawing 10A, was included as Appendix 25 to the Appeal Statement.

b) The submission on 17th October 2017 of a revised access drawing (ITL12517-SK-010E ("Drawing 10E"). Drawing 10E shows an improvement to the access road connecting the Site to Chartridge Lane. That drawing showed the access road as being 4.10m wide at the point that it entered the Site (the north western end) and 4.8m wide at its south eastern end. The central part of the access road is shown as being 3.7m wide consisting of a carriageway of 2.75m in width and a pedestrian refuge of 0.95m in width. Drawing 10E is marked 'For Information'. Drawing 10E was not included with the Appeal Statement.

c) The submission on 2nd November 2017 of a revised access drawing (ITL12517-SK-012A ("Drawing 12A"). Drawing 12A shows an improvement to the access road connecting the Site to Chartridge Lane. That drawing showed the access road as being 4.3m wide at the point that it entered the main part of the Site (the north western end) and 4.8m wide at its south eastern end. The central part of the access road is shown as being 4.1m wide. Drawing 12A is marked 'For Information'. An email was sent by i-Transport to the Interested Party and Buckinghamshire County Council dated 2nd November 2017. Drawing 12A was attached to that email. The email was included as Appendix 29 to the Appeal Statement. Drawing 12A was included as Appendix 17 to the Appeal Statement.

ii) At paragraph 7.5 of the Appeal Statement it is stated that "….. in any case (sic) the access road surface is at no point narrower than 3.7m which is sufficient for a refuse truck to pass a wheelchair safely. (note this is the road surface, not the overall width, which is of course (sic) wider allowing for verges)."

iii) Paragraph 7.6 of the Appeal Statement states: "Whilst it is noted CDC and BCC did not take account of this amended plan (Appendix 17) suggesting instead "„, this was not formally submitted to the Local Planning Authority and therefore cannot be taken into consideration" we would request the Planning Inspector reach a different conclusion (see reason for refusal '5' below for a greater exploration of the circumstances relating to this issue)."

iv) Paragraph 7.7 of the Appeal Statement states: "In Appendix 25 the focus is on the width of the road surface, but there are clearly green verges either side. In the case of Appendix 17 reference is only made to the overall width, ie; road surface PLUS green verges, however the boundaries of the application site are not altered, neither is the proposed clear width that is to be made available to vehicles entering and existing the site, it is simply stated in a different manner."

v) Paragraph 7.10 of the Appeal Statement states: "The access road has been designed in summary to provide;

- The first 10 metres from Chartridge lane be 4.8m wide and straight and wide enough for a refuse truck to pass a car, and provides excellent forward visibility.

- This then narrows to 4.3m for 19 metres wide enough for 2 cars to pass.
- This then narrows to 4.1m for 39 metres wide enough for a refuse truck to pass pedestrians, cyclists and wheelchairs.
- This then widens to 4.3m for 8 metres wide enough for 2 cars to pass.
- This then widens to 4.8m to enable a refuse truck to pass a car at this far end of the access road on the bend.
- This then widens to 6.0 metres in front of the parking spaces."

vi) At paragraph 7.40 of the Appeal Statement attention is drawn to Appendix 20, which is a letter dated 10th November 2017, sent by Buckinghamshire County Council to the Interested Party. In that letter an officer working in the County Council's Highway Development Management section stated:

"For clarity, the applicant has submitted an amended plan to the Highway Authority for comment in an email dated the 2nd November 2017, which increased the width of the access point to at least 4.1m for the entirety of the access road, with sections of the site measuring 4.3m and 4.8m. Whilst not ideal, on balance, this arrangement would have overcome the concerns of the Highway Authority. However, it is my understanding that this was not formally submitted to the Local Planning Authority and therefore cannot be taken into consideration."

vii) At paragraph 9.7 of the Appeal Statement, the Claimant stated that the Interested Party's planning officer had chosen not to accept Drawing 12A, and requested that the inspector determine the appeal on the basis of the amendments shown in that drawing. In paragraph 9.7 of the Appeal Statement the Claimant stated that residents had been consulted on Drawing 10A and that "… these reflected identical changes in the highway as the later plans submitted 02.11.17, (Appendix 17) and also reflected the same overall width of access as illustrated on Appendix 17 (see '7.7' above)."

viii) At paragraph 9.12 of the Appeal Statement the Claimant requested that "… the appeal be allowed subject to appropriate conditions and the acceptance of amended plans at Appendix 17 and 42." Appendix 42 was a revised site location plan.

ix) Appendix 39 to the Appeal Statement is entitled "Final list of all plans, drawings and documents upon which the LPA made their decision and the appellant would wish the appeal to be determined on". The list includes Drawing 12A and i-Transport's Technical Note dated 6th September 2017.

8. The Interested Party submitted a Statement of Case. In that Statement of Case the Interested Party commented on the Claimant's grounds of appeal. At paragraph 3.2 of their Statement of Case the Interested Party stated that the case officer had measured the access drive and that the maximum width possible was around 4.15m. The Interested Party stated that the width of the drive was "…not considered to be sufficient to allow for the safe travel of two passing vehicles, pedestrians and cyclists. In particular

concern is raised as to the use of the access by larger vehicles as the driveway would not be wide enough to accommodate two passing vehicles."

9. In July 2018 the Claimant submitted a response to the Interested Party's Statement of Case ("The Claimant's Final Comments"). In that document:

   i) The Claimant made reference to the fact that in January 2018 a further application had been made for planning permission to develop the Site ("the January 2018 Planning Application"), and had been refused by a decision notice dated 13th March 2018. That access drawing submitted in support of that application was Drawing 12A. Buckinghamshire County Council did not object to that application on highway grounds.

   ii) At paragraph 1.21 of the Claimant's Final Comments the Claimant referred to a planning condition suggested by the First Interested Party which included a list of plans to be approved. The Claimant requested that the reference to Drawing ITL 12517-SK-010 be replaced with a reference to Drawing 12A.

10. On 30th July 2018 the Planning Inspectorate wrote to the Interested Party in an email asking them to submit a list of plans on which they made their decision on the Planning Application, and asked them to explain the differences between the Planning Application and the January 2018 Planning Application. The Interested Party responded to the Planning Inspectorate in an email dated 6th August 2018. In that email the Interested Party stated that the Planning Application had been determined on the basis of Drawing 10E.

    That email correspondence between the Planning Inspectorate and the Interested Party was not sent to the Claimant. The Claimant only became aware of that correspondence after the decision letter had been issued. Following the issue of the decision letter the Claimant made a request to be provided with the correspondence. In October 2018 copies of the correspondence were provided to the Claimant. In a letter dated 17th October 2018 the Planning Inspectorate stated that they considered that the correspondence should have been provided to the Claimant at the time that it was sent and received, and apologised.

11. The inspector's decision was set out in a decision letter dated 30th August 2018.

12. The inspector considered procedural matters at paragraphs 3 to 11 of the decision letter. Paragraphs 5 to 9 state:

> "5. From the evidence before me, there appears to have been some confusion over which plans had been taken into account when the Council determined the application. Having sought clarification from the Council, the plans which the Council took into account included a revised access arrangement which included alterations to the existing service road. The Appellant has also submitted these drawings with the appeal submission."
>
> 6. However, the red-line of the planning application does not include the land where the alterations to the highway would be.

> An amended red-line plan has been submitted with the appeal submission to include this extra land."
>
> 7. There has also been additional plans submitted relating to the provision of a bin storage area within the site adjacent to the turning head and revised swept path analyses relating to refuse vehicles and fire tenders.
>
> 8. In deciding whether to accept these plans, I am mindful of the principles of the Wheatcroft case (Bernard Wheatcroft Ltd. v Secretary of State for the Environment and Another 1982).
>
> 9. In this case, the documents and plans which the Council determined the application on included the revised access arrangements and representations received on the appeal also make reference to this detail. Taking this into account, I consider that there would be no prejudice to any party by accepting these plans at the appeal stage. I have therefore determined the appeal on the basis of the revised plans and the Council's description of the development."

13. 14At paragraph 12 of the decision letter, the inspector identified the main issues:

> "12. The main issues are:"
>
> (i) whether the development would provide a safe and suitable access;
>
> (ii) the effect of the development on the living conditions of the occupiers of 54 The Warren with particular regard to outlook;
>
> (iii) whether the development provides a suitable level of amenity space for the future occupiers of plot three;
>
> (iv) the effect of the development on the character and appearance of the area; and
>
> (v) whether the development makes adequate provision for the collection of refuse bins."

14. The inspector considered main issue (i) at paragraphs 13 to 21 of the decision letter:

> "13. The access to the main part of the appeal site is located between 272 and 276 Chartridge Lane. The access driveway is in the region of 67 metres in length and connects to a service road to Chartridge Lane which serves Nos 264 to 276. The driveway varies in width but is around 4.1 metres at its narrowest point, including the grass verges.

14. The proposed development includes alterations to the service road, and would include a new access onto the main carriageway of Chartridge Road. The first part of the new road would be at least 4.8 metres in width and would extend at least 10 metres rear of the main carriageway. The access driveway would have a width of around 4.8 metres before narrowing down to around 4.1 metres. It would then have two narrow sections where the vehicle element of the driveway would be around 2.75 metres[4]. This reduced width would be for at least half the length of the driveway. Along this section, there would also be a 0.95 metre wide area which would be a different surface material and allow for a pedestrian refuge along the driveway. The driveway, including such refuges, would also be wide enough for emergency vehicles to traverse. I also acknowledge that there would be good forward visibility.

4 From drawing ITL12517-SK-010 revision E

15. The 2018 Framework, at paragraph 108, sets out that in assessing specific applications for development it should be ensured that a safe and suitable access to the site can be achieved for all users.

16. From 'Manual for Streets' (MfS), the minimum width for two cars to be able to pass would be 4.1 metres, with the minimum width for a lorry and a car being 4.8 metres, and for two lorries to pass the width should be 5.5 metres. It is clear that for a large proportion of the driveway it would not be possible for two vehicles to pass. For vehicles larger than a standard sized car, vehicles would be forced to wait (or reverse back to) either the public highway (on the service road) or the bend where the access driveway meets the main part of the appeal site.

17. Whilst there would be a low probability of conflict between vehicles, any vehicle which would need to wait on the service road would invariably cause a highway danger. To that extent, in the absence of a sufficient width of the driveway for a large part of its length, the intensification of the use of the access by increasing the number of dwellings from two to six would not be in the best interests of highway safety.

18. Turning to pedestrian access, the Appellant has indicated that a shared surface arrangement would be appropriate and has pointed to MfS where it is indicated that this can work where the volume of motor traffic is below 100 vehicles per hour. However, MfS also indicates that shared surface streets are likely to work in short lengths which (to my mind) is not the case in respect of the appeal proposal.

19. The Appellant has suggested that the development would form a cul-de-sac. Whilst the main part of the site could

> be considered to be a cul-de-sac in the manner which MfS is intending, to my mind, the nature of the narrow driveway is not what it is seeking to achieve. Furthermore, it is recognised that shared surfaces can cause problems for some disabled people.
>
> 20. Whilst I acknowledge that the existing access has been used as a shared surface access for many years, the development would result in an unacceptable intensification of the use of a sub-standard access.
>
> 21. Taking all of these matters into account I consider that, on the basis of the evidence before me, the proposal would not provide a safe and suitable access and would be contrary to Policy CS26 of the Local Development Framework."

15. The Inspector's findings on the other main issues were as follows:

i) Living Conditions of the future occupiers of Plot 3 (paragraph 26 of the decision letter)

> For the above reasons, the proposal would not provide a good standard of amenity space for the future occupants of plot three, and therefore an unacceptable standard of living, contrary to Policies GC3 and H12 of the LP which amongst other matters seek to achieve good standards of amenity for the future occupiers of the development.

ii) Living Conditions – 54 The Warren (paragraph 35 of the decision letter)

> For the above reasons, plot six of the proposed development would have an adverse impact on the outlook from the principal kitchen window of 54 The Warren to the detriment of the living conditions of its occupier's contrary to Policies GC3 and H3 of the LP which amongst other matters seek protect the amenities enjoyed by the occupants of existing adjoining and neighbouring properties.

iii) Character and Appearance (paragraph 40 of the decision letter)

> For the above reasons the development would harm the character and appearance of the area owing to the limited size of the rear garden area for plot three contrary to Policies GC1 and H3 of the LP which amongst other matters seek to ensure that new development relates well to the characteristics of the site and should be sited to create attractive groupings and spaces between buildings and is compatible with the character of locality of the application site. It would also be at odds with the design aims of the 2018 Framework.

iv) Refuse (paragraph 44 of the decision letter)

> For the above reasons, the proposed development would provide an acceptable means for the storage and collection of refuse and would accord with the overall design aims of the 2018 Framework in this respect.

v) Planning Balance (paragraphs 45 to 50 of the decision letter)

> 45. The Appellant has indicated that the Council has failed to evidence a sustainable 5 year housing land supply. However, little evidence of this has been provided to me and the Council have not made any reference to this either in their Officers report or appeal statement.
>
> 46. Reference is also made to the evidence base for the Council's new Local Plan and the need to identify further sites to meet the housing requirements up to 2036, including potential releases

> of land within the Green Belt and relying upon a neighbouring Council to provide housing to meet the needs of the area. However, this does not in itself indicate that there is a current shortfall in the five year supply of housing. Therefore, from the limited evidence before me, it is unclear whether the Council does have a five year housing land supply.
>
> 47. Notwithstanding that, the 2018 Framework indicates that planning decisions should apply a presumption of sustainable development. For decision taking, where Development Plan policies which are the most important for determining the application are out of date6, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the 2018 Framework taken as a whole.
>
> 48. In this case, I have found that the proposal would not provide a safe and suitable access, would harm the amenity of the occupiers of 54 The Warren, would not provide a suitable amenity space for the future occupiers of plot three and would harm the character and appearance of the area. These factors weigh heavily against allowing the proposed development.
>
> 49. Notwithstanding that, the development would give rise to some minor social benefits in that it would provide much needed additional housing. The development would also bring some minor economic benefits through the construction process. These matters are in favour of the proposed development.
>
> 50. However, the provision of four additional dwellings would be unlikely to have any significant effect in reducing the deficit to the housing land supply for the Chiltern District should there be such a deficit. Against this background, the harm identified significantly and demonstrably outweighs the minor benefits when assessed against the policies in the 2018 Framework when taken as a whole. The proposal cannot therefore be considered to be sustainable development.

16. After this claim had been made the inspector provided a witness statement dated 8th January 2019. In that witness statement the inspector states (inter alia):

    i) He considered Drawings 10E and 12A.

    ii) As the site layout and context plan and the transport statement were based on Drawing 10E he had to consider that plan.

    iii) Paragraphs 16 to 20 of the decision letter relate to Drawings 10E and 12A.

## The Legal Framework

17. Section 288(1) of the Town and Country Planning Act 1990 ("TCPA 1990") provides:

> "288.— Proceedings for questioning the validity of other orders, decisions and directions."
>
> (1) If any person—
>
> (b) is aggrieved by any action on the part of the Secretary of State or the Welsh Ministers to which this section applies and wishes to question the validity of that action on the grounds—
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,

> he may make an application to the High Court under this section."

18. The powers of the court when hearing a section 288 application are identified at section 288(5):

> "(5) On any application under this section the High Court—"
>
> (a) …….
>
> (b) if satisfied that any such order or action is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

19. Section 288(4A) provides:

> (4A) An application under this section may not be made without the leave of the High Court.

20. The principles to be applied when considering an application made under section 288 of the Town and Country Planning Act 1990 are well established and were summarised by Lindblom J (as he then was) in ***Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government*** *[2014] EWHC 754 (Admin)* at paragraph 19:

> "19 The relevant law is not controversial. It comprises seven familiar principles:
>
> (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28)."
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks*

*District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

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

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

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

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

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must

> always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

21. The principles to be applied when considering a contention that a decision maker has failed to take into account a material consideration were set out by Glidewell LJ in ***Bolton MBC v Secretary of State for the Environment*** (1991) 61 P.& C.R. 343 at pages 352 to 353.

22. The law relating to challenges on the grounds that the reasons given were deficient was summarised by Lord Brown of Eaton-under-Heywood in ***South Bucks District Council v. Porter (No.2)*** [2004] 1 WLR 1953 at paragraph 36:

> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

23. In ***Shadwell Estates Ltd v. Breckland District Council*** [2013] EWHC 12 (Admin) Beatson J considered the approach to be taken when a decision maker considers the views of statutory consultees, and stated at paragraph 72:

> 72 Secondly, a decision-maker should give the views of statutory consultees, in this context the "appropriate nature conservation bodies", "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons": see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49] per Sullivan J, and *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) at [112] per Owen J. See also *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408per Dyson LJ at [54].

24. The approach to be taken in exercising the discretion not to quash despite some error in a decision letter is that set out in ***Simplex G.E. Holdings v. Secretary of State for the Environment*** (1989) 57 P & CR 306 (at pages 327 and 329). That test was re-stated by

Sullivan LJ in ***R (on the application of Majed) v. Camden LBC*** [2009] EWCA Civ 1029 at paragraph 31:

31 This leads me to issue (5). Mr Harwood referred to the well-known test in *Simplex GE (Holdings) v The Secretary of State for the Environment* (1989) 57 P&CR 306 that, if there has been an error in a decision letter, then the court has to be satisfied, if it is not to quash the decision, that the same decision would, not might, be reached by the decision taker notwithstanding the error.

25. In ***R v. Westminster City Council ex parte Ermakov*** [1996] 2 All ER 302 at pages 315-316 Hutchison LJ considered the approach to be taken when considering a witness statement in which the decision maker seeks to explain, after the decision has been , the reasons for the decision:

(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence—as in this case—which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.

(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.

(4) While it is true, as Schiemann J recognised in *Ex p Shield*, that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same, I agree with Rose J's comments in *Ex p Carpenter* that, in cases where the

reasons stated in the decision letter have been shown to be manifestly flawed, it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings. Accordingly, efforts to secure a discretionary refusal of relief by introducing evidence of true reasons significantly different from the stated reasons are unlikely to succeed.

## Ground 1

The Claimant's Submissions

26. Ms Foster on behalf of the Claimant sets out the three 'steps' to her argument:

    i) The Claimant made it clear to the inspector that Drawing 12A was the correct site access plan.

    ii) The decision letter shows that the inspector only had regard to Drawing 10E and did not have regard to Drawing 12A.

    iii) The court cannot be satisfied that the same decision would have been reached notwithstanding the error.

27. Ms Foster submits that, throughout the Appeal Statement and in the Claimant's Final Comments it was made plain that the Claimant requested that the appeal be determined on the basis of Drawing 12A. In support of that submission she made points under six headings:

    i) Drawing 12A was attached to the Appeal Statement, whereas Drawing 10E was not.

    ii) The list of drawings at Appendix 39 to the Appeal Statement included Drawing 12A, and did not list Drawing 10E.

    iii) The chronology showed that Drawing 12A superseded Drawing 10E.

    iv) In the Appeal Statement, the Claimant argued that the Interested Party was mistaken in not taking into account Drawing 12A.

    v) At paragraph 7.10 of the Appeal Statement the Claimant explained the processed road access measurements by reference to the dimensions shown on Drawing 12A.

    vi) The Claimant relied upon the highway authority response based on Drawing 12A.

28. Ms Foster submits that it is clear from the decision letter that the inspector only had regard to Drawing 10E as:

    i) When deciding to determine the appeal on different plans from those submitted with the Planning Application, the inspector stated (at paragraph 9 of the decision letter) that the documents and plans on which the Council determined the application included the revised access arrangements. The plans on which the Council determined the Planning Application did not include Drawing 12A.

ii) The features of the access road referred to in paragraph 14 of the decision letter, in particular a 2.75m carriageway appears on Drawing 10E not Drawing 12A. Footnote 4 to paragraph 14 of the decision letter refers to Drawing 10E.

29. Ms Foster submits the court cannot be satisfied that the same decision would have been reached notwithstanding the error. Ms Foster relies on a number of submissions on this issue, in particular that, on the basis of Drawing 12A, the highway authority had no objection. She further submits that a different finding on the access issue would have affected the balancing exercise which the inspector carried out at paragraph 50 of the decision letter

The Defendant's Submissions

30. Ms Tafur, who appears for the Defendant, submits that

i) The inspector took into account the proposed access arrangements in Drawings 10E and 12A.

ii) The inspector did not err by taking into account Drawing 10E, as that was one of the drawings upon which the Interested Party determined the Planning Application and as the access arrangements shown on Drawing 10E were incorporated into other drawings which the Claimant invited the inspector to take into account.

iii) The reasons the inspector relied upon when concluding that the site access arrangements were unacceptable applied equally to Drawings 10E and 12A, and therefore, if the inspector had exclusively had regard to Drawing 12A his decision would inevitably have been the same.

iv) If it is held that the inspector did not have regard to Drawing 12A, given the other reasons for dismissing the appeal the inspector's decision would inevitably have been the same.

31. Ms Tafur submits that the list of plans and documents relied upon by the Claimant (at Appendix 39 of the Appeal Statement) includes the September 2017 i-Transport Technical Note, which in turn refers to Drawing 10A which shows the access road with similar dimensions to those shown on Drawing 10E. Ms Tafur contrasts the September 2017 Technical Note with the Transport Note submitted in support of the January 2018 Planning Application. The January 2018 Transport Note refers to a 4.1m wide carriageway.

32. Ms Tafur submitted that there was little or no difference in available road space between Drawings 10E and 12A. Drawing 10E shows a carriageway of 2.75m and a pedestrian refuge of 0.95m giving a total of 3.7m. Drawing 12A only shows 4.1m width by including the grass verge. Ms Tafur seeks to make good that submission by referring to paragraph 7.7 of the Claimant's Appeal Statement, and to paragraph 7.5 where reference is made to the access road surface being "… at no point narrower than 3.7m…". Ms Tafur also relies on paragraph 9.7 of the Claimant's Appeal Statement where it is said that Drawings 10A and 12A reflect the same overall width of the access road.

33. Ms Tafur made the following submissions in relation to the decision letter:

    i) The reference, at paragraph 5 of the decision letter, to drawings submitted by the Appellant was to the drawings listed in Appendix 39 to the Appeal Statement. That list includes Drawing 12A.

    ii) The inspector's witness statement is confirmatory and not an 'after the event' justification.

    iii) At the second sentence of paragraph 16, when the inspector refers to it not being possible for two vehicles to pass, he must have been referring to cars, as he deals with larger vehicles in the third sentence. The concern relating to larger vehicles applies equally to the proposals shown on Drawings 10E and 12A.

    iv) The inspector's conclusion at paragraph 18 of the decision letter, that the access road cannot be considered to be a short length for the purposes of applying the guidance in paragraph 7.2.14 of Manual for Streets, would apply equally to Drawings 10E and 12A.

34. Ms Tafur submits that, if it is held that the inspector erred by not taking into account Drawing 12A, the decision would inevitably have been the same, as the inspector's conclusions on the access road apply equally to Drawings 10E and 12A, and that even if reason for refusal one had been overcome the other matters considered in the overall balancing exercising would have indicated that the Planning Application should be refused.

Conclusion

35. For the purposes of reaching a conclusion on Ground 1 I adopt Ms Foster's three step approach.

*Step 1 – Did the Appellant request that the Planning Application be determined on the basis of Drawing 12A?*

36. In my judgment it is plain from the Appeal Statement that the Claimant requested that the appeal be determined on the basis of Drawing 12A; that is the drawing referred to in Appendix 39, being the list of drawings upon which the Appellant requested that the appeal be determined. The fact that the list at Appendix 39 also included the September 2017 Technical Note which in turn included Drawing 10A does not indicate that the Appellant sought to rely on Drawing 10A. In setting out the chronology in the body of the Appeal Statement the Claimant made clear that Drawing 12A superseded the earlier drawings including 10A and 10E.

37. If there had been any doubt about whether the Claimant requested that the appeal be determined on the basis of Drawing 12A, it is resolved by paragraph 1.21 of the Claimant's Final Comments, where the Claimant requests that any condition attached to a grant of planning permission which lists the approved plans should include Drawing 12A and not Drawing 10.

38. In addition, in the Claimant's Final Comments, at paragraph 1.7, it was said that the January 2018 application "… proposes the same access road as this Appeal" and

express reference was then made to the January 2018 Transport Note, which was appended. The January 2018 Transport Note refers to an access road with a 4.1m carriageway width; that description is consistent with Drawing 12A.

39. In my judgment the documents submitted by the Appellant to the inspector made plain that it requested that the appeal be determined on the basis of Drawing 12A.

*Does the decision letter show that the inspector only had regard to Drawing 10E and did not have regard to Drawing 12A?*

40. The inspector sought and obtained clarification from the Interested Party as to the drawings on which they based their decision on the Planning Application. They based their decision on Drawing 10E. When in paragraph 5 of the decision letter the inspector says that the Appellant had submitted with the appeal submission the drawings on which the Interested Party determined the application he is not correct, Drawing 10E was not submitted with the appeal submission.

41. At paragraph 9 of the decision letter the inspector states that the drawings on which the Interested Party determined the application included the revised access arrangements, and that as a result there would be no prejudice to any party by accepting 'these' plans. On an objective reading of the decision letter, the inspector, in paragraph 9 is indicating that the plans on which he has determined the appeal are plans upon which the Interested Party determined the Planning Application. Those plans include Drawing 10E and do not include Drawing 12A.

42. At paragraph 14 of the decision letter the inspector describes the proposed access road, including its dimensions. He states that

> "The access driveway would have a width of around 4.8 metres before narrowing down to around 4.1 metres. It would then have two narrow sections where the vehicle element of the driveway would be around 2.75 metres[4]. This reduced width would be for at least half the length of the driveway. Along this section, there would also be a 0.95 metre wide area which would be a different surface material and allow for a pedestrian refuge along the driveway."

43. Footnote 4 refers to Drawing 10E, it does not refer to Drawing 12A. The description of the access road in paragraph 14 of the decision letter is consistent with Drawing 10E. Drawing 10E shows that the south-eastern end of the access road would be 4.8m wide narrowing to 4.1m, with the carriageway then reducing to 2.75m. It is clear that the description at paragraph 14 of the decision letter is not referring to Drawing 12A as that

drawing shows the width at the south eastern end of the drive narrowing from 4.8m to 4.3m and then to 4.1m, and does not include a section of carriageway which is 2.75m wide.

44. In paragraph 16 of the decision letter the inspector assesses the proposals against the guidance given in Manual for Streets. If Ms Tafur is right in submitting that, when in the second sentence the inspector states it is clear for a large proportion of the driveway it would not be possible for two vehicles to pass, the inspector is referring to cars only

and not to all vehicles, the inspector's statement is an indication that he was considering Drawing 10E. If the access road was 4.1m wide as shown on Drawing 12A two cars would be able to pass along the entirety of its length and it would not be right to say that for a large proportion they could not do so. The inspector's statement is consistent with Drawing 10E which shows part of the access road having a carriageway width of 4.1m with a narrower carriageway width in the central section of the access road.

45. In my judgment it is clear that from an objective reading of the decision letter that the inspector based his decision in relation to access, on the proposals shown on Drawing 10E.

46. In his witness statement the inspector says that when determining the appeal he considered Drawings 10E and 12A, and that the concerns he expressed in paragraphs 16 and 17 of the decision letter applied to the arrangements shown on both those drawings.

47. The principles to be applied when a decision maker seeks to supplement, by a witness statement or affidavit, reasons given at the time of the decision are set out in ***Ermakov***. In that case Hutchison LJ expressed the view that the court should be cautious about accepting such evidence, and gave examples of where such evidence might be admitted, namely where an error has been made in transcription or expression, or a word omitted, or where the language used is lacking in clarity.

The circumstances of this case are different to those considered in ***Ermakov*** in that the inspector's witness statement does not go solely to reasons but to the matters which he took into account when making his determination.

48. The purpose of a decision letter determining an appeal under section 78 of the Town and Country Planning Act 1990 is to inform the parties why they have won or lost and enable them to assess whether they have grounds for challenging any adverse decision. To allow a decision maker to supplement a decision letter by providing a statement setting out the matters taken into account would, save in exceptional circumstances, undermine the purpose of the decision letter. Further the Court in determining applications under section 288 should be cautious before entering into disputed issues of fact the proper resolution of which would require oral evidence.

49. In my judgment the decision letter itself, read in a fair, reasonably flexible and objective way, leads the reader to conclude that the inspector did not have regard to Drawing 12A. Given that the decision letter is a public document on which the parties and others were entitled to rely, I base my analysis on my reading of the decision letter in preference to the statements made in the inspector's witness statement.

*Can the Court be satisfied that the same decision would have been reached notwithstanding the error?*

50. The issue to be determined is whether the Court is satisfied that the same decision would have been reached if the inspector had determined the appeal on the basis of Drawing 12A.

51. The officers of the highway authority considered Drawing 12A, and informed the Interested Party that the arrangements shown in that drawing would have overcome their concerns.

    That view expressed on behalf of the highway authority is a clear indication that the arrangements show in Drawing 12A were considered to be materially different to those shown in Drawing 10E, and that those differences could lead to a different conclusion.

52. The inspector found against the Claimant on main issues (i), (ii), (iii) and (iv). Ms Tafur argues that even if the inspector had found for the Claimant on main issue (i), he would have reached the same decision on the appeal given his findings on main issues (ii), (iii) and (iv).

53. In making his decision the inspector applied the presumption in favour of sustainable development as set out at paragraph 11(d)(ii) of the National Planning Policy Framework, known as the 'tilted balance'.

54. If the inspector had considered the access proposals shown on Drawing 12A he may have found in favour of the Claimant on main issue (i). If the inspector had found for the Claimant on main issue (i) the adverse impacts to weigh in the overall balance would have been different, and it is not possible to say with that change in position that the same decision would have been reached notwithstanding the error.

55. In my judgment the inspector fell into error by failing

    i) To consider the Claimant's request that the appeal be determined on the basis of the access arrangements shown in Drawing 12A; or

    ii) By failing to take account of a material consideration, namely Drawing 12A, in assessing whether the proposed access arrangements were acceptable.

56. For the reasons I have given, the Claimant succeeds on ground 1.

**Ground 2**

The Claimant's Submissions

57. Ms Foster submits that if the inspector did take Drawing 12A into account, he gave no or inadequate reasons as to

    i) Why the access proposals shown in Drawing 12A were unacceptable; and

    ii) Why he disagreed with the views of the highway authority.

58. Ms Foster submits that if, as the Defendant argues, the inspector's reasoning in paragraphs 13 to 21 of the decision letter applies to Drawings 10E and 12A, it is inadequate in relation to Drawing 12A as the inspector does not explain why he states that it would not be possible for two vehicles to pass for a large proportion of the driveway.

59. Ms Foster submits that as the highway authority was consulted on the Planning Application pursuant to the provisions of paragraph (m) of schedule 4 to the Town and

Country Planning (Development Management Procedure) (England) Order 2015 they are a statutory consultee and that cogent and compelling reasons are required if their views are to be departed from.

60. Ms Foster submits that the Claimant has been substantially prejudiced by the failure to give adequate reasons, as the Claimant intends to and is pursuing a further application/s to develop the Site and seeks clarity as to whether the access road proposals shown on Drawing 12A are considered to be acceptable.

The Defendant's Submissions

61. Ms Tafur submits that it is plain from the decision letter why the inspector considered the access proposals shown on Drawing 12A to be unacceptable and why he disagreed with the highway authority on that issue. She further submits that the Claimant has suffered no substantial prejudice.

Conclusions

62. This ground is founded on the premise that it is held that the inspector did have regard to Drawing 12A. In upholding Ground 1 I have held that the inspector failed to have regard to Drawing 12A. In those circumstances I give only brief consideration to this ground.

63. Decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. The reasoning must not give rise to substantial doubt as to whether the decision maker erred in law. A reasons challenge will only succeed if the person aggrieved has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision (***South Bucks DC v. Porter (No.2)*** [2004] 1 WLR 1953 at paragraph 36).

64. In their letter dated 10th November 2017, which was included as Appendix 20 to the Claimant's Appeal Statement, the highway authority stated that 'on balance' the arrangements shown in Drawing 12A would have overcome their concerns.

65. The highway authority were consulted on the Planning Application in compliance with the requirements imposed by the Town and Country Planning (Development Management Procedure) (England) Order 2015. The view of the highway authority on the proposed access arrangements were highly material. In my judgement the view of the highway authority as expressed in this case falls into the category referred to by Beatson J at paragraph 72 in ***Shadwell Estates***, and by Lang J in ***East Meon Forge and Cricket Ground Protection Association) v. East Hampshire DC and others*** [2014] EWHC 3543 (Admin) (at paragraph 108), and that departure from that view would require cogent and compelling reasons.

66. In the decision letter the inspector makes no express reference to the view expressed by the highway authority. Further, even if, contrary to my findings, a reader of paragraphs 16 to 21 of the decision letter would understand the inspector's analysis to refer to Drawings 10E and 12A, there is no explanation as to why he disagrees with the highway authority's views, and certainly no cogent and compelling reasons.

67. The inspector's reasoning does not enable the Claimant to assess its prospects of obtaining some alternative planning permission. The Claimant is faced with having to make a decision based upon a clearly expressed view from the highway authority that the Drawing 12A proposal is, on balance, acceptable and does not give rise to an highway objection, and the view of an inspector that (on the assumption that Drawing 12A was considered by him) the same proposal is unacceptable on highway grounds, with no explanation as to why he disagreed with the view of the highway authority.

68. In my judgment, given the lack of an explanation for the inspector's disagreement with the highway authority's view, the Claimant has suffered genuine and substantial prejudice as a result of the lack of or deficient reasoning, as it does not know why an access proposal considered acceptable by the highway authority was considered unacceptable by the inspector, and therefore cannot take any action to address the reasons on which the inspector disagreed with the highway authority.

69. For those reasons ground 2 succeeds.

## Conclusion

70. For the reasons I have given, I grant permission to proceed with the application for judicial review on both grounds, I allow the application and quash the Secretary of State's decision.