Neutral Citation Number: [2020] EWHC 24 (Admin)

Case No: CO/1708/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2020

Before :

UPPER TRIBUNAL JUDGE GRUBB
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

R (on the application of SCOTT BAILEY) **Claimant**

-and-

ST ALBANS CITY AND DISTRICT COUNCIL **Defendant**

-and-

DAVID EVANS **Interested Party**

- -
- -

James Neill (instructed by **Solomon Taylor Shaw**) for the **Claimant**
Andrew Parkinson (instructed by **the Solicitor to St Albans City and District Council**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 21 November 2019

- -

Approved Judgment

UT Judge Grubb:

INTRODUCTION

1. The Claimant seeks to quash a grant of planning permission by the Defendant dated 8 March 2019 for the creation of a detached dwelling following demolition of existing garage and outbuildings at 3, Hamilton Road, St Albans, Hertfordshire ("the development"). The Claimant owns and lives at the adjacent property at 5, Hamilton Road, St Albans. The Interested Party is the owner of 3, Hamilton Road, St Albans, who made the successful application for planning permission which the Claimant now seeks to quash.

2. The development is, in effect, an "infill" between the properties of the Claimant and Interested Party in Hamilton Road to create a new property at 3A, Hamilton Road.

3. Planning permission was granted by the Council's Planning Officer pursuant to delegated powers on 8 March 2019 on the basis recommended in the Officer's Report ("OR") dated 6 March 2019.

4. Permission to bring these proceedings was initially refused on the papers by Neil Cameron QC (sitting as a Deputy High Court Judge) on 28 May 2019. However, following an oral renewal hearing on 19 June 2019, Lane J granted permission on three of the original grounds (Grounds 1, 2 and 6).

5. Subsequently, the Claimant sought permission to add an additional ground (Ground 2A) in an application filed on 10 September 2019. Before me, Mr Parkinson who represented the Defendant, raised no objection to the amendment of the grounds to include Ground 2A and I granted permission to amend the grounds to add it. For convenience, I will retain the original numbering of the grounds as set out in the Claimant's 'Statement of Facts and Grounds'.

THE GROUNDS

6. There are, therefore, four grounds of challenge (Grounds 1, 2, 2A and 6) which may be summarised as follows.

7. Grounds 1, 2 and 2A relate to the so–called 'terracing effect' that might result from the development. Ground 6 relates to the absence of a condition relating to the parking provision as part of the development.

8. *Ground 1* contends that the Defendant failed to take into account Policy L23 of the Emerging St Albans City and District Local Plan 2020-2036 ("the Emerging Plan") Local Plan.

9. *Ground 2* contends that the Defendant failed to take into account Policy 72 of the St Albans and District Council Local Plan Review 1994 (the "Local Plan"). In particular, it is contended that the Defendant failed to apply Policy 72 consistently with other planning decisions.

10. *Ground 2A* contends that the Defendant failed to have regard to the cumulative impact of the proposed development on the character of the area.

11. *Ground 6* contends that the Defendant irrationally failed to impose a condition in the grant of planning permission that the proposed parking spaces in the development should be maintained permanently.

THE PLANNING BACKGROUND

12. The present application for planning permission was identical to an application that had been previously made, and for which planning permission had been granted, in 2018. That earlier planning permission was quashed by the High Court by a consent order sealed on 2 November 2018 following a claim for judicial review filed by the Claimant.

13. In relation to the application which led to the challenged grant of permission in these proceedings, the Claimant, together with others, submitted detailed objections to the planning permission on a number of grounds, including that the development was contrary to emerging and existing Local Plan policies.

14. For the purposes of these proceedings, the central issue concerned the proximity of the proposed development to the Claimant's property (at No.5 Hamilton Road) to the north of the proposed development and to the Interested Party's property (No.3 Hamilton Road) to the south of the proposed development.

15. It is common ground that there is less than one metre between the new dwelling and its boundary with the Claimant's property at No.5, Hamilton Road. The precise gap is assessed at either 0.8 or 0.9 metres by the Claimant and Defendant respectively. It is common ground that there is no gap between the proposed building and the boundary with the Interested Party's property at No.3, Hamilton Road. The new building runs along that party boundary.

16. The essence of the Claimant's case is that both emerging Policy L23 and Policy 72 of the Local Plan require that, in order to avoid a 'terracing effect', there must be a minimum of one metre between the proposed building and the boundary with No.5, Hamilton Road, and also with No.3, Hamilton Road.

17. Emerging Policy L23 is, so far as relevant to these proceedings, as follows:

> "Detailed design and layout
>
> All development is expected to achieve a high standard of detailed design and layout. Proposals that are assessed as successful against the following criteria will be approved:
>
> ….
>
> (h) Infill development and extensions in established residential areas: Infill developments and extensions must relate to the domestic scale, character and appearance of the street. Development that could result in an undesirable terracing effect must be a minimum of 1m from the property/party boundary at first floor level and above…"

18. It is accepted that Emerging Policy 23 would apply to an infill, which is a detached property, such as the proposed development in this case.

19. Policy 72 of the Local Plan, so far as relevant, provides as follows:

> "EXTENSIONS IN RESIDENTIAL AREAS
>
> Planning applications for extensions to dwellings and other buildings in residential areas shall conform to the policies and principles below:
>
> ….
>
> (vii) Side extensions – where the cumulative effect would lead to terracing of detached or semi-detached houses, extensions other than at ground floor level shall normally be a minimum of 1 metre from the party boundary;…."

20. On its face, Policy 72(vii) appears only to apply to "side extensions" to dwellings and buildings and not to an infill build of a detached property such as the proposed development. The Claimant's case (under Ground 2) is that it is not so restricted.

THE OFFICER'S REPORT

21. The OR, which was the basis of the Defendant's decision to grant planning permission, is at pages 43–57 of the hearing bundle where the parties have helpfully inserted paragraph numbering.

22. Having set out the background to the planning application, under the heading "Planning Policy" the OR referred to the National Planning Policy Framework ("NPPF").

23. Reference is then made to the "Emerging St Albans City and District Local Plan 2012–2036" after which it is stated: "Limited weight for decision making".

24. Then reference is made to a number of policies in that Emerging Local Plan including Policy L23 "Urban Design and Layout of New Development". Reference is then made to the relevant Local Plan and a number of policies contained within it including, and I shall return to its relevance under Ground 2A, Policy 4. No reference is made, at this point, to Policy 72 in the Local Plan.

25. Having then set out a number of matters, the OR dealt with the substance of the planning application under the heading "Discussion" and identified the main issues for the determination of the application. So far as relevant to these proceedings, I need only set out the following paragraphs:

> " **Main Issues:**
>
> 1. The main issues of relevance to the consideration of this application relate to the principle of development, the impact on neighbouring amenity, car parking provision, impact on highway safety and the living condition of future occupiers.
>
> Principle

2. In accordance with Section 38(6) of the Planning and Compulsory Purchase Act 2004, there is a presumption in favour of development which accords with the development plan unless material considerations indicate otherwise.

3. The site is in St Albans, which is identified as a Town in Local Plan Policy No.2, where Policy No.4 states that there will be a presumption in favour of housing.

4. Given the above, it is considered the creation of an additional housing unit is acceptable in principle, in compliance with the relevant Local Plan Policy and the aims and objectives of the National Planning Policy Framework in principle, subject to it proving acceptable in relation to other matters.

5. The Local Plan makes it clear that there must be compliance with other policies in the Local Plan, and the National Planning Policy Framework seeks to ensure that new residential development does not take place at the expense of other material planning considerations. Any proposal needs to also take into account design, layout, neighbouring amenity and highway considerations.

6. New housing development is acceptable in principle within a town location. This site is located within a predominantly residential area in a suitable location in close proximity to St Albans city centre. Taking these factors into consideration, as a land use, housing is acceptable and the proposed development with add to new housing within the District. The proposal therefore complies with Policies 2 and 4 of the St Albans District Local Plan Review 1994 and the aims of the NPPF 2019.

Character and Design

7. The proposed dwelling when viewed from the street scene would appear similar in design to the other infill properties to the side of 1 Hamilton Road. The proportions would reflect this property and would not therefore appear out of keeping with the surrounding locality. As noted above, 3 Hamilton Road as existing site benefits from a wide plot measuring a total width of around 14.8m although it is noted that this does vary due to the boundary not being straight. The existing dwelling has not been extended. Comparative plots in the area vary in terms of their size. No.5 Hamilton Road has a plot width of around 9.2m which is similar to other semi detached properties in this area whilst the more traditional detached properties such as 9 Hamilton Road have a plot width of around 10.8m. Whilst this is noted, it should be acknowledged that there has been other infill development in the areas such 1a Hamilton Road which is a plot width of 8.3m. The proposed dwelling would sit within a plot which would range from 7.2m to 7.5m in width, with No.3 Hamilton Road

> retaining a plot width of around 7.3 to 7.5m. Whilst it is acknowledged that the resulting plot sizes would be smaller than that typically found on Hamilton Road, it is not considered that this would be of a size which would be significantly harmful to the street scene or out of character with the area in this case. The proposed citing of this additional detached dwelling would mirror the development to the side of the other semi-detached property and would therefore, to some extent, create a more balanced appearance when viewed from the streetscene.
>
> 8. The detached dwelling would be sat off the boundaries by 1m, although this would be reduced slightly to 0.9m where the boundary splays adjacent No.5 towards the middle of the dwelling, however it would open up to 1m further to the rear. This 1m separation to the boundary would therefore leave a gap at two storey with a neighbouring property at 5 Hamilton Road and larger when viewed from the streetscene. In addition a 1m distance would be provided between 3 Hamilton Road and the new dwelling also. Within the street scene, it is noted that many dwellings had been extended in this area and it is not uncommon to see separation distances of varying size. As such, the 1m spacing is considered acceptable in this instance particularly given the further distance provided between the proposed dwelling and the two storey element at No.5 which would achieve a separation of around 2m in the street scene. In view of this, whilst it is noted that objections raise concerns that the 1m spacing is not consistently met in this case, the aim of this policy is to prevent a terracing effect in the street scene. Moreover this is outlined with Policy 72 which refers to Extensions in Residential Areas and is not contained within the Policy 70 which refers to the Design and Layout of New Housing. However it is acknowledged that the effect of this policy is to secure a typical space of 1m between the dwelling and boundary in residential areas. Notwithstanding this, there are a variety of spacing distances within the streetscene and therefore it is considered the distance retained in this instance would not be out of keeping with the area. As such, the spacing provided in this case is not considered to be detrimental to the area or out of character and is therefore considered to achieve the objective of preventing a terracing impact whilst maintaining an adequate appearance in the streetscene. The proposal would therefore not conflict with Policies 69 and 70 in this regard.
>
> ….
>
> 13. With the above, the proposed list considered to comply with Policy 69 and 70 of the St Albans City and District Local Plan Review 1994 and the aims of the NPPF 2019."

26. The OR then went on to consider amenity issues, car parking provisions, landscaping and other matters. None of these are directly relevant to these proceedings.

27. Then the OR turned to the "Planning Balance" at paragraph 54 onwards.

28. At paragraph 54 the OR concluded that the application complied with the Development Plan:

> "As noted above, the scheme is considered to comply with all the policies as outlined within the St Albans District Local Plan Review 1994. Accordingly, it is considered that the application complies with the development plan."

29. At paragraph 56 the OR noted that the Defendant could not demonstrate a five year housing land supply as set out in the NPPF and that as such that was a material consideration carrying significant weight.

30. At paragraph 58 the OR continued:

> "The proposal is considered to achieve a satisfactory appearance in the street scene and would preserve the character and appearance of the locality. In addition, car parking provision is adequate to meet the need arising from the development proposal and a good standard of amenity would be provided to future occupants of the dwelling."

31. The OR concluded in recommending the grant of planning permission that:

> "the proposed development is considered acceptable, as it is compatible with the style, form, scale and character of the street scene and accords with the Development Plan taken as a whole. …".

32. The OR then concluded that the proposal was in accordance with a number of Policies contained within the Local Plan including Policy 4 (New Housing Development in Towns).

33. I note that no reference is made in that concluding section of the OR to Policy 72.

34. The OR in recommending conditional permission set out a number of conditions but those did not include one of the two conditions recommended by the Highway Authority, namely that the parking provision within the development should be permanent. The OR stated (at para 37) that:

> "One condition in respect of parking spaces has not been added as it is shown on the approved plan PL02C that parking spaces are to be constructed at 2.4m by 4.8m and therefore the condition is not considered necessary in this case."

35. Condition 2 requires that the: "development hereby permitted shall be carried out in accordance with the following approved plans: …PL02C".

THE LEGAL FRAMEWORK

36. The applicable legal framework and approach that should be adopted by a court when considering a challenge to an officer's report (or an inspector's decision) were not in dispute between the parties.

37. Section 70(2) of Town and Country Planning Act 1990 ("TCP Act 1990") provides as follows:

> "(2) in dealing with … an application for planning permission the local planning authority shall have regard to –
>
> (a) The provisions of the development plan, so far as material to the application,
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

38. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (as amended) ("PCP Act 2004") provides as follows:

> "(6) If regard is to be had to the [development] plan for the purposes of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

39. It is common ground in these proceedings that the relevant development plan is the Local Plan. It is also common ground that the Emerging Plan, of which policy L23 is a part, does not form part of the development plan when applying s.70 of the TCP Act 1990 or s.38(6) of the PCP Act 2004. It is common ground, however, that Emerging Policy L23 is a material consideration. However, the Claimant does not demur from the Defendant's position that, as an emerging policy, if the OR did take into account Emerging Policy L23, the officer was entitled to give it "limited weight".

40. The effect of s.38(6) was summarised by Lindblom LJ in Gladman v Canterbury City Council [2019] EWCA Civ 669 at [21] in the following terms:

> "Section 38(6) of the 2004 Act requires the determination to be made 'in accordance with the [development] plan unless material considerations indicate otherwise'. The Development Plan thus has statutory primacy, and a statutory presumption in its favour – which government policy in the NPPF does not. Under the statutory scheme, the polices of the plan operate to ensure consistency in decision – making. If the Section 38(6) duty is to be performed properly, the decision – maker must identify and understand the relevant policies, and must establish whether or not the proposal accords with the plan, read as a whole. A failure to comprehend the relevant policies is liable to be fatal to the decision (see the speech of Lord Clyde in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 at pp.1450, and 1458 to 1460).…".

41. The approach of the courts when dealing with challenges to planning decisions has been authoritatively stated in a number of recent well-known cases, in particular: Bloor Homes Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) (Lindblom J); Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; and Gladman v Canterbury City Council.

42. In Mansell v Tonbridge and Malling Borough Council, Lindblom LJ said this at [41]–[42]:

> "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) ….

(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".

41. The need for a cautionary approach was identified by Sales J (as he then was) in relation to officers' reports in R (Maxwell) v Wiltshire Council [2011] EWHC 1840 (Admin) at [43]:

> "…the court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.".

42. Further, helpful, and now familiar, guidance was given by Lindblom J (as he then was) when setting out the 'seven familiar principles' in Bloor Homes Ltd v Secretary of State for Communities and Local Government at [19] (approved in Barwood Strategic II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893 at [8]-[9]) as follows:

> "(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 WLR 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 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).
>
> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).
>
> (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & 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)."

43. In Gladstone Development Ltd, Lindblom LJ laid out the proper approach to the interpretation of planning policy (which is a matter for the court) and the application of that policy which, when involving exercise of planning judgment, is a matter for the

decision maker, subject to a well-recognised challenge on Wednesbury unreasonableness or irrationality grounds. At [22], Lindblom LJ said this:

> "22. If the relevant policies of the plan had been properly understood in the making of the decision, the application of those policies is a matter for the decision – maker, whose reasonable exercise of planning judgment on the relevant considerations the court will not disturb (see the speech of Lord Hoffmann in Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at p.780H. The interpretation of Development Plan Policy, however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to descend from the language used in formulating the plan the sensible meaning of the policies in question in their full context, and thus thereto effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of Development Plan Policy by a local planning authority is not an end in itself, but a means up to the end of coherent and reasonably predictable decision – making in the public interest…".

44. Finally, Sullivan J (as he then was) in Newsmith Stainless Ltd v Secretary of State for the Environment [2001] EWHC Admin 74 at [6]–[7], in the context of an appeal under s.288 of the TCP Act 1990 against a planning inspector's decision emphasised the role of the court as follows:

> "6. An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is Wednesbury perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
>
> 7. In any case, where an expert tribunal is the fact finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable."

45. It was accepted before me that the principles set out in the authorities in a variety of contexts challenging planning decisions applied equally to this case, namely a challenge

to a grant planning permission by an officer with delegated authority following an officer's report.

46. With those principles in mind I now turn to consider the four grounds of challenge now relied upon by the Claimant. There was some degree of overlap (and partial repetition) in the arguments and points made in respect of Grounds 1 and 2, and in respect of Grounds 2 and 2A respectively and which, I am only too well aware, I have inevitably had to replicate in my judgment.

GROUND 1

The Submissions

47. On behalf of the Claimant, Mr Neill reminded me that the Defendant accepted that Emerging Policy L23 was a material consideration. However, Mr Neill submitted that the OR had not taken Emerging Policy L23 into account. He relied on the fact that the OR had not referred to Emerging Policy L23 in the substance of the decision, in particular at paragraphs 7–13. He submitted that it was insufficient for the OR simply to refer to Emerging Policy L23 at the outset of the OR. He submitted that the Claimant was entitled to know the reasons why the OR considered that Emerging Policy L23 was not breached. It was a principle controversial issue and the failure to give reasons was unlawful. He relied upon the well-known decision in South Buckinghamshire District Council v Porter (No.2) [2004] 1 WLR 1953: the failure to give them reasons was unlawful.

48. Second, Mr Neill submitted that, even if it could be said that the OR had considered Emerging Policy L23 in paragraph 8, the OR had misinterpreted the policy since it set a 'rule' that in order to avoid undesirable terracing there should be a minimum one metre space between the development and the party boundaries with No.3 and No.5, Hamilton Road. The objective of Emerging Policy L23 was to maintain a separation of, at least, one metre at the boundary with a neighbouring property in order to avoid the risk of an undesirable terracing effect looking at the street scene on a cumulative basis.

49. Finally, Mr Neill rejected the Defendant's reliance upon s.31(2A) and (2B) of the Senior Courts Act 1981 that, in any event, no relief should be granted as it was highly likely that the outcome of the planning application would have been the same even if Emerging Policy L23 had been taken into account.

50. On behalf of the Defendant, Mr Parkinson submitted that the short answer to the Claimant's Ground 1 was that the OR expressly referred to Emerging Policy L23 at the outset and that it was stretching credibility that the officer then disregarded it as a material consideration giving it, as she noted, "limited weight".

51. Second, Mr Parkinson submitted that in paragraph 8 the OR clearly considered the substance of Emerging Policy L23. He submitted that the Claimant's challenge was not as to the proper interpretation of Emerging Policy L23. Nevertheless, Mr Parkinson submitted, that Emerging Policy L23 did not create a rule such that the development must be a minimum of one metre from the adjoining properties in order to avoid an undesirable terracing effect. He submitted that Emerging Policy L23 was aimed at avoiding a "undesirable terracing effect" and that the minimum of one metre separation from party boundaries was only necessary if, otherwise, there would be an undesirable terracing effect. Mr Parkinson submitted that paragraph 8 of the OR concluded that the proposed

development, with the spacing proposed between the development and No.5, Hamilton Road and up to the boundary of No.3, Hamilton Road, did not produce a terracing effect. That was a matter of "planning judgment" which the court could only interfere with if it was an irrational or Wednesbury unreasonable conclusion.

52. Third, Mr Parkinson accepted that Emerging Policy L23 was a material consideration for the purposes of s.38(6) of the PCP Act 2004. However, he submitted that the Claimant had not challenged the officer's statement that, as an emerging policy, it should only be given "limited weight". He submitted that, applying s.31(2A) of the Senior Courts Act 1981 (as amended), it was highly likely that the result would have been the same if, contrary to his principal submission, Emerging Policy L23 had not been considered or considered in sufficient detail as the Claimant contended. He pointed out that the officer had concluded that the development complied, otherwise, with the Development Plan and, under the NPPF, the 'tilted – balance' was in favour of development. Mr Parkinson submitted that it was not conceivable that giving Emerging Policy L23 only "limited weight" that the officer would have concluded that it was a material consideration sufficient to override the presumption in s.38(6).

Discussion

53. I accept Mr Parkinson's submissions on Ground 1.

54. First, it is common ground that Emerging Policy L23, as an emerging policy, is not part of the relevant Development Plan but that it was, nevertheless, a material consideration. It is also accepted that the officer was entitled to give it "limited weight" giving its emerging status.

55. Secondly, the OR recites, at the outset, Emerging Policy L23 as one of the relevant policies in the Emerging Plan. Bearing in mind the proper approach when considering a challenge to an officer's report, I am not persuaded by the Claimant's arguments that the officer did not consider the substance of Emerging Policy L23. In my judgement, it would be wrong to regard the officer's reasoning in paragraph 8 of the OR (which I have set out in full above at para 25) as not entailing consideration of Emerging Policy L23 as well as, and I shall return to this under Ground 2, the substance of Policy 72 of the Local Plan (see my reasoning at paras 125-133 below).

56. Third, to the extent that the Claimant's grounds as pursued by Mr Neill do challenge the interpretation of Emerging Policy L23, I accept Mr Parkinson's submission that Emerging Policy L23 does not set out a 'rule' that requires infill developments to be a minimum of one metre from the boundary of adjoining properties. The clear aim and objective of Emerging Policy L23 is, as it states, to avoid a "undesirable terracing effect", as I understand to be common ground, looking cumulatively at the street scene where the development is proposed. The policy clearly, in seeking to avoid an undesirable terracing effect, contemplates that where that could arise then a minimum separation of one metre with the boundary of adjoining properties should follow. However, where there is no terracing effect, then the need to separate a new development from the adjoining properties is not, under Emerging Policy L23, engaged. Whether or not there is a "terracing effect" is, in my judgment, undoubtedly a planning judgment and any challenge to that judgment is subject to the cautionary approach set out in Gladman Developments Ltd at [22] and Newsmith Stainless Steel Ltd at [6]–[7]. I return to this

under Ground 2 where it is specifically raised as a ground of challenge by the Claimant to the OR and its consideration of Policy 72 of the Local Plan.

57. For the present, reading the OR, in particular paragraph 8 with, as Mr Neill put it in his submissions, "reasonable benevolence", I am in no doubt that the officer concluded looking at the "variety of spacing distances within the street scene" that the spacing

> "is not considered to be detrimental to the area or out of character and is therefore considered to *achieve the objective of preventing a terracing impact* whilst maintaining an adequate appearance in the street scene." (,my emphasis)

That passage, and I will return to this under Ground 2, considered the substance of Emerging Policy L23 and concluded that the aim of that policy was achieved by the proposed spacing looking at the street scene cumulatively.

58. Consequently, I am satisfied that the officer in the OR did consider the substance of Emerging Policy L23 which was specifically referred to at the outset of the OR even if no specific reference is made to that policy in paragraph 8 when considering the "terracing effect" issue. The officer plainly considered the substance of Emerging Policy L23. I reject Mr Neill's submission that the officer failed to give adequate reasons. On the contrary, it is clear why she found there would, in her planning judgment, be no "terracing impact" despite the absence of a one metre separation with the adjoining boundaries, having regard to the spacing that was proposed and the effect on the street scene.

59. For these reasons, Ground 1 fails.

60. Strictly, it is not necessary to consider Mr Parkinson's alternative submission that, if the officer had fallen into error in the OR had she not done so, it is highly likely that the outcome would have been the same and so s.31(2A) of the Senior Courts Act 1981 applies and relief should be refused.

61. The Defendant's grounds refer to s.31(3C) and (3D) which were relevant to the permission stage. Section 31(2A) which is now applicable at the substantive stage states that:

> "(2A) The High Court –
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make [an award of damages etc] on such application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

62. Suffice it to say that given that the development otherwise complied with the Development Plan, and given the presumption created by s.38(6) of the PCP Act 2004, and taking into account the favourable application of the NPPF to the development, and

given it is accepted that "limited weight" that should be given to Emerging Policy L23 as a "material consideration", I accept Mr Parkinson's submission that it is highly likely that the outcome for the Claimant would not have been substantially different applying s.38(6) and the presumption in favour of the grant of planning permission. For that reason, had it been necessary, I would conclude that s.31(2A) of the Senior Courts Act applied and no relief should be granted as the error would not be material.

GROUND 2

The Submissions

63. On behalf of the Claimant, Mr Neill raised a number of points under Ground 2.

64. First, Mr Neill submitted that the OR failed to take into account Policy 72(vii) which, as I understood his submissions overall, he contended applied not only to "side extensions" but also to "infill" development such as the proposed development of a detached property in this case. He submitted that, as a matter of fact, the OR had not taken into account Policy 72 as it was directly relevant and applicable to the development proposal because it was the only policy in the Local Plan that dealt with the separation between a new infill development and neighbouring buildings. To the extent that the Defendant contended that the policy only applied to "side extensions" that was an irrational application of the policy. It was contrary to the true aim and purpose of Policy 72.

65. Second, Mr Neill submitted that, even if Policy 72(vii) did not directly apply to infill development, there was a lack of consistency with an established practice of the Defendant to apply Policy 72(vii) and to maintain a one metre gap between proposed infill developments and the boundaries of adjoining properties. He submitted that, on the established legal authorities, although a local planning authority was free to reach a decision that differed from an earlier decision, in doing so it had to give reasons for that departure. The previous practice, set out in earlier decisions of the Defendant, was a material consideration in reaching the planning decision. Mr Neill relied upon the cases of North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P & CR 137 at page 145 and Davison v Elmbridge District Council [2019] EWHC 1409 (Admin) at [39] as the basis for the Defendant's duty to act consistently in reaching planning decisions.

66. In support of this submission, Mr Neill referred me to two examples which had been given by the Claimant in his objection letter, relating to a development at 1A, Hamilton Road, and 63, Brampton Road (both at Tab 36 of the hearing bundle).

67. In addition, Mr Neill referred me to six further examples, which he acknowledged had not been relied on in the objections, relating to developments at No.98, Mount Pleasant Lane (Tab 11); 26a, Marshalswick Lane (Tab 12); 6, Trinity Mews Oxford Avenue (at Tab 27); 17, Maxwell Road (Tab 28); 4, Hill End Lane (Tab 29) and 24, Salisbury Avenue (Tab 30).

68. Mr Neill took me through each of these decisions which, he submitted, applied expressly or by implication Policy 72 to infill development requiring a one metre gap to exist between the development and adjoining party boundaries.

69. Whilst Mr Neill accepted only the first two examples had been drawn to the Defendant's attention, the other decisions could have been identified. He submitted that this established a practice that Policy 72 applied to infill developments such as the proposed development in this case. Policy 72 (as applied by the Defendant in its earlier decisions), imposed a requirement of a minimum spacing of one metre between a new infill development and the adjoining party boundaries.

70. Third, Mr Neill submitted that if, contrary to his principal submissions, the Defendant had applied Policy 72 (and indeed emerging Policy L23) the officer had reached a Wednesbury unreasonable decision that the variety of spacing distances within the street scene prevented a terracing effect even without a one metre separation from the boundaries of the adjoining properties.

71. On behalf of the Defendant Mr Parkinson submitted that Policy 72(vii) was not directly relevant to this case. It was, he submitted, on its face limited to "extensions to existing buildings" and Policy 72(vii) specifically to "side extensions". It was not concerned with infill development which was the subject matter of this case. He submitted that, therefore, it was not incumbent upon the officer to reach a conclusion in paragraph 8 of the report whether the development breached Policy 72. He submitted that the policy was not capable of being breached or complied with as it was simply not applicable.

72. Second, Mr Parkinson submitted that nevertheless it was clear that the substance of Policy 72 was, in fact, considered by the officer at paragraph 8 of the OR. He accepted that some of the instances relied upon by Mr Neill demonstrated that, by analogy, in previous decisions the Defendant had taken account of Policy 72 as relevant to infill developments. He acknowledged that, in at least one instance (the decision relating to 98 Mount Pleasant at Tab 11) the officer had, on the face of it, considered that Policy 72 applied and was breached. However, he submitted that that was wrong as Policy 72 did not apply to an infill development as was there being considered. Applying the consistency principle, Mr Parkinson submitted that the Claimant could not rely on erroneous decisions to sustain an argument that Policy 72 was applicable to infill. He relied upon the case of R (Cooper) v Ashford Borough Council [2016] EWHC 1525 (Admin) at [53] where John Howell QC (sitting as a Deputy High Court Judge) rejected the submission of Counsel - there also Mr Parkinson - that the consistency principle could be invoked where the earlier decision was "evidently a mistake" as a submission which "verges on the absurd."

73. Mr Parkinson submitted that in paragraph 8 of the OR, the officer considered the substance of Policy 72(vii), consistently with the earlier decisions, as having application only by analogy and concluded, consistency with Policy 72(vii) that there was no terracing effect produced by the proposed development.

74. Third, Mr Parkinson submitted that the officer had correctly considered the terms of Policy 72(vii) which was to look at the "cumulative effect" and whether it would "lead to terracing of detached or semi-detached houses" and that, if it did, then there shall "normally be a minimum of one metre from the party boundary". Mr Parkinson submitted that it was plain on reading paragraph 8 of the OR that the officer had concluded that the proposed development, looking at the street scene as a whole, would not produce a terracing effect even though the spacing between the proposed development and the boundaries of No.5 and No.3, Hamilton Road was less than one

metre. That was a planning judgment which was unarguably rationally open to the officer to reach.

75. Finally, Mr Parkinson submitted that again applying s.31(2A) of the Senior Courts Act 1981 even if, contrary to the clear wording of policy 72(vii), it did apply to infill development given the officer's reasoning in paragraph 8 it was "highly likely" that the outcome of the planning application would be the same as there would be no conflict with that policy and it would not therefore be a contrary material consideration to weigh against the presumption created by s.38(6) of the PCP Act 2004.

Discussion

1. *The Scope of Policy 72*

76. I dealt first with the proper application of Policy 72, in particular Policy 72(vii), and whether it applies to infill developments such as the proposed development. I have set it out, as relevant, above at para ??.

77. I accept Mr Parkinson's submission that Policy 72 does not apply to infill development such as the proposed development. On its face, Policy 72 is patently limited to "Extensions" to dwellings and other buildings in residential areas and, in particular, Policy 72(vii) is limited to "side extensions". I was told that a draft version of the Local Plan had contained a policy dealing with new developments, inter alia, with infills but that this was removed before the Local Plan was approved. The result is that the Local Plan contained no relevant policy dealing with infills such as the proposed development. That may explain why Emerging Policy L23 is of broader application for the future. However, to construe Policy 72(vii) as applying to the proposed development would distort its plain and clear meaning and I see no proper basis for doing so. It has, therefore, no direct application to the proposed development in this case. The officer was, as a consequence, not required to reach a view as to whether Policy 72(vii) was, or was not, breached for the purposes of applying s.38(6) of the in reaching a conclusion whether or not the proposed development was or was not in accordance with the Development Plan.

2. *The Consistency Principle*

78. That Policy 72 does not in fact apply did not, however, necessarily absolve the officer from considering whether the substance of Policy 72(vii) was, or was not, satisfied if there was indeed an established practice of applying it by analogy in cases of infill development, or otherwise there were relevant other decisions which, applying the 'consistency principle' relied upon by the Claimant, made those decisions and Policy 72(vii) a material consideration.

79. Both Counsel accepted the 'consistency principle' following the North Wiltshire District Council and R (Davison) v Elmbridge Borough Council cases.

80. In North Wiltshire District Council, Mann LJ said this (at p.145):

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important

> reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in a previous case? The areas for possible agreement or disagreement cannot be defined but they would include an interpretation of policies aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

81. In Davison, Thornton J recognised the 'consistency principle' in the following terms (at [39]):

> "The consistency principle is given practical effect in planning decision making via the test of material considerations. There is no rigid rule that a decision maker must always treat a previous decision as a material consideration. Where the complaint is a failure to consider a previous decision, any such failure will make the decision unlawful if no reasonable decision maker would have failed to take it into account in the circumstances of the decision making. There is no exhaustive list of the matters in respect of which a previous decision may be relevant. That must inevitably depend on the circumstances. Whether a decision with which the decision-maker has not been supplied is one that no reasonable decision-maker would have failed to take into account will likewise depend on the circumstances. These may include whether the decision-maker was or ought to have been aware that such a decision may exist, the significance that any such decision might have in relation to the decision to be made and what steps may have been required to ascertain whether or

> not it did exist and to obtain it. (See John Howell QC in Baroness Cumberledge of Newick v Secretary of State [2017] EWHC 2057 approved by Lindblom LJ in the Court of Appeal in DLA Delivery Ltd v Baroness Cumberledge of Newark [2018] EWCA Civ 1305)."

82. The point was also made by Lindblom LJ in Tate v Northumberland County Council [2018] EWCA 1519 (at [42]):

> "In the circumstances, it seems to me, the officer ought to have recognized that the county council was now dealing with a "like" case, in the sense to which Mann L.J. referred in *North Wiltshire District Council*. The committee was not, of course, bound to adopt the same approach as the inspector. It could properly take a different approach. But this was a case in which, if that was to be done, the decision-maker had to acknowledge that the approach now being adopted was materially different from that taken in the previous decision, and to provide some explanation, brief as that might be, for the inconsistency. This was a case in which the status of the site and development – whether "limited infilling" or not – was, in Mann L.J.'s words, a "critical aspect of the decision" being made, and, in the interests of consistency, it was necessary for reasons to be given for "departure from the previous decision". Although this point was very firmly made by Dr Tate in his letter of objection, the officer did not tackle it, either in the advice he gave the members in his report or in the course of discussion at the committee meeting."

83. Mr Parkinson accepted that the 'consistency principle' could apply in a case such as the present if, in other relevant decisions, the Defendant had "by analogy" taken account of Policy 72 in infill development cases.

84. During the course of argument, I raised with Counsel precisely what was the scope of the 'consistency principle' given that, on their facts, both the North Wiltshire District Council and Davison cases involved previous decisions concerning, in effect, the same (or substantially the same) development in respect of which a planning decision was now challenged. Both Mr Parkinson and Mr Neill agreed that the 'consistency principle' was not limited to such situations and applied to decisions concerning different developments.

85. I accept that is the correct legal approach in this case. Indeed, it finds express support in the decision of Dove J in the Gladman Developments Ltd v Secretary of State for Housing Communities and Local Government [2019] EWHC 127 (Admin) at [16]-[17] involving inconsistent decisions (concerning unrelated developments) as to whether or not a policy was up to date.

86. It was, therefore, common ground that if indeed the Defendant (through its officers) had applied Policy 72 by analogy in relevant cases of infill development then that was a material consideration which the officer had to take into account and give adequate reasons for departing from any previous decision if her conclusion was not to apply it by analogy.

3. *The Consistency Principle Applied*

87. There are, therefore, two issues that follow. First, whether there were relevant decisions of the Defendant which, by analogy, apply Policy 72, in particular, Policy 72(vii) in infill cases which should have led the officer to consider Policy 72(vii) by analogy. Secondly, if there were, whether the officer in the OR, in particular in paragraph 8, properly considered Policy 72(vii) by analogy.

88. I can summarise my conclusions as follows. As regards the former, my conclusion is 'yes': there are decisions of the Defendant applying Policy 72 by analogy to infill cases and so the 'consistency principle' applies. As regards the latter, however, it is clear from paragraph 8 of the OR that the officer properly considered policy 72(vii) and concluded that, in effect, as a material consideration Policy 72(vii) did not weigh against the presumption in favour of planning permission given that the development was in accordance with the Development Plan. Remembering, in reaching that conclusion, that since Policy 72(vii) is not, in fact, part of the Development Plan applicable to infill developments, whether or not the proposed development was consistent or inconsistent with it could not affect the presumption under s.38(6) that the proposed development was in accordance with the Development Plan read as a whole.

89. I turn to consider the planning decisions relied upon by Mr Neill in support of his submission that the Defendant had an established practice of applying Policy 72 to infill development and that a one metre gap should be maintained between the proposed infill development and the boundaries of the adjoining properties. Mr Neill relied upon two decisions that were raised in the Claimant's objections. In addition, he relied upon six further decisions, which he accepted had not been directly raised by the Claimant, but, he submitted, nevertheless should have been taken into account. Some, but not all, support Mr Neill's submission.

90. I deal first with the two decisions raised by the Claimant, and others, in their objections to the planning application. They were, as a result, properly to be considered as being within the knowledge of the officer when the OR was prepared.

91. The first decision concerns a development at 1, Hamilton Road. It concerned an infill development. The officer's report is dated 27 January 2012. It recommended the grant of planning permission. Mr Neill relied upon the officer's statement (at page 334 of the trial bundle) that:

> "The property also maintains a front and rear garden of similar depths to the prevailing pattern of development in the locality. The proposed dwelling also leaves 1m gap to each side boundary in accordance with Council Policy."

92. Mr Neill acknowledged that no reference was made in the report to Policy 72. It does, however, refer to the relevant of a 1m gap between the development and the boundaries "in accordance with Council Policy". It does provide some support for Mr Neill's submission that the decision-maker considered that *a* policy most probably, given the reference to "1m gap", Policy 72(vii), had some relevance in cases of infill developments.

93. Secondly, Mr Neill relied upon what was said by an officer in recommending planning permission for an infill development at 63, Brampton Road. The report is dated 20 September 2017. There, at page 3 of the report, the officer states:

> "the first floor flank elevations of the dwelling would be inset from the side boundaries by 1m preventing a terracing effect or a cramped appearance in the street scene."

94. Further, at page 5 of the report the officer states:

> "The two and single storey elements of the dwelling will project rearwards of No.65 by approximately 1.8m and given this is inset from the boundary by 1m it will not impact upon the residential amenity of the occupiers of No.65."

95. Again, whilst relying upon what was said about the maintenance of a 1m gap from the boundary, Mr Neill acknowledged that again Policy 72 was not mentioned.

96. Both reports provide some support for the contention that a one metre gap between an infill development and adjoining property boundaries was considered by the decision-maker to be relevant. Mr Neill accepted that neither report makes any reference to Policy 72(vii). They do, however, resonated with a view that a one metre gap between the development and the boundaries was a relevant issue. It is difficult to see the source for such a material consideration other than through Policy 72(vii) being applied, at least, by analogy.

97. Turning to the six other decisions upon which Mr Neill placed reliance, these can be found at Tabs 11, 12, 27, 28, 29 and 30 of the trial bundle respectively.

98. The first concerns an infill development at 98, Mount Pleasant Lane. The report recommends the refusal of planning permission for the infill development. Mr Neill pointed out that the report sets out as a relevant policy in the Local Plan, Policy 72 at the outset of the report. Mr Neill relied upon what was said by the officer (at page 133 of the trial bundle) as follows:

> "The proposal would also be sat along the boundary with No.100 and would therefore extend up to the common boundary. To the boundary with the other neighbouring dwelling there would be a spacing of around 0.8m. With this, the proposal is contrary to Policy 72 of the St Albans District Local Plan Review 1994 which requires a spacing to the boundary of at least 1m to prevent a terracing effect."

99. Mr Neill submitted this was an explicit reference to Policy 72 being applied and that the proposed development was "contrary" to it.

100. Although the officer put the issue as concerning a "terracing effect" and that there should be spacing to the boundary of at least one metre in terms of Policy 72, in her conclusion she made no reference to Policy 72(vii) although she does refer to the proposal of being contrary to Policy 72(v) which is concerned with a different issue relating to amenity.

101. It does appear, therefore, that the officer considered that Policy 72 was applicable to infill developments even though, on its face, it is limited to extensions.

102. I accept Mr Parkinson's submission in relation to this decision that it cannot be relied upon to establish, contrary to the plain wording of the policy, that it actually applies to infill developments. To the extent that the officer thought that it was, she was mistaken. As the Deputy Judge stated in the Cooper case at [53]: it would "verge[] on the absurd" to apply the consistency principle to a decision that erroneously concludes that a particular policy applies. That said, nevertheless, the officer's decision provides support for the relevance of Policy 72 being applied "by analogy" in infill development.

103. The second decision relied upon by Mr Neill relates to a proposed development at 26a, Marshalswick Lane. The report is dated 12 February 2019 and so postdates challenged decision in this case. It related to an infill development replacing a single storey detached bungalow with a two storey dwelling. Mr Neill could not rely upon this decision as being directly concerned with Policy 72(vii). The decision makes no reference to that policy or, indeed, to any terracing effect as a result of the development. Instead, he relied upon the officer's reference (at page 139 of the trail bundle) to Policy 72(ix) concerned with an amenity aspect of the development.

104. The decision offers little support to Mr Neill's submission given that the officer made no specific reference to Policy 72 in the list of policies under the Local Plan relevant to his decision and, although he referred to Policy 72(ix), he made no reference to the relevant part of Policy 72 and made no reference to Policy 72 in his concluding reasons for recommending the grant of planning permission (at page 141) of the trial bundle.

105. The third report relied upon relates to a development at 6, Trinity Mews. The report is dated 3 September 2018. Mr Neill relied upon the officer's explicit reliance upon Policy 72(vii). At the outset of the report (page 260 of the trial bundle) the officer notes that the development:

> "will maintain a gap of 1m from the side party boundary along No.1, Oxford Avenue and thereby maintaining an overall gap of 3.3m from the existing flank wall of No.1, Oxford Avenue."

106. Further, later in the report under the heading "character and appearance" (at page 262 of the trial bundle), the officer refers explicitly to Policy 72(vii) as follows:

> "The proposal shows a staggered side boundary line to the side of No.1, Oxford Avenue to create a 1m gap between the proposed dwelling and the party boundary at ground as well as upper floor levels. This gap will ensure that there will be no terracing impact with No.1, Oxford Avenue as a result of the development and will comply with policy 72(vii).
>
> The proposed dwelling would therefore sufficiently maintain the character and appearance and would not have an adverse impact upon the street scene and locality. The proposed development is therefore in accordance to Policies 69, 70 and 72(vii) of the St Albans District Local Plan Review 1994…".

107. Mr Parkinson, relying upon the witness statement of Sarah Ashton who is the Development Manager at the St Albans City and District Council, pointed out that the proposed development in this report was for a building which was attached to the existing dwelling and therefore involved an "extension" to which Policy 72 was applicable.

108. It may well be, as Mr Neill submitted, that the proposed development was, in fact, a new dwelling rather than an extension to an existing building. The proposed development, and the existing building to which it was attached, were separate dwellings. Even if that is the case, and therefore the officer was not concerned with "an extension", the report does not support Mr Neill's submission that Policy 72 applies directly to infill developments. The officer's report must be read as a wholly and in a fair and reasonable, and not overly legalistic, way. Policy 72 is not set out as one of the relevant applicable policies in the Local Plan (at page 261 of the trial bundle) and in his reasons for recommending planning permission, the officer when setting out the relevant policies in the Local Plan with which the proposal is in accordance, again made no mention of Policy 72. Clearly, he did not consider it was an applicable policy in the Local Plan. I do not read his subsequent reference to Policy 72(vii) as indicating otherwise even though he refers to the proposed development as being "in accordance" or "complying" with that policy. He would, of course, be mistaken if he considered that it was actually applicable and his mistake cannot be relied upon to that effect (see Cooper at [53]). Its relevance lies, in my judgment, elsewhere. What the report does support is that the officer considered that Policy 72, in particular Policy 72(vii) dealing with terracing effect, was relevant *by analogy* outside cases of side extension developments to which it is explicitly limited.

109. The third report concerns a development at 17, Maxwell Road. The report is dated 18 January 2017. This development also concerned the construction of a new dwelling attached to an existing dwelling. Mr Neill relied on the fact that the officer in recommending the grant of planning permission explicitly took into account Policy 72(vii). Policy 72 is set out as one of the relevant policies under the Local Plan (at page 269 of the trial bundle). Then in the substance of the report under the heading "character and design" the officer said this (at page 271 of the trial bundle):

> "Maxwell Road generally consists of detached and semi-detached properties. The siting of these properties are inconsistent along the street, with spacing's varying from 1.5 to 3.8 metres. The proposal will result in the semi-detached pair of no.15 – 17 becoming a terraced property. Policy 72(vii) states, where the cumulative effect would lead to terracing of detached or semi-detached house, extensions other than at ground floor level shall normally be a minimum of one metre from the party boundary. Whilst a separate dwelling rather than an extension to an existing one, the principles in regards to design remain the same…".

110. Mr Neill pointed out that the officer in his conclusion stated that the development complies, inter alia, with Policy 72.

111. Mr Parkinson again relied upon the evidence of Sarah Ashton that this development was an extension to which Policy 72(vii) applied. I commented earlier concerning Ms Ashton's view in relation to another report and I do not need to repeat that here. What

is, however, clear to me on reading the report is that the officer did not consider that Policy 72 applied directly to the proposed development. As I set out above, he noted that the proposed development was "a separate dwelling rather than an extension to an existing one". He nevertheless went on to say that "the principles in regard to design remain the same". What, therefore, this officer was doing was applying Policy 72 *by analogy* to developments which were not strictly side-extensions to which Policy 72 is explicitly limited. To that extent, therefore, the report provides some support for Mr Neill's reliance upon Policy 72 as applicable by analogy and the application of the consistency principle to the instant case.

112. The fifth report or decision relied upon by Mr Neill concerns a called-in application for 4, Hill End Lane. The officer's report is dated 16 April 2018. Mr Neill placed reliance upon the report's reference to Policy 72 as a relevant policy in the Local Plan (at page 278 of the trial bundle) and the officer's reference to Policy 72(i), (v) and (viii) (at pages 281 -282 of the trial bundle). None of these provisions is, of course, relevant to the present case. Nevertheless, Mr Neill relied upon the fact that the officer specifically stated that the development would be contrary to Policy 72(i) and (v) in a development which was not, on any view, an "extension" but was "infill" development.

113. In response, Mr Parkinson, again relying upon the witness statement of Sarah Ashton, pointed out that the matter had been subject to an appeal and when the inspector had considered the appeal he had made no reference to Policy 72 (exhibit "SA1" to Sarah Ashton's witness statement at pages 310 – 312 of the trial bundle).

114. In my judgment, the fact that the officer's report was subject to an appeal and the inspector made no reference to Policy 72 considerably reduces, perhaps even expunges, the weight that can be placed upon the officer's report. In any event, to the extent that the officer appears to conclude that Policy 72 applies outside of "side extensions", he was in error and his report cannot properly be relied upon in support of an established practice to which the consistency principle relied upon by the Claimant can bite. Again, I agree with and adopt the point made by the Deputy Judge in Cooper to which I referred above (see para 102). It may well, however, provide some support for Policy 72 by analogy being applied more broadly.

115. The final report relied upon by Mr Neill concerns a development at 24 Salisbury Avenue. The report is dated 23 May 2018. It is an infill development and in the officer's report – it was again a called-in application – he made specific reference to Policy 72 as a relevant policy under the Local Plan (see page 288 of the trial bundle). Although the officer made no reference to Policy 72(vii), he concluded (at page 291 of the trial bundle) in his report that the proposal was contrary to Policy 72(i). He also noted the relevance of Policy 72(v), dealing with amenity, in his report (at page 292 of the trial bundle).

116. Again, to the extent that the officer was purporting to conclude that Policy 72 applied to an infill development, he was mistaken and his report cannot assist the Claimant to establish that Policy 72 actually does apply (see Cooper at [53]). But, the decision may provide some support that Policy 72 is considered relevant by analogy and I note that the officer referred to the proposed dwelling as

> "Only leaving a minimum 1m gap on each side with Nos.22 and 26, Salisbury Road. This greater bulk would reduce the spacious

> nature of the surrounding area and will be an inappropriate addition within the street scene."

117. That does appear to reflect the terracing effect issue although no reference is made to Policy 72(vii) and, as I have already pointed out, the officer did not conclude that the proposal was contrary to that part of Policy 72. Indeed, he made no reference to it.

118. Mr Neill indicated that he had not referred me to all of the decisions where Policy 72 was applied or considered. As I was not referred to any others, I must reach my decision only on the basis of the evidence to which my attention was drawn and which was relied upon by the parties.

119. Mr Neill put the Claimant's case on the basis that there was an "established practice" of applying Policy 72 to infill development and to maintaining a one metre gap between a proposed infill development and the party boundaries.

120. In his skeleton argument, Mr Parkinson contended that the reports and decisions relied upon established no such practice. In particular, he relied upon the mistaken application of Policy 72 in a number of the previous reports, Sarah Ashton's witness statement that some of the instances were, in fact, "extensions" rather than infills and that, apart from the two instances which I set out initially above, none of the further decisions were relied on by the Claimant and drawn to the attention of the officer in preparing the OR. Again, relying upon the witness statement of Sarah Ashton, Mr Parkinson pointed out that it would have taken approximately ten working days to carry out a review of all previous decisions where Policy 72 was referenced in the context of infill or replacement development.

121. In his oral submissions, whilst not resiling from the way that he put the Defendant's case in his skeleton argument, Mr Parkinson accepted that in some of the instances the officer had applied "by analogy" Policy 72(vii) to an infill development.

122. Mr Parkinson submitted that the officer in the challenged report had done precisely that, namely applied Policy 72(vii) by analogy to an infill development. She was not required, or indeed entitled, to decide whether or not the proposed development breached Policy 72(vii) as it was not part of the Development Plan. But, he submitted, in substance she took account of Policy 72(vii) and concluded, consistently with it, that there was no terracing effect produced by the proposed development.

123. It is far from clear to me on the basis of the reports and decisions to which I was referred that the Defendant has a *consistent*, established policy of applying Policy 72(vii) by analogy to infill developments. There are decisions which mistakenly, and inconsistently with the policy's wording, consider that Policy 72 is directly applicable. There are other cases where, by analogy, Policy 72(vii) has been considered relevant in assessing the planning merits of the proposed development outside "side extension" cases.

124. It seems to me that applying the approach in the North Wiltshire DC and Davison cases, there is sufficient acknowledgment in a sufficient number of decisions or reports that Policy 72(vii) is *relevant* in proposed infill developments for me to conclude that it was a material consideration applying the consistency principle relied upon by the Claimant and which, therefore, the officer was required to take into account in reaching her recommendation on the planning application. I come to that conclusion well aware of

the practical constraints that Ms Ashton identified in reviewing all the potential instances where Policy 72(vii) may have been considered in infill applications. The decisions are, however, those of the Defendant and its officers and I doubt that it is open to the Defendant to claim not to have at least constructive knowledge of the officers' approach. The two reports to which the attention of the officer in this case was drawn, in themselves, would in any event identify a relevant material consideration applying the 'consistency principle'.

125. The insurmountable difficulty for the Claimant is, however, that the officer clearly did have regard to Policy 72(vii) by way of analogy in her report. In my judgment paragraph 8 of her report cannot be reasonably and fairly read in any other way.

126. The officer made specific reference to Policy 72 (and in substance Policy 72(vii)) and clearly was doing so by way of analogy when she said:

> "moreover this is outlined with Policy 72 which refers to Extensions in Residential Areas and is not contained within Policy 70 which refers to the Design and Layout of New Housing."

127. It could not be clearer. The officer plainly recognises that Policy 72 applies only to extensions and not to new dwellings such as the infill development in this case. Nevertheless, it was a material consideration to consider the substance of Policy 72(vii) in relation to any terracing effect caused by the development even though it was not a "side extension". In that regard, the officer applied the correct approach, based upon the previous consideration of this issue in other reports and decisions.

128. Faced with that possibility, Mr Neill contended that the officer had misunderstood the underlying purpose and aim of Policy 72(vii) and had irrationally applied it. I do not accept that submission.

129. The clear aim of Policy 72(vii) is to avoid a "terracing effect" looking cumulatively at the street scene. It does not require that, as a rule, there should be a one metre gap between the proposed development (here the infill) and the party boundaries. It is worth repeating the terms of Policy 72(vii) which states that:

> "Where the cumulative effect *would lead to terracing of detached or semi-detached homes*, extensions other than those of ground floor level *shall normally be a minimum of 1 metre from the party boundary*". (emphasis added)

130. The aim is to avoid a terracing effect. Where that is the effect of the proposed development then "normally" a minimum of a one metre gap with the party boundaries will be necessary. The use of the word "normally" is significant. The policy does not state that a one metre gap will, in itself, avoid a terracing effect nor does it say that the absence of a one metre gap will produce a terracing effect.

131. In her report (at paragraph 8) the officer clearly considered the impact of the street scene including that there was less than a one metre gap between the proposed development and the boundary with No.5, Hamilton Road. As regards 3, Hamilton Road, although the development was on the party boundary, there would be a one metre gap between the

new development and the existing property at No.3. The officer also noted that in fact there would be at two metre gap between the proposed development and the property at No.5, Hamilton Road. The officer then specifically referred to Policy 72 and the overall impact on the street scene of the proposed development. She concluded that there was a variety of spacing distances within the street scene and that:

> "The spacing provided in this case is not considered to be detrimental to the area or out of character and is therefore considered to achieve the object of preventing a terracing impact whilst maintaining an adequate appearance in the street scene."

132. Consistent with Policy 72(vii) applied by analogy to an infill development, the officer concluded that there would be *no terracing effect* even though there was not a one metre gap either side of the new development with the two boundaries of the adjoining buildings. The officer correctly, in my judgment, understood the aim and effect of Policy 72(vii) when taking it into account as a relevant material consideration in reaching a recommendation. I, therefore, reject Mr Neill's submission that the officer misunderstood the purpose (and aim) of Policy 72(vii).

133. Further, her conclusion that there was no "terracing impact" and that the spacing resulting from the proposed development was "not considered to be detrimental to the area or out of character" was quintessentially a planning judgment which the court could only interfere with if it was irrational in the sense that no reasonable officer properly directing herself as to the relevant matters could reach such a conclusion. I see no basis upon which I could properly interfere with the officer's assessment and judgment on this planning judgment which she fully and properly considered in her report, in particular in paragraph 8. Consequently, I also reject Mr Neill's submission that the officer reached an irrational or Wednesbury unreasonable conclusion that there was no terracing effect.

134. As a result, Ground 2 also fails.

4. *Section 31(2A)*

135. Mr Parkinson again relied upon s.31(2A) of the Senior Courts Act if, contrary to his principal submission and now my decision, Ground 2 was made out. The application of s.31(2A) might well depend upon the extent to which Ground 2 was made out. As I have rejected Ground 2 in whole, it would require somewhat lengthy hypothetical speculation meaningful to consider the application of s.31(2A). I do not consider it necessary, or indeed, helpful to do so.

136. I can deal with the remaining two grounds (2A and 6) more briefly.

GROUND 2A

137. This additional ground contends that, even if the OR did take into account Policy 72(vii), the officer nonetheless failed to have regard to the cumulative effect of the proposal in respect of the character of the area. That, it is said by Mr Neill, is required by Policy 4 of the Local Plan which applies to infill developments. It states in terms:

> "Proposals will be assessed against Policy 70. Schemes for redevelopment in existing residential areas will also be assessed

> in relation to the cumulative impact of such development on the character and amenity of the area."

138. The officer was clearly aware of Policy 4. She set it out as one of the relevant policies in the Local Plan at the beginning of the OR (page 44 of the trial bundle) and again referred to it in paragraphs 3 and 6 of the OR and in her reasons for recommending the grant of planning permission (at page 54 of the trial bundle).

139. Mr Neill accepted that Ground 2A engaged with a similar issue raised in relation to Ground 2, in particular in relation to the issue of whether the officer's conclusion that there was no terracing effect was irrational or Wednesbury unreasonable.

140. I accept that the officer made no specific reference to Policy 4 when considering the planning issues under the heading "character and design". As I have already pointed out, the officer was clearly aware of the relevance of Policy 4. If, indeed, she considered the application consistent with the substance of Policy 4, it would be wrong to infer that she was not doing so in accordance with Policy 4. To do otherwise would, in my judgment, fall foul of the proper approach recognised in cases such as Mansell and Maxwell that such report should not be read with "undue vigour, but with reasonable benevolence…" and that:

> "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."

141. In my judgment, this ground adds little to the challenge based upon irrational and Wednesbury unreasonableness relied upon by Mr Neill under Ground 2. I have already concluded that the officer was not irrational in reaching her conclusion that there was no terracing effect produced by the proposed development even though there was not a one metre gap between the proposed development and the party boundaries with No.3 and No.5 Hamilton Road. It is plain, not least from paragraph 8 of the OR, that the officer considered the street scene as a whole in reaching her conclusion that there was no "terracing impact". She clearly had regard to the street scene as a whole, referring to there being "a variety of spacing distances within the street scene and therefore it is considered the distance retained in this instance would not be out of keeping with the area". She concluded that the effect of the spacing was not detrimental "to the area or out of character" and therefore "prevent[ed] a terracing impact whilst maintaining an adequate appearance in the street scene."

142. In paragraphs 9 to 11 of the OR, again under the heading "character and design", the officer considered other aspects of the street scene, including "projecting features" and matters relating to property design. Consistently with Policy 4, I am in no doubt that the officer considered the issue of terracing and the broader "character and design" issue in the OR having regard to the cumulative impact on the street scene and character of the area. In that, she made, and reached, a planning judgment that is legally unassailable.

143. Consequently, whilst I grant permission on Ground 2A, the Claimant fails on Ground 2A.

GROUND 6

144. This ground contends that the Defendant irrationally failed to impose a condition on the grant of planning permission which had been proposed by the Highway Authority. That condition was, in effect, that the approved parking spaces created as part of the proposed development should be retained permanently.

145. The Claimant contends that there was a real risk that the interested party would not provide onsite parking. The Defendant's case is that since parking spaces were shown in the plan (PL02) and a condition of the proposed development was that the development should be in accordance with the plan including PL02, there was no realistic prospect that the parking would be removed and that the condition was not necessary.

146. In fact, on 25 July 2019, subsequent to the grant of permission, the Defendant and Interested Party entered into a Section 106 Agreement which requires that the parking spaces be provided and retained in perpetuity.

147. The effect of that agreement is, in my judgment, to render this ground academic. Whilst Mr Neill sought to argue that it was not academic as the Claimant should be entitled to raise concerns about the parking provision as part of the grant of planning permission, that mischaracterises the Claimant's challenge under Ground 6. The challenge is not that planning permission should not be granted with the parking as proposed but that, if it were granted, the provision of those parking spaces should be permanent and that should be enforced by a condition on the planning permission. That is not a challenge which raises the issue of whether the parking provision is, in principle, appropriate. It is restricted to an argument that it is irrational to provide for those parking spaces in the grant of planning permission but without a condition that they should be provided and provided permanently. The Section 106 Agreement ensures that they will be provided permanently. It renders Ground 6 academic even if the initial failure to impose the condition was irrational. The Claimant cannot, therefore, properly succeed under Ground 6.

148. In any event, the threshold imposed by the test of irrationality is a high one indeed (see, e.g. R v Ministry of Defence, ex p Smith [1966] QB 517 at p.558). It requires the Claimant to establish that the grant of planning permission without imposing Condition 2 was "beyond the range of responses open to a reasonable decision-maker" (see, e.g. ex p Smith at p.554). The view taken that the approved plan required the provision of parking spaces and that there was no real likelihood that those spaces would not be provided thereafter was, in my judgment, a conclusion that fell within the range of reasonable conclusions that the Defendant could reach even if not every planning authority would necessarily have reached that decision. It was within the range of reasonable conclusions and was not, therefore, irrational. But, as I have already said, the Claimant cannot succeed under Ground 6 which is rendered academic by the Section 106 Agreement.

DECISION

149. In the result, the Claimant has failed to establish Grounds 1, 2, 2A and 6. Therefore, the claim is dismissed.