Neutral Citation Number: [2022] EWHC 2933 (Admin)

Case No: CO/324/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2022

Before:

MR TIM SMITH
(sitting as a Deputy High Court Judge)

- -

Between:

THE KING
on the application of

JENNIE SHAROKIN ARTHUR	**Claimant**
- and -	
LONDON BOROUGH OF BARNET	**Defendant**
- and –	
COMMUNITY HEALTH PARTNERSHIPS LIMITED	**Interested Party**

- -
- -

Richard Harwood KC (instructed by **Harrison Grant Ring**) for the **Claimant**
Richard Ground KC and Ben Du Feu (instructed by **Capsticks LLP**) for the **Interested Party**
(The **Defendant** was not represented at the hearing)

Hearing date: 5th October 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 18 November 2022.

MR TIM SMITH (sitting as a Deputy High Court Judge):

Introduction

1. This claim concerns a challenge to the grant of planning permission by the Defendant following an application made by the Interested Party. The planning permission relates to part of the Finchley Memorial Hospital site to the south of Granville Road and to the east of Bow Lane (**"the Site"**).

2. The planning permission was granted in outline on 17th December 2021 for a residential development and ancillary facilities on land which had been used for public open space (**"the Permission"**). The Claimant is one of numerous objectors to the planning application.

3. The Claimant sent a pre-action protocol letter on 21st January 2022. The Defendant replied on 28th January and indicated that *"The potential claim is contested in full"*. The Claimant brought the claim on the same day citing four grounds of challenge.

4. The Defendant filed an Acknowledgement of Service and Summary Grounds of Resistance on 25th February 2022. As the Defendant had foreshadowed in its reply to pre-action protocol correspondence the claim was resisted in full. The Interested Party did not file any Acknowledgement of Service.

5. By her Order dated 7th March 2022 Lang J granted permission to apply for judicial review on all grounds. By the same Order Lang J certified the claim as being an Aarhus Convention claim and limited the Claimant's costs liability to the Defendant and the Interested Party to £5,000. She imposed a reciprocal costs limit of £35,000 for the Claimant's costs.

6. The Defendant filed its Detailed Grounds for contesting the claim on 13th April 2022.

7. On 12th May 2022 the substantive hearing was listed for 5th October 2022 with a time estimate of one and a half days.

8. Thereafter, in or around early July 2022 the Interested Party became aware that the Defendant may no longer be willing to take an active part in the proceedings. Recognising the possibility that the claim may thus proceed without any party actively defending the Permission, the Interested Party elected to mount its own defence. As it had not filed an Acknowledgement of Service originally the Interested Party required the permission of the Court to do so. Permission was sought and granted by Order of the Court dated 8th August 2022. The Interested Party's application was accompanied by its own Detailed Grounds for resisting the claim which were, in substance, identical to those filed by the Defendant. In effect, therefore, the Interested Party inherited the Defendant's grounds of resistance.

9. The reasons for the Defendant's decision not to take part in the proceedings any longer are not before me and it is not necessary for me to know what they were. In confirming that it consented to the Interested Party's application to file an

Acknowledgement of Service and Detailed Grounds late the Defendant's solicitor stated *"The Council would also like to confirm that it will no longer take an active role in the proceedings".* The Defendant has not consented to judgment nor withdrawn its Grounds of Resistance; it simply elected not to appear at the hearing, as is its right.

10. At the hearing the Interested Party was represented by Counsel to defend the claim. The Defendant did not appear.

Factual Background

11. In 2010 the Defendant had granted planning permission for the construction of a new hospital on the Site following the earlier adoption of a Planning Brief for the redevelopment of the Site in 2007. At that time much of the Site was in use as playing fields. The development of the new hospital left the bulk of the Site undeveloped, and that part of it was laid out and used subsequently as public open space.

12. The Interested Party is the freehold owner of the Site. It is a company wholly owned by the Secretary of State for Health and Social Care having been incorporated in 2001 with the objective of improving the NHS estate and, in turn, improving community-based health and social care services.

13. The status and objectives of the Interested Party are further explained in the Planning and Affordable Housing Statement accompanying the planning application (**"PAHS"**) in these terms:

> *"1.2 CHP is wholly owned by the Secretary of State for Health and Social Care. Incorporated in 2001, CHP set out to improve community-based health and social care services by working to improve the NHS estate through Public Private Partnerships established by the NHS Local Improvement Finance Trust ('LIFT') programme. This includes Finchley Memorial Hospital which was a LIFT project.*
>
> *1.3 CHP is not responsible for the delivery of healthcare services but works closely with NHS healthcare providers to ensure, so far as is possible, that the healthcare estate serves and is well-adapted to their needs."*

14. On 15th September 2020 the Interested Party submitted a planning application reference 20/4343/OUT (**"the Application"**) to the Defendant for the following development:

> *"Outline planning permission for the demolition of Bullimore House and the phased development of up to 130 units of residential accommodation along with the provision of associated car and bicycle parking on land adjacent to Finchley Memorial Hospital"*

15. The Application was submitted in outline with all matters save for means of access being reserved. For the remainder of the reserved matters the future

submission of applications for approval of reserved matters are required to be in accordance with the parameter drawings referred to in condition 1 of the Permission. This means that a broad impression of the final scheme can be gleaned even in the absence of full design details. It is known, therefore, that a consequence of the grant of the Permission is that most of the public open space previously used by the local community would be built upon.

16. The Application attracted a considerable amount of interest, the vast majority of which comprised objections. 677 objections were received (including one from the Claimant) along with 6 letters of support.

17. The Application was referred to the Defendant's Strategic Planning Committee (**"the Committee"**) for determination. Twelve of the Defendant's Councillors are members of the Committee **("the Members"**), one of whom is the Chair and another is the Vice-Chair.

18. The case officer for the Application was Mr Carl Griffiths, an officer from the Defendant's Planning Department. In the usual way Mr Griffiths prepared an officer's report (**"the OR"**) for the Committee summarising the application documents, the representations that had been received through consultation on the Application, and relevant planning policy, before then analysing the Application against planning policy and other material considerations. The OR ultimately recommended that planning permission be granted subject to the imposition of conditions and the completion of a planning obligation (**"the S106 Agreement"**) under section 106 of the Town & Country Planning Act 1990 (**"the 1990 Act"**). For the reasons which I describe below the OR was supplemented by a short Addendum Report before the meeting of the Committee but the positive recommendation remained unchanged.

19. I deal firstly with what the Application documentation says about the loss of public open space.

20. In relation to open space provision within the development the PAHS asserts (§2.12) that:

> *"The wider public will have access to open lawn areas and informal 'doorstep' play space alongside the permissive pathways which will benefit from level access and good accessibility for all members of the community"*

but I accept the characterisation of this space by Mr Harwood KC for the Claimant as having a definite sense of enclosure with an orientation towards use by residents of the development. In any event it is not contended by Mr Ground KC for the Interested Party that the residual level of public open space compensates in any material way for the loss of the existing public space to built development and private enclosure allowed by the Permission. Mr Ground KC also did not pursue any point about the availability of other public open space in the vicinity of the Development (namely Victoria Park) justifying the loss of public open space here.

21. The "Planning Assessment" section of the OR began with this acknowledgement:

> *"The application site represents an area of green open space within the site of the Finchley Memorial Hospital site* [sic]. *The area is used by the local community for amenity and recreation. The proposed development would result in the loss of this open space and as such the primary consideration in the determination of the application is whether the loss of the open space is acceptable in principle"*

22. The statutory development plan for the area comprises both the Barnet Local Plan (September 2012) (**"the Local Plan"**), which itself comprises the Core Strategy and Development Management Policies documents, and the London Plan (2021) (**"London Plan"**).

23. Policy DM15 of the Local Plan relates to the protection of open space. It provides as follows:

> *"i. Open space will be protected from development. In exceptional circumstances loss of open space will be permitted where the following can be satisfied:*
>
> a. *The development proposal is a small-scale ancillary use which supports the use of the open space or*
>
> b. *Equivalent or better quality open space provision can be made. Any exception will need to ensure that it does not create further public open space deficiency and has no significant impact on biodiversity.*
>
> *ii. In areas which are identified as deficient in public open space, where the development site is appropriate or the opportunity arises the council will expect on site provision in line with the standards set out in the supporting text (para 16.3.6)"*

24. Having considered the Application against policy DM15 the OR recorded (paragraph 5.5):

> *"From the outset, it is therefore clear that the proposals would not accord with objective of Policy DM15 nor would it meet the exception tests"*

25. The OR then went on to consider how the conflict with policy DM15 should be treated. It stated:

> *"5.24 Officers give weight to the staffing and operational issues that arise from the issues set out at paragraph 5.11 and also recognise that the proposed development would go some way to addressing this need. The key question therefore is whether the benefits of the proposed housing outweigh the harm arising from the loss of the open space.*
>
> *5.25 It is clear that Policy DM15 does not allow for such an assessment to be made within the parameters of the policy*

wording. However, Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990 state that all applications must be determined in accordance with the development plan, unless material planning considerations dictate otherwise. In this case, officers consider that the outlined need for NHS staff accommodation to protect and aid the operation of healthcare provision within the area is a material consideration.

5.26 In weighing the benefits of the proposal against the harm arising from the loss of the open space, officers have taken into account the proximity of alternative open space provision in the form of Victoria Park and the relevant planning history of the site. And in weighing the benefits, officers have taken into account the exceptional circumstances associated with the need to ensure the health service is able to retain staff to ensure adequate healthcare in the local area. Whilst a finely balanced judgement, it is considered that the benefits of the proposed housing would outweigh the harm arising from the loss of the open space."

26. The overall Conclusion at section 15.0 of the OR then summarises the position as follows:

"15.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires the Council to determine any application in accordance with the statutory development plan unless material considerations indicate otherwise. All relevant policies contained within the development plan, as well as other relevant guidance and material considerations, have been carefully considered and taken into account by the Local Planning Authority.

15.2 In this case, the application does not accord with Policy DM15 of the Local Plan, However, Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990 state that all applications must be determined in accordance with the development plan, unless material planning considerations dictate otherwise. In this case, officers consider that the outlined need for NHS staff accommodation to protect and aid the operation of healthcare provision within the area is a material consideration.

15.3 In weighing the benefits of the proposal against the harm arising from the loss of the open space, officers have taken into account the proximity of alternative open space provision in the form of Victoria Park and the relevant planning history of the site. And in weighing the benefits, officers have taken into account the exceptional circumstances associated with the need to ensure the health service is able to retain staff to ensure adequate healthcare in the local area. Whilst a finely balanced judgement,

> *it is considered that the benefits of the proposed housing would outweigh the harm arising from the loss of the open space and it is recommended that the application be approved"*

27. The OR also acknowledged (pages 16 and 17) that national planning guidance in the form of the National Planning Policy Framework (**"NPPF"**) formed part of the "Relevant Planning Policy". As Mr Harwood KC pointed out, at the date of the OR the relevant version of the NPPF dated from 2019. The current version dates from 2021 but other than some minor renumbering of the paragraphs the substance of the two documents relevant to this claim are identical. For ease I therefore adopt Mr Harwood KC's approach of using paragraph references from the 2019 version because those are the references found in the OR.

28. It is common ground that the NPPF contains policies relevant to public open space. Paragraph 97 is especially relevant to this claim. It provides as follows:

> *"Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:*
>
> *a) an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or*
>
> *b) the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or*
>
> *c) the development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former use"*

29. It is also common ground that paragraph 97 of the NPPF is not referred to anywhere in the OR.

30. The Finchley Society was one of the many objectors to the Application. A copy of its objection was circulated by Mr Peter Pickering, Chair of the Society, by email dated 16th June 2021 to each Member and it was copied to (amongst others) the case officer Mr Griffiths. The objection itself focused on the loss of public open space by reference to policy, case-law, and the 2007 Planning Brief. Mr Pickering's covering email reaffirmed his view that the Application was contrary to policy DM15 of the Local Plan and paragraph 97 of the NPPF. Having set out the wording of the latter the email then concluded as follows:

> *"None of the three exceptions in the NPPF applies in this case. Paragraph 97 of the NPPF does not envisage the overriding of the prohibition by other material considerations (unlike the sections of the NPPF dealing with the Green Belt, and the historic environment). The protection of open space is therefore one of the most fundamental principles of the planning system. Any weakening of this protection is extremely serious and would set a very dangerous precedent.*

> *The officers' report states that the key issue is the balance between benefits arising from the retention of the communal space and use of that space for affordable housing for NHS workers. The Society maintains that what is proposed is a fully commercial development, and not subsidised accommodation for NHS workers. But that is beside the point. The determination that the value of open space trumps all other uses has already been made in the NPPF. That is why the protection of such space is absolute"*

31. Of the six letters of support for the Application, five were submitted by bodies whom Mr Ground KC for the Interested Party described as being "those with a great deal of knowledge" of the NHS's accommodation challenges described in the Application. The bodies were recorded at §4.3 of the OR as the North Central London CCG; University College London NHS Trust; Barnet, Enfield and Haringey NHS Mental Health Trust; Central London Community Healthcare Trust; and Central and North West London Healthcare Trust.

32. The Interested Party's skeleton recites this passage in the letter of support from the Barnet, Enfield and Haringey NHS Mental Health Trust:

> *"I therefore confirm BEH-MHT's very strong support for this planning application …. This and similar future applications are vital to the residents of Barnet and others across North Central London to ensure that the local NHS can continue to provide the full range of services to local people. This application is significant not just for this site but has wider strategic importance of the NHS across North Central London. I hope that the Council will take its importance to local NHS services into account in considered it further"*

33. I turn now to the nature of the residential units and their intended occupation.

34. As I note above the PAHS was one of the documents accompanying the Application. It described the "Aim of the Scheme" in these terms (§2.7):

> *"The principal aim of the scheme is the delivery of new homes for NHS workers – a matter that is discussed in greater detail in Section 4.0 of this Statement. The aspiration is to provide good quality, affordable accommodation that forms part of a pleasant and welcoming environment"*

And (§4.1):

> *"The aim of the scheme is to provide good quality, affordable homes for people working in the National Health Service, building on the longstanding Government aims to enable NHS workers to benefit from affordable housing in surplus NHS land"*

35. In the planning application form the applicant's agent ticked two pre-populated boxes indicating that the proposal was for both "Market Housing" and "Social, Affordable or Intermediate Rent" units.

36. The PAHS provided a more developed description of the residential accommodation noting that there would be a mix of unit types catering for single-person households, family accommodation, and shared units. In relation to the tenure on which the units would be offered the PAHS noted as follows:

> *"4.17 At this stage the tenure means of the operation of the accommodation has not been finalised; if planning permission is granted the applicant will progress discussions with interested parties in this regard.*
>
> ...
>
> *4.19 Whilst the operating model has not yet been finalised we do not think that this is should be* [sic.] *a planning issue that must be decided upon before the determination of this application; rather, it will be the terms on which accommodation will be made available that is a material consideration"*

37. Then in the section headed "Approach to Affordable Housing" the PAHS noted as follows:

> *"4.21 Development plan policy currently seeks 50% affordable housing on public sector land unless it is unviable to do so. In the context of that policy, a decision-maker cannot require an applicant to deliver a greater percentage of affordable housing; to do so would likely fall foul of Regulation 122 of The Community Infrastructure Levy Regulations 2010 because a greater requirement would not be necessary to make the development acceptable in planning terms. However, it is open to an applicant to propose a greater proportion of its own volition.*
>
> *4.22 A possible solution in this instance would be to link occupancy (or the sale of units if some 'intermediate' accommodation is delivered for sale to NHS workers) to employment. This could involve three principal dimensions: (i) eligibility linked to employment;(iii) employment within a defined catchment area of the scheme; and (iii) price linked to income"*

38. The OR (page 12) then recorded the then current offer by the Interested Party in these terms:

> *"A minimum of 50% of the Units shall be affordable to NHS Staff/ Healthcare Workers on salary band(s) of Band 2 to Band 8D inclusive and subject to annual review either as a rented product and/ or a shared ownership product (inclusive of any service charge)"*

39. The OR summarised the Interested Party's case for the need for the residential units, taking the bulk of the material from the PAHS, as follows:

"5.9 The current application proposes to provide NHS staff housing and it is also necessary to consider the benefits that would arise from this provision.

5.10 As is set out within the Planning Statement accompanying the application, there has been (and is) a very pressing need for affordable housing across London. There is a significant amount of data available, including a recent survey from the Royal College of Nursing, that shows that, as is the case for many key workers, the cost of living is one of the biggest concerns for NHS workers. The Planning Statement goes on to set out that the RCN's survey reveals that in five years' time 57% of nursing staff (up from 40% in 2016) say they will either definitely leave London or would like to, with the cost of accommodation and transport being major factors.

5.11 Because of the accommodation difficulties faced by NHS staff, the following implications for healthcare provision arise:

- *difficulties in recruiting staff to areas with high living costs, whether those staff are coming from other parts of the UK or from overseas;*
- *poor staff retention levels, resulting in additional costs in recruiting and training replacement staff;*
- *difficulties in accommodating short-term needs because of a lack of dedicated accommodation, for example to welcome people on secondment, on clinical placement or participating in research programmes; and*
- *greater reliance on agency staff which costs NHS providers significantly more than if they were able to maintain a higher proportion of directly employed staff.*

5.21 The individual and cumulative result of the aforementioned issues is to present sustainability challenges to the healthcare system. The Planning Statement goes on to emphasise this point by referencing the RCN report which states that there are 10,550 vacant nursing posts in the NHS in London alone.

5.22 The proposed development is aimed at addressing this need through the provision of up to 130 residential units which would be for NHS staff. Whilst the affordability of the proposed housing is addressed in a subsequent section of this report, the proposed housing would provide solely NHS staff housing which would be aimed at meeting the affordability criteria of staff on a range of pay grades and would enable staff in the North London area to live close to their place of work. In addition to the affordable nature of the accommodation, the proposed housing would cut down on travel costs and ultimately boost staff retention levels as well as the other matters outlined at paragraph 5.11. The catchment area for the proposed housing would encompass NHS Trusts which form part of the north central

London Sustainable Transformation Partnership ('STP'), which include the following:

- *Barnet, Enfield and Haringey Mental Health NHS Trust;*
- *Camden and Islington NHS Foundation Trust;*
- *Central and North West London NHS Trust;*
- *Central London Community Healthcare NHS Trust;*
- *Moorfields Eye Hospital NHS Foundation Trust;*
- *North Middlesex University Hospital NHS Trust;-Royal Free London NHS Foundation Trust;*
- *Royal National Orthopaedic Hospital NHS Trust;-Tavistock and Portman NHS Foundation Trust;*
- *University College London Hospitals NHS Foundation Trust; and*
- *Whittington Health NHS Trust.*

5.23 Whilst clearly some of these trusts operate wholly outside of the borough, in order to ensure that NHS staff within Barnet are prioritised a cascade clause is proposed within the nominations procedure which would allow for Barnet residents and workers to be prioritised.

5.24 Officers give weight to the staffing and operational issues that arise from the issues set out at paragraph 5.11 and also recognise that the proposed development would go some way to addressing this need. The key question therefore is whether the benefits of the proposed housing outweigh the harm arising from the loss of the open space"

[For clarity I note that the automatic numbering of the OR goes awry and paragraph 5.21 in fact follows on directly from the end of paragraph 5.11]

40. An assessment of the proposals against policy then takes place at section 8.0 of the OR. The key passages of this section are as follows:

"8.1 London Plan 2016 Policy H10 seeks the maximum reasonable amount of affordable housing to be negotiated. The Barnet Core Strategy (Policy CS4) seeks a borough wide target of 40% affordable homes on sites capable of accommodating ten or more dwellings however in the case of publicly owned land as is the case with the application site, Policy H5 of the London Plan that an affordable housing target of 50% is applicable.

8.2 The specific nature of the proposed development is such that it does not fit into the traditional model of affordable housing. The proposed housing would be solely aimed at accommodating NHS staff and there would be no element of open market housing. Consequently, affordable housing products such as Affordable Rent, London Affordable Rent and Shared Ownership and the affordability criteria which underpin these products are not directly applicable to the scheme.

8.3 The application is to serve a specific need which is set out in detail in Section 5 of this report and this need is comprised of a specific professional demographic (i.e. NHS staff). Nevertheless, notwithstanding that the scheme does not fit the traditional affordable housing model, the applicant recognises the need to provide 50% of the homes at an affordable level and for the purposes of this application, this is taken to mean those NHS staff at entry to mid-level.

8.4 Accordingly, whilst there is no fixed housing mix at this outline stage of the application, the applicant has committed to providing 50% (65 homes) of the accommodation as affordable. In the context of the specific and targeted nature of the development, it is considered appropriate to tie the affordability criteria of the affordable homes to the salary bands of the NHS staff at which the scheme is aimed. Therefore, the S106 would secure that 50% (65 homes) would be affordable to NHS Staff/ Healthcare Workers residents of on salary band(s) of Band 2 to Band 8 (inclusive of any service charge).

8.5 For clarity, the salary banding of the NHS staff is as follows:

Salary Band	***Salary Range***
3	*£19,737 - £21,142*
4	*£21,892 - £24,157*
5	*£24,907 - £30,615*
6	*£31,365 - £37,890*
7	*£38,890 - £44,503*
8	*£45,753 - £51,668*

8.6 A full Affordable Housing Delivery Schedule, including the details of the affordable products including a full and detailed nominations procedure as well as a detailed unit mix and details of the tenure and terms of occupation for each of the affordable units would be secured as part of the S106"

41. The Affordable Housing section of the OR ends with the conclusion (§8.9):

"Subject to the above and based on the fact that the proposed building is addressing a specific need, it is considered that the affordable housing proposals are acceptable"

42. In the period between publication of the OR and the date of the Committee the Interested Party revised its offer in relation to occupation of the units from that set out in paragraph 8.4 of the OR. A very short Addendum Report was

prepared for the Committee. It dealt with two points, one of which is irrelevant to the claim and the other dealt with the updated offer from the Interested Party in these terms:

> *"The application makes reference to the scheme providing 50% of the accommodation as affordable to staff on salary bands 2-8. Since the publication of the report, the applicant has fully committed to this being 100% of the homes affordable to NHS staff / healthcare workers on salary Bands 2-8 inclusive. All references within the report should be replaced with the 100% figure and the Heads of Terms should be updated to reflect this"*

The Committee meeting

43. The Committee met in a public session on 17th June 2021. The proceedings at the Committee were transcribed on behalf of the Claimant from the contemporaneous recording and I have been provided with the written transcript. The parties confirmed that whilst this was not an "official" transcript – in the sense that it was not produced by the Defendant – they are content that it is accurate. Although (as is commonplace) there are points in the transcript where the transcriber has recorded a difficulty with hearing all of what was said this difficulty does not affect the ability confidently to follow the discussion.

44. The Committee meeting began with a presentation on the Application by Mr Griffiths. He was then asked questions by some of the Members.

45. I was informed that the Defendant's standing orders allow for one representative of any objectors to an application to present to the Committee, with the same opportunity then being afforded to a representative of supporters of an application. The standing orders then allow for any local Councillors present and wishing to speak to address the Committee before, finally, a representative from the applicant being permitted to present. In all cases presentations are limited to 3 minutes although the presenters can then be asked questions by any Members if they so wish.

46. In this instance the Claimant was deputised to speak on behalf of the 677 objectors. She delivered a presentation (albeit one which the transcript shows was cut short as she exceeded the allotted 3 minutes) and then answered several questions. She was followed by a presentation made by Dr Clare Stephens on behalf of supporters of the Application. Dr Stephens was then asked several questions. The Committee then heard from three local Councillors who were not members of the Committee – Councillors Cooke, Houston and Rozenberg – and Members asked each of them questions. Finally Mr Eugene Prinsloo, an employee of the Interested Party, addressed the Committee on behalf of the applicant and answered questions. (The transcriber was evidently unsure how to spell Mr Prinsloo's surname (although in fact guessed it correctly) and so he is referred to throughout the transcript as "[Eugene]").

47. When the Claimant addressed the Committee she referred to the loss of public open space and the fact that the OR advises the proposal is contrary to Local

Plan policy DM15. She then summarised - correctly - the approach taken by officers to this policy conflict in the OR:

> *"The officers nonetheless suggest that this policy should be overruled by material consideration relating to affordable housing for NHS workers to protect and aid the operation of healthcare provision locally"*

48. When Councillor Houston addressed the Committee he focused his objection on the loss of open space and the relevant policies. He referred in terms to paragraph 97 of the NPPF, saying:

> *"Barnet's current Draft Local Plan Site Selection Background Report – December 2019 – identify sites for development. It lists Finchley Memorial Hospital among its list of sites considered not to be developable. The reason given was, the hospital was constructed under permission granted in 2010 following [unintelligible 01:02:48]. The loss of a playing field was an accepted condition of providing new space – open space, increasing public access and creating new playing fields. All 67 sites listed in the background report are included in the June 2011 draft local plan. The hospital site is still excluded. Unfortunately the officer's report does not address the substantial issue, although it does confirm the site as not developable under Barnet's development plan and the National Policy Planning Framework. The framework enshrines the unqualified protection of open space on paragraph 97. I'm afraid this loss of open space is not justified by the very good cause of NHS housing"*

49. The various oral presentations to the Committee also referenced the affordable housing policy and the affordability of the units to NHS staff.

50. Councillor Rozenberg spoke in opposition to the Application. He challenged the accuracy of how the NHS salary bands had been recorded in the OR:

> *"I want to respond first to the applicant's claim that 100 percent of the units are affordable to NHS staff and to healthcare workers on Bands 2 to 8. What the officer did not tell the committee is that Band 8 goes up to a salary of £87,754 a year. That is how they can promise 100 percent affordable, that is why they haven't provided you with a viability assessment, that is why they haven't provided you with any evidence modelling to prove that NHS staff will be able to live there, and which sort of NHS staff. Certainly not the staff of Finchley Memorial"*

51. Mr Prinsloo then addressed the Committee and was asked questions initially by Councillor Greenspan about affordability:

> *"**Cllr Greenspan:** The previous speaker has pointed out about the affordability of the units and how much they have to pay, the NHS staff. So can you please tell us how affordable it is and what the charges are, etc.?*

> ***[Eugene]:*** *So the appraisal that we have at the moment uses the three tenure mixes. The first tenure mix is effectively socially rented, where you're using social rent levels, and those would be looking at rentals of somewhere between $6-700 [sic.], depending on whether it's a one or a two bedroom flat, per calendar month. There is an element of intermediate rent, which is the lower of London housing allowance or 80 percent of market rent, and there you're looking at rentals somewhere between £1,000 for a one bedroom to £1,200 for a two bedroom unit.*
>
> ***Cllr Greenspan:*** *Okay thank you very much. And also could you just please stress and confirm that this land is secure for NHS key workers?*
>
> ***[Eugene]:*** *Yes. Yes, so the Section 106 agreement –*
>
> ***Cllr Greenspan:*** *And nobody else will be able to move in there in perpetuity.*
>
> ***[Eugene]:*** *Yeah.*
>
> ***Cllr Greenspan:*** *That's important.*
>
> ***[Eugene]:*** *So the Section 106 agreement will have a nomination agreement attached to it, and that nomination's agreement has a cascade mechanism which starts with Barnet NHS employees and then goes to the wider North Central London, and it cascades through to other public sector key workers before ultimately ending up with the council's own waiting list"*

52. Subsequently Mr Prinsloo was asked questions on the affordability of the units by Councillor Farrier:

> *"**Cllr Farrier:** I was going to ask you about the affordable rents as well as the social rents. On page 12 of the report it's talking about then 50%, we're now told it's 100% of the units will be affordable, but then further down the affordable rent is 80% of the market rent. I mean that's not a social affordable rent for most people, particularly on the salary scales you're looking at of band three to eight which, according to this, is between roughly 20,000 to roughly 51,000.*
>
> ***[Eugene]:*** *So I think there's the three different tenant mixes in there. The one element is socially rented and that probably suits the bands two to four, so the lower end of the –*
>
> ***Cllr Farrier:*** *So which social rent? There are several definitions of social rent. What definition of social rent are you using?*
>
> ***[Eugene]:*** *That would be the same as Barnet Homes or any of those kind of registered social landlords where it's a proper socially rented. The rent that you're quoting there about the 80% of market is intermediate rent, so that's a kind of discount to market, which would probably suit more the kind of middle of the salary bands two to eight, or sharers where you've got*

> *two lots of people effectively renting a two bedroom or a three bedroom flat.*
>
> ***Cllr Farrier:*** *So what proportion of the units, particularly the [unintelligible 01:15:35] units will be on the social rent rather than the affordable [unintelligible 01:15:40]?*
>
> ***[Eugene]:*** *I don't know what the exact split is. At the moment we have an appraisal which effectively moves with market conditions, and also needs to be able to flex to reflect the needs of the NHS at any particular time. So the NHS will be providing the list of proposed tenants for the site, and they've got to decide which staff categories etc. are the most important to them at that time, which is why we've not put forward an indicative minimum for any particular type.*
>
> ***Cllr Farrier:*** *So there's no guarantee that it will be for NHS staff. It's going to be cascaded down. If NHS staff are not able to afford to take up any of these units, then –*
>
> ***Cllr Greenspan:*** *It has to be, because it's a nomination agreement.*
>
> ***[Eugene]:*** *Exactly. The nomination's agreement, by specifying salary bands of two to eight, effectively restricts the affordability because there needs to be a test which looks at the level of affordability of rent as a percentage of salary"*

53. Following the presentations and questions Members debated the Application amongst themselves, occasionally seeking clarification from Mr Griffiths. At the conclusion of the debate the Chair of the Committee, Councillor Greenspan, asked for Members to vote on the recommendation in the OR that planning permission be granted. She did not ask for a 'roll call' and so one cannot see the way the individual Members voted but the transcript and the Defendant's official minute of the Committee's decisions both record 6 Members voting in favour of the recommendation, 4 Members voting against it, and 2 Members abstaining. The resolution to grant planning permission was therefore passed.

The Section 106 Agreement

54. The resolution to grant planning permission was subject to the prior completion of a planning obligation under section 106 of the 1990 Act. The S106 Agreement was completed on 29th November 2021. It contains obligations relating to Affordable Housing in Schedule 2.

55. As is commonplace the substantive obligations must be read alongside a considerable number of defined terms. I imply no criticism of the draftsperson for this but it means that the obligations have to be read with particular care to understand their operation.

56. The relevant elements of the S106 Agreement may be summarised as follows (the references below are either to defined terms or to paragraphs in Schedule 2 of the S106 Agreement):

a) 100% of the units have to be provided as Affordable Housing Units (paragraph 2.1.1) save only that occupiers who have exercised a statutory right to buy (or equivalent), or mortgagees who have acquired a residential unit to enforce a legal charge, are exempt from the occupation restrictions (paragraph 3.1.5)

b) "Affordable Housing Units" are defined as meaning *"the Residential Units to be provided within the Development for NHS Key Workers primarily comprising the Affordable Rented Units and the Intermediate Housing Units"* in relation to which:

i) "NHS Key Workers" means *"(a) any person employed by the NHS as a clinical, ancillary, administrative or other non-clinical staff (including a person who has accepted an offer of employment from the NHS but has not yet begun that employment); (b) any self-employed person engaged or working in the NHS on NHS terms and conditions; (c) any person contracted or commissioned to provide healthcare services by the [North Central London Integrated Care System]; or (d) any other healthcare worker"*

ii) "Affordable Rented Units" means *"the Residential Units forming part of the Affordable Housing Units which are to be let primarily to eligible NHS Key Workers at a rent (inclusive of Service Charges) not exceeding 80% of local market rents for an equivalent property of the same size and location"* and

iii) "Intermediate Housing Units" means *"the Residential Units forming part of the Affordable Housing Units which are to be made available primarily to eligible NHS Key Workers on a part rent and part ownership basis (inclusive of Service Charges) with the right for such a worker to Staircase or any other form of intermediate tenure as may be agreed by the Council and the Owner from time to time"*

c) Prior to the start of works the Defendant must have approved both the Affordable Housing Delivery Schedule and the Nominations Strategy submitted by the Interested Party, as to which:

i) "Affordable Housing Delivery Schedule" means *"a detailed schedule for delivery of the Affordable Housing Units to be submitted to the Council identifying (a) the number of Affordable Rented Units; (b) the number of Intermediate Housing Units; (c) the number and details of the Affordable Housing Units which will be Wheelchair Accessible; (d) the location and distribution of the Affordable Housing Units; and (e) the mix, tenure split and unit sizes of the Affordable Housing Units; to ensure the Development caters for a wide range of preferences such as single occupancy, families, shared units for communal living and wheelchair users"* and

ii) "Nominations Strategy" means *"a detailed written strategy approved to be agreed with the Council outlining the procedure, criteria and system for (a) nomination and allocation of the Affordable Housing Units to NHS Key Workers in accordance with the NHS Key Worker Priority Ranking (b) nomination and allocation of the Affordable Housing Units to Non-NHS Key Workers in accordance with the Non-NHS Key Worker Priority Ranking and the circumstances in which such allocations are to be made, and which shall include (but shall not be limited to) timeframes for such nominations and allocations, details of the nominated Affordable Housing Provider (or other management company or body) and management and maintenance procedures"*

d) The Affordable Housing Units must not be occupied by anyone other than an NHS Key Worker unless the occupation cascade in paragraphs 3.1.3 to 3.1.5 operates (paragraph 3.1.1)

e) Furthermore the Affordable Housing Units must not be let or sold to anyone other than an NHS Key Worker on an Affordable NHS Salary Band in accordance with an Approved Nominations Strategy and following the NHS Key Worker Priority Ranking, in relation to which:

i) "Affordable NHS Salary Bands" means *"salary rates falling within Band 2 to Band 8 of the NHS Terms and Conditions of Service (Agenda for Change) or any replacement thereto for the applicable tax year"*. I note that the NHS Terms and Conditions of Service document does not cover all NHS employees. Importantly it does not cover many clinical staff such as doctors and dentists who fall within the remit of the Doctors' and Dentists' Review Body, which accounts for a considerable number of medical professionals employed by the NHS

ii) "Approved Nominations Strategy" means the Nominations Strategy (see above) approved by the Defendant and

iii) "NHS Key Worker Priority Ranking" means *"a system of priority and order of preference for allocation of the Affordable Housing Units to NHS Key Workers as set out in paragraph 3.1.2 of Schedule 2 of this Deed and more particularly detailed in the Nominations Strategy"*

f) The system of priority ranking for NHS Key Workers contained in the above definition prioritises by reference to geographic location. First preference is for NHS Key Workers employed to work in the Defendant's administrative area; secondly those workers who are employed in the wider catchment area of the London Boroughs of Barnet, Camden, Enfield, Haringey or

Islington and who have lived in the Defendant's administrative area for at least two years; thirdly those employed in that wider catchment area but who have not lived in the Defendant's administrative area for at least 2 years; and fourthly to NHS Key Workers, secondees or medical students employed in the wider catchment area (but then only on tenancies limited to 12 months)

g) Only if the cascade described above has been followed and yet still eligible occupiers have not been found for all of the residential units may the units be let or sold to non-NHS Key Workers (and then still only to workers employed in a defined set of public sector jobs)

57. Thus in simple terms:

a) 100% of the Affordable Housing Units have to be let or sold to NHS Key Workers in salary Bands 2-8 of the NHS Terms and Conditions of Service unless for any unit the Interested Party is unable to find an eligible NHS occupier, in which case the unit can be let or sold to a key worker employed in another public sector role. As part of his introductory presentation to the Committee Mr Griffiths acknowledged the technical possibility of the cascade allowing for occupation of some units by non-NHS workers but he added that *"… just in terms of that cascade mechanism which I outlined, obviously priority would be for the NHS workers and the applicant is very, very, very confident that there would be enough demand for this to be fulfilled by NHS staff"*

b) There is a priority ranking for eligible NHS staff occupiers based on their employment and/or residence in the Defendant's administrative area, cascading down through employment or residence in one of four other nearby London Boroughs

c) The S106 Agreement defers a lot of the actual detail regulating the Affordable Housing Units to later agreement with the Defendant including the tenure split, the unit mix, and the nominations procedure and criteria. But the Defendant's subsequent approval of details is not unrestricted. It is known, for example, that Affordable Rented Units must have a rent that does not exceed 80% of local market rents and that Intermediate Housing Units are to be part rent and part ownership unless an alternative intermediate tenure is agreed with the Defendant

58. The S106 Agreement having been completed on 29th November 2021 the Planning Permission was granted on 17th December 2021.

The Legal Framework

59. The relevant legal background is not materially in dispute between the parties.

60. Section 70 of the 1990 Act provides:

> *"(1) Where an application is made to a local planning authority for planning permission:*
>
> *(a) Subject to sections 91 and 92, they may grant planning permission either unconditionally or subject to such conditions as they think fit; or*
>
> *(b) They may refuse planning permission*
>
> …
>
> *(2) In dealing with an application for planning permission … the authority shall have regard to:*
>
> *(a) the provisions of the development plan, so far as material to the application, and …*
>
> *(c) any other material considerations"*

61. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that:

> *"If regard is to be had to the development plan for the purpose 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"*

62. In relation to the grant of outline permissions section 92 of the 1990 Act provides:

> *"(2) Subject to the following provisions of this section, where outline planning permission is granted for development consisting in or including the carrying out of building or other operations, it shall be granted subject to conditions to the effect—*
>
> *… (b) that, in the case of outline planning permission for the development of land in England, the development to which the permission relates must be begun not later than the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved*
>
> *…*
>
> *(3) If outline planning permission is granted without the conditions required by subsection (2), it shall (subject to subsections (3A) to (3D)) be deemed to have been granted subject to those conditions"*

63. The legal approach to the identification and evaluation of material considerations has been considered by the Courts on numerous occasions. In

Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759 Lord Hoffmann held (at page 780):

> *"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process"*

64. This analysis was elaborated upon by the Supreme Court in *R (on the application of Friends of the Earth Limited) v Heathrow Airport Limited [2021] 2 All E.R. 967* where in their joint judgment Lord Hodge and Lord Sales commented at [116] and [120]-[121]:

> *"116. ... A useful summation of the law was given by Simon Brown LJ in R v Somerset County Council, Ex p Fewings [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:*
>
> > *"... [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, ... that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.*
>
> ...
>
> *120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the Wednesbury irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in Corner House Research at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.*
>
> *121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to*

> *give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in Hurst (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann)"*

65. Further guidance on the identification of material considerations was provided by Lord Carnwath in *R (on the application of Samuel Smith Old Brewery) v North Yorkshire County Council [2020] 3 All E.R. 527* at [30]:

> *"30. ... I sought to summarise the principles in Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19 . The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:*
>
> > *"17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is necessarily relevant, so that he errs in law if he fails to have regard to it ...*
> >
> > *18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision- maker (Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council [1995] 1 WLR 759 , 780). On the other hand, to hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so"*

66. The principles underlying the Court's review of a planning officer's report were summarised by Lindblom LJ in *Mansell v Tonbridge and Malling Borough Council [2019] PTSR 1452*:

> *"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 summarise the law as it stands:*
>
> *(1) The essential principles are as stated by the Court of Appeal in R. v Selby District Council, ex parte Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was).*

They have since been confirmed several times by this court, notably by Sullivan L.J. in R. (on the application of Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286 , at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) , at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2 , at paragraph 36, and the judgment of Sullivan J., as he then was, in R. v Mendip District Council, ex parte Fabre (2000) 80 P. & C.R. 500 , at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in Palmer v Herefordshire Council [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother District Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, Watermead Parish Council v Aylesbury Vale District Council [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R. (on the application of Williams) v Powys County Council [2017] EWCA

Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere"

67. In relation to remedies following a successful application for judicial review sections 31(2A)-(2B) of the Senior Courts Act 1981 provide as follows:

> *"(2A) The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review, and*
>
> *(b) may not make an award under subsection (4) on such an 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.*
>
> *(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest"*

The Grounds and Conclusions on each Ground

Ground 1: failure to have regard to paragraph 97 of the NPPF on open space policy

Submissions

68. Ground 1 relates to the NPPF policy on the loss of open space. As I have noted above, it is common ground between the parties that whilst the Local Plan policies relevant to the loss of open space were referred to in the OR (particular policy DM15) there was no reference in the OR to paragraph 97 of the NPPF which also relates to the loss of open space. Both policies are restrictive of the loss of open space.

69. For the Claimant Mr Harwood KC submits that in view of the importance of the open space issues paragraph 97 of the NPPF was clearly and obviously material and that the failure to refer to it means that the Defendant failed to have regard to a material consideration. This, he submits, is a clear error of law.

70. Comparing Local Plan policy DM15 with NPPF paragraph 97 Mr Harwood KC noted that each one contains exceptions but submitted that none of them applied.

71. Policy DM15 provides that the loss of open space is permitted only in exceptional circumstances where one of two exceptions applies:

> *a. The development proposal is a small-scale ancillary use which supports the use of the open space or*

> *b. Equivalent or better quality open space provision can be made. Any exception will need to ensure that it does not create further public open space deficiency and has no significant impact on biodiversity"*

72. By contrast paragraph 97 of the NPPF provides that open space should not be built upon unless one of three exceptions applies:

> *a) an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or*
>
> *b) the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or*
>
> c) *the development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former use"*

73. In oral argument Mr Harwood KC accepted that NPPF paragraph 97 is more benign in its application than is policy DM15 in the sense that the exceptions in paragraph 97 are more easily met, but he maintained that even so none of the paragraph 97 exceptions would apply in this case.

74. Mr Harwood KC acknowledged that paragraph 97 was referred to in terms in the written representations circulated by the Finchley Society to all Members and to the case officer. He also acknowledged that it was referred to by Councillor Houston in his oral presentation to the Committee. But, he says, in each case the reference to paragraph 97 passed without comment by Mr Griffiths and was not otherwise picked up by Members in their discussion on the Application.

75. For the Claimant Mr Harwood KC submitted that the failure specifically to draw attention to paragraph 97 in either the OR or in Mr Griffiths's oral presentation to the Committee had two consequences: firstly that the section 38(6) duty had not been discharged by the Defendant because it had failed to consider fully the extent to which other material considerations weighed in favour of or against Development Plan policy DM15, and secondly it failed to accord with the approach to the predecessor to section 38(6) commended by Lord Hope in *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447* at p.1450 as follows:

> *"The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised* ***in the light of all the material considerations for and against*** *the application for planning permission"* (Mr Harwood KC emphasised the highlighted words)

76. For the Interested Party Mr Ground KC's first submission was that a failure to refer to paragraph 97 of the NPPF would only be unlawful if it were "so obviously material" (per Lord Carnwath in *R (ota Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council [2020] 3 All ER 527* at [32]) as to require a direct consideration, and that whether or not it is "so obviously material" is a question of rationality judged according to the tests in *Wednesbury*, per Lord Hodge and Lord Sales in *R (ota Friends of the Earth Limited and ors) v Heathrow Airport Limited [2021] 2 All ER 967* at [120]:

> *"… a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the Wednesbury irrationality test, the decision is not affected by any unlawfulness"*

77. Applying this rationale Mr Ground KC submitted that paragraph 97 could not be said to be "so obviously material" to the determination of the Application in circumstances where the more stringent policy – Local Plan policy DM15 – had been considered fully.

78. Mr Ground KC made two further submissions in the alternative. Firstly he submitted that even if I were to conclude that paragraph 97 was so obviously material to the determination the evidence reveals that it was put before Members, firstly through the written representations of the Finchley Society and secondly through the comments made at Committee by Councillor Houston. Secondly and alternatively Mr Ground KC submitted that in any event this was a clear case where the Court should exercise its discretion to withhold substantive relief pursuant to section 31(2A) of the Senior Courts Act 1981.

Analysis and conclusions

79. It seems to me that there are two separate points to consider: firstly should paragraph 97 have been referred to in the advice given by officers to the Committee (whether in the OR or the officer's oral presentation), and secondly would an express reference be likely to have made any difference to the outcome? The second question only falls to be considered if the first question is answered in the affirmative.

80. I accept that the loss of open space resulting from the development was clearly a key planning consideration for the Defendant to address. Moreover the fact that the development would be contrary to policy protecting against the loss of open space was not concealed by the Defendant. The OR confronted the issue directly, concluding ultimately that whilst there was a conflict with policy other material considerations such as the need for affordable accommodation for NHS workers outweighed the conflict. Mr Harwood KC's complaint is that the OR did so by reference only to the Local Plan policy DM15 and not also to NPPF paragraph 97. Mr Ground KC submits, in essence, that in circumstances where the more stringent Local Plan policy has been summarised and analysed fully the existence also of less stringent national planning policy to the same effect cannot be "so obviously material" to the determination of the planning application that a failure to refer to it constitutes a legal error.

81. I put to Mr Harwood KC in oral argument that I could readily understand his complaint if paragraph 97 were more stringent than the Local Plan policy but it were omitted, because then the full boundaries of policy would not have been tested, but that it was less easy to understand the complaint where (as here) the omitted national policy were less stringent than the Local Plan policy. The logical extension of Mr Ground KC's argument is that in the current circumstances the consideration in the OR of how the development fails to satisfy Local Plan policy DM15 negates the need to consider the less stringent policies in the NPPF paragraph 97 because they introduce no points which have not already been considered by the Committee.

82. My concern with Mr Ground KC's submission is that it focuses upon the context in which the NPPF policy would have been considered in this case and bypasses the question of whether it is a material consideration in the first place. In doing so he appears to conflate the question of whether the NPPF policy is a material consideration with the separate question of what weight should be accorded to it. As Lord Hoffmann made clear in *Tesco Stores* the former is a question of law whilst the latter is a question for the planning judgement of the Defendant subject only to *Wednesbury* oversight.

83. Here the OR accepted correctly - at page 17 – that the material considerations in the determination of the Application included NPPF policies. In circumstances where the loss of open space was plainly an issue of controversy it seems to me self-evident that NPPF policies relevant to the loss of open space are "so obviously material" that they must be taken into account in the Defendant's decision on the application. To say that paragraph 97 was not obviously material because everything that it says had in substance already been considered by the Defendant in its assessment of policy DM15, it seems to me, also fails to accord with the judgment of Lord Hope in *City of Edinburgh* upon which Mr Harwood KC relies because it would mean that Members were not exercising their planning judgement in light of all the material considerations. Given the context the overall result may have been unchanged, but that is an argument grounded in the Court's discretion to withhold relief not an argument based on materiality.

84. I therefore reject the argument from Mr Ground KC that NPPF paragraph 97 was not "so obviously material" that it ought to have been before the Defendant when it made its decision. I consider that it was material.

85. But that is not the end of the story. The OR is an important – probably the most important – document to be considered by Members but it is not the only means by which relevant material is brought to their attention. As I have indicated, the evidence makes clear that paragraph 97 was referred to in both the written representations of the Finchley Society and in the comments made by Councillor Houston at Committee. In my judgement the substance of paragraph 97 was summarised accurately on each occasion. Certainly nobody sought to gainsay either summary.

86. I asked Mr Harwood KC what he says should have happened in light of this evidence and, in particular, whether the separate references to paragraph 97 could be said to have corrected the omission of any reference to it in the OR.

Mr Harwood KC submitted that if Mr Griffiths had been prompted by these separate references to correct his own omission in the OR then Members can reasonably be inferred to have followed his advice and taken into account the relevance of paragraph 97 but, he says, in the absence of such express acknowledgement by the officer charged with advising the Committee it is more difficult to infer that it formed part of Members' decision-making.

87. On the evidence I have no difficulty in accepting that Members were aware of the existence and import of paragraph 97 when they made their decision on the Application. It had been brought to their attention both in writing before the Committee and during the debate. The most that could be said against this is that because Members were referred to it not by their planning officer in his OR but through external sources they might have given it less credence than if it had been in the OR. But the evidence does not bear this out. Nobody disputed the significance of either reference. There is no evidence that Members misunderstood it. There is no evidence that Members accorded it less weight because it had been omitted from the OR. I am satisfied that it informed the decision taken by Members on the Application.

88. Even if I am wrong in this conclusion I would have no difficulty in holding that any substantive relief should in any event be withheld in exercise of the Court's powers under section 31(2A) of the Senior Courts Act. For the reasons highlighted by Mr Ground KC I accept that where, as here, the policy omitted from the OR added nothing substantively to the careful analysis of Local Plan policy DM15 and the conclusions reached in relation to it then it is at least "highly likely" that the outcome would not have been substantially different had it been there. I also consider (having regard to section 31(2B)) that there are no exceptional circumstances present to cause me to disregard this conclusion, and nobody submitted otherwise to me.

89. In conclusion I therefore reject Ground 1 on its merits, but even if I had accepted it I would have exercised my discretion in section 31(2A) to withhold substantive relief.

Ground 2: failure to consider whether the application accorded with policies in respect of affordable housing

Submissions

90. On Ground 2 Mr Harwood KC's central submissions were that the Defendant failed properly to consider the prevailing affordable housing policies in the Local Plan, the London Plan, and the NPPF; that had it done so it must have concluded that the proposed development did not comply with them; and that the Defendant fell into error in failing to consider the implications of the conflict with affordable housing policy.

91. Mr Harwood KC submitted that the relevant affordable housing policies are principally policy CS4 of the Core Strategy (which specifies, amongst other things, that the Defendant has a Borough-wide target of 40% affordable housing on sites of more than ten dwellings and that the appropriate tenure mix of

affordable housing should be 60% social rented units and 40% intermediate housing) which policy is reinforced by paragraphs 11.1.1 and 11.1.3 of the Development Management Policies document; policy H4 of the London Plan (requiring that 50% affordable housing should be delivered on "public sector land" developed for residential purposes); and policy H6 of the London Plan (establishing the appropriate tenure split for affordable housing of 30% as London Affordable Rent and Social Rent units (meaning in either case – according to paragraph 4.6.4 of the explanatory text – *"Rents significantly less than 80 per cent of market rents"*), 30% intermediate units, and the remaining 40% as low-cost housing determined by the Defendant based on identified need). He added that The Glossary in Annex 2 to the NPPF also provides general guidance on what is meant by "affordable housing" and that the definition refers to *"those whose needs are not met by the market".*

92. Noting that the mechanisms for determining the tenure of the affordable units are found in the S106 Agreement Mr Harwood KC submitted that the result that would be achieved would not accord with the relevant policies, for example because the rents to be charged would be much higher than London Affordable Rent levels, but that this policy conflict was referred to nowhere in the OR. With reference to the definitions in Annex 2 of the NPPF Mr Harwood KC also disputed whether the availability of the affordable housing units to those on relatively high incomes meant that the units were genuinely for those whose needs "are not met by the market", resulting also in a conflict with national policy upon which the OR was also silent.

93. In response Mr Ground KC submitted that it was clear the Application was assessed by the Defendant on the basis that it was not intended to meet the traditional policy definition of affordable housing. He relied on §8.1-8.5 of the OR, emphasising the highlighted passage in §8.2 below:

> *"8.2 The specific nature of the proposed development is such that it does not fit into the traditional model of affordable housing. The proposed housing would be solely aimed at accommodating NHS staff and there would be no element of open market housing.* ***Consequently, affordable housing products such as Affordable Rent, London Affordable Rent and Shared Ownership and the affordability criteria which underpin these products are not directly applicable to the scheme****"*

This passage in particular, submitted Mr Ground KC, reveals that the Defendant approached the Application not as a traditional affordable housing scheme but as one aimed at meeting the specific requirements of eligible occupiers employed by the NHS whose need for affordability would differ from the population at large.

94. Mr Ground KC also drew attention to the control mechanisms in the S106 Agreement. He submitted that the requirement for the Defendant to approve both an Affordable Housing Delivery Schedule (Schedule 2 paragraph 1.1.2) and a Nominations Strategy (Schedule 2 paragraph 1.1.4) meant that the Defendant retained a good degree of control over the tenure mix and the financial eligibility to occupy the units, and so could ensure that the housing to

be delivered was consistent with what Mr Prinsloo presented to the Committee on behalf of the Interested Party.

Analysis and Conclusions

95. In my judgement Mr Harwood KC places too narrow an interpretation on the advice given to the Committee. It is clear that the case being presented to Members was of an application that did not fit the traditional mould of affordable housing as that would be understood under Local Plan, London Plan and national policies, but rather a scheme that was intended to be made available to the target group of occupiers described in the PAHS through controls secured by the S106 Agreement. This much is put beyond any serious doubt in the OR, not least by the opening words of §8.2 to which Mr Ground KC drew attention.

96. Applying the definition of "Affordable NHS Salary Bands" used in the S106 Agreement, "affordability" in this context means affordable to those earning salaries within Bands 2 to 8 in the NHS Terms and Conditions of Service. That this results in rents affordable to those on higher salaries than would normal affordable housing under Local Plan and London Plan policy is undeniable, but so is the fact that that is not the proposal the Defendant was asked to decide upon.

97. The OR, having referred at §8.1 to some (but not all) of the affordable housing policies cited by Mr Harwood KC, correctly identified that this was not an application to be assessed against those policies. I agree with Mr Ground KC that, properly construed, the Claimant's complaint is not about an inaccurate understanding of the affordable housing policies but rather the officer's assertion that they do not apply because the application proposals were always intended to depart from them.

98. A further argument from Mr Harwood KC was that the OR did not record in terms that the proposals were contrary to affordable housing policies, in the way that it did for open space policies in the Local Plan. I can deal with this argument in short order. For the reasons stated above it was clear that Members were being advised the Application was to be considered outside the framework of the conventional affordable housing policies. To complain that the OR omitted a statement that the proposals were therefore not in compliance with such policies is to require of an officer's report the "undue rigour" deprecated by Lindblom LJ in *Mansell*. I see no legal error in the failure to record in terms the lack of compliance with affordable housing policy when both the fact of, and the justification for, non-compliance were obvious on the face of the OR.

99. I therefore dismiss Ground 2.

Ground 3: error of fact in relation to the salary bands of NHS staff eligible to occupy the housing, leading to the Committee being unaware of the high income levels that eligible occupiers may benefit from

Submissions

100. This ground relates to the salary levels of the targeted NHS staff. There is an overlap with the concerns expressed in Ground 2 about affordability as a whole but this complaint is rightly to be regarded as a self-standing ground of claim.

101. In essence the argument revolves around whether Members were misled by incorrect references in the OR to the salary bands of NHS staff who would be eligible to occupy the development. Mr Harwood KC submitted that the OR contained an important error which was not corrected and that the evidence reveals Members to have been misled by the error.

102. The error in question is found in §8.4 and §8.5 of the OR. Those passages provided as follows:

> *"8.4 Accordingly, whilst there is no fixed housing mix at this outline stage of the application, the applicant has committed to providing 50% (65 homes) of the accommodation as affordable. In the context of the specific and targeted nature of the development, it is considered appropriate to tie the affordability criteria of the affordable homes to the salary bands of the NHS staff at which the scheme is aimed. Therefore, the S106 would secure that 50% (65 homes) would be affordable to NHS Staff/ Healthcare Workers residents of on* [sic.] *salary band(s) of Band 2 to Band 8 (inclusive of any service charge).*
>
> *8.5 For clarity, the salary banding of the NHS staff is as follows:*

Salary Band	***Salary Range***
3	*£19,737 - £21,142*
4	*£21,892 - £24,157*
5	*£24,907 - £30,615*
6	*£31,365 - £37,890*
7	*£38,890 - £44,503*
8	*£45,753 - £51,668"*

103. It can be seen that the table of salary bands recorded at §8.5 of the OR had, as its last row, "Band 8" encompassing base salaries in a range from £45,753 to £51,668. But "Band 8" in fact includes four sub-bands 8a to 8d. The salary figures quoted in the table are for the lowest sub-band in Band 8 - Band 8a - only. From publicly available data one can see that at the date of the Committee salary Band 8d – the highest sub-band - encompassed a base range from £75,914 to £87,754. I say "base" range because in addition to this level of salary certain NHS staff are eligible for "High Cost Area Supplements" on their salary

depending on where they live. Those living in Inner or Outer London are eligible for a Supplement at different rates. It is common ground that all those eligible to occupy units in the Development by reason of the cascade employed in the S106 Agreement will benefit from at least the lower level of Supplement since they live in Outer London areas; others will be eligible for the higher level of Supplement since they live in Inner London areas.

104. It is also common ground that it was wrong for the OR to fail to differentiate between the different sub-bands of salary Band 8. The figures quoted for "Band 8" are based on Band 8a levels only. Band 8d levels are considerably higher. There is only one salary band higher than Band 8d and that is Band 9, although as I have noted above NHS clinical staff who are within the remit of the Doctors' and Dentists' Review Body do not feature in any of these salary bands.

105. I invited the parties to explain the different types of eligible NHS role covered by the various salary Bands, especially Bands 8a to 8d. With my blessing an agreed note was provided to me after the conclusion of the hearing which appended an extract from the Health Careers website (https://www.healthcareers.nhs.uk). The pay rates included in the note are current from April 2022 but each salary band gives examples of roles included within them. The note records the following:

> *"Examples of roles at band 8a – consultant prosthetist/orthotist, dental laboratory manager, project and programme management, modern matron (nursing) and nurse consultant (mental health nursing).*
>
> *Examples of roles at band 8b – strategic management, head of education and training, clinical physiology service manager and head orthoptist.*
>
> *Examples of roles at band 8c – head of human resources, consultant clinical scientist (molecular genetics/cytogenetics) and consultant paramedic.*
>
> *Examples of roles at band 8d include consultant psychologist (8c-8d), estates manager, chief nurse and chief finance manager"*

106. Within OR §8.4 and §8.5 two errors may be identified. Firstly in referring to "Band 8" the OR does not differentiate between the sub-bands 8a to 8d. Secondly the upper limit of Band 8 that is recorded in the table at §8.5 - £51,668 – is actually the upper limit for the lowest sub-band (8a), and had the upper limit been given for the highest sub-band (8d) it would have shown a figure of £87,754 before any Supplements are added. Mr Harwood KC calculates the correct upper limit figure to be 88% higher than the incorrect figure given.

107. In addition Mr Harwood KC drew attention to the transcript of proceedings at Committee and submitted that it revealed one of the Members who spoke – Councillor Farrier – to have been misled by the error. Councillor Farrier questioned Mr Prinsloo after his presentation on behalf of the Interested Party. One of her questions was as follows:

> *"I was going to ask you about the affordable rents as well as the social rents. On page 12 of the report it's talking about then 50%, we're*

> *now told it's 100% of the units will be affordable, but then further down the affordable rent is 80% of the market rent. I mean that's not a social affordable rent for most people, particularly on the salary scales you're looking at of band three to eight which, according to this, is between roughly 20,000 to roughly 51,000"*

108. Mr Harwood KC submits that the erroneous reference to "roughly 51,000" in the extract above signals that Councillor Farrier was misled by the incorrect figures given in the OR. She was not corrected by either Mr Prinsloo in his response to the question or Mr Griffiths in his subsequent advice to Members about the Application.

109. In response for the Interested Party Mr Ground KC relies upon other passages in the OR as illustrating the true picture. He notes §8.3 which states as follows:

> *"8.3 The application is to serve a specific need which is set out in detail in Section 5 of this report and this need is comprised of a specific professional demographic (i.e. NHS staff). Nevertheless, notwithstanding that the scheme does not fit the traditional affordable housing model, the applicant recognises the need to provide 50% of the homes at an affordable level and for the purposes of this application, this is taken to mean those NHS staff at entry to mid-level"*

Mr Ground KC stressed in particular the reference to "entry to mid-level" NHS staff at the end of the passage. This, he submitted, is wholly consistent with the actual position since the phrase is a description apt for those on pay scales 2 to 8d as can be seen from the roles described in the agreed note.

110. Mr Ground KC also noted that Councillor Farrier was not the only one to comment on the pay scales at Committee. Earlier in the Committee discussion Councillor Rozenberg had disputed the suggestion that the development was "affordable" by reference to pay bands 2 to 8 and he got the resultant salary figures broadly correct, as this extract from the transcript demonstrates:

> *"Thank you. I want to respond first to the applicant's claim that 100 percent of the units are affordable to NHS staff and to healthcare workers on Bands 2 to 8.* ***What the officer did not tell the committee is that Band 8 goes up to a salary of £87,754 a year.*** *That is how they can promise 100 percent affordable, that is why they haven't provided you with a viability assessment, that is why they haven't provided you with any evidence modelling to prove that NHS staff will be able to live there, and which sort of NHS staff. Certainly not the staff of Finchley Memorial"* (my emphasis)

111. Referring to the comment made subsequently in the debate by Councillor Farrier, Mr Ground KC submitted that this prompted a discussion led by further advice from Mr Griffiths including this passage:

> *"I was just going to comment on those points from Councillor Farrier and Councillor Narenthira, just on the point around the affordable housing*

> *mix. As an outline application it's been very difficult to flesh out a detailed mix at this stage, so as part of the Section 106 there would be an affordable housing strategy which would have to be submitted, which would include the mix.*
>
> *What I would suggest at this stage, because clearly members haven't had a chance to look at that mix, is we can have it minuted that if application is approved, we can have that mix, that affordable housing strategy can come back to committee for approval as part of, as a further reserve matter, if members agree to that, because I do appreciate that members haven't had a chance to look at that mix which we will go forward with"*

Mr Ground KC emphasised the fact that an "affordable housing strategy" would have to be referred back to the Committee for a decision and that the S106 Agreement in fact secures this.

112. In summary Mr Ground KC submitted that the error in the OR was not central to the Defendant's decision and that in any event the Defendant's decision to grant planning permission did not foreclose further input on affordability because of the complex controls over the affordable housing detail secured by the S106 Agreement. In the alternative Mr Ground KC invited me to exercise my discretion under section 31(2A) not to grant substantive relief on the basis that the result would be highly likely not to have been substantially different even if the error had not been present or had been corrected.

Analysis and conclusions

113. There is no doubt that the table at §8.5 of the OR contains an error in suggesting that the upper level of salary in salary band 8 is no more than £51,688 when, properly construed, salary band 8 must be taken to include all of the sub-bands 8a to 8d contained within it with the result that the upper level of salary is considerably higher at £87,754.

114. Moreover I observe that this is a different type of error from the failure to refer to NPPF paragraph 97 in the OR. The latter was an error of omission whereas the former was an error of commission. But it seems to me that the key question remains broadly the same: was the Committee misled by the mistake such that the Defendant's decision was rendered unlawful?

115. I note that not all of the references in the OR to the salary bands are incorrect. For example paragraph 4 of the Recommendation at the front end of the OR summarises the terms of the proposed S106 Agreement at that time as including the fact that:

> *"A minimum of 50% of the Units shall be affordable to NHS Staff/ Healthcare Workers on salary band(s) of* ***Band 2 to Band 8D inclusive*** *and subject to annual review either as a rented product and/ or a shared ownership product (inclusive of any service charge)"* (my emphasis)

(I say "at that time" because by the date of Committee the offer had increased from 50% of the units to 100% of the units, as the Addendum Report recorded. The short Addendum Report repeated the reference to "salary bands 2 to 8" but otherwise said nothing about salary levels).

116. But despite this fact Mr Harwood KC is right to observe that Councillor Farrier's erroneous reference to the lower salary level found in the table at §8.5 of the OR went uncorrected by anybody after she made it. Councillor Rozenberg gave the correct figure in his representations but he spoke before Councillor Farrier. He is also not a member of the Committee.

117. I consider this ground to be more finely balanced than I do Ground 2 because there is more conflict in the evidence, but ultimately I do not consider that the Defendant was led into error by the incorrect references to salary bands in the OR.

118. The evidence reveals the thinking of only two of the Councillors who spoke. Of these two Councillor Farrier repeated the mistake but Councillor Rozenberg did not. I have noted that Councillor Rozenberg spoke as a local Councillor and that he was not a member of the Committee but I consider that nothing turns on this distinction; he heard the same debate as did Councillor Farrier and from the detail of his questions he evidently had reviewed much of the material relevant to the Application, most likely the OR (to which he like everybody else would have had access). There is no evidence about what any of the other Councillors thought.

119. Put at its highest for the Claimant, one of the Councillors appears to have been misled by the mistake. But in the absence of any evidence her mistake cannot be imputed to the other Members or to the Defendant as a whole, especially in circumstances where the other Councillor who referenced the point made no mistake in spite of what the OR said. The voting was logged as six Members in favour of granting permission, four Members voting against it, and two Members abstaining. I was informed at the hearing that Councillor Farrier was one of the four Members voting against the Application in any event and so it is not the case that she was induced by her error to support the proposals.

120. I dismiss Ground 3 on the basis that on the facts the Defendant was not misled by the error.

121. Had I not been of that view then I would have exercised my discretion under section 31(2A) not to quash the permission in any event. The error in the OR is not the only comment on the question of salary bands. The OR states that occupation of the units is intended to be limited to those eligible NHS staff members who are at "entry to mid-level" salaries and I consider this to be an apt description of those within salary bands up to and including 8a-8d. Moreover the substance of the S106 Agreement was, it seems to me, summarised accurately both in the OR and in Mr Griffiths's oral presentation to Committee. The terms of the S106 Agreement serve to restrict occupation of the development to those fairly considered to be on entry to mid-level salaries. They also provide for a cap on the rents charged for the affordable rented units even if not at the levels that would be achieved in traditional affordable housing.

For all of these reasons I consider it highly likely that the results would not have been substantially different even if the identified error had not been made in the OR.

122. For these reasons Ground 3 fails.

Ground 4: the permission failed to specify a period within which development must be commenced, contrary to section 92 of the 1990 Act

Submissions

123. It is common ground between the parties that the conditions on the Permission do not specify a period within which development must be commenced.

124. The relevant conditions are conditions 2 and 3 and they provide as follows:

> *"2 Applications for the approval of the reserved matters (being scale, layout, appearance and landscaping) shall be made to the Local Planning Authority before the expiration of three years from the date of this permission.*
>
> *Reason: To comply with the provisions of Section 92 of the Town & Country Planning Act 1990 (as amended)*
>
> *3 The development hereby permitted in* [sic.] *shall begin no later than 2 years from:*
>
> *i) The final approval of the last Reserved Matters Application pursuant to condition 2, or*
>
> *ii) The final approval of any pre-commencement condition associated with the Development.*
>
> *Reason: To comply with the provisions of Section 92 of the Town & Country Planning Act 1990 (as amended)"*

125. With reference to condition 3(ii) there are four pre-commencement conditions in the Permission: conditions 4, 8, 9 and 10. Unlike the reserved matters approvals (which condition 2 requires to be applied for within 3 years after the date of the Permission), no timescale is specified for applications to discharge any of the pre-commencement conditions. It follows that a developer could wait indefinitely to discharge them and, because development can be delayed by reference to the date of discharge of the last pre-commencement condition, it could also therefore delay implementing the Permission indefinitely.

126. Thus despite the Reason for each condition referring to section 92 of the 1990 Act the effect of condition 3 is that the Permission does not in fact reflect the requirements of section 92.

127. This analysis, submits Mr Harwood KC, renders condition 3 unlawful, although he points out fairly that Ground 4 only falls to be considered if he has not already succeeded on any of his Grounds 1 to 3. The Claimant also submits that the unlawful part of condition 3 could (and should) be severed from the remainder of it, and this is the basis on which Ground 4 is framed.

128. In response Mr Ground KC makes two points. Firstly he submits that section 92(3) of the 1990 Act serves to rescue the condition from the unlawful wording. Secondly he submits, in the alternative, that the Claimant is right to identify that the Court has the power to sever the unlawful wording from condition 3, applying the approach commended by (for example) Ouseley J. in *R (Midcounties Co-Operative Limited) v Wyre Forest District Council [2009] EWHC 964 (Admin),* and hence that if his first submission is not accepted his second submission is to accept the basis on which Ground 4 is advanced.

Analysis and conclusions

129. It is fair to say that Mr Ground KC advanced his first submission with little enthusiasm, doubtless in large part due to his alternative submission that Ground 4 as put could be accepted. Nevertheless Mr Ground KC's first submission was not abandoned and so it is appropriate for me to address it briefly.

130. As I have noted above section 92(2)-(3) provides as follows:

> *"(2) Subject to the following provisions of this section, where outline planning permission is granted for development consisting in or including the carrying out of building or other operations, it shall be granted subject to conditions to the effect—*
>
> ...
>
> *(b) that, in the case of outline planning permission for the development of land in England, the development to which the permission relates must be begun not later than the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved*
>
> *...*
>
> *(3) If outline planning permission is granted without the conditions required by subsection (2), it shall (subject to subsections (3A) to (3D)) be deemed to have been granted subject to those conditions"*

131. Mr Ground KC submitted that the effect of sub-section (3) is to rewrite any time limit condition on a planning permission which does not accord with the foregoing requirements of sub-section (2) so that it does accord with them.

132. I cannot accept that submission. It seems clear to me that the intent of section 92(2) is that it inserts into a planning permission a default time limit condition by operation of law in the absence of any express time limit condition imposed by the local planning authority. In my judgement it cannot be interpreted as a

provision which rewrites an express time limit condition that has been imposed by the local planning authority even if that condition contains unlawful wording. That would lead to intolerable uncertainty as to whether a condition which is clear on the face of the permission may or may not survive as drafted, especially on a point so pivotal as the time limit within which development must be commenced. It would also contradict section 92(4) which expressly allows a local planning authority to depart from the formulation of section 92(2) if it sees fit, in these terms:

> *"(4) The authority concerned with the terms of an outline planning permission may, in applying subsection (2), substitute, or direct that there be substituted, for the periods referred to in that subsection such other periods respectively (whether longer or shorter) as they consider appropriate"*

133. I observe in passing that the flexibility afforded to a local planning authority by section 92(4) to depart from the default timescales in section 92(2) does not itself rescue condition 3 because it still requires that the time limit condition express some finite periods. The addition of sub-paragraph (ii) to condition 3 effectively means that it does not.

134. The parties are, however, agreed that the Court has the power to sever from the condition the parts which render it unlawful.

135. In the *Midcounties Cooperative* case Ouseley J was faced with a permission granted subject to a condition which included unlawful 'tailpiece' wording. He held as follows (at [71]-[74]):

> *71. Mr Harris for Tesco/Santon submits, and I accept, that a power of excision or severance and partial quashing exists. It is illustrated by Mouchell Superannuation Fund Trustees v Oxfordshire County Council [1992] 1 PLR 97, in particular page 109F to G.*
>
> *72. Although that case concerned the quashing of a condition as a whole, and here it is the tailpiece alone which contains the unlawfulness, I see no reason why the principles which that case acknowledges should not be as capable of application to part of a condition, as they are capable of application to a condition as part of a permission. This tailpiece is linguistically severable, and after severance the condition requires no further amendment nor the insertion of any other words to make linguistic and planning sense. The substance of the condition would not be altered. It retains the floorspace limits which are at the heart of the condition and are what the condition aims to achieve. It reflects exactly what was applied for, assessed and contemplated in the officer's report, by the committee and approved by it. It is not, in my judgment, an important part of the planning condition, let alone of the planning permission. Its excision merely prevents the District Council doing what it would have been unlawful for it to do any way.*
>
> *73. Mr Holgate objects to severance, or partial severance, urging that the tailpiece is unlawful and should lead to the quashing of the whole planning*

> *permission because Wyre Forest District Council might have regarded the flexibility which the condition afforded as relevant to the decision and without it might have refused permission or conditioned it differently.*
>
> *74. I regard that as wholly fanciful. In my judgment, severance does not involve substituting a court decision for one not made by the Council, let alone for one that it is possible the Council may not have made if it knew the tailpiece to be unlawful. The condition would have been issued without that tailpiece had attention been paid to its lawfulness by the officer who added it after the report to committee was approved as the basis for the grant. This tailpiece was never referred to in the officer's report or in the debate and only emerged in the final planning permission when the officer under delegated powers issued the permission; it was not itself considered by the Council"*

136. The facts of the present case are not on all fours with *Midcounties.* Here the OR included a list of recommended conditions to be imposed if Members resolved to grant planning permission. The wording of recommended condition 3 in the OR is identical to what appears on the permission and so, unlike *Midcounties*, there was no error in transposition between the resolution to grant permission and the actual grant of permission. But that does not undermine the basic premise that the Court has a power to sever from a condition the wording which makes it unlawful. Both parties are agreed upon this, and I invite them now to consider the appropriate wording for my Order to give effect to this severance.

137. Ground 4 therefore succeeds with this result.

Conclusions

138. In summary, for the reasons I have given above Grounds 1 to 3 are dismissed and Ground 4 succeeds with the result that the words which make condition 3 of the Permission unlawful are to be severed from it.

139. I will now invite the parties to agree an appropriate form of Order or, failing agreement, to make submissions in writing on the form of Order and on any supplementary matters.