Integrated Planning and Design & Access Statement

Site:

Wisteria Farm, Northgate,

Pinchbeck,

Spalding,

PE11 3TA

Applicant:

J W E Banks Ltd

Prepared by:

O. Staff

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Introduction

This planning statement accompanies a planning application for a residential development of 3 no. new build dwellings at Wisteria Farm, Northgate.

Origin Design Studio Ltd has been appointed by J W E Banks Ltd to submit a planning application on a parcel of land which currently has three agricultural buildings, two of which have permission to be converted to residential dwellings. This document provides a rationale for justifying new build dwellings on the site and demonstrates planning betterment against any possible alternative.



Figure 1 – Proposed Site Plan

Site Location

Neighbourhood Context

The proposed site is located at Wisteria Farm in Northgate, Spalding. In planning policy terms, the site is classified as open countryside.

The site is located approx. 3.7 miles from the centre of Spalding.

Existing Site

The existing site contains three agricultural buildings and associated hardstanding.

The site is in a rural location, characterised by agricultural land. There is a cluster of dwellings immediately to the south of the site and further dwellings to the east along Northgate. Therefore, residential development in the area is sporadic but not entirely lacking.



Figure 2 - Red outlined area indicates site location

Site Constraints

Existing Buildings

Demolition

There are currently three agricultural buildings on site, two of which retain permitted development rights to be converted to residential dwellings. This application proposals the demolition of all agricultural units on site.

The existing buildings have a very limited contribution historically or architecturally and are therefore not worthy of retention.

Adjacent Buildings

The adjacent building to the south is a residential dwelling. The proposal has considered the existing amenity and care has been taken to ensure the spatial relationship is maintained and not worsened through inappropriate scale or placement.

Landscaping

The existing landscaping on site is proposed to be retained and for the most part remain unaffected due to proposed dwelling being sited on the existing buildings footprints.

Site Opportunities

Views

Due to the rural location, views towards the open countryside are achieved to some extent in all directions, however the desirable aspect is to the North and West. These have formed part of the determining factor in the orientating of the proposed dwellings, other dictating factors were ensuring the privacy of the existing neighbouring dwelling and those proposed.

Trees

As mentioned, the trees and hedges on site, although a constraint to be considered, also provide natural screening and privacy to the site. There is also the opportunity to include new planting which will add to the biodiversity of the site and bolster the screening.

Planning History

Two of the existing buildings on site have an existing permission to be converted to three dwellings via prior approval.

Details of this application are included below:

REF: H14-0922-22

Location: Wisteria Farm North Gate West Pinchbeck Spalding PE11 3TA

Description: Change of use of agricultural buildings to form 3 dwellings and associated works

Flooding

The site is in flood zones 1, 2 & 3, as a result a Flood Risk Assessment (FRA) has been prepared and submitted with this application. The floor levels of the proposed dwellings have been set in line with the recommendations outlined within the FRA.

The FRA also indicates that the sequential test has been passed due to the proposal for 3 dwellings not being considered to pose a greater risk than that which has and could be approved under permitted development.

It can be argued it would be unreasonable to expand the search area beyond the site, the application site is considered acceptable from a sequential perspective with no acceptable alternative presenting themselves with the immediate or wider search area.

Planning Policy and Material Considerations

Although the NPPF provides the national planning objectives for any planning application in England, the Local Planning Authority's Local Plan policies must take primacy when an application is being determined. In this instance, at the time of writing, the South East Lincolnshire Local Plan (SELLP) takes primacy. The Plan was formally adopted in March 2019.

Decisions must be made in accordance with the development plan unless other material considerations indicate otherwise. Such material considerations can include emerging local plans, emerging neighbourhood plans, national policy, permitted development rights and extant planning permissions.

Principle of Development

The application as presented forms an unusual case insofar as it is correct to start the assessment of the principle of the development against the provisions of the adopted development plan but that the proposition being advanced by the applicant is that the fall-back position weighs significantly in this case. Indeed, the core case being advanced is that notwithstanding the provisions of the local plan pertinent to the settlement and countryside, these considerations are capable of being outweighed by other material considerations.

This section of the report therefore will provide a resume of the local plan policy considerations as well as national policy and guidance before an assessment of the fall-back position. Thereafter a conclusion on the principle of the development proposed will be made having regard to these considerations.

South East Lincolnshire Local Plan Policies

The relevant planning polices relating to the application are the following:

- Policy 1: Spatial Strategy
- Policy 2: Development Management
- Policy 3: Design of New Development
- Policy 4: Approach to Flood Risk
- Policy 28: The Natural Environment
- Policy 31: Climate Change and Renewable and Low Carbon Energy
- Policy 36: Vehicle and Cycle Parking

National Planning Policy Framework - July 2021

One of the overarching and central themes to the NPPF is the Government's absolute commitment to encouraging and achieving sustainable development and strong economic growth, and the crucial role and expectation that the planning system does everything it can to support this. The Government expects that the planning system should operate to encourage, and not act as an impediment, to sustainable growth.

In order to deliver sustainable development, paragraph 11 of the NPPF requires that Local Planning Authorities approve proposals that accord with the development plan without delay, and that where there are no development plan policies, or the most relevant policies are out of date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

Paragraph 12 states that the presumption in favour of sustainable development

does not change the statutory status of the development plan as the starting point for decision making. Where a planning application conflicts with an up-to-date development plan, permission should not usually be granted. Local Planning Authority's may take decisions that depart from an up-to-date development plan, but only if material considerations in a particular case indicate that the plan should not be followed. In this respect, the case being advanced by the applicant seeks to engage the guidance that enables decisions to depart from the development plan.

Chapter 5 of the NPPF addresses housing with paragraph 60 confirms the Government's objective of significantly boosting the supply of homes. Further guidance at paragraphs 78-80 sets out the approach to rural housing. For rural areas sustainable housing development is about enhancing or maintaining the vitality of local communities ergo hamlets and the countryside, with generally poor accessibility to local services, are not therefore favoured locations for development.

Permitted Development & Fallback Position

The change of use of a building represents development in planning law. There are provisions within secondary planning legislation which allow for specified development to be undertaken without express planning permission (referred to as "permitted development"). The Government has introduced an ever-increasing and wide range of permitted development rights for a range of purposes from extending your home or for re-using office buildings or shops as dwellings. One such set of provisions allows for the change of use of an agricultural building to a dwelling without requiring the express permission of the Local Planning Authority, but subject to certain criteria being met and certain conditions being satisfied under Class Q, Part 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 or Class R.

Class Q enables permitted development, with certain criteria and restrictions relating to the following:

- Maximum floor areas
- Numbers of smaller and larger dwellings to be created
- Use
- Agricultural tenancies
- Retention of external dimensions
- Extent of building operations necessary for the building to function as a dwelling
- Location of the site (i.e. within a Conservation Area, AOND, World Heritage Site, National Park/ The Broads, part of a SSSI, safety hazard area, military explosives storage area)

Development is permitted subject to the developer first applying to the relevant Local Planning Authority for a determination as whether the "prior approval" of the Authority will be required as to:

- Transport and highways impacts of the development.
- Noise impacts of the development.
- Contamination risks on the site.
- Flooding risks on the site.
- Whether the location or siting of the building makes it otherwise impractical or undesirable for the building to change to a dwelling.

- The design and external appearance of the building.
- The provision of adequate natural light on all habitable rooms of the dwelling houses.

The LPA has 56 days to determine such an application. If a decision is not made then permission is automatically granted. The prior approval procedure is not available for retrospective development and if the development for which prior approval is applied for starts before formal determination, then it effectively disqualifies itself from the prior approval procedure.

In accordance with paragraph 12 of the NPPF, the Council need to consider the weight to be afforded to this prior approval scenario as an other material planning consideration, and how this needs to be weighed in the planning balance.

Class Q Fallback

The main precedent for the existence of a fallback position with regard to Class Q is Mansell v Tonbridge and Malling BC for which in September 2017, a judgement was handed down by the Court of Appeal. The case concerned the grant of planning permission for four houses on land currently occupied by a bungalow and a large agricultural building. In granting permission for the houses, the Council took into account the fact that the barn could be converted into 3 houses under Class Q and therefore the number of dwellings proposed would be the same as that which would have resulted from the conversion of the barn to 3 dwellings and retention of the existing bungalow. The aggrieved neighbour brought a Judicial Review with the permission initially being quashed by the High Court, but reinstated by the Court of Appeal, who found it was legitimate for the Council to grant the permission, even though no application for prior approval to convert the barn had been made. The Court of Appeal held in this case, the fact that an agricultural building could be converted (the fall-back position) is a material consideration when considering a proposal for new housing, provided that there is a realistic prospect of such a development going ahead. Lindblom LJ confirmed the legal considerations in determining the materiality of a fall-back position as a planning judgement were:

The basic principle is that for a prospect to be a "real prospect", it does not have to be probable or likely: a possibility will suffice;

There is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand.

Lindblom LJ concluded in Mansell that the clear desire of the landowner to develop and maximise the value of the site was sufficient to demonstrate there was a real prospect of the Class Q fall-back position in that case. Therefore, whilst it was noted that many Local Planning Authorities

would want to require a developer to go through the process of applying for determination as to whether prior approval is required for a proposed conversion under Class Q, and this would be preferable, applying the findings of Mansell, a Local Planning Authority cannot insist that a prior approval is first obtained before determining an application that relies on Class Q as a fall-back position.

Accordingly, the Class Q fall-back is engaged and therefore represents a material planning consideration in accordance with paragraph 12 of the NPPF.

Fallback Prospect

Prior to this application, a prior approval application was submitted and approved for two buildings on site to be converted to allow for two large dwellings and one smaller dwelling. The fallback position also does not require a Class Q to be gained, but just that it can be demonstrated that it could be. Therefore the proposal to construct three dwellings reflects what has already been granted approval through Prior Approval.

It was determined that the approved scheme did not make the most of the site's potential and as a result an alternative sketch scheme was developed which has been the basis of the proposed GIA for the site.

Assessment of Policy and Material Considerations

South East Lincolnshire Local Plan Policy Assessment

The starting point for the consideration of all planning applications is the development plan as per Section 70(2) of the Town and Country Planning Act 1990 (as amended). In this case, in the absence of a neighbourhood plan, the development plan is South East Lincolnshire Local Plan (SELLP). The site is located within the countryside as set out within the plan. The plan has specific policies relating to development in the countryside (policy 22 & 23) however the proposal does not strictly accord with the criteria set out in the policy, such as being a replacement dwelling or the re-use of a building for residential dwellings.

It can be argued as a result the proposal conflicts with the local plan, however the fallback position in this case should be afforded a high degree of material weight in the planning balance.

Policy 1 outlines the spatial strategy for South East Lincolnshire and as such the site is defined as being in the open countryside. As a result, development will be permitted that is necessary to such a location and/or where it can be demonstrated that it meets the sustainable development needs of the area in terms of economic, community or environmental benefits.

Policy 2 relates to development management and defines further detail as to how sustainable development should be achieved.

One aspect of this is analysis of the size, scale, layout, density and impact on the amenity, trees, character and appearance of the area and the relationship to existing development and land uses. The proposal, as defined in the 'Design' section of this document is of a suitable size, layout and density. The proposal is also of high quality design and the orientation of the dwellings have been carefully considered in terms of solar gain/ preventing overheating as well as considering amenity of neighbouring dwellings.

The access also remains unchanged and the vehicle levels will not be greater than that required for the prior approval permission. It will also have no greater impact on the community services and infrastructure than the approved scheme.

As outlined in the FRA, flood risk of the site has also been carefully considered.

Natural habitats have also been retained and added to through this proposal.

Policy 3 relates to the design of new development and outlines how new development should be designed to create a sense of place. The proposal is in line with this through respecting the density, scale and massing of neighbouring dwellings. The proposal has also considered the orientation of the dwellings for the purpose of including renewables in the form of solar panels on the southern facing sections of roof.

The existing trees on site will be retained to promote and enhance biodiversity.

Policy 4 relates to flood risk and has been addressed within the included FRA, and the recommended construction and floor levels have been adhered to in the design.

Policy 28 relates to the natural environment and requires proposals shall provide an overall net gain in biodiversity.

This has been demonstrated in the proposal through the retention of the existing landscaping which is reinforced with additional planting. There are also areas of dedicated bio-diversity zones with wildflowers, denser shrubs and trees to promote diverse wildlife habitats.

Policy 31 relates to climate change and renewable and low carbon energy. The dwellings will be more energy efficient than is able to be achieved through a conversion. This can be achieved through quality materials and improved insulation capabilities to maximise thermal performance. The energy generation for these properties is supplemented by on site, solar panel generation. The hot water system and heating is provided by Air Source Heat Pumps (ASHP) which are more efficient than conventional methods of heating and hot water supply.

Policy 36 relates to vehicle and cycle parking. The number of parking spaces provided for each dwelling are of a suitable level as well as enabling electric vehicle charging.

Class Q Fallback Position Assessment

The current planning application seeks permission for a total of three new build dwellings. This equals the number of properties approved in the class Q application.

The original application proposed a large expanse of land (around the demolished third unit) unassigned. The class Q legislation does not allow large amounts of curtilage and the location of this left over piece makes it impractical for continued agriculture and would become assimilated with the residential units. This would suggest the use of the land, as a whole, can achieve a better site arrangement.

The dwellings Gross Internal Area (GIA) also totals 639m² with 2 larger dwellings at 244m² and 1 smaller at 151m², the scale of development within the maximum limit of 865 m² allowed through a Class Q application.

The positioning of each dwelling would be on the footprints of the current units, this allows better distribution of the amenity space for the 3 plots, allows for the ability of meaningful biodiversity improvements.

Through the current approval, the potential for a Class Q fall-back exists, it should be afforded a high degree of material weight in the planning balance. Ordinarily as evident from the policy commentary above, new dwellings on the site would fail to accord with the spatial strategy and settlement hierarchy, such that the development would be resisted as it is contrary to policy.

However, the realistic prospect of a Class Q fall-back shifts the planning balance in this case and establishes that, under the provisions of permitted development, the site could be developed for a total of 5 dwellings and such a development is a real prospect.

The next key consideration, mindful of the approach in Mansell and planning appeal precedents, relates to whether the proposal subject to the planning application represents a 'betterment'. In short new build dwellings by their very nature offer betterment with regard to thermal efficiency and airtightness.

Betterment

Due to the constraints of Prior approval permissions, the previous scheme would not make efficient or effective use of the site.

The proposed scheme keeps the development on the footprints of the existing units, the proposed units have a smaller footprint than the existing, reducing the density of development on site.

The splitting of the site into 3 residential plots and amenity space avoids pockets of land not associated with the residences but also not impractical land for continued agricultural use.

The ability to provide meaningful landscaping aimed to promote bio-diversity. The proposed site plan shows areas on the site set aside for less domesticated landscaping with the purpose of providing a net gain to the habitats.

The ability to build anew allows for higher quality construction, better air tightness and improved thermal performance, particularly better control over thermal bridging. The proposal also includes for

the installation solar panels for on site power generation, something a Class Q application would not permit given the constraints on exceeding the original envelope.

Sustainability

U-Values & Airtightness

The proposed dwellings, due to being new build, will be an improvement in regard to energy efficiency. This will enable a more comfortable environment for the future occupants as well as being of benefit to the wider community through reduced emissions and energy wastage. New build dwellings being able to be constructed in a way which reduces the U-value of a dwelling to a level of which a conversion would not be able to achieve.

When comparing a development which utilises an existing building versus a new build dwelling, there are cases where the retention of the existing fabric of the building enables a more sustainable development. For example, when retrofitting an existing dwelling which already is constructed of thermal elements, this would often have a smaller carbon footprint than a new build, however this is not the case for an agricultural building. They lack the basic level of amenities suitable for human habitation.

When constructing a dwelling, the aim is always to create an environment which is comfortable for humans to live in, such as thermal efficiency, airtightness, and natural daylighting.

With an agricultural building, the objective is often secure storage for assets, crops, animals, supplies or machinery. Since with an agricultural building, you are starting with a point which is averse to human living standards, the extent to which additional materials, rebuilding etc are required and will still not result in a dwelling that is close to the standards achieved by a new build dwelling, even when building to modern, minimum standards.

Technology has allowed dwellings to become more thermally efficient such as the development of better performing insulation which improves U-values. U-Values assigned to a building element represent its ability to transmit heat from a warm space to a cold space within a building. The lower the value, the less heat is transferred through the element.

There is the ability to upgrade various elements in an old dwelling to improve the internal comfort and carbon footprint. As a result, in most cases, a new build dwelling will in fact have a smaller carbon footprint over the lifetime of the building, which through considering this is thinking with a much more sustainable, future thinking mindset.

A new build dwelling will enable a more comfortable environment for the future occupants as well as being of benefit to the wider community through reduced emissions and energy wastage. With a new build it is much easier to create an airtight, well insulated dwelling and avoid issues which arise from not fully knowing the history of the building or original construction. A new build also provides the opportunity to specify all construction elements, enabling greater flexibility and opportunity for creating a well-insulated and sealed building.

The building regulations include different targets for existing buildings undergoing conversion and new build dwellings. This is because by the nature of a conversion,

they are unable to achieve the same thermal efficiency as new dwellings due to the existing constraints they have.

Approved 'Document L Volume 1: Dwellings' outlines maximum U-Value requirements for new fabric elements in existing dwellings, requiring roofs to achieve 0.15 W/m²K and floors 0.18 W/m²K. Whereas the notional dwelling specification for new dwellings, outline a dwelling to be constructed in line with much more stringent requirements, with U-value for roofs at 0.11 W/m²K and floors 0.13W/m²K. When compared, this is a significant improvement. We would recommend speaking to your building control officer for further insight into this.

Therefore, because of this, the economic and environmental benefit of a new build dwelling in the long term, particularly when compared to a converted agricultural building would be greater.

With the exception of U-value targets a conversion only records the energy performance of a building. There is no requirement to meet emission targets.

Further, the current Building Regulations aid in the plans to move towards net zero carbon. New homes and buildings in England have to produce substantially less CO2 under the current regulations. CO2 emissions from new build homes should be around 30% lower than under the previous standards. The new dwelling would be constructed in accordance with the building regulations and therefore provide betterment compared to the existing permission.

Biodiversity

The proposal includes for much greater biodiversity through more diverse native planting whilst also retaining the existing trees on site. We would be happy to accept a suitability worded planning condition which allows for full details to be submitted.

Precedents

There are a number of other developments which utilise the fallback decision. The first, as mentioned is the 'Mansell v Tonbridge and Malling' case, for which the precedent was initially set. The decision for which is included within this document as an appendix.

There are also a number of similar applications which have been decided close to the district.

Cheal Road, Gosberton

REF: H08-0443-22 - Erection of Dwelling Location Corner of Cheal Road/Salt fleet Lane Gosberton Fen Spalding

This scheme was approved by South Holland District council and the following was stated by the officer with regard to the fallback position:

'In this case, the application property has a Class Q consent for a dwelling (ref. H08-0861-21). It seems likely that there is a clear desire by the landowner to develop and maximise the value of the

site. Moreover, the scheme approved under Class Q is the conversion of a non-typical residential appearance agricultural building into a dwelling. The current proposal is for a detached house that is in keeping with that of the vernacular Fenland Cottage in terms of design, scale and setting.

The proposal would deliver some benefits to the appearance of the site compared to the fallback position. This carries significant weight in favour of the proposal. On balance, taking account of the above considerations, it is considered in this particular case that the benefits of the proposed development compared to the identified fallback position are a material consideration which outweighs the conflict with the development plan and justifies granting planning permission for the proposal.'

Further to this the site is also similarly in a flood zone and therefore the following was stated:

'The site is within Flood Zone 3 of the Environment Agency Flood Maps and is not impacted by increased hazard or flood risk on the 2115 South East Lincolnshire Strategic Flood Risk Mapping. Finished floor levels would be sited at 300mm above existing ground level. For this reason, a sequential or exceptions flood test is not required.'

This proposal also seeks to align the proposed floor levels with the recommendations of the prepared FRA. As a result this should similarly be deemed acceptable.

Crossgates Farm, Algarkirk

REF: B/22/0454 -Demolition of existing agricultural barns and erection of 3no. dwellings with associated accesses and change of use of agricultural land to residential curtilage at Crossgates Farm, Crossgate Lane, Algarkirk, Boston, PE20 2AJ

This scheme was approved by Boston Borough Council and had not previously had a Class Q permission gained on the site, however it was demonstrated that the site had the realistic prospect of gaining a class Q permission and therefore the fallback position was a material consideration.

The following was stated in the officer's report:

'In conclusion, the application site benefits from an extant consent to convert the existing agricultural building

to a residential dwelling, with further evidence indicating that the large steel framed building on the site can be converted into 2no dwellings gives significant weight to establishing the principle of residential development on the site, despite the identified conflict with the development framework of the South East Lincolnshire Local Plan 2019.'

Similarly in this application, the proposal does not accord with the local plan policies, however due to the class Q permission being gained, there is a realistic prospect of the building being converted. The existing building also showed the potential to be converted into more dwellings than was proposed, similar to this site, creating betterment from the potential class Q.

Poplar Farm, Algarkirk

REF: B/22/0350 - Proposed construction of 5 No residential dwellings including a conversion and extension to existing agricultural building on site at Poplar Farm, Marsh Lane, Algarkirk, Boston, PE20 2AY

This scheme was approved by Boston Borough Council and proposed to construct 5 dwellings on a site with permission for 5 dwellings via class 2, split between two buildings. The following was stated in the officer's report:

'The existing buildings on site to be removed do not enhance the character of the area, although as agricultural buildings within a rural context do not cause harm to that character either. The proposed dwellings would be set back within the site but Plot 2 would be visible, particularly on approach from the south. These dwellings would be finished in black timber shingles, an uncommon material within the immediate context but would not be harmful and would be in keeping with the agricultural character of the site. Plots 4 and 5 to the rear 6 of the site are larger dwellings with a similar material palette. Each property has a brick single storey extension separated by a glazed link.

The existing character is rural, with scattered dwellings individually or in small clusters. The proposed form and scale of development would be out of character with this rural character. However, there is limited wider visibility of the site and the form and scale of the development would be largely unseen. As such the level of harm arising is limited.'

This proposal similarly seeks to replace agricultural buildings which do not enhance the character of the area and are not easily seen from the public realm. A mixture of more contemporary and traditional materials are also proposed (brick, timber cladding and standing seam metal) which although not seen together locally, are of high quality and reflect elements of the local vernacular in a new and interesting way. Plots 2-4 are also similarly set back and shielded from the road and therefore any deviation from the existing character will be negligibly harmful. Plot 1 however is road frontage and so continues the pattern of development along Barrier Bank.

Vicarage Lane, Scopwick

REF: 22/1447/FUL - Demolition of the existing agricultural barn and erection of 2 no. dwellings at Land Adjacent To 1 Vicarage Lane Scopwick Lincoln Lincolnshire LN4 3NT

This scheme was approved by North Kesteven District Council and proposed two dwellings on a site which had permission for dwellings via prior approval.

The officer's report said the following about the proposal:

'The approved Class Q fallback position creates two detached dwelling in this location which are created by the partial demolition of the existing agricultural building on the site. This rectangular building is utilitarian and functional in its appearance being constructed of blockwork and cement fibre sheeting and is not of any architectural merit. The Class Q application did improve its appearance by the inclusion of a mixed render and timber clad finish but the form of the building was unchanged and the proposed dwellings were not of any significant architectural merit either. The overall design of the proposed dwellings by this application would result in betterment in terms of visual amenity as it of a much-improved design that responds to its context.

Furthermore, the applicant has highlighted that the fact the proposed new build dwellings will be built in accordance with current Building Regulations which require a higher standard of energy efficiency that would not be achieved through the conversion of the existing building.

It is noted also that the proposal includes the provision of solar panels which will generate on plot renewable energy to meet the energy needs of proposed dwellings'

This application similarly seeks to replace an agricultural building with little to no architectural or historic merit with high quality, well designed dwellings. The dwellings will also similarly be built in accordance with the current building regulations and achieve a higher standard of energy efficiency than required or achievable through converting the existing buildings. The scheme also includes for solar panels on the dwellings, providing renewable energy generation.

Round House Farm, Haven Bank

REF: S/207/02406/22 | Planning Permission - Erection of 2no. detached dwellings, existing agricultural barns to be demolished. | ROUND HOUSE FARM, HAVEN BANK, NEW YORK, WILDMORE

This scheme was approved by East Lindsey District Council and similarly proposed to demolish two agricultural barns (with permission via prior approval to convert to four dwellings) and build two new dwellings. This site similarly is also located within a flood zone. With regard to flooding, the officer's report stated the following:

'Officers accept the site having gained approval for four dwellings under part 3 of the GDPO, that an argument could be made in regards the application of the Sequential and Exception test (SET) with the site already having permission for housing…..

In line with the PPG as regards being pragmatic on the availability of alternative sites, it would in the Councils view be unreasonable to expand the search area, the application site is considered acceptable form a sequential perspective with no acceptable alternative presenting themselves with the immediate or wider search area. Given the previous application an argument could be made to further refine the search area to the site itself, irrespective of this both approaches would get you to a point of acceptability and appeasement of the sequential test.'

It can be argued that a similar conclusion can be drawn on this site in respect of flooding, since the site similarly has an existing permission for residential dwellings and that the wider area surrounding the site is similarly at the same risk of flooding and therefore there are no nearby sites sequentially better than the site. Further to this the scheme also proposes to either set the dwellings outside of the flood zone or raise the land and floor levels to achieve a level outlined in the submitted FRA.

The officer's report also stated the following:

'The design itself is sympathetic to the agricultural history of the site, whilst also being more aesthetically pleasing than conversion of the existing barns including layout, resulting a more comprehensive scheme.'

The proposal similarly is sympathetic to the history of the site and the design of the dwellings are more aesthetically pleasing than converting the existing barn.

Sprite Lane, Billinghay

REF: 21/0162/FUL | Erection of 1no. dwelling on the site of an existing agricultural building which is to be demolished. | Barn Off Sprite Lane Billinghay Lincoln.

This scheme was approved by North Kesteven District Council and similarly proposed to demolish an existing agricultural barn and build a new dwelling. It was determined that the fallback position was a material planning consideration, stating the following in the officer's report:

The application, by virtue of the previously approved prior notification and the similar site area demonstrates there to be a realistic fall-back position. With this in mind the fall-back position becomes the determining consideration outweighing the considerations within local policy, particularly policy LP55 of the CLLP. Following assessment, the proposal is considered acceptable in principle and is of a design which is reflective of its agricultural origins whilst respecting and assimilating with the open countryside. The officer recommendation is therefore one of approval.'

Due to the existing permission via prior approval on this site, it can be demonstrated that such a development. This proposal was also similarly of a more contemporary design, utilising similar high quality materials such as metal cladding.

The proposal also included for an increase in site area, however this was seen as being acceptable by the officer stating the following:

'It is noted that a slight increase is still proposed, measuring approximately 730sqm in comparison to 680sqm, however officers consider this marginal when taken in the context of the overall site. Additionally, the applications seeks to create a more 'regular' shape plot which also further compacts the residential curtilage without sprawling into the countryside beyond.'

This application similarly seeks to create more regular shaped plots through an increase in residential curtilage.

Village Street, Walcot

REF: 21/1376/FUL | Conversion of an agricultural building to 1no. dwelling with conversion of existing barn to provide garaging and the erection of 3no. additional dwellings. | Yard To The South Of Village Street Walcot Sleaford

This scheme was approved by North Kesteven District Council and similarly

proposed to demolish an existing agricultural barn and build new dwellings. It was determined that the fallback position was a material planning consideration, stating the following in the officer's report:

'In the case of the application for Walcot, the fall-back scheme presented in the submission of the application is a worked-up proposal and on assessment of the scenario presented, Officers find that it would accord with the criteria set out under Class Q. Furthermore it is evident the applicant has, through this application and previous proposals, demonstrated that a re-development of the site is a "real prospect"…

Accordingly Officers find that the Class Q fall-back is engaged and therefore represents a material planning consideration in accordance with paragraph 12 of the NPPF.

….Having established that the Class Q fall-back exists, it is reasoned by Officers that such is

capable of being afforded a high degree of material weight in the planning balance. Ordinarily as evident from the policy commentary above, planning permission could reasonably be obtained for the conversion of the stone barn to a dwelling but otherwise 3 new dwellings on the site would fail to accord with the spatial strategy and settlement hierarchy of policy LP2 such that the development would be resisted as contrary to policy. However, the Class Q fallback shifts the planning balance in this case and establishes that, under the provisions of permitted development, the site could be developed for a total of 5 dwellings and such a development is a real prospect. With the above in mind, the next key consideration, mindful of the approach in Mansell and planning appeal precedents, relates to whether the proposal subject to the planning application represents a 'betterment' compared to the fall-back position and this is considered in detail below.

…..The revised scheme for determination, offers the opportunity for betterment in design terms giving the opportunity to create a comprehensive and cohesive scheme which covers the whole yard. This is a distinct advantage in terms of a design outcome rather than the relatively contrived form of development under Class Q with the conversion of functional agricultural buildings of no architectural merit or interest into dwellings which would result under the fallback position, and with very limited amenity afforded to the occupiers by the restricted curtilages allowed.'

As outlined above, the fallback position was afforded material weight and betterment was demonstrated. Similar types and levels of betterment are present in this application. In particular, both proposals offer a comprehensive and cohesive scheme which covers the whole site, rather than a contrived form of development through permitted development. Amenity is also improved in both schemes due to not requiring the proposal to include restrictive curtilages allowed under Class Q.

Summary

The above precedents each have similar aspects to the proposal and as a result the application should similarly be seen in the same light and recommended for approval based on the same justification.

Design

Use

The current use of the site is agricultural, however has a realistic possibility of being converted to residential via a Class Q application. The application also proposes a use of residential. The potential for residential development in this location sets a precedent for this use and therefore the proposed use is in line with this.

Amount

The site contains 3 existing buildings. The proposed development for the site is inspired by the agricultural developments and proposes 3 new residential dwellings in place of the existing ones.

Dwellings on Plot 1 and 2 is proposed to contain 5 bedrooms each, while Plot 3 proposes 3 bedrooms.

Site

The site layout has been designed to be an improvement on site, The proposed site layout ensures that each dwelling is placed strategically to maximize privacy and views. Proper orientation of the houses takes advantage of natural light and ventilation. The proposed dwellings are sited on the footprint of the existing buildings. It was determined that locating the dwellings closer to the access track with longer gardens would ensure better accessibility.

Plots 1 and 2 have a similar footprint and have been mirrored on the rear site for better access and planning.

Plot 3 is located closer to the entrance of the site and reflects the location of a traditional barn present on site.

Dwellings

The interior layout of the dwellings reflects modern living, The living spaces are on the ground floor with the bedrooms and bathrooms distributed on both the ground as well as the first floor. All plots also have an open plan kitchen dining area, with separate reception rooms. Plot 3 proposes for a double heighted Kitchen/Dining allowing in abundance light into the dwelling and a gallery on the first floor. The open plan living spaces have the direct access to the rear patio and the garden, allowing direct access to outdoor areas.

Scale

The scale of the proposed development has been designed to be sensitive to the setting. The dwellings are proposed to be 2 storeys in keeping with the neighbouring dwellings and the height of the existing building.

Given the surrounding context the proposed dwellings are of a suitable scale for the area and site. The gardens are also generously sized.

The total Gross Internal Area (GIA) of the dwellings is 628m² with Plots 1 and 2 are 242m² each and plots 3 is 144m². This overall GIA is comparable to the potential converted floor area of the existing class Q permissions which totalled 674m² split over 3 dwellings.

The height of the dwellings are also within the realms of that of the existing buildings on site. The existing buildings range from approx. 8.6m (plot 1) to 7m (plot 2) to 4.5m (plot 3) tall. The proposed dwellings are 7.92m tall (plots 1 and 2) with plot 3 having a higher ridge height of 6.95m and a lower ridge of 4.55m. As a result the heights have been designed to be commensurate with the existing buildings

on site, whilst also respecting the height of neighbouring buildings.

Landscaping

The proposed landscaping scheme has been designed to enhance the site's biodiversity. Currently, hardstanding areas are present on the site, while trees and shrubs are predominantly clustered in the northwest and along the access track.

The proposed scheme retains these trees and proposes new tree planting in the gardens of individual plots. New native hedge planting is also proposed to further improve biodiversity and natural screening to the plots. Further details are shown on the site plan submitted with this application.

To the north of the dwellings, an area is proposed to be allocated to promote biodiversity through the inclusion of 'wilding area' which will consist of native wildflowers to attract pollinators and provide habitats for wildlife.

These landscaping additions will provide a benefit and improvement on site.

Appearance

The design rationale for the proposal was to be in keeping with the agricultural aesthetic and allow for contemporary residential living. Plot 1and 2 have the aesthetic of a modern barn. The design proposes brick walls on the ground floor with a raised seam for cladding at the first floor and roofing.

For these dwellings, the Multi colour brick (Fig 5) and the green box profile cladding (Fig 6) will be used. These materials are chosen to blend in with the surroundings. The first floor is wrapped in the metal cladding as opposed to the bricks on the ground floor giving it a very modern aesthetic The openings (doors and windows) also have been inspired by modern farmhouse designs and are simple and have no ornamentation. The longer window on the whole of first floor enhances the overall look of the dwellings.

Plots 3 has a traditional approach. It proposes a traditional brick blend with timber cladding and detailing. The roof is a traditional clay pantile. This material palette is in keeping with both historic dwellings and the local vernacular. The overall form of the dwellings and site are reflective of the existing site and vernacular with well-considered and unique design.

For this dwelling, the red bricks(Fig 6) are laid in the flemish bond and will have a clay pantile roof(Fig 7) to give an overall traditional finish. The Openings are inspired by the form of the traditional openings and are arched with Header bricks surrounding the aluminium frames for doors and windows. The Double heighted door and circular windows have been provided to compliment each other elevate the exterior of the dwelling.

Materials

Plot 1 and 2

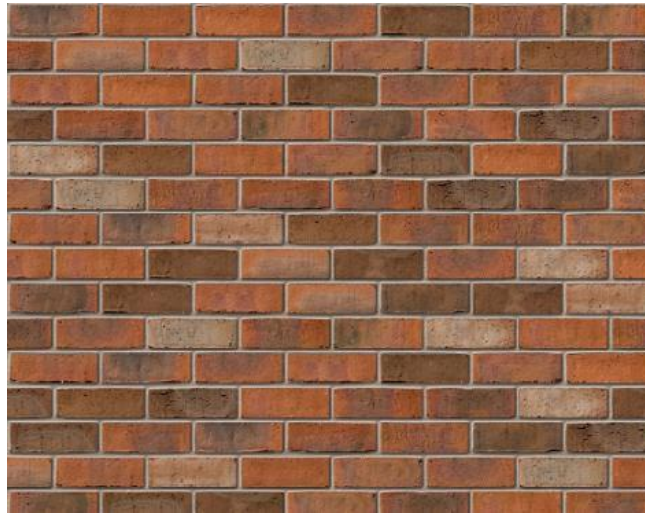


Figure 3 – Example of Brick Blend



Figure 4 – Example of Sheet Cladding for Plots 1 and 2

The materials used for Plots 1 and 2 are Multi Red brick (Figure 4) and Metal profile Cladding (Figure 5).

Plot 3

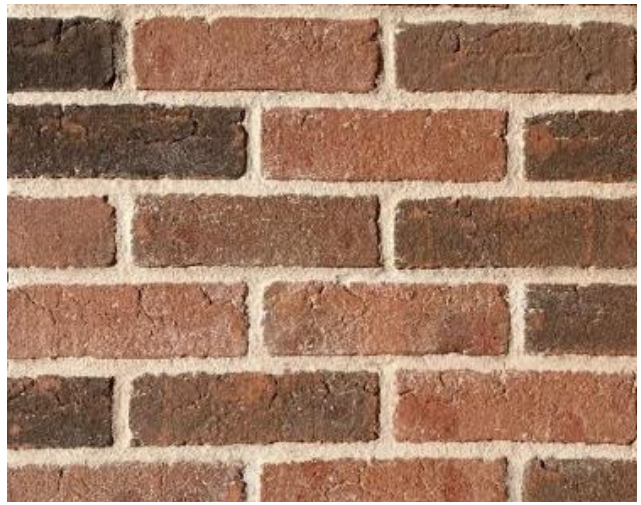


Figure 6 - Reference for red bricks for Plot 3



Figure 7 - Reference for Clay Pantile roof tiles for Plot 3

The materials used for Plot 3 are traditional red bricks (Fig 6) and Clay Pantile roof (Fig 7).

Access

Site Access

Access to the site is via an existing access which currently leads to the agricultural buildings. A shared surface drive serves all the 3 proposed properties with their allocated parking.

Proposed Parking Provision

Pots 1 and 2 have 3 car parking spaces and plot 3 has 2 car parking spaces.

Conclusion

This site has permission for the conversion of two agricultural units (and demolition of a third) into 3 residential dwellings. This application proposes development that provides 3 new build dwellings on the footprints of the existing structures.

Through a number of metrics we have justified that a new build scheme provides substantial betterment to the original approval of conversion.

The conversion with its limitations on sustainability, effective use of space and ecology represents a legitimate 'fall-back position, the site will be developed on the basis of the class Q approval, however this application hopes to achieve the same density of residential development but with improved design, deliberate landscaping and enhanced thermal and sustainable performance.

Appendices

Appendix 1 – Existing Site Photographs













Appendix 2 - Judgement: Mansell V Tonbridge And Malling Bc [2017] Ewca Civ 1314.



Neutral Citation Number: [2017] EWCA Civ 1314

Case No: C1/2016/4488

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2017

Before:

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

- -

Between:

Michael Mansell	**Appellant**
- and -	
Tonbridge and Malling Borough Council	**Respondent**
- and -	
(1) Croudace Portland **(2) The East Malling Trust**	**Interested Parties**

- -
- -

Ms Annabel Graham Paul (instructed by **Richard Buxton Environmental and Public Law**)
for the **Appellant**
Mr Juan Lopez (instructed by **Tonbridge and Malling Borough Council Legal Services**)
for the **Respondent**
The interested parties did not appear and were not represented

Hearing date: 4 July 2017

- -

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

Lord Justice Lindblom:

Introduction

1. Should the judge in the court below have quashed a local planning authority's grant of planning permission for the redevelopment of the site of a large barn and a bungalow to provide four dwellings? That is what we must decide in this appeal. It is contended that the authority misdirected itself in considering a "fallback position" available to the landowner, and also that it misapplied the "presumption in favour of sustainable development" in the National Planning Policy Framework ("the NPPF") – a question that can now be dealt with in the light of this court's recent decision in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893.

2. The appellant, Mr Michael Mansell, appeals against the order of Garnham J., dated 10 November 2016, dismissing his claim for judicial review of the planning permission granted on 13 January 2016 by the respondent, Tonbridge and Malling Borough Council, for development proposed by the first interested party, Croudace Portland, on land owned by the second interested party, the East Malling Trust, at Rocks Farm, The Rocks Road, East Malling. The proposal was to demolish the barn and the bungalow on the land and to construct four detached dwellings, with garages and gardens. Mr Mansell lives in a neighbouring property, at 132-136 The Rocks Road – a grade II listed building. He was an objector.

3. It was common ground that the proposal was in conflict with the development plan. Rocks Farm is outside the village of East Malling to its south-east, within the "countryside" as designated in the Tonbridge and Malling Borough Core Strategy. The site of the proposed development extends to about 1.3 hectares. The barn, about 600 square metres in area, had once been used to store apples. The bungalow was lived in by a caretaker. The application for planning permission came before the council's Area 3 Planning Committee on 7 January 2016. In his reports to committee the council's planning officer recommended that planning permission be granted, and that recommendation was accepted by the committee. The officer guided the members on the "fallback position" that was said to arise, at least partly, through the "permitted development" rights for changes of use from the use of a building as an agricultural building to its use as a dwelling-house, under Class Q in Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO").

4. Mr Mansell's challenge to the planning permission attacked the officer's approach to the "fallback position" and his assessment of the proposal on its planning merits. Garnham J. dismissed the claim for judicial review on all grounds. Permission to appeal was granted by McCombe L.J. on 21 February 2017.

The issues in the appeal

5. The appeal raises three main issues:

    (1) whether the council correctly interpreted and lawfully applied the provisions of Class Q in the GPDO (ground 1 in the appellant's notice);

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

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

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

> "Q. Permitted development
>
> Development consisting of –
> (a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order; and
> (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwellinghouses) of that Schedule.
>
> Q.1 Development not permitted
>
> Development is not permitted by Class Q if –
> …
> (b) the cumulative floor space of the existing building or buildings changing use under Class Q within an established agricultural unit exceeds 450 square metres;
> (c) the cumulative number of separate dwellinghouses developed under Class Q within an established agricultural unit exceeds 3;
> …
> (g) the development would result in the external dimensions of the building extending beyond the external dimensions of the existing building at any given point;
> (h) the development under Class Q (together with any previous development under Class Q) would result in a building or buildings having more than 450 square metres of floor space having a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order;
> … ."

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

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

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

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

6.15 The existing bungalow within the site could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building. Such a scenario would, in effect, give rise to the site being occupied by a total of four residential units albeit of a different form and type to that proposed by this application. This provides a realistic fallback position in terms of how the site could be developed.

6.16 I appreciate that discussion concerning realistic 'fallback' positions is rather complicated but, in making an assessment of any application for development, we are bound to consider what the alternatives might be for a site: in terms of what could occur on the site without requiring any permission at all (historic use rights) or using permitted development rights for alternative forms of development.

6.17 In this instance a scheme confined to taking advantage of permitted development would, in my view, be to the detriment of the site as a whole in visual terms. Specifically, it would have to be developed in a contrived and piecemeal fashion in order to conform to the requirements of the permitted development rights, including the need to adhere to the restrictions on the floor space that can be converted using the permitted development rights.

6.18 I would also mention that should the applicant wish to convert the entire barn for residential purposes, above the permitted development thresholds, such a scheme (subject to detailed design) would wholly accord with adopted policy. Again, this provides a strong indicator as to how the site could be developed in an alternative way that would still retain the same degree of residential activity as proposed by the current application but in a more contrived manner and with a far more direct physical relationship with the nearest residential properties.

6.19 The current proposal therefore, in my view, offers an opportunity for a more comprehensive and coherent redevelopment of the site as opposed to a more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights."

8. For Mr Mansell, Ms Annabel Graham Paul submitted to us, as she did to the judge, that the officer's advice in those six paragraphs betrays a misunderstanding of the provisions of Class Q in the GPDO, in particular sub-paragraphs Q.1(b) and Q.1(h). She argued that the restriction to 450 square metres in sub-paragraph Q.1(b) applies to the total floor space of the agricultural building or buildings in question, not to the floor space actually "changing use". Before the judge, though not in her submissions in this court, Ms Graham Paul sought to bolster that contention with a passage in an inspector's decision letter

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

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

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

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

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

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

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

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

13. Ms Graham Paul sought to reinforce these submissions by pointing to other provisions of the GPDO where similar wording is used: Class M, which provides permitted development rights for changes of use of buildings in retail or betting office or pay day loan shop use to Class C3 use, and states in sub-paragraph M.1(c) that development is not permitted if "the cumulative floor space of the existing building changing use under Class M exceeds 150 square metres"; and Class N, which provides permitted development rights for changes of use from specified sui generis uses, including use as an amusement arcade or centre, and use as a casino, to Class C3 use, and states in sub-paragraph N.1(b) that development is not permitted if "the cumulative floor space of the existing building changing use under Class N exceeds 150 square metres".

14. I cannot accept Ms Graham Paul's argument. I think the judge's understanding of Class Q was correct. The provisions of Class Q relating to the scope of permitted development rights should be given their literal meaning. When this is done, they make perfectly good sense in their statutory context and do not give rise to any duplication or redundancy.

15. The focus here is on the provisions as to development that is "not permitted" under paragraph Q.1, and in particular the provisions of sub-paragraphs Q.1(b) and Q.1(h). Sub-paragraph Q.1(b) establishes the "cumulative floor space of the existing building or buildings" that is "changing use under Class Q …". The limit on such "cumulative floor space …" is 450 square metres. This restriction is stated to be a restriction on the change of use, not on the size of the building or buildings in which the change of use occurs. Sub-paragraph Q.1(b) relates to a single act of development in which the building in question, or part of it, is "changing use". The floor space limit set by it relates not to the total floor space of the building or buildings concerned. It relates, as one would expect, to the permitted development rights themselves, which apply to the "cumulative" amount of floor space actually "changing use under Class Q". The use of the word "cumulative" in this context – as elsewhere in the GPDO – is perfectly clear. It connotes, in relevant circumstances, the adding together of separate elements of floor space within a building or buildings, or, again in relevant circumstances, a single element of floor space, which in either case must not exceed 450 square metres. The total floor space of the building or buildings concerned may itself be more than 450 square metres. But the cumulative amount of floor space whose use is permitted to be changed within that total floor space must not exceed 450 square metres.

16. This interpretation of sub-paragraph Q.1(b) avoids arbitrary consequences in the application of the permitted development rights under Class Q. It does not make the availability of those rights for a qualifying "agricultural building" depend on the total floor space of the building itself. It would not, therefore, create a situation in which the permitted development rights under Class Q would be available for a building whose total floor space was 450 square metres, but not for a building with a floor space of 451 square

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

17. Had the draftsman intended to confer permitted development rights under Class Q only to a building or buildings whose total floor space was not more than 450 square metres, the relevant provision would have been framed differently. There would have been no need to use the word "cumulative" or some other such word. The provision would simply have stated, for example, "the total floor space of the existing building or buildings within an established agricultural unit in which the change of use under Class Q is being undertaken does not exceed 450 square metres". But that is not what sub-paragraph Q.1(b) says, or, in my view, what it means.

18. Nor can I see how an interpretation of sub-paragraph Q.1(b) in which the restriction of 450 square metres applies not to the floor space actually changing use but to the total floor space of the building or buildings in which the change of use is taking place can be reconciled with the definition of "building" in paragraph 2 of the GPDO as including "part of a building". Unless one disapplies that part of the definition of a building to sub-paragraph Q.1(b), one must read that provision as meaning "the cumulative floor space of the existing building or buildings or part of a building changing use under Class Q … exceeds 450 square metres" (my emphasis). That understanding of sub-paragraph Q.1(b) would not sit happily with the concept that the restriction of 450 square metres applies not to the floor space changing use but to the total floor space of the building itself.

19. My interpretation of sub-paragraph Q.1(b) does not leave sub-paragraph Q.1(h) redundant. Sub-paragraph Q.1(h) achieves a different purpose. It prevents, for example, a change of use as "permitted development" in an agricultural building of which part is already in Class C3 use, or an aggregation of successive changes of use through separate acts of development, that would result in more than 450 square metres of floor space in a building or buildings being in Class C3 use. Neither of those outcomes would necessarily be prevented by sub-paragraph Q.1(b).

20. Finally, there is nothing in the provisions of Class M and Class N, or in any other provision of the GPDO, to suggest a different understanding of Class Q. The provisions in sub-paragraphs M.1(c) and N.1(b) also contain the word "cumulative" in referring to the floor space "changing use", not to the total floor space of the "existing building or buildings" in which the change of use is taking place. And in both Class M and Class N the draftsman has also included a provision – respectively in sub-paragraphs M.1(d) and N.1(c) – stating that "the development (together with any previous development under [the relevant class]) would result in more than 150 square metres of floor space in the building having changed use under [the relevant class]". Although we are not deciding those questions, it seems to me that the same analysis would hold good for those provisions too.

21. In my view, therefore, the officer did not misrepresent the permitted development rights under Class Q in his advice to the committee on the "fallback position". The provisions of Class Q were correctly interpreted and lawfully applied.

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

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

> "36. In paragraph 6.15 of the report the Officer concluded that the fall back position was "realistic". In my judgment he was entitled so to conclude. The evidence establishes that there had been prior discussions between the Council and the Planning Agent acting for the East Malling Trust who owns the site. It was crystal clear from that contact that the Trust were intending, one way or another to develop the site. Alternative proposals had been advanced seeking the Council's likely reaction to planning applications. It is in my view wholly unrealistic to imagine that were all such proposals to be turned down the owner of the site would not take advantage of the permitted development provided for by Class Q to the fullest extent possible.
>
> 37. It was not a precondition to the Council's consideration of the fall back option that the interested party had made an application indicating an intention to take advantage of Class Q. There was no requirement that there be a formulated proposal to that effect. The officer was entitled to have regard to the planning history which was within his knowledge and the obvious preference of the Trust to make the most valuable use it could of the site."

23. The judge accepted the submission of Mr Juan Lopez for the council that the committee did not have to ignore fallback development that included elements for which planning permission would be required and had not yet been granted. He noted that "[the] building could be converted, so as to provide dwelling houses limited in floor space to 450m^2 by the construction of internal walls without using the whole of the internal space of the barn" (paragraph 40). And he went on to say (in paragraph 41):

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

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

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

25. Ms Graham Paul said there was nothing before the council to show that either the East Malling Trust or Croudace Portland contemplated the site being developed in the way the officer described in his report. On the contrary, the conversion of the barn for residential use – as opposed to its demolition and replacement with new dwellings – seems to have been regarded as impracticable or uneconomic. The East Malling Trust's planning consultant, Broadlands Planning Ltd., had submitted a "Planning Statement" to the council in December 2013, seeking the council's advice before the submission of an application for planning permission. In that document two possible schemes for the site were referred to (at paragraph 26). Neither could have been achieved using permitted development rights. One involved the retention of the barn and its conversion to four dwelling-houses, the other a "wholesale redevelopment of the site", perhaps with the replacement of the bungalow, to create five new dwellings. In a letter to Broadlands Planning Ltd. dated 30 January 2014 the council's Senior Planning Officer, Ms Holland, said she was "not convinced that the proposal would result in the building being converted, but rather [that] large portions would be removed and a new building created". And the East Malling Trust's marketing agent, Smiths Gore, in a letter to potential developers dated 27 February 2014, suggested it was "unlikely that a developer would contemplate the conversion of the Apple Store". There was, said Ms Graham Paul, no other contemporaneous evidence to lend substance to the fallback scheme to which the officer referred in his report, and no evidence of the council trying to find out what, if anything, was actually contemplated. The evidence did not demonstrate a "real prospect" – as opposed to a merely "theoretical" prospect – of such a development being carried out. The judge should have recognized that the fallback development referred to in the officer's report was not a material consideration.

26. I cannot accept that argument. In my view the officer did not misunderstand any principle of law relating to a fallback development. His advice to the members was sound.

27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:

    (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.

    (2) The relevant law as to a "real prospect" of a fallback development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.'s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As

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

(3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand.

28. In this case, in the circumstances as they were when the application for planning permission went before the committee, it was plainly appropriate, indeed necessary, for the members to take into account the fallback available to the East Malling Trust as the owner of the land, including the permitted development rights arising under Class Q in the GPDO and the relevant provisions of the development plan, in particular policy CP14 of the core strategy. Not to have done so would have been a failure to have regard to a material consideration, and thus an error of law.

29. That the East Malling Trust was intent upon achieving the greatest possible value from the redevelopment of the site for housing had by then been made quite plain. The "Planning Statement" of December 2013 had referred to two alternative proposals for the redevelopment of the site (paragraph 26), pointing out that both "[the] redevelopment and replacement of [the] bungalow" and "[the] conversion of the existing storage and packing shed" were "permissible in principle" (paragraph 35). The firm intention of the East Malling Trust to go ahead with a residential development was entirely clear at that stage.

30. In my view it was, in the circumstances, entirely reasonable to assume that any relevant permitted development rights by which the East Malling Trust could achieve residential development value from the site would ultimately be relied upon if an application for planning permission for the construction of new dwellings were refused. That was a simple and obvious reality – whether explicitly stated by the East Malling Trust or not. It was accurately and quite properly reflected in the officer's report to committee. It is

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

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

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

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

> "4. … This letter … states that at that time [Smith Gore's] opinion was that it was unlikely that a scheme of conversion would be contemplated by any developer. However, this letter pre-dated the permitted development rights that subsequently came into effect in April 2014. By the time the planning application had formally been submitted, these permitted development rights were in effect.
>
> 5. Had no other scheme proven acceptable in planning terms, and if planning permission had been refused for the development the subject of the planning application, the Trust would have built out a "permitted development" scheme to the fullest extent possible in order to realise the highest value for the land, in order to thereafter seek disposal to a developer."

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

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

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

34. The officer did not simply consider the fallback in a general way, without regard to the facts. He considered it in specific terms, gauging the likelihood of its being brought about if the council were to reject the present proposal. In the end, of course, these were matters of fact and planning judgment for the committee. But the officer's advice in paragraphs 6.14 to 6.19 of his report was, I believe, impeccable. He was right to say, in paragraph 6.14, that the "new permitted development rights" – under Class Q in the GPDO – would enable the barn to be converted into three residential units; in the same paragraph, that the building "could be physically adapted in certain ways that would allow for partial residential occupation …"; and, in paragraph 6.15, that the bungalow "could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building". He was also right to say, therefore, that the site could be developed for "four residential units albeit of a different form and type to that proposed by this application". All of this was factually correct, and represented what the council knew to be so. It did not overstate the position. It went no further than the least that could realistically be achieved by way of a fallback development – through the use of permitted development rights under Class Q and an application for planning permission complying with policy CP14.

35. The officer also guided the committee appropriately in what he said about the realism of the "fallback position". At the end of paragraph 6.15 of his report he said that the fallback development he had described was "a realistic fallback position in terms of how the site could be developed". He was well aware of the need to take into account only a fallback development that was truly "realistic", not merely "theoretical". He came back, in paragraph 6.16, to the question of "realistic 'fallback' positions", again reminding the members that this was what had to be considered. He went on to acknowledge, rightly, that the council had to consider what could be achieved "using permitted development rights for alternative forms of development". The context for this advice was that in his view, as he said in paragraph 6.15, he was dealing with "a realistic fallback position". He went on in paragraph 6.17 to consider what "would" happen if a scheme taking advantage of permitted development rights came forward. And in paragraph 6.18 his advice was that a redevelopment involving the conversion of "the entire barn for residential purposes, above the permitted development thresholds … would wholly accord with adopted policy". That was a legally sound planning judgment. The same may also be said of the officer's conclusion in paragraph 6.19, where he compared the proposal before the committee with the "more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights".

36. In short, none of the advice given to the council's committee on the "fallback position" can, in the particular circumstances of this case, be criticized. It was, I think, unimpeachable.

37. In my view, therefore, the council was entitled to accept that there was a "real prospect" of the fallback development being implemented, and to give the weight it evidently did to that fallback as a material consideration. In doing so, it made no error of law.

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

38. Paragraph 14 of the NPPF states:

> "14. At the heart of [the NPPF] is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> …
>
> For decision-taking this means:
>
> - approving development proposals that accord with the development plan without delay; and
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>   – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
>   – specific policies in [the NPPF] indicate development should be restricted."

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

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

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

40. The judgments in this court in *Barwood v East Staffordshire Borough Council* entirely supersede the corresponding parts of several judgments at first instance – including, most recently, *Reigate and Banstead Borough Council v Secretary of State for Communities and Local Government* [2017] EWHC 1562 (Admin). In those cases, judges in the Planning Court have offered various interpretations of NPPF policy for the “presumption in favour of sustainable development”, and have explained how, in their view, the presumption should work. There is no need for that to continue. After the decision of the Court of Appeal in *Barwood v East Staffordshire Borough Council*, it is no longer necessary, or appropriate, to cite to this court or to judges in the Planning Court any of the first instance judgments in which the meaning of the presumption has been considered.

41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a “doctrinal controversy”. But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker’s own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain – because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see paragraph 22 of my judgment in *Barwood v East Staffordshire Borough Council*). That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court’s interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court’s review of a planning decision, not the hypercritical approach the court is often urged to adopt.

42. The principles on which the court will act when criticism is made of a planning officer’s report to committee are well settled. To summarize the law as it stands:

    (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of*

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

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

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.

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

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

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

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

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

and in paragraph 6.7:

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

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

> "6.10 With this in mind, it must be noted that paragraph 49 of the NPPF states that applications for new housing development should be considered in the context of the presumption in favour of sustainable development. Paragraph 50 of the NPPF emphasises the importance of providing a wide choice of high quality homes, to widen opportunities for home ownership and create sustainable, inclusive and mixed communities. Paragraph 55 states that in order to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities.
>
> 6.11 These criteria all demonstrate a clear government momentum in favour of sustainable development to create new homes and drive economic development. The proposed development would create four high quality new homes on the very edge of an existing village settlement.
>
> 6.12 A further indicator of such emphasis is borne out of the recent changes to the regime of permitted development rights set out by national government by the Town and Country Planning (General Permitted Development) Order 2015. This allows for far more development to take place without the need for planning permission from Local Authorities and generally provides a steer as to government's thinking on how to boost the country's economy through the delivery of new homes.
>
> 6.13 Such continued emphasis from government is a material consideration that must be balanced against the policy context set out in the TMBCS."

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

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

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

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

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

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

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

50. In the submissions they made to us at the hearing, though not in their respective skeleton arguments, both Ms Graham Paul and Mr Lopez recast their arguments in the light of what this court has now said about the "presumption in favour of sustainable development" in *Barwood v East Staffordshire Borough Council*, including the basic point that the presumption is contained solely in paragraph 14 of the NPPF (see paragraph 35 of my judgment in that appeal). They were right to do so.

51. It was common ground before us, as it was in the court below, that the "presumption in favour of sustainable development" did not apply to the proposal. And the council's officer did not advise the committee that it did. As Ms Graham Paul acknowledged, the only reference to the "presumption in favour of sustainable development" in the officer's report is in the first sentence of paragraph 6.10. But, she submitted, in view of what the officer said in that paragraph of the report, and also in paragraph 6.42, we should conclude that the committee took the presumption into account as a material consideration, which it ought it not to have done. Ms Graham Paul did not submit that the proposal was given the benefit of the so called "tilted balance". But she argued that the effect of the officer's advice was that the "presumption in favour of sustainable development" was one of the "requirements set out within the NPPF …", which the officer treated as "an important material consideration" and a significant factor weighing in favour of the proposal in the planning balance.

52. I disagree. In my view the argument fails on a straightforward reading of the officer's report, in the light of the judgments in this court in *Barwood v East Staffordshire Borough Council*. I do not accept that the officer counted the "presumption in favour of sustainable development" as a material consideration weighing in favour of planning permission being granted.

53. The reference to the "presumption in favour of sustainable development" in paragraph 6.10 of the officer's report is a quotation of the first sentence of paragraph 49 of the NPPF, not of paragraph 14. The quotation is correct. In the same paragraph of the report the officer also referred to two other passages of policy in the NPPF, namely paragraphs 50 and 55. The policies are correctly summarized. The common factor in those three passages of NPPF policy is not the "presumption in favour of sustainable development". It is the promotion, in national planning policy, of sustainable housing development. That this is

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

54. In those paragraphs the officer was not purporting to apply the "presumption in favour of sustainable development" to the proposal. Nor did he advise the committee that the presumption was engaged, or that it was, in itself, a material consideration weighing in favour of the proposal. He referred, in paragraph 6.11, to "[these] criteria" – meaning the matters to which he had referred in paragraph 6.10 – as demonstrating "a clear government momentum in favour of sustainable development to create new homes and drive economic development"; in paragraphs 6.12 and 6.13 respectively, to "such emphasis" and "[such] continued emphasis from government"; and in paragraph 6.24 to "the emphasis contained within the NPPF concerning sustainable development generally …" (my underlining). The language in those paragraphs is very distinctly not the language one would have expected the officer to have used if he thought he was applying the "presumption in favour of sustainable development". The intervening and subsequent assessment, culminating in his final conclusion on the planning merits of the proposal in paragraph 6.42, is concerned with its credentials and benefits – and advantages when compared with the fallback – as sustainable development.

55. Paragraph 6.42 of the officer's report does not, in my view, betray a misunderstanding of NPPF policy for the "presumption in favour of sustainable development". The advice given to the committee in that paragraph was not inaccurate or misleading. The officer did not undertake the planning balance in terms of the policy for "decision-taking" in paragraph 14 of the NPPF. There can be no suggestion that, contrary to his earlier conclusion and advice in paragraphs 6.6 and 6.7 of his report, he was treating this as a case in which the proposal accorded with the development plan, so that it was to be approved "without delay" under the first limb of the policy for "decision-taking" in paragraph 14. Nor can it be suggested that, contrary to the whole tenor of his assessment of the proposal in paragraphs 6.1 to 6.41, this was a case in which the development plan was "absent" or "silent" or any "relevant policies" of it were "out-of-date", so that the second limb of the policy for "decision-taking" in paragraph 14 applied.

56. This case is clearly and materially different from *Barwood v East Staffordshire Borough Council* – a case that shows what can go wrong when a decision-maker is misled as to the meaning and effect of government policy for the "presumption in favour of sustainable development". Here the officer did not commit an error of the kind made by the inspector –and conceded by the Secretary of State – in that case: the mistake of discerning a "presumption in favour of sustainable development" outside paragraph 14 of the NPPF and treating that wider presumption as a material consideration weighing in favour of the proposal (see paragraphs 43 to 48 of my judgment in *Barwood v East Staffordshire Borough Council*). The officer did not say, as the inspector did in *Barwood v East Staffordshire Borough Council*, that "where a proposal is contrary to the development plan [the "presumption in favour of sustainable development"] is a material consideration that should be taken into account" (paragraph 12 of the decision letter in that case). Unlike the inspector in that case (in paragraphs 37 to 41 of his decision letter), he did not bring the "presumption in favour of sustainable development" into the balancing exercise as a material consideration (see paragraphs 26 and 29 of my judgment). And, in my opinion, it cannot realistically be suggested that the members would have thought they were being invited to apply that presumption in government policy, or to give it weight as a material consideration, in their assessment of the proposal.

57. The "presumption in favour of sustainable development" did not, in fact, feature as a material consideration to which the officer gave any positive weight when undertaking the planning balance. The exercise he conducted in paragraph 6.42 of his report was an entirely conventional and lawful balance of other material considerations against the identified conflict with the development plan, as section 38(6) of the Planning and Compulsory Purchase Act 2004 requires. It was, in fact, a classic example of that provision in practice. This is not to say that in his assessment of the proposal he had to refrain from considering the extent to which it complied with relevant NPPF policies – in particular, in the specific respects to which he referred, the sustainability of the proposed development in the light of NPPF policy, as well as its compliance with relevant policies of the development plan. That was a perfectly legitimate, and necessary, part of the planning assessment in this case. Had the officer left it out, he would have been in error, because he would then have been failing to have regard to material considerations. But he did not make that mistake. He assessed the proposal comprehensively on its planning merits, exercising his planning judgment on the relevant planning issues. He took into account the sustainability of the proposed development in the light of NPPF policy, but without giving it the added impetus of the "presumption in favour of sustainable development". I cannot fault the advice he gave.

58. Finally on this issue, I do not accept the suggestion made by Ms Graham Paul in reply that the council's response to Mr Mansell's solicitors' pre-application protocol letter, in its solicitors' letter dated 22 February 2016, can be read as conceding the error for which Ms Graham Paul contended. In fact, it squarely denied that error. Having referred to the quotation of the first sentence of paragraph 49 of the NPPF in paragraph 6.10 of the officer's report, it acknowledged that the proposal was a "departure from the development plan" and that the development plan was not "absent" or "silent" nor were relevant policies "out-of-date". It then said that neither the officer nor the committee had treated the "presumption in favour of sustainable development" under paragraph 14 of the NPPF as "operative" in this case. It acknowledged, therefore, that neither of the limbs of the policy for "decision-taking" in paragraph 14 of the NPPF could have applied here. And it said that the officer's report "does not begin to suggest otherwise". I agree.

59. It follows that this ground of appeal must also fail.

Conclusion

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

Lord Justice Hickinbottom

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

The Chancellor of the High Court

62. I too agree with Lord Justice Lindblom's judgment, but would add a few words from a more general perspective. In the course of the argument, one could have been forgiven for thinking that the contention that the presumption in favour of sustainable development in the NPPF had been misapplied in the planning officer's report turned on a minute legalistic dissection of that report. It cannot be over-emphasised that such an approach is wrong and inappropriate. As has so often been said, planning decisions are to be made by the members of the Planning Committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and the courts must give them space to undertake that process.

63. Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a planning officer's report. An appeal will only succeed, as Lindblom L.J. has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common-sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied.

64. It is also appropriate to reiterate what Lindblom L.J. said at paragraph 35 of the *East Staffordshire* case to the effect that planning decision-makers have to exercise planning judgment as much when the presumption in favour of sustainable development is applicable as they do they do when it is not. The presumption may be rebutted when it is applicable, and planning permission may be granted where it is not. In each case, the decision-makers must use their judgment to decide where the planning balance lies based on material considerations. It is not for the court to second guess that planning judgment once it is exercised, unless as I have said it is based on a distinct and material defect in the report.

65. I agree that this appeal should be dismissed.