Neutral Citation Number: [2020] EWHC 1836 (Admin)

Case No: CO/2072/2019

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

Bristol Civil Justice Centre
2 Redcliff Street
Redcliffe
Bristol BS1 6GR

Date: 9th July 2020

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

THE QUEEN (on the application of SUSAN WALKER)	**Claimant**
- and -	
BATH AND NORTH EAST SOMERSET COUNCIL	**Defendant**
-and-	
(1) RENGEN DEVELOPMENTS LIMITED (2) CLAIRE BUHR (3) STEVEN BIRCHALL	**Interested Parties**

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Ms Nina Pindham (instructed by **Thrings LLP**) for the **Claimant**
Mr Conor Fegan (instructed by **Rosling King LLP**) for the **First Interested Party**

Hearing date: 26 November 2019

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JUDGMENT

MRS JUSTICE JEFFORD DBE:

1. This matter concerns a challenge by way of judicial review to the decision of the Defendant, Bath and North East Somerset Council ("the Council"), on 17 April 2019, to grant full planning permission and the associated listed building consent for a development at the Belvoir Castle, Bath. The site is located at the junction of Lower Bristol Road and Midland Road. That decision followed the resolution of the Council's Development Management Committee on 26 September 2018 to delegate to permit both those applications. The development includes the building of a new skittle alley and a new community room, provision of accessible toilets, refurbishment of a public house, and the provision of 9 studio apartments. As part of the development and in order to provide the 9 studio apartments, a Grade II listed building, namely the existing skittle alley, will be demolished. The site of the proposed development is located within a World Heritage Site and a Conservation Area.

2. The claimant lives in Park View, a Grade II listed terrace, adjacent the site of the proposed development. Permission to bring these proceedings was granted by Swift J on 30 July 2019.

3. The Council has taken no part in these proceedings and consents to judgment, conceding that the decision was unlawful on Ground 1 (failure to give reasons). As recorded in the Order of Swift J on 30 July 2019, the Council and the claimant have agreed the terms of a draft consent order under which the grant of planning permission and listed building consent would be quashed and the Council would consider the applications afresh.

4. The second and third interested parties are the owners of the site and have taken a neutral stance. The first interested party, Rengen Developments Limited ("Rengen"), is a developer with an option to develop the site and it is Rengen that applied for the consents in issue in June 2018. Rengen is the party that has taken an active role in opposing this application and does not agree to the draft consent order. Rengen's position is that the Council's consent is irrelevant to the issues before me.

Policy and statutory background

5. Section 70(2)(a) of the Town and Country Planning Act 1990 provides that in dealing with an application for planning permission, the planning authority must have regard to the provisions of the development plan so far as material to the application.

6. The meaning of development plan for these purposes is set out in section 38 of the Planning and Compulsory Purchase Act 2004 and section 38(6) provides that:

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

7. The Planning (Listed Building and Conservation Areas) Act 1990 includes the following:
   (i) Section 66(1) provides that "in considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority … shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historical interest which it possesses."
   (ii) Section 72(1) provides that in the exercise of planning functions in respect to any building in a conservation area, "special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area".

8. The Council's development plan included Core Strategy Policies. Of particular relevance to this matter is Policy CP5 "Flood Risk Management". I do not set it out in full but it provided that development would "follow a sequential approach to flood risk management, avoiding inappropriate development in areas at risk of flooding and directing development away from areas at highest risk in line with Government policy (NPPF)". The Policy then deals with how development in areas at risk of flooding will be made safe.

9. The reference to the National Policy Planning Framework is to section 14 and in particular the paragraphs headed Planning and Flood Risk. So far as relevant, those paragraphs include:

"157. All plans should apply a sequential, risk-based approach to the location of development – taking into account the current and future impacts of climate change – so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:

a) applying the sequential test and then, if necessary, the exception test as set out below; ....

158. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.

159. If it is not possible for development to be located in zones with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. .....

160. The application of the exception test should be informed by a strategic or site specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage .....".

10. The National Planning Policy Framework also provides (at paragraph 11) that there is a presumption in favour of sustainable development which, in decision making, means that proposals that accord with the up-to-date development plan should be approved without delay and, where there is no development plan, should be approved *"unless the application of policies in the NPPF that protect areas or assets of particular importance provides a clear reason for refusing the development proposed"*. A footnote explains that the policies referred to are those in the Framework relating to matters which include designated heritage assets and areas at risk of flooding. The claimant's position, in effect, is that these are "specific policies" as referred to in R (on the application of CPRE (Kent)) v Dover District Council [2017] UKSC 79. As I read the NPPF, departure from specific policies is a reason to refuse permission if there is no development plan.

11. Core Strategy Policy CP6 "Environmental quality" is concerned with promoting, protecting, conserving and enhancing the distinctive quality, character and diversity of Bath and North East Somerset and the sensitive management of its outstanding cultural and historic environment. Placemaking Policy HE1 entitled "Historic Environment" is concerned with "Safeguarding Heritage Assets". It includes the statement that great weight will be given to the conservation of the District's heritage assets. The NPPF, section 16, paragraph 196 provides that where a development proposal will lead to less than substantial harm, that harm should be weighed against the public benefits of the proposal.

12. Placemaking Policy D6 "Amenity" provides in particular at paragraph (b) that development must "Not cause significant harm to the amenities of existing or proposed occupiers of …. residential or other sensitive premises by reason of loss of light, increased noise, smell, overlooking, traffic or other disturbance."

13. Placemaking Policy ST7 is entitled "Transport Requirements for Managing Development" and includes standards for vehicle parking. In particular, paragraph 4b states that there should be "no increase in on-site parking in the vicinity of the site which would affect highway safety or residential amenity."

Factual background

14. In 2017, Rengen made an application for planning permission and listed building consent for a similar development. These applications were withdrawn.

15. Further applications were then made in June 2018. The planning application included a Flood Risk Assessment dated August 2017. That document made reference to the sequential test. It was noted that the Council had presented a Sequential and Exception Test which was "the most recent and relevant strategic-level sequential test appraisal for Bath". The Flood Risk Assessment notes that that had concluded that even if all sites with planning permission and allocation in Flood Zone 1 were developed, the identified need for housing in Bath would not be met, so that there was a clear need and rationale for housing in Flood Zones 2 and 3a, including in the Riverside area which was, it was said, subject to a greater risk of flooding than the current development.

16. The planning application in issue (no. 18/02499/FUL) was recommended for refusal by the Officer's Report, the Officer concluding that:

"... there are multiple and significant conflicts with the Development plan resulting from this development and any benefits generated from this development are not considered to outweigh the harm identified. The development is therefore recommended for refusal."

More detailed reasons, which I refer to below, followed. The application for listed building consent was no. 18/02500/LBA and was similarly recommended for refusal.

17. As Ms Pindham submitted on behalf of the claimant, context is everything, and, in her oral submissions, she highlighted a number of aspects of the proposed development and the consultation about it which in due course were reflected to a greater or lesser extent in the Officer's Report and the recommendation that permission be refused.

18. What is proposed is, on any view, a significant change in the development of the site. Under the proposal, the existing skittle alley is to be demolished and replaced with a 3 storey residential block with bin and bike stores, increasing the height of the building opposite Park View.

19. Some of the Council's own officers recommended refusal.

20. The Council's Environment & Design Team recommended refusal. The summary of reasons given was that *"Massing and height facing residential Victorian terrace to the east is of concern – proposals should be reduced in scale. Amenity of residents should be improved."* The response identified as "Polices/Condition/ Reasons for Refusal" the World Heritage Site Setting, Placemaking Policy CP6 (referred to above) and also Placemaking Policies D1-10, CP1/2/3, SCR 1 – 5 and SU1.

21. The Highways department's response (from the Senior Highways Development Control Engineer) noted that the application was supported by a Parking Provision Technical Note which presented the case for a car free development with no demand from residents for car ownership. The response, however, considered that it was probable

that there would be some parking demand both from residents and visitors; that it would be inappropriate for there to be parking in Midland Road and that the operation of the Lower Bristol Road (one of the main roads into Bath) needed to be protected because of its importance; and that there was concern that there would be detrimental impact on other local residents if on-street parking took the place of established parking. The response concluded:

"The proposed development would not provide an appropriate level of on-site parking spaces which would exacerbate highways safety and residential amenity issues associated with additional on street parking, and is therefore contrary to policy ST7 of the Bath and North East Somerset Placemaking Plan".

22. No objection was, however, raised by the Council's Drainage and Flooding Team which commented that the applicant's Flood Risk Assessment "made suitable recommendations on floor management measures including minimum level differentials and flood resilience measures." A number of conditions were requested the purpose of which was stated to be to limit the risk of flooding and provision satisfactory means of flood management. The Environment Agency, having initially objected, withdrew its objection (subject to condition) on the basis of the Flood Risk Assessment, although continuing to draw attention the fact that the Food Risk Assessment contained many incorrect comments and flood levels and mechanisms. These were, however, not sufficient for the Environment Agency to maintain its objection.

23. So far as the Councillors themselves were concerned, Councillors Blackburn and Crossley requested referral to Committee if the Officer was minded to refuse. Councillor Blackburn observed that the plan sought to preserve the long term status of the pub in the community and that "if the plans don't go through I fear for it's (sic) long term existence". Councillor Crossley similarly observed that the plan would help to ensure the survival of the pub and saw the lack of parking provision as an opportunity. Councillor Player objected to the development for similar reasons to others, namely overdevelopment, lack of parking provision, and harm to residential amenity, in particular, the impact of Park View.

24. The Bath Heritage Watchdog ("the BHW") made a submission strongly objecting to the development. I do not propose to quote from that submission at length but I note three particular aspects:

    (i) The skittle alley appears to have been listed because it was within the scope of the listing of the Belvoir Castle pub but the BHW placed emphasis on its importance in its own right. They noted that an inventory for the pub from 1862 described a bar, a parlour, a tap room, a skittle alley and a brewery and, they said: "… so it does confirm that the skittle alley is at least 150 years old and it thus shares the history of the pub, making it far more important than just a curtilage listed later addition as described in the planning application. We believe it is the oldest surviving skittle alley in Bath and thus is far too important to be considered disposable."

    (ii) Secondly, the BHW expressed the view that the design, scale and massing of the development was excessive and harmful:

    "It would be highly damaging to the street scene and the protected buildings. The height of the application building would dominate Park View, would lead to a significant reduction in their light levels especially in the evenings, and would leave the Park View residents feeling hemmed in."

    (iii) Thirdly, the BHW drew attention to the flood risk asserting that the development would flood because there was visible evidence that it already had and took issue with the applicant's Flood Risk Assessment that claimed the development would be safe from flooding.

25. The Bath Preservation Trust also made an objection. The objection was based on the overdevelopment in terms of height and massing. In the immediate area, the Trust asserted that the development would dominate the surrounding heritage assets and obliterate any sense of historic grouping of the pub, skittle alley and beer garden. They added: *"A high level of harm is also caused to the setting, views and outlook of Park View and we are very concerned by this".* The Trust also addressed the issue of any benefit to or from the pub:

"Though we are not viability experts, we continue to be sceptical of the justification given by the applicant that the addition of TEN studio apartments is needed to essentially keep this well-placed pub as financially viable and to provide a community room. …. The loss of both the amenity of the garden and skittle alley, both of which contribute to the pub offering, should be weighed against the benefits of the development itself, of which we can see little other than developer financial gain, especially in that it does look likely that these units will either be holiday lets or student studios, given the compromised open living space."

26. There were 14 objections from members of the public including the claimant. In very broad terms, the objections focussed on two issues which reflected the matters referred to elsewhere, namely the impact on Park View and the lack of parking provision and its impact. There were two comments in support which were summarised in the Officer's Report as follows:

"- Retains the important local social asset of the public house, meeting facilities and skittle alley

- *provides much needed affordable accommodation in a highly sustainable location*
- *The existing building is a total eyesore and something has to be done with it before it falls down. The proposal would bring it into line with its new surrounding and compliment both the listed to the Lower Bristol Road frontage and the new developments springing up in this part of our City.*
- *No flooding issues*
- *Development will enable improvement to the Belvoir and will secure important community facilities."*

27. A petition in support with 71 signatures was also submitted to the Council. The petition was framed as follows:

"We believe the proposals to improve the pub's facilities including the addition of a new community room, and accessible toilets, as well as a new skittle alley, will make the pub more user friendly, make it more appealing to new customers but will also enable the landlords to find new revenue streams to protect the Belvoir Castle's future. We also agree with the inclusion of 10 one-bedroom apartments to the rear of the pub, which will help finance the improvements."

The Officer's Report

28. The Officer's Report set out the context which I have referred to above:
    (i) The report summarised the position as to the objections from Highways and Urban Design and noted that Conservation objected due to the impact upon the listed building, the setting of adjacent listed buildings and the character and appearance of the Conservation Area. It was noted that there was an Ecology objection because of an out of date survey and incomplete information on the surveyor and his experience. The report was updated before the decision was taken but that is the subject of a separate ground. In other instances there were no objections but, in some cases, subject to conditions. As I have said, that was the position so far as Drainage and Flooding was concerned.
    (ii) The report summarised the views of Councillors Blackburn, Crossley and Player.
    (iii) The report summarised the objections from the Bath Preservation Trust and Bath Heritage Watchdog set out above and also from Transition Bath.
    (iv) The report summarised the objections from the 14 members of the public and the 2 comments in support.
    (v) The report noted that there was a petition in support of the development.

29. The Officer's assessment included the following observations or assessments:
    (i) The proposed development is located in a built up area of Bath where new residential development can be considered acceptable subject to compliance with the relevant policies of the Development Plan.
    (ii) Under the heading "Protection of Community Use", it was noted that the development included the renovation of the public house which was considered to play an important community role and that the development "proposes enhancements to the public house and the benefits of these will be weighed up in the overall planning balance section of the report".
    (iii) As to Flood Risk, the report recorded that the site was predominantly in Flood Zone 3 with the remainder within Flood Zone 2 and that the Environment Agency had reviewed the Flood Risk Assessment and were satisfied that subject to conditions the development would not increase the flood risk. I quote what followed almost in full because it is a key point in the claimant's case:

"Residential dwellings are considered as a "more vulnerable" use and given the location of the site within Flood Zone 2 and 3, the development must be subject to the sequential and exception tests. The National Planning and Policy Framework (NPPF) advises that the aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding.

The FRA references the strategic level sequential test appraisal for Bath. It explains that it is reasonable to conclude that even if all sites with planning permission and allocation in Flood Zone 1 are developed, the identified need for housing in Bath would not be met. It is argued that there continues to be a clear need and rationale for future housing sites to be provided within Flood Zone 2 and 3a.

However, the sequential test must be carried out in accordance with the advice within the National Planning Practice Guidance (NPPG). The test should include an audit of any alternative sites ..... The sequential test should conclude whether any of the alternative sites identified have a lower risk of flooding than the proposed site.

The above has not been carried out and the development therefore fails the sequential test. As the sequential test has not been passed, it is not necessary to consider the exception test. The development is considered to be contrary to Placemaking Plan (PMP) policy C5." (My emphasis)

(iv) Under the heading Highway Safety, the Officer noted that there was no parking provision and a significant concern that a car free development would result in overspill parking in an area with high levels of on street parking and the report reflected the concerns about highway safety. The Officer concluded that the development was unacceptable due to a failure to accord with adopted minimum parking standards and was contrary to PMP Policy ST7.

(v) As to character and appearance and the listed buildings, the Report included the following:

"... the overall scale of the development is considered to be excessive in this context harming the setting of the Belvoir Pub, and Park View, both designated heritage assets.

> *The Design and Access Statement presents the application as managing a transition between the scale of Riverside* [a larger scale development] *and the Belvoir Castle/ Park View. …. This already small parcel of land provides a limited but critical buffer to the Riverside development for both the Belvoir Castle and Park View. Breaching the curtilage would inflict unacceptable harm on the character and setting of the listed building."*
>
> *…*
>
> *The NPPF distinguishes between "substantial harm" and "less than substantial harm" when referring to the impact upon the significant of a heritage asset. Any harm to the listed building itself, the setting of the adjacent listed building and the character and appearance of the Conservation Area is considered to be less than substantial. When a proposed development will lead to less than substantial harm to the significance of a designated heritage asset, the harm should be weighed against the public benefits of the proposal. This will be addressed in the Planning Balance section of this report."*

(vi) In relation to Ecological considerations, the Report said there was a need for an up to date protected species survey and assessment and that there was insufficient information to assess the ecological implications of the development.

(vii) Under the heading of residential amenity, the report said that the development would dominate the outlook of the occupiers of Park View, have an overbearing impact and result in a loss of light to the gardens and rear windows, cumulatively having a "severe detrimental impact upon the residential amenity currently enjoyed by these residents." The development was considered to be contrary to Placemaking Policy D6.

30. When it came to the planning balance, the report recognised that the clear harm identified had to be weighed against the benefits of the scheme. The key benefit identified in the planning application submission related to the improvement to the pub to secure its long term future. Other benefits were the provision of housing and economic benefits in the construction period. The submission explained that the pub required significant investment to secure its future but it was noted that it was being advertised for sale in an advertisement that said it was generating a profit of £40,000 per annum and that there was potential for growth from longer opening hours and the

Riverside development. A report from Carter Jonas was also provided that concluded that the pub would not be attractive to an operator without significant investment.

31. The report continued:

"The Belvoir would visibly benefit from upgrading, and its deficiencies are outlined within the submission. Whilst it is noted that the development may generate funds to improve the facilities of the pub to increase customers and profitability in the future, no tangible evidence had been submitted to demonstrate this. The new skittle alley and community room would replace existing facilities as opposed to add to those facilities already offered. Whilst it would improve their relationship with the main bar area and increase the trading area, it has not been demonstrated how this would attract significant new customers. .....

..... It is not considered that the development and the long term viability of the pub are intrinsically linked. If the development is permitted, the approved flats would not be in the same ownership as the Belvoir and it is therefore questioned as to how the development would sustain the viability of the Belvoir in the long term. ....

Whilst the Belvoir is not currently maximises (sic) its potential, it is considered is likely that other business models could be explored to generate additional profits such as those outlined within the sales brochure. It is not considered that it has been justified that that redevelopment of the site and the subdivision of the plot to build the additional 9 units is intrinsically linked to the long term success and the retention of the Belvoir. The improvement works, whilst potentially increasing the interest in the Belvoir does not guarantee that the pub will continue to be run in the future." (My emphasis)

The conclusion was that the public benefits did not outweigh the harm.

32. The Officer's Report, therefore, recommended refusal and gave 7 specific reasons. It is, in my view, a fair summary to say that the Officer's Report was overwhelmingly in favour of refusal. The reasons for refusal included the harm to the significance and setting of the Belvoir Castle Pub and Park View and the demolition of the skittle alley, both of which were considered to be contrary to Core Strategy Policy CP6 and Placemaking Plan HE1. In terms of the planning balance, the Officer saw little reason to attach weight to the future of the pub, not because that was unimportant in itself but because there was no evidence of the relationship between the development and

securing the future of the pub. The reasons for refusal included that there were not considered to be any public benefits which outweighed the harm. Further, a specific reason for refusal was that the development had not been subject to the sequential test. The Officer said:

"5. The application site is located within Flood Zone 2 and 3a, and the development has not been subject to a satisfactory sequential test. It has not been demonstrated that there are no reasonably available sites appropriate for the proposed development in areas of lower probability of flooding. The development is, therefore considered to be contrary to policy CP5 of the Bath and North East Somerset Placemaking Plan."

The decision on 26 September 2018

33. The applications were considered at the Development Management Committee meeting on 26 September 2018 and the Committee resolved to delegate to permit planning permission (and corresponding listed building consent) by a narrow majority of 5 votes to 4. Full permissions were granted on 17 April 2019. It is these decisions that are the subject of challenge but they flow from the decision to delegate.

34. The only source of reasons for the decision, which patently rejected the Officer's recommendation, are to be found in the minutes of the meeting.

35. Two of the councillors, who were not members of the planning committee and to whom I have already referred, spoke at the beginning of the discussion of the application:

(i) Councillor Player, who opposed the application, said that she did not want to lose the pub but felt the proposal would cause damage to Park View and she was concerned about the lack of parking provision.

(ii) Councillor Blackburn spoke in favour. The minutes record that he stated that starter homes were badly needed in the area and that he *"stressed the importance of retaining the Belvoir Castle pub as a heritage asset in this locality as it was a key facility in the centre of the community."*

(iii) The Case Officer responded to questions from members of the Council. Amongst the matters mentioned in these responses were the following:

(a) The occupancy of the apartments could not be restricted because this was not an affordable housing scheme.

(b) The Placemaking Plan set the parking requirement for student accommodation at zero but this was not an application for designated student accommodation.

(c) The Highways Officer confirmed that Bath Spa station was 1.47km away and Oldfield Park Station 380m.

(d) The skittle alley was not listed in its own right but as part of the pub building.

(e) *"The Team Manager, Development Management advised that, as stated in paragraph 193 of the NPPF, great weight should be given to the conservation of a heritage asset and its significance must be taken into consideration. She explained that there was no connection delivered in the application between the refurbishment of the pub and the construction of the dwellings. Therefore the Committee should not give great weight to the pub refurbishment being supported by the sale of the apartments."*

36. There were no questions asked or responses given about the sequential test and/or flood risk.

37. The minutes record that Councillor Kew then stated that these were difficult applications: it was important to retain the pub as a community asset; there was a great need for housing in Bath; the development could be considered overbearing; this was a central location with good local transport links; and on balance he felt that this was an area of dereliction requiring redevelopment. He moved that the committee delegate to permit, subject to conditions for the following reasons:

"- To secure the retention of the pub as a community asset, meeting place and public amenity

- *The existing building is in need of improvement and the proposal will complement the listed buildings.*
- *He did not think that the development would flood.*
- *The site is in a highly sustainable location.*
- *To improve the area*
- *To provide housing*
- *To secure important community facilities*

- *The harm identified is considered to be less than substantial."*

38. A number of other councillors then contributed to the debate. Their comments included concern that the development was overbearing and would dominate Park View. One councillor said that she would support the application if the housing were designated for key workers and starter homes (which, I observe, it was not). So far as the pub was concerned:
    (i) Councillor Jackson said that there was no guarantee that the pub would be retained as a community and heritage asset.
    (ii) Councillor Sandry noted that there was no evidence that the pub was unviable and pointed out that there was a large amount of redevelopment in the area.
    (iii) Councillor Organ *"was concerned at the number of pubs that were closing and supported the refurbishment of this business which would provide a facility to the community."*

39. The minutes do not record that any councillor made any comment about flooding other than the comment of Councillor Kew quoted above. Similarly, no councillor appears to have made any comment about parking and highways safety other than the comment of Councillor Kew about good local transport links.

40. The Team Manager then advised the members that if they were placing weight on the community benefits arising from the refurbishment of the pub, they could delegate to permit on the basis of securing those benefits through conditions or legal agreement. On that basis, the matter was put to a vote and passed by a majority of 5 to 4 (with one abstention).

41. There then followed what was, in effect, a further period of consultation. As I set out below, the Council has explained that that followed from the view of the Officer that it was necessary to advertise the application as a departure from the Development Plan. The decision notices were issued (with conditions) on 17 April 2019.

Grounds

42. With that lengthy background, I turn to the pleaded grounds which are these:

(i) Ground 1: The Committee on behalf of the Council erred in law in failing to provide sufficient reasons for granting permission having departed from the officer's recommendation that the development fails the sequential test in respect to Flood Risk and is further contrary to Placemaking Plan Policy 5.

(ii) Ground 2: The Committee on behalf of the Council erred in law having taken into account immaterial considerations in granting permission in respect of the Development, namely the retention of the public house as a result of the same which was not supported by evidence.

(iii) Ground 3: There was procedural unfairness and/or the Council acted irrationally in failing to further consult following the receipt of an updated Ecology Report on or about 13 September 2018 and in respect of which parties not previously notified were likely to be concerned.

(iv) Ground 4: The committee acting on behalf of the Council acted irrationally in concluding that the public benefits they point to in the minutes of the Committee meeting outweigh the Development Plan and material considerations identified by the Planning Officer in her report to the Committee.

43. Prior to the hearing of this matter, the claimant made an application for permission to amend the grounds. I heard that application by telephone and refused the application.

Ground 1: Duty to give reasons

The nature of the issue and dispute

44. The claimant recognises and accepts that there is no statutory duty on the Council to give reasons for its decision and that disagreement with or departure from the Officer's recommendation is not, in itself, sufficient to give rise to a duty to give reasons.

45. The claimant relies, however, on the principles which it is submitted can be derived from in *R (on the application of CPRE (Kent)) v Dover District Council* [2017] UKSC 79 and *R (on the application of Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71 as to when such a common law duty arises and the nature and extent of the reasons to be given to discharge that duty. I address these authorities in detail below but, in short, Ms Pindham, for the claimant, submits that this as clear and

obvious a case as there could be in which there was a duty to give reasons because it involves each and every one of the circumstances which the Supreme Court and Court of Appeal regarded as capable individually or in combination of giving rise to a duty to give reasons, namely departure from the development plan, departure from specific policies in the NPPF and a decision that goes against the clear recommendation of the planning officer.

46. The Council accepts both that the common law duty arose and that the reasons given were inadequate. The Council has given its reasons for conceding this ground in its letter to the court dated 1 July 2019.

"5…. the Defendant takes the view that, notwithstanding the absence of a statutory duty to give reasons for the grant of planning permission, the court would identify a duty to give reasons in the circumstances of this decision not only because the application was recommended for refusal by officers but because it was identified to be contrary to the Development Plan by reference to the application of specific policies in the Development Plan and NPPF ….. The Council accepts that it is not clear from the decision to grant planning permission whether or not members of the Council's planning committee agreed that the proposals would be contrary to the Development Plan (but that other considerations outweighed that conflict) or whether they reached the view that the proposals would accord with the Development Plan. The Defendant further accepts that it is not clear whether, and if so with what consequence, the members of the Council's planning committee applied relevant planning policies in respect of the issues material to the decision.

6. So far as the issue of flood risk is concerned, that issue did not merely involve the exercise of a judgment on the part of members as to whether or not any adverse impact was acceptable. The issue also required members to apply specific policies set out in the NPPF and in the Development Plan. It is not clear from the Defendant's decision whether and if so how the relevant policies were applied, whether members disagreed with the conclusion reached by the officer or whether they agreed with those conclusions but nonetheless decided that permission should be granted.

7. So far as prejudice is concerned, the Defendant accepts that the Claimant (and other members of the public) would have been prejudiced insofar as they would have no way of knowing what the basis for the Defendant's decision was.

…"

47. The Council went on to explain that due to the conflicts with the Development Plan identified in the report of the planning officer, after the committee meeting, officers considered it necessary to advertise the application as a departure from the Development Plan pursuant to Article 15 of the Town and Country Planning (Development Management Procedure) (England) Order 2015/595 and further representations were received during this period. I will refer to this loosely as the second consultation phase or period.

48. Ms Pindham contends that the view of the Council must be relevant since it was the decision maker and, in any event, that the view of the Council must be material to the argument raised by Rengen in respect of grounds 1 and 3, relying on section 31(2A) of the Senior Courts Act 1981, that the court should refuse to grant relief because it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred.

49. Rengen's position is that the subjective views of the Council are not relevant and, other than in respect of the issue that arises under section 31(2A), that, in my view, is right. As between the claimant and Rengen, the views of the Council are no more than arguments that may be adopted by the claimant. A difficulty also arises because the pleaded Ground 1 is limited to the failure to give reasons relating to the sequential test and the conflict with Placemaking Policy C5 whereas the Council's reasons for the concession go further.

50. Mr Fegan, in any case, argues that this is not a case in which the common law duty arose and, in any event, that sufficient reasons were given.

51. His submissions are set in a legal framework in which he drew the court's attention to 4 principles which I summarise here:

    (i) There is no place for hypercritical scrutiny in planning challenges (*St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643.

(ii) Matters of planning judgment are within the exclusive province of the local planning authority (*Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759).

(iii) Local councillors are assumed to have local background and knowledge, a working knowledge of the statutory tests, and familiarity with the relevant polices of the development plan and the national planning policy. The court will not readily draw an adverse inference that the local authority acted unlawfully (*South Buckinghamshire v Porter (No. 2)* [2004] 1 WLR 1953).

(iv) When reviewing committee minutes, prudence is the sensible judicial approach *Bishops Stortford Civic Federation v East Hertfordshire DC* [2014] EWHC 348 (Admin).

52. Against that background and legal context, Rengen submits that the effect of the decision of the Supreme Court in *CPRE (Kent)* is that fairness may require or impose a duty to give reasons but the burden lies with the claimant to show that this is an exceptional case where such a duty arises. The circumstances elaborated by Lord Carnwath in *CPRE Kent* (which are those I have referred to briefly above) are not to be viewed prescriptively as providing that where such circumstances exist a duty to give reasons arises.

53. The claimant argues that those submissions are not supported by these two authorities. Ms Pindham submits that in *Oakley* there was an overwhelming case for giving reasons but that it does not set a minimum standard nor is the test one of exceptional circumstances. The circumstances in *CPRE Kent* are strong indicators of when such a duty arises, particularly where they are all in play and, taking all the circumstances of this case together, this is clearly a case in which reasons ought to have been given.

The authorities

54. I bear in mind the broad principles Mr Fegan relies upon which are clearly properly identified. However, whilst they provide a broad context, the key issues on ground 1 are ones to which the cases of *Oakley* and *CPRE Kent* are most pertinent.

55. I start with the decision in *R (on the application of Oakley) v South Cambridgeshire District Council*. To put this decision in context, the case concerned a challenge to the grant of planning permission for a 3000 seater football stadium on the outskirts of Sawston in Cambridgeshire. That went against the recommendation of the planning officer that permission be refused because the development did not comply with the requirements of the NPPF and the local development plan regarding development in the green belt. The claimant sought judicial review on the basis of a failure to give reasons.

56. The focus of the claimant's argument at first instance appears to have been that a duty to give reasons arose because the decision was aberrant and called out for an explanation. Jay J. rejected that argument – there was nothing intrinsically peculiar or aberrant in the committee disagreeing with the officer's recommendation and that fact alone was not sufficient to trigger a duty to give reasons. On appeal that argument was not pressed. As Elias LJ said at [19]: *"The mere fact that the officer and the committee part company is not a sufficient basis for saying that the latter decision is peculiar or aberrant so as to attract the duty to give reasons. Having said that, for reasons I develop below, the fact that the committee has departed from the officer's report may in some contexts be a relevant factor supporting the conclusion that a common law duty to give reasons should be imposed."*

57. The appellant's argument instead focussed on the propositions either that the common law should always require reasons to be given, unless it is clear from the publicly available materials how the decision must have been reached, or that the nature of this particular decision required reasons to be given. At [22] Elias LJ summarised the basis for the alternative argument as follows:

> *"Mr Simons* [counsel for the appellant] *relies upon two features of the decision in particular which, whilst not making this decision unique, distinguish it from most other planning determinations. First, the committee has departed from the officer's very strong recommendation. Second, it did so in circumstances where the development constitutes a departure from the development plan and, more specifically, where it involves development in the Green Belt. Reasons should be given in order to explain why such interference is justified."*

I summarise by saying that Elias LJ then set out what he described as the powerful reasons for administrative bodies to give reasons for their decisions. He regarded the common law as moving to a position where, in general, reasons should be given unless there was a proper justification for not doing so, and he said he was "strongly attracted"

to counsel's first proposition. Nonetheless, he declined to decide the case on the basis of any general principle to that effect because he concluded that the case could be decided on the narrower alternative ground.

58. On that narrower ground, Elias LJ said the following:

"56. The decision under challenge has a number of distinct features relied upon by the appellant. Not only has the committee disagreed with the officer's recommendation, but in addition it has done so in circumstances where its decision is not consistent with the local development plan and involves development in the Green Belt. Prima facie that is inappropriate development and the planning committee is required to conclude that the adverse effects "by reason of inappropriateness or any other harm" are clearly outweighed by other considerations.

…..

58. An important objective of environmental policy is to protect and preserve special features of the landscape and certain important buildings . So, special status is given, for example, to areas of outstanding natural beauty, the Green Belt, and listed buildings. They have this status because it is considered that in general their preservation enriches the quality of life. These features are not to be preserved at all cost, but strong reasons, and sometimes very exceptional reasons, will be required to justify interfering with them. … There will obviously be situations where the benefits of a particular development outweigh the environmental disadvantages, and nobody can expect to live in a time capsule. But in my judgement the common law would be failing in its duty if it were to deny to parties who have a close and substantial interest in the decision the right to know why that decision has been taken. This is partly, but by no means only, for the instrumental reason might enable them to be satisfied the decision was lawfully made and to challenge it if they believe that it was not. It is also because as citizens they have a legitimate interest in knowing how important decisions affecting the quality of their lives have been reached. This is particularly so where they have made representations in the course of consultation. They cannot expect their detailed representations to be specifically and individually addressed, but as participants in the process, they can expect to be told in general terms what the committee perceived to be the advantages and disadvantages of a particular development, and why the former clearly outweigh the latter.

59. In a general sense, this may be considered an aspect of the duty of fairness which in this contrast requires that decisions are transparent. The right for affected third parties to be treated fairly arises because of the strong and continuing interest they have in the character of the environment in which they live……In my judgment, these are powerful reasons for imposing a duty to give reasons, at least if the reasoning process is not otherwise sufficiently transparent.

60. The decision in this case involved a development in the Green Belt and was also in breach of the development plan. Public policy requires strong countervailing benefits before such development can be allowed, and affected members of the public should be told why the committee considers the development to be justified

notwithstanding its adverse effect on the countryside. In my judgment, these consideration demand that reasons should be given. Even if there are some planning decisions which do not attract the duty to give reasons, there is in my judgment an overwhelming case for imposing the duty here.

61. That conclusion is in my judgment reinforced where the committee departs from the officer's recommendation. The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required. As I have said I would not impose the duty to give reasons on the grounds that the committee's decision appears to be aberrant …. but the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty."

59. It can be seen from those passages that Elias LJ's reasoning was that the duty to give reasons arose from the duty of fairness. It was fair that those affected should know why a decision had been taken that was contrary to the development plan and to policies of wider application, in this case, in respect of development in the Green Belt. The fact that the development was also contrary to the officer's recommendation was a reinforcing factor. Elias LJ, therefore, allowed the appeal and the other two members of the court agreed but Sales LJ, as he then was, gave separate reasons because, he said, there was some difference, at least in nuance, between his reasons and those of Elias LJ.

60. Sales LJ firstly said that where the officer's report set out the reasons for and against a grant of planning permission and the committee departed from the officer's recommendation, the fair and proper inference would be that it had simply adopted the contrary reasoning. I observe that later, at [77], he noted that, in this case, the fact that permission was granted was contrary to the whole thrust of the officer's report and at [80] that, whilst that did not itself give rise to a duty to give reasons, it meant that the Council could not rely on the report to show that it had discharged the duty which he found to arise for other reasons.

61. On the narrower argument, Sales LJ said this:

"78. … In a general sense members of the public have a reasonable expectation that development plans and national policy for the protection of the Green Belt will usually

be complied with, and may indeed have taken decisions having such considerations in mind, for instance when deciding where to buy a house.

79. Where the public interest in ensuring that the relevant decision- maker has considered matters properly is especially pressing, as in cases of grant of planning permission as a departure from the development plan or in cases of grant of planning permission as a departure from the usual protective policy in respect of the Green Belt, that is a factor capable of generating an obligation to give reasons. This is because requiring the giving of reasons is a way of ensuring that the decision-maker has given careful consideration to such a sensitive matter. Similarly, where a person's private interest is particularly directly affected by the decision, that may also provide a normative basis for imposition of a duty to give reasons, …. In the planning context, I think that there is particular force in this point where the decision appears out of line with a natural and reasonable expectation on the part of the public that decisions will comply with the local development plan and with national policy to protect the Green Belt. Although it might be said that decisions to allow development in the Green Belt or contrary to the development plan are not aberrant as such, in that such decisions are not uncommon and cannot be assumed to be irrational, I think that they do give rise to an important onus of justification on the part of the decision-maker which, taken with the parallel public interest consideration in such cases, grounds an obligation under the common law to give reasons in discharge of that onus.

80. In my judgment, the foundation for the identification of a duty to give reasons for the decision of the Council in this case is the fact that the decision to grant planning permission appeared to contradict the local development plan and appeared to subvert the usual pressing policy concern that the Green Belt be protected (I think either of these factors alone would be sufficient), which engaged a particular onus of justification on the part of the Council which could only adequately be discharged by the giving of sufficient indication of its reasons for making the decision it did. …." (My emphasis)

62. The decision of the Supreme Court in *R (on the application of CPRE (Kent)) v Dover District Council* [2017] UKSC 79 post-dates that in *Oakley*. Developers applied for planning permission for 2 sites near Kent, one in an Area of Outstanding Natural Beauty and one a scheduled monument being a series of fortifications dating from the Napoleonic Wars. There was both strong support for and strong opposition to the proposed developments. The planning officers recommended that permission be granted subject to conditions which included excluding an area of the first site and reducing the number of houses. Permission was granted without the conditions. No statement of reasons was given but the minutes of the planning committee meeting contained brief reasons that the conditions could jeopardise the viability of the scheme, deter other developers and be less effective in delivering economic benefits and that the

advantages outweighed the harm to the AONB which could be minimised by effective screening. The Court of Appeal quashed the permission.

63. The applicable regulations, the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, regulation 24(1), imposed a duty to given reasons expressed as "the main reasons and consideration on which the decision is based …". The claimant's challenge was made on the basis that the reasons for the decision were inadequate.

64. As to the standard of reasons, Lord Carnwath, with whom the other members of the Supreme Court agreed, at [35] first cited the summary of relevant authorities governing reasons challenges given by Lord Brown in *South Bucks DC v Porter* [2004] UKHL 33:

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

65. Lord Carnwath at [39] said that he took the statutory requirement to give the main reasons to be no different in substance to Lord Brown's reference to the need to refer only to the main issues in dispute. He then set out what was required of reasons:

"41. …. Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision. The content of that duty should not in principle turn on differences in the procedures by which it is arrived at. Local planning authorities are under an unqualified statutory duty to give reasons for refusing permission. There is no reason in principle why the duty to give reasons for grant of permission should become any more onerous.

42. There is of course an important difference that …. the decision letter of the Secretary of State or any planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However, the essence of the duty remains the same, as does the issue for the court: that is. in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what has been decided and why." (My emphasis)

66. Although noting that it was strictly unnecessary to address the issue of a common law duty to give reasons, the Supreme Court thought it right to consider it, Lord Carnwath saying that *Oakley* was rightly decided:

"57. Thus in Oakley the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. the same combination is found in the present case and, in my view, would of necessary have justified the imposition of a common law duty to provide reasons for the decision."

67. Lord Carnwath recognised that that might give rise to a charge of uncertainty as to when reasons should be given. He continued:

"59. As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public opposition and against the advice of the officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as specific policies identified in the NPPF – para [22] above). Such decisions call for public explanation, not just because of their immediate impact; but also because …. they are likely to have lasting relevance for the application of policy in future cases."

The reference to the policies in paragraph 22 was to the NPPF and the "specific polices" restricting development in sites protected under the Birds and Habitat Directive, Green Belts, AONBs, and National Parks.

68. I have addressed both these decisions at some length for a number of reasons:

(i) Firstly, I accept Ms Pindham's submission that although *Oakley* was a case about development in the Green Belt, the approach adopted by the court was not limited to cases about Green Belt development. That seems to me to be clear from the context, from what is said about environmental control at [58], from Elias LJ's conclusion at [60], and from Sales LJ's particular observations about departure from the development plan. That is also supported by Lord Carnwath's description of the case, at paragraph 57 in his speech in *CPRE (Kent)*, which identified the combination of circumstances in that case that meant that openness and fairness required reasons to be stated and from his conclusion that such a duty would have arisen in *CPRE (Kent)* where there were strong public views both for and against development of the sites which affected an AONB and a scheduled monument.

(ii) Further, I read paragraph 61 in *Oakley* as meaning that, whilst it is not the position that in all cases where the committee departs from the officer's recommendation the committee must give reasons, that is another factor that may give rise to the duty to do so depending on the circumstances and/or may lend further support the duty to give reasons where there is, to adopt Elias LJ and Sales LJ's examples, an interference with a landscape or structure to which special status has been given or a departure from the development plan. There must, as Sales LJ put it, be a sufficient accumulation of reasons of particular force and weight in relation to the particular circumstances of an individual case.

(iii) The powerful reasons for giving reasons for a decision encompass both enabling parties affected to understand the decision and the public interest in ensuring that the decision is properly taken.

(iv) The particularly strong reasons, or sufficiently strong accumulation of reasons of particular force, for concluding that reasons should have been given that existed in *Oakley* are not, as it was put in argument, a minimum standard. *Oakley* illustrates the factors that may give rise to a duty to give reasons and, indeed, Sales LJ considered that departure from the development plan or from the policy in relation to the Green Belt would be sufficient. I would infer that departure from the policy of protecting listed buildings would similarly be sufficient. In

any case, it does not seem to me helpful or necessary to seek to articulate the test further or reconcile the difference in nuances in the judgments of Elias LJ and Sales LJ. Both considered that the interference with the Green Belt, the departure from the development plan and the departure from the recommendation of the officer were more than sufficient individually or cumulatively to give rise to the duty to give reasons.

(v) In *CPRE Kent* the Supreme Court similarly considered that *Oakley* was rightly decided because of the combination of circumstances which were summarised at paragraphs 57 and 59. I agree with Ms Pindham's submission that the reference to a major departure from the development plan is a gloss rather than a requirement – it is an illustration of the sorts of circumstances that may typically give rise to the duty to give reasons. Something less than a major departure may be sufficient in all the circumstances.

69. So far as the nature and extent of the reasons which can legitimately be expected to be given is concerned, the decisions in both these cases also indicate in broad terms what those interested in the outcome of the application can expect to be told – in short the advantages and disadvantages and why the ones outweighs the other. Where that can be inferred from the officer's report, the duty may be said either not to arise or to be discharged in any event. Where is cannot, the converse is true.

70. I note finally that in *CPRE Kent*, it was argued that a declaration of breach was a sufficient remedy and that reasons could be provided after the event. That argument was rejected. Lord Carnwath observed (i) that the submission that the views of 3 members who voted in favour represented the views of the majority was an uncertain assumption and (ii) that the economic argument was only one side of the coin with the interests of the AONB on the other and that it then became critical to understand the basis on which the committee believed that the damage could be minimised by effective screening. He concluded:

"68. These points were not merely incidental, but fundamental to the officers' support for the amended scheme. The committee's failure to address such points raises a "substantial doubt" (in Lord Brown's word) as to whether they had properly understood the key issues or reached " a rational conclusion on them on relevant grounds"."

71. Amongst the further authorities I was referred to was the decision of HHJ Cotter QC in *R (on the application of Hollings) v Bath and North Somerset Council* [2018] EWHC 1418 (Admin). This case involved the grant of planning permission for alterations and extensions to a Grade II listed building, in use as a care home, situated within a World Heritage Site and Conservation Area. The officer recommended refusal but the committee (by a majority) granted permission. The permission was quashed on a number of grounds arising out of the taking into account of immaterial considerations but the judge held that the claimant would not have succeeded on the ground of failure to give reasons.

72. The judge held that there was a duty to give reasons because the committee was departing from the officer's recommendation where there was an application of "significant scale and public importance (such as here in both a Conservation Area and wider World Heritage Site)" which faced considerable opposition and may well have an impact on future applications. He considered that the council should err on the side of caution "given that the reasons given need not be extensive".

73. Having found that the duty arose, the judge held that the duty had been discharged. Such reasons as there were to be found in what were described as the relatively brief minutes of the meeting in which one councillor had said that the public benefits of the increase in bed spaces and securing jobs outweighed any harm. The judgment also makes reference to the view, with which another councillor agreed, that the home was not financially viable without expansion, although that was a view for which it was impossible to identify the foundation (which went to the other grounds). The judge found those reasons to be intelligible and adequate; that they allowed the reader to understand why the application was decided as it was and the conclusions reached on the important controversial issue of the planning balance; and that there was no reason why the reasons could not make shorthand reference back to the content of the officer's report.

74. At [75] the judge continued:

"However I would observe that whilst reasons as to why planning permission has been granted may be brief in circumstances such as the present they will ordinarily be taken as the sole operative reasons for the decision. It will often be difficult to infer that

matters not mentioned have been taken into account and weighed in any planning balance. In the present case this throws focus back on the limited positive aspects set out by the councillors. If, as I find, one falls away [and] then the extent to which the decision can be supported as rational also comes into play."

75. Mr Fegan submits that the present case is very similar to that of *Hollings* and that, even if the duty to give reasons arises, it should similarly be found to have been discharged. With respect to that submission, I find it difficult to see *Hollings* as more than an illustration of the principles in *Oakley* and *CPRE (Kent)* about the extent of reasons and it provides no more guidance on the nature and extent of adequate reasons.

Arguments and discussion

76. In *CPRE (Kent)* and *Oakley*, there was commonality between the matters that were said to give rise to the duty to give reasons and the matters on which it was said that the Council had failed to give adequate reasons. The position is different here. Both counsel have approached the issue of the duty to give reasons by having regard to the overall context of the decision but the only pleaded matter on which is it claimed that the council failed in that duty is the issue of the sequential test and flood risk. In my judgment, however, counsel were right in the approach that they took. The common law duty, if it arises, arises from the context as a whole and not by virtue of the perceived significance of one aspect of the planning matrix. Although the arguments as to adequacy of reasons ranged outside the distinct issue of flood risk, those arguments may be more properly relevant the further grounds.

77. As I summarised above, the claimant's case is that the departures from both the development plan and the Officer's recommendation, in the context of this case, give rise to a duty to give reasons. Some reliance is placed on the departure from specific policies in the NPPF. Whilst I accept that the nature of these policies is some indication of the weight to be given to them, they do not have some special status in terms of weight and, in this case, were adequately reflected in the development plan in any event.

78. Rengen emphasises different aspects of the context of this application which, it is submitted, cannot give rise to any such duty on the facts of this case.

79. Firstly, it is said that the proposed development in this case is a minor development on a brownfield site in an area already undergoing a massive transformation and that this is wholly unlike the situations in *Oakley* and *CPRE (Kent)* which were concerned with substantial developments in the Green Belt or an AONB respectively. Whilst the imperative to give reasons may be, in a sense, greater the more substantial the development, I can see nothing in the authorities that would point the other way – in other words, it is not the case that the less substantial the development, the less likely it is that there will be powerful reasons to give reasons, if the other factors identified in these cases are in play.

80. Secondly, this was, it is submitted, a case in which the Officer drew together a complex matrix of factors and presented the Council with a balance of advantages and disadvantages, giving less weight to the advantages or benefits of the development. It was entirely open to the Council to place different weight on those factors and reach a different conclusion. In this particular case, so far as the heritage aspects were concerned, the skittle alley is listed only because it falls within the curtilage of the pub and the Officer found "less than substantial harm", bringing the balancing exercise into play. So far as the flood risk was concerned, it is submitted that neither the Environment Agency nor the Drainage and Flooding Team made any objection to the development on flooding grounds and there was no reason for the Council to take a different view from that of the experts. Overall the conflict with the development plan was minor and whilst there was clear opposition there was also clear public support for the development.

81. Mr Fegan also contrasted the present case with the decisions *R(Tate) v Northumberland County Council* [2018] 208] EWCA Civ 1519 and *R (Gare) v Babergh District Council* [2019] EWCHC 2041 (Admin). In the former case, the duty to give reasons arose from an inconsistency in planning approach; in the latter case, it arose from an inconsistency in the Council's approach to whether it was subject to such a duty. Neither is the position here. However, to my mind, all these cases do is illustrate that the reasons which may mean that fairness requires reasons to be given are many and varied and not limited to cases that fall squarely within *Oakley* and *CPRE Kent*. They do not add weight to Rengen's argument.

82. Put broadly, Rengen's position is that taking account of these matters, it is a matter of planning judgment where the balance lies and it can readily be seen that the Council simply gave greater weight to the advantages and benefits than did the Officer. No further reasons are necessary. As I indicated above, this argument ranges beyond the distinct issue of flood risk but, taken as a whole, the submission seems to me to be that there could be no duty to give specific reasons on each aspect of the Officer's reasons for recommending refusal and/or that the exercise of the planning balance is sufficient for no duty to arise or, in the event that a duty arose, to discharge that duty.

83. Whilst there is force in this argument, in my judgment, it does not stand up to scrutiny. Whilst the Officer's Report did identify the advantages and disadvantages, the complexity of the issues in this case make it impossible to say simply that the Council gave them different weight. The Officer's Report identified an accumulation of reasons for not recommending that permission be granted and made an overall assessment. As I consider further below, the minutes neither give reasons for the Committee's decision on the main points of difference nor give any indication as to why it reached a different overall assessment.

84. It seems to me self-evident that in order to determine the Council's reasons for its decisions and, in this case, to address whether those reason are adequate, the minutes should be read, so to speak, with the Officer's Report. That is the clearest and fairest way to see what the basis was for the Officer's recommendation and the Council's reasons to depart from it, and is consistent with the *Bishops Stortford* case relied on by Rengen. But this is not a case in which it can simply be assumed that the Council took the opposite view from the Officer and the minutes neither enable that reasoning or any other reasoning to be discerned. So far as the heritage aspects are concerned, the impact was not merely on a listed building but one in a Conservation Area in a World Heritage Site. It was opposed by heritage organisations who made much of the setting and emphasised the importance of the skittle alley (albeit not listed in its own right) which was to be demolished. Numerous concerns were expressed by the heritage organisations, members of the public and councillors about the impact on Park View and the amenity of its residents. The benefits of the pub as a community asset were identified together with importance of retaining it as a community asset but both the

Officer's Report and the comments of the majority of councillors identified that there was no evidence that the future of the pub would be secured by the development and no intrinsic link between the development and the future of the pub. The petition does not seem to have featured in the Council's reasoning and added little or nothing. Those who signed the petition were assuming a link between the development and the future of the pub, since that was how the petition was framed, and gave no indication of why they supported the development of 10 studio apartments or how they might be affected by it.

85. Mr Fegan submitted that the record of the Committee debate showed clear and careful consideration of the benefits and harms and he relies on Councillor Kew's summary of the position. In my view, on a natural reading of the minutes, the Councillor was setting out his views in support of the application; that was followed by further debate in which some of those views were challenged; and it cannot simply be inferred either that the Committee gave careful consideration to those reasons or that they amounted to the reasons for the decision.

86. Against this background, in my judgment, there was a duty to give reasons as to why the planning balance was exercised in the way in which it was.

87. The nature of scope of that duty must then have been one in which, as a minimum, the Council was required to give reasons which demonstrated that they had taken into account the matters that weighed on each side of the balance and, in this case, that included the Officer's reasons for refusal. Looked at another way that is the same exercise as giving reasons for the main points of difference. One of those reasons for refusal was the failure to follow the sequential test and departure from Placemaking Policy CP5.

88. Put in that way, it is clear, in my view, that the Council did not give any or any adequate reasons. The minutes of the meeting say nothing about the flood risk or the sequential test other than the comment of an individual councillor that he did not think the site would flood.

89. For Rengen, Mr Fegan submitted that, in undertaking the planning balance, the Council must have rejected the views of the Officer as to the flood risk because the Environment Agency and Drainage and Flooding teams raised no objection. That is no more than an assumption and it is not one that can be discerned from the minutes.

90. In any case, the Officer's Report concluded that the sequential test had not been followed and that was the view articulated as one of the reasons for refusal. The Officer's Report itself explained the purpose of the sequential test as identifying whether there might be other sites for the development. The short point, so far as the Officer was concerned, is that that sequential test had not been undertaken at all. The sequential test itself is, in principle, a different point from the flood risk to the site itself. The Flood Risk Assessment itself referred to the sequential test but proceeded on the basis that it was met by the strategic test for development in Flood Zones 2 and 3. The Officer clearly held a different view and it was an express reason for refusal and not just a minor point of difference.

91. There is nothing in the minutes to indicate that the Council gave any consideration to these issues, namely whether the sequential test had been followed or the failure to follow the sequential test. There is nothing to indicate that the Committee had come to the conclusion that the test had been followed or that failure to follow the test was irrelevant because they had come to the conclusion that there was no flood risk. Although I have accepted that the views on the Council on this application are no more than arguments, the reasons given for the concession of Ground 1 entirely reflect the same points.

92. Therefore, as I have indicated, in my view it is clear that the duty to give reasons was not discharged because it is not possible to see whether this reason for refusal was even considered.

93. I cannot see how the argument that this was just one of the matters in the planning balance can succeed in any event. Standing back and considering the position more broadly, the issue of public benefit specifically arose in the context of the weight to be given to that benefit as against the harm to the heritage assets. It may be possible to infer that the Committee considered that the public benefit outweighed the harm

because that was an issue expressly raised at the meeting and was the context of the motion on which the Committee in the event voted. But there is no reason given as to why. It is clear that importance was attached to the retention of the pub as a community asset and may well have been given weight, but no reason was given for rejecting the view of the Officer, reflected in the comments of some of the councillors, that there was no intrinsic link between the development and the long term prospects of the pub.

94. Further, the objections raised by the Highways department as to lack of parking and the impact of that lack of provision were also not addressed. It is suggested by Rengen that that point is met by the fact that the development was close to public transport and that there is some basis for saying that the Council saw benefit in a car free development. This issue is perhaps more relevant to Ground 4 but, in my view, it is again largely assumption and cannot be seen from the minutes. The suitability of the development as a car free development was mentioned briefly in the Planning Policy Statement in the context of accessibility and in the Technical Note on parking a car free development was argued to be justified. The Committee does not appear to have given any consideration to these and, in particular, to the argument advanced in the Technical Note which had been rejected by the Council's Highways Department. The only references to parking in the minutes are in the responses of the Case Officer about the position if this were designated student accommodation (which it is not) and to the proximity of the railway stations (which may be relevant to accessibility but was not immediately relevant to the concerns expressed by the Highways department).

95. I recognise that it may be said that it is clear that the Council must have reached its decision to delegate to permit on the basis that conditions could be attached to the grant of planning permission to secure the long term future of the pub. That does not change the position, however, because the same absence of reasons for rejecting the Officer's reason for refusal based on the flooding risk would arise, as would the same absence of explanation for linking the development to the long term future of the pub. The decision then made to grant full planning permission suffers from the same failing.

96. For completeness, I should add that Mr Fegan also submitted that it was apparent from the submissions made by the claimant in the second consultation period made it clear

that she was able to understand the Committee's reasons, which is strong evidence that they were adequate. In her supporting statement no. 6, the claimant said that the Committee had used as a reason for delegating to permit "the fact that it is more important to keep the pub open than to save a neglected heritage asset". She continued:

"Many objectors have commented (on both the 2017 and the 2018 applications) that the aim to keep the pub open is unlikely to be met in this particular case (and some of the Committee members at the meeting thought so too), given that the studio apartments will NOT provide a revenue stream for the pub in the future. The pub is viable as it stands ....."

She then addressed various aspects of the application including the flood risk. Read as a whole, the statement does no more than demonstrate that the claimant was able to understand that retaining the pub seemed to have been the dominant factor but not that she was able to understand why, or how that had been weighed in the balance, or what account had been taken of the flood risk.

Ground 2

97. This ground specifically relies on the Council's having taken into account an immaterial consideration, namely the long term future of the pub. It was not in issue between the parties that enabling development, in the sense of development which brings benefits by financially enabling other desirable development is a material consideration and to be distinguished from pure financial gain for the developer. In the Design and Access Statement, the Planning Policy Statement and the Heritage Assessment, Rengen presented the development as such an enabling development.

98. Rengen submits that, once it is accepted that enabling may be a material consideration it is for the Council to determine whether there is sufficient evidence for that to be, in fact, a material consideration. It is only if the Council's conclusion is irrational that it is capable of challenge. Rengen relies on three matters to demonstrate that, in this case, there was sufficient evidence on which a rational conclusion that the benefit to the pub was a material consideration could be reached. Those three matters are the Carter Jonas Report; local knowledge; and the fact that resolution was to delegate to ensure that funds were used to improve the public house.

99. The Carter Jonas Report dated 3 September 2018 was an Appraisal Report commissioned by Rengen in connection with the planning application. The report provided evidence that the pub needed to be refurbished in order to attract both a buyer and custom and that its current profit margins and location were not sufficient. The report referred to the proposal to develop 10 studio apartments and concluded simply that *"We consider that this proposal provides an optimum development solution being a compact scheme of development that realises sufficient profitability to fund the proposed works to the public house."*

100. It is not at all apparent that the Committee had any regard to that report. It was referred to in the Officer's report but not in the minutes. The point made by the Officer, and indeed by members of the public and the majority of Councillors, was that there was no intrinsic or any link between the development and the future of the pub. The simple statement in the Carter Jonas report that the proposal realised sufficient profitability to fund the proposed works to the pub did not provide that link. The Councillors' local knowledge was similarly at best of the role and business of the pub and not of the link to the development.

101. I do not, therefore, accept the submission that there was a rational basis for the Council, in this case, to have regarded the future of the pub as a material consideration. The section 106 agreement was not the basis for the decision to delegate to permit. To the extent that it was the basis of the decision notices, it addressed the future of the pub solely in terms of the disabled WCs.

Ground 3

102. As I summarised above, the Council's ecologist objected to the development on ecology grounds. The principal reason given was that there was insufficient information on protected species because the survey was out of date and there was incomplete information on the surveyor and their experience. An updated report (entitled Bat Scoping Survey and Nesting Bird Report) was submitted and caused the ecologist to withdraw the objection.

103. The claimant argues that that was procedurally unfair because the updated report was not the subject of consultation.

104. Rengen submits that the chronology in respect of this matter demonstrates that there was no unfairness:

(i) The updated report was uploaded to an online document bank on 13 September 2018.

(ii) It is apparent that the claimant was aware of the updated report and, although she noted the shortness of time available, she made detailed written representations on 23 September 2018.

(iii) On 25 September 2018, the ecologist reviewed the updated report and the claimant's representations. The ecologist then changed her recommendation to no objection subject to conditions. In her full comments she said:

"The findings of the newly submitted report are accepted.

I note concerns raised in comments by the public, including that the scope of the survey did not extend to the main pub building or its roof. I have considered this but am satisfied that the works affecting this building are of a nature that would not damage or disturb features that could potentially be used by bats (which are limited in any case), in the unlikely event of bats being present."

(iv) She was thus satisfied with the updated information and changed her recommendation to one of no objection with conditions.

(v) The Committee was informed of that change. No further issues were raised at the meeting.

(vi) In what I have called the second consultation phase, the claimant made further comments about the ecology report but the Officer did not consider that any of these representations raised any new material considerations.

105. It might be argued that others, who were not so assiduous in monitoring the Council website, were deprived of the opportunity to comment on the updated report prior to the Council's meeting. There is no evidence to this effect and there were no comment from others in what I have called the second consultation phase. Mr Fegan relied on the decision in *R (Wainwright) v Richmond upon Thames London Borough Council* [2001] EWCA Civ 2062 at [47] and [49] as authority for the propositions that it would be only

in a comparatively rare case that a claimant who had had the opportunity to make detailed representations would be able to rely on a failure to consult others. That submission is well-founded. On its facts, the *Wainwright* case was one in which the claimant had herself consulted widely amongst local residents and no-one else had complained that they were not consulted or said that they would have made any material point if they had been. Although the facts are not identical, in the present case, what is clear is that there were a number of local objectors and that none has complained about the lack of consultation on the updated ecology report or raised any issue that might have made a difference, even though they would have had the opportunity to do so at the Committee meeting and in the second consultation phase.

106. In this respect, it seems to me that there was no procedural unfairness. The claimant herself was able to comment on the updated report and did so fully.

Ground 4

107. The final ground is one of irrationality. Ms Pindham submits that this ground to a large extent flows from the previous grounds and it seems to me that in reality this is very much a further manifestation of the arguments that were advanced in respect of the reasons challenge.

108. The claimant submits that on the one side of the planning balance were significant departures from the development plan and that the Council was, pursuant to section 38(6), constrained only to depart from the development plan if that departure was outweighed by material considerations. The departures included the conflict with Policy CP5 (the sequential test), Policies CP6 and HE1 (in respect of heritage assets), Policy ST7 (the parking and highways issue), and Policy D6 (amenity). As Ms Pindham succinctly put it in her skeleton argument: *"No specific reasons were ever provided which set out clearly what material considerations outweighed these multiple and significant conflicts with the development plan."*

109. Ms Pindham does not go quite so far as to say that absent such reasons, the decision can be inferred to be irrational but rather that that inference can be drawn if no material considerations can be identified. Those considerations could only be identified from

the minutes of the Council meeting and the claimant suggests three: the retention of the pub, the improvement of community facilities, and the provision of homes. Rengen asserts the same three factors.

110. I have addressed the first of these above. The second, the improvement in community facilities is barely referenced, and it is impossible to see how it could have weighed sufficiently against the multiple departures from the development plan. The provision of homes was itself a contentious issue: it was of relevance but it was not the case that housing was for any particular groups or with any particular benefit which was a material issue for at least some of the councillors.

111. Rengen submits that there was nothing irrational about the ultimate decision in light of the range of factors capable of being weighed in favour of the development. However, those factors were, for the reasons I have set out above, very largely a matter of assertion, and assertion that was demonstrably wrong or questionable, and cannot rationally have outweighed the multiple departures from the development plan that the Officer identified. The burden on the claimant, particularly where matters of planning judgment are concerned, is a high one but, in my judgment, in this case it is met.

Section 31(2A)

112. Rengen accepts that if the claimant is successful on grounds 2 or 4, the decision should be quashed. In light of my decision on these grounds, it is strictly speaking unnecessary for me to address, therefore, the argument on section 31(2A). It seems to me, however, appropriate to do so given the view I have formed in relation to ground 1.

113. On ground 1, Rengen submitted that this alone would not have been sufficient for the decision to be quashed. In short, it was submitted, it is highly likely that the decision would have been the same if the conduct complained of had not occurred and that all that would have happened was that more detailed reasons would have been given.

114. I do not accept that submission for the following reasons. Firstly, as Ms Pindham submitted, the Council's letter setting out the basis of its concession of ground 1 itself

makes clear that the view of the Council is that, if sufficient reasons for the decision had been given, the decision might have been different. Inherent within that is an acceptance that the process of giving such reasons might have led to a different conclusion. That articulates the good reason to accept the Council's concession. The failure to meet the sequential test was not a formality and nor was it the same as a flood risk assessment. The Council appears to have had no regard to it at all; the minutes disclose virtually no discussion or consideration of the flood risk; and any suggestion as to how the Council approached this is a suggestion and no more. Even if the Council might have concluded that there was no other available site and that the exception test was met, there is nothing in the minutes to lead to the conclusion that it was highly likely that the Council would have reached the same decision if it had given proper consideration to the issue and it is the absence of reasons which casts doubt on whether such proper consideration was given.

115. In relation to ground 3, however, and had I decided that ground in the claimant's favour, I would also have concluded that the decision was highly likely to have been the same had the conduct complained of not occurred.