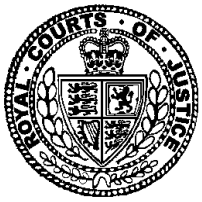

Neutral Citation Number: [2020] EWHC 2098 (Admin)

Case No: CO/4682/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

Rectory Homes Limited	**Claimant**
- and -	
Secretary of State for Housing Communities and Local Government	**Defendant**
-and-	
South Oxfordshire District Council	**Interested Party**

- -
- -

Mr. Rupert Warren QC and Mr. Matthew Fraser (instructed by **Eversheds Sutherland LLP**) for the **Claimant**
Mr. Leon Glenister (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not attend the hearing

Hearing date: 8 July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10:00 on the 31st July 2020

Mr. Justice Holgate :

Introduction

1. The Claimant, Rectory Homes Limited, applies under s.288 of the Town and Country Planning Act 1990 ("TCPA 1990") to challenge the decision of the Defendant's Inspector dated 21 October 2019 dismissing their appeal against the decision of South Oxfordshire District Council ("SODC") to refuse planning permission for development at The Elms, Upper High Street, Thame OX9 2DN, namely "the erection of a 'Housing with Care' development (Use Class C2), a communal residents centre" and other works.

2. The central question in the challenge is whether, as the Claimant submits, on a proper interpretation of the development plan, a proposal for extra care housing within the C2 Use Class does not fall within the scope of the policy requiring schemes for 3 or more dwellings to provide affordable housing.

3. The appeal site comprises 2.94 ha of land in the centre of Thame to the south of The Elms, a 19th century house and Grade II listed building, and of dwellings facing Park Street. Elms Park lies to the east, Elms Road to the south and properties fronting Nelson Street to the west. The site lies within the Thame Conservation Area. It is an open area of privately-owned parkland and mature trees.

4. The Thame Neighbourhood Plan ("TNP") allocates the site for up to 45 dwellings. On 5 August 2015 planning permission was granted for the erection of 37 dwellings and the creation of new public open space ("the 2015 scheme"). It is common ground that this development was begun and the permission remains extant. The Inspector accepted evidence showing that there was a real possibility of this development being completed in the event of the appeal being dismissed. In other words, he accepted that the 2015 scheme should be taken into account as a "fallback" and gave substantial weight "to this material consideration" (DL 66). A linked s.106 obligation required a financial contribution to be made to off-site affordable housing equivalent to 40% of the 37 dwellings to be built on site. It does not appear that the obligation to make that payment had yet been triggered.

5. The appeal scheme would provide 78 units of residential accommodation. Each unit would have its own front door, between one and four bedrooms, a living room, bathroom and kitchen allowing for independent living (paragraphs 7-8 of the Statement of Facts and Grounds).

6. By clause 1.1 of a s.106 agreement dated 13 September 2019 the "development" was defined as:-

> "the erection of a 'Housing with Care' development (Use Class C2) for 78 open market extra care Dwellings and a communal residents centre"

The residential units are referred to as "dwellings" or "extra care dwellings" in several parts of the agreement. The term dwelling is defined in clause 1.1 as:-

> "a building erected or proposed to be erected upon the Site pursuant to the Planning Permission or (where clause 6.10

> applies) a Section 73 Permission or part of such building designed for residential occupation as extra care Dwellings in accordance with this Agreement and the Planning Permission and includes flats"

7. The s. 106 agreement restricted the occupation of each "dwelling" to up to 2 people (see clause 2.1 of schedule 2) at least one of whom must be aged 65 or more and in need of at least 2 hours of "personal care" a week ("the primary resident"). The level of care required is likely to increase with age and is to be the subject of regular assessment at least once a year. A person who is not themselves aged 65 or more and in need of such care, may only live in one of the dwellings if he or she is the spouse or partner of the primary resident of that dwelling. Accordingly, the drafting of the s.106 agreement proceeded on the basis that the provision of residential accommodation under the C2 Use Class could include an extra care dwelling in which no more than 1 person or two 2 people living as a couple may reside.

8. The site is to be managed by a property services company working together with a CQC registered care provider for the provision of on-site personal and domiciliary care. All residents would be entitled to use the communal facilities in the residents' centre, which included a lounge/function room, dining area, 3 treatment rooms and gym. The services and facilities, including the maintenance of communal spaces, would be paid for through a service charge on each residential unit. The section 106 obligation would require each "primary resident" of a dwelling to buy a "basic care package" (as defined) to meet their needs in accordance with a health assessment (clause 2.12 of schedule 2). The personal care services which are available are defined in the agreement. The owner of the site and the developer covenanted "to ensure that the personal care and other support services appropriate to the assessed need of the primary resident of the dwelling (so as to allow them to live independently) is available to them if required by their individual health assessment, 24 hours a day and seven days a week" (clause 2.9).

9. The remainder of this judgment is set out under the following headings:-

Ground 1	83 – 93
Ground 3	94 – 100
Ground 4	101 – 109
Ground 5	110 – 112
Conclusion	113

Development Plan Policies

10. The South Oxfordshire Core Strategy was adopted in December 2012 and forms part of the statutory development plan.

11. Policy CSH3 sets out the circumstances in which development will be required to provide affordable housing:-

> "40% affordable housing will be sought on all sites where there is a net gain of three or more dwellings subject to the viability of provision on each site.
>
> - In cases where the 40% calculation provides a part unit a financial contribution will be sought equivalent to that part unit;
> - A tenure mix of 75% social rented and 25% intermediate housing will be sought;
> - With the exception of part units the affordable housing should be provided on site and the affordable housing should be mixed with the market housing;
> - The housing should meet required standards and should be of a size and type which meets the requirements of those in housing need."

12. Paragraph 7.29 of the explanatory text of the Strategy states that, according to the Housing Needs Assessment prepared in 2008 for the plan process, the annual need for new affordable housing in the district is 530 units. Because that was almost equivalent to the full housing allocation assigned to the District by the former South East Plan of 547 units a year until 2026, an affordable housing target based on the annual need figure would have been unrealistic and so the core strategy sought to maximise the amount of affordable housing required while ensuring that housing schemes are deliverable. A Housing Viability Study carried out as part of the preparation of the Core Strategy supported the use of both the 3 unit threshold for the requirement to provide affordable

housing and the 40% target, subject to "individual site circumstances" and the carrying out of a full viability appraisal for development on any particular site (paragraphs 7.29 to 7.32 of the Core Strategy).

13. Policy CSH4 deals with the different types of housing needed:-

> "A mix of dwelling types and sizes to meet the needs of current and future households will be sought on all new residential developments.
>
> - At least 10 per cent of market housing on sites of 10 dwellings or more should be designed to meet current Lifetime Homes standards.
>
> - In the case of affordable housing all ground-floor properties should be designed to meet current Lifetime Homes standards.
>
> - The provision of dwellings for people with additional special needs will be sought as part of the overall affordable housing percentage.
>
> - Specialist accommodation for older people should be provided in the new greenfield neighbourhoods identified in this strategy and will be permitted at other suitable locations."

The third bullet point is elaborated by paragraph 7.39:-

> "The aim of government policy is to provide support for people to be able to live in or remain in their own homes. This can include homes adapted for people with disabilities and/or in housing schemes which provide specific forms of support. These include people with disabilities, older people and vulnerable young people. Within the affordable housing element of the larger developments, we will look for scheme(s) to meet the needs of specific vulnerable groups."

14. Paragraphs 7.41 to 7.42 of the explanatory text of the Core Strategy deals with "specialist accommodation" for older people:-

> "7.41. There are a range of models that can play a part in providing specialist accommodation for the elderly. These include sheltered and enhanced sheltered housing, Extra Care housing, retirement villages, continuing care retirement communities and registered care homes both with and without nursing care. The council's preference is for Extra Care housing or schemes which include an element of Extra Care provision within them, in accordance with the county council's Extra Care housing strategy.

> 7.42. Where appropriate, specialist accommodation for the elderly should be provided on a mixed-tenure basis, and such accommodation should be located on sites in or adjacent to the towns or within the larger villages. Where any scheme providing specialist accommodation for the elderly (with or without care) includes an affordable housing component, this can count towards the overall 40% affordable housing requirement if part of a wider development."

15. In March 2013 the Thame Neighbourhood Plan was made by SODC as a neighbourhood development plan under s.38A of the Planning and Compulsory Purchase Act 2004. Policy H1 allocates land for 775 homes distributed across a number of sites in the town, including the appeal site.

16. Policy H8 of the Neighbourhood Plan provides for affordable housing:-

> "All proposals for new housing where there is a net gain of three or more homes should provide affordable housing as required by Policy CSH3 of the South Oxfordshire Core Strategy 2012. Affordable homes should be well integrated with market housing. The type and size of affordable homes should meet the specific needs identified for Thame."

Both this policy and the accompanying "objective" follow SODC's Core Strategy and, as we shall see below in relation the latter, the words "home" and "dwelling" are used interchangeably.

17. Policy HA4 dealt specifically with The Elms allocation and included the following relevant guidance:-

> "The key issue is heritage, specifically the relationship of proposed development to The Elms listed building and to the wider Thame Conservation Area. A heritage assessment has been carried out by the landowners, and this is available in the Thame Neighbourhood Plan Evidence Base. The landowner's consultant team has discussed the principles of developing the site with English Heritage. The site's sensitivities mean that the residential development will be restricted to the eastern and south-eastern side, although it is not possible to define the exact extent of the built area and open space prior to designs being completed and agreed. In any event, the site will provide no more than 45 dwellings.
>
> …….
>
> The precise number of dwellings to be accommodated on the site is to be determined through a detailed design proposal to enable full consideration of the heritage issues, public benefits and other material planning matters."

The main issues in the planning appeal

18. In DL 12 the Inspector set out the main issues in the planning appeal as follows:-

(1) how the appeal proposal should be considered;

(2) the relationship to the development plan, with specific reference to:

- the site specific policy in the Thame Neighbourhood Plan;
- the type and size of accommodation proposed;

(3) the effect on heritage assets, in particular the setting of The Elms as a listed building and the Thame Conservation Area;

(4) whether the proposal would make appropriate provision for affordable housing;

(5) whether the proposal would make appropriate provision for infrastructure and other related facilities and for any necessary improvement works to Elms Park;

(6) the weight to be given to the extant planning permission on the site; and

(7) whether there are any other material considerations, including the benefits of the proposal, which would indicate that the appeal should be determined otherwise than in accordance with the development plan.

19. This challenge is mainly concerned with the Inspector's reasoning on issues (1), (2), (4) and (7).

20. Under issue (2), the Inspector found that the proposal conflicted with Policy HA4 of the TNP because it would provide 78 dwellings rather than the maximum permitted by the policy of 45, a materially significant exceedance (DL 23, 67 and 93).

21. On issue (3), the Inspector concluded that the proposal would cause "less than substantial harm" to the setting of the listed building and to the character and appearance of the conservation area. But ultimately, he decided that the public benefits of the proposal would balance the heritage harms, applying paragraph 196 of the National Planning Policy Framework ("NPPF") (see DL 30 to 47 and 94). Issue (5) was also resolved in the Claimant's favour (DL 60-62).

22. Under issue (7), the Inspector decided that the most important policies of the development plan remained up-to-date and consistent with the NPPF. He concluded that the "tilted balance" in paragraph 11d of the NPPF did not apply (DL 68 to 79). There is no challenge to that part of the decision, but there is a challenge to the way in which the overall planning balance was struck in DL 93 to 96.

Issues in the planning appeal on extra care and affordable housing

23. The parties at the inquiry saw issues (1) and (4) as being related. How the appeal proposal should be defined and understood was thought to affect the issue of whether policy CSH3 applied so as to require the proposal to provide affordable housing.

24. Both the Claimant and SODC agreed that the use of the whole scheme should be considered as falling within the words italicised below in Class C2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (SI 1987 No. 764) ("the Use Classes Order") :-

> "**Residential institution**
>
> Class C2. *Use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses).* Use as a hospital or nursing home. Use as a residential school, college or training centre" (italics added)

"Care" is defined in Article 2 as:-

> ""care" means personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in class C2 also includes the personal care of children and medical care and treatment;"

It was common ground that the proposal would involve the provision of care as so defined to persons in need of such care.

25. The C3 Use Class is defined as follows:-

> "**Class C3. Dwellinghouses**
>
> Use as a dwellinghouse (whether or not as a sole or main residence) by—
>
> (a) a single person or by people to be regarded as forming a single household;
>
> (b) not more than six residents living together as a single household where care is provided for residents; or
>
> (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4).
>
> **Interpretation of Class C3**
>
> For the purposes of Class C3(a) *"single household" is* to be construed in accordance with section 258 of the Housing Act 2004."

The Use Classes Order does not define "dwellinghouse".

26. The essence of the Claimant's case before the Inspector and before this court is that the use of the word "dwellings" in the affordable housing policy, CSH3, of the SODC's Core Strategy could only refer to a dwelling in the C3 Use Class. Because it was agreed between the parties that the entirety of the proposed development fell within the C2 Use

Class, the Claimant contended that it had to follow that no part of the development could fall within the C3 Use Class and so could not amount to a "dwelling" under policy CSH3 triggering a requirement to provide affordable housing (likewise policy H8 of the TNP).

27. On 19 September 2019 the Inspector sent to the parties a Pre-Inquiry Note setting out some questions about the implications of the agreed position they had reached. He referred to paragraph 014 of the NPPG dealing with "Specialist housing for older people" issued on 26 June 2019" which states:-

> "**How does the use classes order apply to specialist housing for older people?**
>
> It is for a local planning authority to consider into which use class a particular development may fall. When determining whether a development for specialist housing for older people falls within C2 (Residential Institutions) or C3 (Dwellinghouse) of the Use Classes Order, consideration could, for example, be given to the level of care and scale of communal facilities provided."

28. It is helpful to put paragraph 014 into context. Paragraph 010 explains the different types of "specialist housing" that may be provided:-

> "There are different types of specialist housing designed to meet the diverse needs of older people, which can include:
>
> - **Age-restricted general market housing**: This type of housing is generally for people aged 55 and over and the active elderly. It may include some shared amenities such as communal gardens, but does not include support or care services.
>
> - **Retirement living or sheltered housing**: This usually consists of purpose-built flats or bungalows with limited communal facilities such as a lounge, laundry room and guest room. It does not generally provide care services, but provides some support to enable residents to live independently. This can include 24 hour on-site assistance (alarm) and a warden or house manager.
>
> - **Extra care housing or housing-with-care**: This usually consists of purpose-built or adapted flats or bungalows with a medium to high level of care available if required, through an onsite care agency registered through the Care Quality Commission (CQC). Residents are able to live independently with 24 hour access to support services and staff, and meals are also available. There are often extensive communal areas, such as space to socialise or a wellbeing centre. In some cases, these developments are known as retirement

> communities or villages - the intention is for residents to benefit from varying levels of care as time progresses.
>
> - **Residential care homes and nursing homes**: These have individual rooms within a residential building and provide a high level of care meeting all activities of daily living. They do not usually include support services for independent living. This type of housing can also include dementia care homes.
>
> There is a significant amount of variability in the types of specialist housing for older people. The list above provides an indication of the different types of housing available, but is not definitive. Any single development may contain a range of different types of specialist housing."

The present proposal fell within that description of "extra-care housing" or "housing with care".

29. The Inspector wanted to understand the legal implications of the agreement by the Claimant and SODC that the proposal fell within the C2 Use Class. He referred the parties to Church Commissioners v Secretary of State for the Environment [1996] 71 P & CR 73 and asked a number of questions about the identification of the planning unit, before and after the carrying out of the development, and whether the use of any buildings would be ancillary to another element. The Inspector's questions were as follows:-

> "(i) What is the planning unit at present;
>
> (ii) What would be the planning unit(s) following completion of the development;
>
> (iii) If the appeal is granted, implemented completed, would each individual 'House with Care' represent an individual planning unit;
>
> (iv) Would each 'House with Care' represent a 'dwelling';
>
> (v) How should the communal accommodation be considered;
>
> (vi) Would any element, and in this I am referring to the use of a building and its immediate grounds, represent an ancillary element, and if so, what would it be ancillary to and what would the planning unit be;
>
> (vii) Does the physical disposition of buildings upon a site make any difference to the proper consideration of these matters;
>
> (viii) Can a Planning Obligation make a difference as to how uses should be considered, both in law and practice;

> (ix) Is there merit in the proposition that, if the appeal is granted, implemented and completed that a mixed use would occur, made up of a planning unit consisting of the 'Houses with Care' and the communal accommodation, with other planning unit(s) for the public open space and other elements of the proposed development;
>
> (x) Is there merit in the proposition that, if the appeal is granted, implemented and completed, the site would consist of a number of planning units, with the 'Houses with Care' being 78 individual units, the communal accommodation being another, with other planning unit(s) for the public open space and other elements of the proposed development?"

30. In summary, the Claimant responded that:-

(a) For a building to fall within the C3 Use Class it must have the physical characteristics of a "dwelling" as characterised in Gravesham Borough Council v Secretary of State for the Environment (1984) 47 P & CR 142 *and* must also be used in a manner falling within the terms of Class C3;

(b) The whole of the appeal site, both at the time of the inquiry and upon completion of the development, constituted a single planning unit;

(c) Upon completion of the development each individual unit of accommodation would not represent a separate planning unit. Instead, the 78 units would be "units of residential accommodation within a single C2 planning unit";

(d) Each unit would not represent a dwelling because "C3 dwellings are expressly excluded from the definition of C2 residential institutions;"

(e) None of the proposed buildings would be used for an ancillary purpose. The whole site would be a C2 planning unit within which a variety of different activities would take place contributing to the "residential institution" use of the site as a whole;

(f) Here the proposal fell within Class C2 because of the terms of the section 106 obligation governing the use of the site, together with the conditions of any permission granted.

Point (a) is significant. It correctly recognises that the word dwelling can properly be used to describe firstly the physical nature of a building or property, as well as secondly the way in which it is used.

31. In summary, SODC responded that:-

(a) The planning unit at the time of the inquiry was the entirety of the appeal site "assuming that this land is in single occupation";

(b) Following completion of the development, there would continue to be a single planning unit comprising the whole site;

(c) Each unit of residential accommodation would not be an individual planning unit. The whole site would be in C2 use, with the provision of care as important as, and integral to, the provision of accommodation;

(d) Each Housing with Care unit is a dwelling, in form and function. A C2 use can include residential accommodation in the form of dwellings, provided those dwellings are not in C3 use;

(e) The primary components of a use within the relevant part of C2 are use for the provision of (a) residential accommodation and (b) care. Elements of the scheme that do not constitute the provision of accommodation or care would fall to be considered as ancillary to the C2 use;

(f) If the provision of care is merely an ancillary activity to what is essentially a dwellinghouse use then the appropriate use class would be Class C3. A planning obligation that ensures that the accommodation is occupied by persons in need of care, and that the provision of care is (or will be) integral to their occupation, can form part of the factual matrix demonstrating a C2 use.

32. It will be seen that, for the most part, the Claimant and SODC were in agreement. Although there was a slight difference of approach between the parties on the "ancillary" issue (point (e)), that did not affect the key reasoning of the Inspector or affect the issues before the Court. The key difference lay in what they said at point (d). The Claimant's stance was that because it was agreed that the residential accommodation did not fall within Class C3, none of those units could constitute a dwelling. SODC's case was that the "housing with care" units were dwellings in both "form and function", and as such could fall within the C2 Use Class provided that they are not in C3 use.

33. SODC's analysis of these issues remained the same by the time the inquiry closed. In particular, they continued to adhere to their point (d) and maintained that residential accommodation could be provided within a C2 development as dwellings, (so long as the *use* of each such dwelling did not fall within the C3 Use Class) (see paragraph 32 of Closing Submissions).

34. The Inspector's reasoning on issue (1) in his list of main issues, "How the appeal proposed should be considered", then followed at DL 13 to 18 and 21:-

> "13. The two main parties agreed that the use should be considered to fall within Class C2 of the UCO. The main difference was how the individual units for those living on site should be considered. The Council was of the view that they should be considered as dwellings ancillary to the overall use of the site as a C2 use, but the appellants considered that they would be "C2 units", on the basis that the definition of Class C2 excludes "use within class C3 (dwelling house)" and through the operation of the Planning Obligation.
>
> 14. The Planning Practice Guidance (the PPG) states: "Not all uses of land or buildings fit within the use classes order. … Where land or buildings are being used for different uses which

> fall into more than one class, then the overall use of the land or buildings is regarded as a mixed use, which will normally be sui generis. The exception to this is where there is a primary overall use of the site, to which the other uses are ancillary. For example, in a factory with an office and a staff canteen, the office and staff canteen would normally be regarded as ancillary to the factory." It therefore follows, in the case of the cited factory, the "office" and the "staff canteen" are still an "office" and a "staff canteen" respectively but are ancillary to the factory and are not classified separately under the UCO.
>
> 15. There is no statutory definition of a dwelling in planning legislation, but the Courts have accepted that the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. In this case each of the units has all the necessary said facilities, that is kitchens, washing facilities, bedrooms and living areas.
>
> 16. The appellants also sought to show that even though each unit had all the facilities required for day-to-day private domestic existence that did not necessarily mean that each was a dwelling, setting out the counter example of an apart-hotel unit. However, that unit is not used on a permanent basis as the primary place of residence, which would be the case here, and that to my mind makes a material difference.
>
> 17. It is next necessary to deal with the point made by the appellants that the UCO positively excludes a "use within class C3 (dwelling house)". A use that is ancillary does not represent a primary use and the UCO deals with primary uses. Thus, each of these units/dwellings would not fall within Class C3 and the exclusion in the UCO does not affect my conclusions.
>
> 18. One of the Planning Obligations deals with how the occupiers may utilise the site and ensures both an age restriction and a requirement for Personal Care but refers to each unit as a "Dwelling". This term is specifically defined as a "building designed for residential occupation as extra care Dwellings". This, therefore it seems to me, reinforces my conclusion rather than go against it.
>
> […]
>
> 21. I therefore conclude that, while ancillary to the overall C2 use of the appeal site, each accommodation unit represents a dwelling."

35. In DL 17, which forms only part of his reasoning, the Inspector appears to have taken the view that if each of the dwellings proposed would be *ancillary* to the C2 use of the site, the exclusion of dwellings falling within the C3 Use Class, upon which the

Claimant had relied, could not apply. This has given rise to the Claimant's challenge under ground 1, that a use which forms a constituent part of the primary use described by a Use Class, for example C2, cannot be ancillary to that use.

36. The Inspector dealt with his main issue (4) at DL 48 to 59. The Inspector concluded that the proposed units of residential accommodation were dwellings to which the requirement to provide affordable housing under Policy CSH3 of the Core Strategy applied. The Claimant challenges that conclusion as a misinterpretation of the policy (see ground 2).

37. On 14 October 2019 a different Inspector issued a decision letter granting planning permission for an extra care scheme with up to 65 apartments and cottages, treated as falling within the C2 Use Class, on a site in Lower Shiplake, which is also situated within the area of SODC and therefore subject to the same Core Strategy policies. Although he endorsed the use of the description "apartments and cottages", that Inspector decided that those units did not constitute dwellings and so the grant of permission in that case was not made subject to any requirement to provide affordable housing under Policy CSH3. As Mr. Leon Glenister pointed out on behalf of the Secretary of State, it is important to note that the reasoning in the Shiplake Inspector's decision did not involve the central issue raised in the present case about the effect of the exclusion of the C3 Use Class from residential accommodation in Class C2.

38. The Shiplake decision was simply forwarded to the Inspector in the present case without any representations from either party. The Thame Inspector dealt with that decision at DL 19-20 and 53. This gives rise to ground 3 of the challenge.

The Inspector's conclusions on the overall planning balance

39. The Inspector's overall conclusions were set out in DL 93 to 96:-

> "93. Taken as a whole the proposal would be contrary to the development plan in that it would materially exceed the maximum number of dwellings set out in the site specific policy in the TNP. It would cause harm to the setting of The Elms and to the TCA, which are both designated heritage assets, contrary to the relevant policies in the SOLP, the SOCS and TNP; special attention and great weight should be given to these harms. It would also fail to provide affordable housing, in particular on-site, to deliver a mixed community, in line with the policies of the SOCS, the TNP and the Framework. While there would be compliance with other policies, I consider that these are the most important policies for the determination of this appeal. These policies are all up-to-date.
>
> 94. As explored above, the proposal would result in less than substantial harm to, and thus the significance of, both the setting of The Elms and to the TCA. These should be balanced in line with paragraph 196 of the Framework with the public benefits of the proposed development. In this regard I consider that the public benefits identified above would balance those heritage harms. This is in line with Policy HA4 of the TNP which allows

> for a balance to be undertaken as to the overall planning conclusion, but this would not mean that there was compliance with that policy overall due to the number of dwellings being proposed.
>
> 95. By failing to provide affordable housing on the appeal site, the proposal would result in very substantial harm. The need for owner occupied elderly persons extra care accommodation in the area does not outweigh this harm.
>
> 96. I have given substantial weight to the fall-back position as a material consideration in this appeal, but this does not change my final conclusion. The heritage effects would be very similar to the appeal proposal, and the increase in the number of dwellings and other benefits associated with the appeal proposal but not the permitted scheme, would not outweigh the harm from the non-provision of affordable housing on site and the overall non-compliance with the site specific policy in the TNP."

Summary of the Grounds of Challenge

40. In summary, the Claimant raises the following grounds of challenge:-

> "(1) The Inspector misinterpreted the UCO in concluding at DL[21] that "while ancillary to the overall C2 use of the appeal site, each accommodation unit represents a dwelling".
>
> (2) The Inspector misinterpreted Policy CSH3 of the CS on affordable housing at DL[51]-[59].
>
> (3) The Inspector failed to give legally adequate reasons for departing from the Shiplake Decision.
>
> (4) The Inspector unlawfully applied reg. 122 of CIL Regs in giving the financial contribution no weight at DL[83];
>
> (5) The Inspector erred in his approach to the Development exceeding the 45 dwelling maximum in the TNP."

41. In his oral submissions, Mr. Rupert Warren QC for the Claimant, decided to run grounds 1 and 2 together. However, I think it would be most convenient if I were to deal with ground 2 first before going on to consider ground 1 and then grounds 3 to 5.

Ground 2

42. The Claimant submits that "dwelling" in Policy CSH3 must be interpreted consistently with the Use Classes Order and so is limited to development falling within Use Class C3. The Secretary of State submits that Policy CSH3 does not use language referable to that Order or to the C3 Use Class. The word dwelling in Policy CSH3 is an ordinary English word which should be given its natural meaning. It is not a technical expression or term of art. The Plan does not contain a definition of "dwelling".

Principles on the interpretation of planning policy

43. The general principles governing the interpretation of planning policy have been set out in a number of authorities, including Tesco Stores Limited v Dundee City Council [2012] PTSR 983; Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 1865; East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88; R (Mansell) v Tonbridge and Malling Borough Council [2019] PTSR 1452; St Modwen Developments Limited v Secretary of State for Communities and Local Government [2018] PTSR 746; Canterbury City Council v Secretary of State for Communities and Local Government [2019] PTSR 81; and (R (Samuel Smith Old Brewery) v North Yorkshire County Council [2020] PTSR 221.

44. Planning policies should be interpreted objectively in accordance with the language used, read in its proper context. Planning policies should not be interpreted as if they were statutory or contractual provisions. They are not analogous in nature or purpose to a statute or a contract. Planning policies are intended to guide or shape practical decision-making, and should be interpreted with that purpose in mind. They have to be applied and understood by planning professionals and by the public to whom they are primarily addressed. Decision-makers are entitled to expect both national and local planning policy to be as clearly and simply stated as it can be and, however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy (Tesco at [18]; Mansell at [41]; Canterbury at [23]; Monkhill Ltd v Secretary of State for Housing, Communities and Local Government [2020] PTSR 416 at [38]).

45. The following more specific principles are to be found in case law:-

(i) Reading a policy in accordance with the language used and its proper context means reading the plan as a whole, or at least the relevant parts of it (Phides Estates (Overseas) Limited v Secretary of State for Communities and Local Government [2015] EWHC 827 (Admin) at [56]);

(ii) The supporting text of a Plan is an aid to the interpretation of its policies. The supporting text refers to explanatory material and the reasoned justification for a policy (Regulation 8 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012 No. 767)). But supporting text does not form part of the policy and cannot override it (R (Cherkley Campaign Limited) v Mole Valley District Council [2014] EWCA Civ 567 at [21]);

(iii) Where development plan policies are intended to implement national guidance, that guidance forms part of the relevant context to which regard may be had when interpreting those policies (Tesco at [27]);

(iv) The public nature of development plans is of "critical importance". "Forensic archaeology", for example, referring to earlier drafts of a local plan or to an Inspector's report on the examination of the "submission draft" is generally inappropriate. "The public is in principle entitled to rely on the public document as it stands, without having to investigate its provenance and evolution" (R (TW Logistics Limited v Tendring District Council [2013] 2 P & CR 9 at [13] to [15]). Neither the public relying on the development plan, nor the court having to interpret a policy, should be expected to delve into background documents to the plan's preparation (Phides at [56]). The same approach applies to the interpretation of the

NPPF (Dartford Borough Council v Secretary of State for Communities and Local Government [2017] PTSR 737)[1];

(v) If there is a particular difficulty in interpreting a policy which *can only be resolved* by looking at a document incorporated into the plan or explicitly referred to in it, then that extrinsic material may be examined (Phides at [56]; J.J. Gallagher Limited v Cherwell District Council [2016] EWHC 290 (Admin) at [42] and [46]).

Whether "dwelling" in policy CSH3 is restricted to property within the C3 Use Class

46. I deal first with a preliminary point. The Inspector suggested in his Pre-Inquiry Note that because the purpose of the Use Classes Order is to remove certain changes of use from development control, a planning permission ought not to be expressed in terms of a Use Class, particularly as that consent would be issued before the development is constructed and begins to be used. The principal parties at the inquiry did not see this as posing any legal difficulty and ultimately it did not appear in the Inspector's reasoning in his decision letter. I agree with them on this point. For example, the provisions on certification of lawful development require that the lawfulness of an existing use (which may be based upon a planning permission), or the lawfulness of a proposed use, should be described by reference to any Use Class applicable (ss.191(5)(d) and 192(3)(b)). I therefore cannot see why the grant of a planning permission may not also be defined in terms of a Use Class.

47. I have come to the clear and firm conclusion that policy CSH3 does not use the word "dwelling" as a term restricted to the C3 Use Class. The policy makes no reference, expressly or by implication, to the Use Classes Order at all.

48. CSH3 defines the circumstances in which a development may be required to provide affordable housing and how much should generally be provided. Essentially the policy is directed to the landowner and/or developer of the site for which planning permission for the whole scheme is sought. Therefore, the interpretation, and indeed application, of the policy is not affected by any issue about whether the development site will eventually result in multiple planning units when the dwellings are completed, sold off and occupied, whether for ordinary housing or for occupation restricted to a C2 assisted living scheme. If there is a requirement for a scheme to provide affordable housing then either (a) it will be provided on site in specified units which are made subject to a legal control restricting future occupation to that use, or (b) a financial contribution for off-site provision will be accepted by the planning authority. The affordable housing policy is applied, and the relevant legal restrictions are created, before individual residential units start to be occupied. It therefore does not matter to the interpretation or application of the policy that the occupation of those units may or may not give rise to separate planning units.

49. The policy operates by (1) setting a threshold for its application, simply expressed as a "net gain of three or more dwellings" and (2) requiring 40% of the accommodation

[1] Although principle (iv) was common ground between the parties, I note that in Ashburton Trading Limited v Secretary of State for Communities and Local Government [2014] EWCA Civ 378 at [26] the Court of Appeal accepted that material forming part of the evidence base for, and referred to in, a development plan could be relevant to its interpretation, albeit without referring to TW Logistics. However, that different approach could not result in a different outcome for the Claimant here, because the extrinsic material relied upon does not provide any support for its interpretation of policy CSH3.

proposed to be affordable. Plainly, the 40% requirement is applied as a percentage of the total housing proposed. So, if planning permission is sought for 100 residential units, the policy would generally require 40 of those units to be affordable and allow the remaining 60 units to be provided as "market housing". The 40% requirement is not applied to either the market or the affordable housing elements separately.

50. There is also a general requirement that the affordable housing should be provided on site and "be mixed with the market housing". "Market housing" is defined in the Plan's Glossary (p. 143) as "Private housing for rent or sale, where the price is set in the open market." Affordable housing is provided for those whose needs cannot be met by market housing (para. 7.28 and p. 141).

51. Policy CSH3 follows on immediately after the policies which deal with overall housing provision for the district through to 2027 and a minimum density requirement for new housing developments (policies CSH1 and 2). The reasoned justification for these policies is set out in paragraphs 7.1 to 7.26. It covers housing need and the distribution of development throughout the district. Throughout that section the terms "dwelling", "house", "unit" and "home" are used frequently and interchangeably. They are not used in a technical or restrictive manner. For example, the use of the word "house" does not exclude a dwelling in the form of a flat.

52. The same approach continues in the text of the Plan following policy CSH3. For example, paragraph 7.29 refers to the annual need for affordable homes in terms of "units". Paragraph 7.31 also expresses the "3 dwelling" threshold in Policy CSH3 in terms of "units". There is no indication in the Plan that these interchangeable words were being used so as to refer solely to dwellings in the C3 Use Class.

53. It has become well-established that the terms "dwelling" or "dwelling house" in planning legislation refer to a unit of residential accommodation which provides the facilities needed for day-to-day private domestic existence (Gravesham p. 146; Moore v Secretary of State for the Environment, Transport and the Regions (1998) 77 P & CR 114, 119; R (Innovia Cellophane Limited) v Infrastructure Planning Commission [2012] PTSR 1132 at [27]-[28]). This concept is consistent with the Core Strategy's interchangeable use of the words "dwelling", "house", "home" and "unit". It can include an extra care dwelling, in the sense of a private home with the facilities needed for "independent living" but where care is provided to someone in need of care. This meaning is entirely consistent with the approach taken by the Claimant in the s. 106 obligation referred to above.

The scope of the C2 Use Class

54. The Claimant's argument depends upon an assertion that anything which is a dwelling or dwelling-house must fall within the C3 Use Class. In other words, that Use Class exhaustively defines what may be considered to be a "dwelling" and therefore a unit of residential accommodation falling within Class C2 cannot include a "dwelling".

55. The Claimant rightly accepted before the Inspector that a property cannot fall within the C3 Use Class unless it has the *physical characteristics* of a "dwelling" as defined in Gravesham *and* is *used* in a manner falling within that Class (see [30] above). It follows that a property might properly be described as a "dwelling" in accordance with the physical criteria given in Gravesham without being used within the parameters of

Class C3. Indeed, Class C3 demonstrates this point, both in the form in which it was originally enacted and in the version substituted (in England, but not Wales) by the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (SI 2010 No. 653).

56. In its original form Class C3 applied to use as a dwelling house either (a) by a single person or "by people living together as a family" or (b) by not more than 6 residents living together as a single household (including where care is provided for residents). Where a single household (not being a family) comprised more than 6 persons, the use would fall outside Class C3, but the property could still be described as a dwelling-house.

57. The amended version of the C3 Use Class excludes from that Class the use of a dwelling house by no more than 6 residents living together as a single household where no care is provided and the use falls within Class C4 (also introduced in 2010). Class C4 applies to the use of a dwelling house by no more than 6 residents as a "house in multiple occupation" (as defined). Class C4 shows that Class C3 does not cover all cases in which a property has the physical characteristics of, and is used as, a dwelling house. "Dwelling house" is not a term of art confined to the Class C3 Use Class. If recourse is had to the Use Classes Order in order to interpret the affordable housing policy in the Plan, the Order demonstrates that properties having the physical characteristics of a "dwelling" may be *used as a dwelling* in more than one way.

58. The Claimant also submits that the title to the C2 Use Class "residential institution" indicates that accommodation in the form of a dwelling falls outside that Use Class. Reference may be made to a heading as an aid to construction of legislation (R v Montila [2004] 1 WLR 3141).

59. There can be no doubt that a hospital, nursing home, residential school, college or training centre are all types of institutional use which provide accommodation. It is very unlikely that any of those uses would include dwellings in the sense defined in, for example, Gravesham, putting to one side ancillary flats or houses for accommodating staff.

60. The first sentence of the C2 Use Class refers to "the provision of residential accommodation and care" without expressly requiring that to be provided by an institution in the traditional sense, such as a school or college or foundation of some kind. Indeed, if Parliament had provided that that should be the test, the proposals embodied in the s 106 obligation in this case (see [6] to [8] above), and in similar cases, would not suffice. But "institution" in Class C2 must have a broad meaning which would include, for example, an "organisation" managing the whole of a development or scheme in order to ensure that the needs of residential occupants for "care" are delivered. A development for an institutional or organisational use in this broad sense is compatible with the provision of residential accommodation and care to occupants living in dwellings within the scheme. That is the very model which the s. 106 obligation in this case seeks to create and indeed the terminology which it employs. Substance and form are at one.

61. I also note that the draftsman of the Order has excluded uses falling within Class C3 from Class C2, but only in relation to uses falling within the first sentence of C2. That implies that "residential accommodation" in the C2 Use Class includes properties with

the *physical* characteristics of dwellings and used as such. Otherwise, the exclusion would not be necessary. Accordingly, a Class C2 development may include accommodation in the form of dwellings, for example flats and bungalows, each of which has facilities appropriate for private, or independent, domestic existence. But their *use* would only fall within the C2 Use Class if "care" is provided for an occupant in each dwelling who is in need of such care.

62. Mr Glenister was right to identify this key point of distinction between the C2 and C3 Use Classes which was effectively overlooked in the Claimant's submissions in this court. As we have seen in [30] and [31] above, the difference between the parties at the inquiry was one of nomenclature, not substance. The Claimant called the units to be leased "units of residential accommodation within a single C2 planning unit" whereas SODC called them dwellings within a C2 scheme covering the same planning unit, or "C2 dwellings". In my judgment SODC's description was compatible with the C2 Use Class. As they said in paragraph 32 of their closing submissions at the inquiry:-

> "There is no ….. inconsistency between the classification of the scheme as a whole as a C2 use and a finding that within it there are dwellings. ……..
>
> The residential accommodation provided as part of a C2 use can be in the form of dwellings ….."

63. Where the units in an extra care scheme physically amount to dwellings, it really does not matter what alternative language a developer chooses to describe them. They still remain dwellings. What enables "residential accommodation", including dwellings, to fall within the C2 Use Class is not simply the provision of care to occupants. Care may also be provided to one or more occupant of a dwelling falling within the C3 Use Class. A distinguishing feature of Class C2 accommodation is that occupants are in "need of care". Indeed, the Claimant made it clear in its response to the Inspector's note (see [30] above) and in it closing submissions at the inquiry (e.g. paragraph 15) that the application of the C2 Use Class to this development depended on the s. 106 obligation and its restriction on the occupation of accommodation "to those who are in need of and in receipt of care such that they come within the C2 Use Class."

64. For completeness I mention the Claimant's submission that it would be "bizarre" to treat the units of accommodation within a C2 scheme as dwellings, because they could not be lawfully used as such without the grant of planning permission for a change of use to Class C3. There is nothing in this point. It assumes that a "dwelling house" use must always fall within Class C3 and cannot, for example, form part of a Class C2 scheme. For the reasons I have given, those assumptions are incorrect and so the problem posed by the Claimant does not arise. There would be no practical problem in the units being sold off or leased to residential occupiers without obtaining C3 planning permissions for each individual unit. Indeed, if there were such a problem, then it would exist in any event, whatever the wording or interpretation of a policy in the development plan requiring the provision of affordable housing. In any event, the scope of policy CSH3, properly understood, is not constrained by the interaction between the C2 and C3 Use Classes, nor is it restricted to development falling withing Class C3.

65. In summary, there is no reason why a C2 development or scheme may not provide residential accommodation in the form of dwellings. That possibility is not precluded by the operation of the C3 Use Class and its interaction with the C2 Use Class. Thus,

the language of the Order does not support the Claimant's argument that the extra care accommodation proposed could not represent dwellings and therefore could not trigger the application of policy CSH3.

The reasoned justification for Policy CSH4 of the Core Strategy

66. I do not consider that paragraphs 7.39 to 7.42 of the Plan lend any support to the Claimant's argument. Paragraph 7.39 (see [13] above) simply provides that in the case of larger developments which include affordable housing, SODC will encourage some of that affordable element to be provided for specific vulnerable groups, for example the elderly. That statement is simply concerned with a possible use of affordable housing which will be provided. It has nothing to do with the separate question of whether any affordable housing is required to be provided in the first place. Paragraph 7.39 does not imply, therefore, that open market dwellings provided for the elderly, including extra care housing, fall outside the scope of Policy CSH3, in contrast to other forms of open market housing.

67. Paragraph 7.41 of the Plan (see [14] above) refers to the range of models that can provide specialist accommodation for the elderly. SODC's preference is for extra care schemes. Paragraph 7.42 simply provides that where a scheme providing specialist accommodation for the elderly (with or without care) includes some affordable housing, that component may count towards satisfying the overall 40% affordable housing requirement applicable to a larger development of which it forms a part (i.e. a mixed development comprising general and specialist housing). The language of 7.42 is consistent with the interpretation of Policy CSH3 as requiring proposals for open market dwellings for the elderly to provide affordable housing. DL 55 of the Thame decision does not contain any error.

68. I note that in paragraph 44 of the Shiplake decision the Inspector treated the first sentence of paragraph 7.42 of the Plan as acknowledging that the business models for some forms of residential development for the elderly may affect the requirement to provide affordable housing. In so far as he might have been suggesting that open market dwellings provided for the elderly never engage Policy CSH3 that cannot, with respect, be correct. Instead, his comment on that first sentence goes to viability analysis which, according to CSH3 and paragraph 7.32, may justify a reduction in the provision of affordable housing, or no such provision at all.

69. Mr. Warren QC sought to rely upon sections 1.10 to 1.12 of SODC's Housing Needs Assessment (2008), a document referred to in paragraph 7.29 of the Plan, as supporting the Claimant's interpretation of Policy CSH3. I do not consider that there is any "particular difficulty" in the interpretation of that policy which could justify recourse to extrinsic material. In any event, the passages in the 2008 Report do not assist the Claimant, either in its contention that "dwellings" in CSH3 is limited to "C3 dwellings" or that open market housing for the elderly, such as extra care housing, falls outside the scope of Policy CSH3. Paragraph 1.10.7 states that there are specific housing needs, such as sheltered housing and extra care housing, which should be addressed in addition to "general household requirements". Certain of those needs are dealt with in terms of both the affordable and the private sectors (1.11.1). The 2008 Report, which simply formed part of the evidence base for preparing the draft plan and is not a policy document, contained no statement or suggestion that open market residential development for the elderly should not trigger any requirement to provide affordable

housing. In any event, reliance upon this document exemplifies the sort of "forensic archaeology" which was criticised in TW Logistics.

Viability testing of a draft policy

70. That criticism also applies to the Claimant's reliance upon SODC's Affordable Housing Viability Study, referred to in paragraphs 7.30 to 7.31 of the Plan. Paragraph 173 of the NPPF 2012 stated:-

> "Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable. Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable."

It appears to have been common ground at the inquiry that the 40% target for affordable housing was tested for general market housing but not, for example, in relation to extra care housing (see also paragraph 46 of the decision in the Shiplake appeal).

71. I do not accept that material of this kind should be treated as an aid to the interpretation of Policy CSH3 for a number of reasons, both individually and cumulatively. First, it involves delving into the background history of the plan, whereas the plan should generally be understood from its own text. Second, viability testing of policies in the preparation of a plan is typically carried out at a generic level and not, for example, for each individual site or each variant of a type of development. Testing seeks to take into account the likely range of costs that will be imposed by local plan policies as a whole, including infrastructure contributions and the Community Infrastructure Levy ("CIL"). The Claimant has not suggested that the viability testing for the Core Strategy was any different. Third, the scope of an individual development plan policy should not be interpreted according to whether each variant of the type of development in question, or analogous forms of development, has been the subject of viability testing during plan preparation. It may well be unnecessary or impractical to test all such variants. It would be wrong to conclude from the fact that there was no viability testing for a particular type of development, whether against a specific policy or a collection of policies, that proposals of that kind fall outside the ambit of that policy or policies. Instead, the meaning of a policy should be determined from the language used in the development plan.

72. There is no real disadvantage or unfairness in adopting this approach to interpretation of policy. The statutory process for consultation on, and examination of, a draft development plan enables those who seek to promote development in a particular sector to make representations clarifying whether their projects would fall within the scope of a particular policy and, if so, to advance a case, for consideration by the Inspector conducting the examination, that the policy should not apply in such cases or only in a

modified way. If appropriate. viability testing may be raised as an issue in that process. If the Inspector should find that the plan is unsound, then it may not be adopted by the local planning authority, unless it requests the Inspector to make "main modifications" to render the plan "sound" (ss. 20 and 23 of the Planning and Compulsory Purchase Act 2004).

73. Even where an adopted policy (properly understood) applies to a particular type of development, when a planning application for a particular proposal is made, there may be site-specific considerations which would result in development becoming non-viable if the planning authority were to insist upon all policy requirements being satisfied. In that situation it may be possible for the developer to make a good case for the relaxation of one or more of such requirements in that instance. Indeed, this may also be the case for those types of development which have been the subject of generic viability testing against draft policies during plan preparation. The absence of viability testing during the preparation of a development plan should not be treated as a factor going to the interpretation or ambit of policy in that document.

74. In paragraph 46 of the decision on the Shiplake appeal the Inspector took into account the absence of viability testing on the provision of affordable housing by extra care housing schemes as providing some support for his view that policy CSH3 did not apply to such proposals. At DL 53, the Thame Inspector disagreed with the correctness of that approach because the Claimant had made no case on viability. Mr. Warren QC suggested that if the Inspector was referring to the fact that no viability case had been put forward in the planning inquiry, that involved a *non sequitur*. I see his point, but given the conclusion I have reached that the absence of viability testing is not an aid to interpreting the scope of policy CSH3, the views of the Shiplake Inspector on this aspect were irrelevant and likewise what the Thame Inspector said about them. They have nothing to do with the legal validity of the latter's decision.

75. Although not essential to my reasoning on the interpretation of CSH3, I would mention one feature of the present case which illustrates how unhelpful the "viability testing" point can be to the interpretation of a policy. The Claimant entered into a second s.106 obligation on 13 September 2019 by which they would pay about £1.66m prior to commencing the extra care housing scheme, as a contribution towards the provision of affordable housing off site. This was equivalent to the s.106 contribution referred to in [4] above. It was designed to overcome an objection put forward by the Council that the use of the site for extra care housing would result in the loss of the affordable housing contribution that would have been made under the 2015 scheme (equivalent to 40% of 37 units or 14.8 units). It was the Claimant's case before the Inspector that the 2015 scheme would be built if the appeal were to be dismissed. That implied that that general market housing scheme would be viable notwithstanding the affordable housing contribution. Logically, the same applies to the Claimant's willingness to offer the same contribution in connection with the appeal scheme. But the latter was not the subject of viability testing during the planning appeal to see whether a *greater* affordable housing contribution could be provided. So, I doubt whether viability testing of extra care housing during the preparation of the plan would have demonstrated that the provision of *any* affordable housing by such schemes would never be viable. In any event, on the interpretation of CSH3 I consider to be correct, viability testing for open market extra care housing can be addressed where appropriate on a case by case basis, just as may be done for general market housing.

Paragraph 64 of the NPPF 2019

76. The Claimant also relies upon paragraph 64 of the NPPF 2019 which states:-

> "Where major development involving the provision of housing is proposed, planning policies and decisions should expect at least 10% of the homes to be available for affordable home ownership, unless this would exceed the level of affordable housing required in the area, or significantly prejudice the ability to meet the identified affordable housing needs of specific groups. Exemptions to this 10% requirement should also be made where the site or proposed development:
>
> a) provides solely for Build to Rent homes;
>
> b) provides specialist accommodation for a group of people with specific needs (such as purpose-built accommodation for the elderly or students);
>
> c) is proposed to be developed by people who wish to build or commission their own homes; or
>
> d) is exclusively for affordable housing, an entry-level exception site or a rural exception site."

77. The Claimant submits that the exemption in (b) for specialist accommodation, such as purpose-built accommodation for the elderly, indicates that "such schemes have always been exempt from making any affordable housing contributions" (paragraph 48 and 50 of skeleton). Although it is permissible when interpreting a development plan policy intended to implement national guidance to have regard to that guidance ([45(iii)] above), paragraph 64 substantially postdates the Core Strategy in this case, which was adopted in 2012. Paragraph 64 is therefore irrelevant to the interpretation of CSH3. The same applies to what the Thame and Shiplake Inspectors had to say about paragraph 64 of the NPPF in that context. For completeness, I should add that the Claimant has not suggested that at the time when the draft Core Strategy was being prepared and considered there was any national guidance similar in effect, or interpretative significance, to paragraph 64 of the NPPF.

78. For these reasons it follows that the Claimant's criticism of DL 56 (a) does not affect the interpretation of CSH3 and (b) cannot vitiate the appeal decision.

Summary on ground 2

79. Fundamentally, the interpretation of a development plan policy must depend on the language used in that particular policy and in the plan. As a general approach, unless the language of a policy expressly relies upon the Use Classes Order (or part thereof), or that plainly appears from the policy's context, such provisions do not provide an aid to the interpretation of the policy. For the reasons I have given the term "dwelling" in policy CSH3 is not limited to property falling within the C3 Use Class.

80. Mr. Warren QC accepted that on the Claimant's interpretation of CSH3 the Plan contains no policy mechanism by which affordable extra care housing may be secured through development control, despite the importance which SODC has attached to that type of provision (see e.g. para 7.42 of the Plan). This is a further indication as to why the word "dwelling" in CSH3 should not be interpreted by being shoe-horned into the C3 Use Class.

81. The housing chapter of the Plan is concerned with the delivery of new homes to meet a range of housing needs, including market housing, affordable housing and specialist needs. There is nothing in the Plan to suggest, nor any reason to think, that the word dwelling, whether in Policy CSH3 or elsewhere, is confined to residential accommodation the use of which falls wholly within the C3 Use Class.

82. For the reasons given above, ground 2 must be rejected.

Ground 1

83. When the Inspector considered under issue (4) whether the appeal proposal was required by policy CSH3 to provide affordable housing, he stated that he had already rejected the Claimant's argument that the scheme did not include dwellings (DL 51 and 52).

84. Under ground 2 I have decided that the correct interpretation of "dwelling" in policy CSH3 (a) accords with the explanation of that term in Gravesham and (b) is not confined to proposals for dwellings for use within the C3 Use Class. In DL 15-16 (see [34] above) the Inspector applied the decision in Gravesham and he made clear findings of fact that the residential units in the proposal scheme would constitute dwellings. Mr. Warren QC rightly did not seek to impugn the Inspector's factual findings in DL 15 and 16. They are not open to challenge. On that basis, those findings were sufficient for policy CSH3 to apply to the appeal proposal.

85. Nonetheless, the Claimant seeks to challenge the Inspector's reasoning in DL 17 and DL 21. Having found that each of the proposed units of accommodation would represent a dwelling, the Inspector said in DL 17 that he should go on to deal with the Claimant's argument that the effect of the Use Classes Order was to exclude from the C2 Use Class dwellings used within Class C3. However, because policy CSH3, properly interpreted, is not confined to proposals for dwellings falling within Class C3, in my judgment the Inspector had no need to deal with the Claimant's argument based on that Order.

86. In DL 17 the Inspector said that the Use Classes Order only deals with primary uses and an ancillary use does not represent a primary use. Because he considered the proposed dwellings to be *ancillary* to the overall use of the site for C2 purposes, the Inspector reasoned that they could not be treated as primary uses falling within Class C3, and hence the exclusion from Class C2 could not apply. Likewise, in DL21 the Inspector stated that:-

> "… while ancillary to the overall C2 use of the appeal site, each accommodation unit represents a dwelling."

87. It is plain from the decision letter that the Inspector agreed with the Claimant and SODC that the whole of the appeal site should be treated as a single planning unit. Mr. Glenister appeared to suggest that the concept of a "planning unit" is really only relevant to assessing whether a material change of use occurs (see e.g. Burdle v Secretary of State for the Environment [1972] 1 WLR 1207). But the concept is also relevant for defining the use of land. A planning unit represents an area of land or property within which a primary use (or perhaps mixed use) is identified and any other uses within that same unit are ancillary to that primary use (Westminster City Council v British Waterways Board [1985] AC 676, 684-5).

88. Mr. Warren QC submits that in DL 17 and DL 21 the Inspector erred in law in thinking that the residential accommodation (or dwelling houses) being provided could be described as ancillary to a C2 use, because, by definition, that use is an essential or intrinsic part of the primary use. The relevant part of the C2 Use Class refers to "the provision of residential accommodation and care."

89. I agree with Mr. Glenister that this line of argument could not possibly vitiate the decision. DL 13 to 21 only considered the nature of the scheme so that the Inspector could decide under issue (4) whether affordable housing was required under policy CSH3. For the reasons I have given under ground 2 that policy is not confined to proposals for dwellings within Class C3 of the Use Classes Order. On that basis alone, as I have indicated, the Inspector had no need to address the interaction between the C2 and C3 Use Classes and he had no need to consider the matters set out in DL 17 and DL 21. As a matter of law those paragraphs were wholly immaterial to his decision.

90. In any event, on a proper interpretation of the Use Classes Order, Class C2 may include residential accommodation in the form of dwellings as part of the primary use, subject to the provision of care and restrictions on occupation of the kind contained in the s.106 obligation in this case.

91. The Inspector's findings in DL 15 and 16 are not challenged by the Claimant and they are not tainted by any criticism that may be made of the gratuitous reasoning in DL 17 and reflected in DL 21. The findings in DL 15 and 16 are legally sufficient to support the Inspector's conclusions that policy CSH3 was engaged. DL 51 and 52 must be read fairly as drawing upon DL 15 and 16.

92. The Inspector's other conclusion that the contribution to affordable housing offered was insufficient was a separate matter and, quite rightly, is not challenged. The Claimant has not suggested that if its interpretation of CSH3 is rejected under ground 2, the policy did not apply to this proposal. That is the key issue here.

93. For all these reasons, ground 1 must be rejected.

Ground 3

94. After the close of the inquiry in the present case, the parties sent the Inspector a copy of the decision on the Shiplake appeal but without any further information, such as the s.106 obligation in that case. Neither side sent any submissions on the decision. The Inspector was not given any assistance as to how it might, or might not, affect the issues in the present case.

95. Notwithstanding that lack of assistance, it is said that the Inspector failed to give adequate reasons for differing from the Shiplake Inspector. Although it must be acknowledged that the Thame Inspector did in fact address the Shiplake decision in DL 19-20 and 53, the Claimant says that the Inspector failed to:-

    (1) address certain aspects of the Shiplake Inspector's interpretation of CSH3; and

    (2) give reasons in DL 19-20 for distinguishing the use of the communal facilities in the two schemes.

96. Point (1) goes nowhere. The Inspector in the present case did address a number of points made by the Shiplake Inspector on the interpretation of policy CSH3. But given that the issues raised in this case about the interpretation of the policy and the interaction of C2 and C3 Classes, are questions of law which the Court has had to determine, and moreover the Claimant's interpretation has been rejected, the Shiplake Inspector's views on such matters and the alleged failings of the Thame Inspector to deal with them could not possibly flaw the latter's decision letter. The Claimant did not advance any contrary argument.

97. There is nothing either in point (2). The present Inspector has indeed explained why he has taken a different view on the communal facilities, without departing from the common ground between the parties in the inquiry that the appeal proposal fell within the C2 Use Class. What he said in DL 19-20 did not impinge on the factual findings he had already made in DL 15-16, which are not challenged, nor open to challenge.

98. The above reasons are sufficient to dispose of ground 3, but, in addition, there is a real problem in the Claimant's attempt to raise a ground of challenge in this court based upon the Shiplake decision. That Inspector accepted in paragraph 43 of his decision that, considered as individual elements, the residential units proposed (comprising apartments and cottages) would have the form, function and facilities associated with dwellings. But he went on to decide that the occupation of those units would be restricted to persons requiring care who would have access to communal facilities and that this Class C2 use of the overall site should not be disaggregated or "dissected" into its constituent parts when it came to applying policy CSH3. That is not an argument upon which the Claimant has relied in this challenge. It was right not to do so. To conclude that a C2 scheme provides residential accommodation in the form of dwellings, to which policy CSH3 applies, does not require any disaggregation of the overall scheme into smaller units.

99. On the conclusions which the Court has reached on the Claimant's submissions under ground 2, there was no need for the Inspector in this case to say any more about the Shiplake decision. The fact that the Inspector did not go into any further detail in DL 19-20 could not possibly vitiate his decision.

100. For these reasons, ground 3 must be rejected.

Ground 4

101. This ground relates to the way in which the Inspector applied regulation 122 of the CIL Regulations, which provides:-

> "(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development."

102. The complaint relates to the Inspector's treatment of the developer's commitment to pay an affordable housing contribution of £1.66m pursuant to the second s.106 obligation (see [75] above) in DL 83 which stated:-

> "It was for this reason that the appellants submitted the Planning Obligation to deliver a financial contribution towards off-site affordable housing. I do not consider that in this context such an obligation would relate to the development being permitted since it relates to something being "lost" from another scheme. It therefore would not comply with Regulation 122 of the CIL Regulations or paragraph 56 of the Framework. Consequently, I will not take it into account and can give it no weight. This means that the very substantial weight I have given to the harm from the failure to deliver affordable housing does not change."

103. The Inspector's reference to "something being lost from another scheme" was to the 2015 section 106 obligation which would provide the same sum of money for affordable housing in the event of the 2015 scheme being carried out (see DL 51). The Claimant's evidence was that it would undertake that fallback development if the appeal were to be dismissed (DL 65-66).

104. The Claimant points out that its case before the Inspector was that it entered into an obligation linked to the appeal scheme to make a contribution of £1.66m towards affordable housing in order to overcome a "negative" which SODC had advanced against that scheme, so that there would be "nothing foregone" and the Council's criticism would be "overcome" (paragraphs 56-57 of the Claimant's closing submissions to the inquiry). The Claimant says that it therefore follows that, as between the principal parties at the inquiry, the contribution was "necessary to make the development acceptable in planning terms" and there was no basis for the Inspector to say in DL 83 that the obligation did not "relate to the development" proposed in the appeal.

105. A challenge to an Inspector's findings on the application of any of the three tests in regulation 122(2) can only be brought on public law grounds; the court may not substitute its own judgment for that of the decision-maker (Smyth v Secretary of State

for Communities and Local Government [2013] EWHC 3844 (Admin) at [192]; [2015] PTSR 1417 at [117]). Assuming that the Claimant can overcome that hurdle by showing that the Inspector's conclusion on the application of regulation 122(2)(b) was irrational, the next step in its argument is that the Inspector gave no weight to the obligation simply because he regarded it as immaterial, and not as a result of exercising his judgment on the weight to be attached to a relevant consideration (see the distinction drawn by Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, 780).

106. Paragraph 64 of the Claimant's skeleton "let the cat out of the bag." It turns out that the real complaint is about the Inspector's decision to give "no weight" to the affordable housing contribution rather than his application of regulation 122. But if the only issue raised by the Claimant in this challenge had been the weight given to that contribution as the means of overcoming the "loss" of the same sum of money otherwise provided under the 2015 scheme, no possible criticism could have been made of a decision by the Inspector to give it no weight. Indeed, logically that would have been the inevitable outcome of making the contribution under the appeal scheme simply in order to overcome the harm involved in that "loss", just as the Claimant's closing submissions stated. In that context, the second s.106 obligation dated 13 September 2019 would only have neutralised that disbenefit of the appeal scheme.

107. However, the Claimant is really seeking to go further by arguing that if, contrary to its contention, the Inspector had been entitled to decide that the appeal scheme was required to provide affordable housing under policy CSH3, then "the provision of a contribution should have been given weight (even if not equivalent to the full 40%)" (paragraph 64 of the Claimant's skeleton).

108. This argument has no merit. In DL 51 the Inspector had already said that the contribution of £1.66m would only represent the equivalent of 13.8 affordable dwellings (40% of the 37 dwellings in the 2015 scheme), whereas the requirement in CSH3 was that the appeal scheme should provide 31.2 affordable dwellings (40% of 78 dwellings). This was not a case where the developer presented a viability analysis to show that no greater contribution could be justified. In DL 57 the Inspector found that the appeal proposal failed to "provide the full quantum of affordable housing required to make the scheme policy compliant." He repeated that point in DL 59 and added a further criticism that the Claimant had failed to justify robustly the making of a financial contribution in lieu of on-site provision. He concluded that the proposal would be contrary to policy CSH3 of the Core Strategy and policy H8 of the TNP and also paragraphs 62 and 64 of the NPPF and that "taken together, this harm should be given very substantial weight." Those conclusions are not open to legal challenge. The key point is that the Inspector gave "substantial weight" to that harm after having taken into account and weighed the inadequate contribution of £1.66m. What the Inspector said in DL 83 could not, as a matter of law, detract from his assessment in DL 51, 57 and 59. That lawful assessment was then carried through to the planning balance at the conclusion of the decision letter, notably DL 95 to 96.

109. For these reasons, ground 4 must be rejected.

Ground 5

110. This ground concerns policy HA4 of the TNP which states that the appeal site should provide no more than 45 dwellings, the actual number being determined through a detailed design proposal. The reasoned justification for this stipulation was "to enable full consideration of the heritage issues, public benefits and other material planning matters." In his assessment of the planning balance, the Inspector said that the proposal would be contrary to the development plan because *inter alia* "it would materially exceed the maximum number of dwellings set out in the site specific policy in the TNP" (DL 93). The Claimant complains that the Inspector failed to identify any harm relating to this numerical policy exceedance, having regard to his findings on heritage impact. Indeed, in DL 96 the Inspector accepted that the increase in the number of dwellings would be a benefit.

111. There is no merit in this challenge, which fails to read the decision letter as a whole. The Inspector assessed heritage impact by comparing the appeal proposal with the current condition of the site as "the baseline". He concluded that the proposal would cause "less than substantial harm" to heritage assets in terms of paragraph 196 of the NPPF (DL 30 to 46). In DL 63 to 67 the Inspector gave substantial weight to the 2015 scheme as a fallback to the appeal proposal on the basis that there was "a greater than theoretical possibility" that it would be built if the appeal were to be dismissed. Comparing the two schemes, he considered that the effects on heritage assets would be very similar (DL 67). But he added that the Claimant had accepted that the appeal scheme would result in greater activity on the site through the increased resident population and employees. He judged that this difference "would only be very limited" and "consequently, any additional harm would be very limited." Nonetheless, the Claimant has to accept that the Inspector did make that finding on harm, rather than concluding that no harm would result at all, and that he was entitled to do so. It was that additional harm, together with heritage and other harms, that were taken through to the overall planning balance in DL 92 to 96, along with the "public benefits" and the benefits of the increase in the number of dwellings. It is impossible to say that the Inspector failed to consider or explain the harm relating to the exceedance of the number of dwelling accepted by policy HA4 of the TNP.

112. For these reasons, ground 5 must be rejected.

Conclusion

113. For the reasons given above, all the grounds of challenge fail and the application for statutory review must therefore be dismissed.