Neutral Citation Number: [2020] EWHC 2969 (Admin)

Case No: CO/93/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before:

JAMES STRACHAN QC (Sitting as a Deputy Judge of the High Court)

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Between:

THE QUEEN **-on the application of** **BARRY ZINS**	**Claimant**
- and - **EAST SUFFOLK COUNCIL**	**Defendant**
-and- **ACTIVE URBAN** **(WOODBRIDGE) LIMITED**	**Interested Party**

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Mr David Forsdick QC (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Mr Robin Green (instructed by **East Suffolk Council**) for the **Defendant**

Hearing dates: 23rd July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 6 November 2020.

James Strachan QC (Sitting as a Deputy Judge of the High Court):

Introduction

1. By a claim form dated 10 January 2020, the Claimant Barry Zins challenges a grant of planning permission by East Suffolk Council ("the Council") to Active Urban (Woodbridge) Limited ("the Interested Party") for the redevelopment of the Council's former office complex at Melton Hill, Melton ("the Site") for:

> "Residential development (100 no units) including 32 no affordable housing units (Class C3) plus a community space (91sq.m) (Class D) and a retail unit (157.7 sq.m)(A1/A2/A3), car parking, means of access and landscaping, all following demolition of the buildings on site."

2. By his Amended Statement of Facts and Grounds, the Claimant contends that the Council erred in:

   i) the approach adopted to the issue of affordable housing; and

   ii) the application of the "tilted balance" in the determination of the planning application.

3. Permission was granted by Order of the Honourable Mr Justice Jay dated 1st May 2020.

4. The substantive hearing took place by video conferencing with the co-operation of the parties. The Claimant was represented by Mr Forsdick QC. The Defendant was represented by Mr Green. I am very grateful to them for the clarity and helpfulness of their written and oral submissions. The Interested Party did not appear and was not represented.

Factual Background

<u>The Site</u>

5. The Site was previously occupied by the former Suffolk Coastal District Council ("SCDC") for various local authority functions before SCDC moved out to new purpose-built premises elsewhere.

6. In August 2014 SCDC produced a Planning Position Statement for the Site. Its stated purpose was to inform potential developers of SCDC's requirements and expectations in relation to potential future uses. It sought to set out a planning framework for the assessment of future planning applications. The statement was not subject to consultation and was not formally adopted. It identified that it did not bind SCDC as a local planning authority to grant planning permission for any particular development.

7. Residential C3 use for flats and family housing, including affordable tenure, was identified as a use that would be acceptable in principle. The statement suggested the developable area had the potential to accommodate a scheme incorporating a variety of housing sizes, including the provision of affordable homes and lifetime homes. It also suggested that the majority of new housing that had been delivered recently in

Woodbridge, as well as that envisaged for the foreseeable future, was on small infill plots unlikely to yield the required range of housing and affordable provision. It stated there was a need for smaller units, and affordable housing, in the town to ensure it did not become polarised by large plots and retirement dwellings. The Site was identified as providing a real opportunity to deliver this in a sustainable location. Under the heading "Affordable Housing Requirement" it stated:

> "The communities [sic] need for affordable housing is a material planning consideration and covered by Policy DM2 of the Local Plan (Core Strategy). There is a requirement for affordable housing in both of the Parish's of Woodbridge and Melton. The scheme is expected to provide up to one-third (33%) of all housing on site to be affordable. The preference for any affordable housing is to be rented accommodation. The exact mix of the affordable units would be a matter for neg[oti]ation with discussions from the Council's Housing Enabling Officer."

8. In January 2015 SCDC tendered the Site for sale. Informal tenders were invited by 4 June 2015. Completion was expected to take place no later than November/December 2016. An indicative layout accommodating 69 houses and apartments was shown, but the tender document noted that applicants might choose to remodel the scheme in line with their own vision.

9. The Claimant refers to a pre-application planning advice letter dated 1 June 2015 from an SCDC planning officer to one bidder. In that document, the officer stated (amongst other things):

> "Affordable housing provision is welcomed and should be provided at policy compliant level (33%) and as 100% rented accommodation. I would suggest also that discussion takes place with the Council's Housing Team to ascertain exact unit size requirements."

10. In the event, the Interested Party was selected by SCDC as the preferred bidder. The documents indicate it entered into a conditional contract to buy the Site for £6 million.

11. The Claimant considers the Interested Party agreed to pay too much, given the Site's established use and/or residual land value, if a policy-compliant scheme for affordable housing were to be provided. He believes the Interested Party has been seeking to avoid, or reduce, the provision of policy-compliant affordable housing because of this. He refers, by way of example, to the notes of an "SCDC Office Accommodation Project Board" on 20 June 2016 in which the Interested Party questioned whether affordable housing was required. He also refers to pre-application discussions between SCDC and the Interested Party. He submits the Interested Party erroneously assumed affordable housing requirements might be reduced when obtaining planning permission in reliance on the price paid for the Site contrary to principles expressed in *Parkhurst Road Ltd v Secretary of State for the Communities and Local Government* [2018] EWHC 991 Admin. He refers to the content of a letter from Carter Jonas to the Interested Party in August 2018 which relates to viability advice provided by BNP Paribas to SCDC; this was to the effect that the benchmark land value of the Site was

£2.45million, the residual land value was likely to be between £3.89 million and £4.60 million depending on the split of rent and shared ownership affordable housing, and as this was above the benchmark land value, development of the site with affordable housing should be viable.

The First Planning Application

12. In July 2017 the Interested Party sought planning permission (reference number DC/17/2840/FUL) to demolish all of the existing offices and buildings on the Site and to replace them with 100 residential units, including 33 affordable housing units, together with a community building (Class D1) and a retail unit that could be a coffee shop (Class A1/A2/A3). The description of development does not identify the tenure mix, but the Claimant says that the material supporting the application referred to a proposal for 24 units as "intermediate housing" and 9 as affordable rented housing units.

13. The application was controversial. It attracted significant objection on a number of grounds. It involved the provision of 14 angular blocks designed in a modern style. There were objections from (amongst others) Woodbridge Town Council, Melton Parish Council, the Woodbridge Society, the River Deben Association, the Deben Estuary Partnership, the Woodbridge Town Trust, the Woodbridge Riverside Trust, and the National Trust (responsible for the Sutton Hoo archaeological site) and some 330 other letters of objection received, as opposed to 12 letters of support. The objections were advanced on various grounds, including the design of what was proposed, the impact on heritage assets, but also in respect of affordable housing. The Claimant was one of the objectors.

14. The first planning application was the subject of an officers' report for a planning committee meeting on 13 October 2017 ("the 2017 Report"). Although there were many objections, it is clear that officers ultimately did not agree with the majority of them. To the contrary, officers considered the design to be beneficial, the benefits to outweigh the harms, and that the scheme should be approved.

15. The Executive Summary in the 2017 Report included the following:

> "Planning Permission is sought for the redevelopment of the former Council Offices site into a residential lead scheme of 100 dwellings, with the policy requirement of affordable housing …
>
> …
>
> Members of the Planning Committee had had the benefit of a detailed site visit on the 2 October 2017 which took in a number of public viewpoints so as to understand the sensitive relationships to neighbouring land uses and the wider setting.

> The proposed scheme in the opinion of officers represents an interesting and progressive design solution for the site, offering direct views through the site to the Reiver Deben and Sutton Hoo beyond. …
>
> It is acknowledged by officers that the design is bold and unlike other developments in the locality, but this does not make the development unacceptable. The design approach selected is considered to be an acceptable and positive approach in this instance to take to reflect the myriad of constraints on and around the site. Significant pre-application dialogue has taken place with officers, the public and the independent RIBA Suffolk Design Review Panel (SDRP) before formal submissions, as is strongly advocated in the N[ational] P[lanning] P[olicy] F[ramework]. The scheme as presented for determination is the culmination of this significant level of engagement and has positively responded to the detailed comments made through this process.
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> …
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> The benefits of permitting this scheme are considered to outweigh any harms identified and accordingly the application is recommended for approval subject to the imposition of appropriate conditions and mitigation measures, in line with the strong presumption in favour of sustainable development espoused in the NPPF."

16. It is also evident that officers considered the proposal to provide 33 units of affordable housing as "policy compliant". For example, at paragraph 3.1 of the report the officers stated that: "33 of the units are proposed to be affordable, set within two blocks in accordance with Policy DM2 of the Local Plan." The mix of housing proposed was described in paragraph 3.3, with a Table identifying that there would be 18 "1 bed" and 15 "2 bed" affordable housing units provided. Paragraph 3.3 stated:

> "… Members will note that the scheme makes provision for the policy compliant level of affordable housing. The mix and tenure of this is currently under discussion with officers and the delivery of the affordable housing is to be dealt with by means of planning condition."

17. Paragraph 3.7 identified a table setting out the nature of the blocks proposed within the scheme.

18. Section 4 of the 2017 Report dealt with consultation responses to the application, summarising objections that had been received including those related to affordable housing. For example:

    i) Paragraph 4.2 identified Melton Parish Council's objection on this basis that:

> "… given the very high level of need for affordable family homes it is not surprising that East Suffolk Housing service has expressed concern about the mix. All the affordable housing offered is in the form of apartments, and East Suffolk Housing has requested, on the basis of 33 affordable units, a better balance of houses and apartment ie 19 apartments and 14 houses. On the basis that such a revised mix would much better reflect the ability to meet housing need it should be considered in relation to whatever final numbers of dwellings might be agreed."

ii) Under 'Third Party Representations' officers noted the existence of objection that the scheme did not make provision for social housing, but included the officers' comment that: "Officers have clarified through this report that affordable housing is proposed as part of the package."

19. Paragraph 4.28 summarised SCDC's Head of Housing consultation response to the effect that: "Discussions have been undertaken with the Head of Housing in relation to the mix proposed and the affordable element of the scheme".

20. Section 6 of the 2017 Report set out the officers' assessment of planning considerations. This included an analysis of 'housing need' in paragraphs 6.1-6.6. Officers took the view that Woodbridge was considered to be a highly sustainable site for new housing, with limited opportunities for new housing provision in the town, and with a particular need to meet locally generated needs particularly for affordable housing (see paragraph 6.4). Having considered other development sites in Woodbridge, officers expressed the view that residential developments which could offer a range of housing sizes and tenures in Woodbridge were infrequent, with the majority of sites being below the five units required by Policy SP3 to enable the local planning authority to seek a range of housing sizes and the ten units required to provide affordable housing and, for the most part, being for larger dwellings which "do not seek to meet the identified need for smaller units of accommodation": see paragraph 6.5. Officers took the view that:

> "6.6 The proposed development would yield a choice of homes of both the market and affordable tenure, and therefore complies with Policy SP3 of the Local Plan and paragraph 50 of the NPPF."

21. Section 6 also set out the officers' view of the many other issues raised by the proposal, including design and effects on heritage assets. The officers' conclusions were set out in Section 7. They took the view that, on balance, the benefits delivered through the scheme outweighed the levels of harms that had been identified. That conclusion was repeated at paragraph 7.10. In relation to affordable housing, officers stated:

> "7.3 The provision of affordable housing needs to be dealt with by condition rather than a legal agreement, as the landowners of the site at present at [sic] the district council and the district council is not able to enter into a legal agreement with itself. Officers can provide comfort to Members that such

> a condition is a robust mechanism to deal with the delivery, and retention thereafter, and not only has been used on other schemes locally (including Cedar House opposite) but is also commonly used by the Planning Inspectorate."

22. The 2017 Report recommended the approval of the proposal, subject to the application not being called-in for determination by the Secretary of State and the imposition of conditions covering particular matters including:

> "7. Mechanism to deliver the affordable housing in perpetuity – including the mix and tenure."

23. The application and the 2017 Report were considered by SCDC's Planning Committee in October 2017. At the meeting itself officers recommended to the Planning Committee:

> "Members to agree the principles of the form, layout and design of the scheme, in accordance with the detailed plans presented and the formal APPROVAL will not be issued until:
>
> 1. A detailed scheme for the delivery of affordable housing has first been submitted and approved by the Planning Committee at subsequent meeting, and
>
> 2. The Secretary of State has confirmed that the application is not to be "called-in" for his determination
>
> And the imposition of appropriate conditions."

24. The minutes indicate that the Planning Committee did agree the principles of the form, layout and design of the scheme, in accordance with the detailed plan presented to them but they resolved that formal approval would not be issued until:

> "1.A detailed scheme for the delivery of affordable housing has first been submitted and approved by the Planning Committee at a subsequent meeting, and
>
> 2. The Secretary of State has confirmed that the application is not to be 'called-in' for his determination.
>
> 3. That officers be instructed to seek to negotiate further additional car parking to a minimum of 1:1 and report back to the Committee for sign off.
>
> 4. A scheme to review and address any impacts resulting from the development to properties in Deben Road and to demonstrate how these impacts can be addressed going forward, and the proposed conditions (replicated in this recommendation)."

25. The Planning Committee therefore required the application to be brought back to it in due course to deal further with, amongst other things, affordable housing.

26. At around the same time in October 2017, SCDC produced an 'Affordable Housing Commuted Payments' document. The Claimant submits that its status is unknown, as is any evidence upon which it is based. It seeks to identify what sums the Council would require by way of commuted payment for off-site affordable housing delivery. The Claimant points out that the document makes no distinction between contributions required for displacing affordable rented accommodation and contributions required for displacing intermediate housing, even though the benefits to the landowner and costs to the local authority of off-site provision of the former are far higher than for the latter.

27. The Claimant subsequently sent a letter to SCDC's planning officer setting out his calculations showing that application of the approach in the document would be likely to secure the Interested Party (and therefore SCDC via completion of the land sale) a windfall of £2.7 million as compared with the delivery of affordable housing on site. The Claimant submitted there was therefore a strong incentive for the Interested Party to secure a planning permission which allowed for the developer to make a contribution to provide for off-site affordable housing in lieu of providing it on site, particularly in respect of the affordable rented provision.

28. The Claimant notes that between October 2017 and April 2018, there were further discussions between SCDC and the Interested Party to which the Claimant is not privy and in respect of which the Defendant has provided no further information.

29. The First Planning Application was reported back to SCDC's Planning Committee in April 2018. Another report was produced by officers to cover the outstanding matters the Planning Committee had identified ("the 2018 Report"). The officers considered that each of the remaining matters had been dealt with satisfactorily by the applicant and the proposal was "a high quality, policy compliant scheme".

30. Paragraph 2.5 of the 2018 report also identified:

> "Since the report was presented, the Council have accepted that Policy SP2 is out of date and therefore this updated report also includes a section on the 'tilted balance' that needs to be applied in such circumstances."

This was a reference to the application of the tilted balance to the determination of planning applications that is the subject of Ground 2 to which I will refer in more detail below.

31. The officers' views on the reserved issue of affordable housing were as follows:

> "A detailed scheme for the delivery of affordable housing has first been submitted and approved by the Planning Committee at a subsequent meeting
>
> 5.2 The affordable housing provision consisted of 33 units in Blocks G and H and the surplus one unit to be provided in Block B. The provision of affordable housing was proposed to be dealt with by means of the following condition, which was presented to the Planning Committee:

The development shall not begin until a scheme for the provision of affordable housing as part of the development has been submitted to and approved in writing by the local planning authority. The affordable housing shall be provided in accordance with the approved scheme and shall meet the definition of affordable housing in Annex 2 of the National Planning Policy Framework or any future guidance that replaces it and shall be retained in perpetuity. The scheme shall include:

i) the numbers, type, tenure and location on the site of the affordable housing provision to be made, which shall consist of not less than 32 affordable dwellings to meet current identified needs to be located in blocks G and H;

ii) the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing, with the delivery of the affordable housing prior to the sale of the 30th open market dwelling;

iii) the arrangements for the transfer of the affordable housing to an affordable housing provider or the management of the affordable housing;

iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and

v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.

Reason: In accordance with Policy DM2 of the Core Strategy to secure the appropriate provision of affordable housing on the site

5.3 Since the resolution of the Planning Committee in October 2017, the applicant team has been in discussions with the Local Authority, as landowner, concerning the delivery of affordable housing on the site. It has been agreed that the inclusion of one surplus unit in Block B would not be attractive to a registered provider, and therefore the affordable offer should amount to the 32 units in Blocks G and H only.

The Local Authority remains confident that the scheme, inclusive of the affordable element, is viable and deliverable, having regard to the viability reports and that the condition proposed (as repeated above) is a suitable mechanism for its delivery."

32. The 2018 Report dealt in turn with the other matters left over by the Planning Committee and returned to the issue of the "tilted balance" at paragraphs 5.18-5.24. Having set out extracts from paragraph 14 of the NPPF (as it then was) officers stated:

> "5.21 However, it should be noted that the tilted balance applies only in a case where less than substantial harm is said to arise where it is considered that, in accordance with paragraph 134 of the NPPF, that such assessed harm to the significance of heritage assets is outweighed by the public benefits of the proposals.
>
> 5.22 This proposal accords with the Development Plan and it represents plan-led development which achieves compliance with the economic, social and environmental roles of Sustainable Development. Whilst this is a policy compliant development, it is important to consider the effect of paragraph 14 of the NPPF on the determination of the application. Due to its policy compliance, it would accord with that paragraph's requirement to approve development without delay. This paragraph is also dependent upon how up-to-date the District's housing requirement policy is. Policy SP2 (Housing Numbers and Distribution) of the Core Strategy is deemed to be out-of-date. This requires the Council to apply the fourth bullet point of paragraph 14, this is known as the 'tilted-balance'.
>
> 5.23 The tilted balance will apply only if members are satisfied that the harm to the setting of the heritage assets (listed buildings and Conservation Area) and the landscap[e] as identified in the initial report (appended) is outweighed by the public benefits of the proposal in accordance with the NPPF.
>
> 5.24 If this is the case, the requirement is to permit applications for sustainable development unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole; or specific policies of the NPPF indicate development should be restricted. Based on the assessments already undertaken, it is considered that the adverse impacts of the proposed development do not significantly and demonstrably outweigh the benefits. The application should therefore be approved."

33. Officers concluded that all the outstanding matters from the October 2017 Planning Committee meeting had been dealt with and the proposal was presented for approval, subject to appropriate conditions, as listed and originally presented. These included:

> "7. Mechanism to deliver the affordable housing in perpetuity – including the mix and tenure (see paragraph 5.2 for exact wording)"

34. Two "Update Sheets" to the 2018 Report were provided for the Planning Committee's meeting on 19 April 2018. The first noted and summarised two additional letters of representation. It also set out an updated version of the affordable housing condition proposed:

> "The development shall not begin until a scheme for the provision of affordable housing as part of the development has been submitted to and approved in writing by the local planning authority. The affordable housing shall be provided in accordance with the approved scheme and shall meet the definition of affordable housing in Annex 2 of the National Planning Policy Framework or any future guidance that replaces it and shall remain at an affordable price for future eligible households or for the subsidy to be recycled for alternative affordable housing. The scheme shall include:
>
> i) the numbers, type, tenure and location on the site of the affordable housing provision to be made, which shall consist of not less than 32 affordable dwellings. The details to include a mechanism for delivering an alternative method of providing affordable housing at the same level as approved in the event that no affordable housing provider acquires some or all of the affordable housing within a reasonable timescale.
>
> ii) the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing, with the delivery of the affordable housing prior to the sale of the 30th open market dwelling;
>
> iii) the arrangements for the transfer of the affordable housing to an affordable housing provider or the management of the affordable housing;
>
> iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and
>
> v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.
>
> Reason: In accordance with Policy DM2 of the Core Strategy to secure the appropriate provision of affordable housing on the site."

35. The second update sheet provided updates to the officers' analysis within the 2018 Report itself. On affordable housing it stated:

> "… Regarding the location of the affordable housing, as referred to in paragraph 5.2 that the affordable housing

> provision, consists of 33 units in total, with 32 contained in Blocks G and H, and the one extra unit contained in Block B. It has been agreed, due to known issues of delivering individual affordable housing units in managed blocks with open market housing that the offer is reduced to 32 units. The provision of affordable housing is proposed to be dealt with by means of planning condition clearly setting out the requirement."

36. On the "tilted balance" it stated:

> "It is acknowledged that officers agree that Policy SP2 is out of date. Specific policies which indicate development should be restricted include those relating to designated heritage assets, the AONB and the SPA. In a case like the present, where 'restrictive policies' are engaged, a decision maker must first apply the restrictive policy. It is only if the proposal is acceptable having regard to the restrictive policies that the decision maker can then turn to apply the tilted balance. If the restrictive policies are not satisfied (for example, if less than substantial harm to a designated heritage asset is not considered to be outweighed by public benefits) then the application should be refused and the tilted balance will not be engaged. There is accordingly a sequential approach to be followed …"

37. The Minutes of the April 2018 Planning Committee reveal that in response to a question from a member of the committee, the Head of Planning and Coastal Management advised that the planning committee were entitled to go back to first principles and revisit the decision taken on 13 October 2017. The Committee also heard presentations from objectors. The first addressed them solely on the issue of affordable housing. The Minutes record (amongst other things):

> "… [Mr Saggers] noted that the Committee had delayed the approval of its previous decision until a detailed scheme for the delivery of affordable housing had been approved. Mr Saggers considered that this was because, at the last meeting, the applicant could not provide details of the scheme. Mr Saggers was of the view that the situation remained unchanged. Instead, he felt that officers had set out conditions which they felt would secure the delivery of the affordable housing. He did not see how these conditions would achieve this, but considered that they had been imposed to enable planning permission to be granted.
>
> Rather, he suggested that a detailed scheme for the delivery of the affordable housing would give comfort to the Committee, as it enabled it to see that a registered provider had agreed to terms and could provide the mix of housing required. He queried why such a detailed scheme was not available and why no registered provider had been attracted to the site over the last eighteen months.

Mr Saggers said that the Committee required a detailed scheme so that there was no issue with the affordable housing being provided, after planning permission had been approved. He asked the Committee to ensure that before approval was given, a credible and well funded entity was in place to deliver the affordable housing required.

The Chairman invited questions to Mr Saggers.

A member of the Committee enquired if Mr Saggers' concerns related to the wording of paragraph 5.2 of the report and if he felt that it did not provide the certainty required. Mr Saggers reiterated that he felt that the conditions which had been laid out by the Committee for affordable housing had not been met by the applicant, as no detailed scheme had been approved.

At this point, the Head of Planning and Coastal Management revisited the first principles in relation to affordable housing. He reminded the Committee that originally, the scheme looked to deliver thirty three units of affordable housing.

Following the meeting of the Committee on 13 October 2017, discussions took place between officers and the applicant and a figure of thirty two units was agreed; this was because one of the proposed units of affordable housing was a single unit, located in Block B. Such a single unit would not have been practical or an attractive prospect to registered providers.

He advised the Committee that the applicant was in dialogue with a number of registered providers and had received varying levels of interest in the site, from them. He explained that the affordable housing market was an extremely challenging one and that offers from registered providers in the Suffolk Coastal area were generally at a lower value than offers in other areas.

He stated that policy DM3 [which must, in fact, be a reference to DM2] was clear in requiring up to a third affordable housing for the development, and he was confident that the condition set out in the recommendation, as amended in the update sheet, would deliver the affordable housing scheme required. The condition as worded sought an approval to the mechanism for delivery before any development on the site commenced. Permission would however enable the site to be actively marketed to prospective providers.

He was clear that the wording "not less than thirty two dwellings" meant that anything lower than that would not satisfy the condition and would mean that it could not be lawfully discharged. He considered that the condition gave comfort to the Committee and to the public that the

> development would provide the required amount of affordable housing.
>
> He outlined the mechanisms within the wording of the proposed (amended) condition of the report to deliver the required level of affordable housing via an alternative method, in the event that a registered provider did not acquire some or all of the affordable housing units, within a reasonable timescale.
>
> The alternative method of delivery would allow for the potential for a commuted sum to be paid to the equivalent "value" of the affordable homes not delivered on site. The Head of Planning and Coastal Management advised the Committee that this was not an uncommon approach and recently the committee had accepted a commuted payment for a residential development behind the Notcutts garden centre in Woodbridge. This would ensure that the development was not stymied due to a registered provider not being willing to take on units on the site.
>
> The Committee was strongly advised against refusing the application based on the limited risk of a registered provider not coming forward. The Head of Planning and Coastal Management stressed that the applicant was content with the condition and that its wording was lawful."

38. The Committee then heard from Lady Blois, representing Woodbridge Town Council. Lady Blois also objected on affordable housing grounds and considered tenure and mix to be important, but was concerned about leaving the matter to the judgment of the officers, with the potential for no social housing to be provided, and whilst acknowledging that a commuted sum could be agreed, was concerned it would be used to fund social housing outside Woodbridge.

39. The Committee also heard from Mr Porter, Chairman of Melton Parish Council. He too objected on affordable housing grounds, identifying that no detailed scheme was in place. He criticised the Head of Planning's advice on affordable housing in trenchant terms and the Head of Planning was asked to respond. The Minutes record that the Head of Planning expressed the view that the advice he had provided was "bona fide, lawful and in line with local and national policies" and he rejected the assertion that his advice was "magic" and was clear that it was not designed to achieve anything untoward. He stated that the advice to the Committee had been given to allow a lawful decision to be made on the application.

40. The Committee then heard from Councillor Mulcahy, Ward Member for Woodbridge, who referred to the discussions at the meeting in October 2017 and significant debate on the benefits and harms of the application. She expressed the view that the loss of two heritage buildings on the site was considered to be a significant harm at that meeting, but that the promise of affordable housing outweighed the loss. She therefore considered that the affordable housing was one of the key benefits of the development and that this was why the Committee had asked for a detailed scheme.

She acknowledged that the recommended conditions had been designed to ensure such a scheme would be in place, but she felt that it would have been prudent to see more information regarding a scheme, in which registered providers were interested and detail on the reduction from thirty three to thirty two affordable units. She considered that the people of Woodbridge deserved to know that information. She also noted that a previous development in Woodbridge had not proceeded as planned, because the developer had stated that the affordable housing requirements were not economically viable. She considered that if it was not possible to achieve the scheme required, then the heritage buildings should be retained and the entire development revisited, providing an opportunity to reduce the development and consider alternative proposals. In response to a question, she expressed the view that if the affordable housing could not be secured, the development would not be of an advantage to the town, and reiterated her understanding that the affordable housing had been considered a benefit that outweighed the harm of losing the heritage buildings and if the affordable housing could not be delivered, then those buildings should be retained. She was also of the opinion that a commuted sum would not be of benefit to Woodbridge.

41. In response to these representations, the Head of Planning and Coastal Management advised the Committee that the affordable housing was not the sole benefit of the development and referred the Committee to the original report presented on 13 October 2017. He acknowledged the harm that would be caused by the loss of the heritage buildings; he also reminded the Committee of the controls on affordable housing and outlined how priority for affordable housing would be given to local residents in the first instance, followed by those from the nearby parishes. He stated if the affordable housing solution result in a commuted sum, this would be ring-fenced to be used on development in the Woodbridge/Melton area first. He referred to a similar situation that had resulted from the development of the Notcutts site in the town and stressed that any commutable sum would benefit the local community, with details to be defined in the discharge of the recommended planning condition.

42. In response to these comments, a member of the Committee asked if there was a suitable site in the local area where affordable housing could be delivered, if it could not be delivered on site. The Head of Planning and Coastal Management noted there were several sites in the area, including a site for approximately fifty five houses behind Riduna Park, Melton, which was identified in the Melton Neighbourhood Plan, where the affordable housing could be delivered. He confirmed to the Committee that registered providers were interested in the Melton Hill site, and he was hopeful that all thirty two units could be delivered on site, but there needed to be a "backstop" for developers, if this was not the case.

43. Following the debate, the Planning Committee resolved to approve the First Planning Application subject to the imposition of conditions, including one dealing with affordable housing as set out in the Update Sheet.

44. The Claimant subsequently wrote to SCDC indicating that if planning permission were granted it would be challenged by way of judicial review. The Claimant notes that a particular, and repeated, concern he articulated was that the "payment in lieu" mechanism could be used to support the inflated price paid by the Interested Party by providing a windfall reduction in the cost of complying with the affordable housing obligations.

45. The Claimant also states that by August 2018, the Interested Party was claiming that no affordable housing provider could be found, and an off-site payment in lieu of all the affordable housing in the sum of £3.02m was being mooted. The Claimant notes that no details of the efforts to find an affordable housing provider have been provided by the Interested Party or SCDC, but the Defendant has stated that SCDC was "not involved" in those discussions.

46. In the event, on 9 August 2018, just before planning permission for the First Planning Application was to be issued by SCDC, the Interested Party notified SCDC of its withdrawal of that application.

47. The reason for this was because the Interested Party wished to submit a revised planning application relying on the concept of "vacant building credit" to justify provision of a reduced amount of affordable housing. Vacant building credit, where applicable, can enable a developer to calculate the affordable housing requirement based on the floorspace of existing buildings on Site. The opportunity to take advantage of this would have been lost if planning permission had been granted for the First Planning Application as vacant building credit cannot be invoked in the same way if there is a recent planning permission for the development proposed.

48. The Claimant is critical of SCDC in allowing the Interested Party to withdraw the First Planning Application in this way. There is, however, no freestanding challenge to SCDC's actions in this respect. I am also not persuaded that there is any real merit in these criticisms in any event. An applicant is ordinarily entitled to withdraw a planning application that it has made to a local planning authority at any time before its final determination which occurs on issue of a notice. The Claimant does not point to a requirement for the local planning authority to consent to a withdrawal. SCDC therefore cannot be criticised for treating the application as withdrawn once it had received written notice of that withdrawal from the Interested Party. Moreover, the Claimant himself had already threatened to challenge any issue of a notice to grant planning permission on the First Planning Application in any event.

49. The Claimant also criticises SCDC, in its capacity as landowner, for facilitating that application by either extending or waiving the deadline for submission for making planning applications under the conditional contract. But it is not clear what particular advantage the Claimant suggests SCDC gained from doing so. As set out below, SCDC, in its capacity as local planning authority, refused the Interested Party's subsequent planning application that relied upon vacant building credit and successfully resisted the Interested Party's appeal against that decision.

The Second Planning Application

50. Having withdrawn the First Planning Application, the Interested Party submitted a second planning application to SCDC on 15 August 2018 (reference number DC/18/3424/FUL). It proposed the same development, save that in reliance on vacant building credit it proposed 16 units of affordable housing rather than 32.

51. The Second Planning Application was the subject of an officer's report and was considered at a planning committee meeting on 26 November 2018. Officers recommended refusal on the basis that vacant building credit was not applicable and,

consequently, the application failed to provide a policy compliant level of affordable housing (notwithstanding the Interested Party's expressed concerns about viability). On all other matters, the scheme remained acceptable to officers and no other reason for refusal was proposed. The report dealt with an objection received from Historic England to the application which had not previously existed to the previous schemes, but this had not changed officers' views. The report also dealt with the update that had occurred to the NPPF which had been published in July 2018. The officers considered this to provide greater emphasis to the protection of heritage assets and securing high quality design and stated that the scheme had been reappraised against those principles. Members agreed with officers and resolved to refuse the application.

52. The formal decision notice refusing planning permission was issued on 22 January 2019. The reason for refusal explains (amongst other things):

> "… the Council considers that given the previous and relevant viability evidence submitted with the First Application (which although was not resubmitted with the second application but no change in circumstances regarding the development occurred), there is no need to incentivise the development of this brownfield site because of the significant need in the district, and in Woodbridge in particular, to deliver affordable housing.
>
> As it is considered that VBC does not apply, the proposed redevelopment of the site for 100 dwellings should make provision for one-third of all the units to be affordable housing in accordance with Policy DM2 of the Suffolk Coastal District Local Plan (Core Strategy and Development Management Policies DPD 2013). The viability evidence submitted with the First Application clearly indicated that a policy compliant scheme of 32 units of affordable housing could be delivered. The under-provision of affordable housing in the Second Application (without the application of VBC) conflict with Policy DM2 and whilst acknowledging the benefits arising from the development, these do not outweigh the harm associated with the under-provision of affordable housing in an area where there is significant demand and need for such."

53. The Interested Party appealed under section 78 of the Town and Country Planning Act 1990 ("the 1990 Act") against SCDC's decision. That appeal was opposed by SCDC and subsequently dismissed by an Inspector in February 2020.

The Creation of the Defendant Council

54. On 1 April 2019, the Defendant Council was formed by the amalgamation of SCDC and Waveney District Council.

The Third Planning Application

55. On 2 July 2019 the Interested Party submitted a third planning application (reference number DC/19/2641/FUL). It is this which led to the grant of planning permission

under challenge. The Third Planning Application proposed the same number of dwellings and affordable housing units as the First Planning Application. The description of development was:

> "Residential development 100 (no units) including 32 no affordable housing units (Class C3) plus a community space (91 sq.m) (Class D1) and a retail unit (157.7 sq.m)(A1/A2/A3), car parking, means of access and landscaping, all following demolition of the buildings on site."

56. In relation to affordable housing, the Planning Statement that accompanied the application stated (amongst other things):

> "1.05 Although the application is lodged solely by AUWL, it is being progressed in partnership with a Registered Provider, Sage Housing. Sage will take on, own and manage the affordable housing within the proposed development.
>
> …
>
> 6.04 The development will produce a mix of dwelling types and sizes, including a policy compliant level of affordable housing. It complies with policies SP2 and DM2 of the development plan.
>
> …
>
> Affordable Housing
>
> 6.21 The proposed development delivers 32 affordable units, to be located within blocks G & H. While it is the case that to meet the precise requirements of policy (1 in 3 of all units as affordable) it would be expected that there would be 33 units, it has been agreed with officers that 32 can be provided as this number of units can be accommodated within blocks G & H. To provide a 33rd unit would require the inclusion of one unit within a separate block. It was felt this would not be ideal and hence 32 units are to be provided to be delivered for Sage Housing. It has been confirmed that not less than 25% of the total number of affordable units should be allocated to affordable rented tenure and this can be secured by condition. The scheme is considered to comply with Policy DM2 of the Core Strategy and Development Management DPD.
>
> …
>
> 7.04 Since the second application was submitted, the applicants have managed to secure a new affordable housing provider (Sage Housing) who can take the affordable units on (32 no.) at an economic level. In light of this and to try and deliver an early planning consent on the site so that development may

> proceed, the applicants have made this further application. In doing so, they have proposed some minor changes to make the scheme more workable and also to improve on its efficiencies. This is being done without any diminution to the quality of the proposal.
>
> …"

57. The Claimant states that no viability assessment was submitted with it to justify non-policy compliant provision of affordable housing. This is not surprising as it is clear that the Interested Party considered the scheme to be policy-compliant in terms of affordable housing. I will return to the question of policy-compliance below in light of Ground 1.

58. The Claimant also notes that the Interested Party did not suggest the Council lacked a "five year housing land supply" and Policy SP2 of SCDC's Core Strategy was a policy relied upon by the Interested Party. That is also not controversial, but relates to the question of the "tilted balance" under Ground 2 to which I will also return below.

59. In this latter respect, the Claimant notes that on 21 November 2018 a planning inspector determining an appeal under section 78 of the 1990 Act concerning land at Aldeburgh had considered SCDC's housing requirement. The Inspector had concluded that in light of the July 2018 NPPF and the introduction of a standard methodology for the calculation housing need, SCDC's housing need requirement considerably exceeded those identified within SCDC's Core Strategy. She concluded that Policy SP2 of SCDC's Core Strategy was not up to date so far as it related to the housing requirement (see paragraph 14 of her decision). However, the Inspector went on to find SCDC had more than five years' housing land supply when measured against the new requirement (see paragraph 91 of the decision).

60. The Claimant also notes that in August 2019, the Defendant Council published a Statement of Housing Land Supply as at 31 March 2019. This statement identified the existence of 7.02 years' housing land supply for that part of East Suffolk previously in SCDC's area.

61. Officers prepared a report on the Third Planning Application for a planning committee meeting on 22 October 2019 ("the 2019 Report"). Like its predecessors, it is a long and detailed report that addresses the multiplicity of issues that arose on the application and the many objections that had been received. It needs to be read as a whole, but I identify below some parts which deal with matters particularly relevant to Grounds 1 and 2 of the Claimant's challenge.

62. The Executive Summary of the 2019 Report noted that the application made some minor amendments to the layout and appearance of the Site as compared with the previously considered schemes, but that the design ethos remained the same and it stated that "the scheme makes provision for the policy requirement affordable housing". The Executive Summary noted that the officers' report had been updated to reflect changes to the NPPF since the previous application, along with the policy position of the Site as expressed in what was then the emerging East Suffolk-Suffolk Coastal Local Plan. This plan had been through the examination stage at that point.

The Executive Summary noted that the recommendation of officers remained one of approval stating:

> "…The current scheme overcomes the previous concerns raised by the Council re the provision of affordable housing and officers believe the scheme will result in a dynamic, exciting high quality development in a sustainable location, and is therefore policy compliant.
>
> The changes to the current scheme do not in the opinion of officers result in the scheme being unacceptable having noted that the Council has on two occasions endorsed the design, appearance, layout and impacts of the development. The changes proposed are minor when considering the scheme as a whole. Indeed, it is contended that the strengthening of design in the NPPF and the requirements for the site in the emerging Local Plan add extra weight to the approval of the scheme.
>
> The harms of the development in this instance do not outweigh the benefits of approving the development and the scheme remains one which is policy compliant."

63. As with previous reports, Section 1 of the 2019 Report provided an introduction and background. Paragraph 1.1 stated:

> "… The application seeks to provide the full complement of affordable (32 units) housing required via Policy DM2 of the Local Plan in two blocks of accommodation (blocks G & H).
>
> This application is the third such submission for the re-development of the site by the applicants and although there have been some minor changes, the general thrust of the application remains the same."

64. It is therefore evident from this, and the other parts of the 2019 Report, that officers remained of the view that the proposal was policy-compliant in terms of affordable housing as a result of the provision of the 32 units in blocks G and H.

65. Paragraph 1.1 also noted that members had undertaken a detailed site visit before dealing with the First Planning Application. It then summarised the history in respect of the First and Second Planning Applications (which it is unnecessary to rehearse again here). At the time of writing that report, the appeal against the refusal of the Second Planning Application had not been determined. The officers noted that the formal decision of the planning inspectorate was awaited. The officers drew members' attention to the fact that that the only concern that the Council had pursued in respect of that appeal was the under-provision of affordable housing and all other matters remained acceptable.

66. The officers then drew attention to the existence of various competing issues considered in more detail in Section 6 of the report where the officers sought carefully to assess and balance out those competing issues "to reach an informed judgment on

the merits of the application, having due regard to all issues presented." The report then stated:

> "As required by the NPPF, the presumption is in favour of sustainable development and that developments should be approved unless any adverse impacts would significantly and demonstrably outweigh the benefits and in accordance with the NPPF local planning authorities should look at ways to significantly boost the supply of housing. The starting point for any application is one of support if it is argued to be sustainable, having due regard to the three strands of sustainable development outlined in the NPPF."

67. Paragraph 1.1 also noted that information was appended to the report for the benefit of members. This included the Minutes of previous planning committee meetings that had dealt with the applications (to which I have already referred).

68. Section 3 of the report outlined the proposals, again identifying the provision of 100 residential units proposed, with 32 units proposed as affordable units set within two blocks. Paragraph 3.3 set out the proposed size mix of the residential provision in a table. This identified that (as before) 22 of the affordable housing units were proposed as one bedroom units and 10 were proposed as two bedroom units.

69. Section 4 again summarised consultation responses or comments received on the application. Paragraph 4.1 recorded the objection from Woodbridge Town Council, including that made on affordable housing grounds as follows:

> "DM2 Affordable Housing
>
> The developer has reduced the Social housing element in this application, and does not comply with DM2. Only eight units are so designated, and the additional 24 are described as "Intermediate Housing". This is not what the local community requires — there is an established clear local need for units available for social rent, and this application patently fails to meet that need. Affordable housing appears to be by means of very small one bedroomed apartments. Many townspeople waiting for social and affordable housing have children and need accommodation that supports the family.
>
> The mix does not conform to East Suffolk Council policy.
>
> …
>
> Public Views
>
> Woodbridge Town Council considered this Application on 16th July 2019.
>
> Seventy two members of the public attended, and 13 of them spoke to the committee. …

> Their comments included
>
> …
>
> - Less affordable bedrooms and more Market bedrooms and an increase in the number of three and four bedroom houses.
>
> …"

70. It is evident that the first part of this objection was referring to what the Interested Party had stated in the accompanying planning statement as to the intended split between intermediate housing and affordable rented units.

71. Paragraph 4.2 of the 2019 Report identified the objections of Melton Parish Council. It set out the Parish Council's recommended reasons for refusal which included:

> "4. Draft Local Plan Policy SCLP5.10 requires that proposals for residential development with capacity for more than ten units…will be expected to make provision for 1 in 3 units to be affordable dwellings, and to be made available to meet an identified local need. The Policy goes on to say that of the affordable dwellings, 50% should be for affordable / social rent, 25% should be for shared ownership, and 25% should be for discounted home ownership. This application offers 32 units, but with the emphasis on intermediate housing rather than social rent: 8 x 1 bedroom units for social housing and 24 units (14 x 1 bedroom and 10 x 2 bedroom) for intermediate housing – part sale / part rent. Whilst it is unclear what the local needs are, the offer clearly does fall short of compliance with Draft Local Plan Policy SCLP5.10."

72. Paragraph 4.12 of the 2019 Report summarised the objection of the Woodbridge Society as including: "The size of the affordable units is not what is required."

73. The 2019 Report also recorded responses from the Council's departments. At paragraph 4.28 it was noted: "Head of Housing: No comments received."

74. The 2019 Report then summarised third party representations, identifying that 215 letters of objection had been received. It summarised the points that had been made, whilst also noting that full transcripts of the responses were available on the public access system. This included the identification at paragraph 4.32 of objections that (amongst other things):

> "…
>
> • The dwellings proposed are too small and more effort should be made for dwellings which would be attractive for families. Flats are not required.
>
> …

> • The affordable housing provision fails policy in terms of the type and size – more larger units required.
>
> • More details on affordable housing required.
>
> • Concern over the potential for affordable housing commuted sums.
>
> • Only 20% affordable housing when looking at GFA
>
> • Not taking a stand on full affordable sets a bad precedent.
>
> …"

75. Section 5 of the 2019 Report sought to identify the relevant policy framework in light of the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 (erroneously identified as the Planning and Compensation Act 2004 in the report).

76. Having dealt with adopted development plan policies, it also turned to identify emerging policies in the East Suffolk-Suffolk Coastal Local Plan which had been the subject of examination. At paragraph 5.10 it identified a site specific emerging Policy SCLP12.32 allocating the Site for a residential-led mixed use development of approximately 100 dwellings, subject to certain criteria which included the following:

> "Development will be expected to be of an exemplar, high quality design, and comply with the following criteria:
>
> a) Provision of a mix of units including a predominance of flatted dwellings, including affordable housing on-site;
>
> …"

77. At paragraph 5.11 it identified other relevant emerging policies as including SCLP5.10 on affordable housing.

78. Section 6 of the 2019 Report set out the officers' analysis of the planning considerations under various sub-headings. It is not necessary to set out that assessment in full. It is a detailed report which considers a significant number of issues relating to the planning effects of the scheme and needs to be read as a whole.

79. For present purposes, without detracting from that need to read it as a whole, I note that officers included within that analysis the following views (amongst others):

> "6.3 The site is not proposed for allocation within the adopted Site Specific Allocations DPD; however, as the site is located within the settlement boundary it is to be treated as a windfall site …
>
> …
>
> 6.4 Members will note however that the site is proposed for allocation in the emerging East Suffolk - Suffolk Coastal Local

> Plan via policy SCLP12.32. Given the advanced nature of the emerging plan, the policy contained within can be afforded weight in the determination of applications and appeals. The principle of the development of the site for 100 dwellings complies with this policy, as does the density of development occurring as a result of the level of development.
>
> …
>
> 6.6 The proposed development would provide a choice of homes of both the market and affordable tenure, and therefore, in the opinion of officers, complies with Policy SP3 of the Local Plan and the NPPF."

80. Section 6 of the Report includes many other parts dealing with the effects of the proposal (whether harmful or beneficial) which I do not set out here. It also included at the end the following in respect of the "tilted balance" which I set out in full given that it is the particular focus of the challenge under Ground 2:

> "Application of The Tilted Balance
>
> 6.162 The starting point for decision making on all planning applications is that they must be made in accordance with the adopted development plan unless material considerations indicate otherwise (Section 38 (6) of the Planning and Compulsory Purchase Act (2004)).
>
> 6.163 Policy SP2 (Housing Numbers and Distribution) of the Core Strategy sets out how the Core Strategy makes provision for 7,900 homes in the District between 2010 and 2027. This policy identifies the need to progress to an Issues and Options Report by 2015 at the latest, which would include identifying the Full Objectively Assessed Housing Need. The publication of an Issues and Options Report did not take place until August 2017, for reasons including the delays caused by the High Court and Court of Appeal challenges to the Core Strategy. In a number of recent appeals, Planning Inspectors have taken the view that this delay has caused Policy SP2 of the Core Strategy to be out of date.
>
> 6.164 In this context, the NPPF applies:
>
> "…For decision-taking this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date7, granting permission unless:

> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed6; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed"

6.165 However, it should be noted that the tilted balance applies only in a case where less than substantial harm is said to arise where it is considered that, in accordance with the NPPF, that such assessed harm to the significance of heritage assets is outweighed by the public benefits of the proposals.

6.166 This proposal accords with the Development Plan and it represents plan-led development which achieves compliance with the economic, social and environmental roles of Sustainable Development. Due to its policy compliance, it would accord with that paragraph's requirement to approve development without delay. This paragraph is also dependent upon how up-to-date the District's housing requirement policy is. Policy SP2 (Housing Numbers and Distribution) of the Core Strategy is deemed to be out-of-date. This requires the Council to apply.

6.167 The tilted balance will apply only if members are satisfied that the harm to the setting of the heritage assets (listed buildings and Conservation Area) and the landscape as identified in the initial report (appended) is outweighed by the public benefits of the proposal in accordance with the NPPF.

6.168 If this is the case, the requirement is to permit applications for sustainable development unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole; or specific policies of the NPPF indicate development should be restricted.

6.169 It remains the position of officers that the benefits of the scheme, which have been outlined in detail in this report, outweigh any harm identified and therefore the presumption should be in favour of development. The previous concerns relating the lack of provision of affordable housing have been overcome via this application submission."

81. Section 7 of the 2019 Report sets out the officers' conclusions as follows:

> "7. CONCLUSION
>
> 7.1 There is a very clear steer from Government that the presumption should be in favour of development unless any harms identified are significant and demonstrable when

weighed against the benefits arising. The government though the NPPF, White Paper and relevant case law are putting significant pressure upon local authorities and communities to take significant levels of growth and that those levels of housing growth should be significantly boosted. The delivery of the site for housing would seek to meet these objectives and also deliver housing into a town where there has historically been limited housing growth, especially of the smaller sized units.

7.2 The site is in a highly sustainable location within easy reach of key services and facilities required to support additional growth. These are within walking distance of the site and therefore future residents would not need to rely on the private car for access.

7.3 A number of clear and identifiable benefits have been identified as a result of the approval of this application. These include:

• The removal of the unsightly modern buildings on the site with a positive impact on the setting of the Conservation Area and setting of the listed buildings.

• A car free development, with space given over to public and private use rather than the car. With the exception of the visitor's spaces, the cars would be hidden from view, by using existing levels on the site.

• The opening up of views through the site to the benefit of many, including some of the residential properties opposite.

• The significant economic benefits from construction, on site employment, additional spend in the community, CIL and New Homes Bonus both as an immediate response and a longterm impact.

• A bespoke modern design for a prominent important site which has clear references to its setting and historical values of Woodbridge.

• Reduction in traffic associated with a residential scheme over a fully serviced office development and the resulting benefits to the Air Quality Management Area (AQMA).

• Enhanced landscape strategy for the site and maintenance thereof.

• Pedestrian permeability through the site including a new link to Deben Road.

• The application is made in detailed form, with a three year time limit for implementation, and therefore there is certainty over its delivery and assisting therefore in meeting the identified housing targets for the Council.

• Creation of public space and units within the scheme for the benefit of the wider

community and seek to elongate the Thoroughfare to the site.

7.4 The benefits arising from the development are considered to be significant and weigh in favour of the demolition of the two identified Non-Designated Heritage Assets (NDHA's), a test required by the NPPF. The new frontage buildings themselves in turn will become feature buildings in prominent locations and are considered to be of exceptional design

7.5 The design of the development as a whole is considered by officers to be of high quality and responds positively to its setting. Whilst it is noted that there are concerns that the development is too bold and modern for Woodbridge, this is not a view shared by officers or indeed the independent review panel. The positioning and scale of the individual blocks has been carefully considered having due regard to the sensitive boundaries and views, and does not give rise to any harms of a significant scale upon which permission should be refused.

7.6 Whilst there will be a change in relationship to neighbouring land uses, particularly to Deben Road and the Maltings, change is not necessarily unacceptable and the openings and position of windows has been carefully considered to respect as far as possible private amenity, also having due regard to the position and use of the existing buildings. It is also important to note that the blocks adjacent Deben Road have been reduced in scale through the application process to respond more positively to these properties. There would no unacceptable harm or loss of amenity to the properties on the opposite side of The Thoroughfare or the river, but there will be a change in view.

7.7 It remains the position of officers that the benefits of the scheme, which have been outlined in detail in this report, outweigh any harm identified and therefore the presumption should be in favour of development. The concerns raised are primarily in relation to design, which is a subjective matter, and Members are reminded that the technical experts (the Councils officers and the SDRP) endorse the scheme, as has the Planning Committee on two previous occasions. There are no technical barriers to development and the earlier concerns raised by the LLFA have been overcome through this submission to the

> extent that they are content to accept conditions on any approval.
>
> 7.8 The application is therefore recommended as AUTHORITY to approve (subject to the receipt of RAMS payments)."

82. Section 8 set out the recommendation to approve subject to the receipt of the RAMS payments and the imposition of conditions. These included:

> "10. The development shall not begin until a scheme for the provision of affordable housing as part of the development has been submitted to and approved in writing by the local planning authority. The affordable housing shall be provided in accordance with the approved scheme and shall meet the definition of affordable housing in Annex 2 of the National Planning Policy Framework or any future guidance that replaces it and shall remain at an affordable price for future eligible households or for the subsidy to be recycled for alternative affordable housing. The scheme shall include:
>
> i) the numbers, type, tenure and location on the site of the affordable housing provision to be made, which shall consist of not less than 32 affordable dwellings. The details to include a mechanism for delivering an alternative method of providing affordable housing at the same level as approved in the event that no affordable housing provider acquires some or all of the affordable housing within a reasonable timescale.
>
> ii) the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing, with the delivery of the affordable housing prior to the sale of the 30th open market dwelling;
>
> iii) the arrangements for the transfer of the affordable housing to an affordable housing provider or the management of the affordable housing;
>
> iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and
>
> v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.
>
> Reason: In accordance with Policy DM2 of the Core Strategy to secure the appropriate provision of affordable housing on the site"

83. The Minutes of the meeting on 22 October 2019 record what transpired. The Planning Committee received the officers' report and a presentation on the application from the Planning Development Manager. It is also apparent from the Minutes that the Planning Committee had visited the Site the day before the committee meeting, so replicating the site visit undertaken by the SCDC Planning Committee in 2017.

84. The Planning Development Manager highlighted the changes made to the current scheme compared to previous applications, as detailed in paragraph 3.9 of the report. She described the application as being very similar to the first application on the site that the SCDC Planning Committee resolved to approve in April 2018. It was noted that the emerging Suffolk Coastal Local Plan, which had recently been examined by the Planning Inspectorate, had allocated the site for 100 units of housing, which was the level of housing proposed in the application.

85. Photographs of the site in its existing condition were displayed and there was some detailed consideration of what was proposed. The Minutes record that the Planning Development Manager highlighted the conditions proposed "that could be brought back to the Chairman and Vice-Chairman of the Committee". It is evident from the Minutes that attention was drawn to the fact that the proposal was for two blocks to contain the 32 affordable housing units. The Minutes state that members were advised:

> "Since the previous refusal of permission, the applicant had been able to secure a Registered Provider (RP) in respect of the affordable housing so that the policy compliant level could be provided on site.

86. The Chairman allowed questions from the committee to the planning officers and then invited Mr Saggers, representing objectors to the application, to address the Committee. The Minutes record that Mr Saggers (amongst other things):

> "… noted that eight units of the affordable housing would be social housing and that the remaining 24 would be intermediate units which would be used for 'rent to buy' schemes. He considered that the application should fail on this test alone. …"

87. In response to questions Mr Saggers stated that he was not opposed to 100 units on the site "if there was the correct proportion of affordable homes."

88. The Committee then heard from the Mayor of Woodbridge, Mr O'Nolan for Woodbridge Town Council who focused "on the affordable housing and compared to the existing need in the local community". He considered that the needs of Woodbridge had not been identified in the report and referred to the 2018/19 Gateway to Home Choice Report. He said that data within that report showed that the need for affordable housing in East Suffolk had decreased over the last three years and that the changes year on year reflected the variation of new affordable housing units available. He stated that social housing provided very affordable rent but that the proposed scheme included affordable units that would be shared ownership. He stated that other councils under Gateway to Home Choice allocated 80% of their housing stock to social housing and that East Suffolk did not provide this proportion of its stock on

social housing. Mr O'Nolan said that the 40% of the requirement across the councils under Gateway to Home Choices could be satisfied by one-bedroom properties and highlighted that not one of the social housing units was a one-bedroom property. He concluded by outlining the increased need for affordable housing and he considered that "the Committee had an opportunity to go down in history."

89. In response to questions invited by the Chairman, Mr O'Nolan confirmed that his statement regarding housing needs being satisfied by one-bedroom properties was based on the 2018/19 Gateway to Home Choice report. He explained that his comment regarding the Committee having an opportunity to go down in history related it being able to look carefully at the deficiencies in the application and refuse it. He confirmed that his chief concern with the application was the affordable housing element.

90. The Committee then heard from Ms Barrington for Melton Parish Council. She expressed the view that the application did not comply with policy SP3 of the current Local Plan nor with policies in the emerging Local Plan and that it did not meet the identified needs of the local community. She stated that when the application had been considered previously it had been stated that affordable housing should be delivered at the maximum possible on the site and was of the opinion that this was not the case.

91. The Committee then heard from Mr Brown as agent for the Interested Party. The Minutes record that he stated that he considered that the reason no scheme currently had approval related to the applicant's difficulty in securing a Registered Provider to deliver the affordable housing. He said the current application had been submitted as the applicant had been able to make an agreement with a Registered Provider to deliver the affordable housing on the site. He said this would enable the applicant to move forward with the development. He said that the applicant had engaged with 12 different Registered Providers over several months before being able to secure arrangements with one to deliver affordable housing on the site.

92. In response to questions from the Committee, the Minutes record that a Mr Hughes sought to assure the Committee that affordable housing could be delivered on the site. He advised that terms had been agreed with a Registered Provider, the necessary legal documents had been drawn up and would likely be exchanged on 25 October 2019.

93. The application was the subject of debate by committee members. During that debate, a member expressed the view that the Council, as owners of the site, had a duty of care to the community to deliver the maximum affordable housing and was of the view that the application did not achieve this.

94. The Chairman referred to the conditions contained in the recommendation to state that authority to approve was subject to several factors, including affordable housing and RAMS payments being received. Several other members of the Committee are recorded as expressing concern with the application noting (amongst other things) that the affordable housing element was considered insufficient.

95. The Chairman noted that she had voted to approve the first application and had voted to refuse the second application due to the lack of affordable housing. She considered that the current application solved some of the issues with the site's relationship to

dwellings on Deben Road and restored the affordable housing element to an acceptable level. She said that the applicant had assured the Committee that the affordable housing element of the development would be delivered and said that Members had to trust that the Council's officers would ensure this was guaranteed before consent was issued. A member of the Committee sought an assurance that any conditions subject to approval came before officers and Members. The Head of Planning and Coastal Management referred to the condition which required a scheme for the provision of affordable housing to be submitted and approved by the Local Planning Authority and advised that the quantum of affordable housing met the requirements of the Local Plan policies and hoped that this would provide the Member with confidence on delivery.

96. The Committee moved to a vote and by majority resolved to approve the application, subject to the RAMS payments and the imposition of conditions, including the affordable housing condition that had been identified in the officers' report.

The Grant of Planning Permission

97. Following the committee meeting, but prior to the issue of planning permission, an Inspector issued a decision letter dated 5 November 2019 dismissing a section 78 appeal for a housing proposal on land at Street Farm, Framlingham in the Defendant's area. In paragraphs 17 and 18 of that decision, the Inspector concluded that Local Plan Policy SP2 was in accordance with the NPPF, as the Council was able to demonstrate that it had a five-year supply of housing the policy was up-to-date and consequently the tilted-balance under paragraph 11(d) of the NPPF was not engaged.

98. The Claimant notes that the Third Planning Application was not referred back to the Council's Planning Committee despite a "stark inconsistency" regarding the existence of a 5 years housing land supply which was not addressed.

99. Planning Permission was granted by notice dated 29th November 2019. Condition 10 and the reason for it reflected that set out above in the officer's report.

100. The Claimant draws attention to an entry on the Charges Register on the Land Registry title document for the Site that refers to an agreement for sale dated 5 December 2019 between the Interested Party and Sage Housing Ltd affecting plots 73, 76-85 and 89-101. This is the subject of a unilateral notice dated 9 December 2019. The Claimant considers that this concerns 24 units which the Claimant therefore infers are those proposed for intermediate affordable housing. He believes that the rump of 8 affordable rented units is left out, and contends that no thought has been given as to whether a social housing provider would be interested in just 8 units spread across and intermingled with the intermediate housing units, particularly in circumstances where the Defendant has previously recognised the importance of having single blocks for affordable housing provision.

101. The appeal against the refusal of the Second Planning Application was dismissed on 12 February 2020. The Claimant states that the Council ended the Interested Party's effective option thereafter.

Legal Framework and Principles

102. The correct approach to a judicial review challenge of this kind is not in dispute. Relevant principles were authoritatively summarised in *Mansell v. Tonbridge & Malling BC* [2017] EWCA Civ 1314; [2018] JPL 176, in which Lindblom LJ stated at [41]-[42]:

> "41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. …
>
> 42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016 EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the

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

103. The Claimant also refers to the following propositions:

i) When deciding whether to grant planning permission, an authority must interpret the material development plan policies correctly and, as a general rule, it must also determine (a) whether the individual material policies support or count against the proposed development or are consistent or inconsistent with them, and (b) whether or not the proposed development is in accordance with the development plan as a whole: *Cooper v Ashford Borough Council* [2016] EWHC 1525 (Admin) at [26].

ii) Development plans contain broad statements of policy, and it is not unusual for relevant policies to pull in different directions. Where they do, the planning authority has to exercise its judgement to determine whether a proposal accords with the plan as a whole, bearing in mind the relative importance of the policies in play and the extent of the compliance or breach: Lindblom LJ in *R (Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [28].

iii) When interpreting policy, there is a distinction to be drawn between supporting text to local planning policy and the policy itself. While the policy governs, the supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is

not itself a policy or part of a policy: Richards LJ in *Cherkley Campaign Limited v Mole Valley District Council* [2014] EWCA Civ 567 at [16].

iv) Although any conflict is resolved in favour of the policy itself, the obligation to determine whether the proposal is in accordance with the development plan as a whole requires consideration of the supporting text as well: Singh J (as he then was) in *Cherwell DC v Secretary of State for Communities and Local Government* at [31].

v) Where a policy fails to define a relevant term that may be read more or less broadly, it is appropriate to look at the supporting text for a steer as to the intention of the policymaker: Laws LJ in *Old Hunstanton Parish Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 996 at [32].

vi) The construction of conditions is a matter of law – the Court will seek to ensure a condition can be made to work: Lord Hodge in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85 at [34]; Beatson LJ in *Telford and Wrekin Council v Secretary of State for Communities and Local Government v Growing Enterprises Ltd* [2013] EWHC 79 (Admin) at [33].

vii) Where a scheme is provided for under a condition, the Council will have a wide discretion as to whether to approve the scheme – and in deciding whether to discharge the condition may have regard to the underlying policy framework but is not bound to follow it: Jay J in *R (Smith- Ryland) v Warwick DC* [2018] EWHC 3123 at [59] and [64].

viii) The proper interpretation of planning policy, including the NPPF, is ultimately a matter of law for the Court. Statements of policy are to be interpreted objectively by the Court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration or will amount to having regard to an immaterial consideration: Lord Reed in *Tesco Stores v Dundee City Council* [2012] UKSC 13 at [17] – [22].

ix) If a decision maker misdirects himself on a relevant policy, it follows that he is not in a position to lawfully apply it: Lindblom LJ in *R (Watermead Parish Council) v Aylesbury Vale DC* [2017] EWCA Civ 152 at [47].

x) On its true construction the "tilted balance" under the NPPF only applies, so far as relevant, where a development plan policy is absent or out of date; whether a housing policy is out of date for the purposes of the NPPF will (in large part) depend on whether there is a 5 year HLS: NPPF at para 11(d)(ii) at footnote 6; see also Holgate J in *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [13] - [16]

xi) Where a higher tier decision maker has determined an issue on the same facts, the Council should follow that decision unless it gives, and has, good reasons for not doing so: Lord Neuberger in *R (Evans) v Attorney General* [2015]

UKSC 21 at [66]; Patterson J in *R (Stonegate) v. Horsham* [2016] EWHC 2512 at [66]; May LJ in *R (Enfield LBC) v Mayor of London* [2008] Env LR 33 at [29];

xii) If new relevant material comes to light between a resolution and a grant, the Council may need to revisit the resolution: Parker LJ in *R (Kides) v South Cambridgeshire District* Council [2002] EWCA Civ 1370 at [125].

Ground 1: Affordable Housing

104. Under this Ground, the Claimant submits the provision of policy compliant affordable housing on the Site to meet the identified needs was a central issue. He contends that the price the Interested Party had agreed to pay made, on its own case, provision of policy compliant affordable housing impossible. He argues that in order to try to overcome this problem the Interested Party made an affordable housing offer which inverted the tenure mix to be provided and offered only small units, with none of the needed larger family units. In addition, he argues the Interested Party sought to have the ability to substitute off-site payment in lieu, which was hugely financially advantageous to it

105. The Claimant submits that all the key affordable housing issues - size, tenure and provision of off-site affordable housing in lieu of on site provision were left unresolved and "parked" for later resolution under Condition 10. The Claimant submits that under that Condition:

i) In relation to tenure, the Defendant acknowledges that a non-policy compliant mix could be approved "for good reason", or because of "other material considerations", and this leaves the door "wide open" to a non-policy compliant mix.

ii) In relation to size, a failure to meet the proportionate need for larger units was embedded in the permission without explanation or justification; and

iii) In relation to off-site provision, the Interested Party has been left in control as to how that could be triggered under Condition 10.

106. The Claimant therefore submits that when interpreted in accordance with standard principles, "Condition 10 *empowered* but did not *require* policy compliant AH". He argues that when the condition is discharged, the Defendant will have a wide discretion (*Smith-Ryland*) and it is contended that it would not be possible to challenge on discharge a non-policy compliant mix, or the availability of agreement to "off site in lieu" provision.

107. The Claimant submits that the Defendant knew the fundamental driver behind the question of affordable housing and there was no reason to think that a policy compliant mix could be delivered and every reason to conclude the opposite. Despite this, members were told that the proposal was policy compliant, and that advised that affordable housing was an important benefit to outweigh the "considerable harm" to the non-designated heritage assets. The Claimant advances nine specific arguments as to the unlawfulness of the Council's decision. I will deal with each of those criticisms in turn below.

Analysis

108. As many of the Claimant's submissions focus on the effect of the Council's grant of planning permission, and in particular Condition 10, it is convenient to start with the proper construction of that document and the effect of Condition 10.

109. On its face, the notice of planning permission for the Third Planning Application grants planning permission for the description of development described in the notice, namely residential development of 100 units "including 32 no affordable housing units". There is nothing in this description itself which stipulates the tenure mix of those affordable housing units.

110. The notice grants planning permission "in complete accordance with the application shown above, the plan(s) and information contained in the application, and subject to compliance with the following conditions" which are then set out in the notice. Condition 2 requires completion of the development "strictly in accordance with" an identified list of plans. As one would expect for a full planning application, the effect of this is that the development will need to be carried out in accordance with those plans. Consequently, the size of the 100 dwellings to be provided, including in Blocks G and H, is fixed by those plans. It is therefore inevitable that the size of the 32 affordable dwellings which are required to be provided within the scheme is necessarily constrained because those dwellings will have to be provided within the 100 dwellings that are to be constructed in accordance with those plans.

111. That said, neither the description of the development permitted, nor Condition 2 and the plans that it incorporates, necessarily require the provision of the affordable units within Blocks G and H of the permitted scheme. Whilst that is clearly what was envisaged, the description and Condition 2 of themselves do not fix that result. It may be that there is something specified on the relevant plans themselves which does fix the location but it is unnecessary for me to explore that further here.

112. Condition 10 (set out in detail above) deals further with the 32 units of affordable housing that form part of the development permitted. Condition 10 requires a scheme for the provision of affordable housing as part of the development to be submitted and then approved in writing by the Council before the development permitted can begin. This therefore takes effect as a condition precedent for development commencing on the Site. It is not sufficient for the beneficiary of the planning permission simply to submit whatever it chooses by way of an affordable housing scheme; that scheme also has to be approved by the Council. It is therefore necessarily within the Council's power to refuse to approve a scheme submitted pursuant to Condition 10 if it is not satisfied with what is proposed.

113. Condition 10 specifies that the scheme that has to be submitted and approved has to include, amongst other things "the numbers, type, tenure and location on the site of the affordable housing provision to be made, which shall consist of not less than 32 affordable dwellings." It is inherent in this that the beneficiary of the planning permission could submit a scheme for the provision of more than 32 affordable dwellings to be provided as part of the permitted 100 residential units, but it cannot submit a scheme in accordance with Condition 10 if it proposed less than 32 such affordable dwellings. So, whilst the scheme has to include details of the numbers of

affordable housing units to be provided, this does not detract from the requirement that a minimum of 32 units has to be provided.

114. The fact that the scheme must also identify the location of the affordable housing within the Scheme is consistent with the point I have already made that the description of development and the plans may not, of themselves, fix the location, even though Blocks G and H were envisaged as the blocks to accommodate such provision. However, it is inherent in the requirement that the location be identified in the scheme, and the need for the Council to approve the scheme, that if the affordable housing were proposed in locations which the Council did not regard as acceptable, then the Council would have the ability to refuse to approve the scheme submitted.

115. The scheme must also specify the "type" and "tenure" of the affordable housing to be provided. This should also be read with the requirement in sub-clause (iii) of Condition 10 which also requires the scheme to specify the arrangements for the transfer of the affordable housing to an affordable housing provider or for the management of the affordable housing. The arrangements under that sub-clause are likely to depend on the type and tenure of affordable housing proposed. The requirement for the scheme to specify the type and tenure of what is proposed is also consistent with the fact that the description of the development does not fix the tenure to be provided. Given that the planning permission granted does not fix the type and tenure of affordable housing to be provided (as opposed to the minimum quantity of units), it is therefore unsurprising that this is a matter which will need to be covered by the scheme that has to be approved by the Council before the development can begin.

116. In reality, there is no real dispute between the parties that this is the effect of the planning permission and Condition 10. The Claimant positively contends that the effect of the planning permission and Condition 10 is "to park" these matters for later determination. Ultimately, I agree; but I do not consider there to be anything unlawful in principle with such an approach. It is common, and in many respects, an intrinsic feature of conditions that they "park" matters for future determination. In this case, the question of (amongst other things) the tenure mix of the minimum number of 32 affordable units has been left for future approval by the local planning authority.

117. Condition 10 also requires the details of the scheme to include a mechanism for delivering an alternative method of providing affordable housing at the same level as approved "in the event that no affordable housing provider acquires some or all of the affordable housing within a reasonable timescale". The Claimant identifies that this requirement is addressing the potential prospect of the required amount of affordable housing (here no less than 32 affordable dwellings) being provided off-site if no affordable housing provider can be found to deliver it on-site within a reasonable timescale. It is clear from this part of Condition 10 that the scheme to be submitted for approval by the local planning authority must address this prospect and provide a mechanism to address it. I will deal with the question of "policy compliance" in respect of this provision, along with the other provisions addressed above, shortly.

118. One of the Claimant's criticisms is that this provision surrenders control of whether affordable housing is provided on-site or off-site to the Interested party. The Claimant submits that the Interested Party could, for example, set the price for the affordable

housing too high such that no affordable housing provider would acquire the affordable housing. In this regard, the Claimant points to his legitimate concerns that the Interested Party may have offered too high a price for the Site. He submits that the Interested Party is therefore likely, or even bound, to seek too much for the affordable housing in order to cover its own costs.

119. In my judgment, Condition 10 does not surrender control to the Interested Party in the way that the Claimant suggests. It is true that the scheme that has to be submitted for approval to the local planning authority must contain a mechanism for an alternative method of delivering the affordable housing required if no affordable housing provider is found for some or all of the affordable housing within a reasonable timescale. The intended mechanism is therefore to deal with a situation where the Interested Party has not managed to find an affordable housing provider within a reasonable timescale. It is also true that if the Interested Party sets unrealistic terms for any affordable housing provider (including too high a price), or to fails to seek an affordable housing provider at all, then the Interested Party might try and invoke such alternative mechanism with which this provision is concerned. What this overlooks, however, is that the scheme in which such mechanism is to be specified has to be submitted and approved by the local planning authority. This means that the mechanism itself, within that scheme, will need to be particularised as part of the scheme and it will require the approval of the local planning authority before it can take effect.

120. In my judgment, this means that the local planning authority still has control over any mechanism that is proposed before it is approved. It is inherent in what is envisaged that the specifics of the mechanism will need to be scrutinised before being approved by the local planning authority. As part of that process, one can legitimately expect the local planning authority to ensure that the Interested Party is not given unilateral control as to how the mechanism operates. Thus, for example, one would legitimately expect that the mechanism will need to address the mechanics of what constitutes an effective search for an affordable housing provider, and for judging whether an appropriate and reasonable price has been sought. The local planning authority retains power to decide the detail of such criteria as part of the scheme. These are all ultimately matters for the future judgment and determination of the local planning authority in the discharge of Condition 10 itself. If the mechanism proposed as part of the scheme under Condition 10 is regarded as unsatisfactory by the local planning authority in any of the detail specified (for example, if the envisaged search procedure or the envisaged procedure for determining a reasonable price surrenders all control to the Interested Party in the way that the Claimant suggests), then the local planning authority will have the ability to refuse to approve the scheme in question. In my judgment, Condition 10 still ensures that the local planning authority do have control because the local planning authority's approval of the scheme that will specify such detail is required.

121. The local planning authority will no doubt wish to be astute to ensure that any mechanism submitted does not surrender control in the way that the Claimant is concerned about. One would expect a local planning authority to be astute in such matters in order to retain control over the provision of affordable housing on any site. Here, the local planning authority is already well aware of the Claimant's particular concern that the Interested Party has paid too much for the Site. That particular

concern may no longer be so acute in the Claimant's mind if the conditional contract for acquisition of the Site by the Interested Party has expired. Whether or not it has expired is not critical, as planning permission runs with the land in any event. The local planning authority's scrutiny of any scheme submitted to discharge Condition 10 will therefore naturally need to ensure that the local planning authority retains appropriate control as to the exceptional circumstances in which off-site affordable housing might be accepted in substitution for on-site delivery (given the local planning authority's policy which I address further below) whatever price has been offered, or comes to be paid, for the Site. The important point for the present challenge is that such control still exists in principle in consequence of Condition 10. The Claimant and others may well be very interested in the way that control is exercised by the Council in the future, but that does not affect the lawfulness of the imposition of Condition 10. It retains control in principle; and, to use the language of the Claimant, it merely "parks" such questions for future determination by the local planning authority.

122. I agree with the submissions made by Mr Green on behalf of the Defendant that there is nothing unusual, but more importantly, nothing unlawful in principle in imposing a condition on a planning permission which requires the submission of further details for future approval in this way (see eg *R v Flintshire CC, ex p Somerfield Stores Ltd* [1998] PLCR 336 at 345F-347A and *R (Hayes) v Wychavon DC* [2014] EWHC 1987 (Admin), [2019] PTSR 1163, at paragraphs 13 and 15).

123. Having considered the effect of the planning permission, and Condition 10 in particular, it is convenient to consider the question of whether Condition 10 means the development is "policy compliant", before turning to deal with each of the Claimant's specific criticisms.

124. The focus of the Claimant's concern in this respect is Policy DM2 of the Council's Adopted Core Strategy and Development Management Policies. This deals with the provision of affordable housing on residential sites. For a location such as this it states:

> "Whether in total or in phases, the District Council will expect 1 in 3 units to be affordable housing unless its provision is not required due to:
>
> a) Lack of identified local need in the area;
>
> b) Site conditions, suitability and economics of provision
>
> The District Council will need to be satisfied as to the adequacy of arrangements to ensure that these homes are offered to local people who can demonstrate need, at a price which they can afford, and that its enjoyment is by successive, as well as initial, occupiers.
>
> In exceptional circumstances, where the District Council and the developer consider that a site is not suitable to accommodate an element of affordable housing, the District Council will expect a financial or other contribution towards

> the provision of affordable housing on a different site within the same area.
>
> *Footnote: "Affordable Housing" is defined in paragraph 3.51*"

125. Paragraph 3.51 of the Core Strategy identifies that "Affordable Housing" is defined in Annex 2 of the NPPF. It then sets out the corresponding definitions of affordable housing in Annex 2 of the NPPF that existed at the time of adoption, namely comprising "social rented" housing, "affordable rented" and "intermediate housing".

126. The accompanying text to Policy DM2 includes paragraphs 5.11 and 5.12 as follows:

> "5.11 The Council commissioned a Local Housing Assessment, completed in July 2006, which identified the affordable housing need of the district as 24% of all new homes. Policies SP1, SP19, DM1 and DM2 provide the framework within which to provide the estimated 1,896 affordable homes required over the period 2010 to 2027. The breakdown of these homes will be:
>
> - 75% affordable rent and
>
> -25% other affordable homes.
>
> Policy DM2 sets out how this can be achieved."
>
> 5.12 Based on the proportions arising from the survey, the following targets will be set for affordable housing provision over the plan period 2010 to 2027:
>
> - 1,422 affordable rented units (75% of 1,896);
>
> - 474 other affordable (25% of 1,896)."

127. It is well-established, as Mr Forsdick accepts, that there is an important distinction between a policy and its supporting text. Whilst the supporting text is plainly relevant to the correct interpretation of a policy, it is not itself a policy, or part of the policy (see *Cherkley* above).

128. In this case, Policy DM2 sets out an expectation that 1 in 3 units on sites to which the policy applies will be "affordable housing" as so defined, unless the exceptions apply. This sets a policy expectation as to the amount of affordable housing that will be provided. The second paragraph of the policy also identifies that the district council will need to be satisfied as to the adequacy of the arrangements in the way set out in the policy. The third paragraph also articulates a policy requirement for provision of that affordable housing on site unless exceptional circumstances apply as articulated in the last paragraph of the policy. By contrast, the policy itself does not impose any requirements as to the size or tenure mix of the affordable housing in order to comply with the policy.

129. Mr Forsdick relies upon paragraphs 5.11 and 5.12 to amplify the meaning of the "adequacy of the arrangements" about which the Council will need to be satisfied

under the second paragraph of the policy. As I understood it, he contends that these paragraphs result in a requirement that the tenure mix of affordable housing on any site should be 75% affordable rented and 25% other affordable homes. I do not accept that interpretation for two main reasons.

130. First, such an approach conflicts with the well-established principle in *Cherkley* of not treating the explanatory text as part of the policy itself. In the absence of any stated requirement within the policy as to the required tenure mix (or indeed size) requirements, it is not correct to import such requirements into this particular policy given the wording of the explanatory text. Had the policy intended to set a tenure mix requirement for a scheme to be policy-compliant, it could have done so; but it does not.

131. Second, even if one used the explanatory text to interpret the policy in the way Mr Forsdick does, or to import requirements into the policy, I do not consider the explanatory text bears the meaning Mr Forsdick advocates. Read as a whole and in a fair way, paragraphs 5.11 and 5.12 are referring to a target tenure mix for the area as a whole in light of the Local Housing Assessment work carried out in July 2006. In the context of an overall requirement for 1,896 affordable homes within the plan period, paragraphs 5.11 and 5.12 are setting the target breakdown of those homes to be provided in the proportion 75% affordable rented and 25% other affordable homes. It does not follow from such targets that there is any consequential policy requirement for each and every site to provide affordable housing in accordance with that proportion. It would, for example, be possible for some sites (because of their nature and form of development) to provide a higher percentage of affordable rented homes and some sites to provide a higher percentage of other affordable homes, without preventing the Council from reaching its overall target provision. Paragraphs 5.11 and 5.12 therefore cannot be construed as setting policy requirements for each and every site in the way Mr Forsdick contends (even if they could be treated as setting policy requirements despite their status as explanatory text).

132. I recognise that if the Council is to achieve its target, it may well have to try and secure the target split on the majority of its sites. The delivery of affordable rented provision is likely to be more challenging than other affordable homes such as intermediate housing. That does not convert that target split expressed in the explanatory text into a policy requirement for each site.

133. For these reasons, I consider that officers were entitled to advise, and the Council were entitled to conclude, that the provision of no less than 32 affordable units out of 100 residential units was compliant with Policy DM2 as properly interpreted. The policy does not prescribe the size or tenure mix of that affordable housing.

134. Even if Policy DM2 had included a required tenure mix, or if I am wrong about the effect of paragraphs 5.11 and 5.12, I do not consider this would assist the Claimant in this particular case. The development approved by the planning permission does not fix the tenure mix to be provided on the site. To the contrary, Condition 10 specifically reserves the question of tenure mix for future determination in accordance with the scheme that has to be submitted and approved by the local planning authority in due course. The local planning authority retains control over the tenure mix to be provided.

135. As to the size of the affordable housing units, neither the policy itself, nor paragraphs 5.11 and 5.12 say anything about the size of the units. It is true that the development approved, as a full planning application fixes the size of the 100 units that will be provided on the site. There is a necessary limitation on the size of the units of any affordable housing that can be provided. It was also specifically envisaged that the affordable housing units would be provided in Blocks G and H, and in the proportion of 22 1x bed units and 10 2x bed units as set out in the 2019 Report (and its predecessors). In my judgment, none of this can affect the lawfulness of the officer and member view that the scheme complied with Policy DM2. Neither the policy nor the explanatory text imposes any requirements on the size of the units to be provided. It therefore remained a matter of planning judgment for the Council as to whether provision of at least 32 units within the scheme proposed, and more specifically in the form they contemplated, would meet the requirements of Policy DM2. It is very clear from the way in which the matter was reported to the committee, the objections that were made and the record of the committee meeting that members were well aware of the details of the scheme (in terms of the size of units and the affordable housing contemplated). They were also well aware of the objections on affordable housing grounds. In my judgment, members could not have been materially misled in any of these respects. It was a matter for their planning judgment as to the acceptability of what was proposed.

136. I agree with Mr Forsdick that the third paragraph of the policy does set out a policy expectation that affordable housing will be provided on site unless the exceptional circumstances identified in the policy apply. In those circumstances, I agree that a scheme for the site which did not make provision for affordable housing on the site would not be compliant with Policy DM2, absent the sort of exceptional circumstances justifying alternative provision. But this is not what the development proposed, nor is it the inevitable result of the planning permission granted and the terms of condition 10.

137. It is clear from the 2019 Report and the terms of the application that the development proposes delivery of 32 affordable dwellings on the site. It was specifically contemplated that these units would be delivered in Blocks G and H. As to Condition 10, I have already identified why it does not mean that the local planning authority have necessarily agreed to off-site delivery, or surrendered control as to the circumstances in which such off-site delivery would be accepted. The fact that the scheme requires a mechanism to deal with exceptional circumstances does not make the development itself non-compliant with Policy DM2. The local planning authority retains control over the approval of any such scheme. It will be able to assess the scheme against any relevant policy framework at the time of the discharge of the condition and all material considerations.

138. For all these reasons, I consider that the Council officers and the Council were entitled to conclude that the scheme complied with Policy DM2 of the adopted plan.

139. Reference has also been made to what were, at the time, emerging Policy SCLP5.10 and emerging Policy SCLP 12.32 relating to the Site itself.

140. Like adopted Policy DM2, emerging Policy SCLP5.10 also identifies: (1) an expectation of the provision of 1 in 3 units as affordable dwellings on a site of this size and (2) the expectation of provision on-site unless there are exceptional

circumstances specified. Unlike adopted Policy DM2, emerging Policy SCL5.10 also set out a policy expectation of the tenure mix – 50% affordable/social rent, 25% shared ownership and 25% for discounted ownership in the policy itself. The inclusion of this expectation within the body of the policy itself reinforces the point that I have already made that if there had been a policy intention to set a tenure mix in Policy DM2, one would have expected to have seen it within the body of the policy itself.

141. As an emerging policy, rather than an adopted policy, the question of "policy compliance" for the purposes of the adopted development plan did not arise in the same way. However, for the reasons I have already addressed when considering Policy DM2, I consider that officers and the Council were entitled to conclude that the proposal was also "policy-compliant" with Policy SCL5.10. That is because (as set out above), the development it has approved ensures that it is able to secure an appropriate tenure mix for the affordable housing when dealing with the discharge of Condition 10.

142. The Interested Party was contemplating a potential tenure mix that would not have complied with this emerging policy. But this intention does not make the development the Council did approve, with the imposition of Condition 10, non-compliant with the emerging policy. As I read it, one of the benefits of Condition 10 is that it explicitly requires the issue of tenure mix to be dealt with in the future scheme. The Council will have the ability to scrutinise whatever scheme is proposed, including tenure mix, and decide whether or not to accept it in light of relevant policies and all other material considerations.

143. As to emerging Policy SCLP 12.32, I did not understand the Claimant to advance any contention that the Council's decision was unlawful in light of that policy. The policy itself refers to the inclusion of affordable housing on-site, but I have already identified that is what the scheme proposes.

144. In light of that more detailed analysis of the planning permission and Policy DM2, I turn to each of the Claimant's specific criticisms under Ground 1.

145. First, Mr Forsdick argues that policy compliance was not secured by Condition 10, but members were repeatedly told that it was and so they were materially misled.

146. I agree that officers advised, and members can be treated as having concluded, that the proposal was "policy compliant" with Policy DM2, and that Condition 10 was part of securing that policy compliance. The reason given for the imposition of Condition 10 identifies as much. But I reject the basic premise of Mr Forsdick's submission that such policy compliance was not secured by Condition 10, for the reasons I have already articulated. The Council was entitled to conclude that the development with the imposition of Condition 10 *does* secure policy compliance with the requirements of Policy DM2, as properly interpreted. The description of the development specifies the required number of affordable dwellings. Condition 10 thereafter provides for a scheme which will have to be submitted, but critically approved, before any development can begin. The local planning authority retains control over the approval of that scheme. It enables it to secure compliance with whatever policy is extant at the time if it requires such compliance in light of all material considerations at the time of approval.

147. Second, Mr Forsdick submits that since such affordable housing issues had not been resolved, members were materially misled in being told that their previous concerns (as to tenure, size and off-site provision) had been overcome, whereas these matters had been "parked" for later consideration under Condition 10.

148. Out of deference to this and similar submissions that members were materially misled, I have set out in some detail what advice members were given at various stages, along with what the respective minutes record about the meetings. This consequently has made this judgment undesirably lengthy. Having considered all of the relevant material in detail, I ultimately have no hesitation in dismissing any suggestion that members were materially misled (in the sense identified in *Mansell*) on this issue, or in respect of the affordable housing issue generally.

149. To the contrary, it is evident that members would have been conspicuously well-informed about this issue in determining this application. The reasons for this include: (1) the fact that this was the third planning application for a very similar form of development, in circumstances where the issue of affordable housing had been a feature of the consideration for each planning application; (2) members knew that objections were being advanced in relation to the affordable housing proposed on each such application; (3) members were not only informed about the affordable housing issue in each of the respective reports, but also heard specific objections on affordable housing when considering the First and Third Planning Applications; (4) the issue of whether previous concerns expressed by members on affordable housing on the First Planning Application had been reconsidered at a second meeting to deal with that application, at which the equivalent of condition 10 was considered in detail; (5) the issue of whether Condition 10 for the Third Planning Application addressed the Council's previous concerns on the First Planning Application was specifically raised again at the Council's committee meeting to determine the Third Planning Application.

150. When dealing with the First Planning Application for the first time in October 2017, the SCDC Planning Committee resolved that formal approval should not be issued until a detailed scheme for the delivery of affordable housing had first been submitted and approved by the Planning Committee at a subsequent meeting. That Planning Committee did therefore envisage and require a more detailed scheme to be approved before planning permission was granted. This was rather than resort to the sort of condition that ultimately has been approved under Condition 10. But the First Planning Application was reported back to the SCDC Planning Committee in April 2018. In the report back to that committee, officers set out their view that approval to grant with a condition like condition 10 should be given. They considered it was a suitable mechanism for its delivery (see paragraphs 5.2 and 5.3 of the 2018 Report and the second Update Sheet). Objectors did not agree. The SCDC Planning Committee also heard from objectors (including those who expressed themselves in forceful terms) on that point (as can be seen from the Minutes). They also heard about objections to the proposed form of the condition and the potential for the scheme under Condition 10 to have a mechanism for affordable housing off-site. The Head of Planning had a different view. Ultimately the members agreed with their officers. They ultimately decided not to require a more detailed scheme to be provided at that stage, although they had originally contemplated it should.

151. A similar situation arose when the Third Planning Application came to be considered and determined. In the 2019 Report to committee officers advised members that the scheme overcome previous concerns raised by the Council regarding the provision of affordable housing. It is important not to read such advice over-forensically. Members had subsequently accepted the principle of a condition to address their original request for a more detailed scheme when dealing with the First Planning Application. I do not consider it to be materially misleading for officers to advise that the Third Planning Application overcame previous concerns in this regard. It too involved the use of a condition. It was a condition which members had previously accepted to address their concerns. Moreover, members were provided with the Minutes of the previous meetings at which this issue had been aired. In addition, it is evident from the objections and the Minutes of the meeting in 2019 that members would have continued to be well aware of the strong views on what affordable housing should be secured.

152. It is not for this court to adjudicate on the planning merits of those competing, but rational, points of view. The Claimant argues members were materially misled by officers that their previous concerns had been overcome, whereas Condition 10 "parked" concerns for later determination. In my judgment, there is no realistic basis for this contention. Members would have been very well aware of what was proposed in terms of Condition 10 and its effect. It was explained in the materials. Specific objections to it were raised. Consequential discussions ensued regarding its effect. Members would necessarily have been aware of the extent to which it "parked" matters for later determination, along with objection to that course of action by others. Ultimately members were content to allow those matters to be "parked" for future determination, in accordance with the views of their own officers that this was the appropriate course of action. They were entitled to reach that judgment and did so without being materially misled.

153. The third criticism is the contention that the Interested Party was given control of triggering off-site provision under Condition 10, whereas members were repeatedly told that on site provision could or would be secured. I reject this submission for the reasons I have already identified. It involves a misreading of Condition 10 and its effect. The Council retains control of approving any scheme which sets out a delivery mechanism which would permit delivery of affordable housing off-site. The Council will no doubt need to be astute in the ordinary way to ensure that it exercises that control effectively. Condition 10 does not surrender its ability to do just that. In so doing, the Council can scrutinise any proposed mechanisms, against any relevant policy test that applies at the time, whether that be the question of exceptional circumstances referred to in Policy DM2 as it was then, or as now expressed in an adopted version of what was previously emerging Policy SCLP5.10, or any other policy and all relevant considerations.

154. The fourth point advanced is that the Council failed to take into account "the necessarily material inevitability of a non-policy compliant affordable housing outcome". The Claimant submits this was demonstrated by the history relating to the inflated asking price. He says that that the 2019 Report "blandly repeated" advice in the 2018 Report on affordable housing, but omitted to refer to subsequent events to the effect that "the 2018 expectation of policy compliance had quickly become just £3.02m payment in lieu".

155. I am far from satisfied that there was any necessary "inevitability" of a non-policy compliant affordable housing outcome in the way the Claimant suggests. The Claimant certainly has identified evidence which makes it clear the Interested Party had been seeking to reduce the amount of affordable housing to be provided generally. The Interested Party was contemplating and calculating the cost of provision off-site. The Second Planning Application was, of itself, an attempt to reduce the affordable housing requirement provided. At the time the Third Planning Application was made, and then determined, there was material indicating that previous problems in finding an affordable housing provider might have been overcome. The Third Planning Application was made in conjunction with an affordable housing provider. At the Planning Committee meeting, the agent for the Interested Party identified that agreement had been reached to deliver the affordable housing site and the necessary legal documents to be able to do so were in preparation. I therefore reject the basic premise of the submission as to the inevitability of a non-policy compliant housing outcome.

156. It may be that the Claimant's submission in this respect is bound up with its earlier submission (which I have rejected). That was the contention that compliance with Policy DM2 in fact requires a specific tenure mix and this was not a mix contemplated by the Interested Party or affordable housing provider. If so, the submission is mistaken given the correct interpretation of Policy DM2 that I have identified.

157. In any event, I am not persuaded that there is any substance to the complaint in principle. The difficulties of delivering affordable housing on this Site, as with other sites in the Council's area, were self-evidently well-known to the Planning Committee. This would have been apparent from all the material that had been provided (including the objections which they heard). It was also self-evident from the history of the planning application themselves. Members of the Committee would have been well aware of these challenges. What matters, however, is whether the Council acted lawfully in granting planning permission when imposing the controls in the way it did. I consider it did act lawfully. The description of the development refers to the provision of 32 affordable dwellings. Condition 10 retains control over any future scheme for the delivery of affordable housing in the way I have explained. Even if the provision of affordable housing on the Site proves to be challenging or unachievable, the Council ultimately retains the ability to control the development proceeding if no appropriate affordable housing provision can be delivered.

158. The fifth contention is that the Council tested policy compliance on an "unlawfully narrow basis", looking at the number of units only, rather than also considering tenure, size and the question of on-site provision. It is said the Council misdirected itself as to the correct interpretation and application of its own policy DM2. This largely depends upon the interpretation of Policy DM2 which I have already rejected. But it also ignores the fact that Condition 10 retains control over the question of tenure and off-site provision. As to size, the Council members were necessarily aware of the size of all units (and therefore necessarily any element of affordable housing on site which would have to be within those units) when deciding to approve the scheme.

159. The sixth submission is a contention that the affordable housing offer was not policy compliant because Condition 10 allowed flexibility on tenure mix. It is said the 2019 Report was silent about this and it was not an issue "which could be lawfully parked"

under Policy DM2. It is argued that the inverted tenure mix proposed in the planning statement was not policy compliant. I reject this criticism for the same reasons that I have already articulated about policy compliance and the effect of Condition 10.

160. The seventh submission is that the Council failed to take into account the need for larger units as a necessarily material consideration. The Claimant seeks to rely on what he says was the up-to-date need set out in paragraph 5.38 of the emerging Local Plan, and say this refers to a need for 60% of units of 3 bedrooms or more. It is alleged that members were not told that the scheme would not provide larger affordable housing units and no justification for this failure to provide such units was given. I reject this submission both in light of the facts of this case and as a matter of principle.

161. On the facts, this submission does not get off the ground. The Council members approving the Third Planning Application cannot have been in any doubt whatsoever as to what size units were being provided as part of the scheme (and consequently the size of any affordable housing units). This was a full planning application. The merits of the scheme in terms of its design and layout were the subject of intense scrutiny at every stage. Like their predecessors, the 2019 Report for the Third Planning Application advised members as to the size of units being provided, along with identification of what was proposed in terms of the size of units for the affordable housing within Blocks G and H. It is therefore simply unrealistic to contend that members were not aware that the scheme did not involve larger affordable housing units. On this basis alone, this submission fails.

162. In addition, I cannot accept the particular gloss that the Claimant seeks to put on paragraph 5.38 of the emerging Local Plan in this context as founding the basis for an error of law in the Council's determination as a matter of principle. For a start, paragraph 5.38 of the emerging Local Plan is explanatory text to an emerging plan. It is not even emerging policy. But leave that aside, paragraph 5.38 deals with needs generally throughout the district, not specifically the needs for affordable housing sizes, so it is misplaced to equate these two things. Moreover, even on its own terms it seeks to interpret the figures in a way which actually places an emphasis on the shortage of smaller properties, referring in the text to a need "for at least 40%" of new housing to be 1 or 2 bedroom properties. And as with the explanatory text that accompanies Policy DM2, in referring to needs for the district as a whole, it is not necessarily imposing a policy requirement for each and every site. I therefore do not consider that there was any failure to take account of a material consideration as alleged.

163. The eighth contention is that there was no attempt to justify off-site provision by reference to exceptional circumstances. It is argued there were no such exceptional circumstances given the Site is suitable for affordable housing on site. In this respect, the Claimant also criticises the fact that members were told orally that agreement had been reached with a registered provider, but they were not told that this was limited to the provision of 24 intermediate units, or that such provision would make the provision of affordable rented units more difficult.

164. I reject the basic premise of the first part of this submission for the reasons I have already identified. The Claimant has wrongly interpreted the planning permission and Condition 10 as necessarily permitting off-site provision without demonstration of

exceptional circumstances, whereas that is not its effect. As to the second part of the submission, the chronology of events does not provide a sound basis for this criticism either.

165. At the meeting, the Council were advised by the Interested Party's agent that it considered affordable housing could be provided on site and a legal agreement to that effect was in contemplation. That was on 22 October 2019. Planning permission was subsequently issued on 29 November 2019. The Claimant relies on an entry on the Charges Register on the Land Registry title document concerning an agreement for sale that is dated 5 December 2019. That post-dates the Committee meeting and the issue of planning permission.

166. The Claimant has interpreted what is disclosed of that agreement to mean that the agreement with Sage Housing Ltd relates to 24 units only and this is likely to be for 24 intermediate units which the Interested Party had in contemplation, leaving no agreement for the delivery of 8 units of affordable units. There is much inference in this process of interpretation; but the Claimant fairly points out that neither the Defendant nor the Interested Party has filed evidence to contradict that interpretation. I am therefore prepared to proceed on the basis that the Claimant's interpretation is correct (in the absence of other evidence or the sale agreement itself). But even on that basis, it does not provide a basis for impugning the Committee's resolution to grant planning permission or the subsequent issue of the notice on 29 November 2019. Whatever sale agreement has been entered into by the Interested Party and any affordable housing provider after the event, the acceptability of the affordable housing provision proposed will be a matter for control under Condition 10 by the Council as local planning authority. The Council will be able to reject any scheme under Condition 10 if it considers it to be unsatisfactory.

167. It would, of course, be a matter of general concern if the pending legal arrangements to which the council's attention was drawn had been misrepresented in a material way. But there is no direct evidence before me that it necessarily was. The Minutes of the Council meeting simply record the Interested Party seeking to assure members that affordable housing could be delivered on site. He advised that terms had been agreed with the registered provider and an anticipation that the necessary legal documents had been drawn up and were likely to be exchanged on 25 October 2019. He did not actually give detail of those terms (for example, if they were limited at that stage to the provision of 24 intermediate units on site). Any such terms would not have had legal effect until exchange. As the legal agreement does not appear to have been signed until December, it is possible that the terms previously thought to be agreed had changed.

168. It is certainly fair to say that the Minutes indicate that reassurance was being given that a legal agreement for delivery of all the affordable housing on site was in contemplation. But even if that was reassurance was misplaced, unjustified or even misleading, I am not ultimately persuaded that it affects the lawfulness of the Council's decision to grant permission in the way it did. That is because whatever comfort members might have taken from such representations, ultimately the Council granted permission in a way which retains control over the delivery of affordable housing on the Site in the way I have described. If acceptable affordable housing cannot ultimately be delivered (for whatever reason), the Council retains the control to prevent the development from proceeding.

169. The final point advanced by the Claimant is that the Defendant cannot rely upon Condition 10 to overcome the points of unlawfulness it says arose for six reasons. It argues that: (1) the Defendant is not bound by the condition, nor the law, to follow the underlying policy framework in discharging the condition; (2) the construction of the condition is a matter of law and the condition does not allow the Defendant to insist on the offer to a registered provider to be on particular terms; (3) the Interested Party could seek to justify a non-policy compliant scheme on the basis that that is what it had offered and the basis upon which permission had been granted; (4) the Interested Party could seek to justify a non-policy compliant scheme, on the basis that no affordable sale had occurred and this is a matter over which it has complete control under the affordable housing Condition, or on the basis of "other material considerations"; (5) as a result of the lack of precision in the condition, the Defendant will be unable to set later requirements as to what the scheme must cover which it could and should have imposed at the outset, as this would amount to a derogation from the grant; (6) the Defendant could not insist on a policy compliant size mix given that other conditions fix the size of the units.

170. The bulk of these points raise matters which I have already addressed and rejected in my earlier analysis as to the proper interpretation of Condition 10. Contrary to the Claimant's submissions, the Council does retain control over the matters of concern that the Claimant has identified.

171. It appears that the Claimant's real concern about the principle of Condition 10 is that while Condition 10 *empowers* the local planning authority to approve a scheme which does deliver policy-compliant affordable housing on or off-site, it does not *require* the scheme it approves to be policy-compliant. The Claimant is concerned that the local planning authority will have a wide discretion as to whether or not to approve the scheme that is ultimately submitted, including any mechanism as to off-site delivery. He is concerned that the discharge of that condition will require a planning judgment which would permit the local planning authority to approve a non policy-compliant proposal (see, e.g., *R (Smith-Ryland) v Warwickshire DC* [2018] EWHC 3123 (Admin) at paras 40, 45) and that the decision to grant a permission with such a condition is unlawful.

172. In my judgment, there is no substance to this complaint as a matter of principle. I have already identified that the imposition of conditions which "park" matters for subsequent approval is commonplace in practice; the imposition of conditions on a planning permission is specifically permitted by the statutory scheme. It is correct that on any subsequent application to discharge such a condition, the local planning authority will be exercising a planning judgment. This will inevitably involve the exercise of a discretion. It is also correct to say that the local planning authority will not be required to exercise that discretion in accordance with any particular development plan policy. It would therefore be lawful in principle for a local planning authority to approve a scheme which turned out not to be policy compliant (in terms of whatever policy framework happens to be in place at the time of discharge), subject to the ordinary principles of acting lawfully in a public law sense. An example might be a decision to accept a mechanism to allow for off-site affordable housing provision which was not predicated on the existence of exceptional circumstances if the local planning authority ultimately judged that it was appropriate to approve such a scheme.

Its decision to do so would be subject to control by way of judicial review in the ordinary way.

173. In my judgment, however, there is no basis for suggesting that deciding to "park" such determinations into a condition of this kind is unlawful simply because the decision-making will be discretionary, and a non-policy compliant scheme could potentially be approved. It will still be a decision of the local planning authority. The local planning authority therefore retains power over the decision itself in its capacity as a local planning authority, discharging its planning functions. By whom the decision is taken, and what oversight is applied, is a matter for the local planning authority's scheme of delegation in the ordinary way.

174. Even at the stage of determining a planning application (rather than discharging a condition), a local planning authority is entitled to reach decisions which are not policy-compliant. Whilst the statutory framework creates a presumption at that stage that decisions are taken in accordance with the development plan, that is subject to the principle that material considerations can indicate otherwise.

175. I do not consider there is anything unlawful in a local planning authority deciding to "park" matters relating to the detail of the affordable housing for future determination in a condition of the type specified in Condition 10. I can see that a problem could arise if the local planning authority purported to "park" matters of principle for future determination under a condition, but where the grant of permission itself precluded the authority from reconsidering those principles on the basis that it would derogate from the grant of what had been permitted (see eg *Medina Borough Council v Proberun Ltd* [1990] 61 P&CR 77). In my judgment, that is not what has occurred in this case. Such a conclusion involves misinterpreting the scope of what remains controlled under Condition 10 for the reasons I have identified.

176. For all these reasons, I reject the Claimant's challenge under Ground 1.

Ground 2 – the tilted balance.

177. I can deal with the Claimant's challenge under Ground 2 more shortly.

178. The Claimant's point is relatively simple. The 2019 Report claimed to have updated the 2018 Report. In reality, it essentially repeated advice in the 2018 Report that did not reflect the reality of the situation. He argues that the Report advised the Council that the "tilted balance" in favour of the development under the NPPF was engaged on the basis that policy SP2 was out of date, but without any proper analysis of the situation. The Claimant relied upon the Inspector's decision on the section 78 appeal concerning land at Aldeburgh dated 21 November 2018 and the fact that she considered that the Council had a five year housing land supply and so Policy SP2 should have been treated as up-to-date, such that the "tilted balance" was not engaged. In any event, so the Claimant submits, that position was confirmed by the Inspector's decision in the subsequent Street Farm case issued on 5 November 2019 and the officers failed to refer the matter back to Committee in light of that decision.

179. In response, the Council submits that in the Aldeburgh decision, the Inspector had found Policy SP2 out of date. Therefore there was no error in the 2019 Report in proceeding on the basis that the tilted balance was engaged. Whilst the Inspector in

the Street Farm decision concluded that Policy was not out-of-date, that decision post-dated the Council's consideration at committee. The Council submits that there was no need to refer the matter back to committee in light of that decision because the officers had concluded that the proposed development complied with the development plan, such that planning permission should be granted, and that position was not altered by the Street Farm conclusion. Whilst the application of the tilted balance was treated in the report as a consideration supporting the grant of planning permission, the conclusion about compliance with the development plan already justified that conclusion. Further or alternatively, even if the committee report had not applied the tilted balance, or the matter had been reported back to the committee to say that the tilted balance no longer applied, it is highly likely that the outcome would have been the same so that any relief should be refused under section 31 of the Senior Courts Act 1981 anyway.

180. In the particular circumstances of this case, I doubt that it is necessary for me to resolve definitively any dispute as to consequence of the Inspector's decision in the Aldeburgh case. The Inspector did find that Policy SP2 was out-of-date in relation to the housing requirement (see paragraph 14 of her decision). There was therefore a basis for the officers to make a judgment that the "tilted balance" was engaged if they considered that this was one of the most important policies for determining the application. This is despite the fact that the Inspector went on to find that the Council was able to demonstrate a five year housing land supply (see paragraph 91 of her decision). It seems to me that this latter finding might have justified a judgment that the fact that Policy SP2 was out-of-date in one respect should not actually trigger the tilted balance under paragraph 11 on the NPPF when considering footnote 7. But that was not the judgment officers made in this case. The subsequent Street Farm decision was relevant to that question, as a more recent Inspector found Policy SP2 to be up-to-date in light of the existence of a five year supply. But that begs the question of whether officers were required to refer the matter back to the committee in light of the decision overall

181. In my judgment, any debate over whether the tilted balance was applicable in this case at the time the Council's committee considered the application, or whether the application should have been referred back to the committee following the Street Farm is a sterile one on the facts of this case. On a fair analysis of the officers' advice and the Council's consequential decision, when the 2019 Report is read fairly and as a whole, there is no real doubt that the outcome would have been the same. I agree with Mr Green's submission that a fair reading of the officers' report confirms that the conclusion was undoubtedly reached that the proposal complied with the development plan (for all the reasons given in the 2019 Report). Although that was a controversial decision that involved planning judgments on a wide range of issues (including not just affordable housing, but issues relating to design and impacts on heritage assets), there is no doubt that such a decision was reached.

182. It is a conclusion reflected in express terms in paragraph 6.166 of the 2019 Report when the officers were dealing with the tilted balance. It is in that context that officers specifically refer to the first of two alternative limbs to the approach in the NPPF to decision-taking, namely that the presumption in favour of sustainable development means approving development proposals that accord with an up-to-date development plan without delay. Ultimately even if, as the Claimant submits, officers

should have advised members that Policy SP2 was not out-of-date, this would have only reinforced the application of the first limb of paragraph 11 of the NPPF in this particular case. Having found that the proposal accorded with the relevant policies in the development plan, the presumption in favour of approving it would still have applied

183. In these circumstances, I consider it is clear that the application of the tilted balance in this particular case did not affect the outcome. Had the tilted balance not been applied in the way it was, officers would still necessarily have advised that the application should be approved in accordance with the first limb of paragraph 11 of the NPPF in light of their detailed analysis of each and every issue. That included, for example, findings that whilst some less than substantial heritage harm arose, such harm was outweighed by the benefits of the proposal. These sorts of judgment involved a straightforward exercise of a planning balance.

184. I am reinforced in my conclusions when reading the conclusions in section 7 of the report. In paragraph 7.7 of the report, for example, officers state expressly that they remain of the view that the benefits of the scheme outweigh any harm identified. Such an assessment simply reflects a normal balance, without any "tilt" of the type which would arise under the second limb of paragraph 11, which requires adverse impacts significantly and demonstrably to outweigh benefits. It is clear that even without the tilted balance, officers considered that the benefits outweighed the harms. This is consistent with their conclusion that the proposal complied with the development plan as a whole. It is also, of course, consistent with the views that officers and members had reached in 2017 on the First Planning Application (which was very similar in nature), in accordance with the 2017 Report, which did not apply the "tilted balance" at all.

185. For these reasons, I consider that even if the tilted balance should not have been applied to the application (for whatever reason), the outcome would necessarily have been the same. It is, however, sufficient for these purposes for me to be satisfied that it is highly likely that the outcome would have been the same, which I am.

186. Accordingly, I reject the Claimant's challenge under Ground 2.

187. For all these reasons, notwithstanding the comprehensive and persuasive arguments presented by Mr Forsdick on the Claimant's behalf, I dismiss this claim for judicial review.