Neutral Citation Number: [2021] EWHC 2724 (Admin)

Case No: CO/2759/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2021

Before :

Timothy Mould QC
(sitting as a Deputy High Court Judge)

- -

Between :

ASTRAL DE LA MARE	**Claimant**
- and –	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
-and-	
WEALDEN DISTRICT COUNCIL	**Second Defendant**

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- -

Melissa Murphy (instructed by **Setfords Solicitors**) for the **Claimant**
Freddie Humphreys (instructed by **Government Legal Department**) for the **Defendant**
The Second Defendant did not appear and was not represented.

Hearing date: 22 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 13th October 2021.

Timothy Mould QC:

The Claim

1. By this claim made pursuant to section 288 of the Town and Country Planning Act 1990 ['the 1990 Act'], the Claimant challenges the validity of a decision by an inspector appointed by the First Defendant to dismiss the Claimant's appeal against the Second Defendant's refusal to grant planning permission for development at Jubilee Cottages, High Cross Estate, Palehouse Common, Framfield, Uckfield TN22 5QY.

2. The development proposed by the Claimant in her application for planning permission was the "demolition of the existing, dilapidated Jubilee Cottages on Eastbourne Road and the erection of a replacement dwelling in the north-westerly parkland of the High Cross Estate" ['the proposed development']. Planning permission was refused by the Second Defendant acting as local planning authority on 19 August 2019. The inspector determined the Claimant's appeal against that refusal on the basis of written representations. The inspector undertook a visit to the appeal site on 22 June 2020. She issued her decision by letter dated 26 June 2020 ['the DL'].

3. The Claimant advances two grounds of challenge to the validity of the inspector's decision –

    (1) The inspector failed to have regard to a material consideration, namely the basis upon which planning permission had been granted by the Second Defendant on 21 May 2008 for the replacement of Jubilee Cottages in an almost identical location within the High Cross Estate ['the 2008 planning permission'].

    (2) The inspector failed to give legally adequate reasons for disagreeing with the Second Defendant's decision to grant the 2008 planning permission.

4. On 18 September 2020, Neil Cameron QC (sitting as a Deputy High Court Judge) granted permission for the claim to proceed.

The factual background

5. At the time of the Claimant's application for planning permission, Jubilee Cottages were two semi-detached dwellings located adjacent to Eastbourne Road at Palehouse Common. By the date of the Claimant's planning appeal, one of the cottages had either collapsed or been demolished.

6. It is necessary to refer to certain matters in the planning history which are important to the Claimant's case.

7. On 21 May 2008, the Second Defendant granted the 2008 planning permission. The 2008 planning permission was an outline planning permission, reserving for subsequent approval the matters stated in condition 1, namely "detailed particulars of the siting, design and external appearance of the buildings to which this permission relates, the means of access thereto and the landscaping of the site before any development is commenced, such matters being reserved from the permission".

8. The development authorised by the grant of the 2008 planning permission was stated to be "Relocation of Jubilee Cottages to new location within the High Cross Estate". In

giving notice of its decision, the Second Defendant stated its reasons for approval of that development –

> *"In the determination of this proposal, the District Planning Authority had particular regard to policies GD2, EN8, EN27, TR3 and DC18 of the Wealden Local Plan, where the main policy considerations were in respect of the improved grouping and pattern of development, resulting from the re-siting of the cottages further north within the estate, with improved, safer road access from Brookhouse Road as opposed to the busier Eastbourne Road. The amended siting results in a clear highway benefit as the existing access and siting is very close to the intersection with Eastbourne Road. The proposal does not result in loss of property of local character and, noting the environmental advantage of the new location, complies with the criteria for replacement dwellings under policy DC18 in the Local Plan".*

9. That reasoning was reflected in the imposition of conditions 4 and 10 of the 2008 planning permission, which in turn prohibited any development in conjunction with the outline planning permission until such time as the existing Jubilee Cottages had both been demolished; and prohibited commencement of the development until the existing access onto Eastbourne Road had been stopped up. I also note condition 16, imposed in order "to safeguard the appearance of the countryside and the character of the area generally, having regard to Policies EN8, EN27 and DC18 of the Wealden Local Plan and Policies DC16 and BE1 of the Non Statutory Wealden Local Plan", in the following terms –

> *"The reserved matters details relating to the design of this outline planning permission for a pair of semi-detached houses hereby approved shall not exceed two storeys in height and the total ground footprint of the combined buildings shall not exceed a total gross floor space of 115 square metres".*

10. The decision notice included a note which identified the submitted plans to which the 2008 planning permission related. Those plans included an existing location plan and a proposed location plan. The latter plan identifies two adjoining square plots within a red lined area as the proposed new location for the two cottages; and the location of the proposed access onto High Cross Road (erroneously identified both on that plan and in the decision notice as "Brookhouse Road"). The decision notice also refers to site and tree survey plans and to photographs. There is no reference to the existence of any illustrative plans or drawings having been submitted to the Second Defendant in support of the application for outline planning permission. No such plans or drawings were identified in evidence before me.

11. Prior to the grant of the 2008 planning permission, the owner of Jubilee Cottages at that time entered into an agreement with the Second Defendant pursuant to section 106 of the 1990 Act ['the section 106 agreement']. Under the terms of the section 106 agreement, the then owner of Jubilee Cottages gave certain planning obligations which were to come into effect upon the grant of the 2008 planning permission. Those planning obligations were included in the schedule to the section 106 agreement. They

included covenants, before commencement of the "Proposed Development", that the owner would complete the demolition of Jubilee Cottages and cease all residential use and rights associated with the land upon which those buildings were then sited; and permanently stop up the existing road access onto Eastbourne Road. The section 106 agreement defined "the Proposed Development" as extending to "any substantially similar development for which planning permission is granted in substitution or modification of [the 2008 planning permission] and to any development in respect of which details have been submitted and approved by the Council pursuant to [the 2008 planning permission]".

12. No application for approval of reserved matters was submitted to the Second Defendant. The 2008 planning permission accordingly lapsed following the expiry of the period of three years stated in condition 2(a) of that planning permission, within which the application for reserved matters approval was required to be submitted.

13. On 21 January 2019 the Claimant applied for planning permission for the proposed development. The site for the proposed development was the same field within the High Cross Estate as had been the location of the replacement cottages approved under the 2008 planning permission, albeit slightly further to the north-west within that field; and with the proposed replacement dwelling itself being sited a little further to the east of the footprint shown on the proposed location plan approved under the 2008 planning permission. The access arrangements also differed somewhat from those approved under the 2008 planning permission: in place of the proposed new access onto High Cross Road, the proposed development would use existing estate accesses to serve the replacement dwelling.

14. On 19 August 2019, planning permission was refused by the Second Defendant for two reasons. The second reason concerned the net loss of a single dwelling from the Second Defendant's overall supply of housing land and the impact of that loss in circumstances where the Second Defendant was unable to show a five-year supply of such land. For the reasons given in DL14 and DL15, the inspector rejected that asserted reason for refusal.

15. The Second Defendant's first reason for refusal was in the following terms –

> *"The application site is located outside any defined development boundary, where strict policies of restraint are applied to new development. The site of the replacement dwelling is well outside the curtilage of the existing cottages, and falls within land that forms part of the High Cross Estate – currently open grass land. The new dwelling set away from any other built form within the estate into what is open pasture would be more imposing on the rural setting with a new curtilage in open grass land. Whilst the site does not fall within any national designation, the nature of this rural countryside location should be protected for its intrinsic value. As such the landscape impact of breaking away from the group of established buildings within the estate is considered detrimental. This harm is exacerbated by the lavish character and scale of the dwelling with bears little resembles [sic] to the simple cottages which it proposes to replace or the general character of other buildings within the estate and*

> *surrounding locality. In this regard the dwelling would appear out of place.*
>
> The proposal is therefore contrary to the provisions of Saved Policies GD2, EN8, EN27 and DC18 of the adopted Wealden Local Plan (1998), Policies SP01, SP013 and WCS14 of the Core Strategy Local Plan (2013), Policies EA4, BED1 and RAS2 of the submission Wealden Local Plan (2019), and paragraphs 8, 79 and 170 of the NPPF".

16. The Claimant's planning consultants lodged a planning appeal on her behalf against the refusal of planning permission. In the grounds of appeal, they referred to the 2008 planning permission, and described the current planning application as seeking "to demolish Jubilee Cottages and erect a replacement single family dwelling further north, in the same area of the High Cross Estate as the 2008 outline permission, also under Policies GD2, EN8, EN27, TR3 and DC18 of the adopted Wealden Local Plan".

17. In their written representations in support of the Claimant's planning appeal against the refusal of planning permission, the Claimant's planning consultants identified policy DC18 of the adopted Wealden Local Plan as "the key policy used to develop our proposal and the key policy against which our application was considered It sets out the guidance for replacement dwellings in the countryside…". The planning consultants drew attention to the 2008 planning permission and to the reasons given by the Second Defendant in 2008 for its decision to grant the 2008 planning permission. Reference was also made to observations made by a senior planning officer of the Second Defendant in April 2018, reiterating that the development approved under the 2008 planning permission had been judged to result in "material improvements in terms of highway safety, (moving off a fast and dangerous road)…and by removing a more prominent and run down pair of cottages from the landscape. Indeed the agent confirmed a more ordered, less scattered development".

18. In concluding their written representations in response to the Second Defendant's first reason for refusing planning permission for the proposed development, the Claimant's planning consultants said –

> *"Permission to demolish Jubilee Cottages and erect a replacement property further north, within the High Cross Estate, was in 2008, agreed in principle, by the Council.*
>
> *The Council in their considerations behind the granting of outline permission in 2008 stated that the visual, landscape, grouping, ecological and highway safety improvements of relocating the property to the High Cross Estate "complies with the criteria for replacement dwellings under policy DC18".*
>
> *In April 2018, the Council still regarded the 2008 outline permission for the relocation of Jubilee Cottages as relevant as the Council's current Development Management Team Leader described the various benefits of the demolition of Jubilee Cottages and erection of a replacement property within the High Cross Estate as material.*

> *The Council has now chosen, without acknowledgement of their previous position, to disregard the benefits that they themselves had 6 months earlier described as material".*

19. In its written response to the Claimant's planning appeal, the Second Defendant advanced the following representations under the heading "Principle of development" –

> *"The site is not located within any defined development boundary in the adopted development plan, therefore in policy terms the site occupies a countryside location. Saved Policy GD2 within the Wealden Local Plan 1998 seeks to restrict new development in the countryside unless it complies with other policies in the Plan. There is policy support for replacement dwellings at Policy DC18 of the WLP 1998; however, fundamental to this appeal is whether the development proposed accords with this saved Policy and if not, whether there are any specific grounds to justify departure away from this saved policy…".*

20. The Second Defendant went on to appraise the performance of the proposed development against the four stated criteria in policy DC18. In relation to the second policy criterion, which requires the proposed replacement dwelling to be in keeping with the character of the locality, having regard to the appearance and general design of the original building, the Second Defendant made the following representations –

> *"(2) Jubilee Cottages whilst in a current state of disrepair are of a simple, well-proportioned traditional form of rural cottages and in this regard should they have been maintained then they would not have necessarily appeared contrary in a rural location such as this. Whereas, the proposed dwelling is somewhat lavish in both character and scale, appearing as a Georgian manor house, with brick quoins and stone porticos to both front and rear elevations. The Council notes that the local area is characterised by a mix of residential properties, however, the predominant properties in Palehouse Common are of more modest scale and of simpler design. The Council cannot agree with the appellant in their GOA that the incorporation of the 'Thornton armorial marker' on the main front gable of the proposed house, which is seen on other properties in the locality and which the appellant alludes to as being the main locally distinctive attribute of properties in the local area, is sufficient to ensure that this grandiose replacement dwelling either resembles the simple cottages which it proposes to replace or the general character of other buildings in the estate and surrounding locality…"*

21. In relation to the third policy criterion in policy DC18, which requires a replacement dwelling to be sited similarly to the existing dwelling within its plot, unless an alternative position would result in clear landscape, highway access or local amenity benefits, the Second Defendant made the following representations –

> *"(3) The site of the replacement dwelling is well outside of the curtilage of the existing cottages, and falls within land that forms part of the High Cross Estate – currently open grass land. Like the previous outline permission…(which forms Appendix 1 of the appellants GOA), there is an argument that on highway safety grounds the proposed site is more satisfactory and that given the poor state of repair the loss on visual landscape grounds of Jubilee Cottages has its benefits. However, a balanced judgment has to be made as to whether any benefits outweigh the harm. As previously stated should Jubilee Cottages be repaired/maintained then they would not necessarily appear at odds in this countryside location and would be read as a modest pair of former rural worker's cottages. Whereas, the proposed site of the new dwelling set away from other built form within the estate into what is open pasture would be imposing on the rural setting with a new curtilage in open grass land. The impact of breaking away from the group of well-established buildings within the estate, and against which the new dwelling will be read in context with, unlike Jubilee Cottages which are read independently from the estate, is considered detrimental and would harm the nature of this rural countryside location which should be protected for its intrinsic value…".*

22. The Claimant's planning consultants made a written response to the Second Defendant's representations on the planning appeal. That written response included the following representations –

> *"The Council has failed to identify any reasons why the proposed development no longer complies with Policy DC18. The Council in 2008 said that 'the main policy considerations were in respect of the improved grouping and pattern of development, resulting from the re-siting of the cottages further North within the estate, with improved, safer road access from Brookhouse Road as opposed to the busier Eastbourne Road. The amended siting results in a clear highway benefit as the existing access and siting is very close to the intersection with Eastbourne Road. The proposal does not result in loss of property of local character and, noting the environmental advantages of the new location, complies with the criteria for replacement dwellings under Policy DC18 in the Local Plan'.*
>
> *The change of building from two dwellings (under the 2008 outline permission) to one dwelling does not mean that the development no longer complies with Policy DC18. The main policy considerations remain the same and accordingly we respectfully request the Inspector to conclude that the development proposal fundamentally does still comply with Policy DC18".*

23. The Claimant's planning consultants concluded as follows –

> *"...The Council has failed to identify how the policy considerations that led to the granting of outline permission in 2008 under DC18 are no longer valid".*

The inspector's decision

24. In DL3, the inspector identified two main issues in the planning appeal, the first being "the effect of the proposal on the character and appearance of the area". The inspector considered that main issue in DL4 to DL13. In DL12 she said –

> *"12. Therefore, I conclude for the above reasons that the proposal would harm the character and appearance of the area. As such the proposal is contrary to Policies GD2, EN8, EN27 and DC18 of the [adopted Wealden Local Plan] and Policies SP01, SP013 and WCS14 of the [Core Strategy] which say, amongst other things that development will only be permitted if it is in keeping with the character of the locality, having regard to the appearance and general design of the original building".*

25. Having considered and concluded in the Claimant's favour on the second main issue of housing land supply in DL14 and DL15, the inspector turned in DL16 and DL17 to "Other Matters". She said –

> *"16. I note that there is a lapsed outline permission for a similar proposal related to the appeal site. Similarly, my attention has been drawn to a number of other schemes approved by the Council. However, I have little detail of those schemes before me. Therefore, I have considered the proposed on its own planning merits.*
>
> *17. I acknowledge that the appellant has indicated that she has a need for a larger home, and that the proposal would replace dilapidated dwellings that have a challenging access onto a well-used road. However, neither of these factors, or in combination, outweigh the harm to the character and appearance of the area I have found".*

26. In DL18 and DL19, the inspector stated her overall conclusions –

> *"18. Although I have found in favour of the appellant related to the second main issue this does not outweigh the harm to the character and appearance of the area.*
>
> *19. Therefore, for the reasons given above I conclude that the appeal should be dismissed".*

27. In the light both of the inspector's conclusion on the first main issue and the decisive role that conclusion played in her overall determination of the Claimant's planning appeal, it is necessary to set out the reasons which led her to conclude as she did in DL12. Those reasons are stated in DL5 to DL11 –

> *"5. Jubilee Cottages are a pair of empty semi-detached cottages in disrepair located adjacent to Eastbourne Road. I noticed at my site visit that the cottage to the right-hand side when viewed from the road is no longer standing and appears to have been hoarded on all sides.*

6. The gated entrance to the High Cross Estate is found at the end of a tree-lined, unmade lane. A track to the right-hand side of the entrance leads past a range of modest estate properties on the left. Beyond the track there is a pasture type area in the north west corner of the 'High Cross Estate' which has tree lined boundaries to the nearby side roads and is populated with scattered trees.

7. The proposal is fully to demolish Jubilee Cottages and to replace them with a 4-bedroom, "manor-house" style dwelling of a similar floor area to the demolished buildings within the north-west pasture of the High Cross Estate.

8. However, the proposed brick and tile, two-storey house would be a residential dwelling of significant scale and mass in comparison to the other estate properties that would include; raised chimney stacks to either side, Georgian style windows, and a Doric style entrance with a renaissance type baluster and gable above.

9. Furthermore, the development would introduce an extended access route from the existing track and other domestic paraphernalia into the relatively spacious and simple pasture area. Indeed, there is substantial scope for the introduction of a range of activities associated with a residential dwelling. For example, this could include, but is not limited to, washing lines, barbeques, sheds, informal play-areas, seating etc. Moreover, the proposal, notwithstanding the opportunity for additional landscaping, would be incongruous with the surrounding High Cross Estate grounds which are typified by trees, open grassland and rural type activities such as poultry and small animals. As such, the scale and positioning of the development would harm the beauty of the countryside.

10. Indeed, whether the development could be seen through the hedgerows or in the wider views or not, where development exists nearby it is found in 'low-key' clusters, for example the properties found along the track, or as road facing properties such as Jubilee Cottages. Accordingly, the proposal would be a separate and distinct development in comparison with other properties on the High Cross Estate and nearby area, and therefore would be at odds with its immediate surroundings.

11. I acknowledge that the development would be constructed in similar materials to other properties on the High Croft Estate, including a locally definitive 'Thornton armorial marker', and that construction would not lead to the loss of trees or hedgerows. Nevertheless, the proposal due to its ornate nature, size and bulk would be overly prominent and appear out of place in its immediate setting in comparison to the modest road-side dwellings that it would replace".

Relevant development plan policies

28. As is evident both from the written representations made by both the Claimant and the Second Defendant, and from the DL, there was no material disagreement about the identity of those policies in the adopted Wealden Local Plan (1998) that were of particular relevance to the determination of the Claimant's planning appeal. Policy GD2 of the Wealden Local Plan states that outside development boundaries, development will be resisted unless it is in accordance with specific policies in the Plan. Policy EN8 requires development in the Low Weald to conserve the low rolling agricultural character of the landscape. Policy EN27 is concerned with design. Amongst other requirements, it expects the scale, form, site coverage, density and design of proposed development to respect the character of adjoining development and, where appropriate, promote local distinctiveness. Policy DC18 of the Local Plan is concerned specifically with proposals for replacement dwellings. The reasoned justification states that, notwithstanding the general policy of restraint in relation to housing in the countryside (as provided for under policy GD2), the suitable replacement of existing properties is considered reasonable. Policy DC18 itself sets out the four criteria against which such a proposal is to be evaluated –

> *"DC18 Outside development boundaries, as defined on the Proposals Map, the replacement of an existing dwelling by another dwelling in the same curtilage will be permitted where the following criteria are met:*
>
> *the proposal is of a comparable size and massing to the existing building;*
>
> *it is in keeping with the character of the locality, having regard to the appearance and general design of the original building;*
>
> *it is similarly sited within the plot, unless an alternative position would result in clear landscape, highway access or local amenity benefits;*
>
> *it does not result in the loss of a property of valuable local character, unless it is not reasonably capable of being made structurally sound or otherwise improved.*
>
> *In sensitive locations, permitted development rights relating to future extensions and other structures may be removed".*

Relevant legislation and legal principles

29. By virtue of section 70(2) of the 1990 Act, in dealing with an application for planning permission a local planning authority is required to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. By virtue of section 79(4) of the 1990 Act, that requirement applies also to an inspector appointed to determine an appeal made under section 78(1) against a refusal of planning permission. By virtue of section 38(6) of the Planning and Compulsory Purchase Act 2004, the determination must be made in accordance with the development plan unless material considerations indicate otherwise.

30. Section 288 of the 1990 Act provides for an application to the High Court challenge to the validity of a planning appeal decision on the grounds firstly, that the decision is not within the powers of the 1990 Act; and secondly, that a relevant requirement has not been complied with in relation to that decision. In order to succeed on the latter ground, the applicant must show that he or she has suffered substantial prejudice by reason of the failure to fulfil the relevant requirement. One such requirement is the duty of the decision maker on the planning appeal, here the inspector, to give reasons for her decision to dismiss the appeal.

31. The well-established principles upon which the Court determines a challenge to the validity of a planning appeal decision under section 288 of the 1990 Act were stated by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, [2017] EWCA Civ 164 ['*St Modwen*'] at [6] –

> *"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28).*
>
> *(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004]1 WLR 1953, at p.1964B-G).*
>
> *(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for*

Environment, Transport and the Regions [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But 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 (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012]EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government (2013) 1 P. & C.R. 6, [2012] EWCA Civ 1198, at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P. & C.R. 137, at p.145)."

32. In this Claim, Ms Murphy for the Claimant places particular reliance on the seventh principle identified by Lindblom LJ, that of consistency in planning appeal decision-making. She draws attention to the way in which Mann LJ expressed that principle at page 145 of his judgment in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137 [‘*North Wiltshire*’] –

> *"It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.*
>
> *To state that like cases should be decided alike presupposes that the earlier case is alike and not distinguishable in some relevant respect. If it is distinguishable then it will usually lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way, am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case?"*

33. In *North Wiltshire* the Court of Appeal was concerned with the materiality of a previous decision in a planning appeal. In *R(Havard) v South Kesteven District Council* [2006] EWHC 1373 (Admin); [2006] JPL 1734 at [13], the High Court applied the approach stated by Mann LJ in *North Wiltshire* to an earlier decision of the local planning authority itself. The Court added this at [14] –

> *"In order for a previous decision properly to be taken into account it is necessary that not just the fact of the determination, grant or refusal of planning permission, should be known to the decision maker and taken into account, but that regard should be had to the basis of the decision".*

34. Ms Murphy also relied upon *Dunster Properties Limited v First Secretary of State* (2007) 2 P & CR 26 ['*Dunster Properties*']. As is recorded at [9] of Lloyd LJ's judgment, in that case the inspector had said of the previous planning appeal decision which had been drawn to his attention –

> *"I have no comments on either of those two remarks other than to state that each case is judged on its own merits and my conclusions on the current scheme are given above".*

35. At [23] Lloyd LJ said –

> *"…[the inspector] did not adequately perform his duty to give reasons for this decision in respect of his refusal to follow the*

> *basis of the earlier appeal decision which was a material consideration. In this respect it seems to me that declining to comment, other than to refer to his own reasons already expressed, [the inspector] appears not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. An omission to deal with the conflicting decision, as in the North Wiltshire case, might have been sufficient in itself. But [the inspector's] last sentence in paragraph 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have proper regard to the previous decision. Either he did not have proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give reasons".*

36. At [36] of *South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953, Lord Brown summarised the required legal standard for reasons in planning appeal decisions-

> *"36. The reasons must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".*

The Claimant's submissions

37. In support of ground 1, Counsel for the Claimant submitted that it was clear from what the inspector said in DL16 that she had failed to have regard to the basis for the Second Defendant's decision to grant the 2008 planning permission. The reasons given by the Second Defendant for the grant of the 2008 planning permission show that the decision to grant outline permission was based on two important factors –

(1) that the location for the replacement dwellings for Jubilee Cottages in the field in the north west of the High Cross Estate was acceptable in principle and a better location for residential development than the existing location of Jubilee Cottages; and

(2) that there was a clear highway benefit in removing the existing, dangerous access from Jubilee Cottages onto Eastbourne Road.

38. It had been central to the Claimant's case on appeal that, on the basis of these two important matters of principle, the proposed development was indistinguishable from the development authorised by 2008 planning permission. The minor changes in the siting of the proposed development were immaterial to its achievement of the improved location in the north west of the High Cross Estate which had been the basis for the grant of the 2008 planning permission. The proposed development was founded, just as the 2008 planning permission had been founded, upon securing the clear and important highway safety benefit that would result from the replacement of Jubilee Cottages with a new dwelling at the improved location, that is to say, the opportunity to close the existing dangerous access onto Eastbourne Road.

39. It was clearly inadequate, Counsel submitted, for the inspector simply to "note" that the 2008 planning permission was for a similar proposal related to the appeal site, as she did in DL16. In order to have proper regard to the stated basis upon which the 2008 planning permission had been granted, the inspector needed to face up to and to take account of the locational and highway safety benefits which had been acknowledged by the Second Defendant as the basis for the earlier outline permission; and which would be delivered by the proposed development. The inspector had failed to do so.

40. Essentially, the inspector had fallen into the same error as the Court of Appeal had identified in [23] of *Dunster Properties.* Just as had happened in that case, the inspector here had failed to face up to her duty to have regard to the 2008 planning permission so far as it was based on planning and highway benefits which the proposed development also set out to deliver. It was incorrect for the inspector to say that she had "little detail" of the scheme authorised by the 2008 planning permission. She had access to the approved plans and documents in respect of that outline permission. Moreover, she had the decision notice, which stated the Second Defendant's reasons for the grant of the 2008 planning permission, showing that it did so on the basis of the locational and highway benefits that would result from locating the replacement dwellings to the north west of the High Cross Estate as shown on the approved plan and from closure of the existing access onto Eastbourne Road. That was enough to establish the baseline upon which the Claimant had proceeded in formulating the proposed development. In effect, the inspector had ignored that baseline, treating the proposed location for the replacement dwelling on the High Cross Estate as a green field; whereas the 2008 planning permission established the principle of its development for residential purposes in conjunction with the demolition of Jubilee Cottages.

41. The stated basis for the grant of the 2008 planning permission had demonstrated that the proposed location fulfilled the requirements of criterion (3) of policy DC18. It was established as an alternative position for a replacement dwelling for Jubilee Cottages which did indeed result in clear highway and environmental benefits, a factor that was common to both the 2008 planning permission and the proposed development. The

inspector failed to recognise the consistency between the 2008 planning permission and the proposed development in these important respects.

42. In summary on ground 1, Ms Murphy submitted that in reaching her decision on those matters in relation to the proposed development, that is to say firstly, whether locating a replacement dwelling to the north west of the High Cross Estate was acceptable in principle and secondly, the improvement in highway safety, the inspector had failed to take account of the basis for the grant of the 2008 planning permission. The basis for the 2008 planning permission was plainly a material consideration. The inspector's failure to have proper regard to that material consideration was an error of law.

43. On ground 2, Counsel submitted that the inspector had failed to give adequate reasons for her decision to refuse planning permission for the proposed development and that the Claimant was substantially prejudiced by that failure.

44. Ms Murphy submitted that the inspector's reasons were deficient in two main respects.

45. The first deficiency lay in the inspector's failure to explain what conclusions she had in fact reached on those matters which formed the basis for the grant of the 2008 planning permission, namely the advantages of the field in the north west of the High Cross Estate as an improved location for residential development and the highway safety improvement resulting from closure of the existing access to Jubilee Cottages. If the inspector had reached different conclusions on those matters to those reached by the Second Defendant as the basis for the grant of the 2008 planning permission, she had failed to explain why.

46. That failure resulted in substantial prejudice to the Claimant. As was evident from the written representations of her planning consultants in support of her planning appeal, the Claimant had made her case in support of the proposed development on the basis that the 2008 planning permission established the principle of locating a replacement dwelling for Jubilee Cottages in the north west area of the High Cross Estate shown on the approved plans; and relying on the relative advantages of that location in comparison to the existing location on Eastbourne Road. Yet the inspector had not grappled with that case.

47. As a result, the Claimant cannot know whether a future planning application for a replacement dwelling, perhaps of more modest scale, at the location which was considered advantageous by the Second Defendant in granting the 2008 planning permission is in fact objectionable in principle. That uncertainty exists despite the fact that the relevant local plan policies were unchanged between 2008 and 2019, yet an unexplained, different conclusion was reached in the two decisions. Here also Counsel relied upon the judgment of Lloyd LJ at [23] of *Dunster Properties*. Either the inspector did not have proper regard to the different conclusion reached by the Second Defendant as the basis for the grant of the 2008 planning permission, in which case ground 1 was made out; or she had done so but had failed to explain her reasons, in which case ground 2 was made out. Ms Murphy also relied upon the observations of Lindblom LJ at [56] in *Baroness Cumberledge of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063; [2018] EWCA Civ 1305.

48. The second deficiency, Ms Murphy submitted, lay in the inspector's failure to make clear in DL17 what she had in mind in referring to the fact that the proposed

development would replace dilapidated dwellings that have a "challenging access" onto a well-used road. That reasoning did not disclose whether the inspector had accepted the judgment of the Second Defendant upon which the 2008 planning permission was based, namely that closure of the existing access onto Eastbourne Road was a clear highway safety benefit which merited considerable weight. It appeared from DL17 that the inspector regarded closure of that access and its replacement as part of the proposed development as no more than a convenience to the future occupier. Her reasoning was unclear on the point. She appeared to have lost sight of the force of the highway safety benefit that would result from the proposed development. Given that the considerable weight to be given to the highway safety benefit resulting from closure of the existing access was the basis for the grant of the 2008 planning permission and central to the Claimant's case for the proposed development, the inspector's reasons in DL17 were inadequate and added to the substantial prejudice suffered by the Claimant.

Discussion

49. Consideration of the Claimant's contentions must be set in the context of the inspector's overarching legal responsibilities as the decision maker on the Claimant's planning appeal.

50. The inspector's task was to make a decision on an application for planning permission. She was required to make that decision having regard to the relevant policies of the development plan, and to any other planning considerations that were material to that decision. She was obliged to make her determination of the Claimant's planning appeal, and to decide whether planning permission should be granted for the proposed development, in accordance with the development plan, unless there were other material considerations that justified a decision otherwise than in accordance with the development plan. She was required to give her reasons, explaining why she had determined the appeal as she did, and the conclusions that she had reached on the principal important controversial issues arising in the appeal.

51. In considering and resolving the issues raised by the Claimant's challenge to the validity of the inspector's decision, I am required to read her decision in a reasonable flexible way. I must read her decision letter as a whole, and approach her stated reasons on that basis. I am also required to have in mind that the inspector is writing a decision addressed principally to the Claimant and to the Second Defendant, both of whom know both what were the issues in the planning appeal and what evidence and argument had been deployed on those issues.

52. Applying these principles (and on the approach stated by Lindblom LJ at [6] in *St Modwen Developments Ltd*), it seems to me that the following contextual points are important in order to give a fair reading of the inspector's decision.

53. Firstly, there was no dispute between the parties as to the most relevant and applicable policies of the development plan. In particular, both parties identified policy DC18 of the adopted Wealden Local Plan (1998) as the key development management policy against which the merits of the proposed development fell to be appraised and evaluated by the inspector.

54. Secondly, there was no dispute as to the need for the inspector to take the 2008 planning permission into account in her determination of the Claimant's planning appeal. In their

written representations in support of the planning appeal, the Claimant's planning consultants drew the inspector's attention to the 2008 planning permission. They placed particular reliance on the Second Defendant's stated reasons for granting the 2008 planning permission, in order to advance the case that the proposed development was based upon and sought to deliver the locational and highway safety benefits that had been the stated basis for the grant of that earlier planning permission. I have not detected any significant dispute on those particular matters in the representations made by the Second Defendant. As I have shown in the passage which I quote in paragraph 21 of this judgment, the Second Defendant did not assert that the 2008 planning permission was immaterial to the determination of the Claimant's planning appeal. Nor did the Second Defendant assert that the basis for the grant of that earlier planning permission had no bearing on the inspector's decision whether to grant planning permission for the proposed development. The Second Defendant's argument was that, in the case of the proposed development, the factors which justified the grant of the earlier planning permission were outweighed by the harmful impacts resulting from the scale and design of that development on the character and appearance of the surrounding area. That is a different argument altogether. Indeed it assumes that the basis upon which the 2008 planning permission was granted is material to the decision whether to permit the proposed development.

55. It follows that the materiality to the determination of the Claimant's planning appeal of not only the 2008 planning permission itself, but also the basis upon which that planning permission was granted, was not a principal important controversial issue before the inspector.

56. My third important point of context is that the 2008 planning permission was an outline planning permission. The approved plans gave no clue as to the detailed design of the dwelling houses that would come forward for approval in accordance with condition 1 of the 2008 planning permission. To some degree, condition 10 defined parameters within which the designer of the two replacement dwellings was required to produce that detailed design. Nevertheless, there were no illustrative plans or drawings before the Second Defendant. There was no contemporary indication of how the outline planning permission might be taken forward to detailed design at the reserved matters stage. In the event, that stage was never reached and the planning permission lapsed without any detailed design work apparently having been carried out.

57. For these reasons, given that during the intervening years there had been no significant change in the applicable policies of the development plan, I accept that the Claimant had good reason to claim for the proposed development both the locational and highway safety benefits identified by the Second Defendant as the basis of the grant of outline planning permission in 2008. However, neither the 2008 planning permission itself, nor the Second Defendant's stated reasons for its grant, gave the Claimant any good reason to anticipate that the actual replacement dwelling for which she now sought planning permission would necessarily be judged to be in keeping with the character of the locality, having regard to the appearance and general design of the original building, that is to say, Jubilee Cottages. In other words, neither the 2008 planning permission nor the basis for its grant gave any real clue as to whether the replacement dwelling comprised in the proposed development would be found to meet the second criterion of policy DC18. Nor did the stated basis for the grant of the 2008 planning permission give any useful guidance as to whether the proposed development would be judged to

fulfil the design requirements of policy EN27, as regards scale, form and design. None of those questions arose in the context of the grant of outline permission, beyond the Second Defendant's implicit acknowledgement that a replacement dwelling was capable of being designed in fulfilment of those policy requirements (in recognition of which, it is reasonable to assume, the Second Defendant thought it necessary to impose condition 10 on the 2008 planning permission).

58. My final point of context is that the question whether the design of the replacement dwelling comprised in the proposed development fulfilled the second criterion of policy DC18 (and the broader design policy stated in EN27) was a key issue raised against the proposed development by the Second Defendant in their written representations in opposition to the Claimant's planning appeal.

59. It was in this context that the inspector made her determination of the Claimant's planning appeal. It readily explains why in DL3 the inspector stated the first (and ultimately decisive) issue in the appeal as being *"the effect of the proposal on the character and appearance of the area"*; and why in DL12 she concluded on that main issue with a judgment founded on the question whether the proposed development was in keeping with the character of the locality, having regard to the appearance and general design of the original building, Jubilee Cottages.

60. The inspector's reasons in DL5 to DL11, which I have set out in paragraph 27 of this judgment, clearly explain why she reached the adverse conclusion that she did in DL12. She carried out the assessments required by DP18(2) and EN27 of the Local Plan. She explained why she judged the proposed replacement dwelling to be of a scale and design that was not in keeping with the character of the locality. She explained why she judged the scale and design of the proposed dwelling not to relate well to the appearance and general design of the dwellings that it was proposed to replace.

61. This was an application for full planning permission. It is vital to understand that the inspector's reasons in DL5 to DL12 are directed towards the qualities of the particular replacement dwelling that was before her for consideration. Although in DL9 she expressed concerns about the impact of the proposed development on its surroundings, those concerns must plainly be understood to have been made in that context and for that purpose. She is not to be understood to be making a wider judgment of planning principle about the ability of the location to receive a replacement dwelling of acceptable design in its local context. Nor was she concerned with the advantages of the proposed location in comparison to the existing site of Jubilee Cottages on highway safety or environmental grounds. She was concerned with the principal important controversial issue raised between the parties, which was whether the particular replacement dwelling comprised in the proposed development was of an appropriate scale and design to fulfil the objective of development policy that it be in keeping with the character and appearance of the surrounding area.

62. It seems to me that the inspector's brief consideration of the 2008 planning permission in DL16 is both consistent with and follows naturally from her reasoning and conclusion on the first main issue. Whilst she noted that the 2008 planning permission had authorised a similar proposal to the proposed development, that now lapsed permission had been in outline only. The approved plans provided the inspector with no indication of the detailed design of the replacement dwellings that were to be proposed on the submission of reserved matters. Nor were there any illustrative plans

or drawings which might have shed light on the detailed design of those dwellings that the Second Defendant might have found to be acceptable when it granted outline planning permission, beyond the very limited guidance given by condition 10. In those circumstances, it was both understandable and reasonable for the inspector to determine the planning appeal before her on its own merits. She was plainly entitled to take the view that the 2008 planning permission offered her no assistance in resolving the main, determinative issue in that planning appeal. Far from indicating that the inspector failed to take proper account of the basis for the grant of the 2008 planning permission, what she said in DL16 shows that she had indeed carefully considered that earlier outline permission. She had concluded, correctly, that it had nothing useful to inform her judgment on the particular merits of the detailed design of the proposed replacement dwelling that was before her for approval.

63. Her approach, in my view, accords with the principles stated by Mann LJ in the *North Wiltshire* case as applied by Lloyd LJ in *Dunster Properties*. The principle of consistency assumes that the basis for the earlier planning decision is engaged by the principal issue (or issues) that the subsequent decision maker is called upon to resolve. Applying Mann LJ's practical test (in *North Wiltshire* at page 145), the inspector was entitled to reach the view that, in determining the Claimant's planning appeal on the basis that the proposed replacement dwelling was of a scale and design that harmed the character and appearance of the area for the reasons she gave in DL5 to DL12, she was not necessarily disagreeing with the stated basis for the grant of the 2008 planning permission. To the contrary, her decision was in fact consistent with the stated basis for the grant of the earlier outline permission, which left a decision on the scale and design of the two replacement dwellings that it authorised to be resolved at the reserved matters stage. The inspector did not call into question the principle of locating a replacement dwelling of acceptable scale and design in the field to the north west of the High Cross Estate. Neither did she disagree with the Second Defendant's earlier judgment about the environmental and highway safety advantages of providing a replacement dwelling of acceptable scale and design in that location. She founded her decision on the distinct question begged by the fact that the 2008 planning permission was in outline only; that is to say, whether the particular replacement dwelling before her for decision was of an appropriate scale and design to realise those advantages, by virtue of being in of keeping with the character of the locality and thereby avoiding harm to the character and appearance of the surrounding area.

64. I have no doubt whatsoever that in referring in DL17 to the fact that *"the proposal would replace dilapidated dwellings that have a challenging access onto a well-used road"*, the inspector intended to record her acceptance of the highway safety benefit that would result from the closure of the existing access to Jubilee Cottages from Eastbourne Road. In other words, there is no reason to doubt that the inspector had well in mind the highway safety benefit that had been identified by the Second Defendant in granting the 2008 planning permission. I am also in no doubt that the inspector gave substantial weight to that material consideration. That she did so is necessarily implicit in the final sentence of DL17. Unfortunately from the Claimant's perspective, the inspector gave greater weight to the disbenefits of the proposed development that she had identified in her conclusions on the first main issue in the planning appeal. The evaluation of the benefits and disbenefits of the proposed development was, of course, a matter for her planning judgment.

Conclusions

65. I turn to the Claimant's grounds of challenge. Notwithstanding Ms Murphy's clear and cogent submissions, I am in no doubt that neither ground is made out.

66. Contrary to the Claimant's contentions, there is no merit in the argument that the inspector ignored the basis upon which the 2008 planning permission was granted. The inspector referred to that previous outline permission. She noted that it authorised a similar scheme of development to that proposed in the planning appeal before her for determination. However, neither the 2008 planning permission itself nor the Second Defendant's stated basis for its grant were of assistance to the inspector in resolving the main issue that, in the light of both the applicable development plan policies and the parties' representations, she had identified with respect to the proposed development. That main issue concerned the scale and design of the particular replacement dwelling which was before her for approval. The 2008 planning permission had been in outline only, leaving the question of detailed design of the two replacement dwellings that it authorised to the reserved matters stage.

67. The inspector's decision does not call into question either the principle or the potential environmental advantages of providing a replacement dwelling of acceptable scale and design in the location on the High Cross Estate that is common to both the 2008 planning permission and the proposed development. Nor does the inspector's decision call into question the Second Defendant's earlier judgment that providing a replacement dwelling of acceptable scale and design in that location offered a clear highway safety benefit, since it would enable the existing access serving Jubilee Cottages to be stopped up.

68. Contrary to Counsel's submissions, neither the principle stated by Mann LJ in *North Wiltshire* nor its application in *Dunster Properties* and other cases on which she relied provides any support to the Claimant's case on ground 1. There is no inconsistency between the inspector's decision and the Second Defendant's stated basis for the grant of the 2008 planning permission. The Second Defendant had been concerned with the principle of locating replacement dwellings for Jubilee Cottages in the field in the north west of the High Cross Estate and the environmental and highway safety benefits that would result from such development. The inspector's decision did not involve a *"necessary disagreement"* with that earlier planning judgment on the principle of such development. Her decision was founded upon her concerns about the scale and detailed design of the replacement dwelling proposed to fulfil that principle and realise those benefits; it was not concerned with whether that principle should be followed or those benefits had been rightly identified. It is in obvious contrast to the position in *Dunster Properties*. In that case, the inspector had found the proposed extension before him for decision to be acceptable in design terms, but had nevertheless dismissed the appeal on principle, without giving any explanation why he differed from the previous inspector on that principle. There was a clear and unexplained inconsistency in that case. There is no such inconsistency in the present case. Ground 1 must be rejected.

69. In my view, the inspector gave proper, intelligible and adequate reasons for her decision to dismiss the Claimant's planning appeal and refuse planning permission for the proposed development.

70. As I have sought to explain, in founding her decision on her conclusions on the first main issue, it was unnecessary for the inspector expressly to state her agreement with the stated basis for the grant of the 2008 planning permission. That was not a principal important controversial issue in the planning appeal. That the 2008 planning permission was a material consideration for the inspector to take into account was not in dispute. Nor did the Second Defendant challenge the Claimant's contention that the inspector should have regard to the basis for the grant of the 2008 planning permission. For the reasons I have given, the inspector did so. In DL16 and DL17, she gave her reasons for concluding that the 2008 planning permission and the basis on which it was granted offered her no real assistance in resolving the first main issue that she needed to determine. In DL17, in particular, the inspector acknowledged that the proposed development also offered the opportunity to achieve a clear highway safety benefit. That consideration did not prevail because, as she said, she found it to be outweighed by the harm resulting from the scale and design of the proposed replacement dwelling house. That was a matter for her planning judgment, for which no further explanation was necessary. I reject the submission that there was any uncertainty in what she meant in the first sentence of DL17. In my judgment, it is obvious that she was there referring to the highway safety benefit that would result from closure of the existing access to Jubilee Cottages, rather than some perceived advantage to the future occupier of the replacement dwelling.

71. It follows from my analysis of the inspector's decision and my reasons for rejecting both grounds of challenge, that the Claimant is not prejudiced by the inspector's reasoning. In my judgment, the Claimant is able to formulate a revised design for the replacement dwelling for Jubilee Cottages confident in the knowledge that the inspector's decision, properly understood, does not call into question either the environmental advantages of the location for that replacement dwelling or the highway safety benefits that would result from closure of the existing access onto Eastbourne Road. It would be a false reading of the inspector's decision to say otherwise.

72. Had I found either (or both) of the grounds of challenge to be made out, I would have quashed the inspector's decision. Counsel for the First Defendant submitted that the challenge was academic, and that relief should be refused in the exercise of the Court's discretion, because it would have been legally impossible to implement a planning permission granted on the Claimant's application for the proposed development. The basis for that submission was that the Claimant has no title to Jubilee Cottages and would be unable to fulfil a necessary element of the proposed development, namely their demolition.

73. I do not accept the premise of that submission. The question whether the Claimant would be in a position to implement a planning permission granted for the proposed development was, at least in the first instance, for the inspector to consider and to determine. In the light of her decision to refuse planning permission and to dismiss the planning appeal, the inspector did not address that question in her decision. It does not follow that it was incapable of being resolved in the Claimant's favour, were a different inspector upon re-determination of the planning appeal to have decided that planning permission was merited. An obvious question would have arisen as to whether, for example, a *Grampian* style condition was justified. As a matter of law and policy, that question would have raised issues of fact about the realistic prospect of that condition

being fulfilled within the lifetime of a planning permission. It is not for the Court to attempt to pre-judge the outcome.

74. For the reasons I have given, this claim must be dismissed. I am grateful both to Ms Murphy and to Mr Humphreys for their considerable assistance both in written and oral submissions.