Neutral Citation Number: [2022] EWHC 73 (Admin

Case No: CO/2390/2021

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

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 17 January 2022

Before :

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

FORMBY PARISH COUNCIL	**Claimant**
- and –	
SEFTON COUNCIL	**Defendant**
- and -	
THE OPTIMUM GROUP	**Interested Party**

- -

Kate Olley (instructed by **Kingsley Smith LLP, Solicitors, Chatham, Kent**) for the **Claimant**
Anthony Gill (instructed by **Sefton Council Corporate Legal Services**) for the **Defendant**
No appearance by or on behalf of the **Interested Party**

Hearing date: **11 January 2022**
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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 12 noon on 17 January 2022.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

1. In this case the claimant parish council seeks judicial review of the decision of the defendant planning authority dated 28 May 2021 to grant planning permission ("the permission") for a development at 19 Chapel Lane, Formby, Liverpool ("the property"), being a "change of use of the first floor involving the erection of extensions at the rear to form two self-contained flats involving alterations to the elevations".

2. The single ground of challenge identified in the statement of facts and grounds accompanying the claim form is that there was an error of law in relation to the fallback position, leading to the taking into account of immaterial considerations.

3. I have had the benefit of detailed and helpful written and oral submissions from Ms Olley, counsel for the claimant, and Mr Gill, counsel for the defendant. The interested party, the developer and applicant for planning permission, has taken no part in the proceedings.

4. As developed in the grounds and in written and oral submissions before me, the essence of the claimant's case is as follows:

    4.1 The property, situated in Formby town centre, has existing planning permission for use of a shop.

    4.2 The property could have been developed under permitted development rights (and thus without the need for planning permission) to provide a shop on the ground floor and up to two flats above. If the property was developed under permitted development rights there would have been no ground for objecting on the basis of a lack of outdoor amenity space or a lack of car parking.

    4.3 However, development under permitted development rights would only have permitted a change of use to change the use of the existing floorspace and would not have permitted operational development, including the erection of extensions as sought by the applicant and as granted by the permission.

    4.3 The officer report demonstrates that the defendant wrongly proceeded under the mistaken belief that the whole proposed development, including the extensions, could have been carried out under permitted development rights.

    4.4 Thus the defendant wrongly decided the application on the basis that it would have been unreasonable to refuse permission on the basis of a lack of outdoor amenity space, since the whole development could have been undertaken anyway without the need for planning permission under the fallback position of permitted development rights.

    4.5 This was a material error of law which led to the defendant placing reliance on an immaterial consideration (i.e. that the whole development did not need planning permission anyway).

    4.6 Even if - which the claimant disputes - the officer report could be construed as referring to an alternative proposal, i.e. a change of use without operational development, nonetheless the officer report failed to identify the fallback with sufficient detail or to conclude on any identified grounds that the fallback was a reasonable possibility. Thus, the defendant could not properly have treated it as any more than a theoretical possibility which could not, on the authorities, have been a relevant consideration which would justify the grant of planning permission.

5. As developed in the grounds and in written and oral submissions before me, the essence of the defendant's response is as follows:

5.1 On a fair reading of the officer report, it did not proceed on or thus convey the mistaken impression that the whole development could have been carried out under permitted development rights. That is obvious from the fact that the officer report demonstrated that the planning officer was plainly aware that the lack of outdoor amenity space was contrary to relevant policy and that the lack of parking provision needed justification. Such matters would not have needed to have been considered had the planning officer believed that the whole development could have been undertaken as permitted development.

5.2. On a fair reading of the officer report it recorded, correctly, that two flats could be provided under such rights without the need for planning permission and, hence, without the need to comply with applicable policy as regards outdoor amenity space, and that the availability of this as a fallback scheme, which would have produced a worse scheme in terms of the quality of living space provided by the flats if there was no extension, was a material consideration which justified the grant of planning permission notwithstanding non-compliance with applicable policy.

6. Permission to apply for judicial review was granted on the papers by Mr Timothy Straker QC, sitting as a deputy High Court judge, who observed that "the claim is plainly arguable; a change of use is to be distinguished from operational development". By the same decision he directed, as requested by the defendant, that the claim should be heard in Manchester (as the Administrative and Planning Court centre closest to the area in question, where the claim ought properly to be have been issued) and made a cost capping order in favour of the claimant.

7. It is common ground that the decision to grant planning permission was made by or on behalf of the chief planning officer, acted under delegated authority, rather than by the planning committee. There is no suggestion or evidence that the decision maker did not follow the officer report, produced by the planning officer to whom the application had been assigned. Thus, it is the officer report which is the key document in the case. Apart from the officer report and the application for planning permission (and some pre-action correspondence) no other relevant documents have been placed before me.

8. Before turning to the officer report I should however refer to the relevant policies and to the relevant legal principles.

Relevant policies

9. The development plan was made up of the Formby and Little Altcar Neighbourhood Plan, adopted 21 November 2019 ("Neighbourhood Plan") and the Sefton Local Plan 2017 ("Local Plan"). As is well known, s.38(6) Planning and Compulsory Purchase Act 2004 requires any planning determination to be made in accordance with the development plan unless material considerations indicate otherwise.

10. The Neighbourhood Plan included a section dealing with Housing Policies, including Policy H6: Off-Road Parking, which stated that: "All new dwellings must provide off-road parking spaces and those of two bedrooms and above must provide off-road parking for at least two cars."

11. The Local Plan included the following material provisions:

Policy EQ2 "Design": development will only be permitted where …

"2. In relation to site design, layout and access:

The arrangement of buildings, structures and spaces within the site, including density and layout, and the alignment and orientation of buildings, relates positively to the character and

form of the surroundings, achieves a high quality of design and meets all of the following criteria:

a. Ensures safe and easy movement into, out of, and within the site for everyone, including pedestrians, cyclists and those with limited mobility

b. Integrates well with existing street patterns

c. Protects the amenity of those within and adjacent to the site

d. Ensures the safety and security of those within and outside the development through natural surveillance and the creation of active frontages

e. Creates well-connected attractive outdoor areas which fulfil their purpose well."

12. The policy explanation at paragraph 10.15 states the term "outdoor area" includes "gardens, amenity space, car parking areas"

13. The Sefton Supplementary Planning Document dated 2018 and entitled "Flats and houses in multiple occupation" ("the SPD") addresses outdoor amenity space in some detail from paragraphs 30 to 41. It is unnecessary to set the whole section out in full. It suffices for present purposes to observe that the normal minimum acceptable standard for outdoor amenity space for flats is $20m^2$ per flat, which may be private or shared. Any departure from this minimum standard has to be justified on a case by case basis and accepted only in limited exceptional circumstances, which might include the property being within easy walking distance of town centre facilities. In accessible locations, on site car parking may not be necessary. It is common ground that the SPD was not part of the development plan.

The GPDO 2015

14. It is common ground that the Class G of part 3 of Schedule 2 to the General Permitted Development Order 2015 ("GPDO") then in force permitted:

"Development consisting of a change of use of a building-

(a) from a use for any purpose within Class A1 (shops) of the Schedule to the Use Classes Order, to a mixed use for any purpose within Class A1 (shops) of that Schedule and as up to 2 flats.

15. It is also common ground that the application for planning permission, involving as it did substantial extensions to the rear, first and upper floor levels to facilitate the creation of the two flats, was both a change of use and operational development, with the latter requiring planning permission.

Relevant legal principles

16. It is well-established that questions of planning judgment are for the decision maker and not for the court: see the decision of the House of Lords in City of Edinburgh v Secretary of State for Scotland [1997] 1 WLR 1447.

17. The principles on which the Planning Court will act when criticism is made of a planning officer's report were summarised by Lindblom LJ in his judgment in Mansell v Tonbridge & Malling BC [2017] EWCA Civ 1314 at [42][1]. In short, they should be read with "reasonable benevolence" rather than with "undue rigour" and the question to be asked is whether "on a fair reading of the report as a whole" the officer has materially misled the decision maker.

[1] Although in that case the officer report was intended for and put before the planning committee, rather than - as in this case - the chief planning officer acting under delegated powers, there is no basis for treating these principles, which are of general effect, as inapplicable to the present case.

That will depend on the context and circumstances in which the advice was given and on its possible consequences. Unless there is some distinct and material defect in the advice given the court should not interfere.

18. Mr Gill reminded me that in Mansell at [41] Lindblom LJ also cautioned the Planning Court to be vigilant against what he described as "excessive legalism infecting the planning system", saying that planning officers were entitled to expect "good sense and fairness" rather than a "hypercritical approach" in the court's review of a planning decision.

19. The other members of the Court of Appeal (Hickinbottom LJ and Sir Geoffrey Vos C) expressly associated themselves with these observations.

20. The decision in Mansell is also the key current authority on the status of a fallback development as a material consideration in planning decisions. This aspect was addressed by Lindblom LJ at [27] onwards, where he summarised the effect of the earlier decision of the Court of Appeal in Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] JPL 1326, where the substantive judgment was given by Sullivan LJ, before adding some further comments of his own. Lindblom LJ said that the status of a fallback as a material consideration was a familiar concept, noting that: (i) the court must resist a "prescriptive or formulaic approach" and must "keep in mind the scope for a lawful exercise of planning judgment by a decision-maker"; (ii) where the question was whether there was a "real prospect" of a fallback development being implemented, it was sufficient if that was a possibility as opposed to one which was merely theoretical; (iii) fallback cases tend to be very fact-specific, and the role of planning judgment is vital, so that the exercise of a broad planning discretion, based on the individual circumstances of the case, should not be constrained.

21. In the context of this case, what he said at [27(3)] is worth setting out in full:

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

22. Ms Olley referred me to the decision of Mr George Bartlett QC sitting as a deputy High Court judge in Simpson v Secretary of State for Communities and Local Government [2011] EWHC 283 (Admin) where, at [10], he identified the two elements which needed to be established for a fallback before it can be brought into the evaluation.

> "The first is the nature and content of the alternative uses or operations. These need to be identified with sufficient particularity to enable the comparison that the fall-back contention involves to be made. The second element is the likelihood of the alternative use or operations being carried on or carried out."

23. The guidance in Mansell was applied by Ouseley J in Luna v Stockton-on-Tees BC [2018] EWHC 2510 (Admin), where he observed at [30-31] that the only question for the court was whether the fallback was a material consideration, i.e. whether it was rationally relevant to the

decision. If it was, then the weight it should be given was a matter for the planning judgment of the decision maker.

24. At [32] he explained that the expression "merely theoretical" is simply a way of describing the point at which it becomes irrational to have regard to an asserted fallback position".

25. In the Mansell case the issue of the fallback was something which had been debated in some detail at the planning permission stage and addressed in some detail in the officer report.

26. Ms Olley submits that in a case such as the present, where - as will be seen - there is a complete absence of contemporaneous evidence - beyond that which can be gleaned from the officer report - of the fallback having been raised by the applicant for planning permission, discussed between the applicant and the planning officer, or expressly considered by the planning officer, it is impossible to conclude that the fallback is more than merely theoretical.

27. Neither counsel has been able to refer me to any authority which directly addresses this particular point. It is, however, worth noting that in Mansell Lindblom LJ also referred with evident approval to the application of the relevant law by Supperstone J in Kverndal v Hounslow LBC [2015] EWHC 3084 (Admin). In that case Supperstone J observed at [17] that in Samuel Smith Sullivan LJ did not suggest that there was a requirement for a finding of an actually intended use for a fallback position to arise and held at [53] that "in circumstances where it was not suggested that there was no possibility of the prior approval being implemented, the Committee was entitled on the evidence before it to treat the prior approval as a material consideration".

28. Supperstone J also referred with evident approval to the earlier analysis of Mr Ian Dove QC sitting as a deputy High Court Judge in Gambone v Secretary of State for Communities and Local Government [2014] EWHC 952 (Admin) who said, at [25-27] that:

> "25. The fallback argument is in truth no more or less than an approach to material considerations in circumstances where there are, or may be, the opportunity to use land in a particular way, the effects of which will need to be taken into account by the decision-maker. That involves a two-stage approach. The first stage of that approach is to decide whether or not the way in which the land may be developed is a matter which amounts to a material consideration. It will amount to a material consideration on the authorities, in my view, where there is a greater than theoretical possibility that that development might take place. It could be development for which there is already planning permission, or it could be development that is already in situ. It can also be development which by virtue of the operation of legal entitlements, such as the General Permitted Development Order, could take place.
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> 26. Once the question of whether or not it is material to the decision has been concluded, applying that threshold of theoretical possibility, the question which then arises for the decision-maker is as to what weight should be attached to it. The weight which might be attached to it will vary materially from case to case and will be particularly fact sensitive. Issues that the decision-maker will wish no doubt to bear in mind are as set out in the authorities I have alluded to above such as the extent of the prospect that that use will occur. Allied to that will be a consideration of the scale of the harm which would arise. Those factors will all then form part of the overall judgment as to whether or not permission should be granted. It may be the case that development that has less harm than that which is being contemplated by the application is material applying the first threshold, and then needs to be taken into account and weight given to it.

> 27. However, the question of whether or not there is more or less harm applies at the second stage of the assessment and not at the first stage when deciding whether or not such existing land use entitlements, as may exist in the case, should be regarded as material. In short, there is nothing magical about a fallback argument, it is simply the application of sensible legal principles to a consideration of what may amount to a material consideration, and then the application of weight to that in context in order to arrive at the appropriate weight to be afforded to it as an ingredient in the planning balance.

29. Whilst these authorities do not answer directly this specific point they do, in my judgment, provide very powerful support for what may properly be taken from the decisions in Samuel Smith and Mansell, namely that there are no necessary pre-conditions of which a planning officer must be satisfied, which must be identified as such in the officer report and/or be demonstrated by contemporaneous evidence, before he or she may take a fallback into account as a material consideration. Thus, there is no necessary pre-condition that the applicant for planning permission has identified, expressly or implicitly, an intention to undertake the fallback if planning permission is refused, nor that the planning officer is satisfied that it would be feasible, whether in terms of constructional or financial viability, to undertake the fallback. It all depends on the particular facts and circumstances of the individual case. I therefore do not accept Ms Olley's overarching submission and determine this case on that basis.

The application for planning permission.

30. The application and supporting drawings reveal: (a) an existing traditional property being used as a Costa Coffee coffee shop both at ground level and at first floor front level; and (b) a proposal to convert the existing coffee shop first floor seating area to living accommodation, to convert the loft space on the second floor into living accommodation, and to construct an extension to the rear and a new raised roofline to the rear. The effect was to allow the coffee shop to continue to operate from the ground floor level, but to create two self-contained flats on the first and second floor levels. These met the requirements of the SPD as regards overall flat size, bedroom size and outlook and prospect but did not provide any private amenity space or off-site parking. It is evident from the officer report that the proposal had been reduced in scope down from three to two flats but no further details were provided or are available as to this reduction or the circumstances which led to it.

31. The defendant has not produced any other relevant material contemporaneous documents. Mr Gill assured me, and I accept, that the defendant was aware of and has complied with its duty of candour, from which I can reasonably conclude that there were no relevant exchanges, written or oral, between the defendant and the developer or relevant submissions made by the interested party in relation to the fallback of conversion without extension under permitted development rights. As I have said, the developer has not played any part in this judicial review and, thus, has provided no further relevant evidence directly.

32. Nor has the defendant produced any witness evidence as part of its defence to the claim. In particular, there is no witness statement from either the planning officer who produced the officer report or the chief planning officer who made the decision. That is not, however, surprising or to be held against the defendant since, as Ms Olley noted, any evidence to correct or add to the reasons given by a decision maker would normally be ruled inadmissible anyway under the principles set out in the decision of the Court of Appeal in Ermakov v Westminster City Council [1996] 2 All ER 302.

The officer report

33. In this case the substance of the officer report runs to only 3 pages. In the main, it is written in a perfectly intelligible and straightforward way, dealing in a logical and coherent order with sections relating to: (a) the site; (b) the proposal; (c) the history; (d) consultations; (e) neighbour representations; and (f) policy context, in which the application of the Local Plan and the Neighbourhood Plan was correctly recorded.

34. The next section, headed assessment of the proposal, is key to this case and is subdivided into sections headed: (i) principle; (ii) living conditions (divided into future occupiers and neighbouring properties); (iii) character; (iv) highway safety; and (v) conclusion.

35. In the sub-section titled "living conditions - future occupiers" the report made reference to the requirements of the SPD. Although there is a point taken that there is no explicit reference in this section to the car parking requirement in H6 of the Neighbourhood Plan, the claimant - rightly in my opinion - did not press this point, since the question of parking provision was addressed and reasons given for considering the lack of parking provisions to be acceptable in the section headed Highway Safety, which are not challenged nor sensibly capable of challenge as matters of planning judgment.

36. For present purposes the key section of the report is as follows:

> "The proposal would not provide any private amenity space to occupiers of the apartments. This would be contrary to policy EQ2 Part C of the Local Plan. However, as the proposal has been reduced to 2 apartments over a commercial premises, the conversion could be carried out under permitted development. Under the permitted development rights, private amenity space is not something that can be taken into consideration.
>
> It is therefore considered unreasonable to refuse the application on the lack of private amenity grounds alone, given the proposal could be carried out under permitted development."

37. In the "Conclusion" section the report ended as follows, before formally recommending approval with conditions:

> "While the proposal would not provide any private amenity space for future occupiers, given the town centre location and the legitimate fall back position in relation to permitted development and given that the proposal is acceptable in all other regards, it is recommended on balance that planning permission be approved subject to conditions."

Discussion and decision

38. Mr Gill submitted that it was wrong to focus in on the key section set out at [31] above, and that it is important to read the report as a whole. Ms Olley did not dispute the principle but submitted that since the only reference to fallback appears in this key section and the conclusion it is not unreasonable to focus on these sections.

39. Given the arguments raised, it is important to make some initial observations about the words used in the key section. This is not, as the authorities make clear, because the court is construing the officer report as if it were a statute or contract, but because it is principally from the words used that the court can understand the fair meaning to be given to the report. Ms Olley observed that the relevant section of the report refers, using the definite article, to the proposal (and to the conversion) which showed, she submitted, that the officer was viewing both the proposal for planning permission and the fallback as one and the same scheme. I agree that the officer report does not make it clear in this section that it is

considering two separate proposals, one with extensions to the existing building and the other without.

40. Equally, as I observed in argument, there is a difference in the words used, in that the section refers to the proposal as being contrary to the Local Plan policy and the conversion as being able to be carried out under permitted development rights. Notwithstanding that there is no other reference to or explanation of what is meant by the word conversion in the report, it is possible in my view to read the report as referring to two separate things in that sentence, consistent with the defendant's case. As a matter of ordinary English the word conversion connotes a change of something, such as a physical structure, which does not necessarily, although it may, involve an extension of that physical structure. However, as Ms Olley observes, the section continues to say that the proposal could be carried out under permitted development, so that this follow-on wording is inconsistent with that interpretation.

41. The first question is whether or not, on a fair reading of the officer report, it conveyed the mistaken advice that the whole development, including the extension, could be undertaken under permitted development rights.

42. Ms Olley submits that it plainly did. She relies on the wording used in the officer report discussed above. She submits that the officer report failed to make clear that the whole development could not have been undertaken under permitted development rights, which only permitted a conversion which did not involve any operational development and, thus, did not include the extensions.

43. Mr Gill submits that it plainly did not. He relies upon the difference in wording referred to above between the proposal and the conversion. He submits that it would have been apparent to the chief planning officer as the intended reader of the report that: (a) permitted development only applied to a change of use and not to operational development; (b) the planning officer would have been well aware of this fundamental distinction in planning law. He submits that it goes without saying that the chief planning officer would have known that the fallback could not have included the construction of the extension as operative development. He submits that when the officer report is read in this sensible way it is obvious that the comparator fallback can only be understood to be the conversion alone, without any extension.

44. Although in submissions I tended to treat the two questions as separate, on reflection it seems to me that it is necessary to consider the second question at the same time as considering the first question. The second question is whether or not the fact that the change of use without any extension was within permitted development was being put forward as a relevant consideration, in circumstances where on Ms Olley's analysis there was no suggestion in the officer report that this was anything other than entirely theoretical. On Ms Olley's analysis, the absence of such suggestion renders it even less plausible that it was this which was being referred to as a fallback, whereas on Mr Gill's analysis the officer report addressed the fallback perfectly adequately. Thus, I consider that the two questions are to some extent connected.

45. It is convenient, therefore, to consider the second question first. As I have said, this is not a case where I can assume that the planning officer who wrote the report or the chief planning officer to whom the report was addressed had any knowledge that the applicant positively intended to develop under permitted development if the application was refused or that this had been the subject of representation or discussion. I must therefore assume that if the question was being considered by the planning officer it was being done of his own volition and without reference to the applicant or by reference to anything other than the application itself and his local knowledge and planning experience.

46. Both Ms Olley and Mr Gill agreed that any conversion without extension would inevitably have resulted in the provision of two flats which would have been markedly inferior in size to those the subject of the application for planning permission.

47. Ms Olley also submitted that there is no evidence that it would have been possible for the applicant to have converted the property without also extending it to provide two flats which would have been commercially viable. Although she also submitted that there is no evidence that it would have been possible for the applicant to have converted the property without also extending it to provide two flats which would have complied with the other requirements of the SPD, as she recognised that was not a relevant question anyway since, if the conversion was lawfully undertaken as permitted development, there would have been no obligation to comply with the SPD anyway.

48. In contrast, Mr Gill submitted that the planning officer was entitled to consider this as a possibility of his own volition, using his local knowledge (which would undoubtedly have include his knowledge of what other developers were doing in Formby and other local town centres) and using his planning experience and judgment to know what was realistically possible.

49. Furthermore, Mr Gill submitted that it was obvious from the terms of the officer report that the officer had turned his mind to such questions. He submitted that the fact that the officer report referred to a conversion which could be carried out under permitted development showed that the officer was considering this very question. He submitted that the fact that the officer report referred in the conclusion section to this as a "legitimate fall back position in relation to permitted development" showed clearly that the planning officer was aware that he was considering a fallback and, therefore, must have applied his mind to it on that basis.

50. Moreover, although this is straying back into the first question, he submitted that it would have been obvious to the intended reader that the planning officer was conducting the analysis he did for a purpose. What would have been the point, he asks rhetorically, of the officer report analysing in some detail whether or not the proposed flats complied with the requirements of the SPD, concluding that they did not due to the lack of private amenity space and thus fell foul of the Local Plan, but also concluding that the conversion could nonetheless be carried out as permitted development where the lack of amenity space was not relevant and deciding that this was a legitimate fallback, if he was not undertaking the specific analysis mandated in such cases of deciding whether or not this was a material consideration which outweighed the non-compliance with the development plan?

51. In my judgment this rhetorical question illuminates the key issue in this case, which is that on Ms Olley's analysis this whole exercise was an exercise in pointlessness because the planning officer had decided, of his own volition, to investigate whether what could be done under permitted development amounted to a fallback which justified the grant of planning permission, whilst operating under a profound mistake that what could be done under permitted development included the construction of substantial extensions as operational development, when any competent planning officer would have known that it did not. The alternative analysis as propounded by Mr Gill is that the planning officer undertook this analysis because he understood the difference between what was being applied for and what could be done under permitted development, and because he considered that the alternative option of undertaking a conversion under permitted development was a possible outcome, notwithstanding the absence of any positive assertion from the applicant that this is what it would do. On this analysis, as Mr Gill submits, the planning officer was comparing the end result under the scheme applied for with the end result under permitted development and concluding that, notwithstanding the non-provision of private amenity space, the scheme applied for was still preferable to the end result under permitted development.

52. Albeit with some hesitation, reflecting the less than clear wording used in the officer report, I prefer and accept Mr Gill's submissions on these points. In my judgment it is far more likely, on a fair reading of the report as a whole and in context, that there was a genuine comparison being made between the scheme as applied for and the alternative fallback under permitted development. The use of the word conversion in the key part of the officer report supports this, as does the later express reference to fallback and the overall content of the relevant part of the officer report which shows the exercise being undertaken and, thus, informs its purpose. Moreover, the question must be decided in the context of the subject matter of the application (as a relatively modest application to convert and extend an existing building to provide two new flats whilst retaining the existing shop premises) and, in particular, in the absence of any suggestion that the issue of the extension or lack of amenity space was a matter of dispute as between the applicant and the planning authority, and in the absence of any concern being raised by the consultees or any others about this. On that basis, it seems to me that the simple statement that "the conversion could be carried out under permitted development" was sufficient on the facts of this particular case to show that the planning officer had addressed his mind and had reached the conclusion that the prospect of this happening as a fallback met the minimum standard of possibility so as to amount to a material consideration.

53. Whilst more could undoubtedly have been said, and whilst greater clarity could undoubtedly have been achieved in the key section. nonetheless applying the relevant legal principles discussed above what was said was sufficient in my judgment.

54. Although not argued, nor in my view realistically capable of being argued, I should add that in my judgment there can be no challenge to the rationality of the advice conveyed or the decision made. Policy EQ2 does not distinguish between a proposal to build a substantial new block of flats and the instant proposal to develop and extend space in an existing building in a town centre location above and behind a coffee shop which will continue trading, where the extensions will enable the developer to provide flats which comply with policy requirements in all respects other than outside amenity space and car parking space, in the context of a town centre location such as Formby where it could rationally be concluded that the lack of neither was fatal. The fact that the developer could provide two inferior flats under permitted development, which might not comply at all with policy requirements, is plainly a material consideration which the planning officer was rationally entitled to conclude, as a matter of planning judgment, outweighed the limited non-compliance with policy.

55. I note that the claimant says that it is "seriously concerned by the precedent arising from this case, as the Site is typical of the area, where failure to provide any outdoor space for occupiers or, indeed, off street parking is contrary to up to date policy objectives". Whilst I fully accept that this is the claimant's genuine belief, I do not consider that this decision, properly understood, sets any such precedent. It may be that the claimant is aggrieved that because the decision was delegated to the chief planning officer rather than being determined by the planning committee it did not have the opportunity to learn of the application or to make representations, but that is not the subject of challenge.

Disposal

56. For all of these reasons I dismiss the application for judicial review.