Neutral Citation Number: [2024] EWHC 2327 (Admin)

Case No: AC-2023-LON-003582

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 September 2024

**Before** :

**Mr James Strachan KC sitting as a Deputy Judge of the High Court**

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**Between :**

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| **THE KING**<br>**-on the application of-**<br>**TESCO STORES LTD** | **Claimant** |
| **- and –** | |
| **REIGATE AND BANSTEAD BOROUGH COUNCIL** | **Defendant** |
| **-and-** | |
| **(1) LIDL GREAT BRITAIN LTD**<br>**(2) GREENE KING BREWING AND RETAIL LTD** | **Interested Parties** |

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**Mr Richard Turney KC** (instructed by **Bryan Cave Leighton Paisner LLP)** for the **Claimant**
**Mr Ben Du Feu** (instructed by **Reigate and Banstead Borough Council)** for the **Defendant**
**Mr Craig Howell Williams KC and Mr Michael Feeney** (instructed by **Blake Morgan LLP**) for the **1st Interested Party**
The **2nd Interested Party** did not appear and was not represented

Hearing date: 6 June 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30 am on 11 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mr James Strachan KC (sitting as a Deputy Judge of the High Court):**

## Introduction

1. This is a claim for judicial review by Tesco Stores Ltd, the Claimant, of a decision given by notice dated 20 October 2023 by Reigate and Banstead District Council, the Defendant, to grant full planning permission (reference 22/01400/F) for demolition of an existing building and redevelopment of the site to provide a Class E(a) retail foodstore with associated parking, access and landscaping ("the Permission") at The Air Balloon, 60 Brighton Road, Horley, Surrey RH6 7HE ("the Site").

2. The applicants for planning permission were Lidl Great Britain Ltd and Greene King Brewing and Retailing Ltd, the First and Second Interested Party respectively. The Claimant owns and operates a superstore in Horley town centre.

3. The Claimant seeks to rely on two grounds of challenge to the Defendant's decision:

    a. Ground 1 is an allegation that in granting permission, the Defendant failed to comply with its statutory duty under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("P(LBCA)A 1990") in that it failed to give great weight to the preservation of the setting of a Grade II listed building.

    b. Ground 2 is an allegation that the Defendant failed to give any, or any adequate, reasons for finding that the identified harms arising from the development proposed were outweighed by the benefits of the proposal.

4. Permission to apply for judicial review was granted by Neil Cameron KC (Sitting as a Deputy Judge of the High Court) by Order dated 19 January 2024 on Ground 2 only. The Deputy Judge refused permission for the Claimant to proceed with Ground 1, along with Ground 3. Ground 3 is no longer pursued. The Claimant, has however, renewed its application for permission to proceed with Ground 1.

5. By Order dated 21 February 2024, Lang J directed that the renewed application for permission to proceed with Ground 1 be heard together with the substantive hearing of Ground 2. I therefore heard argument on both grounds during the course of the hearing. The parties were content that I deal with the question of whether permission for Ground 1 should be granted when delivering my judgment on the claim overall.

6. The Claimant was represented by Mr Turney KC. The Defendant was represented by Ben Du Feu. The 1st Interested Party was represented by Craig Howell Williams KC and Michael Feeney. I am very grateful to them all for the clarity of both their written and oral submissions. The 2nd Interested Party did not appear and was not represented.

## The Factual Background

The Site

7. The Site is approximately 0.64 hectares in area. It contains a building known as the Air Balloon Public House, a locally listed building. It lies on the eastern side of Brighton Road and south-east of the junction with Vicarage Lane and Victoria Road. The Site is within the designated urban area and lies approximately 225 metres from the Horley Town Centre Boundary. To the north-west, across the junction with Vicarage Road

and Victoria Road, is a Grade II listed War Memorial that lies within the Horley Recreation Ground.

8. The proposed development would involve the demolition of the Air Balloon Public House and the construction of a retail foodstore with associated car parking on the Site instead.

9. The proposed occupier of the retail foodstore, the First Interested Party, currently operates a foodstore in Horley town centre. It considers that its existing store does not meet its current specifications and that this was compromising store operations and the quality of products it could offer for sale. The Site was identified by it as suitable for a replacement store.

The Application for Planning Permission ("the Application")

10. The Application sought permission to construct a new retail store on the Site with gross internal area of 1,812 sqm, providing 1,200 sqm of sales floorspace. Vehicular access was proposed from Brighton Road, with a new exit out on to Victoria Road.

11. The proposed store building was originally intended to have a modern mono-pitched roof design with large, glazed frontage along the Victoria Road elevation and silver roof cladding and parapet. The external materials proposed for the elevation were, however, amended during the application process to multi-stock brick with contrasting red brick piers and plinth.

The Officers' Report on the Application

12. The Application was reported by the Defendant's planning officers to the Defendant's Planning Committee on 25 July 2023 with a recommendation for refusal.

13. The Summary section of the Officers' Report ("the OR") reported (amongst other things):

> "There is no objection to the loss of the existing community asset. It is accepted that the existing store is restricted in terms of its operations and a replacement supermarket would improve the shopping experience for some Lidl customers. A key test is however whether this site is sequentially preferable given its out of town centre location and whether the impact on the vitality and viability of the town centre and local centres and future investment in those centres is significantly adverse.
>
> It is accepted that the site is sequentially preferable with no other alternative sites identified which are either within the town centre or closer than this edge of centre location. It is concluded that the closure of Lidl and its relocation to the application site will cause an adverse impact. The negative impacts concern loss of a large convenience retailer reduced turnover and the potential for a large vacancy. The question is whether the level of impact is significantly adverse that would warrant a refusal of planning permission. Overall, it is the view of officers, following independent planning advice from Q+A Planning Ltd (see Appendix A for full response) and consideration of information

submitted from the applicant and third parties, that this adverse impact will not be significantly adverse.

In terms of the impact on the character of the area and heritage assets it is considered that there would be substantial harm to the locally listed building (air balloon pub) due to its complete removal, and there would be less than substantial harm to a designated heritage asset (setting of grade II listed war memorial) due to the unsympathetic scale, form and layout of the proposed supermarket and complete loss of a non-designated heritage asset (the air balloon pub). Therefore the development is contrary to criteria 1 of DMP policy NHE9 which requires development to protect, preserve, and wherever possible enhance, the Borough's designated and non-designated heritage assets. Criteria 3 of policy NHE9 states that the Council will give great weight to the conservation of the asset, irrespective of the level of harm. This is in line with paragraph 199 of the NPPF. In terms of the complete loss of the non-designated heritage asset criteria 5 of the policy NHE9 states that "In considering proposals that directly or indirectly affect other non-designated heritage assets, the Council will give weight to the conservation of the asset and will take a balanced judgement having regard to the extent of harm or loss and the significance of the asset." This test is in line with the NPPG paragraph 203. It is therefore a judgement for the decision maker to determine the level of harm attributed to the significance of the non-designated heritage asset. Given that the proposal results in the complete loss it is my view that the harm is substantial and this level of harm must be weighed against the benefits.

Where the proposal will lead to less than substantial harm to a designated heritage asset criteria 3 c. of policy NHE9 states that the harm will be weighed against public benefits of the proposal.

In support of the application the relocation of Lidl would result in an improved shopping experience and improved retail offer for residents and there would be potential for 15 additional staff to be taken on top of those existing jobs transferred from the existing store. The consultation exercise carried out by Lidl also shows that the majority of the responders (92%) expressed support for the new Lidl. The construction of the supermarket would create jobs. There may be additional benefit associated with increased convenience floorspace helping meet retail needs across the area, although the extent to which this can be given weight is not clear given it would be based on the 2016 retail and leisure needs assessment. The vacation of the existing store also provides the opportunity for new jobs linked to any new … tenancy. The building will also be more sustainable than the existing store in town. The applicant also contends that it would provide a quantitative and qualitative improvement to the Limited Assortment Discount (LAD) grocery offer in Horley and will not result in any significant adverse impact on existing stores. In terms of benefits whilst the above factors do weigh in favour of the application the weight of the benefits is

tempered by the finding that whilst there is not a significant adverse impact on the town centre there is still found to be harm to the town centre due to the loss of Lidl to an edge of centre location. Therefore whilst the harm is not enough to refuse on retail impact alone this does weigh against the scheme. The additional jobs created also has to be balanced against the fact that the existing pub use will cease resulting in the loss of the equivalent of 16 full-time jobs. The sustainability of the building is positive to the scheme and is an improvement to the existing store however the proposal would not replace the existing store, which still remains, and the proposal would result in the complete removal of an existing building and erection of a new building. Such activities would in themselves cause some harm to the environment due to the new resources (embedded carbon) required to erect the supermarket. In terms of the consultation results from Lidl's survey the significant support has to be seen in the context of the leaflet sent out by Lidl which puts doubt on the continued trading of the store.

Therefore, the starting point is that great weight is given to the protection of designated and non-designated heritage assets. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 also applies a legal obligation to all decisions concerning listed buildings. When making a decision on a planning application for development that affects a listed building or its setting, a local planning authority must have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses. Preservation in this context means not harming the interest in the building, as opposed to keeping it utterly unchanged. Historic England advise that the Court of Appeal decision in the case of Barnwell vs East Northamptonshire DC 2014 (ref. 2) made it clear that in enacting section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 Parliament's intention was that 'decision makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise'

Based on the assessment of the impact and consideration of the public benefits set out within the Design appraisal and impact on heritage assets it is concluded that the benefits would not outweigh the great and considerable weight afforded to the identified harm to the designated and non-designated heritage asset. The proposed form and scale of the building and complete removal of all existing trees and landscaping would also fail to promote and reinforce local distinctiveness and respect the character of the surrounding area, including positive physical characteristics of local neighbourhoods and the visual appearance of the immediate street scene. The proposal would therefore fail to comply with policy NHE9 and DES1 of the Development Management Plan and the requirements of the NPPF.

In addition, the proposal would result in a significant net loss of biodiversity on the site. Whilst the net loss of biodiversity is not a reason to refuse the application such a loss in biodiversity is disappointing and

an indication of the extent of tree works to the site, where all existing trees and vegetation are to be removed and the lack of space within the site for compensatory planting. Such matters certainly do not add any weight in favour of the application.

The application is therefore recommended for refusal.

**RECOMMENDATION(S)**

Planning permission is **REFUSED** for the following reasons:

1. The proposed development by reason of the complete loss of the locally listed Air Balloon Pub (a non-designated heritage asset) and the unsympathetic scale, form and layout of the proposed supermarket, would result in substantial harm to the locally listed building and less than substantial harm to a designated heritage assets (setting of Grade II listed war memorial). Having considered the benefits of the scheme put forward by the applicant it is considered that there are no public benefits or material considerations which outweigh the harm to the designated and non-designated heritage assets (as dictated by Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, the NPPF and policy NHE9 of the Development Management Plan). The proposal would therefore be contrary to Policy NHE9 and DES1 of the Council's Development Management Plan 2019 and paragraphs 199 to 203 of the NPPF."

14. The body of the OR dealt in more detail with that assessment under various sub-headings.

15. The 'Loss of a community facility' was dealt with in paragraphs 7.1-7.4. 'Retail Matters' were considered in paragraphs 7.5-7.21. Reference was made to a retail report that had been obtained by the Council from Q+A by way of independent review of the planning application. This had identified there would be an impact on the vitality and viability of the town centre if the store were to relocate, but not a significant adverse impact. At paragraphs 7.19-7.21 the OR stated:

"7.19 Since the receipt of the report from Q+A the applicant has also confirmed that they have been marketing their existing store. As of March 2023 they have received interest form 7 organisations (4 fitness/leisure, two retailers and a charity). Lidl are therefore confident that the site can be successfully let.

7.20 The applicant has also submitted letters from both Lidl and Green King (who own and run the Air Balloon pub) regarding the future of their existing operations. In the case of Lidl they are clear that the existing site is no longer fit for purpose and it is not feasible to continue

operations in the current building. Were the planning application to be refused the future of Lidl in Horley is said to be at risk. In terms of the Green King letter they advise that the Air Balloon site does not have an operational future in the current use and irrespective of the outcome of this application they would have little option but to close the premises.

7.21 Taking into account the independent Q+A report, all the submissions and the submitted letters officers considered that the relocation of the existing Lidl store to the Air Balloon site whilst causing harm to the town centre would not be to such an extent that it would cause significant adverse impact."

16. With reference to these paragraphs, as part of its submissions, the Claimant contends that the OR did not draw a conclusion as to the trading of the existing Lidl store, or the operational future of the Air Balloon Pub.

17. The 'Design appraisal and impact on heritage assets' was considered in paragraphs 7.22-7.31. Within those paragraphs the officers set out the objections of the Defendant's Conservation Officer at paragraph 7.25. At paragraph 7.26 officers then set out their views, based on the assessment from the Conservation Officer, that it was considered there would be less than substantial harm to the War Memorial, and a complete loss of a non-designated heritage asset which harm the officers considered to be substantial and had to be weighed against the benefits. The OR explained at paragraphs 7.27-7.31:

"7.27 Where the proposal will lead to less than substantial harm to a designated heritage assets criteria 3 c. of policy NHE 9 states that harm will be weighed against public benefits of the proposal. The Conservation Officer's view is that the public benefits do not outweigh the harm. In support of the application the relocation of Lidl would result in an improved shopping experience and improved retail offer for residents and there would be potential for 15 additional staff to be taken on top of those existing jobs transferred from the existing store. The consultation exercise carried out by Lidl also shows that the majority of the responders (92%) expressed support for the new Lidl (though that is not replicated in the responses made to the Council's on the planning application). The construction of the supermarket would create jobs. The vacation of the existing store also provides the opportunity for new jobs linked to the new tenancy. The building will also be more sustainable than the existing store in town. The applicant also contends that it would provide a quantitative and qualitative improvement to the Limited Assortment Discount (LAD) grocery offer in Horley and will not result in any significant adverse impact on existing stores.

7.28 In terms of benefits whilst the above factors do weigh in favour of the application the weight of the benefits is tempered by the

finding in the retail section above that whilst there is not a significant adverse impact on the town centre there is still found to be harm to the town centre due to the loss of Lidl to an edge of centre location. Given the challenges faced by Horley as a centre and as we continue through a difficult retail market environment, even a less than significant harmful retail impact still weighs against the scheme. The additional jobs created also has to be balanced against the fact that the existing pub use will cease resulting in the loss of the equivalent of 16 full-time jobs. The sustainability of the building is positive to the scheme and is an improvement to the existing store however the proposal would not replace the existing store, which still remains, and the proposal would result in the complete removal of an existing building and erection of a new building. Such activities would in themselves cause some harm to the environment due to the new resources required to erect the supermarket and any new tenant for the old store would still be faced with the same environmental challenges as before. In terms of the consultation results from Lidl's survey the significant support has to be seen in the context of the leaflet sent out by Lidl which puts doubt on the continued trading of the store.

7.29 Therefore the starting point is that great weight is given to the protection of designated and non-designated heritage assets. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 also applies a legal obligation to all decisions concerning listed buildings. When making a decision on a planning application for development that affects a listed building or its setting, a local planning authority must have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses. Preservation in this context means not harming the interest in the building, as opposed to keeping it utterly unchanged.

7.30 Historic England advise that the Court of Appeal decision in the case of Barnwell vs East Northamptonshire DC 204 (ref. 2) made it clear that in enacting section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 Parliament's intention was that 'decision makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise.

7.31 Based on the above assessment and consideration of the public benefits I do not consider that the benefits would outweigh the great and considerable weight afforded to the identified harm to the designated and non-designated heritage asset. The proposed form and scale of the building and complete removal of all existing trees and landscaping would also fail to promote and

reinforce local distinctiveness and respect the character of the surrounding area, including positive physical characteristics of local neighbourhoods and the visual appearance of the immediate street scene. The proposal would therefore fail to comply with policy NHE9 and DES1 of the Development Management Plan and the requirements of the NPPF."

18. 'Archaeology' was then considered in paragraphs 7.32-7.34 of the OR, 'Impact on neighbouring amenity' at paragraphs 7.35-7.43, 'Highway matters' at paragraphs 7.44-7.51, 'Trees and landscaping' at paragraphs 7.52-7.57, Ecology in paragraphs 7.58-7.62, 'Flooding' in paragraphs 7.63-7.66, Crime at paragraphs 7.67-7.68, 'Sustainable Construction' at paragraphs 7.69.7.70, 'Employment and Skills Training' at paragraphs 7.71-7.72, and then 'Community Infrastructure Levy (CIL) and requested contributions' at paragraph 7.73-7.75.

19. The OR then set out the officers' 'Summary and balancing exercise' in paragraphs 7.76-7.81 as follows:

"Summary and balancing exercise

7.76 There is no objection to the loss of the existing community asset. It is accepted that the existing store is restricted in terms of its operations and a replacement supermarket would improve the shopping experience for Lidl customers. The key test is however whether this site is sequentially preferable given its out of town centre location and whether the impact on the vitality and viability of the town centre and local centres and future investment in those centres is significantly adverse.

7.77 It is accepted that the site is sequentially preferable with no other alternative sites identified which are either within the town centre or closer than this edge of centre location. It is concluded that the closure of Lidl and its relocation to the application site will cause an adverse impact. The negative impacts concern loss of a large convenience retailer reduced turnover and the potential for a large vacancy. The question is whether the level of impact is significantly adverse that would warrant a refusal of planning permission. Overall, it is officers view that this adverse impact will not be significantly adverse.

7.78 In terms of the impact on the character of the area and heritage assets it is considered that there would be substantial harm to the locally listed building (air balloon pub), due to its complete removal, and there would be less than substantial harm to a designated heritage asset (setting of grade II listed war memorial) due to the unsympathetic scale, form and layout of the proposed supermarket and complete loss of a non-designated heritage asset (the air balloon pub). Therefore the development is contrary to criteria 1 of DMP policy NHE9 which requires development to protect, preserve, and wherever possible enhance, the Borough's designated and non-designated heritage assets. Criteria 3 of

policy NHE9 states that the Council will give great weight to the conservation of the asset, irrespective of the level of harm. This is in line with paragraph 199 of the NPPF. In terms of the complete loss of the non-designated heritage asset criteria 5 of the policy NHE9 states that "In considering proposals that directly or indirectly affect other non-designated heritage assets, the Council will give weight to the conservation of the asset and will take a balanced judgement having regard to the extent of harm or loss and the significance of the asset." This test is in line with the NPPG paragraph 203.

7.79 Based on the assessment of the impact and consideration of the public benefits set out within the 'Design appraisal and impact on heritage assets' section of the report it was concluded that the benefits would not outweigh the great and considerable weight afforded to the identified harm to the designated and non-designated heritage asset. The proposed form and scale of the building and complete removal of all existing trees and landscaping would also fail to promote and reinforce local distinctiveness and respect the character of the surrounding area, including positive physical characteristics of local neighbourhoods and the visual appearance of the immediate street scene. The proposal would therefore fail to comply with policy NHE9 and DES1 of the Development Management Plan and the requirements of the NPPF.

7.80 In addition to the above heritage weighing exercise the report has also found that the proposal would result in a significant net loss of biodiversity (- 32.49%). on the site, primarily due to the removal of all trees and vegetation within the site. Whilst the net loss of biodiversity is not a reason to refuse the application and it is noted that the applicant has offered to address this through an off-set payment to fund biodiversity improvements elsewhere in the district, such a loss in biodiversity is disappointing and an indication of the extent of tree works to the site, where all existing trees and vegetation are to be removed and the lack of space within the site for compensatory planting. Such matters certainly do not add any weight in favour of the application.

7.81 The application is therefore recommended for refusal."

20. The OR set out the officers' proposed single reason for refusal in the following terms:

"Reason for refusal

1. The proposed development by reason of the complete loss of the locally listed Air Balloon Pub (a non-designated heritage asset) and the unsympathetic scale, form and layout of the proposed supermarket, would result in substantial harm to a designated heritage asset (setting of Grade II listed war memorial). Having considered the benefits of the scheme put forward by the

> applicant it is considered that there are no public benefits or material considerations which outweigh the great and considerable weight afforded to the identified harm to the designated and non-designated heritage assets (as dictated by Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, the NPPF and policy NHE9 of the Development Management Plan). The proposal would therefore be contrary to Policy NHE9 and DES1 of the Council's Development Management Plan 2019 and paragraphs 199 to 203 of the NPPF."

21. The officers provided a written update to the Committee on further representations that had been received after writing the OR - including one submitted on behalf of the Claimant dated 21 July 2023 from Martin Robeson Planning Practice - in the form of an addendum report ("the Addendum"). This also contained a 'Clarification on heritage matters' in the following terms:

> "With regard to the reference by the Conservation Officer in their comments (paragraph 7.25, Page 31, third paragraph down of the Committee Report), to the recent exercise by the applicant looking at but rejecting some alternative options, for ease this document from the applicant is attached at Appendix B.
>
> At paragraph 7.25 the Conservation Officer has noted that they have included a typo in their quoted consultation response. At page 31 of the agenda, third paragraph down, the Conservation Officer meant to say:
>
> "In regard to the other two proposals these were rejected by the applicant due to the reduction in car parking and the loss of service access. However, I consider that if a ***smaller*** footprint scheme as has occurred elsewhere were used then potentially these issues could be overcome."
>
> In terms of the consideration of the application clearly the impact on the identified heritage assets is a key consideration. Officers therefore consider it useful to clarify the relevant tests for members and how this fits in to the weighing exercise.
>
> As set out in the Committee report it is considered that there would be complete loss of a non-designated heritage assets and less than substantial harm to the setting of the grade II listed war memorial (a designated heritage asset).
>
> Policy NHE9 (1) of the Development Management Plan (DMP) states:
>
> Development will be required to protect, preserve, and wherever possible enhance, the Borough's designated and non-designated heritage assets and historic environment including special features, area character or settings of statutory and locally listed buildings.

In terms of the impact on the setting of the war memorial policy NHE9 (criteria 3) states:

"In considering planning applications that directly or indirectly affect designated heritage assets, the Council will give great weight to the conservation of the asset, irrespective of the level of harm" and at 3(c), "Where less than substantial harm to a designated heritage asset would occur as a result of a development proposed, the harm will be weighed against the public benefits of the proposal". This policy is in line with the requirements set out in the NPPF at paragraph 202.

As per paragraph 7.29 of the committee report Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 also applies a legal obligation to all decisions concerning listed buildings. As per paragraph 7.30 Historic England advise that the Court of Appeal decision in the case of Barnwell vs East Northamptonshire DC 2014 (ref. 2) made it clear that in enacting section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 Parliament's intention was that "decision makers' should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise'.

In terms of the impact of the loss of the non-designated heritage asset. Policy NHE9 (5.) of the DMP states:

"In considering proposals that directly or indirectly affect other non-designated heritage assets, the Council will give weight to the conservation of the asset and will take a balanced judgment having regard to the extent of harm or loss and the significance of the asset." This test follows that set out in the NPPF at paragraph 203.

Paragraph 2.5.46 of the DMP also states that:

"The Borough Council, with the assistance of the County Council and local organisations, has compiled a comprehensive list of buildings of local interest to supplement the Statutory List. The Borough Council will seek to ensure that buildings of local architectural or historic interest are not demolished and that their inherent qualities are taken into account in considering proposals which may affect them."

The level of weight afforded to the complete loss of the locally listed building is not set out within local policy, national policy or legislation. Therefore as per paragraph 7.26 of the committee report it is "a judgment for the decision maker to determine the level of harm attributed to the significance of the non-designated heritage asset." In this case as the proposals result in the complete loss of the heritage asset it is the view of officers that the harm is substantial and this level of harm is given great weight in the balancing exercise.

Given the above it is note[d] that there is an error in the report where great weight is given to the protection of both designated and non-

designated heritage assets. Therefore the following changes are proposed to the committee report. At the summary on page 14, paragraph 2 and paragraph 7.29 it should say:

"Therefore, the starting point is that great weight is given to the protection of designated heritage assets. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 also applies a legal obligation to all decisions concerning ***statutory*** listed buildings. When making a decision on a planning for development that affects a listed building or its setting, a local planning authority must have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses. Preservation in this context means not harming the interest in the building, as opposed to keeping it utterly unchanged."

Summary and updated Reason for Refusal

In summary great weight is given to the impact on the setting of the designated heritage assets. The complete loss of the non-designated heritage asset is considered to cause substantial harm to the heritage asset and this substantial harm must be weighed against the public benefits. In this case officers consider that this should be given great weight. The benefits and material considerations are not considered to outweigh the great weight afforded to the identified harm to the designated and non-designated heritage asset.

To make the distinction of the above discussed tests clear it is proposed to update the Reason for Refusal to the following:

1. The proposed development by reason of the complete loss of the locally listed Air Balloon Pub (a non-designated heritage asset) and the unsympathetic scale, form and layout of the proposed supermarket, would result in substantial harm to the locally listed building and less than substantial harm to a designated heritage asset (setting of Grade II listed war memorial). Having considered the benefits of the scheme put forward by the applicant it is considered that there are no public benefits or material considerations which outweigh the great and considerable weight afforded to the identified harm to the designated ~~and non designated~~ heritage assets (as ***indicated*** by the NPPF and policy NHE9 of the Development Management Plan by Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990), and ***great weight afforded to the substantial harm caused by the loss of the non-designated heritage asset.*** The proposal would therefore be contrary to Policy NHE9 and DES1 of the Council's Development Management Plan 2019 and paragraphs 199 to 203 of the NPPF."

22. The planning application was considered by the Defendant's Planning Committee at a meeting on 25 July 2023. An agreed transcript of the Committee meeting has been submitted in evidence. The transcript records (amongst other things) that the Planning

Officer presented the application and, in so doing, drew members' attention to the Addendum report with the clarification on heritage matters and the amendment to the proposed reason for refusal. That oral presentation included referring to an aerial photograph showing the relationship of the Site with the Grade II Listed War Memorial and photographs of the Site. The planning officer identified the loss of the locally listed building and the impact on the War Memorial as a "key consideration". He stated (amongst other things) that:

> "The Addendum sets out the relevant heritage tests that Members have to consider, great weight is given to the impact on the setting on the designated heritage asset. The complete loss of the non-designated heritage asset is considered to cause substantial harm to the heritage asset , and this substantial harm must be weighed against the public benefits. In this case, Officers consider that it should be given great weight. The benefits and material consideration are not considered to outweigh the great weight afforded to the identified harm to the designated and non-designated heritage assets. And also just to note again that the Addendum does include the slightly updated reason for refusal."

23. This view was then repeated again in very similar terms a few moments later at the end of the officer's presentation.

24. The transcript then records that the members heard from Mr Forsdick, the Regional Head for Property for Lidl in the South-East in favour of the application, who summarised what he considered to be some of the benefits of the proposal and responded to the heritage issues raised by officers. Thus, for example, he contended (amongst other things):

> "The particular significance of any heritage asset needs to be considered and, in this case, only a very small part of the existing building is from the late 18th century. Externally it has been subject to unsympathetic extensions with staff ashtrays and external air condition units now adjoining the only remaining original façade. Internally, the entire building has been stripped and there are no heritage features remaining. If Heritage England's own criteria for local listings were applied, this building would not meet the test. Despite this we attempted to incorporate original elements of the façade into our proposal. This left the development economically and operationally unviable. We remain committed to honour the site's history through on-site signage and other artwork. Our view is that the War Memorial is already subject to harm by its location adjacent a busy road and signalised junction with large warehouse buildings immediately opposite. Nonetheless, we altered our elevations from our standard design to soften any impact from the building and to tie in more sensitively with local surroundings, we added more trees to improve screening, and if Members are minded to over-turn, we are happy to review further and will take every opportunity to maximise tree screening and biodiversity. This is addition to the public realm pedestrian improvements between the site and our existing store requested by SCC Highways.

> By refusing consent tonight, Members will not be maintaining the status quo. Greene King's letter to the LPA confirms that the premises will close irrespective of this application. Lidl's own Property Director wrote to Officers to confirm that our existing store is no longer fit for purpose, and that its continue with trading cannot be guaranteed. Members will be aware that we recently shut two underperforming stores in the south, Canterbury and Gosport, and elsewhere in Surry, Camberley will be closing this Sunday. If on assessment of all the information put to you tonight, members feel in the planning balance that this application can be consented because of its economic regeneration benefits and additional jobs, may I respectfully request that you move a recommendation for approval and defer to Case Officers and the Chair to agree conditions, thus safeguarding access to discount groceries in Horley during the cost of living crises and upholding the wishes of those 91% of residents in support of our proposals …"

25. Members then heard from Russell Ingram, the store Manager for Waitrose in Horley Town Centre, who spoke in support of the officers' recommendation to refuse the planning application, expressing serious concern about the impact of the application on the vitality and viability of Horley town centre and welcoming the recommendation for refusal on grounds of impact to the local heritage assets and stating that he considered this to be a highly significant consideration given the prominent position of the Site.

26. Members then heard from the visiting Councillor Buttironi who spoke in his capacity as a supporter of the scheme, rather than in his capacity as a councillor. He expressed support for the application. He set out why he considered the benefits of the development from both an economic and societal standpoint outweighed the concerns expressed in the OR.

27. Members then debated the planning application. It is clear from the transcript of that debate that various views were aired by different councillors as to the effects of the proposal in terms of the loss of the locally listed building and the effect on the listed War Memorial. Moreover, during the debate, additional advice was provided to members by the Council's planning officer, but also by the Council's Development Manager, Steven Lewis. That included the following after a contribution from Councillor Blacker:

> "**Steven Lewis (Development Manager)**: Michael [the planning officer] will come back on some of those technical points, I think it might be a good point in debate to perhaps cover some of these issues that have cropped up several times over pricing, over heritage and those kinds of things. Now I want to be clear what when you look at this, this evening, as decision makers you have to weigh your own judgment of those things (issues such as pricing and heritage), however, the Government do give you advice via the NPPF and Officers will repeat those about what weight you should give to those, ultimately if you decide that the other benefits of the scheme outweigh those then that is a judgment you are entitled to make and one you should make as a decision maker, so I will run through some of those in a moment.

With respect of pricing, occupancy, all those other issues, first up I will say, while Lidl are the applicant, this is not a store that will be tied to Lidl, anyone could operate from there, and Lidl may have a contract or otherwise in order to occupy that but should the supermarket or the store be built in the future, it could reasonably be occupied by somebody else, in the same way that the same operating company may change their pricing plans and may change entirely their means of operation, so I would ask members to very seriously consider not giving substantial weight or great weight to pricing and those other issues because that's not what's being asked, what's being asked is this being a retail store.

With respect of the heritage part, I think it's worth just running through what the advice and what those tests are so that it is clear when you are considering the other points that you have considered those and if you are still minded that you are thinking that those things outweigh them then at least you know you have considered the right tests. So the first thing I will point out is the War Memorial statutory listed Grade II, what the Government advice within paragraph 199 of the National Planning Policy Framework, is when considering the impact of a proposed development on the significance on a designated heritage asset, great weight should be given to the asset's conservation and the more important the asset, the more weight it should be. This is irrespective of whether any potential harm is substantial total loss, or less than substantial harm to the significance, so you must give great weight to the statutory listed building.

Now when we move onto that, the Conservation Officer has explained within the Report and Michael [the planning officer] has too, respect of what he finds less than substantial harm, which should be given great weight and that is set out in paragraph, let me just look at my notes, paragraph 202 in the National Planning Policy Framework. That says where a development or proposal will lead to less than substantial harm to the significance of a designated heritage asset, the harm should be weighted against the public benefits of the proposal including, where appropriate, securing its optimum viable use. Now, obviously, the war memorial does not have a use in that way, but this is about its setting and its impact. So, essentially what we are saying is that there needs to be a public benefit which outweighs whatever level of harm within less than substantial, that you consider it to be and that is a judgment for you to make, but nevertheless, it should be given great weight.

Turning to the locally listed building, that's a non-statutory designated asset, and there are not tests set out within the guidance as to how you weigh, for example, the total destructions loss of an asset. In a designated assets, the Government set out a very clear test of how it should be. Now, the Governmental test to do with statutory listed buildings is a good starting point. This is total destruction of the asset, it will be gone, it will be no more, you may be able to record the asset but it will not be the same as it being in perpetuity. So from that

> point of view, Officers feel there is substantial harm to that asset, now what that says and that should be given great weight, and what the test there is that the effect of an application on the significance of a non-designated asset should be taken into account determining the application in weighing applications that directly or indirectly affect non-designated assets, a balanced judgment will be required in regard to any scale of harm or loss to the significance of the asset, which I would say is total in this case because it will be gone. So those are the tests you need to bear in mind when you are considering the other potential benefits to this scheme."

28. In its written argument, the Claimant, however, sought to place particular emphasis on the following extracts from the transcript in relation to comments made during the course of that debate:

> "**Councillor Bray** … I am afraid I am going to have to discount a lot of the heritage stuff because I think this is too important for Horley and its local residents, that's my final point."
>
> …
>
> **Councillor Thorne** … I must say I wasn't impressed with the applicant's contact with the residents, it felt like a threat. However what it has done is show the care and feeling amongst the residents for this site and although the gentleman said 91%, the way it was presented it was always going to be ridiculously biased in that manner, but I don't feel like Horley can lose Lidl. The great weight I place on the building, I just don't think as a town we can afford to lose Lidl and their threat for me has done the job, its sad to say but I do think we need to keep them here and it might bring people from outside of the town into Lidl's in terms of the business coming into the town centre. So, I am for it."
>
> "…
>
> **Councillor Dwight** … I appreciate the Officers for coming on at this I think our protection for heritage and identity of our area are one of the reasons that make Reigate, Banstead and communities like Horley great, but we have to look at future requirements. I know we are not supposed to look at it like a future Lidl site but I will put on the cards that my dad is a huge fan of Lidl and if he was here I know which way he would vote and he is an upstanding guy and I believe the people of Horley are upstanding people too. So I can see why there are significant levels of support.
>
> …
>
> **Councillor Green:** …
>
> "[S]o it sounds like the obligation on us is to give great weight to potential harm to the War Memorial and so, what it really seems to boil

> down to me is whether we think that siting a shop on the other side of a dual carriageway from a War Memorial will have such a deleterious effect on people's enjoyment of that War Memorial that we shouldn't build a shop, which to me feels like a bit of a stretch, and from the people who actually live there have said that doesn't make any sense.
>
> Then we may also consider the pub which is not statutory listed which we are then not obliged to give great weight but nevertheless the advice is something we should think about which seems perfectly reasonable to think about, and again, the people who live there are telling us they don't really use it, its going to close anyway, and as much as I agree with others, it is a great shame to see pubs close. We are all familiar with dilapidated pubs up and down the country. So really it seems to me the decision comes down to, do we want a dilapidated pub or do we want a Lidl on this site?"

29. The Claimant submits that none of these comments was subject to any clarification or comment from officers. The Claimant relies upon such comments, in conjunction with the reasons that were given by members for resolving to grant planning permission (by 9 votes to 3), in advancing the two grounds of challenge considered below.

30. In his oral submissions, Mr Turney fairly took the Court to some of the context for the extracted comments in his skeleton argument, and identified the contributions from other members during the debate. In so doing he made some further criticisms of the comments that were made, such as suggesting that both Councillor Blacker and Councillor Harp's comments were directed at the public house and not the War Memorial. In respect of Councillor Green's comments (above), he contended that the Councillor had applied the wrong test of "such a deleterious effect on people's enjoyment of that War Memorial that we shouldn't build a shop" and that this read as the application of a straightforward balance, rather than the approach required under statute and policy, and that Councillor Green was considering the loss of a public house as a public house, rather than as a locally listed asset. He also criticised the comments made in respect of the approach to provision of a store operated by Lidl, rather than weighing up the benefits in an appropriate way as required.

31. I will return to the question of the proper approach to reliance on comments made in debates of this kind shortly; but before doing so, having read the transcript of the debate in full, I should record some reservations I have as to the presentation of, and reliance on, the chosen extracts and the additional oral comments in this way.

32. First, as I have already identified, the debate that occurred took place in the context of both (1) the written advice already provided by officers in the OR, as then substantially clarified in the Addendum; and (2) then the oral presentation by the planning officer at the outset of the committee meeting and advice from the Development Manager. That advice repeatedly advised members as to the correct legal approach to adopt in relation to the statutory duty applicable to a listed building, and the great weight to be attached to heritage harm. This is important context when considering whether comments made in the subsequent debate itself, and the reasons for the decision, reveal that members fell into legal error despite the advice they had received.

33. Second, considerable caution also needs to be exercised in reading the extracted comments themselves in isolation in any event, as became apparent when going through the transcript. For example, the extracted comment from Councillor Bray in fact came at the end of his contribution to the debate, where what he said earlier provides relevant context for his concluding remark. Thus, in full, the transcript records his contribution to the debate as follows:

> "**Councillor Bray**: I have to say I have been listening with great interest at the debate really tonight because my stance normally is that I like to go with our policies and what the Officer's recommending so that's kind of my standpoint on most of these applications. I have to say when reading the Report and listening to it being presented tonight and also the other speakers. What struck me was all of the things that you would normally expect this to be voted down on, were you know, but this hasn't got a lot of weight to it, so you know the fact you have lorries and cars making deliveries, that seems to have been handled, all the charging points and that kind of stuff has been handled. So I am kind of left on my piece of paper really with Councillor Ritter's point which was about the scorched earth policy that seems to be adopted on this site. I know the Tree Officer has said that these trees are not significant but collectively it is a massive ecosystem for insects, for birds and whatever and I am very concerned that they have taken sufficient action to try and keep some of it there. What they are planning to plant and add to over time, I would really like to see that conditioned, that the watering system is good enough for it all, that they have a system for replacement if things fail. So, I am trying to get away from the bucolic picture that I have in my mind that we have got a heritage, locally listed pub and across the road is a War Memorial, and I imagine everyone having a drink in the pub wandering across in November paying their respects for the fallen. That isn't the case, we have this massive road in between, there's no kind of connection between the two and the War Memorial itself is set in a nice area with lots of other things around it. So, I am afraid I am going to have to discount a lot of the heritage stuff because I think this is too important for Horley and its local residents, that's my final point."

34. The final remark therefore follows on both sequentially, and grammatically (given the conjunctive use of the word 'So'), from the Councillor's expression of views about both the locally listed pub and the War Memorial and its setting. It is clear from those views that the Councillor considered those heritage assets not to be connected, and to be significantly affected by the presence of the busy road. Leaving on one side the question of how one should approach commentary in a debate of this kind (to which I will return), that context is relevant if, for example, it is being suggested his final remark evinces an error of law of the type alleged under Ground 1, as opposed to a member seeking to express their own potentially legitimate planning judgment as to the extent and nature of harm that the development would cause to the heritage assets in question, taking account of their location and setting.

35. To similar effect in respect of the other extracts relied upon, the full transcript shows:

    a. Councillor Thorne began his contribution to the debate as follows:

> "… Thank you Chair. There's a lot to get through here. I agree with Councillor Blacker actually that I have quite a fondness for the building and I really didn't want to see it demolished, however as it has been said it's not been looked after very well in particular and I don't see it as having a very rosy future certainly from a commercial point of view. That leaves me to believe it could end up as housing in some shape or form. …"

Councillor Thorne therefore was expressing a reluctance to see the locally listed pub demolished, but that was tempered by his view as to its condition and his judgment as to its potential future.

b. The comment from Councillor Dwight that the Claimant has extracted was in fact immediately preceded by the following:

> "Thank you very much. I am a lover of heritage and history and while your American friend Councillor Harp sadly won't be so used to so much heritage that we are lucky to have in this country dating back many thousands of years not just a few hundred. Of course, the challenge we have with any heritage site particularly like a pub, as Councillor Thorne said a second ago, they have got to be commercially viable. As wonderful as that site is, and I have this in my day job with some of the things we try and protect, unless it's going to have that commercial viability of people going there for whatever reasons, it's actually not viable at all and it's just going to waste over time. So, …"

Again, the remarks the Claimant relies upon in fact followed on sequentially, and also again grammatically with the use of the word "So", from the Councillor's views about balancing the preservation of the locally listed pub with the question of its continued commercial viability as such (as to which the pub operator had provided some evidence).

c. The comments made by Councillor Green on which the Claimant relies in fact followed on from a specific question the Councillor had just asked, which had just been answered by the Council's Development Manager. Read in context, this actually tends towards showing particular attention being paid by the Councillor to understanding the correct legal and policy approach to be applied to the heritage assets in question. The transcript records that exchange as follows:

> "**Councillor Green**: Thank you Chair. I wonder if I could go to Michael [the planning officer] to ask about a policy question. If I followed what you said earlier correctly, you say that we should give great weight to the heritage asset on the basis that it is the policy framework for a statutory listed building, but that is not a statutory listed building and so, can I just understand the position of even though it is not a statutory listed building, you think we should treat it as a statutory listed building.

> **Councillor Parnall (Chair)**: We will go to Steven [the Council's Development Manager officer] on this one, obviously there is two sites, you have got the War Memorial site, but Steven to you.
>
> **Steven Lewis (Development Manager)**: I think its worth me outlining again perhaps where we were and what weight you need to give, so, the first one was when considering the impact of a proposed development of the significance of a designed asset and that is on the setting of the War Memorial, you should give greater weight to the asset's conservation and the more important the asset, the greater the weight should be, this should be irrespective of whether any potential harm or substantial total loss or less than substantial harm to its significance. In this case we have identified less than substantial harm, but you still have to give that great weight. The tests when you are considering that harm is that it should be weighed against the public benefits of the scheme and the public benefits of the scheme are for you to decide upon but some of those things could be for example, job creation, value to the economy, choice, social, that kind of thing. With respect to the non-designated asset with respect to the Air Balloon itself, it says the effect of the application and the significance of a non-designated heritage asset should be taken into account in determining the application in weighting applications directly or indirectly effect non-designated assets, a balanced judgment would be required having regard against the scale of any harm or loss to the significance of the asset.
>
> So, from the point of view because tests within the non-designated asset are not set out and there is nothing within the PPG guide, that's the online guidance the Government provide, then Officers would advocate a good way to start is thinking about the asset itself and this being substantial harm because it's the total loss of that asset. The Government also advises that are irreplaceable when lost and it's Officers view that should give great weight to that as well."

36. As to the advice provided by Mr Lewis at that point, as with the written advice and the earlier oral advice, the Claimant does not allege any error in what was stated. In oral submissions Mr Turney noted that the officers did not deal expressly with references in the National Planning Policy Framework as to the need for clear and convincing justification for harm, but he confirmed that he was not taking any point about that and that the Claimant considers that the officers' advice given both orally and in writing to be legally correct. It is therefore in that context that Councillor Green expressed the views the Claimant has focused on which actually begin with the Councillor identifying the obligation to give great weight to the potential harm to the listed War Memorial, just as the members had in fact been advised. The Councillor then went on to express his own views on the nature of the harm he considered to arise in that context.

37. Third, I have already noted that one of the Claimant's submissions is that the comments from Councillors on which the Claimant relies were not subject to any clarification or comment from officers. That submission proceeds on an assumptive basis that the comments required some sort of clarification or comment, which (for reasons I will come to) I am not persuaded is the case. But the submission fails to recognise that the comments made by Councillors Bray, Thorne and Dwight (on which the Claimant

relies) in fact preceded the further oral advice given by Mr Lewis, the Council's Development Manager, in answer to Councillor Green's question. So, in fact, the council members received a reiteration of what the Claimant accepts was correct advice on the proper legal approach to apply after those contributions were made, and very shortly before voting on the proposal. It seems particularly challenging to contend that members did not understand that advice where, for example, Councillor Green immediately repeated the substance of the advice as to obligation to give great weight to the potential harm to the War Memorial in making a decision.

38. Fourth, selecting extracts from the debate on heritage matters, or making the sort of criticisms of comments as done at the hearing, not only suffers from the potential problem of focusing on particular comments made by some members, rather than the contributions from all members, but also ignores the contributions and commentary on what were perceived to be the public benefits of the proposal relevant to any balancing exercise. For the avoidance of doubt, I have taken the opportunity to read again in detail the transcript of the Committee meeting in full in considering this claim.

39. Returning to what happened at the committee meeting, following the various contributions from members, Councillor Baker put forward a motion for approval with reasons for doing so expressed as follows:

> "**Councillor Baker:** Thank you Chairman, I have got reasons for approval if that's ok. The development hereby permitted has been assessed against the relevant Development Plan Policies as set out in the Committee Report, and material considerations including third party representations. It is considered the public, social and economic benefits provided by the development would outweigh the less than substantial harm to the designated heritage asset, total loss of the non-designated heritage asset, the scheme's failure to promote and reinforce local distinctiveness and respect the character of the surrounding area and the potential impact on the town centre. It is therefore concluded that the development is in accordance with the relevant policies in the Development Plan and there are no material considerations that justify refusal in the public interest. The Local Planning Authority has acted positively and proactively in determining this application by assessing the proposal against all material considerations including planning policies and any representations that may have been received and subsequently determining to grant planning permission in accordance with the presumption in favour of sustainable development where possible, as set out in the National Planning Policy Framework. Thank you."

40. The motion therefore was not a simple one of resolving to approve the planning application; it was a motion to approve advanced with reasons for approval. This motion was seconded by Councillor Bray. The Chair then established that the vote on the motion would be subject to the imposition of appropriate conditions on any approval. A vote was then taken on the motion which passed by 9 votes to 3, with 2 abstentions.

41. The Claimant submitted that no contemporaneous reasons for the decision were recorded; however, as the transcript shows, the motion itself for approval was expressed with the reasons stated above.

42. The subsequently approved minutes of the meeting provide a summary of what transpired at the committee meeting (including, for example, a summary of the representations that were made orally by Mr Forsdick, Mr Ingram and Councillor Buttironi) and then stated as follows:

> “A reason for approval was proposed by Councillor Baker and seconded by Councillor Bray, whereupon the Committee voted and **RESOLVED** that planning permission be **APPROVED** on the grounds that:
>
> The development hereby permitted has been assessed against the relevant development plan policies as set out in the committee report and material considerations, including third party representations.
>
> It is considered that the public (social and economic) benefits provided by the development would outweigh the less than substantial harm to the designated heritage asset, total loss of the non-designated heritage asset, the schemes failure to promote and reinforce local distinctiveness and respect the character of the surrounding area and the potential impact on the town centre. It is therefore concluded that the development is in accordance with the relevant policies of the development plan and there are no material considerations that justify refusal in the public interest.
>
> Proactive and Positive Statements
>
> The Local Planning Authority has acted positively and proactively in determining this application by assessing the proposal against all material considerations, including planning policies and any representations that may have been received and subsequently determining to grant planning permission in accordance with the presumption in favour of sustainable development where possible, as set out within the National Planning Policy Framework.
>
> Conditions to be agreed with the Ward Councillors and Chair/Vice Chair of the Committee”

**Legal and policy framework**

43. There was no real dispute as to the key and well-established elements of the legal and policy framework for this claim.

44. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”), taken in conjunction with section 70(2) of the Town and Country Planning Act 1990 (“the 1990 Act”) has the effect that the Application fell to be determined in accordance with the development plan unless material considerations indicated otherwise.

45. In addition, in a context where the development proposals potentially affected a statutorily listed building, section 66 of the P(LBCA)A 1990 was engaged:

> "66. General duty as respects listed buildings in exercise of planning functions
>
> (1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority … shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.
>
> …"

46. The National Planning Policy Framework ("NPPF") in the form it existed at the time the Council made its decision stated in terms of approach (amongst other things):

> "199. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 200. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification…
>
> 202. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

47. In terms of the statutory development plan, it was common ground that Policy NHE9 of the Reigate & Banstead Local Plan Development Management Plan (September 2019) ("the DMP") was of similar effect to the policy set out in the NPPF.

48. The duty under section 66(1) P(LBCA)A 1990 is an overarching statutory duty which requires a decision maker not simply to give careful consideration to the desirability of preserved the setting of a listed building for the purposes of deciding whether there is some harm, but a finding of harm to a listed building is a consideration to which the decision-maker must give "considerable importance and weight" when carrying out the balancing exercise. It is not open to a decision-maker merely to give the harm such weight it thinks fit, in the exercise of his planning judgment or to treat less than substantial harm to the setting of a listed building as a less than substantial objection to the grant of planning permission: see *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2015] 1 WLR 45 per Sullivan LJ at [16]-[29].

49. The discharge of the statutory duty has been identified as "a demanding duty for a decision-maker, whose rigour has been repeatedly emphasised in the case law", but the relevant standard to apply in assessing the adequacy of reasons remains the usual standard under the principles explained in *Save Britain's Heritage* and *South Buckinghamshire DC v Porter*, in light of *Jones v Mordue* [2015] EWCA Civ 1243;

[2016] 1 WLR 2682, Sales LJ at [26]: see *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] JPL 1420, at [51].

50. The requirement to give "considerable importance and weight" to any harm to the setting of a listed building does not mean that the weight to be given to the desirability of preserving its setting is the same in every such case: see *City and Country Bramshill v Secretary of State for Housing Communities and Local Government* [2021] EWCA Civ 320; [2021] 1 WLR 5761 at [60], [61] and [71]-[83] and *East Quayside 12 LLP* (above) at [38].

51. The advice contained in the NPPF is set out in a fasciculus of paragraphs which lay down an approach which corresponds with the duty in section 66(1) of the TC(LBCA)A 1990. Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty: see *Jones v Mordue (above)* per Sales LJ (as he then was) at [28].

52. The reference in paragraph 202 of the NPPF to weighing harm against the public benefits of the proposal must nonetheless give effect to the presumption against granting permission for development which harms the setting of a listed building. The balance is "tilted" in favour of the preservation of setting; but how much weight to give to the harm to the setting of a listed building and to that tilt is a matter for the decision maker: *R (Leckhampton Green Land Action Group Ltd) v Tewkesbury BC* [2017] EWHC 198 (Admin), at [49].

53. The Claimant submitted that to be lawful, the decision must demonstrate that a weighted (or tilted) balancing exercise has taken place: see for example, *R (Kinsey) v LB Lewisham* [2021] EWHC 1286 (Admin), at [86]. However, that was an example of a case where the Court, having considered the way in which that particular officers' report was articulated, concluded that the planning officer had in fact undertaken an unweighted balancing exercise rather than a weighted balancing exercise as required.

54. The principle that Inspector's decision letters should be read and interpreted (and the adequacy of their reasoning judged) on the basis that they are addressed to a "knowledgeable readership" applies with particular force to an officer's report to a planning committee, although in a different way. The purpose of an officer's report is not to decide an issue or to determine an application, but to inform the committee of considerations relevant to the application. The report is not addressed to parties interested in the application, let alone to the world at large, but to the members of the committee, who can be expected to have substantial local knowledge and an understanding of planning principles and policies. The Court should guard against undue intervention in policy judgments made by planning committees and respect their decisions unless it is clear that they have gone wrong in law: see *Leckhampton Green Land*, per Holgate J at [25].

55. As identified by Lindlom LJ in *R (Mansell) v Tonbridge BC* [2019] PTSR 1452 at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R v Selby District Council, Ex p Oxton Farms* [2017] PTSR 1103 : see, in particular, the judgment of Judge LJ. They have since been confirmed several times by this court, notably by Sullivan LJ in *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] JPL 571 , para 19, and applied in many cases at first instance: see, for example, the judgment of Hickinbottom J in *R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [15]

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337 , para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different— that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (Loader) v Rother District Council* [2017] JPL 25 ), or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43 . There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive

> explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439 . But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

56. There is no general common law duty to give reasons where a planning committee grants planning permission. However, a common law duty may be imposed where, in all the circumstances, fairness requires it: see *Dover District Council v CPRE Kent* [2018] 1 WLR 108; [2017] UKSC 79, at [51].

57. The Claimant referred to the Supreme Court's approval of what was stated in *R (Oakley) v South Cambridgeshire District Council* [2017] 1 W.L.R. 3765, where Elias LJ had stated:

> "26. There are powerful reasons why it is desirable for administrative bodies to give reasons for their decisions. They include improving the quality of decisions by focusing the mind of the decision-making body and thereby increasing the likelihood that the decision will be lawfully made; promoting public confidence in the decision-making process; providing, or at least facilitating, the opportunity for those affected to consider whether the decision was lawfully reached, thereby facilitating the process of judicial review or the exercise of any right of appeal; and respecting the individual's interest in understanding — and perhaps thereby more readily accepting — why a decision affecting him has been made. This last consideration is reinforced where an interested third party has taken an active part in the decision making-process, for example by making representations in the course of consultations. Indeed, the process of consultation is arguably undermined if potential consultees are left in the dark as to what influence, if any, their representations had."

58. In *Dover District Council* (above), Lord Carnwath identified at [42] that a decision letter of the Secretary of State or his inspector on an appeal was "designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion" but that in a decision of a local planning authority this task "will normally be performed in the planning officers' report". The principles of fairness, which underpinned the duty to give reasons, were found to apply equally to the "the less formal, but equally public, decision- making process of a local planning authority". At [60] Lord Carnwath identified that: "[m] embers are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny….".

59. In this particular case, both the Claimant and the Defendant agreed that the Defendant was under a duty to give reasons for approving the planning permission in circumstances where the officers had recommended refusal, and I have proceeded on that basis.

60. Although the Claimant and Defendant cited from different authorities in relation to the standard of reasons, there was no significant difference between them in the result. The Claimant referred to the reasons needing to be “intelligible and adequate”, and, in particular, they must enable the reader to understand what conclusions were reached on the “principal important controversial issues”, but accepted that a reasons challenge will only succeed if the reasoning gives rise to a “substantial doubt” as to whether their decision was wrong in law: see *South Buckinghamshire DC v Porter* [2004] 1 WLR 1953 at p.1964B-G, and *Save Britain’s Heritage v Number 1 Poultry Ltd* [1991] 1 W.L.R. 153 at pp.166 to 168. The Claimant submitted that the question for the court is whether the decision-maker’s reasons leave “genuine”, rather than merely “forensic”, doubt over what was decided and why: see *Dover DC*, at [42].

61. The Defendant also referred to *Dover DC* at [35]-[42] as identifying the requirement for “an adequate explanation of the ultimate decision”, but where local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate, there is no reason why the duty to give reasons for the grant of permission should become any more onerous and such reasons can be “briefly stated”.

62. The Defendant referred to what Lord Carnwath stated in *Dover DC* at [42] as an important distinction between decisions of the Secretary of State and those of a planning committee:

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

63. The Defendant also relied on the absence of a duty to give “reasons for reasons”: see, for example, *R (Mid-Counties Co-operative Ltd) v Forest of Dean DC* [2017] EWHC 2056 at [96] per Singh J (as he then was); *Newcastle upon Tyne City Council v Secretary of State for Levelling Up* [2023] 2 P& CR 7 at [101] per Holgate J; and *Siraj v Kirklees MBC* [2010] EWCA Civ 1286; [2011] JPL 571 per Sullivan LJ at [24].

64. As to making references to the debate between members of a planning committee in this respect, the Claimant accepted that there is a general reluctance to delve too deeply into such material, but submitted there was no general prohibition on referring to it.

65. In this respect, both parties referred to *Mid-Counties* (above). The Defendant noted what Singh J (as he then was) had stated at [56]:

> "56. The first principle to make clear is that, in this country, the planning system is entrusted by Parliament to democratically elected councillors. This was made clear by Lady Hale JSC in *Morge v Hampshire County Council* [2011] 1 WLR 268. At para. 36 she said:
>
> > "Some may think this is an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities … Democratically elected bodies go about their decision making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the court should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision or themselves. It is their job and not the court's to weigh the competing public and private interests involved.""

66. The Defendant also then referred to what the Judge stated at [57] in relation to the well-established principle that questions of weight as to planning matters are for the decision-maker and not for the court and that a judicial review of a decision to grant planning permission for development is not a substantive appeal in relation to the planning merits of that decision.

67. Both the Claimant and the Defendant referred to what Singh J stated at [58]–[59] and [61]:

> "58. The third principle to bear in mind is that a decision such as that under challenge in the present case is take by a collective body, in this case the full Council. In R v London County Council, ex p London and Provisional Electric Theatres Limited [1915] 2 KB 446, at 490-491, Pickford LJ said:
>
> > "With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision of a body like the London County Council…could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably few debates in which someone does not suggest as a ground for a decision something which is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being found on that particular ground is wrong."

> 59. As Schiemann J (as he then was) said in Poole Borough Council, ex p Beebee [1991] 2 PLR 27, at 31 :
>
> > "…I have grave reservations about the usefulness of this sort of exercise when there is no allegation of bad faith. These reservations in part arise out of the theoretical difficulties of establishing the reasoning process of a corporate body which acts by resolution. All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may well have changed them because of what was said subsequently in debate."
>
> …
>
> 61. Finally, in this context, it is important to recall that, insofar as it is helpful to refer to the debate of a collective decision-making body such as this, it is "the general tenor of their discussion rather than the individual views expressed by committee members, let alone the precise terminology used" which will be relevant: see R v Exeter City Council, ex p Thomas [1991] 1 QB 471, at 483-484 (Simon Brown J, as he then was) ; see also R (Tesco Stores Ltd) v Forest of Dean District Council [2014] EWHC 3348 (Admin), para 23 (Patterson J)."

68. The Defendant also relied on what was identified at [86]-[88] in *Mid-Counties* as to focus of the Court needing to be on the terms of the resolution, rather than the discussions during the committee meeting:

> "86. […] The Court has to proceed on the basis that the reasons for the decision which are set out in the resolution are the genuine reasons […] All that one can safely say is that, once the final wording of the motion had been arrived at, that is the wording which a majority of the councillors present at the meeting were willing to pass.
>
> 87. Insofar as Mr Maurici QC has sought to draw attention to the statements of some of the councillors who took part in the discussion at the meeting, I have not found that helpful in resolving the issues in this case. This is essentially for the reasons set out in the authorities to which I have already referred. It is clear from those authorities that:
>
> > (1) The decision is that of a collective body, not individual members of it.
> >
> > (2) It is therefore the "general tenor" of their discussion rather than the individual views expressed by members which will be relevant.
> >
> > (3) Even in the case of an individual who may have expressed something earlier during the course of the

> discussion, he or she may well have changed their view because of what has been said subsequently in debate.
>
> (4) The law encourages the formulation of the reasons of a collective decision-making body in the form of a minute. It is helpful to all concerned, including the Court if there is an application to it, to have such a minute of the reasons for the collective decision.
>
> 88. It is therefore to the terms of the resolution that the Court must turn in order to decide whether an erroneous approach has been taken as a matter of law…"

69. The Defendant also referred to the earlier case of *R (Tesco Stores Ltd) v Forest of Dean DC* [2014] EWHC 3348 (Admin); [2015] JPL 288 in which Patterson J at [73] had previously identified the following:

> "73. As is made clear in the case of *Beebee* there are real difficulties in establishing the reasoning process of a corporate body which acts by resolution. What an individual says during the debate may or may not be how he acts when he casts his vote after that debate. Many of those present at the meeting in this case made no verbal contribution. In those circumstances a court has to be extremely cautious in attaching any undue significance to a transcript of proceedings during the debate part of the decision making process. I have applied that cautious approach."

70. The principles in *Mid-Counties* were recently considered and applied by Dove J in *R(Village Concerns) v Wealden District Council* [2022] EWHC 2039 (Admin). The Court referred to the importance of not fixating upon the observations of a single contributor to the discussion but to look at the general tenor of the debate and bear in mind that it is a collective decision that is being considered (see the submission at [53] and the Judge's endorsement at [54]). The Judge identified at [55]:

> "“[I]t is necessary to approach the transcript of the committee discussions with realism as to their nature, being different in kind from the carefully formulated contents of an officers' report, and bearing in mind the context in which they occur, namely a discussion or debate seeking to forge a collective decision. As the authorities suggest, there is a danger of focusing too closely on the contributions of one participant in the process. Similarly, in my view, there is a danger in forensically examining the ex-tempore remarks of a person responding to the discussion … doing his best to engage constructively with members' concerns, but not attempting to provide a comprehensive and precise supplementary report in oral form."

## The Grounds of Challenge

71. With the above principles well in mind, I turn to the two grounds of claim.

Ground 1 – Alleged failure to give great weight to the heritage interest of the Grade II listed War Memorial

72. Under this heading the Claimant renews its application to argue that in making their decision, the Council members failed to give great weight to the heritage interest of the Grade II listed War Memorial, as required in consequence of section 66 of the P(LBCA)A 1990 and the analysis in *East Northamptonshire*.

73. The Claimant argues that the Council's printed reasons for granting permission fail to recognise the "considerable importance and weight" that had to be given to the harm to the setting of the War Memorial and simply refer to the existence of "less than substantial harm", rather than noting the particular statutory weight to be given to that harm. The Claimant submits that the failure to comply with the statutory requirements and the requirements of the NPPF is illustrated by the fact that the "public (social and economic) benefits" that were relied on by the Council's committee are not articulated in the reasons and submits there is no attempt to explain how any such benefits provide a "clear and convincing justification" for the purposes of paragraph 200 of the NPPF, and there is no attempt to explain how any purported benefits attract a different weight to that accorded to them in the OR.

74. Turning to the Committee debate, the Claimant submits that "the general tenor" was that the objection to the grant of planning permission based on the harm to the setting of the listed building could be "put to one side", and submits that tenor is consistent with the absence of any particular importance being given to the impact on the listed building in the printed reasons.

75. The Claimant contends that the question of whether the demanding duty imposed by section 66 of the P(LBCA)A 1990 has been met is answered by considering the substance of the decision. The Claimant submits that it is clear the officers did give the harm to setting great weight, but in departing from the overall conclusions, there is no evidence that members did the same. It is said that they failed to express (in terms or in substance) that they were giving that harm considerable importance and weight and that they identified no different or further benefits of the proposal beyond those articulated in the OR. It is further submitted that the members failed to explain, consequently, how the balance struck in the OR could be reversed, whilst still giving the heritage objection its statutory weight. The Claimant contends that instead, the evidence strongly suggests that Members discounted the (correct) advice they had been given as to the need to give considerable weight to the harm to heritage assets.

76. The Claimant notes that in refusing permission for this ground of challenge to be pursued, the Deputy Judge stated:

> "The officer's report and addendum report drew members' attention to section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, and to the considerable importance and weight to be given to the desirability of preserving the setting of listed buildings when carrying out the heritage balancing exercise. There was no need for that analysis to be repeated in the reasons given for deciding to grant planning permission."

77. The Claimant notes that the Defendant and 1st Interested Party similarly seek to emphasise that the resolution did not need to refer to the statutory test and that the OR advice was correct, but submits that the Claimant is not criticising the OR or the officers' oral advice, and the Defendant and 1st Interested Party are missing the point of the criticism that is being advanced which is one of substance rather than form. The Claimant submits there is simply no evidence that Members did give considerable importance and weight to the preservation of the War Memorial's setting, and the tenor of the debate was that it should not be given that importance and weight and the only passages relied on by the Defendant and the 1st Interested Party come from the advice to members, rather than the debate itself. To like effect, in respect of the reasons given by the Council for granting planning permission, the Claimant says it is not the absence of a reference to s66 of the P(LBCA) 1990 which renders the decision unlawful, but the failure to show that considerable importance and weight was, in substance, given to the preservation of the War Memorial's setting and thus significance.

78. The Defendant and 1st Interested Party both submit that the ground of claim remains unarguable for the reasons given by the Deputy Judge, as supplemented in their own submissions. In short, the Defendant and 1st Interested Party placed particular emphasis on the fact that members were correctly advised as to the statutory duty and consequential approach, including shortly before the vote was taken. The Defendant submits there was no need for the resolution to refer to the statutory duty where such advice had been given and that a committee's reasons can be "limited to points of difference" and the committee were not differing from the advice on the correct statutory and policy approach to apply, so it was not a matter which needed to be covered in the resolution.

79. As to the contention that contributions of members of committee suggest that they were discounting the advice, the Defendant and 1st Interested Party rely on the extreme caution that should be exercised in referring to comments in debate generally; but they argue that having regard to the tenor of the debate, it was in fact being recognised that the heritage harm was being treated as a key consideration and members were repeatedly reminded of the statutory duty and correct legal approach, and that there is nothing in the resolution or debate to demonstrate that they set that approach aside.

80. The 1st Interested Party adopted the Defendant's oral submissions, but in addition Mr Howell Williams made a number of additional submissions. Amongst other things, he submitted that it was for the Claimant to establish positively that the members had not complied with the statutory duty in circumstances where correct legal advice had been given to them. Given the approach of the Court of Appeal in *Jones v Mordue,* he submitted it was necessary to identify material that positively gave the impression that the statutory duty had not been discharged. He referred back to the comments by members recorded in that light (including references to where great weight had been referenced), and the terms of the resolution which also specifically applied the development plan policies, including Policy NHE 9.

81. In reply, Mr Turney emphasised that section 66 of the P(LBCA)A 1990 and the corresponding paragraphs in the NPPF impose a duty of substance rather than form; and whilst accepting that one has indications that the test has been applied, the case of *Kinsey* is a good example of where an officer had set out the relevant test, but when analysed in substance, the report had demonstrated that the great weight and considerable importance had not been applied in reality, with a failure to apply the

weighted balance in the result. He submitted that there was a short set of reasons here which, on their face, did not apply a weighted balance and the real question was whether the Court should infer that such a weighted balanced had nonetheless been applied. He submitted that the analysis showed that, as in *Kinsey*, this was a case where no great weight had been applied and the inference that the wrong approach had been taken was correct. He argued that whilst correct advice had been given, it was not enough for that advice to have been stated; it was also appropriate to judge from the tenor of the debate that it had not been taken on board. He submitted that where members were disagreeing with officers on benefits outweighing harm, it is necessary for members to show that they have given effect to the statutory test and demonstrate that they had given the requisite importance to the issue of harm and the resolution did not do this.

82. In my judgment, there is no arguable merit in this ground of challenge on the facts of this case for reasons advanced by the Defendant and 1st Interested Party, and for the following additional reasons.

83. First, whilst I readily accept and understand that: (1) the Claimant's criticism is focused on the substance of the decision and the reasons provided, rather than the form; and (2) the Claimant's criticism relates to the way the Council members made their decision, rather than the advice of the OR and officers (about which no criticism is made), the fact that members were correctly advised throughout the process by officers as to the correct approach to adopt is fundamental to any fair analysis of the reasons given by members.

84. The Claimant (understandably) accepts that the officers correctly advised members as to the requirements of the statutory duty, and the need to give considerable importance and weight to the desirability of preserving the setting of the War Memorial. Indeed, this advice was repeatedly given, first through the OR, then in the Addendum, and then orally at the outset of the meeting and then again during the debate itself. This is, therefore, a case where members were consistently correctly advised about the approach they should adopt to the statutory duty and harm to heritage assets. In my judgment, that is an important starting point for any fair consideration as to whether the reasons they gave for their decision, or the tenor of the debate, reveal that despite that advice, members either ignored or misunderstood it in the approach they adopted.

85. Second, I consider that the Claimant's submissions suffer from a significant conflation of two distinct things. As members were correctly advised, the statutory duty and its consequential effect required members to give considerable importance and weight to harm caused by a development to a statutory listed heritage asset like the War Memorial (as identified in *East Northamptonshire* and now reflected in the fasciculus of paragraphs in NPPF). They were clearly and repeatedly advised of that by officers. But that requirement does not mean that their own assessment of the extent and nature of that harm is the same in every case, as the Court of Appeal identified in *City and Country Bramshill* and repeated again in *East Quayside*. There is an evaluative judgment for the decision-maker as to the nature and extent of harm depending upon the decision-maker's view. If that were not the case, then there would be no way of distinguishing between different degrees of harm that a development might cause along what is often referred to as a spectrum, even within the NPPF policy category of "less than substantial harm" with which the Council members were concerned in this case. So, whilst harm to the setting of a listed heritage asset attracts considerable importance and weight, and the balance is tilted in favour of the preservation of its setting, there is

still a legitimate evaluative assessment of the nature and extent of that harm (see eg *Leckhampton*). In that context, in applying the correct legal approach that they were repeatedly advised to do, it is not only legitimate, but arguably a requirement, on a decision-maker to consider the nature and extent of the harm themselves as, for example, the Development Manager identified when giving them oral advice. Where members have been correctly (and repeatedly) advised as to the obligation to attach considerable importance and weight to any harm arising to the War Memorial, there is nothing objectionable or inconsistent in members then applying their own minds to reach their own judgment as to the extent of harm caused to the setting of the listed War Memorial by the development proposed. The same need to exercise an evaluative judgment is true of the balancing exercise to be performed in deciding whether the public benefits of a proposal outweigh less than substantial harm to a heritage asset required under the NPPF.

86. Third, turning to the members' reasons for granting planning permission and applying the well-established legal principles set out above, I agree with the Deputy Judge that the reasons did not need to rehearse the statutory duty, or the point about considerable importance and weight to be attached to heritage harm, in explaining the members' decision. This was in circumstances where there is no doubt that members were correctly and repeatedly advised about those things when making their decision. The absence of such express reference to that in the reasons does not mean there has been an error of law. In fairness, the Claimant did not suggest that the mere absence did, but instead correctly identified the need to focus on the substance rather than form. But in doing precisely that, and focusing on substance rather than form, there is no good reason to infer that members were making any legal error in the assessment, as opposed to reaching their own legitimate evaluative views on the extent and nature of the harm caused by the proposal.

87. Fourth, I do not regard the Claimant's attempt to infer a legal error by members because officers had reached a different overall judgment to be well-founded. In my judgment, members could lawfully reach a different overall view in relation to the harm caused to the setting of the War Memorial (along with the locally listed public house) and whether that harm was requisitely outweighed by benefits whilst at the same applying the correct legal approach that members had been advised to of attaching considerable importance and weight to any harm to the setting of the War Memorial (as well as to the harm to the locally listed public house).

88. Fifth, in so far as it is appropriate to look at the tenor of the debate, in circumstances where the Court should be primarily concerned with the articulated reasons of the Council in its decision (after the vote has been taken), I similarly do not see anything in the tenor of that debate which supports the contention that members had misunderstood or misapplied the legal advice they had been given. To the contrary, the tenor of the debate seems to reinforce the close attention that members were giving to the question of applying the correct legal and policy approach both to the listed War Memorial and the locally listed pub, with a desire to ensure that they approached the matter correctly. It seems to me this is reflected in the immediate remark of Councillor Green after hearing the repeated legal advice given by the Development Manager.

89. The error in the Claimant's approach is to assume that the correct application of that legal approach is somehow inconsistent with the members reaching their own judgment as to the nature and extent of harm caused to the setting and the balancing exercise that

was conducted. Far from demonstrating any legal error of approach, I consider both the tenor of the debate, as well as the comments relied upon by the Claimant when read in context, to demonstrate members properly engaging with that exercise. So, for example, expressing views as to the effects of the existing busy road on the setting of the War Memorial, or in the case of the locally listed building, considering its condition are consistent with members giving careful consideration to the proposal and its effects, in the context of the clear advice they had been given as to how to go about that exercise. Members were entitled to reach different judgments without there being any necessary inferred departure from the advice to give considerable importance and weight to any harm to a heritage asset like the War Memorial.

90. Sixth, for the reasons I have already foreshadowed above, I consider the Claimant's criticisms of the comments made during the debate to be artificial in light of the caution one should exercise in reading comments made in a debate of this kind. The mere fact that some councillors' contributions were limited to comments about the locally listed pub does not, in my judgment, mean that one can reasonably infer that they have failed to take account of the War Memorial, or indeed any of the other matters that they would have had to consider. Likewise, read in context, I do not consider that Councillor Green's summary of his own view as to balancing the deleterious effect to the War Memorial against the building of the new store can be treated as demonstrating a rejection of the legal advice given, or indeed summarised by the Councillor. I consider that sort of forensic approach to such comments to be contrary to the principles set out in *Mid-Counties.*

91. Accordingly, I do not consider it is arguable that members did err, as alleged, in light of (1) the advice they received; (2) the reasons they gave for disagreeing with officers and deciding to grant planning permission; (3) the tenor of the debate, or (4) even the more specific comments extracted from that debate, when all read fairly and as a whole.

92. Accordingly, notwithstanding the elegant and persuasive force with which the point was argued by Mr Turney, I refuse the Claimant's renewed application for permission to advance Ground 1 as I consider it to be unarguable.

Ground 2 – Alleged failure to identify what benefits outweighed the harm and alleged failure to give any reasons for departing from the officers' view

93. Under this ground - for which the Claimant already has permission - the Claimant submits that the Council members failed to identify what benefits outweighed the harm that arose, and there was a failure to give any reasons for departing from the officers' view that planning permission should be refused.

94. In that respect, I have already noted it is common ground between the parties on the facts of this case that the Council members were under a duty to give reasons for their decision as a departure from the recommendation in the OR. I have already referred above to the submissions made as to the standard of those reasons in respect of which there is considerable common ground in principle, if not in the application to the facts of this case.

95. The Claimant notes that the Defendant and 1st Interested Party rely on the reasons given in the printed minutes of the Council's committee meeting and ask these to be read with the OR, to which the Claimant responds that the OR reached a different conclusion.

The Claimant argues that the printed minutes fail to articulate what "public (social and economic) benefits" would outweigh the identified harm, both to the Grade II listed building, and other harms to the non-designated heritage asset and to the town centre.

96. As to the contention by the Defendant and 1st Interested Party that members were simply adopting benefits set out in the OR at paragraphs 7.27 – 7.28, the Claimant submits that the OR properly read was identifying: (1) there were no economic benefits, on the basis that officers considered that the 15 additional jobs created would not outweigh those 16 jobs lost by the closure of the public house; and (2) the absence of "significant" impact on the town centre was not a benefit, since there would be a less than significant, but still negative, impact.

97. The Claimant submits that nothing in the debate identified any economic benefits of the proposals which would not similarly be tempered. Although the Defendant argues that the "tempering" of the economic benefits with other factors was not a finding that there were no economic benefits, the Claimant contends that this misconstrues the exercise being carried out in the OR at paragraph 7.28. The Claimant submits that the claimed benefits were each balanced against disbenefits, namely: (1) the creation of 15 jobs against the loss of 16; and (2) the benefit of a new occupier in the town centre against the evidenced harm to the town centre of the new store. In his oral argument, Mr Turney went through the OR and also drew attention to the relevant representations that had been made, as well as to relevant extracts of the report the Council had received on retail impact which had led to the officers' conclusions that there was harm, but it had not met the threshold for a refusal under the NPPF.

98. The Claimant further submits that if, as claimed, members did simply adopt the benefits in paragraph 7.27 of the OR, then they looked at only one side of the coin, and failed to address the factors in paragraph 7.28 of the OR.

99. As to social benefits, the Claimant argues that the OR makes no express identification of any social benefit at all. In response to the Defendant's argument that the social benefit was "an improved shopping experience and retail offer for residents" identified in OR 7.27, the Claimant submits that the OR was clear that this was only an assertion made by the 1st Interested Party and that local support for the proposal had to be understood in the context of the leaflet threatening closure of the existing store.

100. Insofar as members were accepting the proposition that the town centre Lidl would close regardless of whether planning permission was granted, the Claimant submits that the OR reached no conclusion on that matter and, beyond an assertion, there was no evidence that the closure would happen.

101. As to reasons, the Claimant argues that in the context of heritage harm, they had to include an articulation as to what benefits were said to outweigh the great weight given to the conservation of the asset and it is contended that the reasons given come nowhere close to that standard at all. Likewise, in relation to the question of the closure of the Lidl store, the Claimant argues that if members were accepting that potential closure, members had failed to explain why they had accepted that in the absence of evidence.

102. Accordingly, and in short, the Claimant submitted that members failed to articulate in what way they were departing from the recommendations of the OR because:

a. they failed to articulate what the claimed benefits were;

b. they failed to explain why those benefits convincingly outweighed the heritage harm.

103. In response, the Defendant maintained that the harms and benefits of the proposal were addressed in the OR, and that benefits of the proposal were identified in OR 7.27-7.28 on which the members were entitled to rely, even if not agreeing with officers as to the outcome of the balance between harms and benefits. The Defendant submits that the Claimant does not suggest that the OR identified matters as benefits which were not benefits, or that the OR missed out any harms or benefits which were not taken into account. On a fair reading of the OR, the Defendant submits that benefits were indeed "public (social and economic) benefits" to which the resolution was making reference and this did not require further articulation in the resolution when read with the OR.

104. The Defendant submits that the point of difference between the judgment of the members and those of the officers was not whether the respective harms and benefits existed, but as to the outcome of the balance between them. On that basis, the members were not required to identify any different set of benefits from those in the OR in order to disagree with the assessment in the OR that the harms outweighed the benefits. The committee were entitled to disagree with the overall assessment and to reach their own judgment that the benefits did outweigh the harms and this did not require further explanation. It submits that read with the OR, the resolution provides an "adequate explanation of the ultimate decision" referring to *Dover District Council* at [40] and to require more would be to require reasons for reasons to be given.

105. The Defendant notes that the OR did not seek to attribute specific weights to the benefits of the proposal as if conducting some sort of mathematical exercise and it was not necessary for the committee resolution to do so.

106. Moreover, the Defendant submits that it is a misreading of the OR to contend that it identified that there were no economic benefits (as the Claimant asserts) on the basis that the additional jobs created would not outweigh those lost by the closure of the public house, and submits that the OR does not say there were no economic benefits, merely that there were factors which tempered some of the economic benefits. The Defendant relies on that part of paragraph 7.27 of the OR that stated that "there would be the potential for 15 additional staff to be taken on top of those existing jobs transferred from the existing store" that "the construction of the supermarket would create jobs" and that "the vacation of the existing store also provides the opportunity for new jobs linked to the new tenancy". It submits that these matters were said to "weigh in favour of the application", but the OR was also careful to explain that the "weight of some of the benefits is tempered" by "harm to the town centre due to the loss of Lidl" and needed to be balanced against the fact that "the existing public house will cease resulting in the loss of the equivalent of 16 full-time jobs". The Defendant submits there was no error in the committee's resolution identifying that the proposal had economic benefits and the OR did not contend there were no economic benefits.

107. The Defendant submits that contrary to what is suggested by the Claimant, it is not claimed by the Defendant that the members only looked at OR7.27 and not OR7.28, but rather the Defendant's submission is that those paragraphs read together simply do not support the Claimant's assertion that there were no economic benefits of the scheme.

108. As to the Claimant's contention that the OR makes "no express identification of social benefits at all" and therefore the committee was wrong to identify that there were "social benefits" of the proposal, the Defendant submits that the criticism proceeds on a false premise. The Defendant submits that the OR did identify social benefits, including "an improved shopping experience and retail offer for residents" – see paragraph 7.27 of the OR and the Defendant argues that this is obviously a social benefit; but if the criticism is that it is not expressly labelled as such, the criticism goes nowhere in substance. The Defendant also rejects the suggestion that the improved shopping experience was an assertion from the 1st Interested Party only and submits that is not what paragraph 7.27 of the OR states. The Defendant argues that the relevant part of the sentence reads: "In support of the application the relocation of Lidl would result in an improved shopping experience and retail offer for residents" and this was a finding being made in the OR, and not simply an assertion by the 1st Interested Party.

109. The Defendant argued that the Claimant has also conflated the benefit of an improved shopping experience and retail offer for residents with the question of local support for the new Lidl as expressed in the consultation exercise. The Defendant submitted that the OR drew members' attention to the fact that "the significant support had to be seen in the context of the leaflet sent out by Lidl which puts doubt on the continued trading of the store", but submitted this does not in any way undermine the finding that the development would result in an improved shopping experience and retail offer for residents.

110. The Defendant contended that once it was recognised that social and economic benefits were identified in the OR, it is hard to see why those benefits needed to be set out in more detail in the members' resolution and why the shorthand used in the resolution to those benefits was inadequate. The Defendant also argued that there was nothing in the resolution to suggest that members voted on the basis that the town centre Lidl would close regardless of whether planning permission was granted.

111. Accordingly the Defendant submitted that the committee's reasons were adequate and intelligible and the resolution read with the OR, identified the harms and benefits of the proposals and there could be no genuine doubt as to what was decided and why, repeating its contention that the crucial point of difference between the committee and the officer's report was as to the balance between harms and benefits. It submits the committee concluded that the harms were outweighed by the benefits and this was a planning judgment which the democratically elected committee were entitled to reach and which did not require any further explanation. Whilst the committee's conclusions were briefly stated the Defendant argues that the resolution gave an adequate explanation of the ultimate decision and no further reasons were required.

112. The 1st Interested Party adopted the Defendant's submissions at the hearing, but Mr Howell Williams also invited the Court to take an overall view of officers' comments about the benefits, rather than apply what it submitted was a close forensic analysis being adopted by the Claimant in its submissions which it considered to be an

unjustified mechanistic approach in circumstances where officers had accepted a number of benefits, albeit ones that officers considered were tempered. He also submitted that it was not correct simply to compare one job with another, and pointed out, for example, that there were also jobs related to the construction of the store as well as the more permanent jobs.

113. In reply Mr Turney returned to the question of retail benefits and the references in paragraph 7.18 of the OR (to which the Defendant had drawn attention) dealing with such matters, but noted that the paragraph in question was a summary of the advice that had been received from Q+R and they were reasons why the impact was deemed to be adverse, albeit not significantly adverse, rather than a list of benefits. As to reasons, he emphasised that the decision in *Dover District Council* was the correct starting point, whereas *Leckhampton* preceded it and he submitted that in *Dover District Council* an expression of simple disagreement did not grapple with the points. He submitted that officers explained in paragraph 7.28 of the OR why the social and economic benefits did not win the day and members did not touch on that and did not explain why they disagreed. He submitted that it was not a question of giving reasons for reasons, but reasons why members disagreed with officers and that the decision in *Dover District Council* was one taken in the same context where the reasons were legally inadequate. As to the debate, he submitted that nowhere did it show such reasons and whilst not taking issue with what officers had said and advised, he submitted that members' responses did not show acceptance or proper consideration of that advice, referring in particular to what Councillor Green had said as being a long way from showing any proper application of the correct legal test. Returning to the question of the benefits of the new proposal, and improving the range and quality of shopping, he submitted that had to be seen in the context of the proposal causing adverse effects on the town centre and he submitted that having regard to the required standard of reasons (having regard to *Siraj* and the authorities already identified), the standard had not been met in this case.

114. Again, notwithstanding the forceful and persuasive way in which Mr Turney presented the argument under Ground 2, I am satisfied that there was no failure on the part of the Defendant for the reasons given by the Defendant and 1st Interested Party and as further summarised below.

115. First, when the Committee's reasons are read fairly and as a whole with the OR and Addendum that inform those reasons, I consider there is no genuine doubt as to why the Committee reached the conclusion it did. The fair reading of the OR and Addendum, particularly also when taken with the further oral advice given by officers at the meeting, is that members did consider the proposal to have public benefits of the type that they had summarised in paragraph 7.27 of the OR, including both economic benefits in the form of jobs, and social benefits in the provision of an improved shopping offer which a significant number of members of the public saw as advantageous. And whilst officers considered those benefits to be tempered by the factors that they considered in paragraph 7.28, I regard it as an artificial misreading of those paragraphs, and the advice given as a whole, to suggest that officers considered those benefits to be displaced by the factors referred to in paragraph 7.28. They remained benefits, albeit ones that were tempered by the factors to which officers drew members' attention which members therefore duly considered. Not only is this the fair

reading of their advice, but it also reflects a fair reading of the reasons that underpinned that advice.

116. So, for example, in relation to jobs, whilst it was fair to recognise that the provision of 15 new permanent jobs was tempered by the fact that 16 jobs would be lost from the closure of the public house, it is overly simplistic (as the 1st Interested Party submitted) to suggest that officers were treating all such jobs as the same; moreover, there was evidence before officers and members to which reference is made in the officers' advice and in the debate itself as to the closure of the public house in any event.

117. Similarly, in relation to the social benefits of an improved shopping offer, whilst that was tempered by what officers identified in paragraph 7.28, it is artificial and unrealistic to suggest that members were not still identifying that improved shopping offer as a benefit. In addition, there were other benefits being identified, such as the sustainability of the new store.

118. Second, once it is accepted (as I consider it must be on a fair reading of the materials) that officers were identifying benefits, albeit ones tempered by the factors they had identified, then I agree with the Defendant and the 1st Interested Party that the weighing of those benefits against the harm to heritage assets (and any other harms) involved a balancing exercise for members. In carrying out that balancing exercise, I consider that the Committee was entitled to disagree with officers as to the overall outcome without having to provide additional reasons to those that they gave. The terms of the resolution taken with the OR and Addendum mean that members were, in effect, relying on the same benefits that officers had identified; but whilst officers considered that the benefits did not outweigh the harm to the heritage assets that had been identified, members did. In my judgment, that sort of different view even when set in the context where members were required to approach the question of harm to the heritage assets in the way that they did, does not require further clarification or explanation to be lawful. The natural reading of the resolution and the OR and Addendum is simple and straightforward. The Committee reached a different judgment as to how the balance should be struck but that different judgment did not require more in terms of reasons than were given in the resolution.

119. Third, consistent with the above analysis, I consider that the Development Manager himself, in giving further oral advice at the meeting, correctly recognised that outcome. He correctly advised members that the balancing of the benefits against the harms, provided the correct legal approach were adopted to the heritage assets, was a matter for members and that they could disagree with the judgment reached by officers. In my judgment, that approach was correct. Officers did not anticipate the need for further reasoning from the Committee beyond what is given in the resolution itself, nor request further reasoning after the vote was taken, because no such additional reasoning was required for the decision to be lawful.

120. Fourth, I do not consider this situation was equivalent to that which arose in *Dover DC*. In that case, the nature of the reasoning provided by officers on an important issue as to the evidence relating to viability required members to explain the basis upon which they were acting if disagreeing with officers' reasoning. It was not the equivalent of the case that arose here of identified harms and identified benefits set out in the OR and Addendum, then requiring an overall classic balancing exercise for members to perform, in respect of which members could legitimately disagree with officers without

having to elaborate further than they did in the resolution. It is inherent in the different judgment reached by the Committee that they attached greater weight to the same benefits that officers had identified than officers had, as members were entitled to. I do not consider they were legally obliged to set out the benefits again in their own resolution, or to explain further why they attached greater weight in this sort of context. I agree that this strays into a requirement to give reasons for reasons.

121. Fifth, I do not consider a fair reading of the transcript in order to identify the tenor of the debate, or a close reading of members' comments (even if such a close reading were appropriate which the authorities indicate it is not) assists the Claimant's criticisms. To the contrary, the tenor of the debate demonstrates that members were undertaking the balancing exercise that was required of them, albeit in a context where they had been advised correctly as to the correct approach to adopt to harm to the heritage assets. The tenor of the debate demonstrates that members were carefully considering the question of harm to the heritage assets as compared with the benefits of the delivery of a new store in this location in the way that officers had in the OR and Addendum, but where members were entitled to reach a different overall outcome which did not require further amplification or clarification for the reasons to be legally adequate.

122. Accordingly, for the reasons given by the Defendant and the 1st Interested Party and as summarised above, I reject Ground 2 of the Claimant's claim.

123. In light of the conclusions above, I refuse permission for Ground 1 and I reject the Claimant's claim under Ground 2 and so dismiss this claim for judicial review.