Neutral Citation Number: [2024] EWHC 71 (Admin)

Case No: CO/4688/2022 and CO/4698/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

JOHN SOUTHWOOD	**Claimant**
- and -	
BUCKINGHAMSHIRE COUNCIL	**Defendant**
-and-	
STEPHEN GREEN	**Interested Party**

- -
- -

Celina Colquhoun (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Richard Glover KC (instructed by **Buckinghamshire Council Legal Services**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing dates: 18 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This application for judicial review relates to a planning matter which has a long and complicated history going back over many years. The case concerns a site on land adjacent to Wayside, Oving Road, Whitchurch, Aylesbury, Buckinghamshire (the Site)**.**

2. As initially framed, the Claimant challenged two decisions said to have been made on 28 October 2022 by the Defendant, Buckinghamshire Council, in its capacity as local planning authority.

3. Until 2020 the relevant local planning authority was Aylesbury Vale District Council (AVDC) and some of the material in these claims came from that authority. AVDC was merged with other councils from 1 April 2020 to form a new unitary authority, Buckinghamshire Council, which took over planning matters. Hence, in this judgment the term 'Defendant' should be taken to refer either to AVDC or Buckinghamshire Council, as appropriate.

4. The two decisions that are or were challenged are these:

    a. The decision of 28 October 2022 to decline to take enforcement action in respect of a building (the As Built Building) which was built following a grant of permission for a storage building in 2010, but which the Claimant says did not comply with that permission. This decision is the subject of CO/4688/2022 (the Enforcement JR).

    b. The decision of 28 October 2022 to grant permission for a change of use (Ref 20/03073/AP) in relation to the As Built Building from storage to residential use (the Change of Use Decision). This decision is the subject of CO/4698/2022 (the Permission JR).

5. As I will explain in a moment, the Enforcement JR has fallen away and I am only concerned with the Permission JR.

6. The Claimant is the owner of the property adjoining the Site directly to the east, where he resides.

7. The Interested Party is the owner of the Site and the wider area of land of which the Site forms the northern part (the Land).

8. The Change of Use Decision was made by a delegated officer, Ms Armstrong, on the basis of a report by Ms Jarvis, a planning consultant to the Defendant, dated 19 October 2022 (the Jarvis Report) recommending approval.

9. Permission was granted by Neil Cameron KC sitting as a Deputy High Court judge in respect of both claims by way of separate orders:

    a. on 10 February 2023 in relation to the Enforcement JR; and

b. on 14 February 2023 in respect of the Permission JR.

10. On 14 February 2023 the judge also ordered (at [4]) that the two claims should be heard together.

11. Mr Cameron granted permission on the following grounds only:

a. In the Enforcement JR, Grounds 2 and 3, namely:

(i) Ground 2: the Defendant wrongly concluded that there had been no breach of planning control in relation to the construction of the As Built Building.

(ii) Ground 3: the Defendant adopted an unlawful approach to interpreting the planning permission when considering whether the development accorded with it and whether a breach of planning control had arisen.

b. In the Permission JR, Grounds 2, 3 and 4, namely:

(i) Ground 2: there is an error on the face of the permission granted in that it refers to the wrong plan ref, namely PL-01, when it should be PL-01A.

(ii) Ground 3: the Defendant adopted a wrongful approach to the interpretation of the relevant Planning Permission and reached erroneous conclusions in respect of the differences between the As Built and Permitted building.

(iii) Ground 4: the Defendant adopted a wrongful approach to the lawful implementation of the relevant Planning Permission in light of the failures to accord with the permission.

12. Grounds 2 and 3 of the Enforcement JR and Grounds 3 and 4 of the Permission JR effectively overlap. Ground 2 of the Permission JR has fallen away and I am only concerned with Grounds 3 and 4.

13. In granting permission on the Permission JR, Mr Cameron said:

> "Grounds 3 and 4:
>
> a. Ms Jarvis advised that:
>
> (i) The lawfulness of the existing As Built Building was a main issue (paragraph 5.11).
>
> (ii) The building has not been built fully in accordance with the approved plans both externally and internally (paragraphs 5.24 and 5.28).
>
> (iii) The building is not materially different from the original permission (paragraph 5.28).

(iv) At paragraph 5.38 Ms Jarvis considers whether it is expedient to take enforcement action.

(v) At paragraph 5.40 Ms Jarvis states:

> "Whilst the building that has been erected is not in full accordance with the original permission, it is not fundamentally or materially different from that which was permitted as to justify taking enforcement action;"

b. As stated at paragraph 145 of the Claimant's Statement of Facts and Grounds (CSFG) the fact that the Council has decided not to issue an enforcement notice is not of itself a sufficient basis for a finding that the As Built Building was lawful.

c. It is arguable that it is not clear from the report whether the conclusion was that the departure from the approved plans was not material, and therefore the building works had been carried out in accordance with planning permission, or whether the conclusion was that the works were not carried out in accordance with planning permission, but the departure from the approved plans was not so material as to justify taking enforcement action.

d. On that basis it is arguable that the Defendant did not determine whether the As Built Building was lawful."

14. In this judgment, 'SFG' stands for the Claimant's 'Summary Facts and Grounds'; 'SGCC' for the Defendant's 'Summary Grounds for Contesting Claim'; and 'DGCC' for the Defendant's 'Detailed Grounds for Contesting Claim'. Unless otherwise noted all references are to the documents filed in the Permission JR.

15. I should say the papers are voluminous (unsurprisingly, given the history) and given the complexity of the history, the matter has taken some time to consider.

The Enforcement JR

16. With regard to the Enforcement JR, permission to proceed was based upon the Defendant's position at the time as set out in its SGCC which were lodged with the Defendant's Acknowledgment of Service dated 18 January 2023. The Defendant then submitted its DGCC on or about 17 March 2023 (ie, after permission had been granted).

17. The Defendant's position in the SGCC and the DGCC in relation to the decision not to take enforcement action was that it was lawful and had been reasonably made (see DGCC, [20]). The Defendant did not suggest that no such decision had been |made.

18. However, on 19 April 2023 at the hearing before Lavender J of the Claimant's renewal application of the grounds on which permission had not been granted by Mr Cameron,

the Defendant changed its position in respect of the Enforcement JR. Its new position was that it considered it had only made one decision on 28 October 2022, namely, to grant planning permission, and that it did not make a decision declining to take enforcement action.

19. Ms Colquhoun on behalf of the Claimant said that whilst the Claimant was surprised by this change of position, the Claimant is not in a position to take issue with it, and so as I have said that matter has now fallen away.

Background

20. The Site is situated within the locally designated Quainton - Wing Hills Area of Attractive Landscape (AAL). The Claimant says that the land on which the Site is situated plays an important role in preserving the openness of the countryside and safeguarding the character of the AAL. He says the Defendant and Inspectors (on appeal over the years) have recognised the importance of the land in question when rejecting all but one of the Interested Party's residential schemes prior to the latest proposal that is challenged regarding change of use.

21. Since the 1990s, there have been numerous attempts by the Interested Party - the Claimant says 13 - to obtain planning permission for residential or other development on the Site.

22. In her Report, Ms Jarvis stated:

> "3.1 There is a lengthy and complex planning history relating to the site and the adjoining land to the south. Between 1984 and 2001 a number of applications seeking permission for residential development were refused and dismissed on appeal, essentially on grounds that the site was beyond the built-up limits of the settlement and that the development, if permitted, would result in the intensification and extension of sporadic development which would have a detrimental effect on the character of the countryside and Area of Attractive Landscape (AAL)."

23. Paragraph 3 of the officer's report from early 2021 (OR 2021) in respect of an initial decision granting the Interested Party's application for change of use (Ref 20/03073/AP), but which was subsequently quashed on judicial review, lists some of these earlier applications as follows:

> "84/00407/AV - ERECTION OF TWO DETACHED DWELLINGS – Refused
>
> 98/01956/AOP - SITE FOR 2 DWELLINGS – Refused
>
> 01/01335/APP - Erection of dwelling – Refused
>
> 10/00583/APP - Erection of single storey building for storage including tractors and farm machinery and

provision of track to existing field access – Refused (allowed on appeal)

10/02003/APP - Erection of stable block – Refused

11/02132/APP - Erection of two detached dwellinghouses with associated access and landscaping. – Refused (dismissed at appeal)

11/02663/APP - Erection of one detached dwellinghouse with associated access and landscaping. – Refused

12/02532/APP - Erection of one detached dwellinghouse with associated access and landscaping. – Refused (dismissed on appeal)

13/02835/APP - Erection of one detached single storey dwelling – Refused

14/00455/APP - Erection of a three bedroom single storey dwelling and one detached garage. – Refused

15/02903/APP - Construction of partially underground Passivhaus with ground source heat, and construction of detached building with central archway (amendment to storage barn approved on appeal under ref. 10/00583/APP) to provide access, garaging and storage, with associated external parking and access. – Approved

16/03245/APP – Construction of a barn style single storey house with bedrooms in the roof space above and double garage attached. – Refused (dismissed at appeal)

17/03292/APP - Construction of partially underground Passivhaus with ground source heat and detached storage building with associated external parking and access (amendment to planning approval 15/02903/APP – Refused (dismissed at appeal)

10/A0583/DIS - Submission of details pursuant to Condition 3 (materials) and 4 (landscaping) relating to Planning Permission 10/00583/APP – Satisfies Requirements"

24. This last entry relates to the submission in 2019 and 2020 of details by the Interested Party about the As Built Building which were approved by the Defendant in May 2020.

The current matter

25. The background decision to the present application for judicial review was taken in 2010 by an Inspector under Ref 10/00583/APP on appeal for the erection of a storage building (to put it neutrally). I will refer to the Inspector's appeal decision letter of 9 December 2010 as 'DL'. I will refer to this permission as 'the 2010 Storage Planning Permission' or 'the Planning Permission'.

26. Key parts of the DL were as follows (emphasis added):

> "The development proposed is the erection of a detached single storey building for general storage and for a tractor shed with secure storage for vintage farm machinery …
>
> **Decision**
>
> 1. I allow the appeal and grant planning permission for the erection of a detached single-storey building for general storage and for a tractor shed with secure storage for vintage farm machinery on vacant land known as 'The Old Sandpit', adjacent to Wayside, Oving Road, Whitchurch, Aylesbury, Buckinghamshire, HP22 4ER, in accordance with the terms of the application, Ref 10/00583/APP, dated 23 March 2010, subject to the following conditions:
>
> 1) The development hereby permitted shall begin not later than three years from the date of this decision.
>
> 2) The development hereby permitted shall be carried out in accordance with the following approved plan: 010/SG/001
>
> *3) No development shall take place until samples of the materials to be used in the construction of the external surfaces of the building hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.*
>
> *4) No development shall take place until full details of soft landscape works have been submitted to and approved in writing by the local planning authority and these works shall be carried out as approved. These details shall include planting plans; written specifications (including cultivation and other operations associated with plant and grass establishment); schedules of plants, noting species, plant sizes and proposed numbers/densities where appropriate; implementation programme.*
>
> 5) If within a period of five years from the date of the planting of any tree that forms part of the approved

> planting scheme that tree, or any tree planted in replacement for it, is removed, uprooted or destroyed or dies, another tree of the same species and size as that originally planted shall be planted at the same place, unless the local planning authority gives its written approval to any variation.
>
> *6) The building hereby approved shall be used for storage purposes only and not for any other use."*

27. As a preliminary point, it seems to me that there is a potential ambiguity in [1] under 'Decision', in as much as it could be read as granting permission for *two* buildings: a detached single storey building; *and* a tractor shed. However, when the permission is read as a whole, and in particular in the context of the application, it is clear that what was being permitted was just one building. So, for example, in [5] under 'Reasons', the Inspector stated (emphasis added):

> "*The proposed building* would be sited on the lower, northern part of the site and would take the form of a single-storey building with three interlinked storage bays, each with a large door. It would face north and would be served by a new access drive located alongside the eastern boundary of the site."

28. In his reasons the Inspector also said:

> "9. … the proposed building is intended for the storage of vintage farm machinery. There is no indication that the building would be used to support farming or other countryside-based enterprises … the building would be low and have the appearance of a barn or other similar farm storage building.
>
> …
>
> 11. On the basis of its restricted visibility, siting, and design as a farm-type storage building, I consider that the proposal would not harm the character of the landscape, and that it would conserve the specific nature of the open countryside around the appeal site. Furthermore, the position of the building at the rear of the site would enable the retention of the visual gap in the road frontage, which protects the countryside appearance of the surrounding area. It would not, therefore, conflict with policy RA.8 of the LP or advice in PPS7.
>
> 12. The appellant [ie the Interested Party] has indicated that he would be prepared to accepted conditions relating to maintenance of the screening hedgerow and the submission of a soft landscape scheme. I have attached

> conditions to this effect in order to enable the strengthening of the screening of the proposed building and to protect the character and appearance of the landscape. I have also attached conditions relating to approved plans and the use of the building because it is necessary that the development shall be carried out in accordance with the approved plans, and for the avoidance of doubt and in the interests of proper planning. Finally, I have attached a condition relating to materials to be used, in the interests of the visual amenities of the surrounding landscape."

29. The Inspector incorporated the planning application into the grant of permission ('… in accordance with the terms of the application'). Section 10 of the application form 'proposed' brick for the walls. The Design and Access Statement (DAS) which accompanied the application form stated that the walls of the building 'will be of facing brick' (at [6]). The DAS also referred to the building having 'a higher eaves height than is normal' (at [4]) and to 'tall doors to the Northern elevation' which meant that the 'front central storage section protrudes beyond the building line and allows for a forward facing gable end wall to accommodate a higher head height level for the doors' (at [6])..

30. Following the 2010 Storage Planning Permission, foundation works commenced in about 2012.

31. The Interested Party then put works on hold for a number of years until around 2018/2019.

32. In his statutory declaration of 31 August 2022, [2]-[4], the Interested Party described these events:

> "2. In December 2010 permission was granted for a storage building at the site under application reference 10/00583/APP, prior to work starting in September 2012 a building control application was submitted to the Aylesbury Vale District Council Building Control Department and this was approved.
>
> 3. The site was cleared, and the foundations dug to the approved depth as agreed by the building control officer. Once approval was given concrete was ordered for delivery the following day. The concrete was poured and allowed to set. The next operation was the clearing of the oversite to expose a level surface to build off.
>
> 4. Following the completion of the foundations, further work on the building was paused until 2018 when work was restarted on site."

33. When work re-started, the foundations were uncovered and the erection of a superstructure commenced. At that time, the Interested Party had not made the applications required by Conditions (3) and (4).

34. On 12 June 2019 the Claimant's solicitors wrote a letter before action to AVDC identifying for potential challenge 'the decision of the Council on 30 May 2019 to decline to take enforcement action in respect of unlawful development at the Site'.

35. AVDC responded on 28 June 2019. Its response considered a number of cases culminating in *R (Hart Aggregates Ltd.) v Hartlepool Borough Council* [2005] EWHC 840 (Admin). I will return to this case later.

36. AVDC's position was that Conditions (3) and (4) did not go 'to the heart' of the 2010 Storage Planning Permission, and so did not prevent the foundation work carried out in 2012 from being material operations that had implemented the permission. AVDC said it had indicated to the Interested Party the breach of conditions, and he had undertaken to make applications to regularise the position. In the circumstances, AVDC did not consider enforcement to be expedient. The Claimant did not pursue his threatened challenge.

37. Construction continued. The facing material was not brick, but timber boarding. In July 2019, details were submitted by the Interested Party under Ref 10/A0583/DIS to AVDC pursuant to Conditions (3) and (4). In respect of materials, approval was sought for the timber boarding.

38. The Claimant objected to the application to discharge the conditions, but in a letter to the Defendant of 19 July 2019 said he did not intend to interfere with the Defendant's decision not to take enforcement action upon grounds of expediency.

39. In August 2019, the building started to be used for storage. In May 2020 approval was given for the details submitted under Ref 10/A0583/DIS. There was no challenge to that approval.

40. A completion certificate in respect of the As Built Building was issued by the Defendant on 1 September 2020. The date of completion was 11 August 2020.

41. On 11 September 2020, the Interested Party applied for planning permission to change the use of the storage building/barn to residential use (Ref 20/03073/APP). The application was for 'Change of use of storage barn to residential dwelling incorporating alterations to elevations to include the insertion of new glazing to existing ground floor openings and insertion of rooflights and removal of all shipping containers'.

42. The Defendant granted the application on 10 March 2021 following an officer's report in favour of granting it (OR 2021) (the initial change of use decision).

43. The Claimant challenged that decision by way of judicial review.

44. Permission was granted by Lavender J in August 2021. He said there were two arguable points. One concerned the NPPF and is no longer relevant. The other was whether OR 2021 had, in the unusual context of the case, adequately addressed three contentions by the Claimant: (a) that the building did not comply with the planning

permission that had been granted; (b) that the building was not genuinely disused or redundant; (c) if the building was redundant when built, then the planning system was being abused.

45. Following the grant of permission by Lavender J, the initial change of use decision was quashed six months later by a consent order, on 8 February 2022, and the matter was remitted for redetermination by the Defendant.

46. A further six months later, on 31 August 2022, the Interested Party made the statutory declaration to which I referred earlier. In it, he explained, *inter alia*, when storage use of the building commenced and why, given changes in circumstances, the building had become redundant.

47. On 28 October 2022, the Change of Use Decision now under challenge was made by a delegated officer, Ms Armstrong. She made that decision on the basis of the Jarvis Report. The planning permission contained a typographical mistake: in Condition 2, the site location plan was identified as PL-01 when it should have read PL-01A. PL-01A is the plan referred to at paragraphs [2.4] and [5.85] of the Jarvis Report. This error gave rise to Ground 2 in the Permission JR, however the matter has since been corrected and so this ground has fallen away.

The Jarvis Report

48. I will need to consider the Jarvis Report in detail later, but in summary it was to the following effect.

49. At [5.7] Ms Jarvis said the most relevant policy in relation to the change of use application in question was policy C1 (Conversion of rural buildings) which is within the Countryside chapter of the Vale of Aylesbury Local Plan (VALP). I will refer to this as 'C1'.

50. C1 provides:

> "The re-use of an existing building that is of permanent and substantial construction and generally in keeping with the rural surroundings in the countryside will be permitted provided that all the following assessment criteria are met:
>
> …
>
> d. The redundant or disused status of the building has been demonstrated and the re-use of the building would enhance the immediate setting
>
> …
>
> h. The proposed re-use is of a scale that would not have an adverse impact on its surroundings or the viability of existing facilities or services in nearby settlements"

51. It is common ground between the parties on the present application that 'existing building' means 'existing lawful building'. It is also common ground that the As Built Building did not fully accord with the 2010 Storage Planning Permission. Ms Jarvis nonetheless concluded that the As Built Building was lawful. It is that conclusion as to lawfulness which underpins the Claimant's current challenge.

52. In his Skeleton Argument the Claimant drew particular attention to the following parts of the Jarvis Report:

    a. Paragraphs [5.13-5.15], where Ms Jarvis dealt with implementation of the 2010 Storage Planning Permission.

    b. Paragraphs [5.20-5.21] where she interpreted that Permission as not including any requirement that the external materials should be brick.

    c. Paragraphs [5.21, 5.27 and 5.38], which referred to that Permission as being for a 'farm type storage building' in terms of appearance.

    d. Paragraph [5.28], where she stated:

> "5.28 It is concluded that whilst the 'as built' building is not in full accordance with the approved plans externally and internally, it can nevertheless still function and be used as was originally intended in accordance with its lawful use and as such it is not materially different from the original permission in either appearance or function/use."

    e. At [5.39], where she said:

> "5.39 It is concluded that whilst it is agreed that the building has not been built in full accordance with the originally approved plans, no material harm has arisen nor is there any adverse impact on the amenity of the site or its surroundings such as to render the works unacceptable or in conflict with the development plan. Taking enforcement action would not be justified nor be in the public interest."

53. Ms Jarvis concluded at [5.40]-[5.41]:

> "5.40. In the light of the above, it is concluded that:
>
> • The original permission was lawfully implemented through completion of foundations and the subsequent approval of discharge of conditions does not affect this position;
>
> • Whilst the building that has been erected is not in full accordance with the original permission, it is not

> fundamentally or materially different from that which was permitted as to justify taking enforcement action; and
>
> • The building was used for its lawful purpose following completion;
>
> 5.41. Therefore, it can be considered to be an 'existing rural building' for the purposes of policy C1 [of the VALP]."

54. Ms Jarvis then went on to consider other policy matters, with which I am not concerned.

Legal principles

55. These were not materially in dispute.

Officer's reports

56. The principles to be applied when considering a challenge to a planning officer's report were summarised by the Court of Appeal in *R* (*Mansell) v Tonbridge and Malling District Council* [2019] PTSR 1452], [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 parte Oxton Farms* [1997] EGCS 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500,

> at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

57. The level of detail to be expected in an officer's report was considered by Sullivan J in *R v Mendip District Council ex parte Fabre* [2017] PTSR 1112, p1120:

> "Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy

> of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."

Implementation of planning permission

58. I need to spend a little time on this as it underpins Ground 4.

59. Section 56 of the 1990 Act provides:

> "(1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated -
>
> (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
>
> …
>
> (2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.
>
> (3) The provisions referred to in subsection (2) are sections 85(2), 86(6), 87(4), 91, 92 and 94.
>
> (4) In subsection (2) 'material operation' means -
>
> (a) any work of construction in the course of the erection of a building;
>
> (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building; the

> laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b) …"

60. When considering whether lawful commencement or implementation of a permission has arisen within s 56, this depends upon looking at whether the operations done were 'comprised within the development'.

61. In *Commercial Land Limited v Secretary of State for Transport, Local Government and the Regions and another* [2002] EWHC 1264 (Admin), planning permission had been granted for the erection of a sixth storey in a block of flats in Kensington. Four flats were to be built. Plans were submitted and approved. One condition required development to begin no later than 11 December 1988. It was not in dispute that certain works were done before 11 December 1988: two walls were built but no more was done.

62. Passing over some of the detail, in due course an issue arose about whether the work which had been done had been effective in beginning the development permitted by the permission granted in 1983, with the effect that the 1983 planning permission was still capable of being implemented. The Inspector acting on behalf of the Secretary of State eventually held that although the erection of the walls constituted a 'material operation' for the purposes of s 56(2) of the 1990 Act, it was not an operation 'comprised in the development' as approved within the 1983 and the later more detailed approved plans.

63. Commercial Land (the developer) challenged the Inspector's decision because, it said, he had failed to apply the correct test as to the significance of the differences between the wall as built and the wall as shown on the approved plans (and upon another ground which is not relevant).

64. Ouseley J recorded Commercial Land's counsel's submission at [12] as follows:

> "The Inspector, he submitted, ought to have focused on the extent to which what had been done complied with the approved drawings, bearing in mind how little, as the Inspector had correctly recognised, needed to be done in order to constitute a material operation. It did not matter, once sufficient had been done to start the development, that more had been done which might not comply with the approved drawings …"

65. In his judgment quashing the Inspector's decision, Ouseley J referred to *Spackman v Wiltshire County Council* (1976) 33 P & CR 430 and *Staffordshire County Council v Riley* [2001] EWCA Civ 257. The latter case concerned whether the stripping of top soil implemented a planning permission for the winning and working of minerals. It was held at [23]:

> "Once it was accepted that stripping had occurred on a substantial part of the land subject to the planning permission, the legal effect, if any, of that action was not defeated either by the fact that the stripping did not

> coincide with the boundary of the land granted planning permission or by the fact that stripping also occurred on land where planning permission had not been granted."

66. At [20] Ouseley J said:

> "… [Counsel for Commercial Land] drew on those authorities to submit first, that very little needed to be done in order to constitute a material operation and second, that the existence of a difference between the approved plans and what was built, did not preclude reliance on what was being built if that was substantially usable in implementing the permitted development; excess of works did not prevent the part which accorded with the approved plans being effective to that end."

67. At [32]-[33] he said:

> "32.. The decision in *Spackman* shows that as a matter of law, differences between the approved plans and the operations relied upon, need not be fatal to the capability of the operations to be effective in commencing the development …
>
> 33. It is, in my judgment, necessary for an Inspector dealing with this sort of problem to consider not just the existence of differences between the plans and the operations relied on, but also to consider the significance of those differences. It is insufficient just to mark and measure the existence of differences …"

68. Overall, Ouseley J said the required approach involves:

> "35. … looking at what has been done as a whole and reaching a judgment as a matter of fact and degree upon that whole. It does not entail any artificial process of ignoring part of what has been done. I reach that view even where it is not contended that the works are different functionally from the planning permission which has been granted, or are ambivalent in nature and so not unequivocally referable to the planning permission in question"

69. The *Commercial Land* approach was followed in *Green v Secretary of State for Communities and Local Government* [2013] EWHC 3980 (Admin), where Cranston J dismissed a challenge to a decision of an inspector, who had upheld an enforcement notice which alleged a breach of planning control by the erection of a building without planning permission. At [30] he said:

> "… [The inspector] considered the appellant's contention that the implementation of planning permission was achieved through the demolition of the existing structure on the site, the removal of the tanks and equipment, and the evacuation of trenches and that all this amounted to the commencement of the development. However, assessing the matter objectively, in accordance with Commercial Land, he concluded… that the works undertaken were so different from the permitted development that they did not constitute the commencement of the 2006 permission. That, in my judgment, was a perfectly permissible exercise of planning judgment."

70. It was also followed in *Silver v Secretary of State for Communities and Local Government* [2014] EWHC 2729 (Admin). Supperstone J said at [43]-[44]:

> "43. In the present case the Inspector made clear (at para 36) that in his judgment there were numerous material differences between the "as built" scheme and the 2008 scheme such that he could not accept that the 2008 scheme has been implemented. Ms Dehon submits, and I accept, that the Inspector's conclusion that there was a sufficiently substantial difference cannot be characterised as irrational, and was a permissible exercise of his planning judgment.
>
> 44. In my judgment the Inspector, following *Commercial Land*, adopted the correct approach and his decision discloses no error of law. Accordingly the Claimant's contention that the 2008 permission was lawfully implemented fails. That being so it is not strictly necessary to consider the Condition 3 issue (see para 32 above), but out of respect for the careful submissions made by counsel I shall do so."

71. The *Commercial Land* approach was recently applied by Lane J in *Atwill v New Forest National Park Authority* [2023] EWHC 625 (Admin), [33].

Interpretation of planning permission

72. In *UBB Waste v Essex County Council* [2019] EWHC 1924 (Admin). [52]-[56], Lieven J said:

> "51. In the light of Lord Carnwath's strictures in [53] of *Lambeth* [*London Borough of Lambeth v Secretary of State for Housing Communities and Local Government* [2019] 1 WLR 4317] I hesitate to set out any principles on the approach to the interpretation of planning permissions and their conditions. However, the following are factors which I have applied to the issues that arise in this case. It needs to be emphasised that these factors will not arise in

all cases, and that much will depend on whether the permission or a specific section of the incorporated documents gives a clear cut answer.

52. Firstly, permissions should be interpreted as by a reasonable reader with some knowledge of planning law and the matter in question. This does not mean that they are the "informed reader" of a decision letter, but equally the reasonable reader will understand the role of the permission, conditions and any incorporated documents.

53. As Lord Carnwath has said [in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, [53]) the permission needs to be interpreted with common sense. Mr Sharland points out with some justification that reasonable people may differ on what amounts to common sense. In my view references to common sense are really pointing to the planning purpose of the permission or condition. If the interpretation advanced flies in the face of the purpose of the condition, and the policies underlying it, then common sense may well indicate that that interpretation is not correct. So, in ***Lambeth*** it was plainly contrary to that purpose for the permission not to limit the sale of food items, such an interpretation was contrary to common sense once one understood the planning background.

54. Secondly, it is legitimate to consider the planning 'purpose' or intention of the permission, where this is reflected in the reasons for the conditions and/or the documents incorporated. The reasons for the condition should be the starting point, the policies referred to and then the documents incorporated. This is not the private intentions of the parties, as would be the case in a contractual dispute, but the planning purpose which lies behind the condition.

55. Thirdly, where as here, there are documents incorporated into the permission or the conditions by reference, then a holistic view has to be taken, having regard to the relevant parts of those documents. This can be a difficult exercise because where, as here, the permission incorporates the application (including the Planning Statement) and the Environmental Statement and Non-Technical Summary, there can be a very large number of documents to be considered. It may be the case that those documents are not all wholly consistent, and that there may be some ambiguity within at least parts of them. In my view the correct approach is to take an overview of the documents, to try to understand the nature

> of the development and the planning purpose that was sought to be achieved by the condition in question. The reasonable reader would be trying to understand the nature of the development and any conditions imposed upon it. It is not appropriate to focus on one particular sentence without seeing its context, unless that sentence is so unequivocal as give a clear-cut answer.
>
> 56. Fourthly, where documents are incorporated into the permission, as here, plainly regard can be had to them. Where the documents sought to be relied upon are 'extrinsic', then save perhaps for exceptional circumstances, they can only be relied upon if there is ambiguity in the condition. In my view, even where there is ambiguity there is a difference between documents that are in the public domain, and easily accessible such as the officer's report that led to the grant of the permission and private documents passing between the parties or their agents.
>
> 57. The Court should be extremely slow to consider the intention alleged to be behind the condition from documents which are not incorporated and particularly if they are not in the public domain. This is for three reasons. The determination of planning applications is a public process which is required to be transparent. Any reliance on documents passing between the developer and the LPA, even if they ultimately end up on the planning register, is contrary to that principle of transparency. Planning permissions impact on third party rights in a number of different ways. It is therefore essential that those third parties can rely on the face of the permission and the documents expressly referred to. Finally, breach of planning permission and their conditions, can lead to criminal sanctions.

73. The Supreme Court set out the approach in *Hillside Parks Ltd v Snowdonia National Parks Authority* [2022] 1 WLR 5077, [26]:

> **"**26. The scope of a planning permission depends on the terms of the document recording the grant. As with any legal document, its interpretation is a matter of law for the court. Recent decisions of this court have made it clear that planning permissions are to be interpreted according to the same general principles that apply in English law to the interpretation of any other document that has legal effect. The exercise is an objective one, concerned not with what the maker of the document subjectively intended or wanted to convey but with what a reasonable reader would understand the words used, considered in

> their particular context, to mean: see *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, paras 33–34 (Lord Hodge JSC) and para 53 (Lord Carnwath JSC); *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317, paras 15–19."

74. This is sometimes known as the 'reasonable reader' test.

75. On the issue of extrinsic material, Keene J said in *R v Ashford Borough Council ex parte Shepway District* [1999] P&CR 12, p19C;

> "The legal principles applicable to the use of other documents to construe a planning permission are not really in dispute in these proceedings. It is nonetheless necessary to summarise them:
>
> (1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v. Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 QB 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v. Secretary of State* (ante); *Wilson v. West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '… in accordance with the plans and application …' or '… on the terms of the application …,' and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is

granted. These words need to govern the description of the development permitted: see *Wilson* (ante); *Slough Borough Council v. Secretary of State for the Environment* (ante).

(4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorlands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council* (ante); *Creighton Estates Limited v. London County Council*, The Times, March 20, 1958.

(5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v Secretary of State* (ante); *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P& CR 223 affirmed (1981) 42 P&CR 1"

Breach of planning control

76. Section 171A provides:

"(1) For the purposes of this Act –

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

(2) For the purposes of this Act -

(a) the issue of an enforcement notice (defined in section 172);

aa) the issue of an enforcement warning notice (defined in section 173ZA); or

(b) the service of a breach of condition notice (defined in section 187A),

constitutes taking enforcement action.

(3) In this Part 'planning permission' includes permission under Part III of the 1947 Act, of the 1962 Act or of the 1971 Act."

Material departures from planning permission

77. Guidance is provided by s 96A of the 1990 Act as to what, is or is not, a material change to a planning permission:

> "(1) A local planning authority may make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission or permission in principle as originally granted."

78. Where a material change arises (including even a minor material one) then s 96A cannot be deployed. In such circumstance, either an application under s 73 of the 1990 Act should be made (if it can be achieved through an amendment to a condition (see recently, *Armstrong v Secretary of State for Levelling Up, Housing and Communities and another* [2023] EWHC 176 (Admin)), or an application for fresh planning permission must be made.

79. In the absence of such permission the development will amount to a breach of planning control, as defined in s 171A.

Is exact compliance with a permission required ?

80. In *Hillside*, [69]-[70], the Supreme Court explained that (my emphasis):

> "69. … the continuing authority of a planning permission is not 'dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied' the 'presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: see *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, 230. What is or is not material is plainly a matter of fact and degree.
>
> 70. There is no inconsistency here with section 96A of the 1990 Act (referred to at para 24 above). If the planning authority makes a change to a planning permission under section 96A because satisfied that the change is not material, this will have the benefit for the landowner that it can be certain that the altered pattern of development is

> indeed within the scope of the permission. It could not afterwards be said that there has been any departure at all from the scheme for which permission has been granted. *If, on the other hand, the landowner alters the pattern of development in an immaterial way without first obtaining a variation under section 96A, it does not follow that the development must be treated as unauthorised by the original, unvaried permission.* In such a case the landowner will simply be more exposed to possible arguments in later enforcement proceedings that the change was in fact material, which would then have to be decided by a planning inspector or a court. That has always been the position under the planning legislation, including before section 96A was added to give the facility to amend a permission."

81. The reference to *Lever Finance* in this passage is to this extract from the judgment of Lord Denning MR at p230 (my emphasis):

> "In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words 'de minimis' because that would be misleading. It is obvious that, as the developer proceeds with the work, there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning committee for every immaterial variation. *The permission covers any variation which is not material. But then the question arises: Who is to decide whether a variation is material or not? In practice it has been the planning officer. This is a sensible practice and I think we should affirm it."*

82. In *R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin), Holgate J was concerned with permission for a large housing development. Condition 6 in the permission required the development permitted to be carried out 'in accordance with' certain plans. He said at [43]-[44]:

> "43. The phrase 'in accordance with' in condition 6 means 'in agreement or harmony with; in conformity to; according to' (Oxford English Dictionary). The dictionary examples given show that a draftsman of a planning permission may go further by adding language so that, for example, the development must be carried out 'exactly' or 'strictly' in accordance with particular plans. The natural meaning of the phrase "in accordance with", taken by itself, does not connote that degree of conformity. The addition of such terms would not be tautologous. They would change the meaning of the phrase, certainly in the context of the document I have to construe.

> Deciding whether a development is in conformity or harmony with parameter plans may well involve matters of planning judgment and degree."

The parties' submissions

83. The Claimant argues that the Defendant erred in the following respects (in the Jarvis Report):

    a. the Defendant failed to interpret the 2010 Storage Planning Permission in accordance with the relevant lawful approach and in particular in accordance with its terms as set out within the DL (Ground 3);

    b. this led to a failure by the Defendant properly to identify and take into account all of the relevant differences between the As Built Building and the building permitted by that Permission, which thereby undermined any assessment of the materiality of those differences (Ground 3);

    c. the Defendant, having acknowledged that the As Built Building did not accord with the 2010 Permission, took into account irrelevant matters as part of any assessment of whether the differences were material, and in particular wrongly relied upon the fact that the changes did not prevent the building from appearing as a 'farm type storage building' or from functioning generally as a storage building; the alleged absence of any harm caused by the differences; and that, despite the failure to accord with the 2010 Permission, it was not considered expedient to take enforcement action under the 1990 Act (Ground 3);

    d. further, the Defendant having acknowledged the As Built building did not accord with the Planning Permission, and thereafter concluding that it was not expedient to take enforcement action, wrongly equated that determination in respect of expediency as importing lawfulness to the As Built Building when it did the opposite (expediency only arises if it has been concluded that a breach of planning control has arisen, ie, that the building was unlawful in any event) (Ground 3);

    e. further, the conclusion that it was not expedient to take enforcement action must logically have been based upon a conclusion that the departures from the permission were indeed material (Ground 3);

    f. further and in any event, given that the Defendant's reasons for reaching its conclusions (as set out in the Jarvis Report) that the building is lawful, clearly did involve the question of the expediency of taking enforcement action, those reasons are either confused and irrational or it is not reasonably possible to read that report fairly and still conclude that the decision that the As Built building was lawful was *not* based upon such an irrelevant consideration or that such a conclusion, which is wrong in law, does not vitiate the overall conclusion as to lawfulness (Ground 3);

    g. the Defendant failed to consider any earlier purported act of implementation of the 2010 Permission in light of the subsequent As Built development which failed to

accord with the 2010 permission and the decision as to lawfulness is further vitiated thereby (Ground 4).

84. Developing these points, the Claimant said that the Jarvis Report wrongly failed to recognise the fact that the DAS which accompanied the 2010 application (and the application) had been incorporated into the 2010 Storage Planning Permission. The DAS - and hence the Planning Permission - required brick walls. Thus on this point alone the As Built Building did not comply with that Permission. Later discharge of the Conditions upon submission of (non-brick) materials was irrelevant. Condition (3) did not override the requirement for brick.

85. The 2010 Storage Building Planning Permission was a detailed one; it was not for anything wider or generic; and there was no reference on the face of the permission that it was for a 'farm-type storage building'. Ms Jarvis therefore was wrong to approach her assessment of the differences between the As Built Building and the permitted building and their materiality on the basis that as long as what was built appeared as a 'farm-type storage building', it accorded with the 2010 Storage Building Planning Permission.

86. In addition, Ms Jarvis was wrong to interpret that Planning Permission as granting permission for a storage building *simpliciter*, and was wrong to conclude that as long as the As Built Building could function as a storage building that was sufficient to comply with the Planning Permission.

87. These are matters that related to the *acceptability* of the differences or departures from the Planning Permission and not the *materiality* of those differences.

88. The Jarvis Report in any event set out a number of differences between the As Built Building and that shown on the plan and the subject of the 2010 Storage Building Permission (even though her interpretation ignored the DAS and the application form).

89. The Jarvis Report clearly concluded that these noted differences, in themselves, showed that the As Built Building failed to accord with the 2010 Storage Building Permission. However, Ms Jarvis' assessment of the materiality of these differences and departures was 'infected' throughout by her interpretation of the 2010 Storage Planning Permission which was wider than it should have been; in other words, she misinterpreted it. In particular, despite the differences, she said at [5.28]:

> "… can nevertheless still function and be used as was originally intended in accordance with its lawful use and as such it is not materially different from the original permission in either appearance or function/use."

90. In other words, this approach was based upon Ms Jarvis' view of the acceptability of the changes, as opposed to their materiality.

91. The approach adopted to the interpretation of the 2010 Storage Planning Permission and that the Jarvis Report conclusions are untenable and the Defendant was wrong to grant Change of Use Permission on the basis that the As Built Building did accord with the 2010 Storage Planning Permission, and so was lawful.

92. In relation to Ground 4 (failure to apply relevant lawful approach as to implementation of the 2010 Permission and to lawfulness of the As Built building) the Jarvis Report identified that the As Built Building does not accord with the 2010 Storage Planning Permission. Ms Jarvis wrongly focused solely upon the foundation works carried out in 2012. She failed to apply the approach required by *Commercial Land*. She did not look at what had been done as a whole but instead, looked at the 'modicum of works' alone, namely the foundation works, and concluded that because they complied with s 56(2) and with the Planning Permission, they alone were sufficient to conclude that the Planning Permission had been lawfully implemented.

93. If the correct *Commercial Land* approach had been applied to the facts, the conclusion would have been reached that the works carried out could not have amounted to a lawful implementation of the 2010 Storage Planning Permission. In other words, the subsequent works leading to the As Built Building acted to render the initial commencement (which may well have been within the 1990 Act on their own) insufficient to overcome the subsequent construction of a building which did not (and does not) accord with 2010 Storage Planning Permission.

94. The Claimant therefore submitted that the conclusion that the As Built Building amounted to a lawful implementation of the 2010 Storage Building Planning Permission was clearly vitiated by error and a failure even to apply the correct approach.

95. On behalf the Defendant, it was submitted as follows.

96. The following points were emphasised (some of which I set out in more detail earlier): where a public law decision is taken and not challenged, it is to be treated as lawful; questions of fact and of planning judgement are for the local planning authority and not the court; the requirement that a development be carried out in accordance with a plan does not connote a requirement of strict conformity and can involve matters of planning judgement and degree; departures must be material in the context of the scheme as a whole; the court should not adopt a hypercritical approach to officers' reports; they should be read flexibly and without undue rigour and should not be laboriously dissected in an effort to find fault; and the question for the court is whether, on a fair reading of the report, the decision maker has been materially misled on a matter bearing on the decision.

97. The Defendant said that the Claimant's Ground 3 has two related aspects. The first is that the Defendant misinterpreted the 2010 Storage Planning Permission as permitting the use of timber boarding as facing material. The second is that the Defendant reached erroneous conclusions in respect of the differences between the As Built and the Planning Permission from 2010. The main element of this second criticism is the alleged failure to recognise that the use of timber boarding as facing material was not in accordance with the Planning Permission.

98. The Defendant said Ground 4 alleges a wrongful approach to the concept of 'lawful implementation'. The first aspect of this ground (taken from the Claimant's Skeleton Argument) is that the '[Jarvis] Report when considering the issue … of whether the 2010 Storage Building Permission was implemented clearly focuses solely on the foundation works that were said to have been carried out in 2012' and 'clearly does not look at what has been done as a whole'. The Defendant said the other aspect of Ground

4 covers, in effect, similar terrain as Ground 3: namely, the assertion that what has been built is, as a whole, so far from what was permitted that it is not permitted.

99. The Defendant said that none of these criticisms were made out. Against the backdrop of the relevant legal framework, on a fair reading of the Jarvis Report as a whole, there was an ample basis for Ms Jarvis (and thus the Defendant) to conclude that the As Built Building was a lawful building for the purposes of C1. She had not misinterpreted the Planning Permission and had exercised her planning judgment appropriately. She had been right to conclude that there had been lawful implementation of the Planning Permission as required by s 56(2). Work had begun within three years and any differences between the As Built Building and the Planning Permission were immaterial so that on the *Commercial Land* approach there had been lawful implementation.

Discussion

100. I think it is convenient to take both grounds of challenge together as there is a degree of inter-linkage.

101. The central issue in this case is whether the Change of Use Decision was in accordance with C1, which I set out earlier. It is common ground that this issue, in turn, depends on whether the As Built building was lawful and whether Ms Jarvis was entitled to reach the conclusion that it was.

102. I therefore now need to consider her Report in detail.

103. In the Report, after describing the site, recording the history and the representations made on the application (including the objections which had been made which she summarised in Section 4), Ms Jarvis began her detailed consideration of the As Built Building in Section 5.

104. At [5.11] she identified the 'main issues' as she saw them, the first of which was 'the lawfulness of the existing building'. She then said at [5.12]:

> "5.12 In considering the first sentence of policy C1, whilst it is considered that in the light of the supporting documentation provided, the planning history and site inspections, the building can be concluded to be of 'substantial and permanent construction', the first issue to consider is whether the 'as-built' building can be considered to be 'lawful' and therefore an existing building for the purposes of policy C1."

105. There can, accordingly, be no question that Ms Jarvis began her analysis from the right place.

106. Ms Jarvis then considered the question of lawfulness in a structured way under five headings:

    a. whether the permission has been lawfully implemented;

b. the effect of pre-commencement conditions;

c. whether the building has been built in accordance with the approved permission and associated plans/detail;

d. the timing and nature of the use of the building;

e. and other relevant matters.

107. I propose to consider Ms Jarvis' overall conclusion by reference to these headings.

108. In relation to (a), Ms Jarvis said at [5.13]-[5.15]:

> "5.13 The applicant contends that work originally started on the building in 2012 and this is corroborated by Building Control (BC) records that confirm that the footings were approved in September 2012. This has been confirmed in the statutory declaration latterly submitted to support the application.
>
> 5.14. It has been suggested that the initial works, i.e. the construction of the foundations cannot be taken to have properly implemented the permission given that no further work on the building was undertaken until 2019, a gap of some 7 years. However, there is no requirement for the construction of the building to be completed within a specific period and the applicant has explained that the delay in completing the building was due to pursuing alternative proposals for the site during which time the foundations 'grassed over'. According to the Town and Country Planning Act 1990, "development is taken to be begun on the earliest date on which a material operation is carried out." A material operation can include any works of construction, demolition, digging foundations, laying out or constructing a road and a material change in the use of the land. There is case law to establish what constitutes commencement of a planning permission and the construction of foundations would constitute implementation of the permission.
>
> 5.15. It is therefore concluded that the permission was lawfully implemented by the construction of footings; this is corroborated by BC records."

109. I consider that the Defendant was right to submit that in these paragraphs Ms Jarvis was simply saying that works had begun within three years of the 2010 Storage Planning Permission, as was required by Condition (1), and thus had kept the Permission 'alive'. Her conclusion as stated was correct – or least properly open to her. It is trite that not much is required to begin development, and building the footings, which took place in 2012, taken by itself, was undoubtedly part of the implementation of the 2010 Storage

Planning Permission. The only issue arising is whether that conclusion no longer follows because the As Built Building differed from the Permission.

110. It does not appear that the submission was made to the Defendant that because of those differences, when the works were considered as a whole, they served to prevent the works as a whole from being 'comprised in the development' for the purposes of s 56(2) *per* the approach in *Commercial Land*.

111. The Claimant's submission was recorded at [4.3] in the Jarvis Report as follows:

> "the objector maintains the position that the building has not been lawfully implemented nor has it been built in accordance with the approved plans or for its approved purpose – a materially different building has been built"

112. On my reading, this is not a *Commercial Land*-based objection, or at least not clearly so. So far as I can see, it was never said on behalf of the Claimant during the re-determination in 2022 that, for example, 'The As Built Building is so far from the permitted building that on the basis of *Commercial Land* all of the work including the foundations were not 'comprised in the development' for the purposes of s 56(2) and so the 2010 Storage Planning Permission was not lawfully implemented.' *Commercial Land* first appears to have been explicitly mentioned in pre-action correspondence in December 2022, two months after Ms Jarvis' Report.

113. Hence, I do not think that she can really be fairly criticised for not tackling in terms *Commercial Land* in her [5.13]-[5.15]. I am aided in this view by the way the matter was put by the Claimant's solicitors in their letter of objection to the Defendant of 14 July 2022, which made no reference to *Commercial Land* (my emphasis):

> "It remains controversial between our client and your Council's planning officers and enforcement team that they accepted that, despite the above conditions (3) and (4) not discharged until much later, *the owner somehow lawfully implemented the 2010 Storage Building permission by digging a trench, in or about 2012, but which was then filled in during the period when the owner was seeking to gain permission for a house again*. The above conditions were then not the subject of an application until July 2019 and were discharged by your Council well after construction had formally begun in May 2020 and wholly different materials to that which was shown on the approved conditioned plans has been used."

114. But when the substance of Ms Jarvis' reasons are considered in light of *Commercial Land*, I do not consider the Claimant's argument (which is the nub of his Ground 4) is made out. At [48] of its Skeleton Argument the Defendant submitted:

> "48. If one is going to scrutinise how the report addresses the question whether the development carried out is so

> different from the permission as not to amount to the implementation of that permission, one needs to look at the whole of the analysis – and, in particular, the section headed '(c) Whether the building has been built in accordance with the approved permission and associated plans/detail and can still be used for its intended purpose'".

115. Given that officers' reports have to be read flexibly , I think this approach is right.

116. *Commercial Land* and the cases cited in it show that later differences between a building as constructed and as permitted do not automatically have the effect of rendering earlier works – themselves within the permission - from being 'implementation' for the purposes of s 56(2). It is a matter of fact and degree for the decision maker's assessment. To re-iterate what was said in *Commercial Land* at [33], it is necessary to consider '… not just the existence of differences between the plans and the operations relied on, but also to consider the significance of those differences'.

117. I will come to Ms Jarvis' conclusions under (c) later, but they included that the differences between the As Built Building and the Planning Permission were not material. Hence, if the Defendant's suggested scrutiny is carried out in light of the *Commercial Land* approach, the answer is the same – the foundation works were comprised in the development for the purposes of s 56(2), and Ms Jarvis was right in her overall conclusion.

118. As to (b), and the effect of the pre-commencement planning conditions, Ms Jarvis dealt with this at [5.16] et seq.

119. On a flexible reading of her Report, it is plain that in the first part of this section Ms Jarvis was considering the question whether the As Built Building was unlawful because development began before Conditions (3) and (4) had been complied with.

120. She acknowledged that although work had begun in time (ie, within three years of permission), the details required for submission by Conditions (3) and (4) had not been discharged (at [5.16]). As I explained earlier, building work at that stage did not progress beyond foundations, and no further work was undertaken for some years while other options were considered. Works to complete the building recommenced in 2018 with the work carrying on into 2019, and approval of the materials and landscaping was granted under the discharge of condition application in 2020.

121. Ms Jarvis rightly acknowledged that a failure to seek approval to discharge pre-commencement conditions can result in the original permission being 'lost', because the works undertaken in advance of such approval would be in breach of the conditions. However, she said that it has also been established in the authorities that there may be exceptions to this principle, depending on the nature of the original permission and particularly where any details so required may be subsequently approved and so prevent the planning authority from taking any enforcement action (at [5.17]). As a general proposition, that is right.

122. She then referred to the *Hart Aggregates* case and that the Defendant had previously concluded (as it had said in pre-action correspondence) that Conditions (3) and (4) did not deal with matters that 'go to the heart of the permission'.

123. In *Hart Aggregates*, Sullivan J used that phrase in [61] in relation to a condition which had not been complied with. He said that the condition was not:

> "61. … a 'condition precedent' in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years, or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful.'

124. At [65]-[67] he said:

> "65. The defendant placed particular reliance upon the decision of the Court of Appeal in the *Daniel Platt* case [*Daniel Platt Ltd v Secretary of State for the Environment* [1997] 1 PLR 73]. Mr Porten [for the Council] submitted that it could not be distinguished from the present case. That case was concerned with a planning permission granted in 1947 under a general Interim Development Order (IDO). It was common ground that the planning permission obtained in 1947:
>
> > ' ... was akin to today's outline permission, namely a planning permission subject to a condition requiring the submission and approval of details of the proposed operations before any operations are begun. However, as is again now common ground, no such details were ever submitted to the planning authority. Yet mining continued and no enforcement action was ever taken until recently." Per Schiemann LJ at page 75B to C; see also the passage at page 77C to D cited above.
>
> 66. Again, the Court of Appeal did not have to, and therefore did not, address the question: what happens if there is not an outline but a detailed planning permission and if all the conditions of that detailed planning permission are complied with, save for one, which requires approval of some particular aspect of the development before any development commences? Is the resulting unlawfulness confined to that particular aspect of the development, or does it render the entire development unlawful?
>
> 67. For the reasons set out above, I believe that the statutory purpose is better served by drawing a distinction between those cases where there is only a permission in

> principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular facts, and the outcome may well depend upon the number and the significance of the conditions that have not been complied with. Provided that the Court applies *Wednesbury* principles when considering these issues, there is no reason why it should usurp the responsibilities of the local planning authority."

125. In the present case, Ms Jarvis said that the details of materials and landscaping (as already carried out) were subsequently approved, and there had been no challenge to that decision, and thus no enforcement issues arose.

126. She said [5.19] it was relevant to note that the original implementation of the permission by the construction of footings/foundations in accordance with the approved plans did not rely on the approval of 'materials to be used in the 'external surfaces of the development' nor 'soft landscape works', because the foundational works did not involve external surfaces or such landscaping works (nor, I would add, did such work *need* to rely on such approvals, given its below ground nature).

127. Thus, she said that although not strictly in accordance with the wording of the condition, the works that were undertaken were implemented in accordance with the Planning Permission insofar as the details requiring further approval did not affect those works (at [5.19]). In other words, the work that started in 2012 within three years of the Permission was lawful implementation of it because the conditions in question were not of the type which meant that the entire development was unlawful for failure to fulfil them first.

128. In a later case in the *Hart* line of authorities, *Meisels v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1987 (Admin), the judge said at [16]-[19]:

> "16. The starting-point is that development in breach of conditions is unlawful, and it follows that, if there is a condition that has to be fulfilled before development commences, and development commences without the condition being fulfilled, the development has been commenced unlawfully. This is 'the *Whitley* principle'. In those circumstances, if a question arises about whether the development commenced within the three-year period after the grant of permission, the work done in breach of the condition will not count, and the result may be that the

> permission expired before the commencement of any work authorised by the permission.
>
> 17. But that starting-point has to be applied in the context of the statutory regime as a whole, which draws a clear distinction in s 171A(1) of the 1990 Act between (a) carrying out development without planning permission and (b) failing to comply with a condition subject to which planning permission was granted. It follows that not every breach of condition can have the result that the development has been carried out without planning permission.
>
> 18. Nevertheless, when an authority has clearly made a condition requiring some further act before the commencement of work, there must be scope for saying that the intended function of the condition was to prevent the commencement of work (or render it unlawful) before the condition had been fulfilled. That will be the case if the condition 'goes to the heart of the planning permission': if it does, it is a condition going beyond the detail of a matter that is agreed in principle: it is, instead, something without which the authority would not be content to permit the development at all.
>
> 19. The question whether a condition 'goes to the heart of the planning permission' is not merely a matter of construing the grant of permission. The grant may give reasons why the condition is imposed; but those reasons cannot resolve the question by themselves. Rather, the question can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context. In other words, this question is a matter of planning judgment. It is not for the Court; it is for the Inspector; and unless the Inspector's decision on the issue is at fault in a *Wednesbury* sense, the Court will not intervene."

129. On this approach, in my judgment, Ms Jarvis was entitled to reach the conclusion as a matter of her planning judgement that Conditions (3) and (4) did not go to the heart of the permission in the sense Sullivan J explained in *Hart Aggregates* so as to render the As Built Building unlawful.. The 2010 Storage Planning Permission was for a single storey building for general storage and for farm machinery, and in light of that, Ms Jarvis was entitled to conclude that external materials and soft landscaping did not go to the heart of that permission.

130. In reaching this conclusion I pay regard, as I have to, that Ms Jarvis would have had a much better 'feel' for the context and the overall planning issues involved than I can have. *Greyfort Properties Ltd v Secretary of State for Communities and Local*

Government [2011] EWCA Civ 908 was a 'breach of condition' case. Richards LJ said at [1]:

> "1. The appellant (Greyfort) owns land in Torquay which was the subject of a planning permission granted in 1974 for the development of 19 flats. Greyfort contends that access work carried out in January 1978 amounted to commencement of the development, with the consequence that the planning permission remains extant. An inspector held that the work was carried out in breach of a condition of the planning permission and could not therefore amount to commencement of the development authorised by the permission. That decision turned on the application of what, in planning parlance, is commonly called the *Whitley* principle (see *Whitley & Sons v Secretary of State for Wales* (1992) 64 P&CR 296), in relation to which Sullivan J (as he then was) made extensive observations in *R (Hart Aggregates Ltd) v Hartlepool Borough Council* [2005] EWHC 840 (Admin)."

131. He said at [41]:

> "41. … The fact is… that the Inspector was plainly in a better position than the court to assess the matter, not only because of his greater expertise in interpretation and assessment of plans of this sort but also because he is bound to have had a better feel for the overall context and the site itself, which he had visited. The court should therefore be very cautious about acceding to an invitation to conclude, on the basis of its own examination of the plans, that the Inspector fell into error in making the finding he did as to the importance of condition 4."

132. Ms Jarvis then turned to the timber/brick point.

133. She said (at [5.20]) that some objections had suggested that the use of black feather edge timber boarding to the external elevations as approved under the discharge of Condition (3) in 2020, as opposed to the originally proposed brickwork, represented a fundamental change to the appearance of the building and a change from the permission as a whole.

134. At [5.21] Ms Jarvis said:

> "However, whilst the Inspector imposed a condition to require details of the materials to be used in the external construction of the building 'in the interests of the visual amenities of the surrounding landscape', there is no requirement that those materials should be brick. Furthermore, although another condition requires the development to be 'carried out in accordance with the approved plan' that plan does not specify the external

> materials. In the appeal decision the Inspector makes reference to it being a 'farm-type storage building' though the description only refers to it as a 'building'. The use of timber boarding as opposed to brick is considered to be entirely in keeping with the original permission and typical of a 'farm-type storage building'. However, whilst the Inspector imposed a condition to require details of the materials to be used in the external construction of the building 'in the interests of the visual amenities of the surrounding landscape', there had been no requirement that those materials should be brick."

135. The issue here is whether the Planning Permission required the use of brick.

136. I consider that Ms Jarvis was correct to conclude, on the *Hillside*/*UBB* approach to the interpretation of permission, that no condition or requirement meant that brick *had* to be used had been imposed. That is for the following reasons.

137. To recap matters that I mentioned earlier, the application form from 2010 in Section 10 ('Materials') 'proposed' – and I emphasise that word - that 'Walls' were to be 'Facing Brick'. There is no reference to the application incorporating the DAS, which did specify the use of brick.

138. What status did the DAS have vis-à-vis the planning application ? I consider that the Defendant was right when it said at [22] of its DGCC:

> "The 2010 permission was granted '… in accordance with the terms of the Application'. So, it did not specifically incorporate the DAS. Equally, the application itself did not incorporate the DAS. When the application was made, the relevant provision relating to the submission of a DAS was article 4C of the Town and Country Planning (General Development Procedure) Order 1995 [SI 1995/419]. That provision required that certain planning applications be 'accompanied by' a DAS. It did not require that the DAS form part of the application. In the circumstances, there is no basis for assuming that the DAS formed part of the 2010 planning permission."

139. As I have said, the use of brick was only cast as a 'proposal' in the application, and not as a certain and definite element which *would* be utilised. Proposals can be accepted or not, and the Inspector did not think it necessary to accept the brick proposal otherwise, it is reasonable to assume, he would have said so and incorporated it into a condition. That, in my judgment, is what a reasonable reader would understand the words used in the Planning Permission to mean, considered in their particular context. It follows there was no requirement for brick in the Inspector's DL, and that is what I consider to be the governing document. The very general nature of the requirement imposed by Condition (3) seems to me to be inconsistent with the requirement that brick *had* to be used.

140. Paragraphs 45-50 of the Claimant's Skeleton Argument dealt with interpretation of planning permission and material departures from planning permission. Under the heading, 'What has been permitted', at [49] onwards in its Skeleton Argument, the Defendant submitted:

> "49. Central to the Claimant's complaint is that the use of timber boarding as facing material is not permitted. As indicated in paragraphs 10 and 12 above, the use of that material was approved pursuant to a submission made under condition 3 in May 2020. That approval was not challenged (and the Claimant was aware of it). It is no longer open to anybody to question the lawfulness of that approval.
>
> 50. In consequence of the above, paragraphs 45 to 50 of the Claimant's Skeleton Argument are misconceived. In the circumstances, it is unnecessary to comment on the Claimant's assertion that the relevant DAS was part of the 2010 permission – but, for reference, the point is addressed at paragraph 22 of the Defendant's detailed grounds."

141. It follows from what I have said that I agree with the Defendant's submission in these paragraphs.

142. Next I deal with Ms Jarvis' heading (c), and whether the building has been built in accordance with the 2010 Storage Planning Permission, and associated plans/detail, and whether it can still be used for its intended purpose specified in that Permission. This is an important section of her Report.

143. Ms Jarvis said at [5.23]-[5.24] that the Defendant's records confirmed that the siting of the building is within acceptable tolerances of the originally approved siting. However, during the main construction works of the 'above ground' building during 2019, there were various changes to the building as originally permitted. These include the following: (a) the rear openings all have identical cill heights, lower than that originally approved and all below the eaves level; (the approved height of the central 'barn door' opening was above eaves level, higher than the others either side); (b) the small roof level 'slit window' openings appear to be larger and positioned lower on the gable ends; and (c) internally, a first floor has been inserted accessed via a staircase located towards the front of the building; this upper area has been divided into three areas.

144. Thus, Ms Jarvis clearly accepted that the As Built Building had not been built fully in accordance with the approved plans either externally or internally.

145. Ms Jarvis then went on to consider carefully the differences between the As Built Building and that which had been originally intended. I think it is worth noting in detail some of her conclusions, and the way in which she expressed herself.

146. For example, she concluded at [5.27(a)] that the differences did not 'materially alter its overall appearance which remains a 'farm type storage building' in accordance with the description used by the Inspector.'' She referred in other parts of the same paragraph

to changes being 'hardly noticeable' ([5.27(b)]); to the size and position of the windows being the same 'typical feature' as originally permitted (Ibid); to the fact that the accommodation of a loft storage level was 'not readily discernible ([5.27(c)]); and that changes had not altered the building's 'fundamental use as a storage building including for general storage' (Ibid). She made a number of other points and reached other conclusions to the same effect.

147. Thus, she said at [5.28] (my emphasis):

> "It is concluded that whilst the 'as built' building is not in full accordance with the approved plans externally and internally, it can nevertheless still function and be used as was originally intended in accordance with its lawful use and as such it is *not materially different from the original permission in either appearance or function/use*."

148. It seems to me that all of the points made by Ms Jarvis in [5.27], and her conclusion in [5.28], were matters *par excellence* of planning judgment for her and with which I should not readily interfere, in accordance with the principles I set out earlier. The cases, in particular *Hillside* and *Lever Finance*, make clear that the assessment of materiality is for the planning officer's judgement.

149. There were two principal aspects to Ms Jarvis' assessment: (a) appearance; and (b) function.

150. As to appearance, there is no proper basis for interfering with Ms Jarvis' assessment. She was and is the expert reader of plans, drawings and such matters in the way that I am not: see above. Appearance was a matter for her planning judgement. The Claimant agrees. The letter of 14 July 2022 from his solicitors to the Defendant (which I referred to earlier) stated:

> "Dealing with policy C1, whilst the appearance of the existing building and what is proposed are matters of planning judgement …"

151. Second, as to function, I do not consider there is force in the Claimant's submission that Ms Jarvis construed the 2010 Storage Planning Permission too widely in a way which led her into error. The Inspector's permission was for a building for 'general storage and for a tractor shed with secure storage for vintage farm machinery'. General storage was therefore permitted. Condition (6) limited the building's use to 'storage purposes' (ie, not any particular type of storage). Paragraph 9 of his Reasons referred to the Interested Party's 'intention' to use it to store machinery. I comment here that this was not expressed as an irrevocable matter, but just something which was an aspiration. Paragraph 9 also referred to the building as 'hav[ing] the appearance of a barn or other similar farm storage building.' Paragraph 11 of the Inspector's Reasons referred to the 'design as a farm-type storage building'.

152. It therefore seems to me that Ms Jarvis' description of what had been permitted as a 'storage building including for general storage' and a 'farm-type storage building' and her reference to its '*fundamental* use as a storage building including for general storage' (my emphasis) was neither inapt, nor an arguably perverse or impermissible reading of

the Planning Permission. The language she used tracked that of the Inspector, who used different formulations in different parts of his DL. Given those similarities, I consider her interpretation of the Permission accords with how a reasonable reader would construe the 2010 Storage Planning Permission. I therefore disagree with [66] of the Claimant's Skeleton Argument where it was argued that Ms Jarvis had been wrong to interpret the permission as granting permission for a 'storage building *simpliciter*'.

153. I turn to Ms Jarvis' factor (d), the timing and nature of the use of the building.

154. Ms Jarvis went through the evidence at [5.29]-[5.30], including that from the Interested Party about what he had been using the building for. She then concluded at [5.31]:

> "5.31 Since its completion the building has therefore been used for its lawful storage use. It is also noted that condition 6 of the original permission states that 'The building hereby approved shall be used for storage purposes only and not for any other use'. Thus, despite the description of the development, there is no restriction on the type of storage that can be undertaken.''

155. Again, this seems to me to be a judgement which was rational and open to Ms Jarvis to make.

156. Ms Jarvis then dealt with other points before concluding at [5.40] (my emphasis):

> "5.40. In the light of the above, it is concluded that:
>
> • The original permission was lawfully implemented through completion of foundations and the subsequent approval of discharge of conditions does not affect this position;
>
> • Whilst the building that has been erected is not in full accordance with the original permission, it is *not fundamentally or materially different* from that which was permitted as to justify taking enforcement action; and
>
> • The building was used for its lawful purpose following completion;
>
> 5.41. Therefore, it can be considered to be an 'existing rural building' for the purposes of policy C1."

157. Ms Jarvis then dealt with other parts of C1 and other relevant policies. The correctness of her determination on these matters is not challenged in this judicial review application and so I need say no more about them.

158. I acknowledge the question of materiality is different from the question of enforcement, and to that extent it might have been better to have kept the two issues separate, rather than combining them as Ms Jarvis did in a single sentence in the second bullet point in [5.40].

159. Nonetheless, I consider that adopting a flexible approach to Ms Jarvis' Report (which I am required to do), it is plain what she was saying, and why. She was saying that while there were indeed differences between the 2010 Storage Planning Permission and the As Built Building, they were immaterial as to appearance and function. The question and assessment of materiality was entirely for her planning judgment, as I have said. In accordance with *Hillside,* [70], that did not render the Building unlawful ('If … the landowner alters the pattern of development in an immaterial way without first obtaining a variation under section 96A, it does not follow that the development must be treated as unauthorised by the original, unvaried permission.')

160. For these reasons, in my judgment there was nothing unlawful about Ms Jarvis' approach as contended for by the Claimant in Grounds 3 and 4. I do not consider that she adopted a wrongful approach to the interpretation of the 2010 Storage Planning Permission or reached erroneous conclusions in respect of the differences between the As Built and the permitted building. Nor do I consider that she adopted a wrongful approach to the lawful implementation of that Permission in light of the differences between the As Built Building and the permitted building.

Conclusion

161. It follows that I conclude neither of the Claimant's surviving grounds of challenge is made out, and hence I dismiss this application for judicial review.