LAND TO THE REAR OF THE GRAND JUNCTION PUBLIC HOUSE, HIGH STREET, BUCKINGHAM, BUCKINGHAMSHIRE

_____

ADVICE

_____

Introduction

1. I am asked to advise Buckingham Town Council ("the Town Council") on the merits of making an application for judicial review of Aylesbury Vale District Council's ("the Council") decision, dated 26 October 2018, to grant planning permission (Ref.: 16/03302/APP) for the provision of a 61 bedroom Care Home with 14 assisted living apartment with associated access, parking and landscaping ("the Proposed Development") on land to the rear of The Grand Junction Public House, High Street, Buckingham, Buckinghamshire ("the Site"). The assisted living apartments are in planning terms residential development. The Proposed Development, therefore, comprises in part an application for housing.

2. In particular, I am asked to advise in relation to two potential grounds of review which the Town Council has identified, namely:

   (i) The Council misunderstood the meaning of Policy EE5 of the Buckingham Neighbourhood Development Plan ("the BNDP") ("Proposed Ground 1"); and

   (ii) The Council misapplied paragraph 11 of the Revised NPPF ("Proposed Ground 2").

3. I address both these grounds in the body of this advice.

Factual background

4. Planning permission was originally granted for the Proposed Development on 25 October 2017. The Town Council challenged the planning permission by way of judicial review on the basis that: (i) the Council failed properly to apply paragraph 134 of the 2012 NPPF in that it had not weighed the less than substantial harm to heritage assets that the Council had found to be caused by the Proposed Development against the public benefits of the scheme; and (ii) that Council had wrongly concluded that the presumption in favour of sustainable development under paragraph 14 of the 2012 NPPF applied.

5. The Council consented to judgment on the first (only) of those grounds and the original planning permission was quashed.

6. The grant of planning permission on 26 October 2018 – and in relation to which I am to advise – was the redetermination of the original application.

The Site

7. The site is about 0.56 hectares in size and is bound by Cornwalls Meadow car park to the south west, the River Great Ouse to the east, properties fronting Stratford House to the northwest and Cecil's Yard to the north. It is occupied by single storey brick building which is currently vacant with forecourt parking. The majority of the site is open and vegetated and includes mature trees. The Site is located within the Buckingham Conservation Area and the archaeological area known as 'Buckingham Town Historic Core'. There are no listed buildings within the site boundary, The Grand Junction Public house, at 13 High Street and No 8, High Street are both Grade II listed and located close to the Site.

Planning policy

The development plan and the approach of the Council to the relevant policies within the development plan

8. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") provides that planning decisions must be made in accordance with the plan unless material considerations indicate otherwise.

9. The development plan in this case comprises the saved policies of the Aylesbury Vale District Local Plan ("the AVDLP") and the BNDP.

The AVDLP

10. As I understand it, the Council acknowledges that the housing supply policies in AVDLP are time-expired (given that housing policies within the AVDLP identified housing requirements only for the plan period which expired in 2011, the underlying evidence supporting those requirements is now itself out of date and, further, evidence relating to the housing need has changed substantially since the housing policies of the AVDLP were adopted (see the Council's Overview Report (July 2018), §1.3)).

11. Policy RA13 of the AVLP provides:

> "*Within the built-up areas of settlements listed in Appendix 4 of the Plan* [which includes Buckingham] *residential development will be restricted to smallscale areas of land. Subject to other policies of the Plan, permission will only be granted for residential or mixed-use development comprising:*
>
> *(a) infilling of small gaps in developed frontages with one or two dwellings in keeping with the scale and spacing of nearby dwellings and the character of the surroundings.*
>
> *(b) up to five dwellings on a site not exceeding 0.2 ha that consolidates existing settlement patterns without harming important settlement characteristics, and does not comprise the partial development of a larger site.*
>
> *Such development should use land efficiently and safeguard existing employment uses and significant open spaces and buildings. In Buckingham, Wendover, Haddenham and Winslow larger schemes may be permitted.*"

12. The Council's Overview Report states in relation to RA13:

> "*Policies RA13…relating to the supply of housing district wide form part of that overall housing strategy…[is] now out of date, given that these identified housing targets for the plan period up to 2011 and the evidence relating to the districts need has changed significantly since these policies were adopted, and…[is] not consistent with the NPPF policies to significantly boost the supply of housing based on up to date evidence. RA 13…sought to take a protective approach to development and can only be given very limited weight when considering proposals…settlements identified in Appendix 4. Development proposals on sites are to be considered in the context of policies within the NPPF which sets out the presumption in favour of sustainable development at paragraph 11.*"

13. The Officer's Reports ("the OR(s)") confirmed that very limited weight was to be applied to RA13 (§9.6, OR dated 20 June 2018 and §3.14, OR dated 26 October 2018).

The BNDP

14. The BNDP was made in 2015. The Council confirmed that it regards the policies within the BNDP as being up to date.

15. There are a number of BNDP policies relating to housing development which are relevant to the 14 assisted living apartments but are not applicable to the C2 care home element. There are no policies which are specific to care homes.

16. Policy HP1 allocates land for 617 new dwellings. The policy states that development will be supported within the boundary settlement area (shown on Fig 4.2) for new housing as shown in the site allocation plans, provided the development meets the requirements set out in the policies of this Plan. All dwelling numbers for the allocations are indicative and will be reviewed when applications are made. Site J and Site G seek to make provision for older residents. There is a reserved site, Site M, that will only be required if one or more of the allocated sites, with a total of 80 outstanding units, is not brought forward before 2025.

17. The Site is located within what is called the 'Town Centre' Character Area of the BNDP. It is not allocated for housing but it is specifically allocated as a proposed car park and to accommodate a seating and picnic area and an extension to the riverside walk (§9.17 of the BNDP).

18. Policy EE5 provides under the heading 'Allocation of land for town centre parking':

> "*Two sites have been identified on Figure 9.8 where the provision of town centre car parking will be supported. Car parks at these locations should provide disabled car parking spaces, electric car charging bays and access to footpaths.*"

19. Figure 9.8 shows the Site. The BNDP states that the provision of car parking is to ensure that there are facilities for visitors to the town centre to access the services and amenities (§9.13) and that the increase in car parking will allow the further expansion of retail provision in the town centre (§9.15). The purpose behind these policies is, therefore, to support the vitality and viability of the town centre.

20. The June 2018 OR deals with policy EE5 in some detail at paragraphs 9.10 to 9.17. It is worth setting this out in full:

> "*9.10 In respect of the Buckingham NDP, the site is identified in policy EE5 'Allocation of land for town centre parking', being one of 2 sites "*where the provision of town centre parking will be supported*". Supporting text in para 9.14 states that the parking is to ensure there are facilities for visitors to the town centre and para 9.15 states that increased parking will allow the further expansion of retail provision. An additional land use criteria for the site is specified in Para 9.17 which states that the site should accommodate a seating and picnic area and an extension to the riverside walk.*
>
> *9.11 In respect of the policy (and indeed the consideration of other alternative uses put forward by objectors), although it supports parking, the policy does not expressly preclude the consideration of other uses in this case housing for the elderly, which contributes in part to meeting housing need and elderly accommodation, with a development of this scale and intensity being appropriately located in this sustainable town centre location with no significant adverse impact identified, being in accordance with the NPFF and afforded limited positive weight.*
>
> *9.12 In respect of the reasons for seeking the additional parking as stated in the supporting text, although the Buckingham NDP supporting text sets out a correlation between access to services within and growth of the town centre on the provision of the additional public parking, it should be acknowledged that there are alternative parking sites and the availability of alternative sustainable modes of travel to the centre including the bus and the relative accessibility to the centre by walking or bicycle, given all of Buckingham in within relative proximity.*
>
> *9.13 Furthermore, although the site is not providing additional public*

parking, the scheme mitigates against impacting on public parking space availability in the area by making adequate dedicated onsite provision.

9.14 The applicant's planning statement makes further reference to following aspects that point to the reasonableness and likelihood that the site ought to come forward for parking at the time that the Buckingham NDP was coming forward:

- *The site assessment in preparation of the plan had concluded that as the site had not been put forward for development by the owner, that it was unsuitable for progressing for housing development;*
- *The site assessment made no reference to previous consent for operational development;*
- *There was no supporting evidence for the requirement for additional parking;*
- *No indication of how the parking would be implemented or delivered;*
- *The parking may be at odds with other objectives of the neighbourhood plan, to conserve and enhance the town's historic setting, which an open expansive car park would not positively contribute to; and*
- *By comparison, the scheme would provide parking in support of the proposed care home, would leave existing public car parking unaffected and propose a building that would positively contribute to the character and appearance of the conservation area.*

9.15 Similar circumstances surrounding the ability to deliver the picnic area however, the scheme is making a s106 planning contribution to the delivery of the pedestrian and cycle link which will improve the direct and convenient access to picnicking areas in the parkland across the River Great Ouse and to off site sport and recreation.

9.16 It is further noted that in considering the draft neighbourhood plan, the Examiner noted in his report that:

- *That as part of the examination, the Examination is required under the Town and Country Planning Act 1990 to consider that the plan must not include any provisions that preclude development. It follows therefore that any proposed use should be considered on its individual merits; the Buckingham NDP cannot exclude uses other than parking*
- *In relation to the then draft of policy EE5, the Examiner stated: "The Framework promotes the improvement of the quality of car parking in town Centres (Para 40). Whilst Policy EE5 has regard to this, there is no indication of how the sites identified "are to provide further parking provision". No detail is provided as to where the money will come from to achieve the delivery of car parking on the two identified sites."*
- *Policy EE5 was subsequently amended and in the Examiner's view, the amended policy contributed to achieving sustainable*

development and meets the basic conditions.

9.17 As such, given that Policy EE5 is merely stating that provision of town centre parking will be supported, this does not preclude consideration of other uses. Therefore, it is considered that the current application is not in conflict with the Buckingham NDP."

21. The October 2018 OR appends the June OR and simply states that having regard to the new policies in the 2018 NPPF, the Council considers that policy EE5 of the BNDP continues to be consistent with the NPPF so that it should be afforded full weight but that there is no conflict with it (or other BNDP policies).

22. In relation to the development plan the ORs concluded (§§2.1-2.2 of the October 2018 OR):

"*2.1 As stated in the previous report the proposal complies with the relevant saved policies of the BNDP and AVDLP policies, except for AVDLP policies GP53 and RA13. Taking the plan as a whole, the proposal is considered not to be in accordance with the development plan. However, it is considered that material considerations justify the grant of permission in this case.*

2.2 The NPPF sets out that the presumption applies if policies that are most important are out- of-date. The Council considers that it would be appropriate to accept that in this case, the presumption in favour of sustainable development applies. Whilst the new NPPF advises that made neighbourhood plan policies take precedent over existing non strategic policies in the local plan, RA13 is still part of the development plan and is considered as out of date for the reasons set out in the overview report. As set out above it is relevant to consider the application in the light of paragraph 11d)i. and ii. of the NPPF as one of the most important policies is out of date, namely AVDLP policy RA13.Turning first to paragraph 11 d)i of the NPPF 2018 it is noted that designated heritage assets and areas at risk of flooding continue to be referred to and apply to the scheme."

National planning policy

The Revised NPPF

23. Since the determination of the original application, the Government has published the new NPPF replacing the 2012 version. The presumption in favour of sustainable development is now contained in paragraph 11, the relevant part of which provides:

"*For decision-taking this means:*

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

24. The policies referred to in paragraph 11 d i. are those in the NPPF (rather than those in development plans) and which relate to, *inter alia*, designated heritage.

25. As set out above, the Council applied the 'titled balance' under paragraph 11 d ii. because policy RA.13 is out of date.

The Corrigendum

26. Prior to the Committee Meeting on 26 October 2018, David Saunders, a member of the public, wrote to the Committee and raised the potential grounds of judicial review on which I am asked to advise.

27. He said in relation to Proposed Ground 1, that policy statements should be interpreted objectively in accordance with the language used, read in its proper context. The proper context is provided by the over-riding objectives of the development plan and the specific objectives to which the policy statement in question is directed. He said that the specific objective of Policy EE5 was indicated by its title, i.e. to allocate land for town centre car parking. Such an objective cannot be satisfied if the land concerned is used for a different purpose and so it is a necessary implication that other uses of that land will be resisted by the policy, even if there is no explicit wording saying this.

28. On Proposed Ground 2 he said, in short, that the Council's application of the 'titled balance' under paragraph 11 d of the Revised NPPF was flawed. The Council applied

the 'titled balance' because it found that policy RA13 was out of date and was one of the most important policies for determining the application. That was either illogical or a misapplication of policy where the Council has already conclude that RA13 ought to be accorded very limited weight.

29. The Council issued a Corrigendum OR in order to address these points. In so far as Proposed Ground 1, the Corrigendum states as follows:

> "*In regards to any potential conflict with the neighbourhood plan policy EE5, consideration has been given to this in the officers report and this matter was raised at the previous meetings. Members will recall that at the previous meetings officers have advised that the policy states that provision of town centre parking will be supported, and considered that this does not preclude consideration of other uses and only identifies what will be supported on the land. It does not state that other uses will not be supported, nor does it state that the land will be "protected" for car parking purposes.*
>
> *Having considered the comments made officers consider that the interpretation set out in the report together with the reasons given for this interpretation is the correct and reasonable approach to take. The application of the policy and the weight to be attached to it is a matter for the council. It is for the council as decision maker to make that decision so long as it is reasonable, fully explained and not irrational or perverse*."

30. On Proposed Ground 2 the Corrigendum said:

> "*In regards to the interpretation of NPPF paragraph 11 concern was raised in the objection to the officers report referring to policy RA13 as being relevant and one of the most important policies, and then applying the tilted balance as this policy is regarded as out of date. The objector suggests that a policy is only important if it carries significant weight in the planning balance and officers refers to RA13 as being applied very limited weight. This is not correct. The weight afforded to a policy is distinct from the relevance of the policy to the matter in consideration. Policies are applied according to their relevance to an application. Weight is a separate consideration.*
>
> *The objector also suggests that the committee is required by law to disregard policy RA13 as it is a land use policy and superseded by the BNDP. This is not correct, it is only where there is a conflict with the BNDP that the 2004 Act as amended states that the report to members makes it clear that officers do not consider that there is a conflict with the BNDP and that RA13 of AVDLP is still relevant as set out in paragraph 2.2 and 3.14 (page 52) of the report. Officers remain of the view that the interpretation and application of paragraph 11 as set out in the report is*

correct.

Members attention is drawn to the matter raised on whether or not the tilted balance is applied, and that the officer report has considered both scenarios in the conclusions and have concluded that permission should be granted in either case."

Relevant law

Approach to decision letters

31. It is trite law that it is no part of the court's duty to subject planning decisions to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute; decision letters should be read in good faith, fairly and as a whole (in this regard, the decision letter need not proceed in a linear manner) and without excessively legalistic textual criticism; an Inspector is not writing an examination paper; and the question is whether there is genuine as opposed to forensic doubt as to what has been decided (see the summary of the relevant case law in *Arsenal Football Club v Secretary of State for Communities and Local Government, Islington London Borough Council* [2014] EWHC 2620 (Admin) at [32] – [34]).

32. Further, it has to be remembered that Inspector's decision letters are addressed to the parties who will be well aware of the issues that have been raised and arguments deployed in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background (*R v Mendip District Council ex parte Fabre* (2000) 80 P. & C.R. 500 at [509] and see *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26 at [28]).

Approach to legal challenges

33. The recent jurisprudence on the approach adopted in legal challenges is also of assistance. Lindblom LJ said in *Barwood Strategic Land v East Staffordshire* [2017] EWCA Civ 893 at [50] (having in mind the Supreme Court's deprecation of an overlegalistic analysis of whether policies for the supply of housing are out of date as opposed to emphasising the planning judgment required under paragraph 14 of the Framework in *Suffolk Coastal District Council v Hopkins Homes* [2017] UKSC 37):

> "*I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an* issue *of law (see paragraphs 8 to 14, 22 and 35 above).*"

Interpretation of policy

34. The meaning of a policy is a matter of law. Policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context (*Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 at [18]). Lord Gill affirmed this approach in *Suffolk Coastal v Hopkins Homes* [2017] UKSC 37. He said at paragraph 72:

> "*Lord Reed...expressed the view, as a general principle of administrative law, that policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. The proper context, in my view, is provided by the over-riding objectives of the development plan and the specific objectives to which the policy statement in question is directed*."

The merits of challenging by way of judicial review

Proposed Ground 1

35. I have set out above the correct legal approach to the interpretation of policy. I note further that:

    (i) The Council is correct to say that there is no prohibitive wording that explicitly seeks to prevent development other than car parking on the allocated sites. Neither does the policy indicate a particular level of parking that is required in

Buckingham nor when that parking ought to be delivered. Indeed, paragraph 9.14 states that parking "*will be provided when the sites become available*";

(ii) One of the objectives of the BNDP is to "*Foster the economic development of the town and its hinterland by providing employment led growth, increasing the town's appeal to tourists and invigorating the town centre*" (page 19);

(iii) The main comments raised during consultation on the BNDP in relation to ecomony and education included a need for an increase in parking in the town centre (page 21);

(iv) The Economy and Education chapter specifically identifies policy EE5 as part of the suite of policies directed towards meeting the above objective (page 49); and

(v) The June 2018 OR provided a detailed analysis of the policy. It noted that:

a) There are alternative parking sites;

b) There are alternative modes of transport;

c) There was some doubt about the likelihood of the Site coming forward for parking provision; and

d) The Examiner had changed the draft policy from "The sites indicated on figure 9.8 are to provide further parking provision in or close to the Town Centre" to the current wording (parking "will be supported").

36. In my view, it is clear that the objective of the policy is to support the town centre through the provision of parking. None of the points raised by the Council in the June 2018 OR change this. The question is whether or not the policy prevents other forms of development on the Site.

37. A similar argument was raised at the Castlemilk appeal, which related to a proposal for housing outside of the settlement boundary, in relation to BNDP policy HP1. Policy HP1 allocates housing on five sites within the Buckingham settlement boundary. As the application site in that case was outside the settlement boundary, it was not allocated for housing under policy HP1 (nor was it covered by policy HP7 which relates to windfall sites within the settlement boundary).

38. The Inspector concluded that there was no conflict with policy HP1 as he considered that the BNDP does not place a cap on housing numbers nor does it contain policies specifically restricting housing development outside the settlement boundary. As such, he concluded that the BNDP is silent in relation to housing development outside of the settlement boundary.

39. The Secretary of State, however, rejected that analysis. He said:

> *"…the Secretary of State does not agree with the Inspector that the BNDP is silent in terms of the proposed development of the application site as he considers there is a relevant body of policy in the BNDP (summarised at paragraph 5.18 of the Statement of Common Ground between the applicants and AVDC (GEN1)) sufficient to enable the development proposals to be considered. The Secretary of State also disagrees with the Inspector's conclusion that there is no conflict with policy HP1. The Secretary of State considers that read as a whole, including with the vision for the BNDP and its Introduction, the proposal, being an unallocated site outside the settlement boundary, conflicts with the purpose and effect of Policy HP1. While there is no cap in the BNDP, and no obvious corollary of the site allocation policy HP1 (i.e. that land not allocated is not supported), the larger housing sites, representing both the acceptable location and level of housing, are specifically identified and allocated in the BNDP. Both larger sites and the smaller windfall sites being confined to within the settlement boundary (HP7). The application site, being both unallocated and outside the settlement boundary, falls within neither category above and, as a consequence, the Secretary of State considers the proposals are not policy compliant. This is a policy conflict to which the Secretary of State attaches very substantial negative weight in view of the Framework policy (paragraphs 183-185) that neighbourhood plans are able to shape and direct sustainable development in their area and that where an application conflicts with a neighbourhood plan, planning permission should not normally be granted (paragraph 198)."*

40. A further analogous case was *Canterbury v Secretary of State for Communities and Local Government* [2018] EWHC 1611. The Inspector concluded that policy H1 of

relevant the local plan, which provided that residential development will be permitted on allocated sites and on previously developed land within urban areas, was permissive of development within these locations and silent on development elsewhere. The site in that case was neither an allocated site nor previously developed land. The Inspector concluded that the proposed development (housing) did not, therefore, fall within any of the categories where development is expressly permitted by policy H1 but that, given the policy's purely permissive nature, this did not amount to a conflict.

41. The Council challenged that analysis. It argued that because the policy identified particular types of location for housing development it followed that areas inconsistent with those which have been identified were not supported by and conflicted with the policy. There was, therefore, an implicit "negative corollary" within policy H1 and, as a result, the Inspector should have concluded that the proposal was not in accordance with the development plan policy.

42. The judge said at paragraph 33:

> "*Taking the language of the policy itself, and without reference to any of the explanatory text, it is clear that the purpose of the policy is to identify, for the purposes of housing development, the types of location where the plan required housing development to take place. In essence, the locations which are identified for the permission of residential development are those allocated in the plan, or non-identified sites on previously developed land within urban areas (if other criteria unrelated to location are met). It follows that if housing development is proposed in a location which does not accord with the types of locations specified in the policy, that proposal will be inconsistent with and unsupported by the policy and therefore not in accordance with it and in conflict with it. The interpretation is simple: policies H1 and H9 identify the types of location where housing development will be permitted; if housing development is proposed in other types of location it is not supported by the policy and therefore in conflict with it and, to the extent of that policy (as part of the exercise of assessing compliance with the development plan taken as a whole), not in accordance with the development plan. Whether it is described as a "negative corollary", or a necessary inference, or an obvious implication, what matters is that it is clear that the purpose of the policy is to identify those types of location where housing development is to be permitted and if an application is made outside one of those identified types of location then that is clearly not in accordance with the policy*."

43. These two cases arose in broadly analogous circumstances but it is important to note that they are not absolutely on all fours. In those cases there were housing policies that allocated housing development on certain sites. The proposed developments were for housing elsewhere. Here, it is housing and a care home that is proposed on a site allocated for car parking. The equivalent circumstances would be a proposal for car parking on a site not allocated by policy EE5.

44. I note that policy HP7 supports the development of small sites, of 10 dwellings or less, within the settlement boundary, including previously developed land. Had the Proposed Development been for development of 10 dwellings or less, this policy would on its face have supported the Development Proposed and the conflict with EE5 (if so found) would have had have been resolved by the decision maker. As it is, the Proposed Development is not a small site within the meaning of this policy.

45. As set out above, it is clear that the specific objective of Policy EE5 must be to allocate land for town centre car parking on the two sites specified in order to support the town centre. Further, properly understood the objective is not merely to allocate but for the car parking to be delivered. As a result, the objective cannot be satisfied if the land concerned is used for a different purpose. It seems to me, therefore, that there is a strong argument to suggest that it is a necessary implication that other uses of that land will be resisted by the policy, even if there is no explicit wording saying this. Without such implication, the policy is effectively robbed of meaning.

46. This is an important point because, if the Council had found conflict with the BNDP, it would have had to place that conflict in the planning balance and determine the weight to be applied to it (having regard to paragraph 14 of the Revised NPPF (I note in this regard that, although, the BNDP was made more than two years prior to the decision to grant planning permission, and so not all the conditions would have been met, the Council appears to accept that the BNDP policies are up to date and so the purpose behind that condition is fulfilled)).

47. Accordingly, there is a reasonable argument to indicate an error in the interpretation of policy. In the Corrigendum the Council officer affirmed his view that policy EE5 was permissive of car parking only and that the proposed development did not conflict

with it but went on to outline the considerations relevant were the committee to take a different view on interpretation.

48. The officer advised that should there be a conflict with policy then there were material considerations that indicated that the decision should be made otherwise than in accordance with that policy. These were that: (i) there is no evidence of the need for car parking behind the allocation; and (ii) the fact the site is not available to the town council which raises the question of deliverability. These in part reflect the points made in the June 2018 OR. I do not have any difficult with the view that these points are material to the weight to be applied to any conflict with policy EE5.

49. At present the committee minutes have not been produced. It is not clear, therefore, how the decision was taken and the interpretation the committee placed on policy EE5.

50. In any event, there is a danger that the court could decide that the committee had been informed properly about the competing interpretations and been advised that material considerations indicated that planning permission ought to be granted and as such any error did not make a difference.

51. Furthermore, any victory in the High Court is likely to pyrrhic, as even if the court decided to quash, the Council has indicated in the Corrigendum how it would approach any redetermination.

Proposed Ground 2

52. The Council had to decide, to apply properly the presumption in favour of sustainable development, whether RA13 was one of the "most important" policies for the determination of the application in circumstances where it had concluded that policy RA13 was out of date and as a consequence "very limited weight" could be ascribed to it. If policy RA13 was one of the most important policies, then the tilted balance applied. If not, then the simple planning balance ought to have been applied.

53. The Council did expressly grapple with this question in the Corrigendum. In doing so, it seems to have elided the concept of relevance (which RA13 plainly is) and the concept of "most important" within paragraph 11 of the Revised NPPF which in my view was an error but, for the reasons that follow, I do not regard this as sufficient to found a claim for judicial review with reasonable prospects of success.

54. It is clear that it is the Government's view and intention behind the presumption in favour of sustainable development that where policies are out of date planning permission should be granted (unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole). In short, the Government's objective is to ensure that development is not held up by out of date policies. The Government sees this as part of the promotion of a properly plan-led system. It requires local planning authorities to ensure they keep development plans up to date.

55. The approach under Proposed Ground 2 would mean that where the most important policies were out of date, the tilted balance would not apply. In other words the local planning authority would gain an advantage (if resisting development) where its policies are out of date. This is the inverse of the objective of the policy. In my view the presumption, therefore, must require an assessment of importance prior to the consideration of whether or not the policy is out of date.

56. Two judgments are to be made, therefore, in sequence: (i) what are the most important policies; (ii) are they out of date. It is that sequence that promotes the objective set out above and the plan-led system: if you have an up to date development policy then applications should be determined in accordance with it; if not (i.e. the answer to (ii) is in the affirmative), then national planning policy applies the tilted balance to ensure that development is not held up by out of date policies.

57. So whilst I accept the logic of Mr Saunders analysis, the result, in my view, is it drives a different interpretation of the policy. This interpretation has in mind the full policy context and objectives behind the policy (the Government seeking to ensure development is not held up by out of date policies).

58. My view is, therefore, that, whilst I accept that there are aspects of the Corrigendum that are not correct, a court would likely conclude that the overall finding that the tilted balance should apply was not in error because, in my view, prior to considering whether or not the policy is out of date, RA13 is plainly one of the most important policies with regards the determination of this application – it deals with residential development within the settlement boundary of Buckingham.

59. Further, the Council afforded itself a degree of protection from this proposed ground in stating that the result would have been the same on a simple planning balance. It is not altogether persuasive when a Council takes such an approach but it provides the Court with an easy answer to the claim if it does not want to quash.

60. I conclude, therefore, that there are not reasonable prospects of success on Proposed Ground 2.

Procedure and costs liability

Procedure

61. In a planning judicial review the claim must be made no later than six weeks after the grounds to make the claim first arose (CPR 54.5(5)) (i.e. the claim would have to be issued by 6 December 2018).

62. Despite this short time limit, claimants are normally expected to comply with the pre-action protocol for judicial review which requires the claimant to send a letter before action to the defendant. The defendant should be given a reasonable time (14 days) to reply before the claim is lodged. In this case, where there would be no reason not to comply with this pre-action protocol.

63. There are two stages to a judicial review claim. First, the claimant must obtain permission (CPR 54.4) from a High Court judge to proceed with the claim. The test for permission is whether the claim is arguable. Permission is typically determined on the papers (the Claimant's Statement of Facts and Grounds and the Defendant's Summary Grounds of Defence). The claimant has the right to request that any decision to refuse

or limit the grant of permission is reconsidered at an oral hearing (CPR 54.12(3)).

64. Where permission is granted the matter will go forward to a substantive hearing. Directions for the substantive hearing are usually given in the order granting permission.

Costs

65. In respect of costs, the general rule is that the losing party is required to pay the winning party's costs. However, this position is modified by CPR 45.41 for Aarhus Convention claims which are defined as "*a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject*." In such cases a claimant's costs liability is capped at £5,000 where the claimant is claiming only as an individual and not as or on behalf of a business or other legal person, or in all other cases £10,000.

66. The courts have established that "environmental matters" should be given a broad interpretation, and often encompasses planning challenges (see Lang J in *Venn v Secretary of State for Communities and Local Government and others* [2013] EWHC 3546 (Admin); the point was conceded on appeal: [2014] EWCA Civ 1539 at [13]-[12]).

67. I consider there is a good prospect that, were a claim brought in this case, the court would accept that the claim is an Aarhus claim and cap the claimant's liability accordingly (at £10,000).

Conclusion

68. I conclude, therefore, that there is a reasonable case to be made on Proposed Ground 1.

69. However, it is not yet clear (and may not be made clear) as to how the decision was

actually taken (i.e. what interpretation the committee actually placed on policy EE5).

70. We would need to have a greater understanding on this point prior to making any claim. I suggest we write to the Council requesting a copy of or draft of the minutes within a short timeframe. This could, if desired (and there is an intent to issue a claim), be in the form of a pre-action protocol letter.

71. However, I am not persuaded as to the overall merits of making a claim given that Council has made clear in the Corrigendum how it would re-determine any application where the Court has decided its interpretation of policy EE5 was wrong and I do not think Proposed Ground 2 would make the foundations of a successful claim.

72. The Town Council has the advantage of the Castlemilk decision and can also refer to the Court's decision in *Canterbury*. In the circumstances, I see limited benefit in going to court in the context of policy EE5 where it is clear that the Council is intent on granting planning permission.

MARK WESTMORELAND SMITH

19 November 2018

Francis Taylor Building,
Inner Temple,
London, EC4Y 7BY.