HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Claim number: AC-2023-LON-002758

IN THE MATTER OF AN APPLICATION FOR PLANNING STATUTORY REVIEW UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

AWE PLC

Claimant

-v-

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

and

(1) T A FISHER & SONS LIMITED
(2) WEST BERKSHIRE DISTRICT COUNCIL
(3) OFFICE FOR NUCLEAR REGULATION
(4) SECRETARY OF STATE FOR DEFENCE

Interested Parties

DEFENDANT'S SUMMARY GROUNDS OF DEFENCE

References are made to the claim bundle and supplementary bundle in the following form **[CB/SB/tab number/page number]**
References are made to the Claimant's Statement of Facts and Grounds in the following form **[SFG, §]**
References are made to the Decision Letter in the following form **[DL, §]**

INTRODUCTION

1. These are the Secretary of State's ("D") summary grounds of defence to the Claimant's ("C") application for statutory review under section 288 of the Town and Country Planning Act 1990 ("the TCPA 1990") of the decision of an Inspector appointed by D,

dated 8 August 2003, to grant planning permission ("the Decision") following an appeal by T A Fisher and Sons Limited ("the Appellant") against the decision of West Berkshire District Council ("the Council") to refuse planning permission for the erection of 32 dwellings including affordable housing, parking and landscaping ("the Scheme") on land to the rear of the Hollies, Reading Road, Burghfield Common, Reading RG7 3BH ("the Site").

2. D resists this claim in its entirety and submits that all the grounds of challenge are unarguable.

RELEVANT FACTUAL BACKGROUND

3. The factual background to the present claim is set out in the Inspector's Decision Letter ("the DL") and is not rehearsed in detail here. A number of relevant points are highlighted below.

4. The Scheme proposed development on a site allocated for housing in the adopted development plan (Policy HSA16 of the Housing Site Allocations DPD). The majority of the developable area in the HSA16 housing site allocation is located within Burghfield Common's settlement boundary. Burghfield Common is identified in the adopted Local Plan as a Rural Service Centre. It is one of two such centres to be the focus for housing development in the East Kennet Valley area **[DL, §5]**.

5. The Site is approximately 2km from the Atomic Weapons Establishment site at Burghfield ("AWE B"). It is located within the detailed emergency planning zone ("DEPZ") designated by the Council under Regulation 8 of the Radiation (Emergency Preparedness and Public Information) Regulations 2019 (S.I. 2019 No. 703) ("REPPIR 2019"). It is subject to an off-site emergency plan ("OSEP") under Regulation 11 of REPPIR 2019.

6. The DEPZ was designated on 12 March 2020 following the making of the REPPIR 2019. It is larger than the Inner Consultation Zone that was set under the regulations

previously in force – the Radiation (Emergency Preparedness and Public Information) Regulations 2001 (S.I. 2001 No. 2975) ("REPPIR 2001") **[SB/43/1086, §3]**. The Site does not fall within the area of the DEPZ where residents would be required to evacuate in the event of a radiation emergency **[DL, §17]**.

7. It was a matter of agreement between the parties to the appeal that the OSEP was adequate to ensure public safety in the DEPZ in the event of an AWE B radiation emergency **[DL, §30]**. In accordance with Regulation 12, as identified at **[SFG, §§28-30]** the OSEP had been tested on a number of occasions since the DEPZ had been designated in 2000. Notwithstanding that testing had identified areas of improvement, the DEPZ was nonetheless still found to be adequate **[SB/9/447, §26]**.

8. There were three main issues for the Inspector to decide, only two of which are relevant to the proposed claim. These were:

   (i) the effect of the proposal on the safety and wellbeing of future residents of the proposed development, and the wider public, with regard to the proximity of AWE B; and

   (ii) the effect of the proposal on the future capability and capacity of AWE B to operate effectively **[DL, §3]**.

9. On the first main issue, the Inspector concluded at **[DL, §35]** that "*while the proposal would not harm the safety and well-being of the wider public, it would result in limited harm to the safety and wellbeing of future residents of the proposed development"* and would therefore conflict with Policy CS8 of the adopted Core Strategy. On the second main issue, he found that "*the proposed development would result in very limited harm to the operational capability and capacity of AWE B*" at **[DL, §41]**. However, he found that these conflicts were outweighed by the substantial weight that he attributed to the benefits of the Scheme **[DL, §61]** and therefore resolved to grant planning permission.

RELEVANT LEGAL FRAMEWORK

10. D does not take issue with the well-established legal propositions set out at **[SFG, §§51-57]**. However, D highlights the following legal principles which build on those set out by the Claimant and are also relevant to the present claim.

Challenges to Inspector's Decisions

11. The approach of the Court to challenges to Inspector's decisions must also respect the expertise of specialist planning inspectors and proceed on the presumption that they have correctly understood the policy framework (*Hopkins Homes Ltd v Secretary of State* [2017] UKSC 37 per Lord Carnwath at [25]-[26]). Inspector's decision letters should be read fairly and as a whole, without excessive legalism or hypercritical scrutiny (*St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 at [7]). A reasons challenge will only succeed where the reasons leave genuine rather than forensic doubt as to what was decided (*Clarke Homes Ltd v Secretary of State for the Environment* [2017] PTSR 1081, 1089J).

Interpretation of planning policy

12. The supporting text to a planning policy is relevant to its interpretation although it is not itself part of the policy and cannot trump that policy (*R (Gill) v London Borough of Lambeth* [2021] EWHC 67 (Admin) at [20]).

RESPONSE TO GROUNDS

13. The grounds of challenge have no merit and disclose no legal error in the Decision. They adopt an unduly narrow approach to the reasoning in the DL and fail to consider it fairly and as a whole. Grounds 1, 3 and 4 are ultimately no more than a reasons challenge, and fail because the Inspector's reasoning on the main issues is clear on the face of the DL. In relation to Ground 2, this is in reality a challenge to the application, not interpretation, of Policy CS8 which was a matter for the planning judgment of the Inspector.

14. Crucially, the land use planning decision that the Inspector was required to take was distinct from the emergency planning provisions in play and the decision challenged under REPPIR 2019 in (*Crest Nicholson Operations Ltd v West Berkshire District Council* [2021] EWHC 289 (Admin) at [76]). This Inspector was making a planning determination. He was not simply considering the risks that any work with ionising radiation might have on the wider public, but had to reach a balanced view on whether planning permission should be granted considering all the harms and the benefits of the proposed development.

Ground 1: The approach to ONR's evidence/advice

15. There was no failure by the Inspector to consider and give weight to the ONR's evidence or give legally adequate reasons for disagreeing with ONR's advice. C adopts an unduly critical and exacting analysis of the DL which fails to comply with the guidance from the courts summarised at **[SFG, §51]** and above, namely that Inspector's decision letters should be read fairly and without excessive legalism or hypercritical scrutiny.

16. The Inspector clearly did have regard to ONR's evidence at the inquiry: C itself recognises this at **[SFG, §67]**. In particular, he set out in terms that "*the Council, AWE, the MOD and ONR have expressed concern about potential for new housing in the DEPZ to undermine the adequacy of the OSEP*". The Inspector had regard to the fact that ONR objected to the Scheme **[DL, §10]**. He also recognised the policy obligation on the decision-maker to consult with ONR as set out in Policy CS8 when determining whether the Scheme should be granted planning permission **[DL, §12]**.

17. There is no indication in the DL that the Inspector dismissed the ONR's concerns out of hand or did not give appropriate weight to them. However, it is clear that he disagreed with those concerns on the basis that, in his view, insufficient evidence had been provided to make good the submission that granting planning permission for the Scheme would lead to the OSEP being inadequate to ensure public safety in the DEPZ. That was a matter of planning judgment for the Inspector and could only be challenged

on grounds of irrationality (which C has not sought to do). The Inspector's reasons for making that finding are set out in particular at **[DL, §§31-35]** and are clearly adequate to enable C to understand why the Inspector disagreed with ONR's submission that new housing in the DEPZ would undermine the adequacy of the OSEP to an extent which required planning permission to be refused (*South Buckinghamshire District Council v Porter (No.2)* [2004] UKHL 33 at [36]).

18. This is a complete answer to the points raised at **[SFG, §§70-71]**. D also draws attention to the following points:

(i) With regard to the absence of a "*tipping point analysis*" referred to at **[DL, §31]** and **[SFG, §70(c)]**, it is not correct that the Inspector "*did not give the parties any opportunity to make representations as to the appropriateness of any such analysis*". The point was raised by the Inspector during the inquiry and is discussed in the closing submissions submitted on behalf of the Appellant, the Council and the ONR **[SB/30/865, §13]; [SB/32/883, §4]; [SB/33/910, §18]; [SB/33/920-921, §§29-30]**. Only C chose not to deal with the matter in its closing submissions.

(ii) The Inspector was clearly entitled to consider the size of the development in assessing whether it would undermine the adequacy of the OSEP as well as the impact of the development on emergency services. In doing so he had regard to *both* the relative increase in population resulting from the proposed development by reference to the existing situation and the relative increase should committed development be constructed and occupied **[DL, §25]**.

(iii) There is no obligation in the case law relied on by C at **[SFG, §§57 and 72]** to spell out the weight that is to be given to the evidence of the regulator. As a matter of law, it was sufficient for the Inspector to take into account ONR's evidence, which he plainly did, and to explain, if relevant, why he disagreed with it. That he did so is evident from the DL, as explained above.

19. Ground 1 discloses no error of law and is unarguable.

Ground 2: interpretation of Policy CS8

20. The Inspector did not misinterpret Policy CS8 of the Council's Core Strategy. The wording of the policy is clear: the interpretation contended for at **[SFG, §75]** ignores the actual wording used and is therefore an impermissible approach which conflicts with the advice in *Corbett v Cornwall Council* [2022] EWCA Civ 1068 at [19(3)] that: "*the words of a policy should be understood as they are stated, rather than through gloss or substitution. The court must consider the language of the policy itself, and avoid the seduction of paraphrase*". A local planning authority cannot make a development plan policy mean whatever they would like it to mean.

21. The issue of how to *apply* Policy CS8 to the Scheme, given the changes under REPPIR 2019, was a matter for the Inspector's planning judgment, which could only be challenged if irrational. C has not made such a challenge.

22. Policy CS8 states that:

    (i) "*residential development in the inner land use planning consultation zone … of … AWE Burghfield is likely to be refused planning permission by the Council when the Office for Nuclear Regulation (ONR) has advised against development*";

    (ii) "*all other development proposals in the consultation zones will be considered in consultation with the ONR*", having regard to a number of listed factors; and

    (iii) "*the consultation arrangements for planning applications will be undertaken with the ONR using the table below*".

23. The table is headed "Development within the Land Use Planning Consultation Zones: Office for Nuclear Regulation". It identifies the inner zone for AWE Burghfield as 0-1.5 km and the middle zone as 1.5-3km.

24. The Site therefore falls within the middle consultation zone, where development proposals will be considered in consultation with the ONR. There is no basis in the text of the Policy for applying the first sentence of the Policy to the Scheme, namely that it would be likely to be refused planning permission by the Council where ONR has advised against the policy. There is also nothing in the Policy to indicate that the words "*inner consultation zone"* should be read as meaning "*DEPZ*". Furthermore, the Inspector was entitled to rely on the words of the supporting text and footnotes to assist with his interpretation of the Policy and there was nothing unlawful about that approach.

25. With regard to the points made at **[SFG, §79]**, these require the application of an unwarranted gloss on the clear text of the Policy. The second sentence of Policy CS8 indicates that the off-site emergency plan is not only relevant to the inner consultation zone, but also to the middle and outer consultation zones as defined in that policy. Furthermore, it is not correct that the DEPZ is the only area where an adequate OSEP is required – that also applies to the OCZ pursuant to Regulation 11 REPPIR 2019. The submissions at **[SFG, §79(1)]** therefore do not provide any basis for equating the inner consultation zone with the DEPZ.

26. Given the clear words of the Policy, it was a matter for the Inspector's judgment when applying it to the proposed development to consider whether the supporting text, footnote and its context and purpose, as referred to at **[SFG, §79(2-6)]** justified departing from the clear meaning of the words. He considered that to do so would "*involve a substantially more restrictive approach to housing development in the East Kennet Valley area*" and would "*fundamentally change this adopted Policy's meaning and intent*" **[DL, §§10-11]** and therefore refused to apply the first sentence of Policy CS8 to the Scheme. That was a reasonable judgment for him to reach.

27. While C asserts, at **[SFG, §80]** that the Decision could well have been different if the Inspector had applied the correct interpretation of Policy CS8, the Inspector found that there was conflict with CS8 in any event. Furthermore, even in cases to which the first sentence applies, the advice of the ONR against the development is not an absolute bar to the grant of permission. The considerations in the second sentence of Policy CS8

would still be relevant, as well as the benefits of the proposed development (which the Inspector considered carried substantial weight) **[DL, §61]**. Therefore, even if – which is denied – the Inspector misinterpreted Policy CS8, that would not have affected his Decision.

28. Ground 2 likewise discloses no error of law and is unarguable.

Ground 3: approach to assessment of adequacy of OSEP

29. This Ground adds nothing to Ground 1 and relies on an elevated standard of reasons which has no basis in law. The Inspector did have regard to the submissions of the Council regarding the potential for new housing in the DEPZ to undermine the adequacy of the OSEP, as he specifically referred to them at **[DL, §30]**. Reasons can be briefly stated, and there is no legal requirement for an Inspector to summarise every argument made during the appeal or refer to every material consideration in his or her Decision Letter.

30. The Inspector considered the impact of the proposed development *both* against existing built development and committed development (e.g. at **[DL, §25]**) and reached the judgment on the evidence before him that the impact of the proposed development in both those contexts would not tip the OSEP into inadequacy **[DL, §31]**.

31. With regard to the calculations undertaken at **[DL, §7]** these did not purport to be made for the purposes of carrying out any numerical assessment of the adequacy of OSEP, but merely put the scale of the Scheme into perspective in the context of existing and permitted development in the area and the wider DEPZ. C is also incorrect to allege that the Inspector concluded that there was unlikely to be a strain on emergency services arising from the Scheme *together with other consented development*. The Inspector in fact found that the given the small size of the population increase and the accessibility of the location of the Scheme, the emergency service response levels for the population of Burghfield Common village and its immediate environs would remain adequate **[DL,**

§§25 and 32]. This conclusion was not confined to the situation where all other consented development was delivered.

32. The Inspector's position on the evidence regarding the finite nature of resources is clear from his conclusion that he was not convinced, on the evidence provided by the Council, AWE the MOD and ONR, that the OSEP would be inadequate to ensure public safety in the DEPZ if planning permission for the Scheme were granted **[DL, §§30-31]**.

33. Ground 3 adds nothing to Ground 1 and is unarguable for the same reasons.

Ground 4: material considerations regarding the impact of the Scheme

34. Ground 4 is effectively an amalgamation of four separate complaints. None have any merit and the ground as a whole is unarguable. Again, while it is asserted by C that the Inspector failed to refer to and therefore consider particular material considerations, there is no obligation on Inspectors to recite every material consideration in their Decision Letters. The reasons given were sufficient for the parties to the appeal to understand the Inspector's conclusions on the principal main issues.

35. With regard to Ground 4(a), the Inspector considered the impact of the Scheme on AWE's operations at **[DL, §§36-41]**. The weight to be given to that impact in the planning balance was a matter for his judgment. The likelihood of any adverse impact to AWE occurring as a result of the Scheme was a relevant factor when considering the weight to be given to that adverse impact in the planning balance.

36. The absence of formal regulatory action by ONR was one of a number of considerations taken into account by the Inspector and it is not contended that his finding on this was incorrect: as a matter of fact there had not been any formal regulatory action by ONR.

37. There was nothing wrong about the Inspector giving weight to the fact that another development within the DEPZ had not affected the adequacy of the OSEP. It was relevant to the ability of the OSEP to accommodate additional development beyond

that already existing within the DEPZ. Similarly, the existence of an exemption under REPPIR 2019 was clearly a relevant factor for the Inspector's decision – while how he took it into account was a matter for his planning judgment.

38. With regard to Ground 4(b), this again adopts an unduly critical approach to the DL which has no basis in law. It is clear that the Inspector did consider impacts other than radiological impacts, including psychological impacts, in particular at **[DL, §19]**. All of the impacts he considered influenced his conclusion that the "*appeal proposal could result in adverse impacts on the safety and wellbeing of future occupants of the proposed development*" **[DL, §20]**. He also considered the impact on the wider public in the event that Scheme was implemented and a radiation emergency occurred **[DL, §§29 and 32]**. In the context of what was agreed to be a very low likelihood of a radiation emergency **[DL, §21]**, and the fact that no substantive quantification of estimated potential additional compensation and remediation costs was provided by AWE, AWE's assertion at paragraph 26 of its closing submissions that "*the possibility that AWE/MOD may have to fund decontamination and/or pay other compensation at the Hollies cannot be dismissed*" **[SB/31/878, §26]** was not a principal controversial issue that required explicit treatment in the DL.

39. With regard to Ground 4(c), as acknowledged by C, the Inspector found that there would be an adverse impact on AWE arising from the Scheme and weighed this in the planning balance. There was no need for him to explicitly state that this adverse impact was relevant to both paragraphs 97 and 187 of the NPPF. As cited at **[SFG, §51]**, it is reasonable to assume that Inspectors will be familiar with national planning policy, and the fact that a particular policy is not mentioned does not necessarily mean that it has been ignored. Given the Inspector had already found harm to AWE and conflict with paragraph 97 it is difficult to see what an explicit reference to paragraph 187 would have added to his decision.

40. With regard to Ground 4(d), *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302 confirms that "*the precautionary principle will only apply if there is 'a reasonable doubt in the mind of the primary decision-maker'*".

The principle is not engaged simply because someone else has taken a different view to that of the primary decision-maker (*Kenyon* at [66]). In the present case, for reasons already given above, the Inspector was not in any reasonable doubt as to the adequacy of OSEP or the impact of the proposed development on that adequacy.

41. None of Grounds 4(a)-(d) disclose any legal error and all are unarguable.

CONCLUSION

42. In the result, D submits the grounds advanced are unarguable and respectfully requests that the Court refuse permission to apply for statutory review. D also claims its costs of acknowledging service in the amount set out in the schedule which will be filed at Court within 7 days.

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6 October 2023

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