AC-2023-LON-002758

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

PLANNING COURT

BETWEEN:

AWE PLC

Claimant

-and-

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

FIRST INTERESTED PARTY'S SUMMARY GROUNDS OF DEFENCE

[Page references in [bold] are to the Claim Bundle]

Essential Pre-reading. In addition to the Decision Letter ("**DL**") [**CCB/47-66**] and the Statement of Facts and Grounds ("**SFG**") [**CCB/9-44**], the Court is invited to read:

- These Summary Grounds of Defence, and documents referenced herein
- The Closing Submissions of the First Interested Party (hereafter "**the Developer**") at the Inquiry [**SCB/33/902*ff***]

INTRODUCTION and SUMMARY

1 These are the Summary Grounds of Defence of the Developer.

2 Notwithstanding the length of the SFG, the detailed citation of "*some of the evidence at the appeal*" [SFG p10 [**CCB/18**]], and the multiple grounds and sub-grounds advanced, this application fails to identify an error of law and is wholly lacking in merit.

3 The Site is phase 2 of an allocated site (an allocation not opposed by AWE or ONR), and comprised (prior to the DL) the only allocated site in the DEPZ without planning permission. It is highly unfair that the Developer of this small, 32 home scheme, having prevailed at an expensive 6 day Inquiry, is now faced with this proposed challenge, advanced on a scattergun basis, and seeking in large measure to re-argue numerous matters of fact and evaluative judgment.

4 The Inspector's careful DL sets out with clarity why AWE's arguments at the Inquiry did not prevail, and why planning permission was granted. Accordingly:

4.1 Ground 1 is flawed because the Inspector understood perfectly well ONR's "advise against" and the generalized basis on which it was put forward, and it is entirely clear from the DL why this advice was departed from and on what planning grounds it was outweighed.

4.2 Ground 2 is founded on an interpretation of the first sentence of policy CS8 which ignores the language and would constitute a substantial re-

writing. The Inspector was absolutely right to reject AWE's unarguable construction.

4.3 Grounds 3 and 4 set out a series of "excessively legalistic" criticisms which (inter alia):

(i) Fail to take account of the ambit of Main Issues 1 and 2 [**DL3**] (defining the "principal important controversial issues" for relevant purposes), which were crafted at the CMC taking into account all main parties' input, including AWE's.

(ii) Fall into the trap of asserting that in effect the Inspector had to "*rehearse every argument relating to each matter in every paragraph*" [***St Modwen*** at [6(1)], cited at SFG §51].

(iii) Ignore material parts of the evidence at the Inquiry (forgetting in particular that its and the Council's witnesses were subject to cross examination).

(iv) Seek to re-argue matters of fact and judgment resolved against AWE by the Inspector, and sufficiently addressed in the DL.

RELEVANT FACTUAL BACKGROUND

5 It was common ground that the reference event (an incident at AWE Burghfield leading to release of a radioactive plume) was extremely unlikely. The Developer's expert nuclear physicist and emergency planner (Dr Pearce), whose calculations are endorsed by the Inspector at [**DL22**], estimated that (taking account of event frequency, wind direction and the need for calm/stable "category F weather conditions" for the relevant plume to reach the Site) the chances of such an episode affecting the Site were 1 in 666,667

years. In consequence (and assuming a resident stayed outside for the 2 day duration of the initial plume) risk of individual harm was at most 1 in 1,000 million years [**DL22** and Pearce §133 [**SCB/11/499**]]. On the basis (common ground at the Inquiry) that sheltering indoors reduced the dose by around 40%, the Inspector noted that this risk was further reduced by the fact that category F weather typically only occurs on a cold winter's night, when residents could be expected to be indoors with doors and windows shut – **DL23-24**. It was common ground at the Inquiry that the likely dose in this event is below the annual level of naturally occurring radiation in parts of the UK. Generally, the Inspector observed at [**DL27**] that the case involved "*a lower end of scale of risk to the health of the proposed development's future occupants*". Indeed, HSE's advice is that an individual risk level three orders of magnitude greater (ie, 1 in 1 million years) is "tolerable": see Developer Closing Submissions §12 [**SCB/33/908**].

6 REPPIR 2019 are emergency planning not land use planning regulations. Expansion of the DEPZ via REPPIR 2019 reflects a more precautionary approach to the area where advance emergency planning should be in place, to cater for less likely circumstances (here, category F weather, which occurs c10-12% of the time [**SCB/14/567** §5.14]). It is common ground that it does not reflect an increase in the risk of an event or of harm to an individual: see Developer Closing Submissions at §4 [**SCB/33/903**]. Further, even AWE accepted at the Inquiry that the current, unaltered risk is at least "tolerable" and "very low" for the surrounding population (Person AW's 1st proof §10.5 [**SCB/14/576**]; and 2nd proof §2.6 [**SCB/23/774**]), and that this would not change if the Scheme were built out.

7 In the event of a radiation emergency, residents in the direction where the plume was blowing would be notified and instructed to stay inside for up to 2 days [**DL15**, **DL17**]. It was common ground at the Inquiry (based on an ONR paper) that, following the initial 2 day plume, doses would be negligible, and well below the long-term "clean up target": see Developer Closing Submissions

§25.2(ii) [**SCB/33/918**]. On this basis, AWE's safety witness [Person AW] accepted in cross examination that from a "radiation dose point of view" there would be no justification for (eg) extensive or destructive decontamination activities: see Developer Closing Submissions §25.1 [**SCB/33/917-8**].

8 REPPIR 2019 requires (reg 10(4)(b) and 11(1) [**SCB/35/954, 956**]) that, for AWE to work with ionizing radiation, the Council must make an "adequate" Off-Site Emergency Plan ("**OSEP**") for the DEPZ. As stated at SFG §25 and §44, the OSEP governs the response in the first 2 days after a radiation emergency, following which national structures take over pursuant to (inter alia) the Civil Contingencies Act 2004.

9 REPPIR Reg 25(2) [**SCB/35/975**] allows the Secretary of State for Defence to derogate from these requirements in the interests of "national security". Strikingly, and of particular relevance to Ground 1, ONR advanced no position at the Inquiry in respect of Reg 25(2), whether in its evidence or submissions. The Reg 25(2) exemption was, however, relevant to an assessment of what level of risk there really was as to OSEP adequacy concerns leading to AWE being constrained in its operations. The Inspector was entitled to take the reg 25(2) power into account in assessing that risk level (even if ONR did not), as he did at [**DL40**], and to strike a planning judgment accordingly.

10 ONR "advised against" the Appeal Scheme because of concern about pressure on the adequacy of the OSEP in future. However, it is important to note that the basis on which it did so was both restrained and generalized. In particular:

10.1 ONR stated unequivocally that it considered the OSEP adequate for existing housing in the DEPZ. The Inspector well understood that this was ONR's position, because he noted at [**DL10**] ONR's "stated concern about 'any' new development in the DEPZ" (referencing Mr Ingham's

proof of evidence), and similarly referenced ONR's "concern about potential for new housing" to undermine OSEP adequacy at [**DL30**].

10.2 The terms in which ONR expressed its concern about new housing should be noted. ONR did not argue that the Appeal Scheme **would** cause the OSEP to fall into inadequacy, nor did it assert that this was **likely**, far less did ONR (or anyone else) provide any reasoned, particularised evidence to explain why this would be the case. ONR's position was that "further development **may** have the potential to impact upon the adequate implementation of the OSEP" [ONR S/Case §35a [**SCB/5/63**], emphasis added]. ONR expressed its position in similar terms at (eg) §37a of Mr Guilfoyle's proof [**SCB/10/460**], and at §§12-13 of its opening [**SCB/26/848**]. And ONR's closing submissions made generalized points that the OSEP was "not infinitely scalable", and that the OSEP was "stretched" and "faces a real challenge in respect of remaining adequate" [**SCB/30/864-5** at §§9, 12]. By contrast, ONR did not put forward any specific evidence as to how a Scheme for 32 new homes at an established Rural Service Centre would likely cause the OSEP to fall into inadequacy, nor did relevant Council or AWE witnesses (all of whom were asked about the absence of "tipping point" analysis at the Inquiry).

10.3 ONR noted that recent practice exercises had identified areas for improvement, but self-evidently these did not cause ONR to assert this rendered the OSEP inadequate for the existing population, or that the addition of the Appeal Scheme **would** (or **would likely**) do so.

11 It should be noted too that (as was common ground at the Inquiry) ONR's remit does not extend to planning matters: see Developer's Closing Submissions at §15.1 [**SCB/33/908-9**]. And, as noted above, ONR took no position on the REPPIR Reg 25(2) power to derogate. Thus, insofar as a balance fell to be struck

between a risk of the Scheme causing the OSEP to fall into inadequacy and thereby causing adverse impacts for national security, and other relevant planning considerations (including the planning benefits of the Scheme), this was a matter outside ONR's expertise or on which it did not proffer comprehensive views. This is a **fundamental point** because, reading the DL as a whole, this was precisely the exercise carried out by the Inspector – weighing the risk of such an outcome against the planning merits of the Scheme. The outcome of the planning balance he conducted is not susceptible to legal challenge.

12 A further broad context point which bears on the "adequacy" question should be mentioned. The OSEP with which this case is concerned covers both Aldermaston (AWE(A)) and Burghfield (AWE(B)). Tadley is a town of 14,800 residents, and it is immediately south of the boundary of AWE(A). Given the location of the town of Tadley (see the plan at [**SCB/6/281**]), general population proximity and density appears to be materially greater than at Burghfield Common. Indeed, it appears that most of the c7154 homes in the AWE(A) DEPZ are located within Tadley. It was **common ground** at the Inquiry (see Developer Closing Submissions at §19.1 [**SCB/33/910-1**]) that no rationale had been put forward by any opposing party – whether ONR or anyone else - as to why the OSEP would be adequate to cater for a plume heading over Tadley, but not for a plume heading over Burghfield Common and the Appeal Scheme. Similar points apply at AWE(B), where the Reading direction is far more populous (see the plan at [**SCB/6/291**]).

GROUND 1 [Alleged failure to understand ONR's "advise against" or provide sufficient reasons for departing from it]

13 Against the above background, it is entirely clear, reading the DL as a whole, what was the reasoned basis on which the Inspector departed from ONR's "advise against". The Inspector fully appreciated this was ONR's "expert view": **DL30**. In particular:

13.1 As above, ONR had explained its position in restrained, and highly generalized terms. It made no attempt to explain the inconsistency between any concern about a small scheme at an established Rural Service Centre and its confirmation that the OSEP was adequate to deal with (eg) plumes heading over Tadley. ONR's evidence and submissions did not address all relevant matters that the Inspector needed to consider.

13.2 ONR's stated concern was that new housing consents "may" impact OSEP adequacy, not that it "would". On this basis alone, it is clear why **DL33** concluded that the Appeal Scheme was "unlikely to tip the OSEP over the edge of adequacy". Properly understood, ONR had not alleged the opposite.

13.3 The Inspector also – rationally - derived support for his conclusion from the absence of any "substantive tipping point assessment" presented by ONR (or any other opposing party): **DL31**. As a matter of an evaluative assessment of the evidence before him, he was plainly entitled to do so. This was an obvious matter for opposing parties to face up to in light of the small scale of the Appeal Scheme, let alone the fuller context referenced above. It is absurd for AWE to complain (SFG, §70(c)) that it was somehow unfair for the Inspector to take account of this manifest deficiency in its evidence.

13.4 Further, the Inspector found, as a matter of evaluative judgment, that emergency service response levels at the Appeal Scheme (and elsewhere) would not appreciably diminish: **DL32**. This conclusion reflected (i) that the Site was just as accessible as adjacent development, (ii) that the settlement overall was relatively small in the context of the DEPZ population as a whole [**DL26**], and (iii) that the recommended

counter-measure of sheltering at home for up to 2 days would not require emergency service assistance for almost all residents. This conclusion also accorded with the analysis of Dr Pearce (the Developer's expert nuclear physicist and emergency planner): see §5.5.6 of his main proof [**SCB/11/510-12**].

13.5 While finding at **DL33** that the Appeal Scheme was "unlikely to tip the OSEP" into inadequacy, the Inspector nonetheless (under Main Issue 2) took account at [**DL41**] of a "very limited likelihood" that the Appeal Scheme might cause the OSEP to fall into inadequacy with consequential impact on AWE's operations. This assessment factored in the availability of the REPPIR reg 25(2) exemption (although the Inspector said he could not be certain it would be utilized), on which ONR had no position. Overall, far from ignoring the risk which was the basis for ONR's "advise against", the Inspector expressly factored it into his planning balance via his conclusions on Main Issue 2, albeit that his analysis necessarily went beyond the "risk to OSEP adequacy" on which ONR focused.

13.6 The Inspector's ultimate conclusion was that the planning benefits of the Appeal Scheme (in terms of affordable housing provision, economic benefits at a sustainable and established Rural Service Centre, and respecting the Site's allocation) outweighed the "limited" risk of harm to safety and wellbeing of residents and the "very limited" risk of adverse impact on AWE's operations [**DL35**, **DL41**, **DL56-61**]. This was a matter of planning judgment for the Inspector. It was this planning judgment which led the Inspector not to follow ONR's "advise against".

14 The assertions at SFG §68 about the Inspector's understanding of ONR's position are plainly incorrect and unjustified. Specifically:

14.1 The Inspector did not need to refer at **DL30** to ONR's comments about the 2022 exercise, as well as the 2023 exercise. This is an unreasonable, nitpicking criticism. ONR's evidence was that the 2023 exercise identified "similar issues" to the earlier exercise (Ingham w/s §25 at [**SCB/9/447**]).

14.2 Nor is the DL flawed for failure to refer to ONR's August 2021 letter (quoted at SFG §63). The DL does not have to refer to every piece of evidence before the Inquiry. Anyway, the August 2021 letter simply explained a revised approach by ONR to new development proposals. The Inspector was well aware of the basis for ONR's "advise against", as explained next.

14.3 The Inspector did not "fail to understand or address ONR's position as to the stretched nature of the OSEP even without committed development". **DL30** (first sentence) records ONR's view on areas to be improved, **DL30** (last sentence) references ONR "concern about potential for new housing in the DEPZ to undermine the adequacy of the OSEP" and **DL10** notes (based on Mr Ingham's proof [**SCB/tab 9**]) "ONR's stated concern about 'any' new development in the DEPZ" being likely to lead to an "advise against". The Inspector's DL was not required to use the precise same adjectives as had ONR. It is plain, reading the DL as a whole, that he understood ONR's concerns, and the generalized basis on which they were advanced at this particular Appeal (and limited to which issues).

15 In light of the foregoing, SFG §70 can be addressed briefly:

15.1 SFG §70(a). For the reasons given above, the Inspector's explanation for departing from ONR's "expert view" in "advising against" is supported by clear, intelligible reasoning (not unreasoned statements or mere

assertions) and demonstrably meets the requirements of ***South Bucks DC v Porter (no 2)*** [1994] 1 WLR 257 and ***Together against Sizewell C v Secretary of State*** [2023] EWHC 1526 at [108] (Holgate J).

15.2 SFG §70(b). For the reasons given above, there is no evidence the Inspector misunderstood ONR's position, or the generality with which it was put forward.

15.3 SFG §70(c). This paragraph is a blatant attempt to re-argue the merits of the case, with a view to excusing the failure of AWE (and all other opposing parties) to provide credible evidence that 32 new homes at the Site seriously risked the consequences alleged. It is absurd for AWE to argue that "tipping point" evidence is not a "requirement in REPPIR 2019". Nothing in REPPIR 2019 says that inadequacy may be asserted without supporting evidence or reasoned assessment. Would AWE accept mere assertion in the event the Council/ONR purported to conclude that the point of "inadequacy" had been reached? It is even more absurd for AWE to complain that the Inquiry process was unfair. The absence of tipping point evidence was raised in cross examination of relevant witnesses opposing the Appeal Scheme, and AWE (and other opposing parties) were entitled to make whatever submissions they wished in their closings on the topic. The Inspector's conclusions can hardly be criticized by AWE where (as here) AWE simply ignored the "tipping point" issue in its closings [**SCB/31/867*ff***].

15.4 SFG §70(d). Again, the Inspector did not have to make express reference to every individual piece of Inquiry evidence. Anyway, **DL30** does refer to ONR's generalised concerns (arising out of the practice exercises) relating to monitoring and alternative accommodation (for, inter alia, evacuation / decontamination), as to which please see further §29 of these Summary Grounds of Defence below. In a context where ONR did

not contend that the OSEP was currently inadequate to address such matters, and no opposing party presented "tipping point" evidence in relation to the effect of 32 new homes at Burghfield Common, it is again clear why the Inspector expressed himself as he did in relation to the degree of risk of the OSEP falling into inadequacy in consequence of the Appeal Scheme.

15.5 SFG §70(e). The judgment in question was a matter for the Inspector's evaluative assessment, taking account of what evidence was (and was not) before him, as well as (i) the relatively short (2 day) duration of the emergency, with consequential limited need for any emergency service assistance for almost all residents, and (ii) the accessibility of the Site – which was comparable to surrounding built up areas already served by the OSEP.

15.6 SFG §70(f). This paragraph does not add anything, and is a further attempt to re-argue the merits on matters covered by the Inspector's evaluative assessment explained above.

16 Overall, Ground 1 is an attempt to embroil the Court in a re-appraisal of the Inspector's clearly articulated reasoning on matters of planning judgment and evaluation, which on any view encompass the basis on which he departed from ONR's "advise against". Ground 1 must be dismissed.

GROUND 2 [Alleged misinterpretation of policy CS8]

17 Policy CS8 (and supporting text) is at [**SCB/36/1064**]. The first two sentences of policy CS8 were in the following terms (so far as material):

> "In the interests of public safety, residential development in the inner land use planning consultation zones [footnote 60] of AWE Aldermaston and AWE Burghfield is likely to be refused planning permission by the Council when the Office for Nuclear Regulation (ONR) has advised against that development. All other development proposals in the consultation zones will be considered in

consultation with ONR, having regard to the scale of development proposed, its location, population distribution of the area and the impact on public safety, to include how the development would impact on 'Blue Light Services' and the emergency off site plan in the event of an emergency as well as other planning criteria".

18 In addition:

18.1 The third sentence of policy CS8 provided that consultation with ONR would be in accordance with the Table set out in the policy. This Table defined the Inner Zone for AWE Burghfield as the area "0 – 1.5 km" distant, with the Middle Zone "1.5 – 3 km" away. It was common ground at the Inquiry that the Site was, in distance terms, in the Middle Zone.

18.2 Footnote 60 provided: "Consultation Zones as defined by the ONR and shown on the West Berkshire Proposals Map". It was common ground at the Inquiry that the "West Berkshire Proposals Map" reflected (as had been the case at all times since 2012) the Inner and Middle Zones as defined in the above-referenced Table.

19 Policy CS8 had been re-written by the CS Inspector, whose pertinent comments [**SCB/21/683-4**] were at §§84-5 of his Report:

"84 … I draw the following conclusions:

- …
- At present, the ONR is highly likely to advise against nearly all applications for additional dwellings within the inner land use planning zones defined around the 2 AWE sites. The Council intends to follow that advice and seeks to bring clarity to this matter through the development plan.
- The complexity of the ONR's modelling process, the scope for different outcomes from different inputs and the likely material changes in relevant data and other circumstances over the plan period preclude any firm policy beyond the inner zone.
- …
- The Secretary of State's decision (16 June 2011) to allow 115 dwellings and other development at Boundary Hall, Tadley was a balanced decision on the particular circumstances of that case and does not undermine the

> ONR's policy approach or the need for the Council to make clear its intention to follow that advice in the inner zone. This decision does not justify the implications of the AWE sites and the ONR's views having to be considered solely on a case-by-case basis. The development plan should provide reasonable certainty for all interested parties as to the type and scale of development likely to be acceptable in different locations, avoiding the potentially wasted effort of proposals being pursued which had little prospect of success.
>
> "85 … A clear policy should be set out reflecting the high degree of constraint likely to be applied in the inner consultation zone, with a clear explanation of the implications over the wider area."

20 The Core Strategy was adopted in 2012. Self-evidently, this preceded REPPIR 2019, as well as the NPPG guidance on which AWE erroneously relies to interpret the policy.

21 AWE's argument is that, when in 2020 the Council designated (under REPPIR 2019) a new DEPZ for Burghfield, that new DEPZ fell to be treated as the Inner Zone under policy CS8 such that the strong presumption of refusal set out in the 1st sentence of the policy was engaged. The Inspector rejected the same argument at **DL8-11**, noting (inter alia) that AWE's interpretation would extend the reach of the 1st sentence to an area of land 5 times larger than the Inner Zone, and [**DL11**] "*would alter the wording of this development plan policy, and be contrary to its qualifying footnote and explanatory text such that, it would fundamentally change this adopted Policy's meaning and intent*".

22 In ***Corbett v Cornwall Council*** [2022] EWCA Civ 1069, the Court of Appeal reminded itself at [19] of the Supreme Court's injunction that planning authorities "*cannot make the development plan mean whatever they would like it to mean*", and said at [19(3)]:

> "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. Often it will be entitled to say that the policy means what it says and needs little exposition".

23 AWE's construction of the 1st sentence of CS8 is unarguable. It is demonstrably an impermissible attempt to re-write the policy, substantially extending its intended reach. Specifically:

23.1 The limit of the Inner Zone is defined for purposes of the policy by the Table included within it, and by the (identical) reflection of the Table's distances as shown on the Proposals Map.

23.2 Nothing in policy CS8 allows for the Inner Zone to expand in the manner suggested, on account of subsequent events. Such an expansion requires the adoption of a new development plan policy to replace CS8.

23.3 There is nothing surprising about CS8 being construed such that the very strong presumption against envisaged by the 1st sentence (when engaged) only applies to the specific area to which it expressly relates (rather than an area of land 5 times larger). As stated at §§84-85 of his report, the CS Inspector wanted to provide suitable discouragement to developers in respect of land within the "inner zone". It would fundamentally undermine that objective to allow the "inner zone" to expand, with the same accompanying strong presumption against. While the CS Inspector plainly thought the first sentence of CS8 a sound proposal for the specified "Inner Zone" (which "largely encompasses countryside" per the CS text at §5.43 [**SCB/36/1066**]), nothing in his report suggests that he was endorsing (or that the policy he drafted could be read as intending) that the same planning judgment would necessarily be applicable to a much wider area. All the more so where (as established above) the level of risk (as distinct from the weather conditions which drive the radius of the Urgent Protection Area from which the DEPZ is then derived) has not altered.

23.4 The CS text at §5.44 [**SCB/36/1066**] only contemplates a possible contraction of the areas affected resulting in a consequential tempering of ONR advice for part of the "inner zone". It says nothing about any consequences of a theoretical expansion. This again undermines the suggestion that designation of a DEPZ under subsequent legislation is somehow automatically incorporated into policy CS8 resulting in an entirely new Inner Zone. Further and in any event, as a matter of law, even if the CS text had contemplated a theoretical expansion, this would not have permitted policy CS8 to be construed in this manner (without wording within policy CS8 itself envisaging such a result). Explanatory text cannot add a new requirement to a policy: see ***Cherkley Campaign v Mole Valley*** [2014] EWCA Civ 567 at paras 16-18, 21.

24 The Inspector was right to reject AWE's unarguable construction of the 1st sentence of policy CS8 [**DL8-11**] and to find that it was the 2nd sentence of policy CS8 which applied to the Site [**DL12**].

25 Ground 2 should be dismissed.

GROUND 3 [Alleged errors regarding assessment of OSEP adequacy]

26 Ground 3 sets out a series of "excessively legalistic" complaints.

27 SFG §82 complains about failure to "refer to the detailed evidence" said to have been given by ONR. But as set out in response to Ground 1: (i) the Inspector's duty was not to make express reference to all matters raised before him, but to provide intelligible and sufficient reasoning for the evaluative judgments he reached; (ii) there is no alleged mis-statement in the DL to suggest that the Inspector misunderstood the basis for ONR's concerns or the "advise against" (and the contrary is nowhere alleged by AWE); (iii) anyway, the Inspector did expressly refer to the substance of ONR's underlying concerns, at **DL30**; and

(iv) **DL30** and **DL10** taken together make clear that the Inspector perfectly well appreciated that ONR's confirmation of OSEP adequacy related to the existing position, and that "any" new housing was said to have the "potential" to alter that confirmation.

28 SFG §83 complains about the population figures used by the Inspector for Burghfield Common, and the DEPZ as a whole. This is unfair. The Inspector's analysis was derived from the Council's evidence, with the Council's DEPZ figure being virtually the same as the Council's.

29 As regards SFG §84, it is not correct that the Inspector failed to consider the matters in question (including monitoring and alternative accommodation). In the first sentence of **DL30**, the Inspector accepted ONR's expert view that there were "lessons to be learnt" on these topics, but in the second sentence he observed (correctly) that it was "undisputed" that the OSEP was presently adequate, including therefore in relation to these matters. Further, the evidence on the matters in question, as summarised in the Developer's Closing Submissions (at §19.2 and §24.1, §24.4 [**SCB/33/911, 916-7**]), was that (i) the OSEP was adequate to address monitoring / decontamination needs far in excess of those arising from a plume heading to Burghfield Common, the OSEP being adequate to address a scenario where a plume passes through a 24,000 person crowd attending a football match at Reading's Madejski Stadium; and (ii) rest centre capacity was 4,500, in which respect there was no evidence from inter alia ONR or AWE that this would be inadequate in the event of a plume heading towards Burghfield Common.

30 Ground 3 must be dismissed.

GROUND 4 [Alleged misdirections]

31 This Ground sets out a further list of "excessively legalistic" criticisms, impermissibly seeking to disagree with the Inspector's approach on matters of planning judgment.

32 As to the kitchen sink series of points advanced under the heading "National Security", the Developer responds as follows:

32.1 SFG §88(1). AWE misunderstands **DL39**. It is obvious why the Inspector identifies the "limited" "residual risk to the safety and wellbeing of future residents" as a "moderating" factor on the degree of risk affecting AWE's future capabilities. The fact that future residents of the Site will only be at "limited residual risk" contributes to the lack of serious risk that their presence will result in (eg) impacts on "regulatory permissions" sought in the future by AWE – see **DL37**. The complaint at SFG §88(1) is focused on OSEP adequacy issues – but as **DL37** makes clear, this was not the only matter under consideration in Main Issue 2.

32.2 SFG §88(2). This is an impermissible attempt to re-argue a matter where the Inspector clearly explained why he accepted the Developer's argument. The simple point being made by the Inspector (accepting the Developer's submission at §30.1 of its Closing Submissions [**SCB/33/920**]) was that ONR had not intimated to AWE that it proposed to take any action should the appeal be allowed (far less taken any action to date), thereby further "moderating" the risk of adverse impact on AWE from the Appeal Scheme. The Inspector was entitled to reach that conclusion on the evidence before him.

32.3 SFG §88(3). This is nitpicking. The Inspector was entitled to take into account, in assessing what factors "moderated" the risk of adverse impact on AWE, that no-one at the Inquiry had alleged that the January

2023 grant of permission for 49 new homes at Kingfisher Grove on the opposite side of the DEPZ (following another 6 day inquiry) rendered the OSEP inadequate. Further, the Inspector was well aware that both ONR and AWE had made written representations in that appeal opposing the grant of consent; that neither had pursued a legal challenge against the consent; and that neither had been able to identify at the Inquiry any particular consequence for OSEP adequacy (or step that either ONR/AWE was taking or had taken) flowing from the consent in question.

32.4 SFG §88(4). This is misleading and mis-states the MoD's policy on invoking exemptions such as REPPIR Reg 25(2). The MoD's policy of equivalency is qualified by the words "so far as is reasonably practicable": see Person MD's rebuttal §3.3 [**SCB/24/820**]. Nor is there anything "irrational" about the Inspector at **DL40** "moderating" the risk of adverse impact on AWE by reference to the potential availability of the "national security" exemption in REPPIR Reg 25(2).

32.5 SFG §88(5). Matters regarding AWE's financial liability for clean-up (as polluter, for purposes of the Nuclear Installations Act 1965) do not fall within Main Issues 1 or 2 (as determined by the Inspector, with the input of all parties). Nor was such a matter raised in AWE's evidence. AWE did mention the point in its Closing Submissions, but this was a defensive exercise, attempting to respond to the Developer drawing attention to the fact that AWE declines to take out insurance against causing off-site radiological contamination, presumably reflecting a cost/benefit appraisal that the risk is too low to justify doing so. On any view, there is no error of law.

32.6 SFG §88(6). This is nonsense. The Inspector addresses the matter squarely at **DL38**.

33 SFG §§92-3. As to the list of points said to relate to "Impact on residents and the public", the matter was sufficiently addressed by the Inspector at **DL18-20**, where he explicitly took into account (for purposes of Main Issue 1) both physical and psychological health/well-being impacts, arising from the initial plume and from the subsequent recovery period. It is therefore inaccurate for the first sentence of SFG 92(c) to allege the contrary. Further, paragraph 7 of these Summary Grounds is repeated as regards the common ground at the Inquiry that (based on ONR publications) contamination levels at the Site following the reference incident would be well below long-term clean-up targets.

34 As regards SFG §§94-96 (NPPF para 187), the exact same issues are covered in substance by the discussion of Main Issue 2 at **DL36-41**. An express reference to NPPF para 187 (in addition to NPPF para 97) would have added nothing. It is nitpicking to suggest otherwise.

35 Precautionary principle (SFG §97). This is another way of putting the fact that AWE disagrees with the Inspector's evaluative judgment and planning balance. There is, however, ample evidence that the Inspector adopted an appropriately precautionary approach. Notably:

35.1 At **DL22**, the Inspector accepted Dr Pearce's estimate that the risk of harm to those living at the Site would be 1 in 1,000 million years. That estimate is extremely precautionary in that (i) it assumes the improbable case of a resident remaining outside for 2 days during the plume's passage (and not making any attempt to take shelter), and (ii) it applies a 1.5% chance of the wind blowing towards the Site in category F conditions, whereas available evidence indicated that this only occurred c0.5% of the time [**SCB/11/499, §132**].

35.2 At **DL36-41**, the Inspector took into account as a planning disbenefit of the Scheme the very limited risk that the Scheme would have an adverse impact on AWE. By contrast with the Inspector in the Kingfisher Grove inquiry (who had found no relevant harm such that the same matters were "neutral" in the planning balance), he did not disregard the risk in question.

36 For these reasons, Ground 4 must be dismissed.

DISCRETION

37 Even if, which is denied, there was a legal error as alleged, AWE has not been substantially prejudiced, and the decision in question would not have been any different. Accordingly, permission to bring this claim should in any event be refused pursuant to s31 of the Senior Courts Act 1981.

COSTS

38 The Developer seeks its costs of preparing the Acknowledgement of Service and these Summary Grounds of Defence, on well-established principles. A schedule of such costs is attached which the Court is invited to assess summarily.

CONCLUSION

39 For these reasons, the Court is respectfully asked to refuse permission for this meritless claim, and to dismiss it with an order for costs.

ANDREW TABACHNIK KC

39 ESSEX CHAMBERS

10 October 2023