

IN THE LEEDS ADMINISTRATIVE COURT
[2018] EWHC 3663 (Admin)

Case No: CO/1312/2018

Courtroom No. 2

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

1.57pm – 3.03pm
Tuesday, 30th October 2018

Before:
THE HONOURABLE MR JUSTICE WAKSMAN

B E T W E E N:

THORNHILL ESTATES LIMITED

and

- (1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL
GOVERNMENT
(2) LEEDS CITY COUNCIL

MS J WIGLEY appeared on behalf of the claimant
MR C BANNER appeared on behalf of the Defendant
MR J LOPEZ appeared on behalf of the First Interested Party

APPROVED JUDGMENT

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MR JUSTICE WAKSMAN:

Introduction

1. This is a claim for a statutory review pursuant to Section 288 of the Town and Country Planning Act 1990, of a decision of the defendant, the Secretary of State for Housing, Communities and Local Government ('the Secretary of State'), dated 22 February 2018. By that decision, to which I shall refer as ('the Decision'), the Secretary of State dismissed an appeal by the claimant, Thornhill Estates Limited, against a deemed refusal of planning permission on behalf of the first interested party, Leeds City Council ('the Council'). Thereby it was refused outline planning permission for a residential development of 300 dwellings and associated works at Bagley Lane and Calverley Lane in Farsley, in Leeds.
2. The Decision was contrary to the recommendations made by the inspector, in his report dated 23 March 2017. There had been a previous enquiry but the Secretary of State's decision, which followed that, was quashed by the High Court on 4 November 2015. The reopened enquiry, which led to the report, was held in January 2017.
3. The point of issue before me is a narrow one. Put very briefly, the inspector had referred to three elements of the scheme which formed part of the overall application as, at least in part, benefits. The Secretary of State disagreed and considered that they were merely, or no more than, or not really more than, measures which were required in order to mitigate some consequences of the new development. Those are points which are somewhat more nuanced than that summary suggests, as we will see in due course.
4. As a result, the overall planning balance conducted by the Secretary of State tipped the other way, namely against rather than in favour of the proposed development, as the inspector had been. The three elements were as follows; Firstly, increased highway capacity created by offsite works to the Rodley Lane/Ring Road junction; Secondly improved safety features at the Calverley Lane/Ring Road junction; and thirdly the opportunity to meet the potential need for an additional primary school in the area, by reserving a plot for such a school at the development site, for seven years, in which time the Local Authority had the option to purchase it at a commercial price.
5. The present statutory review, as originally submitted, consisted of two grounds. The first was that the Secretary of State's conclusion that the highway safety and capacity works, and the reservation of a school site, do not constitute benefits in the planning balance, was itself irrational; that was ground one. Ground two, was that there had been a failure to give

adequate reasons.

6. Permission to bring this review on both grounds was refused by Kerr J on the papers. This was on the basis that the review in truth amounted to no more than a challenge to the planning judgment exercised by the Secretary of State, who had simply balanced the various factors, including the three elements, in a way different to the inspector. However, after an oral hearing on 21 June 2018, Whipple J gave permission on ground one but not on ground two. I should make it clear that the issue for the claimant is not whether the Secretary of State was entitled to weigh up the planning balance differently from the inspector; accordingly, if he had decided to attribute less or no weight to the three factors, as described by the inspector, and thereby reach a different and in fact an opposite conclusion, he was entitled to do so. Rather, the claimant's argument was, that to deprive these factors of the characterisation of benefits at all, as opposed to mitigation, if that is what the inspector had found, and so to debar them from playing any part in the weighing process in limine as it were, amounted to an illogicality, having regard to earlier parts of the Secretary of State's decision and all the findings of the inspector. Accordingly, the decision was irrational. Putting it another way, and echoing the words of Sedley J, as he then was, in *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1997], at paragraph 27 'this was a decision which did not add up', in other words there was an error of reasoning which robbed the decision of logic.
7. Since this challenge has given rise to a detailed examination of what the decision and the report actually said, and what they meant or did not mean on the part of all sides, the oft-quoted words first of all of, Lindblom J, as he then was; at paragraph 19 of the case of *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government & Anor* [2017] PTSR128, bear repetition. He said that:

'The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all"'.
8. Essentially, for that reason, an application under Section 288 does not afford an opportunity for review of the planning merits of an inspector's decision.
9. Additionally, there are the well-known observations of Laing J, in *Good Energy Generation Ltd v Secretary of State for Communities and Local Government & Anor* [2018] EWHC

1270, at paragraph 29, where she said this regarding the approach to planning decisions;

‘A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case’.

10. There is no disagreement between the parties, as I understand it, about those propositions.

Background

11. The site of the proposed development lies about 8.5km to the north-west of Leeds city centre, on the north edge of Farsley and on the south-west side of the Aire Valley. Parts of the Farsley conservation area, lie adjacent to the appeal site. As can be seen from the plan which has been provided to me, the Leeds outer Ring Road (‘the Ring Road’), butts the north-west corner of the site at the junction with Calverley Lane on the north-western side; Calverley Lane itself crossing over the Ring Road, but the Ring Road itself and Calverley Lane then leading into Farsley itself. Just to the North of the Northern boundary of the site, there is a large roundabout, where the Ring Road meets Rodley Lane. There is a recreation ground, which is opposite the appeal site, and that is within the conservation area.
12. Originally, the Council had opposed the development in the first incarnation, when planning permission had been sought by way of an appeal against deemed refusal, but by the time of the enquiry, which led to the report, the Council no longer objected to it. There had been certain changes by that stage, including a reduction in the number of dwellings from 400 to 300, and various other alterations. The Council’s position before the inspector was therefore not to object to the scheme, but it was not a positive supporter either, and played no active role in the enquiry.
13. Before turning to the relevant parts of the report and the decision, it is necessary to recite some extracts from two statements of common ground, as between the claimant and applicant, and the Council in the somewhat neutral role as I have just described.
14. First of all, there is the highway statement of common ground, dated 5 December 2016. This begins in the introduction by stating that:

‘Subject to the package of improvements measures proposed, the development site was sufficiently accessible, is in a sufficiently sustainable nature and will satisfactorily mitigate it’s impact on the highway network which will continue to operate it safely’.
15. 2.2 deals with pedestrian and cycle means access. 2.2.1 begins by saying that; ‘it was agreed that pedestrian and cycle access at the development site was suitable, and allowed a high level of connectivity with the surrounding area’. In other words, that was the status

quo. However, it said that several further pedestrian and cycle only access points will be provided around the site. Additionally, in 2.2.2, which is clearly a separate point, it was said that it had been agreed that a new footway cycleway would be provided along the Ring Road between the proposed Calverley Lane site access roundabout, and the Dawsons Corner junction, where it would connect with the existing cycle superhighway; and that would be the subject of a planning condition. There would also be a planning condition so that the layout included an east-west cycle link between Oakland Road and Calverley Lane, and that would ensure a cycle route was provided all the way through from the existing canal tow path to the recently constructed cycle highway. This will provide a material benefit for existing pedestrians and cyclists, as well as for the proposed new occupiers.

16. One then turns to the capacity analysis and offsite improvements. First of all, the Rodley Lane Ring Road signalised roundabout; that is what is shown in red in the diagram in front of me. It said there, that the existing layout had been assessed; the junction had been modelled for following morning and evening peak hour scenarios, which included 2022 based traffic flows, that is, the position in 2022 when it is assumed the site would be finally completed, but without the site. Then the design traffic flows, that is in 2022; that is the base flow, plus the proposed development traffic.
17. Further, in 5.1.3 it is said that the design scenario, in this respect, would exacerbate operational performance of the approach to the roundabout, with predicted increases in queuing and delay. The following mitigation, as I quote, which is illustrated on the drawing and was therefore proposed, 'there would be amendments to the road markings to provide an extension to the existing flare of some 45 metres, thereby increasing the two lane approach to the stop line, and relocation of the existing southbound bus stop'. It was then said that, in summary, it was agreed the proposed improvements will more than mitigate against the impact of the traffic from this development, and the residual situation, including cumulative effects, will certainly not amount to a severe impact. Then in 5.1.5, it refers to that as a mitigation scheme.
18. Then one comes to Dawsons Corner, and that says that the design scenario for 2022 would have an immaterial impact on the operation of Dawsons Corner junction. However, in respect of the Ring Road junction, the development would exacerbate the operational performance of the approach, and therefore the following mitigation was to include Carriageway widening to the Ring Road. It was said that, in summary, it is agreed that the proposed improvements to Ring Road north, will more than mitigate against the impact of

development at Dawsons Corner and the residual situation; in other words cumulative impact will certainly not amount to a severe impact. That wording closely follows the summary wording in relation to Rodley Road and the Ring Road junction.

19. Further, in 5.3 Ring Road in Calverley Lane, while no capacity improvements were required, further measures could be introduced in order to strengthen the existing banned right turn movements to or from the Ring Road and further enhance highway safety. Additionally, it was said the following mitigation was to be proposed; widening the central island to further restrict the ability of the drivers to turn right, and providing merging and diverging tapers. That scheme was agreed to satisfactorily mitigate against the impact of development proposals. It would be done by planning permission. It was agreed that the improved main road, Calverley Lane junction, would continue to operate comfortably, with capacity and with enhanced highway safety measures, for the benefit of future residents and existing road users.
20. In summary, it was said that:
 - a. As to the existing Rodley Lane/Ring Road roundabout, there would be delivery of capacity improvements to the southbound approach, providing delay reductions;
 - b. As to Dawsons Corner, would be delivery of capacity improvements providing delay and queue reductions;
 - c. As to Ring Road/Calverley Lane, provision of highway safety enhancements;
 - d. As to the proposed Calverley Lane site access junction, delivery of speed-reducing junction;
 - e. Otherwise the proposed footway and cycleway along the link road would bring accessibility benefits to existing users as well as occupiers; the proposed cycling through the site would bring accessibility benefits to existing users as well as occupiers.
21. At 5.6.2 it was said the proposals would provide a substantial range of infrastructure benefit, in particular, delivery of proposed footway cycleway route, adjacent to the Ring Road, as well as proposed improvements to Rodley roundabout, Dawsons Corner, and Calverley Lane Ring Road junctions; delivering significant infrastructure enhancements and benefits in the locality of the site. This ends by saying that in conclusion, ‘it is agreed that with the improvements/measures proposed, the site is sufficiently accessible, is in a sufficiently sustainable location, and will satisfactorily mitigate the impact on the highway network which will continue to operate safely’.

22. Secondly, there is the statement of common ground, in respect of education. paragraph 2.4 recites that the Council, in August 2013, had presented a report to the city plans panel and quotations are made from that report.
23. At paragraph 17.716 of that report, said that this site along with the Clariant and Riverside Mill sites, will add to demand for school places. Childrens' Services consider this site at the pre-application stage, as being potentially suitable for a new school, and note this could be potentially provided in lieu of a contribution. The development proposals do not generate requirements for schools by themselves, but in combination with recently approved other developments in the locality, a new school might be required, which could be sighted on the site, contribution requested.
24. AT paragraph 5.4, it was said that there was an offer of a unilateral undertaking to be given under Section 106, for the reservation of a parcel of land, in order for the Council to consider whether it wished to establish a primary school. 5.5 says the parties agreed that the undertaking was a material benefit of the application, in that, in the absence of an alternative location in the local area, it provides a mechanism which is also capable of catering for existing and proposed demands for education provision in the area. It is also in accordance with guidance in the NPPF. That is all I need to say about that.
25. There is also a statement of agreed grounds so far as planning matters are concerned, but I will deal with that when I come to the report.

The relevant planning framework

26. It is common ground that as far as the NPPF is concerned, paragraph 14 is first of all relevant, and that says there is a presumption in favour of sustainable development. For decision makers this means, and there are two bullet points although the second is the only one I am concerned with; where the development plan is absent, silent, or relevant polices are out of date, grant permission unless; (1) 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; or (2) specific policies in this framework indicate development should be restricted, so far as specific polices are concerned.
27. Then one goes to heritage assets; the significance of a development on a designated heritage asset, in that context, great weight has to be given to the asset's conservation. paragraph 134 says, 'where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing it for optimum use'. That is important because

the conservation area itself is a heritage asset. That of course, has got to be read against the overriding background of Section 38(6) of the Act. That of course provides that ‘planning applications and appeals must be determined in accordance with the development plan, unless material considerations indicate otherwise’. Lindblom LJ had some observations to make about that and the relationship it has with the NPPF, in *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88. He referred to another case, *Secretary of State for Communities and Local Government v BDW Trading Ltd* [2016], where he gave the judgment which said this:

‘The section 38(6) duty is the duty to make a decision (or “determination”) by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan’.

28. The duty is not displaced or modified by government policy in the NPPF. Such policy does not have a force of statute, nor does it have the same status in the statutory scheme as the development plan. Under Section 72 of the Act and Section 38(6) of the 2004 Act, the relevance to a planning decision is as one of the other material considerations to be weighed in the balance. The plan led system and priority development plan, as put forward by the first defendant, and I did not understand this to be controversial, were in fact noted in the NPPF prevailing at the time for present purposes, which was the 2012 version.

The report

29. This is a lengthy document; at paragraph 25, it was noted that there were two relevant policies here which formed part of the development plan. One was N34, saying that: ‘policy intended the development be restricted to that necessary for the operation of existing use and temporary uses, which would not prejudice the possibility of long-term development’. In addition, there was N19 which required, ‘all new buildings adjacent to conservation areas, to preserve or enhance their character and appearance’. Under agreed matters at paragraph 30, under planning policy, it was noted that the statement of common ground here, were agreed that the only relevant policies were N19 and N34; N19 conflicts with the NPPF, because it does not include a balance test and should carry only limited weight. N34 is relevant to the supply of housing; it is out of date, it should carry very little weight. The Council did not dispute the appellant’s contention, that is because it has been time-expired and was now silent.
30. Before considering the case of each of the parties, the inspector noted, in paragraph 31, that the works proposed at Ring Road, Rodley Lane, Dawsons Corner and Ring Road Calverley

Lane, would provide satisfactory mitigation for the impact of the development. The overall package of highway and transport measures would provide a substantial range of benefit, so that is putting it, as it were, in a rather global fashion.

31. One then comes to paragraph 59 of the report, which is part of the inspector's citation of what the appellant's case was. As summarised there, the various benefits were, of course, the building of the houses and spin off benefits from that, but also, among other things, the provision of additional maintained and serviced paths providing walk and cycle access; that is the cycleway that I referred to earlier on. The pedestrian and cycle link along the Ring Road, that is the cycleway. Also, there is also the opportunity to provide a site for a school. Together, these benefits are significant, tangible and deliverable. There was no specific reference in those submissions to the specific benefits said to be conferred by the highway works.
32. The analytical part of the report, in terms of the conclusions, begins at paragraph 95. paragraphs 102 to 112 deal with the heritage assets, the most important of which, was the conservation area. The inspector concluded that, having regard to 134 of the NPPF, the effect of the development would be less than substantial harm to the significance of the conservation area as a whole.
33. The overall conclusion was that he was concerned about the effect of the proposal on the setting of the Farsley conservation area, and concluded it would have modest adverse effect, less than substantial harm; that would conflict with policy P11 of the core strategy.
34. 113 to 122 then deals with character and appearance. At 122, the inspector concluded:

‘The proposed development would have a minor adverse effect on the character of the surrounding area and cause moderate harm to the landscape of the site itself. There would be certain harm to visual amenity, most notably from Coal Hill, which carries major weight. In consequence, there would be conflict with Policy P12 of the Core Strategy which seeks to conserve and enhance the character, quality and biodiversity of the landscape’.
35. paragraphs 123 to 128 concern highway and traffic. He noted in paragraph 123 that ‘The Council and the Appellant have agreed in the highways statement of common ground that the impact of the proposed development on the highway network can be satisfactorily mitigated’. Then he specifically deals with Rodley Lane and the Ring Road junction and indicated that without any measures, there would be an increase in delay time from 154 to 218, if the development was implemented without any measures effectively; and from 299 to 342 in the afternoon, by reason of the works which were proposed, there would be

significant reductions in the delay of 147 and 285. There was some uncertainty as to what that meant, but after we all looked at the underlying document, it was clear that what the research had showed was that the overall upshot, with the design, but also with the measures, would be to bring the wait down to 7 and 14 seconds respectively. This would itself be a reduction in delay of 147 and 285 seconds, respectively, from what the base position, that is, without the design, the development would otherwise be by the year 2022.

36. Dawsons Corner is then summarised in 125, and an explanation is given as to how to deal with increased delay times there; there would be no ultimate capacity concerns. In Bagley Lane and Rodley Lane at 126, he said the additional capacity proposed for Rodley Lane South approach to the roundabout is expected to reduce queues and delays on the major road, and that improvement should facilitate movement at Bagley Lane. That was important because, it had been agreed that there was likely to be queuing at Bagley Lane due to a build-up of traffic at the roundabout. Otherwise it was said that in isolation, the junction was within desirable capacity levels and no mitigation is necessary in this location.
37. Then paragraph 127 is headed ‘Highway safety’ and refers to the right hand manoeuvres which were taking place despite the fact that they were prohibited. As part of the overall development the island in the middle would be enlarged, this offsite work, he said, represented an important benefit of the scheme. There had been no record of accidents, but said that he did not consider the appeal proposal would make the situation appreciably more hazardous, and there was no evidence that the appeal proposal would be likely to affect highway safety in Farsley or elsewhere on the road network; that then led to the conclusion at paragraph 128.
38. The detailed evidence before him indicated the proposed offsite highway works would effectively mitigate against potential capacity problems at Rodley Lane, Dawsons Corner on the Ring Road; provide an improvement compared with 2020 base scenario at Rodley Lane; and that the works there, would result in an improvement of traffic conditions on Bagley Lane. These works were covered by a planning agreement and there was an alternative I need not go to, and then he ends up by saying, that he concludes that appeal proposal would not reduce highway safety or restrict traffic movement in the vicinity of the appeal site and it would provide specific benefits through the highway works at Rodley land and Calverley Lane junctions with the Ring Road. In this regard it would be consistent with policy T2 of the core strategy.
39. Then in the section called, ‘Development plan’, he concluded this:

‘Whilst the proposal would comply with the approach to the location of development in the Core Strategy, it would conflict with Policies P11 and P12 concerning conservation areas and landscape. It would also conflict with UDP Policy N19 concerning conservation areas and policy N34, as the land is designated PAS site. Policy N34 carries little weight, but nevertheless I conclude that the proposal would be contrary to the Development Plan considered as a whole.’

40. Hence the need, in this case, to find material considerations which would lead to the result of not following the development plan.

41. In paragraph 137, he refers to the proposed cycleway, saying it would be a link to the new railway station and it is an accessible location.

42. As far as education is concerned, he said that the appeal proposal:

‘Together with other development in the area, may generate a need for a new primary school... Although the need for a new primary school would not be generated by the appeal proposal alone, there is no evidence of the availability of an alternative site and provision of a site alone would be reasonably related in scale and kind to the development’.

43. At paragraph 143, he said that:

‘To ensure highway safety and avoid disruption to traffic movements conditions are required concerning provision of vehicular access from Calverley Lane and a link across the site, further details of off-site highway works, and assessment of the condition of Calverley Lane and Bagley Lane’.

44. Then he comes to his overall conclusions beginning at 144. ‘The proposal would cause less than substantial harm to the significance of Farsley Conservation Area; nevertheless I give great weight to the asset’s conservation’. In accordance with paragraph 134, this had to be weighed against the public benefits. The provision of much needed housing contributed towards the five-year supply, carries considerable weight and then significant weight to the affordable housing which it brought forward. He attached a significant weight to that, to the capacity and highway safety benefits arising respectively from the alterations to the Rodley Lane and Calverley Lane junctions of the Ring Road, and to the opportunity to meet potential need for an additional primary school on the appeal site; all of those he gave significant weight to. The improved connectivity of the cycleway along the Ring Road and the bus stop will be of benefit to the wider community, they merit moderate and minor rate respectively. Then at the end of that paragraph he says, ‘I am in no doubt that the combination of public benefits clearly outweighs the less than substantial harm to the significance of the conservation area’. It is clear that what he was doing there was carrying out the paragraph 134 balancing exercise which was mandated by the second part of the

second bullet point, paragraph 14.

45. Then he says this, that he had found the proposal would be contrary to the development plan, partly because of N34, but that was out of date:

‘The NPPF is an important material consideration in this case. As there is not a five years supply of housing land in Leeds, relevant policies for the supply of housing should not be considered up-to-date, and, in accordance with paragraph 14 of the NPPF, where relevant 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 the NPPF taken as a whole’.

46. In dealing with the first bullet point under 14 he said:

‘It is, therefore, necessary to consider the balance of considerations in this case. The proposal would have a moderate adverse effect on the significance of Farsley Conservation Area. It would also have a minor adverse effect on the character of the surrounding area and cause moderate harm to the landscape of the site itself. I have given major weight to the harm to visual amenity from Coal Hill, but no more than moderate weight to the harm from other locations. There would be a range of benefits from the scheme’.

47. Which he had identified in 144:

‘Notably provision of housing land, affordable housing, capacity and highway safety benefits arising from alterations to junctions on the Ring Road, and the opportunity to meet a potential need for an additional primary school. These benefits of the scheme clearly outweigh the harm’.

48. Therefore he has carried out that part of the paragraph 14 balancing exercise. Then what he has done is to take that result and, say by way of a material consideration, ‘although the proposal does not comply with the development plan taken as a whole, material considerations warrant a decision being taken otherwise than in accordance with it’. Hence, he would have allowed the appeal.

49. Then finally I turn to the decision itself; this is an 11 page document. paragraph 24 notes, the heritage assessed status of the conservation area and agreed with the inspector that the appeal site made an important contribution to the significance. The impact, the proposal would detract from the setting of the conservation area, and it would lead to less than substantial harm and noted the conflict with the development plan.

50. Then in 31, the Secretary of State agreed with the inspector, for the reasons given, that the landscape of the site was of low sensitivity, but the decision making should recognise the intrinsic character and beauty of the countryside. For the reasons given by the inspector, the Secretary of State agreed the appeal site should not be considered as a valued landscape, but

also for the reasons given, the harm to the landscape would attract moderate weight, and development would cause minor harm to the landscape.

51. Like the inspector, the Secretary of State, having carefully considered whether Rodley and Farsley Villages would merge, considered that there were separate identities. He also said, in paragraph 33, that he agreed that for the reasons given there would be moderate harm to visual amenity from Calverley Lane, Prow and Oaklands Road, major harm to visual amenity from Coal Hill and minor harm from private viewpoints; so there would be a conflict with Policy P12 of the core strategy, to preserve and enhance the character of the landscape.
52. Then in paragraph 34, he said that he had considered the inspectors analysis of the proposed development on site, on traffic movement and highway safety at 123 to 128. The Secretary of State agreed with the inspector, that the evidence indicates that the proposed off-side highway works would effectively mitigate against potential capacity problems at the Rodley Lane and Dawson Corner junctions; providing improvement in comparison with the 2020 base scenario. He agreed with the inspector, for the reasons given, that the work at Rodley Lane and Ring Road should result in an improvement to traffic conditions on Bagley Lane. Overall, he agreed with the inspector that the appeal proposal would not reduce highway safety or restrict traffic movement in the vicinity of the appeal site, which was how the inspector put it.
53. In paragraph 42, on education, the Secretary of State, noted the education statement of common ground, but then that the appeal proposal, together with other developments, may generate a need for a new primary school. Then he recited what the undertaking would be, and that while the new primary school would not be generated by the appeal proposal alone, no evidence of the availability of an alternative site.
54. Then it is necessary to read, I am afraid at considerable length, the key passages in the decision.
55. First of all, at paragraph 47, the Section 38(6) position is recited, and he agreed with the inspector that overall the scheme was not within the development plan. Therefore the question was whether there were material considerations indicating the proposal should be determined other than in accordance with the development plan.
56. At paragraph 48, he recited the relevant provisions of paragraph 14, paragraph 134 and 132. At paragraph 49 he said that he considered the proposal would cause less than substantial harm to the significance of the conservation area. He gave this harm considerable

importance and weight against the proposal. He went on to weigh this harm to the heritage asset, that is the conservation area alone, together with certain other more minor conservation areas, against the public benefits of the proposal and he says this; he agrees with the inspector and attached a significant weight to the provision of markets and affordable housing. As to highway capacity and safety works and the reservation of the school site provided for on the planning obligations, the Secretary of State disagrees with the inspector's conclusion at 144, that these should attract significant weight in the planning balance. The Secretary of State considers these matters are intended to mitigate the potential effects of the development and render it acceptable in planning terms, and do not constitute benefits in the planning balance.

57. Secretary of State agrees with the inspector the improved connectivity from the cycleway, along the Ring Road and the bus stop, would be benefits to attract moderate and minor weight. In addition, he agreed with him about economic benefits and the other benefits. Then what he says is that overall, and considering paragraph 134 and the second indent of the fourth bullet point in paragraph 14 of the framework, the public benefits of the proposal outweigh the heritage harm.
58. Thus in the first balancing act, which is solely concerned with whether the less than substantial harm to the heritage asset is outweighed, he agreed with the inspector, although he did not give significant weight to the three particular elements referred to above.
59. Then of course he had to turn to the second balancing exercise as the inspector had done, whether the adverse impacts of the proposal, including the heritage harm, would significantly and demonstrably outweigh the benefits when assessed against the policy of the framework. He said that for reasons given above, he had given moderate weight to the harm to the character of the surrounding area and landscape, including harm to the gap between Farsley and Rodley settlements, and gave significant weight to the harm to visual amenity from Cole Hill, and moderate weight to the harm to visual amenity from other locations.
60. Then in paragraph 51, he concluded in his planning judgment, the adverse impact of the proposal, especially in terms of harm to Farsley Conservation Area, and the harm to character and appearance of the surrounding area and the landscape, including harm to the gap between the two settlements, would significantly and demonstrably outweigh the benefits when assessed against the framework policies as a whole. Therefore the second balancing exercise went against the development, and then as a result of that, which is really

the flipside of the inspector's decision making the recommendation, the Secretary of State concludes that there were no material considerations to indicate that the appeal proposal should be determined, other than in accordance with the development plan.

61. I now turn to analyse the arguments. The thesis underlying the claim, is that in paragraph 49, the Secretary of State was disregarding or forgetting the fact that first, the Rodley Lane works would do more than mitigate the adverse traffic flows which would otherwise be caused by the development, because there would be a significant drop in the delay at the roundabout from what the 2020 base scenario would otherwise show; Secondly, that there were elements of the Culverley Lane junction works which would lead to a net improvement in safety; and thirdly if a school as built, because it turned out there was increased need and the council decided to build it, that would not merely serve the need arising from the development, and there is a reference to calculations suggesting it would be something like 75 primary school children, but would serve other communities in the locality as well. That, says the claimant, that the inspector must effectively have forgotten or disregarded those features of those elements, is shown by the fact that he says they do not amount to benefits in the planning balance. In my judgement that is far too narrow and artificial a way to read his decision here.
62. First, as the claimant has pointed out, it would be odd if the Secretary of State had really not been alive to the factual details of the three elements, because he had referred to them earlier on. Second, the previous sentence in paragraph 49 is in my view, of great importance, and it shows where he is coming from. Indeed it is an echo, although a disagreement with similar words used in paragraph 144 of the inspector's decision. What he says is this; that as for those features, the Secretary of State disagrees with the inspector's conclusion that these should attract significant weight in the planning balance. Third, the Secretary of State was in fact right to say that these features constituted mitigating measures, and in fact as will be appreciated from the extracts of the statements of common ground which I have read, those statements are scattered with references to mitigation. At one point, Miss Wigley for the claimant, relied upon the fact that in relation to the Rodley Lane Ring Road junction works, it was described as more than mitigation, but that does not go very far because exactly the same phrase as used in respect of the Dawson interchange works, which no one had suggested, created a net benefit.
63. What it seems to me, on a fair reading, the Secretary of State was emphasising was that any net or residual benefits, and I accept they were of some significance as far as Rodley Lane is

concerned, all grew out of and came about by reason of the need to adopt mitigating measures as a result of the adverse traffic consequences of the development in the first place. To that extent, I agree with the way in which the matter was put in paragraph 4 of the Secretary of States skeleton argument, that the application was never led by highways or education considerations, it was not a form of enabling development. The issues of the offsite highway works and the school came into the picture by virtue of an identified need for planning obligations to accommodate the impacts that the development would give rise to.

64. The off-site highway works and the school did not form part of the development, and as far as the school is concerned, all of this was only in the context of a potential need. To some extent, although it is not the most important of the points, it is noteworthy that the claimant chose not to stress the so-called benefits arising from the highway works, although I accept what is said about them in the statements of common ground and I refer there to what is recited at paragraph 59 of the report.
65. None of that is to say that specific and very positive benefits cannot arise out of mitigation matters, but rather the point is, that the Secretary of State was entitled to put them in context and recognise, or take the view, that as he saw it, essentially that was all about mitigation, even if the ultimate result of the works which were going to be carried out, yielded some net benefits. Further, to take the view that when it came to weighing all the factors or the planning balances, they were not benefits which should be given any significant weight, and that, in my judgment, on a fair reading, is what he was really saying in paragraph 49.
66. Where the Secretary of State was drawing a line, and he did, was clear from the fact that he accepted that the new cycleway and the link through the development, were benefits which should attract some weight because he says so. That is because, as is plain from the statement of common ground, this was not about mitigation at all. No-one spoke of it as mitigation. True it is that apparently the lack of such a cycleway was one of the Council's original objection to the scheme, but I do not see how that affects the position. To all intents and purposes, that was regarded as a pure stand-alone benefit, if I can put it in that way. I do not see that the compendious description of all the highway works in the statement of common ground as being mitigation, either in 1.1.6 or 6.1.1, really alter the position so far as the cycleway is concerned. For that reason it would be wrong to say, as had been suggested on behalf of the claimant, that the Secretary of State was somehow acting internally inconsistently, by giving the cycleway some weight as a putative benefit,

and not the three elements, because on the footing that the cycleway was also a mitigation measure. For these purposes and for the inspector it was not, so the Secretary of State accepted it had some free standing significance.

67. Another example of the difficulties about it, is that if one goes to the Dawsons Corner point; if the statement of common ground there really meant what it said, which was that it was more than mitigation and so amounted to a net benefit, neither the Secretary of State nor the inspector looked at it in that way. That illustrates the danger of emphasising too much the particular working used in the statement of common ground and or of reading them as if they were a statute. It is not as if every word of the statement of common ground has to be followed slavishly by either the Secretary of State or the inspector for that matter.
68. If one looks at paragraph 34, though it does make reference to improvements and so on, the overall picture painted in paragraph 34 by the Secretary of State in his take on it, was to look at it overall as mitigation. Thus in truth the real point is that what the Secretary of State was doing, was to say that these three matters should not be given significant weight. It is true that there are various planning balancing exercises here; there is not just one. There are two of them mandated by paragraph 14, but then we come to the ultimate one, the one which takes precedence, which is under Section 38(6), but it really does not matter which planning balance one is referring to. Taken overall in context what the Secretary of State was saying, as he was entitled to do, was that these elements were of no real force of weight here. What he was not doing, was for example, forgetting about the fact, as he had recited earlier on, that, for example the Rodley Lane works would actually create a significant reduction in waiting time from the 2022 base scenario if the anticipated works were carried out. Therefore, I simply do not see the exercise which I consider the Secretary of State has undertaken as amounting to anything more than the application of his own planning judgement, even though it led him to the opposite conclusion from the inspector.
69. Indeed appellations like “mitigation benefit” may more often be in the planning eye of the beholder. They are not fixed terms of art, much less legal terms, and in that respect, I gratefully adopt the way in which Kerr J put it succinctly, when he refused permission on paper, and he said this:

‘The distinction between planning benefit and mitigation of a detriment is often artificial. Mitigation of a detriment affects what the net benefits are. The defendant’s task was to exercise planning judgment in the public interest weighing the pros and cons, and judging how to strike the balance’.

70. Of course, it is possible to describe an incremental or a net improvement on the status quo

as affected by a mitigation measure as itself a benefit, but not to do so does not without more, mean that that part of the decision is irrational. It all depends on the context, the nature of the exercise and the other words used, and in particular the preceding sentence in paragraph 49 referring to significant weight.

71. The flaw in the claimant's case, therefore as I see it, is to make and rely upon a rigid demarcation between what it says is the Secretary of State's erroneous and irrational failure to call the three features 'benefits', that is impermissible, while instead taking the view that whatever one called them, no significant weight should be attached to them which would be permissible.
72. In truth, in this case, and however you describe them, it was clearly all a matter of weight for the Secretary of State. If a view is taken that essentially the measures were mitigation, even if they produced some incremental benefits, the Secretary of State was well entitled to give them little or no weight in the balance. Again, the net incremental benefits referred to by the inspector were in fact themselves couched in broad terms, as will be clear from my recitation of the report and at times were interchanged with references to improvements which were needed as mitigation. It was therefore, a matter of planning judgment for both the inspector and the Secretary of State, how to assess their weight in the various balancing exercises, leading to the ultimate balancing exercise under Section 38(6). This is a case par excellence, for observing the injunctions of Lindblom J in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government & Anor* [2014] and Lang J in *Good Energy Generation Ltd v Secretary of State for Communities and Local Government & Anor* [2018].
73. The Secretary of State's decision was detailed and carefully drawn and logically structured. He made it quite clear where he disagreed the inspector, and essentially why, and it was over the question of significant weight. That was an exercise of planning judgment which he was wholly entitled to make. Accordingly, for those reasons, this application is dismissed.

End of Judgment

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