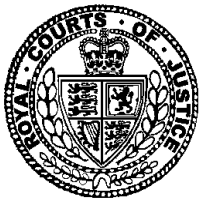

Neutral Citation Number: [2022] EWHC 143 (Admin)

Case No: CO/648/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT FOR WALES

Cardiff Civil Justice Centre
2 Park St, Cardiff, CF10 1ET

Date: 26/01/2022

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

The Queen on the Application of SPVRG LTD	Claimant
- and –	
PEMBROKESHIRE COUNTY COUNCIL	Defendant
-and-	
HERITAGE LEISURE DEVELOPMENT (WALES) LTD	Interested Party

- -
- -

Emyr Jones (instructed by **Lewis Lewis & Co LTD**) for the **Claimant**
James Findlay QC and **Ruchi Parekh** (instructed by **Pembrokeshire County Council**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 11 October 2021

- -

Approved Judgment

Mrs Justice Steyn :

A. Introduction

1. This judicial review claim is a challenge to the decision of Pembrokeshire County Council ("the Council") to grant the interested party's application (19/1340/PA) for planning permission under section 73 of the Town and Country Planning Act 1990 ("the 1990 Act") in relation to an established caravan park at Heritage Park, Pleasant Valley, Narbeth. When the claim was issued the challenge was to the resolution to approve the application made by the Council's planning committee on 9 February 2021. Subsequently, on 27 May 2021, the decision notice granting the permission ("the 2021 Permission") was issued and that is the ultimate target of this claim.

2. The 2021 Permission varies conditions 2 and 7 of a planning permission granted on 14 March 2016 ("the 2016 Permission"). The 2016 Permission was itself granted under s.73 of the 1990 Act, varying two conditions of a permission granted on 14 July 1983.

3. The caravan park known as Heritage Park is situated in Pleasant Valley, Stepaside. A Scheduled Ancient Monument (SAM) (Stepaside Ironworks) and associated listed buildings are situated within or adjacent to the site. The claimant is a company incorporated by the Stepaside and Pleasant Valley Residents Group who were originally formed to oppose another planning application made by the interested party in 2019.

4. The claimant's application for permission to bring these proceedings advanced 18 grounds of challenge in respect of three decisions of the Council relating to Heritage Park. On 22 June 2021, I granted permission to pursue seven grounds in respect of the 2021 Permission only, namely: the second limb of Ground 11 and Grounds 12-17 (as they appear in the claimant's amended statement of facts and grounds). I refused the claimant's application for an extension of time, and permission, to challenge the grant of the 2016 Permission and to challenge a decision made on 2 June 2020 to discharge a number of the conditions relating to the 2016 permission.

5. The seven grounds on which the decision to grant the 2021 permission ("the Decision") is challenged, which overlap, are:

   i) The Decision was taken in ignorance of relevant considerations, namely, the 1987 Permission and the s.52 Agreement ("**Ground 1**", formerly the last sentence of ground 11);

   ii) The Council failed to deal rationally with the visual amenity impact of variation of condition 2 ("**Ground 2**", formerly ground 12);

   iii) The Council failed to properly understand or apply policy GN19 of the local development plan ("**Ground 3**", formerly ground 13);

   iv) The Council failed to consider (lawfully or at all) a relevant consideration, namely, the flood risk ("**Ground 4**", formerly ground 14);

   v) The Council's conclusion that the application complied with the development plan was flawed and irrational ("**Ground 5**", formerly ground 15);

vi) The Council failed to assess the fallback position properly ("**Ground 6**", formerly ground 16); and

vii) The Council failed to apply s.38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to condition 7 ("**Ground 7**", formerly ground 17).

B. The facts

6. Mr Alec Cormack has given three witness statements on behalf of the claimant. He refers to himself as a "*relative newcomer to Pleasant Valley*", but he has been a Director of SPVRG Ltd since it was incorporated on 15 September 2020; and he describes having spent many hundreds of hours, along with his wife, on the task of coordinating and collating the research done by the claimant's supporters. His evidence is very largely based on the documents.

7. The Council's Chief Planning Officer, Mr David Popplewell, has also given three witness statements in these proceedings, including a statement confirming that the conclusions set out in the detailed grounds of defence on the questions of implementation of the 1987 Permission and the application and/or enforcement of the s.52 Agreement properly accord with and reflect his professional view, having undertaken a full and detailed review of all the documentation of which he is aware which appears to be relevant to the Heritage Park development.

8. The history of development at Heritage Park is long and rather complicated. Although the challenge is limited to the 2021 Permission, it is necessary to give some historical context to address the claim fairly.

The 1983 Permission

9. The Council's evidence is that, on 16 June 1971, planning permission was granted for static and touring caravans in respect of what is now known as Heritage Park. I have not seen that permission, but it is immaterial. The permission was varied on 28 January 1982 which limited the holiday caravans to 95 static caravans and 55 touring caravans ("the 1982 Permission").

10. On 14 July 1983, planning permission was granted to vary the condition in respect of layout in the 1982 Permission, and it was similarly restricted to the provision of 95 static caravans and 55 touring caravans ("the 1983 Permission").

The 1987 Permission and s.52 Agreement

11. On 3 March 1987, planning permission was granted by Dyfed County Council for the change of use of the site to a heritage project – the 'Stepaside Industrial Heritage Project at Stepaside' - ("the 1987 Permission"), subject to a s.52 Town and Country Planning Act 1971 agreement ("the s.52 Agreement"). The 1987 Permission states:

> "…the County Council as local planning authority HEREBY PERMITS:-
>
> **Stepaside Industrial Heritage Project at Stepaside**

> in accordance with the application and plans submitted by you on 7th May, 1986 to the Council, subject to the development being begun on a date which is not later than 5 years from the date of this permission and subject also to the following conditions:-
>
> …
>
> 2. The permission now granted is for the change of use of land only and details of new buildings, alterations and other operations will be subject to separate planning applications, including listed building consent, to the local planning authority.
>
> …"

12. The parties to the s.52 agreement were Saundersvale Holiday Estates Limited (the owner of the caravan park), Dyfed County Council (the local planning authority) and South Pembrokeshire District Council (which was involved in promoting the heritage project). The s.52 agreement required the relocation of caravans from the northern part of the site to the southern part and extinguished the use of the northern part as a caravan site 12 months following the commencement of works; and it permitted the northern part of the site to be used only as a car park and for no other form of development without prior written approval.

13. The preamble to the s.52 Agreement states at (2):

> "The Company are the owners in fee simple in possession free from incumbrances of the said property and have by a written application dated 1st May 1986 applied to the County Council for full planning permission to undertake works on the said property in furtherance of the proposed Stepaside Heritage Project incorporating inter alia the resiting of caravans in the manner and for the uses set out in the plans specifications and particulars deposited with the County Council and set out in the Second Schedule hereto". (Emphasis added.)

14. Clause 3 of the s.52 Agreement states:

> "The Company hereby covenants with the County Council :-
>
> (i) that the caravans and tents currently situated on that part of the said property and shown edged ORANGE on the said Plan No.1 shall be relocated on that part of the said property shown edged BLUE within a period of 12 months from the date of the commencement of any works on site and that the use of the parcel shown edged ORANGE as a caravan and camping site shall be consequently discontinued and extinguished; and
>
> (ii) that the parcel of land shown edged ORANGE shall be used only as a car park for the purposes of the Stepaside Industrial Heritage Project and for no other form of development

> whatsoever without the prior written approval of the County Council.
>
> …
>
> (iv) that no building or other operations or change of use in connection with the planning permission hereby granted other than those required in Clause 3(ii) shall be undertaken, either on the application site or on other adjoining land under their control before a) the necessary facilities for disposal of sewage and b) the highway improvement works as specified in the Third Schedule and shown on Plan No.3 attached thereto have been completed to the satisfaction of the County Council." (Emphasis added.)

15. The Second Schedule to the s.52 Agreement provides:

> "Application dated 1st May 1986 (Reference No.C3/104) for detailed planning permission for development works in furtherance of the Stepaside Industrial Heritage Project incorporating inter alia the resiting of the caravans and tents currently sited on the parcel of land edged orange to the parcel of land edged blue on the said Plan No.1. "

16. It is common ground that the highway works referred to in Clause 3(iv) were undertaken, but the sewage works were not.

17. There is a dispute between the parties as to whether the 1987 Permission was implemented, which is the subject of ground 1. In short, the Council's position is that it has not been (and as a consequence the s.52 agreement requirements do not 'bite'); and, in any event, it is no longer relevant given the 2016 Permission. Whereas the claimant contends it was implemented and remained a material consideration in making the Decision.

The Bird Park Permissions

18. On 8 April 1991, planning permission was granted for a change of use of land (adjacent to the northern part of the site) to a commercial bird park ("the 1991 Permission"). Condition 3 of the 1991 Permission prevented the commencement of development unless a car park was provided for a minimum of 50 cars on land adjacent to or within 100 yards of the application site and was made available for use by visitors to the proposed bird park.

19. On 3 December 1992 permission was granted for an extension (to the south) of this bird park ("the 1992 Permission").

20. On 6 July 1994 permission was granted for a further extension of the Stepaside Bird and Animal Park ("the 1994 Permission"). This much larger extension was adjacent to the southern car park. Conditions 3 and 4 of the 1994 Permission provide:

> "3. The land which is the subject of this consent shall not be brought into use as a Bird and Animal Park until the Local Planning Authority has certified in writing that it is satisfied that car parking authorized by planning permission has been provided and is available for use by people visiting the Bird and Animal Park. The car parking is to provide for a minimum of 50 car parking spaces.
>
> 4. If at any time the car parking referred to in condition No. 3 ceases to be available for use by customers of the Animal and Bird Park, the area of land which is the subject of this consent shall cease to be used as an Animal and Bird Park and shall be closed to the public."

21. It is common ground that the 1991, 1992 and 1994 Permissions (together "the Bird Park Permissions") were implemented and that the Bird Park operated during the 1990s (at least between 1991 and 1997, according to Mr Cormack). An application to renew the 1994 Permission (the last such renewal application) was granted on 17 May 1999, which required cessation of use if a minimum of 50 car parking spaces were not made available at all times.

22. The claimant contends that these permissions are relevant because they were conditional upon there being a car park available for visitors to the Bird and Animal Park. The claimant contends the car park used to satisfy condition 3 of the 1991 Permission was the northern car park; and that this confirms the 1987 Permission was implemented. The Council contends the car park envisaged by the 1994 Permission is another car park: and that the 1994 Permission was granted after the time for expiry of the (unimplemented) 1987 Permission.

The 2001 Permission

23. In 1996 the Council had become the freehold owner of Heritage Park.

24. On 20 March 2001, planning permission was granted by Pembrokeshire Coast National Park Authority, on application by the Council, for 65 caravans and the rebuilding of a derelict dwelling at Heritage Park ("the 2001 Permission"), located to the south of the southern car park. It is common ground that this permission was not implemented.

The Lease and draft Heads of Terms

25. By a lease dated 14 June 2007 the Council, in its capacity as landowner, granted the interested party a long lease (999 years) of Heritage Park ("the Lease"). Both the northern and southern car parks are located within the leased property. The Lease granted by way of easement the right "*for the general public free of charge at all times to pass and repass on foot and with vehicles over and along the car park … together with the right for the general public to park vehicles on the car park*" ("the northern car park covenant"). The latter reference to the car park is to the northern car park.

26. In February 2010, in its capacity as lessor, the Council proposed draft Heads of Terms to the interested party relating to the variation of the northern car park covenant. The draft Heads of Terms proposed entering into a contract under which the restrictions

relating to the northern car park would be transferred to the southern car park, but conditional upon the interested party securing planning consent for an 'approved scheme' which would include a multi-user path to be developed by the Council. The draft Heads of Terms were 'subject to contract' and no further documentation was concluded.

The 2016 Permission

27. In 2011, the interested party made an application pursuant to s.73 of the 1990 Act to vary two conditions in the 1983 Permission. These related to the layout of the site as well as the replacement of the 95 static and 55 touring caravans with 132 static pitches, which would involve the relocation of the existing northern car park.

28. A delegated decision report by a case officer, dated 23 January 2013, recommended that permission should be granted subject to the completion of a s.106 agreement. It is common ground that on 28 February 2013, a month after the officer's report was drafted, the Council adopted a new local development plan, which was not referenced in the report. The officer addressed the flooding implications at paragraph 8.5 in these terms:

> "The application site is located within a C2 flood zone and a Flood Consequence Assessment has been submitted with the application. This has been provided to Environment Agency Wales for comment. EAW's response to consultation on this current proposal offers no objection to the application. This is upon the basis of the existing extant consent on the site for touring caravans and that the proposed static caravan pitches would result in a benefit and betterment in terms of flood risk at the site. Given this advice it is considered that the proposal complies with the requirements of Policy 113. "

29. On 14 March 2016, the s.73 application for the varied layout and the 132 static pitches was granted. The delay in issuing the decision notice was due to delays in concluding the s.106 agreement.

30. The Council took the view, when granting the 2016 Permission, that the 1983 Permission was extant. This claim originally challenged that view, but the 2016 Permission is one of the decisions that the claimant was refused permission to challenge, first by HHJ Harman QC on the papers on 28 April 2021 and then by me at an oral hearing of the claimant's renewed application on 22 June 2021.

The 2020 Permission

31. On 15 August 2019, the interested party submitted a further planning application in respect of Heritage Park for the installation of 75 bases for the siting of holiday caravans and associated facilities including a spa, holiday apartments, café and equestrian stables. In a report dated 10 March 2020 ("the March 2020 Report"), the Director of Community Services recommended the application be refused. Amongst other matters, the March 2020 Report addressed the flood risk, stating:

> "6.15 Parcels A and F are primarily located within flood zone C2 - an area of the flood plain without significant flood defence infrastructure. In respect of the proposed bases to accommodate lodges (to be within the definition of a caravan) on Parcel A, residential premises including caravan parks are defined by TAN15 as "highly vulnerable development" in terms of flood risk. TAN15 states that highly vulnerable development should not be considered in flood zone C2. This element of the Proposal is therefore contrary to guidance in TAN15 and thus policy GN.1 in that the proposal would result in unacceptable harm to health and safety including by reason of flooding. Whether there exists any other material considerations that might outweigh this policy conflict is addressed further in this report. Natural Resources Wales (NRW) confirm that there exists no change in vulnerability in respect of Parcel F. However, due to flood risk and potential flood depth during a flood event, flood resilient measures must be incorporated into design. This could be assured by planning condition.
>
> …
>
> 6.40 Planning permission for an amendment to the layout of the site and replacement of 95 static and 55 touring caravan pitches with 132 static pitches was approved on 14th March 2016 (ref.11/0585/PA). This consent remains extant. 30 pitches remain to be provided and, of these, the planning permission includes the siting of 29 static caravans on land Parcel A. This current application proposes instead 23 bases to accommodate lodges on land Parcel A. Having regard to the total number of bases that are proposed (75No.) compared to the number under the extant consent, and the conflict with planning policy that has been addressed, this "fall-back" position should be accorded limited weight (including in terms of the planning balance that should be applied to the issue of flood risk in respect of the "fall-back" position). It is also noted that the lodges that are intended to occupy the bases appear to be twin units (up to 15m x 6m on land parcel A); twin units are specifically excluded by reason of a condition on planning permission ref.11/0585/PA and, in respect of flood risk at Parcel A, are likely to accommodate more visitors per unit when compared to single static caravans." (Emphasis added.)

32. The application was withdrawn by the interested party prior to its consideration by the planning committee in March 2020.

33. In March 2020 the interested party applied to discharge Conditions 3, 4, 5 and 6 of the 2016 Permission. This application was approved on 2 June 2020 ("the 2020 Permission"), following the recommendation of a delegated officer's report dated 1 June 2020. This is the other decision that the claimant sought, but was refused, permission to challenge in this claim.

The Decision – the 2021 Permission

34. In March 2020 the interested party also made an application pursuant to s.73 to vary conditions 2 and 7 of the 2016 Permission ("the Application") which conditions stated:

> "2. None of the 29 re-located caravan units within the area of the former craft village car park as shown on Drawing Number 1203/M/14 Rev A received 6th February 2012 shall be twin-unit caravans.
>
> *Reason: To limit the visual impact of the development and to accord with Policy 78 of the Joint Unitary Development Plan for Pembrokeshire (adopted 13 July 2006).*
>
> …
>
> 7. The "proposed public car park" as shown on Drawing Number 1203/M/11 Rev B received 6th February 2012, shall be constructed and available for public use prior to the occupation of any of the 29 caravan units within the area of the former craft village car park. This car park shall at all times be available for public use.
>
> *Reason: To ensure adequate parking provision and to accord with Policy 100 of the Joint Unitary Development Plan for Pembrokeshire (adopted 13 July 2006).*"

35. The Application sought the removal of the requirement in condition 2 that none of the 29 units should be twin-unit caravans. In relation to condition 7, the Application sought to vary the condition to enable caravan units in the north of the site (but not on the site of the northern car park) to be occupied prior to the "*proposed public car park*" (that is, the southern car park) being constructed and made available at all times thereafter for public use. The proposed variation of condition 7 continued to prohibit occupation of any caravan units located on the site of the northern car park until such time as the southern car park had been constructed and dedicated to the public. It is common ground that the southern car park already exists (and existed). The additional steps required to comply with the construction element of condition 7 would involve addressing matters such as putting up appropriate signage.

36. The Application was referred to the Council's planning committee, which resolved at a meeting held on 10 November 2020 to approve the Application subject to a deed of variation in respect of the s.106 agreement.

37. On 8 January 2021, the claimant sent the Council a pre-action letter in respect of the resolution of 10 November 2020 (and the 2016 Permission), to which the Council responded on 29 January 2021 highlighting, among other matters, the very significant delay in respect of the 2016 Permission. Following receipt of the pre-action letter, the Application was referred back to the committee on 9 February 2021.

38. The report of the Director of Community Services to the Council's planning committee, dated 9 February 2021 ("the Officer's Report"), asked members to "*consider matters*

afresh". The Officer's Report recommended that the Application be approved subject to the conclusion of a Deed of variation. The Officer's Report noted that the "*part of the site that is subject to the relevant planning conditions is a level parcel of land towards the site's northern boundary part of which is a car park. It benefits from planning permission for 29 static caravans…*".

39. The Officer's Report stated:

> "The grant of the 2016 Permission (application reference 11/0585/PA) is not considered a nullity and it is considered that a lawful planning permission was issued, one that has since been implemented."

40. Under the heading "*evaluation*", the Officer's Report included the following:

> "**Condition 2**
>
> 6.1 Condition 2 precludes twin-unit caravans "to limit the visual impact of the development". The layout approved under consent 11/0585/PA by way of discharge of condition consent ref.19/1342/DC provides for sixteen 40ftx12ft caravan bases, four 36ftx12ft caravan bases and nine 40ftx20ft caravan bases. The same layout is included in this application. Provided that a single unit caravan remains within the legal definition (that it is capable of being moved from one place to another), there is no size limitation in the existing consent. However, whether the caravans are single or twin units, their maximum size is ultimately governed by the size of these bases (albeit there may be some "overhang"). The bases are significantly below the maximum dimensions of a caravan that is achievable under the legal definition.
>
> 6.2 The applicant has submitted design parameters that indicate the use of stone skirting and a colour pallet to elevations under a black/grey roof. In respect of twin-units, whilst they would have a pitched roof, their appearance could be considered to be aesthetically more attractive than a typical single static caravan of any likely size. Compliance with the design parameters would also ensure that any single-unit static caravans have an enhanced appearance compared to those achievable under the existing consent. The detailed landscaping scheme that has already been approved would assist in screening or filtering views of the caravans once established.
>
> 6.3 It is considered that the visual impact of twin-unit caravans accommodated on the approved bases would be similar to that of a single-unit caravan (whether a single-unit caravan is of standard or non-standard size) albeit, in reality, there are likely to be a mixture of single and twin-units as the narrower bases lend themselves more to the accommodation of single units. It is also of note that under the existing consent ref.11/0585/PA the

remainder of the units across the site (102 units) are not controlled with most being twin-units.

6.4 An objection has been received based on alleged non-compliance with The Ancient Monuments and Archaeological Areas Act (AMAAA) 1979 due to loss of access by the public to the SAM (Stepaside/Kilgetty Ironworks) and disturbance of the public's enjoyment of the SAM (due to loss of parking spaces and effect of the development on the SAM). … This objection is material to this application to modify the planning conditions only in respect of the effect of the proposed twin units on the SAM compared with the existing consent for single units. Cadw has confirmed that neither of these proposals [the modifications of the two planning conditions] will cause any additional impact to the settings of the SAMs (Stepaside/Kilgetty Ironworks and Grove Colliery). Condition 7 requires the provision of alternative car parking facilities adjacent to the SAM (Stepaside/Kilgetty Ironworks). It is also of note that this Act relates to a discretionary power rather than a statutory duty.

6.5 In these circumstances, the proposed modification of this condition would, as with the existing consent, not result in development that conflicts with the design and visual impact tests, including on the setting of nearby historic assets, of policies GN.1 (General Development Policy) and GN.2 (Sustainable Design) (albeit the actual caravans do not constitute "development") and GN.38 (Protection and Enhancement of the Historic Environment). …

Condition 7

6.6 Planning consent ref.11/0585/PA includes provision for a public car park located adjacent to the SAM. Condition 7 as currently worded requires this car park to be "constructed and available for public use prior to the occupation of any of the 29 caravan units" and that this car park shall at all times be available for public use (albeit that in reality this car park already substantially exists). The reason for the condition is "to ensure adequate parking provision".

6.7 A car park currently exists on part of the land on which the 29 caravan units are to be located. It is of note that there is no requirement under the existing planning consent, including condition 7, that this car park should be retained (including for public use). The application seeks a limited variation to condition 7 to enable only the caravan units outside the existing car park area (amounting to 14 in total) to be occupied prior to the alternative public car park being constructed and available for public use. The current car parking area would therefore still be able to be made available for public use (albeit that this is not a requirement of the current condition 7). The overriding

objective of the current condition is not therefore prejudiced by its proposed modification and there is thus no conflict with policy GN.1 in respect of parking provision and any associated implications for highway safety.

Other matters

6.8 When considering an application made under Section 73 of the Planning Act, whilst the LPA cannot revisit the original permission (in this case consent 11/0585/PA) and reconsider whether it should have been granted in the first place, the Committee should understand that approving an application made under Section 73 would result in a new standalone planning consent coming into existence and case law has established that the principle of development subject to such a prospective consent should be considered having regard to the current development plan and any relevant new material considerations, particularly since the original permission was granted. As the original permission was determined with regard only to the previous development plan (the Joint Unitary Development Plan) it is appropriate to assess the current proposal against the current development plan.

6.9 The development results in the upgrading of touring pitches to static pitches which results in some conflict with Policy GN.19 (Static Caravan Sites). Parts A and B of that policy are not applicable. As to Part C, whilst Stepaside is a large local village as defined in the LDP with the development being well-related to that settlement, it does not provide a community facility not present within the existing settlement (part C2) and small parts of the application site are within two Community Council areas where the principle of such upgrading is not supported (part C3). However, it is evident that of these two small parts of the site, the first that is within the Saundersfoot Community Council area has already been developed in accordance with consent ref.11/0585/PA and the second that is within Amroth Community Council area is not subject to development or the siting of any caravans under consent ref.11/0585/PA. It is also noted that in the supporting text, general support is expressed for upgrading, and whilst that does not negate conflict with policy it is relevant when assessing the extent of conflict in the terms of the development plan as a whole.

6.10 Notwithstanding the benefits of the variation of the section 106 agreement, the development would create an enhancement for those reasons addressed in paragraphs 6.2 and 6.3; this would be supported by reason of policies SP 5, GN.1 & 2 and GN.38 (and GN.19 in part) in relation to controlling appearance within defined design parameters that would ensure a good quality design, and an improved layout and comprehensive landscaping

scheme that did not form part of the original consideration of application 11/0585/PA, to the benefit of the setting of the SAM. In so far as GN.1 is concerned with flood risk, the proposal results in a neutral effect when compared with the implemented consent (this is further discussed in paragraph 6.13.) On balance these matters are considered to outweigh the non-compliance with policy GN.19 and thus the development would be in accordance with the LDP when considered as a whole.

6.11 Even if the above view is not accepted, it is noted that planning permission 11/0585/PA has been lawfully implemented and the 29 caravan units could also be lawfully provided under that same consent. The proposed modified conditions have been shown to raise no substantive planning issues on detailed matters. This fall-back position should be accorded substantial weight and is a material consideration that supports the proposed development. It is considered the fall-back is realistic and is capable of implementation (and indeed has been largely implemented with works continuing) if this application were to be refused. Therefore, even if the development was considered to be contrary to the development plan then the benefits of the proposal and the fall-back position would nevertheless outweigh non-compliance with the plan and permission should be granted. Further it is considered that neither alteration to the conditions goes to the heart of the permission. It is asserted in the threat of challenge that the original permission cannot be implemented in so far as the northern car park is concerned unless and until the lease is varied. However, that has not prevented implementation of the original permission and in so far as relevant would apply to both the original permission and any new permission alike.

6.13 Representations have raised a number of issues most of which have been addressed in this report. On those that have not been, the following comments are made:

…

- Flood risk, potential pollution and effect on wildlife are matters considered at the time of the original application and are not a material factor in the determination of this application. Nevertheless on flood risk, the part of the site subject to this application is located within flood zone C2 – an area of the floodplain without significant flood defence infrastructure. Natural Resources Wales (NRW) did not request the imposition of condition 2, it was placed on the consent for visual amenity reasons. Nevertheless, as addressed in the report, the size of either single caravans or twin-units is ultimately governed by the size of the bases that have already been approved; the maximum size of a twin unit caravan could thus be

> similar to what could be achieved with a single unit. Thus there is no evidence to suggest that the number of occupants would be materially greater with twin units when compared to single units. …" (Emphasis added.)

41. The Officer's Report concluded:

> "6.14 The proposed conditions can therefore be modified in accordance with the recommendations in this report. In respect of condition 2, the visual impact of any twin-units would not be significantly greater than a single-unit caravan and would not result in an unacceptable visual impact subject to compliance with the layout that has already been approved and the design parameters that have been included. In respect of condition 7, the objective of the current condition would not be prejudiced by its proposed modification.
>
> 6.15 When considering the application with regard to the development plan, it is considered that there would be no conflict with the LDP but in any event the fall-back position of the existing consent should be afforded substantial weight and therefore there is no basis upon which to reconsider the principle of permission."

42. At the meeting of the planning committee on 9 February 2021, a number of councillors referred to the site visit that members had undertaken in September 2020. Mr Popplewell addressed the statement in paragraph 6.13 of the Officer's Report that flooding is not a "*material factor*" and advised that "*flooding is a material consideration*" and "*TAN 15 is a relevant consideration*". The transcript of the meeting sets out the advice he gave orally as follows:

> "1:14:35
>
> …I think the reference that has been made to flooding not being material factor is a reference to the situation that the 2016 [permission?] was actually a variation of an earlier planning permission and as part of that Application the development created a betterment in terms of flood risk, so whilst there was conflict with the advice in TAN 15, the conflict with TAN 15 was less than the conflict caused by the development that the 2016 Application sought to vary. Now as the current application is a variation of the conditions of the 2016 permission the argument about betterments still applies because as part of this variation of condition application a new permission is issued. That permission if compared to the fallback position that led to the 2016 permission is a betterment in terms of flood risk, so whilst there is technically non-compliance on the development as a whole with the criterion seven of GN1, the situation is that the development is a betterment in relation to the application which the 2016 commission [sic] flowed from so that that is really to say that flooding is a material consideration but it is not

a material consideration that plays as heavily in consideration of this application as objectors would suggest.

1:16:28

The second issue I would raise is that in respect of the apparent contradiction between the approach taken on application 19/0506 under current application the 19/0506 application withdrawn from committee in March of last year was for a major development that related to a lot of elements. And there were elements and the majority, well the elements of that scheme were contrary to policy and contrary to the plan and therefore there was a recommendation of refusal. In such circumstances the convention is that all matters that are problematic in terms of policy are raised as reasons for refusal. Such that if the matter goes to appeal those matters that could be addressed if an appeal was going to be successful could be dealt with and could be used as a mechanism to ensure planning conditions so flood risk was mentioned in order that if on appeal an inspector considered the application acceptable the flood risk reason would be used as a mechanism to ensure that there were suitable conditions to mitigate the impact on flood risk such as the caravan anchoring and the flood evacuation plan which were conditions of the 2016 permission.

1:18:01

So on the face of it while appears to be a contradiction there isn't a contradiction the current application is considered to have some conflict with planning policy because there are elements of policy GN19 that it doesn't comply with, but it is compliant with the plan and therefore there is a recommendation of approval in those circumstances the flood risk issues are dealt with by conditions which require the approved caravan anchoring details and the approved flood evacuation measures be conditions of any permission the committee grants.

…

1:20:11

Yes, I just wanted to, well reiterate the points that flooding is a material consideration, but it is one that has been assessed in relation to the fallback position and the other issue I would just mention is that with regard to twin unit caravans and single unit caravans; within the legal definition of a single unit caravan, there is no reference to the size of a single unit caravan. The definition of a single unit caravan is a structure that is adapted for human habitation, which is capable of being moved from one

> place to another. So in that respect, there is no size limitation for a single unit caravan whilst there are standard sizes of single unit caravans, there is no restriction on the size of a bespoke or you know, caravan that is manufactured. So in that respect the assessments in relation to the visual impact between unit caravans, and the flood issue in respect of occupancy, has been based on an assessment of the size of twin unit caravans versus the size of... the size of a single unit caravan. Which as I say is not defined in terms of dimensions…
>
> …
>
> 1:27:44
>
> The second point about flood risk is that we've acknowledged that TAN 15 is a relevant consideration and that flood risk is a material planning consideration, and what we are saying is that insofar as it is a material consideration, it does not merit significant weight in this instance because this is an application to vary two conditions of an implemented permission and the difference between that implemented permission and the permission generated by this variation of condition is not significant and in part that is because there is no restriction on the size of a single unit caravan as I indicated so whilst it on the face of it, it might appear that the twin unit caravan would be larger than a standard single unit caravan, you can't make the same judgement that a twin unit caravan is larger than any single unit caravan. (Emphasis added.)

43. There was then an exchange between the Chair of the committee and Mr Popplewell as follows:

> "Chair:
>
> 1:28:52
>
> So, in terms of the impact of this proposal to amend the exiting consent the impact over and above the impact of the previous consent as regards flooding is not – perhaps appreciable is the wrong word – it cannot be quantified, it's not significant enough, simply because it's not something which was quantified by the size of the bases in the previous consent. The impact over and above the previous consent is not something which is necessarily going to be – in fact it's possible it could be reduced, is it David? It's the unknown??
>
> Mr Popplewell
>
> 1:29.37

> Well, it is an unknown, and again the point is that, you've heard comments that a twin unit caravan is larger than the single unit caravan and that is the case for standard sizes of single unit caravan, but as there is no legal definition of a caravan which includes a size limit there is nothing to stop, technically, somebody putting a single unit caravan of a size equivalent to or even greater than the size of a twin unit caravan. There are questions as to the likelihood of that which we have considered. Clearly getting an off-the-shelf single unit caravan will potentially come in a range of standard sizes which are typically smaller than twin unit caravans, but that does not mean that a larger than standard size single unit caravan could not be procured. The layout has been designed in a way, you know, to accommodate development in a way that respects the character of the area, respects the character of the Scheduled Ancient Monuments and so, when considering, you know, that unit restriction, that twin unit restriction, was something of a blunt tool to try and restrict the size of caravans, but it didn't restrict the size of single unit caravans and it may be a product of its time and that as the leisure industry grows and expands, the use of non-standard sized units is becoming more and more of a factor that needs to be considered.
>
> Chair:
>
> 1:31:24
>
> Well, thank you again, what I said perhaps wasn't articulated well, but I think I understand now clearly that what was granted previously and what's already on the books might have a more harmful impact potentially or could have a better impact it's such a wide gamut on the previous consent that this amendment to it, it's not likely to … It's very difficult to explain. I understand it, but I can't explain it, and I think you explained it as best as we could probably, but the impact over and above, created by this proposal as regards flooding is not necessarily any greater than what cold have been implemented by the previous concerns [consents?]." (Emphasis added.)

44. Mr Simmons, the case officer for the planning application, also advised the committee at that meeting, stating:

> "1:34:53
>
> … Condition two was not attached to the consent due to flood risk reasons, it was attached to the consent due to visual amenity reasons. The reason condition two isn't there for flood risk reasons is because in 2016 under the 2016 consent, there were tourers on the site, benefiting from the previous consents that were close to the watercourse and therefore as Mr Popplewell mentioned, that consent provides for a betterment - those 29

> units, is a betterment in terms of flood risk, compared with the previous consent. …
>
> …
>
> 1:39:18
>
> Councillor Dennis's second question, if I'm right, asked about the provision of the southern car park, which he is right and you are right, is substantially there at present. To comply with the condition there probably needs to be, you know, further signage and more sort of formality to that, but the car park is nevertheless there. But what needs to be understood is that under the existing planning condition number seven; condition number seven doesn't afford any protection for the existing northerly car park. Under the planning permission that exists at present, that car park could be removed tomorrow. So, you know, the condition seven simply states that none of the units on the 29 unit site can be occupied before the southern car park that's already substantially provided, is provided in its entirety, and the application before you is that rather than none of the units being occupied, that those units outside the existing car parking area can be occupied so there's no additional prejudicial negative for the retention of the existing car park. The 29 units, caravans, could be provided under the existing consent. It's only their occupation that is controlled …"

45. The Committee resolved to grant the 2021 Permission subject to the conclusion of a deed of variation.

46. The Officer's Report did not refer to the 1987 Permission or to the s.52 Agreement. Nor was either document drawn to the committee's attention during the meeting on 9 February 2021. Mr Popplewell has explained that the 1987 Permission (which was granted by a predecessor council) was not on the electronic file and did not form part of the Council's planning database. The claimant had made a number of requests of the Council for documents and, as part of the disclosure exercise, the Council obtained copies of files relating to the 1987 Permission. The 1987 Permission was first considered by Mr Popplewell on 7 May 2021, after the Council had resolved to grant the 2021 Permission (and after permission to challenge that resolution had been refused on the papers) but before the final decision notice had been issued. Mr Popplewell did not refer the matter back to the committee again.

47. Mr Popplewell has explained his view in evidence that neither the 1987 Permission nor the s.52 Agreement were relevant to the determination of the Application. *First*, even if the 1987 Permission had been implemented, the 2016 Permission was the lawful and relevant fallback position by reference to which the Application had to be assessed. And the existence of the s.52 Agreement – even if the relevant provisions 'bite' – does not prevent planning permission from being granted in respect of the northern part of the site.

48. *Secondly*, Mr Popplewell's view, having now (subsequent to the Decision) undertaken a review of all documentation of which he is aware and that appears to be relevant, is that the 1987 Permission was not implemented. The 1987 Permission was for a change of use only and it envisaged further planning applications for any new buildings, alterations and other operations. The nature of the change of use was such that the development to be covered by the anticipated applications was closely linked to, if not inseparable from, that change of use. No such applications were ever received for the proposed car park or otherwise and, in the absence of any further applications or evidence of some change in activity on site, his view is that there is nothing to support the contention that the change of use in fact occurred.

49. Although there is a car park in the northern part of the site, he considers that the works to construct it were separate from the 1987 Permission because it does not accord with the approved plans in terms of layout or size. It is significantly smaller than the car park proposed as part of the 1987 Permission, it is not laid out on an engineered surface and it does not provide for any marked bays. Mr Popplewell expresses the opinion that "*the works required to facilitate the formation of the car park identified in the 1987 Permission would have comprised operational development*". He also notes that "*any operational development carried out by South Pembrokeshire District Council could have been carried out using its permitted development rights as a local authority*". Mr Popplewell does not consider that the correspondence on which the claimant relies (see paragraphs 82 to 86 below) demonstrates that the 1987 Permission had been implemented and the s.52 Agreement was valid, or that Dyfed County Council's view of the matter can be clearly ascertained.

50. *Thirdly,* the s.52 Agreement only provided for the extinguishment of the use of the northern part of the site for the siting of caravans following 12 months from the date of commencement of any works on the site (clause 3(i)). Mr Popplewell's view is that there is no evidence that the works referred to (as defined in the s.52 Agreement) commenced.

51. *Fourthly,* the detailed grounds state, and Mr Popplewell has confirmed that this reflects his view having considered the full circumstances, that:

> "the Council does not consider that there is any planning purpose of the covenant and the car park as envisaged by the 1987 Permission. This is because no subsequent applications for development were submitted and the car park was and is not therefore required in connection with any development on site or, for that matter, in connection with any adjoining development – the Animal and Bird Park for e.g. has ceased to operate."

52. The s.106 agreement was executed by the interested party on 10 May 2021 and received by the Council on 12 May 2021. On 27 May 2021 the Council issued a final decision notice in respect of the 2021 Permission.

C. The legal and policy framework

53. A developer may make an application pursuant to s.73 of the 1990 Act to develop land without compliance with the conditions to which a previous planning permission was granted. Section 73 provides, so far as material:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

54. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

55. It is well established and common ground that a successful s.73 application results in a new permission. The Council had to have regard to the current development plan and any other material considerations (in accordance with s.70(2) of the 1990 Act) and determine the application in accordance with the development plan unless material considerations indicated otherwise (in accordance with s.38(6) of the 2004 Act). See for example *R (Stefanou) v Westminster City Council* [2017] EWHC 908 (Admin) at [36].

56. In *R (Corbett) v Cornwall Council* [2020] EWCA Civ 508 Lindblom LJ (with whom Leggatt and Lewison LJJ agreed) referred to the principles that emerge from *BDW Trading Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493, [2017] PTSR 1337 and stated:

> "27. Of the five points I mentioned in *BDW Trading Ltd.* (at paragraph 21), three seem particularly relevant here: that "the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions"; that "section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty"; but that "the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole".

> 28. In *R. v Rochdale Metropolitan Borough Council, ex parte Milne* [2000] EWHC 650 (Admin) … Sullivan J., as he then was, said (in paragraph 48):
>
> > "48. It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: "is this proposal in accordance with the plan?" The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. …".
>
> He then referred to the observations to that effect made by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 (at p.1459D-F):
>
> > "… [The decision-maker] will … have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it. …"."

57. In *R (Samuel Smith Old Brewery) (Tadcaster) v North Yorkshire County Council* [2020] UKSC 3, [2020] 3 All ER 527 Lord Carnwath observed at [21]:

> "… The respective roles of the planning authorities and the courts have been fully explored in two recent cases in this court: *Tesco Stores Ltd v 983, and Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 WLR 1865. In the former Lord Reed, while affirming that interpretation of a development plan, as of any other legal document, is ultimately a matter for the court, also made clear the limitations of this process:
>
> > "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and

> their exercise of their judgment can only be challenged on the ground that it is irrational or perverse …" (para 19)

In the *Hopkins Homes* case (paras 23-34) I warned against the danger of "over-legalisation" of the planning process. I noted the relatively specific language of the policy under consideration in the *Tesco* case, contrasting that with policies:

> "expressed in much broader terms [which] may not require, nor lend themselves to, the same level of legal analysis …""

58. The proper approach to challenges to decisions based on officer's reports is settled. In *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452 Lindblom LJ (with whom the Chancellor of the High Court and Hickinbottom LJ agreed) observed:

> "40. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision- making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. … Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, <u>they are entitled to expect – in every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.</u>
>
> 41. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court … and applied in many cases at first instance …
>
> (2) The principles are not complicated. <u>Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence,</u> and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at

> paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother District Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere." (Emphasis added.)

59. In *Mansell,* Lindblom LJ addressed the law relating to fallback positions at [27]:

> "The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
>
> (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.

> (2) The relevant law as to a "real prospect" of a fallback development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan LJ's judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As Sullivan L.J. said in his judgment in *Samuel Smith Old Brewery*, in this context a "real" prospect is the antithesis of one that is "merely theoretical" (paragraph 20). The basic principle is that "… for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice" (paragraph 21). Previous decisions at first instance, including *Ahern and Brentwood Borough Council v Secretary of State for the Environment* [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, "… "fall back" cases tend to be very fact- specific" (ibid.). The role of planning judgment is vital. And "[it] is important … not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court" (paragraph 22).
>
> (3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."

60. In *Stefanou* Gilbart J held at [91] to [92]:

> "One such consideration, and no doubt one to which WCC might have wanted to ascribe great weight, was the fact that there was a permitted scheme in existence, which if it went ahead would include the restoration of the listed building. It may be that, on applying s 70(2) TCPA 1990 and s 38(6) PCPA 2004 that fallback position would have outweighed the clear objective of

> CM 28.1 of preventing a development with basements such as these from being built, with the consequent disruption of the street scene and of neighbours for an extended period. But assessment of the weight to be given to the fallback position must have looked at the likelihood of it going ahead without the proposed 2016 amendments, and of the likelihood of a scheme not going ahead which would not have included basements of the scale proposed here.
>
> Those considerations were simply never explored by WCC. I do not suggest what weight should be given, nor how the competing advantages or disadvantages should be weighed the one against the other, or the s 38(6) balance determined. That is a matter for the local planning authority, and not for the Court."

61. The claimant also draws attention to the authorities regarding the admissibility of *ex post facto* reasons. In *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin), Chamberlain J summarised the principles at [78]:

> "So far as *ex post facto* reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons: *Ermakov*, pp.325-6. Evidence of the former kind may be admissible; evidence of the latter kind is generally not. Furthermore, reasons proffered after the commencement of proceedings must be treated especially carefully, because there is a natural tendency to seek to defend and bolster a decision that is under challenge: *Nash*, [34(e)]."

The Local Development Plan

62. Prior to the adoption of the Council's Local Development Plan ("the LDP") on 28 February 2013, the relevant local plan was the Joint Unitary Development Plan for Pembrokeshire ("the JUDP"), which had been adopted in 2006. Policy 113 of the JUDP (Development and the risk of flooding) provided:

> "Development will not be permitted where:
>
> i) it involves land which is at a risk of flooding, including tidal inundation; or
>
> ii) it is likely to increase the risk of flooding elsewhere; and
>
> iii) the development would hinder flood control or maintenance works."

63. The LDP provides, so far as material:

> "GN.1 General Development Policy

> Development will be permitted where the following criteria are met:
>
> …
>
> 7. It would not cause or result in unacceptable harm to health and safety; …
>
> GN.19 Static Caravan Sites
>
> A. Proposals for new static caravan and chalet sites or extension to existing sites by an increase in the number of pitches will be permitted where:
>
> 1. the site is within the Settlement Boundary of a defined settlement;
>
> B. The enlargement of the area of a static caravan or chalet site will be permitted where it would achieve a demonstrable overall environmental improvement both for the site and its setting in the surrounding landscape.
>
> C. Upgrading of touring pitches to static pitches will be permitted where:
>
> 1. The site is well-related to a settlement identified in the hierarchy as a Service Village, Service Centre or Town; or
>
> 2. The site is well-related to a Local Village, and will provide a community facility not present within the existing settlement, and
>
> 3. In all cases the following should apply:
>
> i) There is no overall increase in the number of pitches; and
>
> ii) There would be a demonstrable overall environmental improvement both for the site and its setting in the surrounding landscape; and
>
> iii) The site is outside the Community Council areas of Amroth, St Florence, East Williamston, Penally, Saundersfoot and St Mary out Liberty."

64. Paragraph 6.85 of the LDP states:

> "…the upgrading of existing touring pitches in sustainable locations can offer the opportunity to improve the overall stock of holiday bed spaces in the static caravan sector and improve existing touring sites. It will apply only to existing touring pitches that are fully authorised by express planning permission.

> Development should not have adverse landscape impacts and should incorporate screening to ensure that the site blends into the landscape."

65. Technical Advice Note 15 – Development and Flood Risk ("TAN 15") was published in July 2004 and paragraph 6.2 provides:

> "6.2 New development should be directed away from zone C and towards suitable land in zone A, otherwise to zone B, where river or coastal flooding will be less of an issue. In zone C the tests outlined in sections 6 and 7 will be applied, recognising, however, that highly vulnerable development and Emergency Services in zone C2 should not be permitted. All other new development should only be permitted within zones C1 and C2 if determined by the planning authority to be justified in that location. Development, including transport infrastructure, will only be justified if it can be demonstrated that:-
>
> i. Its location in zone C is necessary to assist, or be part of, a local authority regeneration initiative or a local authority strategy required to sustain an existing settlement; **or**,
>
> ii Its location in zone C is necessary to contribute to key employment objectives supported by the local authority, and other key partners, to sustain an existing settlement or region;
>
> **and**,
>
> iii It concurs with the aims of PPW and meets the definition of previously developed land (PPW fig 2.1); and,
>
> iv The potential consequences of a flooding event for the particular type of development have been considered, and in terms of the criteria contained in sections 5 and 7 and appendix 1 found to be acceptable."

D. Ground 1: Failure to take into account relevant considerations - the 1987 Permission and the s.52 Agreement

66. As I have indicated, the Council's officers were not aware of the 1987 Permission or the s.52 Agreement prior to the planning committee's resolution to grant the 2021 Permission. It is common ground that the Council did not take the 1987 Permission or the s.52 Agreement into account when making the Decision.

67. The claimant contends that this amounts to a failure to take into account a matter that, acting lawfully, the Council was required to consider. In response, the Council contends, first, that it was not required to take these matters into account. They were not obviously material or mandatory considerations. Secondly, if that is wrong, the Council would, in any event, have made the same decision if it had taken into account the 1987 Permission and the s.52 Agreement, and so relief should be refused.

Admissibility of the Council's evidence

68. The claimant raises a preliminary objection to the Council's evidence, insofar as Mr Popplewell advances reasons why the omission to consider the 1987 Permission and s.52 Agreement is said to be immaterial. The claimant points out that there is no contemporaneous record of any reasons the Council's officers may have had for deciding not to re-refer the Application to the committee when the 1987 Permission and the s.52 Agreement came to their attention. The claimant submits that the Council's case as to the immateriality of the 1987 Permission and s.52 Agreement, in its detailed grounds and Mr Popplewell's statements, goes beyond admissible elucidation of reasons recorded prior to the impugned decision and so, in accordance with the case-law to which I have referred in paragraph 61 above, should be disregarded.

69. The Council suggests this preliminary objection is flawed as there is no reasons based challenge in this case. It is common ground that these matters were considered for the first time by officers on 7 May 2021, many months after the resolution to grant permission. The timing of the Council's explanation is readily understandable in the context of these proceedings. The Council is entitled to respond to the claimant's amended grounds and to adduce evidence going to the question of relief.

70. I am not persuaded that the Council's evidence is inadmissible. This is not a challenge to the officers' decision not to re-refer the Application to the committee. There is no reasons challenge. The case-law with respect to *ex post facto* reasons is concerned with the situation where a decision-maker puts forward evidence as to the reasons it claims to have had at the time of making the impugned decision. That is not the position here. It is fully acknowledged that no consideration was given to the materiality or otherwise of the 1987 Permission and the s.52 Agreement when the Council resolved to grant the 2021 Permission as neither the officers nor the committee were aware of those documents at the time.

71. The claimant was granted permission on 22 June 2021 to amend its grounds to rely on the 1987 Permission and the s.52 Agreement. The Council was entitled to address those grounds in its detailed grounds and evidence, including by contesting the alleged obvious materiality of those documents. I also consider that it was open to the Council to adduce the evidence that it has in support of the contention that no relief should be granted, although I acknowledge that the natural tendency to seek to defend a decision that is under challenge has to be borne in mind when evaluating such evidence.

The claimant's substantive submissions on ground 1

72. The reasons for the Decision were given in the Officer's Report, supplemented by the discussion at the committee meeting on 9 February 2021. No reference was made to the 1987 Permission or the s.52 Agreement because it had not been considered either by the officers or the committee. The s.52 Agreement was disclosed as part of the conveyance of the long leasehold interest to the interested party and it was registered as a local land charge, so the material was available to the Council to present to the committee.

73. The Application falls foul of two policies in the LDP, namely, those relating to flood risk (GN.1(7), together with TAN 15) and those relating to caravans (GN.19), and so is contrary to the LDP. In these circumstances, the grant of the 2021 Permission could

only be justified by relying on the fallback position. By acting in ignorance of the 1987 Permission and, especially, the s.52 Agreement, the Council has misunderstood the nature of the fallback position and therefore made an unlawful decision.

74. The claimant contends that even if the 1987 Permission has been superseded by the 2016 Permission, and so is itself irrelevant, the s.52 Agreement prevents development of the northern part of the site and so it is a fundamental feature of the fallback position. Although it is acknowledged that the 2016 Permission has been implemented, the claimant submits it cannot be implemented in the area of the northern car park because that would breach the s.52 Agreement which states that land can only be used for car parking purposes. The fallback position for the northern car park area is use as a car park, not use as a caravan site.

75. This contention is based on the premises, first, that the 1987 Permission was implemented and, second, that clauses 3(i) and/or 3(ii) of the s.52 Agreement (cited in paragraph 14 above) were triggered.

76. The claimant contends the evidence demonstrates that there has been a northern car park in use continuously since the late 1980s. Mr Cormack states in his second statement, at paragraph 9 (and see his third statement at paragraphs 19 and 21):

> "The 1987 permission was definitely implemented. In particular, the car park has been available for use in the north of the site since the late 1980s. This article from the Western Mail 27th May 1989 records the public opening of the Stepaside Industrial Heritage Project."

77. The article from the Western Mail dated 27 May 1989 states:

> "THIS MONTH saw the official opening of the Stepaside Industrial Heritage Society project and Spring Bank Holiday weekend will be its first opening to the public.
>
> These events marked an important milestone which was reached largely thanks to the support and efforts of South Pembrokeshire District Council and over many years the dedicated enthusiasts who formed the basis of the Stepaside Industrial Heritage Society.
>
> What is now open to the public is still a small scale attraction – an interpretative centre and shop, tea room in a landscaped picnic area and horticultural training unit from which plants can be purchases [sic]."

78. In light of Mr Popplewell's evidence (see paragraph 99 below), the claimant accepted at the hearing that the reference in the Western Mail was to a separate, small scale attraction outside the site, not to the opening of the Stepaside Industrial Heritage Park. Nevertheless, the claimant maintains that this shows the existence of the northern car park as motorists could only access the interpretative centre, shop and tea room by parking in the northern car park.

79. The claimant refers to the Minutes of the South Pembrokeshire District Council Stepaside Project Sub-Committee dated 4 September 1990 which recorded:

> "The short-term agreements regarding car parking, site access, etc had enabled the smooth operation of the car park and visitor reception. Saundersvale Estates had agreed to an extension of these arrangements, to be reviewed in October; they had been given an assurance that once the required approval from the WDA had been received then the lease negotiations would be concluded.
>
> A car parking charge of £1.00 per parked car was being collected by a member of the Project Staff, who had been engaged in Section 15 works in the car park…
>
> 9 – SECTION 15/16 WORKS
>
> In respect of Land Reclamation Scheme Works, decisions were awaited from the WDA. Work, however, continued on Section 15 funded Schemes, including land-scaping and general environmental work.
>
> Under the WDA Section 15 Scheme, 80% grants for the Improvement of the Environment approval had been received for a submitted scheme … for works to the main car park, site entrance and landscaping. The total cost over three years would be £70,000, which meant that the Project could incur this expenditure over 48 months as from 1.4.90. This grant would underpin the proposals for entrance improvements, bridge re-construction, etc."

80. The claimant submits that these minutes show the land was being used as a car park, while acknowledging the arrangements referred to are a matter of private law. Nevertheless, the claimant relies on this as evidence that the use of the land had changed from a caravan and camping site to a car park, with an associated change of use to the southern area which could now be used for camping.

81. The claimant relies on the Bird Park Permissions. The claimant contends that the only candidate for the car park required to meet the third condition of the 1991 Permission was the northern car park, as it was the only car park within the location of the area of the Bird Park at that time. The fact that the northern car park existed and was used for the Bird Park is shown by the report for the committee in relation to the 1994 Permission, which states:

> "…the highway authority recommend a conditional consent, but suggest a condition that adequate facilities for parking and turning shall be made available at all times within the site. In fact there is no scope for visitor parking within the site. <u>The original bird park relied on joint use of the main Stepaside Heritage car park at the northern end of the caravan site. This car park has been used, but is limited in size and is in a different private</u>

> ownership. I do not think that a major expansion of the bird park/zoon should be allowed reliant on this alone." (Emphasis added.)

82. The claimant contends that contemporaneous evidence shows that Dyfed County Council took the view that the change of use had been implemented and the obligation under clauses 3(i) and (ii) of the section 52 triggered. In a letter dated 17 June 1991, the county planning officer wrote to Saundersvale Holiday Estates:

> "A matter which does concern you and which I have pointed out to the County Secretary relates to the observed pitching of a tent on Friday 14th June on an area covered by the Section 52 Agreement in 1987 for use as a car park only (Clause 3(ii)); the use for caravanning and tents was to have ceased under Clause 3(i). It may have been that this was an oversight by your staff in this instance and I invite your comments but I trust you will abide by the legal agreement you signed in 1987 in the future."

83. Saundersvale Holiday Estates responded on 20 June 1991 in these terms:

> "Thank you for your letter of 17/6/91. As you are aware the whole future of the Stepaside area depends on the conclusion by SPDC of the agreement to purchase or lease the land they require for the project.
>
> This has led to the delay in signing and implementing the new section 52 agreement, and delay in the sale or lease of the land you refer to to SPDC.
>
> This has inevitably led to a number of false starts and changes in respect of the land areas and their useage.
>
> I understand from SPDC that their final proposal is now with WDA and that a conclusion will be reached shortly. In the meantime we have reached agreement with them over a smaller care park area as an interim measure, which is designed to assist them to provide a presence on the site prior to formal agreement.
>
> In addition we have agreed with the Saundersfoot Steam Railway Co for a temporary line whilst they await the grant of the LRO to enable the whole project to proceed. This was the subject of a separate application to SPDC which has been approved.
>
> Our error appears to have been simply one tent, and I hope that very shortly the position with SPDC will be clarified to enable all the loose ends in this respect to be tidied up."

84. This letter, and a letter from South Pembrokeshire District Council which was described as confirming the assertions made by Mr Caine (of Saundersvale Holiday Estates) "*about the commencement in full of the Stepaside Heritage Project as*

approved/amended", prompted the county planning officer to send internal correspondence to the county secretary on 25 June 1991 which stated:

> "… The argument being put forward is that South Pembrokeshire District Council and Saundersvale Estates have not come to an agreement about the sale/lease of the land necessary to carry out the heritage scheme as approved by Dyfed County Council on 3rd March 1987, therefore the clauses of the 1987 Section 52 Agreement cannot be adhered to. Notwithstanding the ownership situation (1) the road improvements (clause 4) have been carried out, (2) the site entrance has been formed and is in use, (3) part of the car park has been provided. No new buildings have been provided however. For the purposes of the section 52 Agreement could these works be classified as the "commencement of any works on site"? (Clause 3(i)). If you agree that they do comprise "commencement of any works" then my earlier memorandum is correct and requires your attention. If you do not agree that the planning permission has been implemented then South Pembrokeshire District Council has until 3rd March 1992 to commence work in order to take up the 1987 permission and the Railway Company will not require the County Council's agreement.

The evidence does not show how the county secretary responded.

85. The claimant also relies on a letter of 4 October 1993 from the county planning officer at Dyfed County Council to Mr Frost of Heathfield Court Caravan Park (as Heritage Park was then known). The county planning officer referred to the 1987 Permission and wrote:

> "I enclose a copy of the decision notice and would like to draw your attention to:
>
> …
>
> (c) conditions 1 and 6. Before the decision was issued Saundersvale Holiday Estates, represented by a Director whose signature is indecipherable and Mr A. Caine as Secretary, singed an agreement under s.52 of the Town and County Planning Act 1971 with the County and District Councils. <u>That agreement which is binding to successors in title, required</u>
>
> …
>
> (ii) the removal of caravans and tents from an area to the north of the Company's site to be relocated to the north, north-east, east and south-east of Golden Grove and the vacated land to be used only as a car park for the purposes of the Project and for no other form of development without the prior approval of the County Council; …

> Although there was a clear delineation on the 1987 plan between the SIHP area and the caravan park the application site, delineated by a red line included the existing touring caravan and tent park and where it was to be relocated. Therefore there is no permission other than that granted in 1987 for the relocation of 41 touring caravan pitches as described in (ii) above near to Golden Grove, on land which straddles the National Park Boundary, and this permission is linked to a number of other aspects of the caravan park and on highway works by conditions and agreement. You can not therefore implement the touring caravan element without the other matters referred to above.
>
> …
>
> The planning situation with regard to your land holding at Stepaside as well as having been extremely contentious is obviously extremely complex as apart from the above there are decisions made by the National Park and the District Council for the land wholly within their administrative areas. From the short visit to your site it was difficult to ascertain whether the works you have been undertaking are within the terms of the various permissions or whether they can be considered permitted development. Therefore, before the meeting between officers of the three authorities and your representatives can take place I would ask that the enforcement officers from the authorities look at the site in more detail as soon as possible and prepare reports for the planning officers involved so that they will have as much information as possible available to them when discussing your proposal in more detail. …" (Emphasis added.)

86. The claimant relies on a further lengthy letter dated 15 April 1994 from the county planning officer regarding the planning history of Heritage Park. Amongst other matters, having referred to the grant of the 1987 Permission and the s.52 Agreement (which was described as applying to all successors in title of the land to which the Agreement relates), the officer wrote:

> "The highway works have been completed but the sewage facilities have not. Therefore, no other development included in the planning application should be carried out until the facilities are n place. Whilst clause (ii) was exempt from this limiting requirement, Condition 2 on the decision notice makes it quite clear that the planning permission was for change of use only. Therefore the earthworks carried out at the end of last year (below Golden Grove) by your predecessor was unauthorised and the position needs to be regularised before the area can be used for touring caravan pitches."

87. Mr Cormack states, in his second statement at paragraph 15:

> "What is clear to the residents on the ground is that the use of the land at the northern end of the site did change. Since the 1980s,

> it has only been used as a car park, and not a caravan site. The lawful use of the northern area thus became car park use and any reversion to caravan use would, as I understand matters, require a new planning consent to be granted."

88. The claimant contends a note on the 2001 permission from the Environment Agency which refers to the extant use "*for up to 95 static caravans and 30 tourers*" is significant. This is because the 1983 Permission allowed 95 static caravans and 55 tourers. The claimant contends the inference to be from this discrepancy is that the Environment Agency understood caravan use had been extinguished by virtue of the implementation of the 1987 Permission and s.52 Agreement and so the number of touring caravans which could be accommodated had decreased.

89. The claimant submits that the geographical scope of the Council's application for the (unimplemented) 2001 Permission (see paragraph 24 above), which related to the southern part of the site, evidences the Council's understanding that caravan use had been extinguished in favour of car park use in the northern area.

90. In relation to the question whether clauses 3(i) and/or 3(ii) of the s.52 Agreement were triggered, the claimant contends that the obligations falling upon South Pembrokeshire District Council and Dyfed County Council under the s.52 Agreement were performed as the county council granted the 1987 Permission and the district council carried out highway works (conferring a benefit on the caravan park owner). The developer performed its obligations in terms of acquiring land and then dedicating it for highway purposes. The obligation under clause 3(i) was to remove caravans and tents from the northern area and that was done.

91. The claimant emphasises that clause 3(i) refers to 'works' rather than operational development. Further, the obligation to use the northern area for car park purposes under clause 3(ii) is not said to be contingent on 'works on site'. It is a stand-alone covenant which either becomes operative upon the consent being granted or, alternatively, upon the caravans and tents being removed from the orange land pursuant to clause 3(i). In any event, the claimant contends that the formation of the site entrance or the provision of the car park would constitute 'works on site'.

92. If the s.52 Agreement is no longer valid and effective, it ought to have been removed from the local land charges register. The fact that it has not been, and that it was disclosed before the grant of the Lease, is relied on as showing it remains valid.

93. The claimant contends that Mr Popplewell's view that the 1987 Permission and the s.52 Agreement were not material is irrational. He has failed to acknowledge or deal with the contemporaneous evidence that the northern car park was established and has been used continuously for car parking purposes since 1989; no permission other than the 1987 Permission provides consent for this change of use; and the parties to the agreement performed a number of obligations under it, in particular the highway works and the removal of caravans and tents. The fact that existence of a valid s.52 Agreement would not prevent the permission being granted is no answer to the submission that the fallback position has been misunderstood. It is part of the package of planning control and cannot be ignored.

94. In response to the Council's contention that if the s.52 Agreement is operative, it would not enforce it, the claimant submits no such decision has been taken by the Council. Any such decision would be likely to be taken by a committee, it would be reasoned and it would be subject to judicial review. The reasons expressed by Mr Popplewell are, the claimant submits, irrational because the considerations underlying the s.52 Agreement, which the claimant contends are the provision of public car parking and prevention of over-intensification of the caravan park use, continue to apply. The northern car park, on which £140,000 was spent in 2006, still provides space for the public to park when accessing the SAMs or the coast.

95. On flood risk grounds alone, the claimant contends that a local planning authority, acting rationally, should welcome the rediscovery of the s.52 Agreement as providing a means to regulate development in a way that is consistent with the LDP and national policy on flood risk.

The Council's substantive submissions on ground 1

96. The Council maintains that in not having regard to the 1987 Permission or the s.52 Agreement it has not failed to take into account obviously material considerations.

97. First, it is not disputed that the 2016 Permission has been implemented. It follows that even if the 1987 permission had been implemented, it has been superseded by the 2016 permission. The 1987 Permission is spent: see *Cynon Valley v Secretary of State for Wales* [1986] JPL 760 . The 1987 Permission is just part of a previous chapter of the site's planning history. The 2016 Permission was the lawful and relevant fallback position by reference to which the Application had to be assessed. As the 1987 Permission is spent, it is of no obvious relevance to the Council's determination of an application to vary two conditions in the 2016 Permission.

98. Secondly, for the reasons given by Mr Popplewell, the Council considers that the 1987 Permission was not implemented and so the s.52 Agreement did not come into effect: see paragraph 48 above. The fundamental point is that the change of use permitted by the 1987 Permission was a change to use as an industrial heritage park, with an associated car park. It was not a change of use to a free-standing car park. That change of use never happened.

99. Mr Popplewell has addressed the article that appeared in the press in May 1989 (see paragraphs 76 to 77 above) in his third statement at paragraph 5:

> "The press article states 'what is open to the public is a small scale attraction – an interpretative centre and shop, tea room in landscaped picnic area and horticultural training unit from which plants can be purchases (sic).' The description of what was open to the public does not refer to the development described in the 1987 Permission but rather refers to the development (planning permission D3/1209/88 for Tearoom, Crane Exhibit, Horticultural unit and Flank stone walls to entrance) within a number of sites to the west of the site of the 1987 Permission."

100. The 1987 Permission envisaged further planning applications for new buildings, alterations and other operations. No such applications were ever received, whether in

respect of buildings, the car park or otherwise. The removal of tents and caravans did not change the use of the site. The Council does not dispute that there is a car park in the northern part of the site, but it is not a car park for an industrial heritage park. The Council submits it is instructive that the northern car park is not what was envisaged in the 1987 Permission, namely, a car park with up to 100 bays for cars and 8 for coaches. The northern car park is much smaller than envisaged, it is not laid out on an engineered surface and there are no marked bays. It may have been operated in accordance with the Council's permitted development rights. In any event, Mr Popplewell's view is that such changes as occurred did not occur pursuant to the 1987 Permission.

101. As regards the correspondence, the Council submits that it should not lead the court to draw conclusions contrary to those drawn by Mr Popplewell. The correspondence is incomplete and it contains errors and inaccuracies. The complexity of the planning history was recognised. Moreover, to the extent that the officer appears, in the April 1994 letter, to consider the 1987 Permission to have been implemented and the s.52 Agreement to be valid, this view does not bind the Council and is inconsistent with its current view.

102. Thirdly, the s.52 Agreement only provided for the extinguishment of the use of the northern part of the site for the siting of caravans following 12 months from the date of commencement of any works on the site. The s.52 Agreement envisaged development works in furtherance of the Stepaside Industrial Heritage Project. It clearly did not include the highway works undertaken by the district council. The Council submits there is no evidence that the "works" referred to commenced.

103. Fourthly, even if the relevant provisions of the s.52 Agreement are deemed to be operative, the s.52 Agreement does not prevent planning permission from being granted in respect of the northern part of the site, and the Council would need to consider the planning purpose served by the covenant in deciding whether or not to enforce the obligation. Mr Popplewell, the officer empowered to make enforcement decisions, having considered the full circumstances, does not consider that there is any planning purpose for the covenant and the car park as envisaged by the 1987 Permission and so the Council would not use its discretion to enforce it.

104. The primary purpose of the s.52 Agreement was the development of the industrial heritage project. Clause 3(ii) provided for the northern area (the land edged orange) to be used only as a car park "*for the purposes of the Stepaside Industrial Heritage Project*". That Project ceased long ago and the industrial heritage park does not and never has existed. The car park is not needed for the purpose envisaged in the s.52 Agreement. It is not required in connection with any development on site or even in connection with an adjoining site, the Bird Park for which the northern car park was at one stage used having ceased to operate many years ago.

105. The Council relies on these matters both in support of the argument that the 1987 Permission and the s.52 Agreement were not obviously material and also, in the alternative, that if they had been considered it is highly likely that the decision would have been the same and so, applying s.31(2A) of the Senior Courts Act 1981, no relief should be granted. The Council submits its view on these matters, as explained in detail in its detailed grounds and evidence, is far from irrational.

Analysis and decision on ground 1

106. The essential question is whether the 1987 Permission and the s.52 Agreement were "*so obviously material*" that in omitting to consider them when making the Decision the Council has erred in law: see *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 at [30]-[32] and [41]. It is not enough for the claimant to show that it would have been open to the Council to take into account the 1987 Permission and the s.52 Agreement, the claimant has to establish the Council was legally *obliged* to do so.

107. In my judgment, whether or not the 1987 Permission was implemented, the Council was not obliged to consider it because it has been superseded by the 2016 Permission. I agree with the Council that it is spent and so it is merely part of the planning history of the site. I am not persuaded that it was of any relevance in determining an application to vary two conditions of the 2016 Permission, still less that it was so obviously material that the Council was legally obliged to have regard to it.

108. The planning history of the site is undoubtedly complex. However, the reasons that Mr Popplewell has given for concluding that the 1987 Permission was not implemented are persuasive and, in my view, far from irrational. The 1987 Permission was for the Stepaside Industrial Heritage Project; it was not a change of use to a car park. No operations to establish that project ever began. Indeed, no applications for permission for any of the buildings, alterations or other operations for the Industrial Heritage Project were ever submitted. I accept Mr Popplewell's evidence that the article in the Western Mail in May 1989 was referring to an entirely separate attraction, established under a different planning permission, outside the site.

109. It is evident that a small car park has existed in the northern part of the site for many years, but Mr Popplewell's view that this was not established pursuant to the 1987 Permission is not irrational given the striking differences between the existing car park and what was envisaged by the 1987 Permission. His view that that car park could have been developed using the council's permitted development rights is not irrational.

110. There is much in the contemporaneous documents that can be relied on by both parties. While some of the correspondence seems to indicate that the county planning officer believed, at the time, that the 1987 Permission had been implemented and the s.52 Agreement was valid, the Council is entitled to put relatively little weight on that given the fragmentary nature of the available records and the indications that there were serious questions at the time as to whether that was the case.

111. In any event, it would only be a breach of clause 3(i) of the s.52 Agreement to place caravans on the northern area if, 12 months or more ago, the works envisaged in that clause had commenced. Clause 3(ii) has to be read in the light of that triggering provision in clause 3(i). In my judgment, the phrase "*any works on site*" in clause 3(i) is referable to the development works in furtherance of the Stepaside Industrial Heritage Project, which it was proposed would be undertaken pursuant to full, detailed planning permission, as is made clear in paragraph 2 of the preamble and the second schedule. I accept the Council's submission that even if the 1987 Permission was implemented, the extinguishment (as a matter of private law) of the use of the northern area as a caravan and camp site was never triggered.

112. I accept the Council's substantive submissions on ground 1 and reject the contention that the Council erred in not having regard to the 1987 Permission or the s.52

Agreement. It is unnecessary in these circumstances to address the question whether, if I had found an error of law, I would have refused relief pursuant to s.31(2A) of the Senior Courts Act 1981.

E. Ground 2: Rationality – visual impact on amenity of removal of condition 2

113. Condition 2, which prevented caravans in the northern part of the site being twin unit caravans, was imposed in the interests of visual amenity. The claimant submits that paragraph 1 of the Officer's Report (see paragraph 40 above) seriously misled the committee and that the Council failed to deal rationally with the impact on visual amenity of removing condition 2. The Officer's Report evaluated the impact of removing the constraint on twin unit caravans on what the claimant contends is a "*wholly theoretical and fanciful basis*" that single unit caravans of the same size as twin unit caravans could be placed in the north of the site in accordance with the 2016 Permission.

114. In essence, the claimant contends the committee was misled because the Officer's Report failed to assess the likelihood of the developer siting outsize single unit caravans on the northern part of the site, if condition 2 were not removed; or to draw attention to factors demonstrating that was unlikely. The factors on which the claimant relies are, *first*, that as "*a matter of common sense and economies of scale*" non-standard large single unit caravans would be more expensive than similarly sized twin unit caravans, and therefore less attractive to the developer.

115. *Secondly*, in a letter dated 24 March 2020, the interested party informed the Council:

> "The only difference between a twin unit caravan and a single unit caravan is that a standard single unit caravan in general is 4.2672m (14ft) in width. The reason for this is that 14ft-wide caravans can be transported by road with little complication, however the regulations from the Department for Transport (Road Vehicle Authorisation of Special Types General Order 2003) states that loads over 6.1m (20 feet) can be transported by special order.
>
> It could therefore be possible to install single unit caravans over 20ft on the site which would be the same size as a standard twin unit caravan."

The claimant contends the requirement of a special order shows that transportation of outsize single unit caravans would be difficult and costly, making it improbable a developer would site such units in the area.

116. *Thirdly*, the claimant contends the Council failed to consider whether transporting oversized single units by road was physically possible given road constraints in the vicinity of Heritage Park. The claimant contends that the Council ought, rationally, to have approached the variation of condition 2 on the basis that it would result in larger caravans on the northern part of the site.

117. The claimant also contends that unless the Council releases the interested party from the northern car park covenant contained in the Lease, the implementation of the 2021 Permission would lead to an incoherent layout, a factor the Council failed to consider.

118. The Council submits the assessment of the impact on visual amenity arising from the variation of condition 2 in paragraphs 6.1 to 6.5 of the Officer's Report was both lawful and rational, and resulted from the application of planning judgment. At paragraphs 6.2 and 6.3, the Officer's Report expressly considered the visual impact by reference to twin-units, standard single-units and non-standard single units. It did so having recognised that in reality, because the 20 narrower bases "*lend themselves more to the accommodation of single units*", there was likely to be a mix of twin and single unit caravans.

119. Realistically, the impact was confined to nine bases on which twin rather than single units (whether standard or non-standard) would be likely to be based if condition 2 were removed. The officer's planning judgment was that the appearance of the twin-units, in accordance with the design parameters submitted by the interested party, "*could be considered to be aesthetically more attractive than a typical single static caravan of any likely size*". In addition, compliance with design parameters would ensure that "*any single-unit static caravans have an enhanced appearance compared to those achievable under the existing consent*". The officer's planning judgment was that the impact on appearance was an enhancement. That conclusion did not depend on a comparison of twin units with outsize single units, rather than standard single units. The Council submits there is nothing in the criticism of its approach, noting also that the members of the committee undertook a site visit and they were impressed by the site.

120. The Council submits that the issue with respect to the northern car park covenant was noted, correctly, as a distinct issue in the Officer's Report (at §6.13), and there was no requirement to address this private law matter further.

121. In my judgment, the Council's assessment of visual impact was clearly lawful and rational. It resulted from the application of planning judgment. I agree with the Council's submissions on this issue. Even assuming it was unrealistic to consider that outsize single-unit caravans might be placed on the site if the prohibition on twin-units was not removed, it would not assist the claimant's contention that the assessment of visual impact was flawed. Quite simply, that assessment was not predicated upon presence of non-standard single units. I agree with the Council that there is nothing in this ground.

F. Ground 3: proper application of policy – GN.19 of the LDP

122. The claimant contends that the assessment in the Officer's Report at paragraph 6.19 of whether the proposals complied with policy GN.19 of the LDP was so inadequate as to render the Decision unlawful.

123. It is common ground that paragraph C of GN.19 was applicable and that neither subparagraph 1 nor 2 of paragraph C were satisfied, as the Officer's Report recognised. The Council also accepts (as was again acknowledged in the Officer's Report) that subparagraph 3(iii) of paragraph C was not satisfied because parts of the site are in Amroth and Saundersfoot. The claimant meanwhile accepts that paragraph subparagraph 3(i) was satisfied.

124. However, the claimant contends that the analysis in the Officer's Report was flawed in relation to GN.19C, although the conclusion that paragraph was not satisfied was correct, because the officer failed to address the question whether subparagraph 3(ii) of GN.19C was satisfied i.e. whether the proposal would result in "*a demonstrable overall environmental improvement both for the site and its setting in the surrounding landscape*".

125. The claimant's initial position was that the proposal also breached paragraphs A and B of GN.19 and that the Officer's Report was flawed in determining that those paragraphs were inapplicable. At the hearing, the claimant acknowledged – and so it is now undisputed – that paragraph B of GN.19 is not applicable. That is because the proposal does not involve an "*enlargement of the area of a static caravan or chalet site*".

126. The claimant maintains that paragraph A of GN.19 was engaged (and not satisfied). In support of this argument, the claimant relies on the officer's earlier report in relation to the Application (which was submitted to the meeting of the planning committee on 10 November 2020). In that report the officer stated:

> "6.9 … Policy GN.19 (Static Caravan Sites) of the current LDP supports proposals for extensions to existing sites by an increase in the number of pitches when that site is within a settlement and thus the proposal, if a new application, would fail to accord with policy GN.19. However planning consent 11/0585/PA has been lawfully implemented and the 29 caravan units could also be lawfully provided under the same consent. …" (Emphasis added)

127. This contrasts with paragraph 6.9 of the Officer's Report (for the 10 February 2021 meeting) which stated that "*Parts A and B of [GN.19] are not applicable*". The claimant submits the officer's earlier view was correct. At the hearing the claimant sought to support the earlier conclusion on the basis that the policy is concerned with the reality on the ground that the northern area is not in fact occupied by caravans (rather than what is permitted), whereas the proposal will result in caravans being placed in that area.

128. In addition, the claimant submits that this aspect of the Council's analysis was (again) flawed because the Council failed to take into account the s.52 Agreement and so misunderstood the fallback position. The Council considered the non-compliance with GN.19C was mitigated because the 2016 permission could be implemented as a fallback. Whereas the claimant contends that the effect of the s.52 Agreement was that "*the use of the northern car park as a caravan and camping site was extinguished long ago*". Therefore, there were no lawful touring pitches to be upgraded and the assessment of the Application against GN.19 was fundamentally flawed and unlawful.

129. The Council submits that on a plain reading of the policy it is obvious that paragraph A had no bearing on the Application. Paragraph A applies to proposals for new static caravan and chalet sites "*or extensions to existing sites by an increase in the number of pitches*". There was no application to increase the number of pitches in this case. Equally, paragraph B was inapplicable, as is now accepted. To the extent that there is any difference in approach between the two reports, the Council was entitled to reconsider matters when the Application was referred back to committee. What matters

is that the Officer's Report, on which the Decision is based, correctly interpreted and applied GN19.

130. Only paragraph C is applicable and the Officer's Report dealt with the policy, correctly concluding that there was "*some conflict*" with GN.19C. The Officer's Report addressed subparagraph 3(ii) of GN.19C in paragraph 6.10 which cross-references paragraphs 6.2 and 6.2, where the officer explains his assessment that the proposal would create an enhancement in terms of the visual appearance of the units and the landscaping scheme. The Officer's Report clearly demonstrates that the assessment of compliance with GN.19 cannot properly be faulted.

131. The Council further submits that the fallback position is not a necessary part of its defence of ground 3, it was only an alternative raised in paragraph 6.11. In any event, for the reasons addressed under ground 1, the Council refutes the contention the s.52 Agreement extinguished the use of the northern part of the site as a caravan and camping site.

132. I am satisfied that this ground, too, must fail for the reasons given by the Council (as summarised in paragraphs 129 to 131 above), applying the approach described in *Corbett* and *Mansell* (see paragraphs 56 and 58 above). The Officer's Report properly addressed policy GN.19, recognising that there was some conflict between the proposal and paragraph C of GN.19, but determining as a matter of planning judgment that the proposal accorded with the LDP. Each of the subparagraphs of paragraph C were addressed in the Officer's Report. In particular, the report adequately addressed subparagraph 3(ii). I agree with the Council that GN.19A was plainly not engaged as the proposal involved no increase in numbers of pitches, and it was not an application for a new caravan site. The difference between the earlier and later reports on the Application does not assist the claimant in the face of the plain interpretation of GN.19A.

G. Ground 4: Failure to take into account or lawfully consider the flood risk

133. The claimant contends the Decision is rendered unlawful because of the Council's failure to deal properly with flood risk. The starting point, the claimant submits, is that the 2016 Permission was granted by reference to the JUDP rather than the LDP. When the report that led to the 2016 Permission was written in 2013, the development plan was the JUDP but it ceased being the development plan a month later upon the adoption of the LDP. There was a long delay between the report and the grant of the 2016 Permission, because the Council was waiting for the interested party to execute a s.106 agreement. The application was not re-assessed by reference to the LDP before the 2016 Permission was granted.

134. When the Council considered the Application, it was the first occasion on which caravan development in the northern part of the site had been assessed by reference to the LDP. The Council was obliged to determine the Application by reference to the current development plan. While the 2016 Permission is valid and a material consideration, the Council could not simply adopt the reasoning and assessment set out in the report for the 2016 Permission because it was assessed by reference to the wrong development plan.

135. The claimant contends that officers failed to provide the committee with clear and reasonable guidance in respect of flood risk. Paragraph 6.13 of the Officer's Report wrongly described flood risk as not a material factor (see paragraph 40 above). The claimant acknowledges that Mr Popplewell corrected that during the meeting when he informed the committee that flood risk was a material consideration. But the claimant contends, first, that the officers relied upon the assessment of flood risk which underpinned the 2016 permission, even though the officer's report of 2013 failed to apply TAN 15. In making this correction 'on the hoof', Mr Popplewell failed to take the members through TAN 15, said (in effect) that flood risk had been considered before in the context of granting the 2016 Permission and failed to give the chairman the clarity on this issue that he sought (see paragraph 43 above).

136. Secondly, in comparing the Application with the 2016 Permission, the claimant submits that the officers downplayed the impact of removing condition 2 and failed to acknowledge the obvious point that twin units would be bigger and occupied by more people. Condition 2 prevented twin units being provided in the northern area. Removing that prohibition would enable larger caravans to be located in the flood risk zone. The claimant submits that twin units would be larger than single units. There were commercial and regulatory reasons why the interested party would be unlikely to provide outsize single unit caravans (as addressed in ground 2). Larger units would be likely to have a larger number of occupiers, putting more people into danger in the event of a flood. In this regard, the claimant relies on paragraph 6.40 of the March 2020 Report (see paragraph 31 above).

137. The Council submits the statutory test required it to consider the question of the conditions subject to which permission should be granted (s.73(2) of the 1990 Act), which it clearly did. Regard must also be had to the current development plan and any other material considerations, which, again, the Council did. The analysis in paragraphs 6.8, 6.9 and 6.10 is impeccable.

138. The Council contends the treatment of flood risk in the Officer's Report at paragraphs 6.10 and 6.13 was lawful and adequate in circumstances in which the focus of the s.73 application was on varying two conditions which did not engage flooding matters. As the Officer's Report noted, part of the site subject to the application was located within flood zone C2. But neither of the conditions which it was sought to vary had been imposed to address the flood risk. In particular, the predecessor to Natural Resources Wales, the Environment Agency of Wales, had not objected to the application which resulted in the 2016 Permission or required the imposition of condition 2, which was instead imposed solely for visual amenity reasons.

139. The Officer's Report described the flood risk as being "*not a material <u>factor</u> in the determination of this application*" (§6.13, emphasis added) because it was assessed that the proposal resulted in a "*neutral effect when compared with the implemented consent*" (§6.10). The Officer's Report did not suggest that flood risk was not a material planning consideration. But in any event, if the wording of the Officer's Report gave any cause for concern, the point was rectified at the meeting during which Mr Popplewell made clear that TAN 15 and the flood risk were material considerations, albeit the officers' assessment was that it did not merit significant weight in this instance.

140. The Council submits that it is clear from the transcript of the meeting that the officers did not, as the claimant alleges, accept the assessment that underlay the 2016

Permission at face value. They adopted it having looked at in detail and assessed the position by reference to paragraph 7 of GN.1 and TAN 15.

141. The Council submits that the March 2020 report was addressing a proposal for a significant development which would have increased the number of bases permitted. As Mr Popplewell explained, the flood risk issue was included in that report as a 'hook' to enable the Council to raise it in the event of an appeal.

142. I reject the contention that the Council failed to consider or lawfully take into account the flood risk. When the adequacy of a planning officer's advice is called into question, the court does not expect to find a flawless discussion of every planning issue. If the Officer's Report had remained uncorrected, there may have been a risk that the committee might have mistakenly considered that the flood risk was not a material planning consideration, rather than that it was a material consideration which officers considered did not warrant significant weight. However, it is manifest that any such risk was averted by the way in which the officers addressed the issue orally. Mr Popplewell informed the committee repeatedly that TAN 15 and the flood risk were material considerations. It is plain from the transcript of the committee meeting that the members of the committee understood that they had to consider TAN 15 and the flood risk in determining the Application, and they did so.

143. As there was no failure to take into account the flood risk, the weight given to it was a matter for the Council, subject to challenge by reference to the rationality standard. I agree with the Council that it is clear the officers did not simply adopt the assessment made in 2013, but reassessed the issue. This is evident in the transcript of the committee meeting in February 2021: see especially paragraph 42 above.

144. The assessment that removing the prohibition on twin-units was unlikely to significantly increase the number of occupiers was based in part on the fact that the width of 20 of the 29 bases was 12 feet. The size of the base restricted the size of caravan that could be put in place, and officers made a rational assessment that those bases would be likely to be used for standard single unit caravans.

145. Nine of the bases were 20 feet in width and it was only those that were likely to be used for larger caravans. When advising the committee that the prohibition on twin units did not prevent single units of a similar size to twin units being put in place on those larger bases, Mr Popplewell expressly recognised that the likelihood of non-standard size units, rather than "off-the-shelf" standard single-units had to be considered. But his view was that the use of non-standard size units is becoming more of a factor as the leisure industry grows (see paragraph 43 above).

146. The Council properly considered the impact on the flood risk of varying condition 2 and reached a decision that is within the bounds of reasonable conclusions that were open to it.

H. Ground 5: Irrational and flawed assessment of compliance with the LDP

147. The claimant submits that the conclusion in the Officer's Report in paragraph 6.15 that the proposal complied with the LDP was flawed and/or *Wednesbury* unreasonable. This contention is based on the allegation that there was a clear failure to deal lawfully with two of the most relevant policies, namely, policy GN.19 relating to caravans (which is

the subject of ground 3) and TAN 15 relating to flood risk (which is the subject of ground 4). The claimant acknowledges that it is not sufficient to say that there is a tension between the proposal and aspects of the LDP, but submits that there is here nothing pulling in the other direction that warranted the conclusion that the proposal was compliant.

148. The Council submits it is trite law that conflict with one policy does not mean conflict with the plan overall, citing *Cornwall County Council v Corbett* (see paragraph 56 above). In this case, having appropriately identified the plans, the Officer's Report assessed the proposals against the development plan and concluded that they accorded with the local plan when considered as a whole. The claimant has failed to identify any legal error with the Council's approach. Given that the sole reason condition 2 was included in the 2016 Permission related to visual impact, the size of the bases was such that the removal of condition 2 was likely to affect only nine caravans, and the proposed variation to condition 7 was very minor, the Council's assessment was plainly rational. In reality, the Council submits this ground of challenge is nothing more than an attack on its planning judgment.

149. When planning decisions are made, the policies of the local plan must always be properly understood and lawfully applied. In this case, in my view, the Council did not misconceive the relevant policies or apply them unlawfully. The premise for this ground is that grounds 3 and/or 4 are well-founded. As those grounds have failed, it follows that this ground, too, must be dismissed.

I. Ground 6: failure to assess the fallback position properly

150. The claimant contends that the Council failed to properly assess the *likelihood* of the fallback position being implemented. *First*, the 2016 permission cannot be implemented in the area of the northern car park unless and until the lease is varied. This was a factor to which the Officer's Report paid no regard.

151. *Secondly*, the claimant submits that it is significant that the interested party has not taken steps to implement the 2016 Permission in the north of the site. The Council should have considered whether such implementation was improbable precisely because of conditions 2 and 7. In relation to condition 2, the claimant contends that single unit caravans are far less commercially attractive to the interested party than twin units. The rest of Heritage Park consists of twin unit caravans. The idea that, if the constraint on twin unit caravans in the northern area were not removed, that area would be developed by bringing in outsize single unit caravans was unrealistic. In relation to condition 7, the claimant contends that the interested party may not wish to take the step of dedicating the southern car park to the public (or removing any doubt as to the rights of the public to use that car park).

152. *Thirdly*, the claimant contends that by reason of the s.52 Agreement the 2016 Permission could not be implemented in the north of the site, a factor which the Council ignored (as alleged in ground 1).

153. The Council's case is that the Officer's Report specifically addressed the fallback position, in particular at paragraph 6.11 (see paragraph 40 above), and officers addressed it in the meeting (see paragraph 42 above). The Council noted that the 2016 Permission had been implemented. The 29 caravan units could lawfully be provided

under that consent. In concluding that the fallback position was realistic and should be accorded substantial weight, the Council explicitly considered, among other factors, the northern car park covenant and the likelihood of non-standard sized single unit caravans being used, if the application were not granted. The Council submits that the s.52 Agreement was not a material consideration for the reasons addressed under ground 1.

154. In my judgment, this ground too must fail. The officers did not misunderstand any principle of law relating to a fallback development. There is no dispute as to the law on this issue, including as described in *Stefanou*. But I agree with the Council that the outcome in *Stefanou* is, naturally, fact-specific.

155. The Lease is a matter of private law. The Officer's Report addressed it at paragraph 6.13. There was no need to do more. Moreover, insofar as the Lease restrains the placing of caravans on the part of the northern area occupied by the northern car park, the position remains unaltered by the 2021 Permission compared to the 2016 Permission. In particular, the variation of condition 7 does not permit caravans on the site of the northern car park to be occupied before the southern car park is completed and dedicated to the public.

156. I have addressed the claimant's contention that the possibility of non-standard units being used in the northern area is unrealistic in paragraphs 144 to 145 above. I have rejected the contention that the 2016 Permission is not the correct fallback position because implementing it in the northern area would breach the s.52 Agreement in the context of ground 1. For the reasons that I have given, I am of the view that the Council's assessment of the fallback position was lawful and rational.

J. Ground 7: Failure to apply s.38(6) of the Planning and Compulsory Purchase Act 2004 to condition 7

157. The claimant submits that to satisfy condition 7 the interested party would have to dedicate the southern car park to the public (or remove any doubt as to the rights of the public to use that car park). The interested party may not wish to take that step. The development of the northern car park is, the claimant contends, contrary to the development plan, due to its breach of GN.19, and its contravention of local and national policy on flood risk, and so contrary to the public interest. The officer failed to point out these features to the committee who therefore failed to deal lawfully with the removal of condition 7. Further, it was irrational not to regard condition 7 as a useful constraint on development that is contrary to the public interest.

158. The claimant also contends that the justification for the imposition of condition 7 given in 2016, namely, to ensure adequate parking provision for the public, continues to apply. There was no challenge to the condition when it was imposed in 2016, and there was nothing objectionable about condition 7 remaining in effect.

159. In my judgment, this challenge is unsustainable. The Officer's Report undertook precisely the exercise required by s.38(6) of the 2004 Act at paragraphs 6.8 to 6.11 (see paragraph 40 above), most notably lawfully addressing GN.19 (as I have found in the context of ground 3) and GN.1 together with TAN 15 (as I have found in the context of ground 4). Moreover, the purpose of ensuring adequate parking provision for the public is unaffected by the minor variation to condition 7 which does not permit any caravans to be sited on the northern car park before the southern car park is completed and made

available at all times to the public. Paragraph 6.7 of the Officer's Report addressed this point, lawfully and rationally explaining why the objective of condition 7 was not prejudiced and there was no conflict with policy GN.1.

K. Conclusion

160. For the reasons I have given, the claim is dismissed.