

Neutral Citation Number: [2026] EWHC 2278 (Admin)

Case No: AC-2026-LON-001002

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 September 2026

Before:
HHJ EMMA KELLY
(Sitting as a Judge of the High Court)

Between:

**THE KING (on the application of
THE OLD CHISWICK PROTECTION SOCIETY)**

Claimant

- and -

LONDON BOROUGH OF HOUNSLOW

Defendant

-and-

**BURLINGTON PROPERTIES LONDON
LIMITED**

**Interested
Party**

Andrew Parkinson (instructed by **Khift Ltd**) for the **Claimant**
Rebecca Clutten (instructed by **Legal Hub London Borough of Hounslow**) for the **Defendant**
Richard Harwood KC (instructed by **Maples Teesdale LLP**) for the **Interested Party**

Hearing date: 21 July 2026

Remote hand down. This judgment was handed down remotely at 10.30am on 14 September 2026 by circulation to the parties or their representatives by email and by release to The National Archives.

APPROVED JUDGMENT

HHJ Emma Kelly:

1. The Old Chiswick Protection Society (“the Claimant”) seeks to challenge the decision of the London Borough of Hounslow (“the Defendant”), dated 20 January 2026, (“the Decision”) to grant planning permission for new development at 1 Burlington Lane, Chiswick, W4 2RR (“the Site”).
2. The Claimant is a charitable trust founded over 50 years ago to help preserve, protect, develop and improve the features of historical, architectural and artistic interest in or near Old Chiswick. The Defendant is the local planning authority. Burlington Properties London Limited (“the Interested Party”) is the applicant for the planning application.
3. By order dated 22 May 2026, HHJ Karen Walden-Smith granted permission on the papers on a single ground, comprising two alternative limbs:

Ground 1(a): The Council erred in failing to have regard to the reasons given by a Planning Inspector who had previously granted planning permission for an alternative scheme at the Site.

Ground 1(b): The Council erred by failing to give reasons for departing from the conclusions reached in that decision.

Background

4. The Site is currently occupied by a five-storey vacant office building. The Site is not listed but falls within the Chiswick House Conservation Area. It is in close proximity to Grade I heritage sites including Chiswick House and gardens, and Hogarth House. The Old Chiswick Conservation Area is located approximately 30m from the Site, which includes 70 listed buildings, of which 4 are Grade II* and the remainder Grade II. Those include St Nicholas’ Church, which sits prominently close to the river Thames.
5. By notice dated 31 March 2023, the Defendant refused an application for planning permission (Ref: 00176/1/P4) to extend and redevelop the Site, including adding two new storeys, to accommodate 104 residential flats with retained office space. The Defendant’s grounds for refusing planning permission were, in summary: (i) the proposed development would fail to provide a suitable mix of housing, (ii) the proposed living conditions were unacceptable in that there was an unacceptably high level of single aspect units with inadequate sunlight, daylight, outlook, noise and natural ventilation, and (iii) the design standard would harm the appearance of the area.
6. By a decision dated 12 April 2024 (“the Appeal Decision”), a Planning Inspector allowed an appeal (Appeal Ref: APP/F5540/W/23/3327579) against the refusal of planning permission. He granted planning permission in accordance with the terms of the application, subject to various conditions (“the Fallback Scheme”). The Appeal Decision is a detailed document running to 28 pages, with the substantive decision contained in 76 paragraphs. The Inspector

addressed the Defendant's reasons for refusing permission. His findings included:

- i) At [37] of the Appeal Decision, as to living conditions: *"...the living conditions of residents would not be compromised by an unacceptable outlook, daylight/sunlight, ventilation, noise, air pollution, CET and CP provision. Although cooling systems would be used, their extent would not be significant. There will be no privacy concerns given separation distance between units from one another across the atrium and use of privacy screens. The provision of single aspect homes would be justified given the high density nature of the development and because living conditions for occupiers would be acceptable..."*
 - ii) At [47], as to the design and impact on local heritage: *"...the proposal would be of a high quality design appropriate for this prominent and wayfinding location, and improvement on the existing townscape. It would enhance the character and appearance of the area, including the Chiswick House Conservation Area and would comply with Section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990..."*
 - iii) At [68] – [69], as to the planning balance:

"68. Living conditions of residents would not be harmed, having regard aspect, outlook daylight/sunlight, privacy, ventilation/overheating and noise, air pollution, and the provision of outdoor space. In this case, the number of single aspect residential units would be acceptable in this location. There will be improvements to the character and appearance of the area, with enhancement of the Conservation Area. In respect of living conditions and character and appearance, there would be compliance with HLP and LP policies that have been identified. Given the deficiency in children play space provision, there would be conflicts with LP Policy S4 and HLP Policy GB9. The proposal would result in a poor housing mix in conflict with Policies of HLP and LP.

69. As such, development plan policies pull in different directions, with compliance and conflict in respect of the issues. However, conflicts with LP Policy S4 and HLP Policy GB9 are of a small technical nature and there would be substantial housing, employment, economic and environmental benefits, including embodied carbon savings, which are supported by HLP and LP policies. For these reasons, the proposal would comply with the development plan when its policies are taken as a whole..."
7. The Fallback Scheme has been implemented and the permission remains extant.
 8. On 30 July 2024, the Interested Party made an application for planning permission ("the Proposal") for *"demolition and redevelopment of the [Site] to provide a part-6, part-10 storey building to create 132 self-contained flats and a terrace of 3-storey properties, comprising of residential development, flexible*

commercial floor space with associated car parking, private & communal amenity space, landscaping, refuse, cycle and public realm improvements.”

9. On 7 August 2025, the Defendant’s planning committee (“the Committee”) granted the Proposal, subject to various conditions. The Committee’s decision-making process involved the consideration of various sources of information.

The Officer’s Report

10. The Committee was provided with the Officer’s Report (“OR”) in advance of the meeting, together with a short addendum (“the Addendum”). The OR is a detailed document, running to some 109 pages. It recommended approval of the Proposal.
11. The OR addresses the existence and relevance of previous planning permissions. At [9.8], it identifies the grant of permission for the Fallback Scheme. The OR makes the various comments on the Fallback Scheme. Those include:

“9.10 The fallback scheme would provide fewer family (3+ bedroom) homes with no affordable housing, minimal dual aspect dwellings and negligible public realm improvements and/or external community space. In terms of design intervention, fallback option is not considered good design, does not provide wider environmental enhancements wider contributions, and is not considered the best use of land.

9.11 The previously consented schemes are considered to provide a poor quality of accommodation by virtue of the lack of sufficient private and communal amenity space, with no sustainability measures or obligations to achieve zero carbon.

9.12 This proposal brings forward a more appropriate design solution to the site, including active frontages and public realm improvements. The proposal also provides 13 affordable homes, while making design improvements in this prominent location.

9.13 As such, we consider that the fall-back position holds significant weight in the planning balance, as the fallback option is certainly a ‘possibility’ and would be ‘likely’ should this application be refused.”

12. Section 9 of the OR goes on to consider policy compliance of the Proposal as to issues of energy and sustainability; employment; affordable housing, mix, tenure and wheelchair homes; urban design and townscape; heritage; housing quality; transport, car parking and servicing; refuse and recycling. The OR concludes that the Proposal complies with the various policy considerations save as to heritage.
13. The OR contains a detailed heritage assessment. It recognises the Defendant’s duties under s.66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and associated national and local policy requirements. It considers a number of designated heritage assets and concludes that the

Proposal would cause ‘less than substantial harm’ to a number of assets including Chiswick House and Gardens, Hogarth House, Old Chiswick Conservation Area including St Nicholas’ Church, and the Thames landscape. The OR makes the following heritage assessment:

“9.198 ... The current proposal would result in harms to the setting of significant heritage assets at the low to middle levels of less than substantial harm. Historic England, GLA and the Council conservation team have concluded that this harm is less than substantial to the significance of the setting of designated heritage assets, varying in degree depending on the specific assets affected, between low to middle,

9.199 In accordance with Paragraph 212 of the NPPF (2024), where less than substantial harm to the significance of a designated heritage asset is identified, this must be given substantial weight, and in Paragraph 215, this harm needs to be balanced against the public benefits of the proposal through a clear and balanced planning judgment.

9.200 The Council acknowledges that harm will occur. As noted earlier in this report; in fulfilling its statutory duties under Sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, local planning authorities must give considerable importance and weight to the desirability of preserving the setting of listed buildings and the character or appearance of Conservation Areas. The NPPF also provides that great weight should be given to heritage asset conservation.

...

9.202 Given the above assessments, it is concluded that the scheme fails to fully satisfy HLP policy CC4 at (d) and (i) and LP policies D9, HC1 and HC2 due to harm to heritage assets considered at the less than substantial harm spectrum.”

14. In considering the planning balance, at [9.322] the OR notes the need to balance harm to heritage assets against the public benefit of the proposed development. An analysis of the public benefits is undertaken at [9.328] and benefits identified as to housing delivery, affordable homes, public realm engagement, employment/commercial space, townscape enhancement, high quality of home standards, energy and sustainability. Some but not all of the identified public benefits at [9.328] make express reference to the Fallback Scheme:

“Housing delivery: The Site benefits from a consented Scheme for 106 homes, under a prior approval with a poor residential layout with no improvement to the open amenity space and no affordable housing...

Employment/commercial space: ...This scheme would improve upon the fall-back position...

High quality of home standards: The Scheme would provide a high quality homes with adequate standards of living conditions for future occupants,

including a higher proportion of double aspect homes, private amenity spaces, adequate internal layout...

Energy and sustainability: The proposal would achieve a significant reduction in carbon emissions, overall saving 71% in regulated CO emissions..."

15. The OR concludes that the planning balance falls in favour of granting permission for the Proposal:

"9.331 There is harm identified to heritage assets at different levels of less than substantial harm, from middle to low, which is given significant weight.

9.332 The proposal is considered a complex scheme which will deliver a range of public benefits. There is a range of major public benefits which would weigh in favour of the scheme. Provision of 132 new homes, 13 affordable family homes, and high quality public realm and landscaping are given significant weight. Economic activities, employment opportunities and positive impact on townscape (compared with the existing) are considered as moderate public benefits of the scheme.

9.333 In conclusion, and on balance, the public benefits of the proposed scheme are judged to outweigh the less than substantial harm to the setting of the heritage assets in the vicinity, which in the final assessment would make the proposed scheme acceptable."

The Addendum

16. The Addendum was circulated prior to the Committee Meeting. It is a short document. It clarifies that the fallback position referred to in the OR is the Fallback Scheme and corrected an earlier error at [9.328] to clarify that the number of units under the Fallback Scheme was 104 and not 106.

The Committee Meeting

17. At the meeting on 7 August 2025, the Defendant's officer presented a slide deck summarising key elements of the OR and provided an oral commentary. The Committee was not provided with a copy of the Appeal Decision.
18. A transcript of the oral discussion at the Committee meeting has been obtained. Reference in this judgment to times are to the times noted on the transcript. The officer noted at time starting 20:01: *"Implementation of the consented scheme has now commenced. As such, the fallback position is considered to carry significant weight in planning balance likely outcome should the current application be refused."*
19. The officer made various criticisms of the design of the Fallback Scheme and told the Committee:

Starting at time 20:21: *“On the ground floor we can see ... concentration of car and cycle parking facilities. It is not considered the best use of the space. This slide shows a typical residential unit layout from the first floor to fourth floor of this fallback position. Each floor has long corridors and 22 units with 77% of them being single aspects. Only 70 of the units have access to private outdoor space such as balconies. On every floor, 10 units rely solely on light from the internal court, and some of these only receive north facing light, which is generally less effective. The courtyard itself is quite limited in size, measuring a maximum of 16m in length, 12m in width, and it enclosed by walls approximately 15m high...Overall, this result in a poor standard of accommodation which was one of the reasons for refusal...”*

Starting at time 23.09: *“One of the main reasons for refusal was the poor visual appearance and low design quality. The proposal did not fit well with the surrounding townscape or reflect the character of the area especially when compared to nearby development like the newer and more modern chis gate residential scheme...”*

Starting at time 23.39: *“From the second floor upward, the building would project beyond the existing footprint towards the road resulting in poor relation with the adjacent building and offering no enhancement to the current streetscape. While retaining the existing structure could be considered a sustainable benefit, this alone does not outweigh the poor quality of accommodation and appearance particularly due to lack of adequate private and communal amenity space and limited incorporation of sustainable measures.”*

20. The penultimate slide in the deck focussed on the Fallback Scheme and provided an overview. It notes the provision of “104 new high-quality homes” but “no affordable home[s]”, “poor quality of design external appearance and an inappropriate response to the site”, “poor quality accommodation, dual aspect 23%, 70% homes with private amenity space” and “limited incorporation of sustainability measures”. The officer provided the following commentary on the slide starting at time 40:06:

“... here is a summary of the fallback position which should have significant weight as commencement process. Less homes, no affordable homes, poor standard of accommodation, poor quality of design... As reviewed earlier, the proposed scheme is considered...an appropriate response to the opportunity presented by this site.”

21. The Claimant’s president, Mr Russell Harris KC, made oral representations in support of the Claimant’s objections. He introduced himself as a planning KC and president of the Claimant. He emphasised the importance of St. Nicholas’ Church and the surrounding conservation area, and the harm that would be caused by the additional 10 metres in height of the Proposed; an increase that Mr Harris described at 1:04:27 as one that “robs the church of its primacy”. He highlighted that the OR failed to include any reference to a reasoned objection from the London Borough of Richmond, who had argued that the Proposal

would overwhelm historic buildings in their protected view from the river. Mr Harris noted at 1:07:11 that the Fallback Scheme *“has recently been said to be entirely appropriate to be developed by the inspectorate...”* He submitted that the Proposal’s provision of just 28 extra homes over that provided by the Fallback Scheme was not a sufficient benefit to outweigh the identified harm. At 1:07:52 he described the Proposal as being *“for an over-dominant mass which will create a sense of enclosure and be oppressive. It’ll destroy historic views which have existed for generations...”*

22. Questions were then invited from the councillors. At 1:08:56 a councillor asked Mr Harris KC for his views on the difference between the Fallback Scheme and the Proposal noting: *“It’s very clear that the officers’ uh views and the report’s views is that the current consented scheme will be incredibly poor quality....that’s you know really poor... It will be what’s there now which is a poor quality and you know quite frankly horrible looking building. Uh and what’s proposed is far superior...whether we ...refuse this and it’s the consented scheme or the new scheme, but what kind of quality of life do we want those residents living in?”* Mr Harris KC explained at 1:10:20 that the Proposal was to be *“judged in this case against the fallback. The officers have already made that really really clear.”* He stated that he had not seen the slides before they were played at the meeting and, at 1:10:37, noted: *“there are seven or eight things wrong with the um extant con scheme which has been implemented and which they accept will be um built out.”*
23. Mr Harris KC explained at 1:11:13 that there had been an appeal hearing *“which was ... considering the sorts of points that officers are now making in front of an inspector. And the inspector granted permission and he rejected every single one of the points that’s now being relied on as saying there would be unacceptable living conditions in the fallback position. The inspector looked very carefully at the policies at the London plan and at the guidance on housing standards that sits behind the plan and found in every instance that the council’s case in relation to those was not proven. Then hence the inspector granted permission and said that 104 units and the um impact on heritage that went with that was a perfectly appropriate balance.”*
24. At time 1:13:20 a different councillor made the following observation: *“...we as a committee find ourselves somewhere between a rock and a hard place here because if this is rejected, it’s very likely that the fallback scheme will be built which suboptimal no matter how you want to dress it up sir it’s suboptimal optimal and also provides far less units of a lower standard. Now, no one is suggesting that the old or that the sub substantive scheme is is of a poor standard. It’s just not a very good standard where these are a better quality and there [are] far more of them... If we reject this, we get probably a suboptimal. If we accept it, we get something which is better...”* Mr Harris KC did not accept the suggestion the Committee was between a rock and a hard place. At time 1:14:55 he stated: *“...unless there’s very good reason, you should pay attention to and not traverse recent decisions by the inspectorate. If you do, there are certain consequences...”* He continued at 1:15:08, by stating that the Fallback Scheme would make a very substantial contribution to need and would not cause unacceptable heritage harm. At time 1:15:35, he noted: *“But really what I think*

is not as important as what the inspector has said having listened to exactly the points that were made on behalf of the officers and rejected.”

25. The Interested Party’s construction director, Mr Dhiraj Dabasia, and planning agent, Mr Ben Kelway, then spoke in support of the Proposal. At 1:20:24, Mr Dabasia referred to some of the limitations of the Fallback Scheme noting: *“It’s an inferior design solution as officers have accepted um and it offers inferior homes, perhaps not unacceptable homes...”*
26. Following the speakers, one of the Defendant’s officers, asked to make a point of clarification. He acknowledged that Mr Harris KC was correct to point out that the OR had failed to include reference to the objection from the London Borough of Richmond. He proceeded to read their objection to the meeting.
27. At 1:48:01, another councillor (whose identity is not apparent from the transcript or minutes) sought clarification from the Defendant’s legal advisor. At 1:48:10 he asked: *“obviously one of the objectors was well versed in the law surrounding this ... and I must admit I got a little bit lost in where he was going. That’s probably my fault, not his. Um, the extent [extant] one was agreed by the planning inspector. Uh, therefore to somehow approve this or go against this would be going against the planning inspector. I mean, I don’t think that’s what he said, but could you just just steer us around that bit of law, please, sir?”*
28. At 1:48:37, the Defendant’s legal advisor gave the Committee following advice:

“basically, the fallback position that’s been mentioned numerous times this evening is obviously an important material consideration. If you are not to approve this application, there’s a chance that the fallback uh application may be pursued. That is for the owner of the land to decide. The important point to realise is the mere fact that the fallback position arose as a result of the decision of a planning inspector doesn’t affect the weight you attach to that decision because obviously um put it this way effectively planning inspectors try to be shall we say as consistent as possible and their role is to bring in a lot of consistency in planning decisions that are appealed to them. So in those circumstances, I do not think you need to go into all the details considered by the inspector, the planning appeal. We just have to realise that the outcome of that planning appeal is the material consideration that we have to take account. And then we also have to consider this fresh application we now have and compare it with fallback position whether it is indeed a improvement on the fallback position or in fact could be improved far more because you can’t normally say merely because there is a fallback position we must accept whatever alternatives put forward. You want to make sure that what put forward as an alternative is far better in all respects.”
29. The approved minutes of the meeting record that legal advice in the following terms:

“[The Defendant’s legal advisor] clarified that the fall-back permission referred to many times was an important material consideration - if

Members were not to approve the Application, there was a chance that the fall-back permission may be pursued, which was the owner of the land to decide. It was not necessary for the Committee to examine all the details considered by the Inspector at the Planning Appeal, only its outcome. Members should consider the present Application and compare it to the fall-back permission, deciding whether the Application was better in all aspects.”

30. Shortly thereafter, the Committee voted 13 to 1 in favour of approving the Officer’s recommendation to grant permission for the Proposal, with the addition of an additional condition to reduce the parking provision.

Legal Framework

The statutory framework for the planning decision

31. By s.70(2) of the Town and Country Planning Act 1990 (“TCPA”):
- “(2) In dealing with an application for planning permission or permission in principle the authority shall have regard to
- (a) the provisions of the development plan, so far as material to the application,
 - (aza) a post-examination draft neighbourhood development plan, so far as material to the application,
 - ...
 - (b) any local finance considerations, so far as material to the application, and
 - (c) any other material considerations.”
32. By s.38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA”):
- “(6) 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.”
33. The effect of the two preceding provisions is that planning applications are to be determined in accordance with the development plan unless material considerations indicate otherwise.
34. Where a development proposal will lead to harm to a heritage asset, a balancing exercise is required. Paragraph 215 of the National Planning Policy Framework (“NPPF”) of December 2024 states:
- “Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed

against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

35. The threshold for intervention in planning judgments is high. Provided a planning authority has regard to all material considerations, absent irrationality, it is a matter for the planning authority as to what weight, if any, they give to those considerations: *Tesco Stores Ltd v Secretary of State for the Environment* (“*Tesco Stores*”) [1995] 1 WLR 759.

Officer’s reports

36. The principles upon which the court will act when criticism is made of a planning officer’s report are described in *R. (Mansell) v. Tonbridge and Malling Borough Council* (“*Mansell*”) [2019] P.T.S.R. 1452 at [42] as “well settled”:
- i) “...Reports ... are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge...”
 - ii) “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.”
 - iii) The court will need to consider “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.”
 - iv) “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...unless there is some distinct and material defect in the officer’s advice, the court will not interfere.”
37. The approach in *Mansell* requires the court to assume that a planning committee has followed the officer’s advice unless there is evidence to suggest otherwise. The extent to which that said at a planning meeting can provide evidence to displace that assumption has been considered in a number of cases.
38. In *Scottish Widows PLC v Cherwell DC* (“*Scottish Widows*”) [2013] EWHC 3968 (Admin) at [21]-[22], Burnett J (as he then was), rejected an attempt by the claimants to rely on comments made by individual committee members at the meeting. He noted that the claimants’ argument had difficulties for practical and legal reasons. The former because a number of the committee made no observations at all or on the relevant issue. The latter because of a consistent

line of authority “that caution is required when trying to extract from a general discussion the reasoning of a corporate body; and that what is said in debate does not necessarily reflect the views of an individual at the time he votes.”

39. In *R (Village Concerns) v Wealden DC* (“*Village Concerns*”) [2022] EWHC 2039 at [55], Dove J (as he then was), expressed caution in placing too much reliance on a transcript of the meeting:

“it is...necessary to approach the transcripts of the committee discussions with realism as to their nature, being different in kind from the carefully formulated contents of an officers’ report, and bearing in mind the context in which they occur, namely a discussion or debate seeking to forge a collective decision...there is a danger of focusing too closely on the contributions of one participant in the process. Similarly, in my view, there is a danger in forensically examining the ex-tempore remarks of a person responding to the discussion...doing their best to engage constructively with members’ concerns, but not attempting to provide a comprehensive and precise supplementary report in oral form.”

40. In *R (Arthur) v LB of Barnet* (“*Arthur*”) [2022] EWHC 2933 the committee received information to correct material errors in the officer’s report. Firstly, a failure in the officer’s report to refer to NPPF para. 97 was nonetheless referenced in written representations from an objector and in oral comments made by a councillor at the meeting. Secondly, an error in misstating the NHS salary bands was corrected orally by a councillor. DHCJ Tim Smith, at [114], considered that the key question remains the same regardless of whether the error was one of omission or commission, namely “was the Committee misled by the mistake such that the Defendant’s decision was rendered unlawful?” On the facts, he was satisfied at [87] “that members were aware of the existence and import of paragraph 97 when they made their decision”. He concluded at [119]-[120] that, although there was conflicting evidence from the comments of two councillors as to whether they had been misled by the erroneous information on salary banding, that the members of the committee as a whole had not been misled.
41. In *R (Cook) v Pickett* (“*Cook*”) [2024] EWHC 42 (Admin) Lang J, at [80], interpreted the decision in *Scottish Widows* as it being “wrong to seek to attribute significance to what is said by individual members of a committee during debate, and prior to any vote”.

Consistency in planning decision-making

42. A previous planning decision can be, but is not necessarily, a material consideration in the determination of a subsequent planning decision. In *North Wiltshire DC v Secretary of State for the Environment* (“*North Wiltshire*”) (1993) P & CR 137 at [145], Mann LJ, held:

“It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of

being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give reasons for his departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test is for the inspector to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgements and assessment of need.”

43. Consistent decision making requires the decision maker to “grasp the intellectual nettle of the disagreement” and provide reasons: Lloyd LJ in *Dunster Properties Ltd v the First Secretary of State & Anr* (“*Dunster*”) [2007] EWCA Civ 236 at [23].
44. The question of consistency in decision-making was considered in the recent decision of Holgate J (as he then was) in *R (Weston Homes Plc) v Secretary of State for Levelling Up, Housing and Communities* (“*Weston Homes*”) [2025] P.T.S.R. 98 at [135] – [136]:

“135...There is a legal obligation to give reasons for the decision, whether it is to grant or to refuse planning permission. Consistency in decision-making is important to developers, LPAs and the public because it serves to maintain public confidence in the operation of the development control system (*St. Modwen* at [6]).

136. Previous planning decisions are capable of being material considerations in the determination of a subsequent planning application or appeal. It does not follow that alike cases must be decided alike. A subsequent decision-maker must always exercise his own judgment. He is free, upon consideration, to disagree with the judgment of another. But before doing so he should have regard to the importance of consistency and give reasons for his departure from, or disagreement with, the previous decision. However, if an earlier decision is distinguishable in some relevant respect it will not usually be a material consideration because of the consistency principle (*North Wiltshire* at p.145).”

45. Assuming an earlier case is alike so as to be material consideration because of the consistency principle, the earlier decision has particular potential relevance if it was made by a superior authority: *R (Rank) v East Cambridgeshire DC* (“*Rank*”) [2003] J.P.L. 454 at [17]. The obvious example is a local planning authority considering an earlier decision of a Planning Inspector.
46. Where the consistency principle is engaged, both the fact and basis of the earlier decision should be taken into account: *R (Havard) v South Kesteven District Council* (“*Havard*”) [2006] EWHC 1373 (Admin) at [14]:
- “In order for a previous decision properly to be taken into account it is necessary that not just the fact of the determination, grant or refusal of planning permission, should be known to the decision maker and taken into account, but that regard should be had to the basis of the decision.”
47. An example of the consistency principle being engaged can be found in *R (Tate) v Northumberland County Council* (“*Tate*”) [2018] EWCA Civ 1519 where the officer’s report concluded that the proposed development would amount to “limited infilling” and recommended the grant of planning permission. On an appeal against the refusal of an earlier application for planning permission on the site, an inspector, in dismissing the appeal, had concluded that the proposed development was not infill. Lindblom LJ at [42] – [44] held that the officer should have recognised that his approach and conclusion were starkly at odds with the inspector’s on a critical point and, if he was taking a different approach, should have provided some explanation for the inconsistency. The absence of reasons to explain the inconsistency amounted to an error of law justifying the quashing of the decision.

s. 31(2A) of the Senior Courts Act 1981

48. By s. 31(2A) of the Senior Courts Act 1981:
- “(2A) The High Court—
- (a) must refuse to grant relief on an application for judicial review, and
- (b) may not make an award under subsection (4) on such an application,
- if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”
49. The correct approach to s.31(2A) in a planning context was discussed in *R (Bradbury) v Awdurdod Parc Cenedlaethol Bannau Brycheiniog* (“*Bradbury*”) [2025] EWCA Civ 489 by Lewis LJ. At [72], he endorsed the Court of Appeal’s analysis in *R (Plan B Earth) v Secretary of State for Transport* (“*Plan B Earth*”) [2020] EWCA Civ 214 at [272]-[273]. At [273] of *Plan B Earth*:

“273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is “highly likely” that the outcome would not have been “substantially different” if the executive had gone about the decision-making process in accordance with the law...”

50. Lewis LJ provided the following guidance in *Bradbury* at [74]:

“... the question for the court is whether it is highly likely that there would be no substantial difference in the outcome if the legal error had not occurred. That is a high test to surmount. I doubt that it is correct or helpful to express the test as expressing a standard somewhere between the civil and criminal burden of proof... The section emphatically does not require the court to embark on an exercise where the error is left out of account and the court tries to predict what the public body would have done if the error had not been made... Rather, the focus should be on the impact of the error on the decision-making process that the decision-maker undertook to ascertain whether it is highly likely that the decision that the public body took would not have been substantially different if the error had not occurred.”

The parties’ submissions

The Claimant’s submissions

51. It is submitted on behalf of the Claimant that the consistency principle is engaged in this case in circumstances where the OR concluded that the Fallback Scheme was deficient in certain aspects notwithstanding the Inspector’s conclusion that it was not. The Claimant relies on the OR’s conclusions at [9.10] and [9.11] that the Fallback Scheme was “*not considered good design*” and provided “*poor quality of accommodation*”. The OR’s negative conclusions as to the Fallback Scheme are said to have been reinforced to the Committee through the slide deck presentation which categorised the Fallback Scheme as providing “*poor quality of design*” and “*poor quality accommodation*”, and through the oral commentary provided by the officer at the meeting.
52. The Claimant submits the OR’s conclusion was “necessarily disagreeing”, per *North Wiltshire*, with the Inspector’s findings in the Appeal Decision at [37] and [47] that the Fallback Scheme provided acceptable living conditions and was a high-quality design. That being the case, it is submitted that the Committee was obliged to take into account the findings of the Appeal Decision, and to give reasons for reaching a different conclusion, as required by *Dunster*.

53. It is said that the OR's conclusions led to the Committee comparing the Proposal with a sub-standard Fallback Scheme, rather than focussing on the extent to which the Proposal was an enhancement over an already acceptable Fallback Scheme.
54. The Claimant rejects the Defendant and Interested Party's analysis to the effect that the consistency principle is not engaged:
- i) The Claimant submits that the Defendant and Interested Party misidentify the nature of the inconsistency by adopting the overly simplistic stance that the Proposal and Fallback Scheme are different developments. It is submitted that different nature of the schemes, which the Claimant accepts, does not preclude the engagement of the consistency principle because the OR's assessment of the design and living conditions necessarily disagreed with the Inspector's conclusions in the Appeal Decision.
 - ii) The Claimant rejects the Defendant's analysis to the effect that, when read in context, the negative comments in the OR as to the design and quality of accommodation of the Fallback Scheme are to be construed simply as a comparison with better design and better quality of the Proposal. The Claimant submits that both the comments in the OR, and in the presentation at the meeting, were not comparative judgments but absolute judgments that the Fallback Scheme was deficient.
55. The Claimant submits that, given the consistency principle was engaged, it is clear that the advice provided to the Committee was legally deficient. It submitted that, relying on *Mansell*, the correct starting point is to assume the Committee followed the advice given in the OR. It is said the advice in the OR was deficient in that:
- i) It did not acknowledge that the advice given by the officers as to the design and living accommodation of the Fallback Scheme had been rejected by the Inspector.
 - ii) It did not set out the Inspector's conclusions on the design and living accommodation aspects of the Fallback Scheme.
 - iii) It provided no reasons as to why the OR reached different conclusions from the Inspector on the aforementioned aspects of the Fallback Scheme.
56. The Claimant does not accept the Defendant and Interested Party's position that it would have been obvious to the Committee that the Inspector thought the design and living conditions of the Fallback Scheme were acceptable, given the granting of permission for the Fallback Scheme. The Claimant asks the court to note that the grant of planning permission does not mean every aspect of a proposal is acceptable and that planning permission is granted routinely where some aspects of a proposal are unacceptable but there is overall policy compliance. It is submitted that the effect of the deficient advice in the OR is

that the Committee went into the debate at the meeting unaware as to the inconsistency between the OR's and Inspector's conclusions.

57. Alternatively, the Claimant submits that, even if the Committee were aware of the inconsistency, the Committee were rendered unable to have proper regard to the Appeal Decision as they did not have details of the underlying basis of the Inspector's decision, as required by *Havard*. They were given no copy of the Appeal Decision or even a summary of its conclusions.
58. The Claimant submits that, even if knowledge of the Inspector's conclusions could be imputed to the Committee, the Committee failed, contrary to *Dunster*, to provide any reasons for reaching an inconsistent decision on design and living conditions afforded by the Fallback Scheme.
59. The Claimant urges the Court to reject the Defendant and Interested Party's submission that any legal error was corrected at the Committee meeting by the comments made by Mr Harris KC. The Claimant submits that this is an entirely inadequate basis for displacing the *Mansell* assumption that the Committee followed the officer's advice:
 - i) Mr Harris KC spoke only to living conditions and said nothing about the design of the Fallback Scheme.
 - ii) At no stage following the comments of Mr Harris KC did the officers modify or change the advice given in the OR, or advise the Committee that the Inspector's reasoning needed to be considered. The Claimant notes that the officers did correct the omission raised by Mr Harris KC relating to Richmond Borough Council's objection but stayed noticeably silent about the conflict between the OR and Inspector's conclusions.
 - iii) At its highest, Mr Harris KC advised the Committee that they were about to reach a decision that was inconsistent in relation to living conditions. He did not however address the reasons for the Inspector's decision, so the Committee remained unable to discharge their obligation to have proper regard to the Appeal Decision and provide *Dunster* reasons for departing from it.
60. It is submitted on behalf of the Claimant that the legal advice given towards the end of the meeting only compounded the previous legal error and neutralised the comments made by Mr Harris KC. The Committee was advised: "*I do not think you need to go into all the details considered by the inspector, the planning appeal. We just have to realise that the outcome of that planning appeal is the material consideration that we have to take account...*" The Claimant submits the advice is directly contrary to the requirement in *Dunster* and *Havard* that the basis of the Inspector's decision needed to be known to the Committee for them to address the inconsistency. The Claimant does not accept any attempt by the Defendant to interpret the legal advice as meaning that the Committee were being told to take into account the outcome on each of the substantive criticisms of the Fallback Scheme.

61. The Claimant urges the court to be wary of placing too much reliance on comments made by individual councillors at the meeting, or the meeting transcript as a whole, in light of the guidance given in *Scottish Widows, Village Concerns* and *Cook*. It notes that many councillors did not speak at all such that it is impossible to know the Committee's collective view. Of those councillors that did speak, the Claimant submits that the comments suggest they thought the Fallback Scheme was incredibly poor quality.
62. It is submitted on behalf of the Claimant that the legal error in the case is straightforward, namely that the OR's advice was erroneous, the advice was not corrected at the Committee meeting, such that the Committee proceeded to grant permission having been told that the Fallback Scheme was deficient as to design and living conditions. The Committee did not acknowledge that the decision as to the standard of design and living conditions was directly inconsistent with the Inspector's findings in the Appeal Decision on the same issues, and gave no reasons for departing from the earlier findings.
63. The Claimant does not accept that there is any basis for a s.31(2A) defence. It is submitted that the error went to the heart of the balancing exercise that was required under para. 215 of the NPPF in circumstances where the comparison between the Proposal and the Fallback Scheme were given considerable weight in the overall planning balance. The Claimant recognises that there were other factors relied on by the officers to justify their conclusion that the Proposal was superior to the Fallback Scheme but submits that the design and living conditions factors were clearly important considerations. The Claimant submits that, had the OR recognised that the baseline was an already acceptable, plan-compliant Fallback Scheme delivering substantial benefits without heritage harm, the incremental value of 28 additional units and 13 affordable homes provided by the Proposal, weighed against the heritage harm to Grade I and II* assets, would have presented a materially different and less favourable balance. The Claimant submits it cannot therefore be said that it is "highly likely" the Committee would have reached the same decision.

The Defendant's submissions

64. The Defendant's position, in summary, is that the Committee were made aware of the Inspector's reasons for the Appeal Decision, took them into account, and reached a lawful planning judgment that the Proposal was a superior scheme offering benefits over and above those offered by the Fallback Scheme.
65. The Defendant notes that the Claimant has now elevated the importance of the Fallback Scheme in circumstances where the Claimant's own objections to the Proposal made no mention of the same. It also notes that Historic England, whilst objecting to the proposal, equally failed to refer to the Fallback Scheme.
66. It is submitted on behalf of the Defendant that it is now common ground that the Proposal complied with the development plan. That being the case, the Committee had to determine the Proposal in accordance with the development plan, unless other material considerations indicated otherwise. The Defendant accepts that compliance with the NPPF para. 215 requirement to balance

heritage harm was an “other material consideration”. It also accepts that the Committee regarded the Fallback Scheme as a material consideration.

67. The Defendant does not accept that the consistency principle in *North Wiltshire* is formally engaged. It is submitted on behalf of the Defendant that the Committee could rationally find that the Proposal was superior to the Fallback Scheme without disagreeing with the Inspector’s conclusion that the Fallback Scheme was, taken on its own, acceptable development, including in respect of layout and design. The Defendant notes that the Inspector was never in a position to compare the two schemes.
68. The Defendant does however accept that, if the Committee was taking into account the quality of the Fallback Scheme, the members needed to have express or deemed knowledge that the Inspector took a different view to that of the officers. The Defendant submits that the authorities are not prescriptive as to the level of detail the decision maker needs and that the answer will be fact specific but must be proportionate. It is submitted that, on the facts of this case, it was sufficient for the Committee to be told that the Inspector took a different view.
69. The Defendant’s primary position is that it does not accept that the OR was misleading such that it amounted to a legal error. It submits that it was made clear in the OR that the permission for the Fallback Scheme had been granted on appeal. The OR at [3.1] provided the planning history, including noting the appeal and approval. The Defendant notes that the OR also included the appeal reference number, such that the members could investigate further, if they so wished. Paragraphs [9.8] and [9.235] of the OR also referenced the appeal. The Defendant reminds the court of the *Mansell* principle by which it must be borne in mind that the OR was written for councillors with local knowledge. The Defendant submits that the Committee would have had knowledge of previous appeal decisions, would be expected to understand that to receive planning permission the Fallback Scheme must have been of sufficient quality, and that the officers’ views were simply their own.
70. Even if the court concludes the OR was legally deficient, the Defendant submits that the court is entitled to and should take the subsequent debate into account to correct any material error, applying *Arthur*. The Defendant submits that the transcript reveals a number of instances of the Appeal Decision being discussed. At 19.53, the officer tells the Committee that the Fallback Scheme was permitted on appeal, and that implementation of the consented scheme had commenced. It is submitted that any informed member of the Committee would understand that all the reasons for refusal must have been overturned on appeal in order for permission to have been granted.
71. The Defendant also relies on the comments made by Mr Harris KC at meeting. They include, at 1:07:11, his observation that the Fallback Scheme had “*recently been said to be entirely appropriate...*”. Also, his answer at 1:11:13 to a question from a councillor about living conditions: “*the inspector granted permission and he rejected every single one of the points that’s now being relied upon as saying there would be unacceptable living conditions in the fallback*

position. The inspector looked very carefully at the policies at the London plan and at the guidance on housing standards that sits behind the plan and found in every instance that the council's case in relation to those was not proven." Further, his repetition at 1:15:35: *"But really what I think is not as important as what the inspector has said having listened to exactly the points that were made on behalf of the officers and rejected."* The Defendant submits the facts are analogous to those in *Arthur*, where a correction by an external party was sufficient to correct an omission. That being the case, it is submitted on behalf of the Defendant that there is "evidence to suggest otherwise" to displace the *Mansell* assumption that the members followed the officer's views about the sub-standard aspects of the Fallback Scheme.

72. The Defendant contends that the decision made by the Committee was a lawful comparative judgment that the Fallback Scheme was not poor but simply not as good as the Proposal. It submits that support for that analysis can be found in various comments made at the meeting. Those include comments made by a councillor at 1:13:45 that *"no one's suggesting that the ...substantive scheme is of a poor standard. It's just not a very good standard where these are a better quality and there far more of them..."* It is further submitted that the councillor's comments are consistent with the approach of the Interested Party's planning consultant, Ben Kelway, who also spoke to a comparative assessment. At 1:20:24, Mr Kelway stated: *"[The Fallback Scheme is] an inferior design solution as officers accepted ... and it offers inferior homes, perhaps not unacceptable homes..."* At 1:51:02, it is submitted an unidentified councillor appreciated the need for a comparative judgment stating: *"...It's about weighing up those...pros and cons. It's what is the benefit here against what is the harm and what's...the negative."*
73. The Defendant submits that it does not matter that not all the councillor's views are recorded as their collective view can still be ascertained. The Defendant relies on the fact that no one gainsaid the councillor's comment that *"no one's suggesting that the ...substantive scheme is of a poor standard."* It further asks the court to note that, after Mr Harris KC spoke, no one suggested the Fallback Scheme was unacceptable. The Defendant submits that the Court can safely adopt the councillor's aforementioned comments at 1:13:45 as being indicative of the whole Committee's view.
74. The Defendant does not accept that the legal advice given in the Committee meeting was incorrect. The Defendant submits that, when read fairly and understood in the context of the meeting, the advice was simply saying to the Committee that they did not have to examine *all* the details before the Inspector and that they should focus on the outcome. By "outcome", the Defendant submits that encompassed not only that permission had been granted for the Fallback Scheme, but also the inherent conclusions that the accommodation must have been found to be acceptable. The Defendant does not accept the legal advice directed the Committee to ignore the Inspector's reasoning, contrary to *Havard*. The Defendant emphasises what, it submits, is the important second half of the legal advice, which reminded the Committee to *"consider this fresh application we now have and compare it with the fallback position whether it is indeed [an] improvement"*.

75. The Defendant's alternative argument is that, even if the Court were to find that the OR and subsequent events of the meeting failed to inform the Committee that the design and living conditions of the Fallback Scheme were acceptable, that does not amount to a legal error. The Defendant submits that the same amounts to a minor or inconsequential error of the nature that can be excused: *Mansell* at [42]. It is submitted that the issue did not go to whether there had been compliance with the development plan and was relevant only to whether the heritage harm associated with the Proposal could be justified under NPPF para. 215. The Defendant submits that the nature of the benefits of the Fallback Scheme, although relevant, were not necessarily determinative when deciding whether the benefits of the Proposal justified the harm, particularly as poor design and living conditions were only two elements of the Fallback Scheme.
76. The Defendant does not accept that the Committee was under a duty to provide reasons given the overall consistency of the decision with that of the Inspector. It is submitted that the Committee found that the Proposal offered manifold benefits over and above those offered by the Fallback Scheme, which was a legitimate planning judgment involving no overall departure from the Inspector's earlier decision that the Fallback Scheme was acceptable.
77. In the alternative, the Defendant submits that relief should, in any event, be refused under s. 31(2A). The Defendant concedes that the threshold is a high one (applying *Bradbury*) but submits it is met in this case. It puts its argument in the following way:
- i) It is common ground that the Proposal complied with the development plan.
 - ii) The only possible reason for refusal of permission would be the NPPF para. 215 considerations, namely if the public benefit did not outweigh the less than substantial harm to heritage assets. That was a matter of planning judgment for the Committee.
 - iii) It is inconceivable that permission would have been refused given the Councillors clearly regarded the Proposal was considerably superior providing (a) the provision of 13 affordable homes; (b) an additional 28 dwellings; (c) an improved and policy-compliant housing mix (19% three-bed units, compared to 8% in the Fallback Scheme); (d) an improved commercial offer with active frontages; (e) significant public realm improvements; (f) sustainability measures and net zero carbon obligations; (g) private amenity space for all dwellings; and (h) enhanced biodiversity net gain.
78. It is submitted that, even if the Fallback Scheme design had been explicitly described as high quality and the living conditions as acceptable (to reflect the Inspector's findings), all of the other advantages of the Proposal would have remained meaning there can be no realistic doubt the balance would have remained overwhelmingly in favour of the new development.

The Interested Party's submissions

79. The Interested Party adopts the substance of the Defendant's position.
80. The Interested Party submits that the OR's approach to the issues as a whole is relevant, and notes that the Claimant makes no criticism of the vast majority of the report. It notes that it is not in dispute that the Defendant made no error in determining that the Proposal accorded with the development plan, that the decision should be made in accordance with the development plan unless there were material considerations, and in conducting a lawful assessment as to heritage harm. The Interested Party highlights that the OR's assessment of the planning balance at [9.322] – [9.333] is in some parts comparative with the Fallback Scheme but in other aspects is not comparative. Of those aspects that are comparative, the Interested Party submits that the Claimant's criticisms are limited in scope to the comparisons as to design and living conditions. The Interested Party notes that the OR's conclusions at [13.1-13.7] make no reference to the Proposal being better than the Fallback Scheme. It is submitted the Fallback Scheme therefore had little bearing on the reasoning advanced for the approval of the Proposal. The Interested Party does not therefore accept that the OR was seriously misleading.
81. It is submitted that it is important to bear in mind the limited way in which the now contentious aspects of the Appeal Decision flowed through to the Committee meeting. The slide presentation to the Committee included a summary of the benefits that was not based on a comparative exercise. The contentious penultimate slide summarising the Fallback Scheme included a number of negative features of that proposal with which the Claimant takes no issue, such as the smaller number of homes and the lack of affordable housing. The Interested Party submits it was obvious to the Committee was acceptable from the fact that the Inspector allowed the appeal; a point highlighted by Mr Harris KC in the meeting. It is submitted that there was no obviously material matter that was not put in front of the Committee for them to take into account.
82. The Interested Party does not accept that the principle of consistency applies to the facts of this case. It is submitted that the Fallback Scheme and the Proposal are distinguishable in that, other than relating to the Site, the differences (a taller new building against a conversion and extension) outweigh the similarities, with each scheme also having different benefits and harms.
83. The Interested Party submits that the Committee was under no statutory duty to give reasons for granting planning permission in this case but recognises a common law duty may arise, particularly where the committee report cannot be relied upon as explaining the decision: *R (CPRE Kent) v Dover District Council* [2017] UKSC 79 at [52], [54] – [55], approving *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71. It is submitted there was no duty for the Committee to give reasons in this case for the granting of permission in circumstances where it was apparent from the many other public benefits identified in the OR why the decision had been made.
84. It is submitted that, even if a legal error arose, s. 31(2A) applies such that relief must be refused as the outcome was "highly likely" to have been the same. The Interested Party adopts the Defendant's submissions on this point. It relies on

the fact that the Committee's primary consideration was the benefits and harms of the Proposal without reliance on the Fallback Scheme, taken with the Committee's knowledge that the appeal had succeeded and the unchallenged advantages of the Proposal. The Interested Party reiterates that the Claimant's own objections did not assert the Fallback Scheme as being the preferred alternative.

Discussion

85. There is much in this case which is not in dispute. As a result of s.70(2) of the TCPA 1990 and s.38(6) of the PCPA 2004, the Proposal was to be determined in accordance with the development plan unless material considerations indicated otherwise. It is not in dispute that the Proposal did accord with the development plan.
86. It is further not in dispute that the OR carried out a lawful heritage assessment and concluded that the Proposal would lead to "less than substantial harm" to designated heritage assets. Pursuant to para. 215 of the NPPF, the heritage harm had to be weighed against the public benefits. It is agreed that compliance with the requirement under para. 215 of the NPPF is a material consideration. In weighing the heritage harm against the public benefits, the Committee took into account the Fallback Scheme. It is not in dispute that the Fallback Scheme did not give rise to any heritage harm. I agree with the Defendant's submission that it is not necessary to debate whether the Committee was obliged to take the Fallback Scheme into account; the simple fact is that they did as clearly demonstrated by the references to it in the OR's report (for example, at [9.13], it was described as holding significant weight in the planning balance) and from the subsequent attention it received at the Committee meeting.
87. Given that the Fallback Scheme was deemed a material consideration, it was important that the Committee understood what the Fallback Scheme entailed albeit it was a matter of planning judgment for them as what weight, if any, to afford the consideration: per Lord Hoffman in *Tesco Stores*. The Committee's primary source of information was the OR. The question then arises as to whether the OR's advice was lawful.

Is the consistency principle engaged?

88. The Claimant's argument that the OR's advice was unlawful is predicated on the submission that the OR provided advice that was inconsistent with the Appeal Decision made by the Inspector. At a high level, there was nothing inconsistent about the Committee granting permission for the Proposal and the Inspector granting permission for the Fallback Scheme. As the Defendant and Interested Party highlight, the schemes are readily distinguishable in that one concerns a taller new-build, the other a lower conversion and extension, and each has different benefits and harms. In my judgment, that is however too simplistic an approach. *North Wiltshire* at [145] requires the adoption of a practical test and the asking of whether, if a case is decided in a particular way, that means the decision maker is necessarily agreeing or disagreeing some critical aspect of the decision in the previous case. The reference to "some

critical aspect” is important. One must consider not just at the overall decision (for example, whether permission was or was not granted) but any critical aspects of that decision.

89. The OR invited a comparative assessment between the Proposal and Fallback Scheme. It is noteworthy that the Fallback Scheme, and its perceived disadvantages, were afforded detailed analysis at [9.8] – [9.13] (particularly at [9.10] and [9.11] where judgments as to poor design and poor quality of accommodation respectively were advanced) and again referenced in parts of [9.328]. Given that a comparative assessment was advised, the decision making was required to be consistent with the critical aspects of the Appeal Decision. Critical aspects of the Appeal Decision included the Inspector’s positive conclusions as to living conditions and design quality given that the OR represented these as negative features of the Fallback Scheme. The OR’s conclusion as to the merits of the Fallback Scheme for the purpose of the comparative assessment was therefore “necessarily disagreeing” with the Inspector’s findings. The principles of consistency referenced in *North Wiltshire* are thus engaged.

Compliance with principles of consistency

90. It will be assumed that the Committee followed the recommendation in the OR, unless there is evidence to suggest otherwise: *Mansell* at [42(2)]. It is thus necessary to consider whether the OR complied with the principles of consistency so as not fall into legal error. It is not every error that will render a report defective; minor or inconsequential errors may be excused, and any misdirection may not be to a material issue.
91. I recognise the superficial attractiveness in the Defendant’s and Interested Party’s submission to the effect that the officers’ comments about the living conditions and design quality formed only a very small part of the OR. The OR ran to over 100 pages. The direct references to the Fallback Scheme occupy only a small fraction of the report. The OR did reference at [3.1] and [9.8] that permission for the Fallback Scheme had been granted on appeal. The Committee, as councillors with planning experience, should therefore be taken to have understood that the Inspector must therefore have considered the Fallback Scheme acceptable. It is also the case that discussion as to the planning balance at [9.322] – [9.333] involved an overall assessment, rather than a narrow comparison of simply the Proposal against the Fallback Scheme.
92. The report does however have to be read as a whole. The OR at [9.9] and [9.13] advised the Committee that the Fallback Scheme held significant weight and had been implemented, could be developed and would be “likely” should the Proposal be refused. That advice meant it was inevitable that the merits of the Fallback Scheme would be a focus of the Committee’s attention. The negative comments in the OR at [9.10] and [9.11] were unjustified and contrary to the Inspector’s conclusions at [37] and [47] of the Appeal Decision. The overall effect of [9.10] – [9.13] is that the reader is left in no doubt that the advice is that the Fallback Scheme is a ‘bad’ scheme and one which is at high risk of being built out if the Proposal is refused. I do not accept the submission that the

Committee would have appreciated from the OR that the Inspector must have rejected the criticisms (or some of them) in granting permission. At best, the Committee would have appreciated that the Inspector found the Fallback Scheme to be acceptable overall but would not have known that the Inspector expressly disagreed with the officers' assessment of design quality and living conditions. The Defendant's submission that the provision of the appeal reference at [3.1] provided the Committee with the opportunity to investigate further if they so wished is misconceived. The members were entitled to assume the description of the Fallback Scheme provided in the OR was accurate and the onus was not on them to search out a copy of the Appeal Decision to check the veracity of the officers' representations.

93. Given that the Fallback Scheme was a material consideration, the OR did materially mislead the Committee on a matter that had a bearing on their decision. The OR did not inform the Committee that the officers' conclusions as to the design and living accommodation aspects of the Fallback Scheme had been rejected by the Inspector, or explain what the Inspector concluded on those aspects, or explain that the OR was advising the Committee to reach a different conclusion to the Inspector on those aspects and, if so, why. The overall effect of the OR is that the Committee were deprived of the opportunity to make an objective assessment of the Fallback Scheme to feed into their comparative assessment.

Was the unlawful error in the OR corrected subsequently?

94. The starting point is to assume that the Committee followed the OR's recommendation. That assumption can however be displaced if there is evidence to suggest the error was corrected: *Mansell* at 42(2). The Defendant and Interested Party rely on events at the Committee meeting to correct any unlawful error in the OR.
95. The dangers of too readily relying on transcripts of committee meetings or individual comments of councillors or others in attendance are well known: *Village Concerns* at [55], *Scottish Widows* at [21]-[22]. It is all too easy to cherry-pick individual comments to support a given argument. What is more important is the ability to stand back and consider the dialogue over the meeting as a whole. In this case, the agenda item dealing with the Proposal ran for approximately 1 hour, 48 minutes (from time 16:17 to 2:04:43). There are a number of relevant interactions:

- i) *The officer's presentation of the OR by reference to a slide deck and accompanying oral commentary.*

The presentation lasted for around 25 minutes. The Fallback Scheme was given prominence from the outset with the officer stating at 19:09: "*Before presenting the proposal, a brief overview of the consented scheme is provided which is considered the fallback position for this application.*" The officer reminded the Committee at 21:39 that the Fallback Scheme resulted in "*poor standard of accommodation*" and at 23:14 as to its "*poor visual appearance and low design quality*". No

mention was made of the Inspector's rejection of those judgments as to the standard of accommodation or design quality, let alone was there reference to the Inspector's reasons. At 39:58, the officer reached the penultimate slide which summarised the features of the Fallback Scheme. The officer again orally highlighted the poor standard of accommodation and poor quality of design. The slide itself also made reference to those points. The officer concluded the presentation some two minutes later. The perceived problems with the standard of accommodation and design quality of the Fallback Scheme were thus given prominence at both the start and end of the presentation, and were supported by a visual summary on the penultimate slide. The presentation does not correct the misrepresentation in the OR, indeed it simply compounds the problem.

ii) *The representations made by Mr Harris KC.*

Mr Harris KC spoke from 1:03:07 to 1:08:09. He then answered various questions to 1:17:19. There is some irony in the Defendant and Interested Party now relying on what Mr Harris KC said, given he made representations on behalf of the Claimant. I recognise that he highlighted that the Inspector had found the Fallback Scheme to be "*entirely appropriate*" [at 1:07:11], that the Inspector had rejected the officers' views as to unacceptable living conditions [at 1:11:13] and that he made a more general point about the Inspector rejecting the officers' views [at 1:15:35]. I am not however persuaded that the comments of Mr Harris KC served to correct the unlawful legal error in the OR. Firstly, Mr Harris KC was speaking on behalf of an objector. The Committee is highly unlikely to have considered him neutral and to have preferred his advice to that of the OR. Secondly, Mr Harris KC did not address the question of alleged poor design, or provide any details as to what the Inspector had concluded or his reasons therefore. Thirdly, neither the officer or legal advisor stepped in to correct the advice in the OR as to the Fallback Scheme. This is in marked contrast to the correction made in respect of issue Mr Harris KC raised regarding the omission of an objection from Richmond. The difference in approach gave the impression that there was merit in Mr Harris KC's point about Richmond but that his comments about the Inspector's rejection of the officer's views were irrelevant and/or incorrect.

iii) *Comments made by councillors.*

There are mixed comments from various councillors. At 1:09:01, a councillor was clearly concerned that the Fallback Scheme "*will be incredibly poor quality*" and he references in terms the officers' views. At 1:13:26, a different councillor refers to the Committee being "*between a rock and a hard place*" and his concern that "*it's very likely that the [F]allback [S]cheme will be built which is suboptimal*" but then states "*no one's suggesting that the old or the substantive scheme is ...of a poor standard.*" At 1:48:18, another councillor confessed to being "*a little bit lost in where [Mr Harris KC] was going*" and sought legal

advice as to whether to approve the Proposal “*would be going against the planning inspector*”. In my judgment, it is impossible to discern the collective view of the Committee from soundbite comments from individual councillors. It is relevant that not all of the councillors spoke. I am certainly not persuaded that by 1:48:37 the discussion in meeting had been sufficient to correct the erroneous legal advice given in the OR. The overwhelming impression from the comments made by the councillors is that they had an overly negative view of the Fallback Scheme, no doubt because no one has explained to them in clear terms that the Inspector had rejected the officers’ conclusions about poor design quality and poor living accommodation, and far less had anyone explained why the Inspector came to that conclusion.

iv) *Legal advice.*

Following the councillor’s request for advice at 1:48:18, the legal advisor responded. There were two main takeaways from the advice. Firstly, that the Committee did not need to go into all the details considered by the Inspector and should focus on the outcome of the appeal being the material consideration. Secondly, the Committee should compare the Proposal with the Fallback Scheme to see if the Proposal was an improvement. I am not persuaded by Defendant’s more nuanced interpretation of the first part of the advice to the effect that the Committee would have understood the legal advisor to mean that they should look beyond the fact that permission was granted by the Inspector and also consider the inherent conclusions that accommodation (and presumably design quality) were acceptable. If that is what the legal advisor intended, he needed to use far clearer language, particularly given that the explicit advice in the OR was that the living accommodation and design of the Fallback Scheme were of poor quality. An additional difficulty with the legal advice is that it fails to advise the Committee that they needed to have regard to the basis of the Inspector’s decision as to the inconsistent matters: *Havard* at [14].

96. I recognise that the receipt of subsequent information can correct material errors in the manner seen in *Arthur*. Whether subsequent events do in fact correct material errors is however a fact specific assessment. Considering the totality of the events at the Committee meeting, for the reasons discussed above, those subsequent events were insufficient to remedy the legal error in the OR.

Application of the findings to the ground

97. The effect of the aforementioned findings is that I am satisfied that both limbs of Claimant’s ground are made out, subject to the effect of s.31(2A).
98. As to ground 1(a), the consistency principle was engaged in circumstances where the Committee was advised that the Fallback Scheme was a material consideration (such that a comparative analysis would be undertaken) yet the officers took a different and inconsistent view to that of the Inspector as to the living conditions and design quality of the Fallback Scheme. *North Wiltshire*

applied. The OR misled the Committee as to the Inspector's conclusions on living conditions and design quality, such that the Committee was given a misleading picture of the merits of the Fallback Scheme. That error was material given the Fallback Scheme was a material consideration and a comparative exercise was to be undertaken. *Mansell* applied. The legal error in the OR was not corrected by subsequent events at the Committee meeting. *Scottish Widows* and *Village Concerns* applied, and *Arthur* considered. The Committee therefore remained oblivious to the fact that the Inspector had rejected the officers' judgments on the living conditions and design quality, still less did it know the basis for the Inspector's decision on those topics. Contrary to *Havard*, the Committee failed to have regard to the reasons given by the Inspector for rejecting the officers' criticisms as to living conditions and design quality.

99. As to ground 1(b), given that the Committee failed to have regard to the reasons given by the Inspector, it was not possible for the Committee to give reasons for departing from the Inspector's conclusions as to the design and living accommodation aspects of that decision. The failure to provide reasons for the inconsistency approach was contrary to the requirements established in *Dunster* and *Weston Homes*.
100. Public confidence in the planning system is in large part dependant on officers presenting accurate reports to councillors. It benefits no one for officers to give advice or convey judgments, particularly as to material considerations, that they know to have been rejected by a planning inspector. Councillors risk making flawed decisions in ignorance of material information. Objectors risk feeling deprived of a fair opportunity to engage in the planning process. Applicants inevitably end up frustrated with uncertainty and delay.

Section 31(2A)

101. The Defendant and Interested Party rightly recognise that the application of s.31(2A) in the context of a planning decision poses a high hurdle. I am not persuaded it applies on the facts of this case for the reasons I will explain.
102. The OR at [9.324] advised the Committee that: "*This balancing act involves assessing the impact of the heritage asset's significance, considering potential public benefits, and making a reasoned judgment.*" It is correct to acknowledge that, at [9.328], the OR identified a number of public benefits of the Proposal that did not relate to the matters upon which the officers and Inspector disagreed. Those benefits included that the Proposal would provide 28 more homes, affordable homes, offered a policy-compliant housing mix, public realm enhancements, an improved commercial offering, and townscape enhancements. However, the Fallback Scheme was a material consideration for the purposes of assessing the planning balance under para. 215 of the NPPF. The officer reminded the Committee of the importance of the Fallback Scheme at the meeting at 20:01: "...the fallback position is considered to carry significant weight in planning balance likely outcome should the current application be refused." That importance was again emphasised by the officer in the penultimate slide outlining the features of the Fallback Scheme, including what was said to be the poor quality design and poor quality accommodation.

In circumstances where the Fallback Scheme was given such prominence, the misrepresentation of the features of that scheme meant that the Committee proceeded on a false premise in undertaking the balancing exercise. That inaccurate assessment of the benefits of the Fallback Scheme therefore went to the heart of the balancing exercise. It is not enough to conclude that the Committee may well have made the same decision. The threshold of “highly likely” is a high one. In circumstances where the features (good or bad) of the Fallback Scheme were so central to the planning judgment, to conclude that it was highly likely that the Committee would have made the same decision even if given an accurate appraisal of the features of the Fallback Scheme would be straying into the forbidden territory identified in *Bradbury* of assessing the merits of a public decision.

Conclusion

103. The Claimant’s claim succeeds and the Decision will be quashed.