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Our ref: MIL2/2 (LPF)
Your ref: F/24/97376

17 June 2024

BY EMAIL ONLY: planning@eastleigh.gov.uk

Copy to: Gary Osmond, Senior Planning Officer (gary.osmond@eastleigh.gov.uk)

Dear Council

7-bedroom detached dwelling over three levels with associated landscaping ("the Development")
Cherry Court, Salterns Lane, Bursledon, Southampton, SO3 8DH under reference F/24/97376
("the Site")

1. We are instructed by Mrs Sandra Milton-Tayler and Mr David Milton-Tayler, who oppose the Development of a 7-bedroom detached dwelling over three levels with associated landscaping at Cherry Court, Salterns Lane, SO31 8DH under application reference F/24/97376.
2. The Development is a revised application ("**Scheme 2**") following the withdrawal of the application for a new 4-bedroom dwelling (application F/23/96152) ("**Scheme 1**").

Background

3. The Site sits in the Old Bursledon Conservation Area ("**OBCA**") and within the Old Bursledon Special Policy Area ("**OBSPA**").
4. By letter dated 12/01/24, this firm submitted objections to the Scheme 1 proposal ("Scheme 1 Objection" (enclosed with this letter for convenience). We do not repeat those objections here but adopt them to the revised application and supporting documentation.
5. The main issue is that the Development contravenes the Eastleigh Borough Local Plan ("**EBLP**") policy BU7, which applies to residential replacement dwellings in the OBSPA and the application should be refused in accordance with section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 since the Development does not accord with the development plan and there are no material considerations that would indicate that permission should be granted otherwise in accordance with the development plan.

Changes to the scheme of development

6. As with Scheme 1, Scheme 2 seeks permission to redevelop the Site with a replacement 3-story dwelling. In terms of massing, it is said the total volume is 1480m³ (scheme 1 was 1660m³). The topographical changes to the Site appear unchanged and the south facing elevations show a box like structure. The applicant has provided further planning documents in support of the application. However, the same objections (see below) from statutory consultees appear to be unaddressed by the Scheme 2 application documents, and those consultees' comments opposing development (outlined below) remain equally applicable.

Environmental information

7. Despite the Newt Officer stating further information is required (assessment 06/12/2023) there is no change to the applicant's environmental information submitted in support of Scheme 1. The application form makes a declaration that there is no reasonable likelihood of protected and priority species being affected by development. This is entirely at odds with the Council's own ecological surveys and what is known about the nearby SAC and RAMSAR designated sites particularly where further information is still outstanding.

Design and Access Statement

8. There are a number of changes from the Scheme 1 Design and Access Statement ("**DAS**") dated 26/10/23 with the Scheme 2 DAS dated 09/05/24 that is mostly non-substantive. Although the inclusion of Section 3 "Design evolution" is included, this does not suggest there has in fact been any refinement in the design, nor consultation with e.g. Old Bursledon Action Group ("**OBAG**"), a long standing heritage consultant for the Council, does the Scheme 2 DAS reflect on the observations of the Design Review Panel that met on 16/01/24 and concluded "[we] *could see little evidence of a comprehensive site analysis, or the evolution of the design presented.*"

Heritage Statement

9. The only substantive change to the Heritage Statement is at 4.8 (repeated at 4.11) which proceeds on that the basis that there is a "20.19%, policy-compliant, increase in size over the original dwelling" and concludes "*the significance of the Conservation Area remains unharmed.*" However, that 20.19% calculation is a demonstrably false calculation (see below paragraphs 14-15), and the author of the Heritage Report (who as a point of note is not named) must be asked to review this when there is undoubtably less than substantial harm to OBCA.

Landscape & Visual Appraisal document

10. There is a *Landscape & Visual Appraisal* ("LVA") dated April 2024 from UBU Design. This is a new document and was not submitted as part of the Scheme 1 application. It is not a Landscape & Visual Impact Assessment ("LVIA"). An LVA provides a preliminary understanding but does not assess the significance of the impacts of the Development and in particular there is no thorough analysis of the impact of views across the River Hamble.
11. In particular, as with the Heritage Statement, the LVA relies on a demonstrably false calculation that the residential expansion is less than the 25% policy limit (see paragraphs 14-15). The LVA does not consider the wrap-around glazing (see paragraph 24). Further, The LVA considers the Site self-contained and on South-West of the Site vegetation screens the Development from views from the River Hamble, yet there is a covenant that appears to limit the retention of mature vegetation on the Site boundary (see paragraph 25).

Main Issue: Replacement dwellings EBLP Policy BU7

12. The application should be refused and our primary submission is that it contravenes EBLP policy BU7(1)(a) which limits residential expansion to a 25% increase on the original dwelling being replaced. The applicant's methodology for the calculation is in the Scheme 2 DAS at para.4.7 and the Volume Study (p.26). This is an example of skewing the numbers to bring the proposed increase within the 25% that would make the Development acceptable in planning terms.
13. The Volume Study includes non-habitable rooms and structures, namely the chimney stack and flue, garage, and loft space, which total 304.82 m³ according to the Volume Study. It is not at all clear (nor in anyway explained, let alone justified) that the volume calculation for the purpose of EBLP policy BU7(1)(a) could include non-habitable rooms and structures from the existing/original dwelling. That certainly is not the wording of the policy and in our view would constitute an unlawful interpretation of the meaning of policy under Tesco Stores.

14. Ultimately the interpretation of all planning policy is a question of law. Accordingly, local planning authorities “*cannot make the development plan mean whatever they would like it to mean*”: Tesco Stores v Dundee City Council [2012] PTSR 983. Rather, planning policy must be interpreted objectively in accordance with the language used, read in its proper context: Rectory Homes v SSHCLG [2020] EWHC 2098 (Admin). To understand the purposive nature of the 25% limit and its proper policy context, residential expansion is permitted provided it does not “*create a dwelling disproportionately larger than the one that is being extended or replaced*” (EBLP BU7(1)(c)) and “*are not otherwise detrimental to the character of the area as viewed from the River Hamble*” (EBLP BU7(1)(f)).
15. On any view, this Development is over double the 25% limit. The habitable rooms of the existing dwelling are 927.28 m³. The Volume Study for the new dwelling puts the proposed massing at 1480 m³. Accordingly, the increase is approximately 59.6% expansion on the original dwelling. On an alternative analysis the Development and the changes to the topography add a third storey to a two-storey property. The Volume Study shows a breakdown of 468.68 m³ for the lower ground, 481.49 m³ for the ground floor, and 537.74 m³ for the 1st floor. With the ground floor and first floor totalling 1091.23 m³, there is already an increase of approximately 17.68% replacing (like for like) a two-storey dwelling. That is without the addition of the lower ground, which gives a further 35.63% on that 17.68% increase thereby totalling 53.31%.
16. As to the Council’s position, the Heritage Officer objected on the basis that any increase above 25% was considered unacceptable (see Holding Objection of Mr Tim Dyer dated 12/01/2024) and this is echoed by the Design Officer’s comments dated 13/12/23 which concludes “*This seems like an excessive increase of floorspace in this location [and comprises] an awkward juxtaposition of materials and forms placed onto the ‘front’ of an otherwise dull box.*”
17. Accordingly, the Development does not accord with the development plan and permission should be refused and there are no material considerations that would indicate that permission should be granted.
18. However, and for completeness, the applicant seeks to rely on application material going to issues of heritage, ecology and landscape and we address those issues in what follows.

Heritage: OBCA and OBSPA

19. Related to the policy justification for EBLP policy BU7, is the effect of the proposed Development on the character and appearance of the OBCA and OBSPA. We refer again to our Scheme 1 Letter (paragraphs 10-15 and 19-20).

Less than substantial harm

20. At the very least, there is inadequate information and an unauthored Heritage Statement that proceeds on a false assumption about the volume increase in the replacement dwelling. Accordingly, the conclusion in the Heritage Statement that “*the significance of the Conservation Area remains unharmed*” is untenable.
21. The Council’s Heritage Officer (Tim Dyer) put in a “holding objection” dated 12/01/24, considering that the proposal would detrimentally impact “*Salterns Lodge, Hamble Lodge, and Bursledon...Lodge – a quite expansive Edwardian building overlooking the river and the more humble Lynch Grove, a pair of workers cottages the other side of the public footpath and lane leading down to the boatyard to the west of the site.*” The Heritage Officer concludes the harm is unclear. It appears to us that there is a clear case that the Development will result in less than substantial heritage harm to the character and appearance of the OBCA. That is, the applicant’s own LVA supports that conclusion on any proper analysis/reading where the LVA’s current

conclusion at 6.17 that the Development “*will also avoid harm to the significance of heritage assets*” is based on the erroneous assumption that the development is for a “*slightly extended volume*” (wrong for reasons at paragraphs 14-15 above). Further the LVA’s conclusion at para.6.19 that the “*views from the river may be protected through boundary tree planting to reinforce the existing boundary vegetation*” is also not available to the applicant (see paragraph 25 below).

22. Where there is less than substantial harm, it is important to set out clearly the relevant planning law and policy framework. Section 72 Listed Buildings Act Planning (Listed Buildings and Conservation Areas) Act 1990 requires the planning authority to pay special attention to the desirability of preserving or enhancing the character or appearance of the OBCA in exercising planning functions. Conservation areas are also extended protections by, and the planning authority must apply the relevant policies set out in detail in, Chapter 16 of the NPPF. The significance of the OBCA is set out in the SPD Old Bursledon Conservation Area Appraisal and Management Proposals (2012) (the “OBCAAMP”), and the heritage assets are protected by EBLP policy DM1(1)(a)(iii), and any harm requires evidenced justification in accordance with EBLP policy DM12.

Landscape/heritage: Views of the OBCA

23. The Design Officer’s comments dated 13/12/23 in relation to Scheme 1 stated: “*there was no evidence presented showing the visual impact from across the river*” and that an “*analysis of longer views from the south needs to be done to determine **the impact** that the 3-storey building, its continuous parapet line, and the extensive areas of glazing will have when set within the existing context*” (**emphasis added**). As above the applicant now relies on an LVA. There are a number of shortcomings with the LVA which as noted is not an LVIA.
24. First, the extensive glass fronted design feature is not considered in the LVA whatsoever. The glazing will wrap around the front of the Development, so it is not sympathetic development. The applicant says they will use non-reflective glass in the Development. That does not, as a matter of policy, make any difference in the OBCA, where the fact of a glass frontage that is prominent and therefore unsympathetic modern development cannot be mitigated by anti-glint/glare (see e.g. Appeal Decision Letter of ISP S Leonard dated 26/02/21 under APP/W1715/W/20/3261854).
25. Second, the LVA proposes mitigation through “*Retention and protection of existing boundary trees, hedgerows and shrubs and reinforcement with new tree, hedge and shrub planting, to strengthen local landscape pattern, and enhance landscape character and screening benefits in views towards the site*” (LVA 5.1). However, it is not clear the impact on views from the River Hamble can be lawfully mitigated by allowing vegetation screening to grow out where there is a restrictive covenant burdening the land registered against title number HP188710: “*Not to permit any trees or shrubs growing to the south-west [of the property] to grow to such a height as to block or interfere with the view of Hamble River.*” Indeed, that is consistent with the Design Review Panel’s concerns when they met on 16/01/24 and concluded “*Whilst many plots in the area are hidden from public view, the application site does not benefit from the same degree of mature tree planting.*” To illustrate what that looks like we refer to a photo (enclosed with this letter) of the Site from the bank of the River Hamble taken in June 2024.

Overlapping protection with access to countryside

26. Cherry Court is adjacent to an important public right of way leading to the River Hamble. This was particularly troubling to the Design Review Panel who sat on 16/01/24 and observed the “*relatively close proximity to the lane and public right of way/track down to the river and boatyard means that the site is reasonably visible from the public realm both at the front and rear.*”

27. Given the proximity to this public right of way, together with the views across the Hamble, it would plainly be contrary to EBLP policy SP S8(1)(d), which requires management of development in the OBCA to “*enable public enjoyment and the interpretation of the asset.*” It would also, being new development, contravene policy DM1(1)(f), which requires protection and enhancement of public rights of way and provides fully connected green infrastructure that interlaces the development and connects into the wider network, the context for which is that the OBCA lies in the countryside and is particularly vulnerable to the visual impacts of large-scale extensions and replacement dwellings. Similarly, those views from the River Hamble estuary are protected under EBLP policy S7.

SPD Old Bursledon Conservation Area Appraisal and Management Proposals (Character Zone 8)

28. The property sits in Character Zone 8 of the OBCAAMP. We note that as far as Character Zone 8 is concerned, the historic character has been undermined by “*some unsympathetic modern development, particularly in Salterns Lane*” (OBCAAMP 4.155). However, this is only true of the front boundary treatments and in any event, the view of OBAG is that in respect of the development “*There is much concern amongst residents that the proposed demolition and rebuilding of Cherry Court would create a dangerous precedent and seriously contravene many policies*”. In particular, OBAG considers that the development is not in proportion to the existing building in form, scale, and design, does contribute to the cumulative urbanisation of the area and it will quite clearly be detrimental – because of its proposed height – to the character of the area as viewed from the River Hamble.
29. The landscaping and topographical changes are relevant to management of buildings under the OBCAAMP and although that applies to extensions it lists what would be material considerations including at 4.162 that “*It must be remembered that it is not just the size of the dwelling itself that has a visual impact, but the hard & soft landscape and outbuildings too.*”

Environmental planning control

Inadequate information on protected and priority species

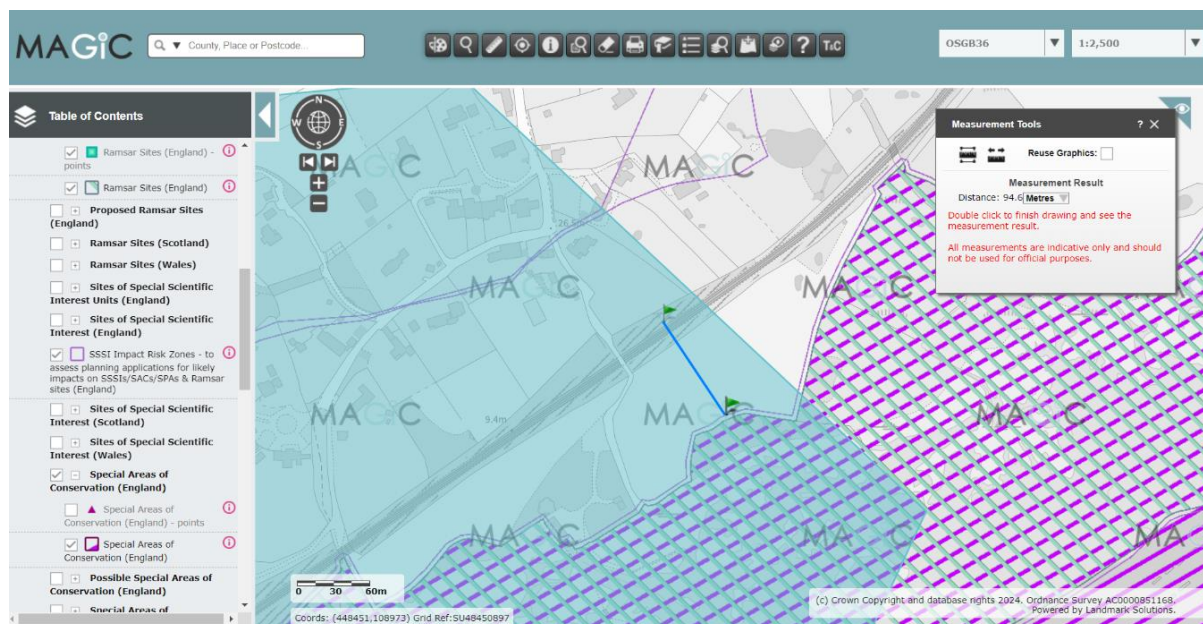
30. Our Scheme 1 objection (paras. 25-28) raised concerns with the Ecology Report which remains unchanged. This omitted from its assessment the impact of the development on Great Crested Newts (“GCN”), where it is in a high-risk zone for newts, near protected areas. Read together with the Arboricultural Statement, which omits detail on tree and foliage retention, the ecology assessment does not properly consider the impact on protected species. The Newt Officer employed by NatureSpace on behalf of the Council produced objections dated 6/12/23 and observed that in respect of Scheme 1 “*Further Information [is] Required*” and identified the risks of the effect of landscaping works on GCN. There is no change in the environmental information submitted meaning that the further information requested in December 2023 has not been provided.
31. Approving the Development relying on this (incomplete) information would contravene NERC section 40 and EBLP policy DM6. The Site also falls roughly 120m from Lincegrove and Hackett’s Marshes and mudflats, both of which are habitats of principle importance under Natural Environment and Rural Communities Act (2006) Section 41. Indeed the marshes are a unique ecosystem with what appears to be spring-fed brackish water (see para.36 below).
32. This assessment needs to be undertaken at the time of the application. In terms of the presence of GCN (and protected and priority species generally) “*The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances*” (see Newt Officer objection 6/12/23).

33. The Applicant, in their application for Scheme 2 (Application form dated 9/5/24), declares that there is no reasonable likelihood of protected species being affected by the Development. This ignores the evidence. The Development risks having an unacceptable impact on biodiversity, contrary to EBLP policy DM1, including causing the loss or damage to priority habitats (DM1(1)(d)).

Appropriate Assessment

34. The Site sits approximately 100m¹ from European Sites, namely a SAC and RAMSAR (see Fig.1 below). Before granting planning permission for a project likely affecting a SAC, an authority must conduct an Appropriate Assessment of its impact on the Site's conservation objectives (The Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations)) and under NPPF 187 the same protection is given to Ramsar Sites.
35. The Development is significantly larger than what is already there and includes increased hardstanding and landscaping. Development on a site over 0.5 hectares should incorporate a SuDS scheme, including at least two forms of naturalised filtration to comply with EDLP DM6(1).
36. The potential for the Development to have likely significant effects on the integrity of European Sites arises from the intended drainage solution and the nature and location of the project. Of particular concern is the construction work on the Site including to the swimming pool and outdoor areas, which risk contaminating water through leaching and improper disposal. As to the location of the project the SAC and RAMSAR designated sites are approximately 100m from the Site. It also appears from the historical map for Hampshire & Isle of Wight LXXIV Sheets 66, 74 - OS Six-Inch Map pub. 1870 (enclosed with this letter) that groundwater just below Salterns Lane flows into the Lincegrove and Hackett's Marshes. Accordingly, the Council must properly consider the proximity of the project to the spring-fed water marsh.

Fig.1



¹ Lisa Malter writes that it sits 105m from the SSSI, although we believe it may be even closer and nearer 95m (see Fig.1).

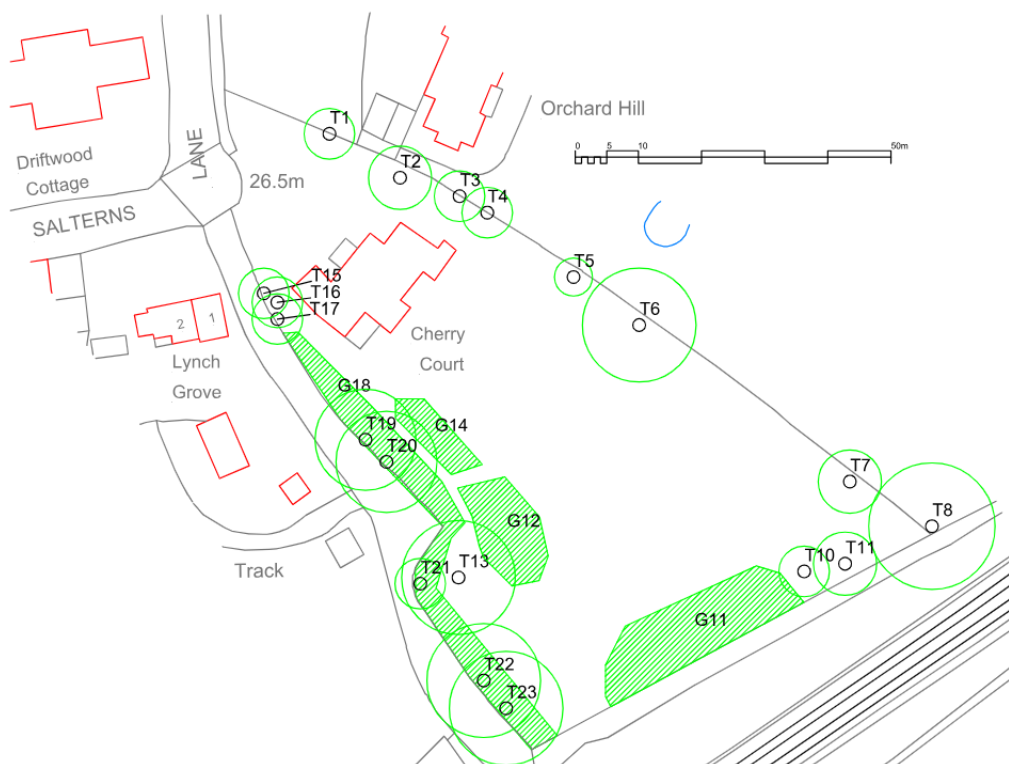
Biodiversity Net Gain ("BNG")

37. It is not at all clear that the Development should be exempt from the BNG requirement now in force under Paragraph 13 of Schedule 7A Town and Country Planning Act 1990.
38. The applicant contends that the Development is exempt on account of meeting self-build or custom house building criteria. However, the Site is over 0.5ha and therefore does not fall within this exemption criteria (The Biodiversity Gain Requirements (Exemptions) Regulations 2024 reg8).
39. Further the definition of self-build is found in sections 1(A1) and (A2) of the Self-build and Custom Housebuilding Act 2015. The applicant in their Scheme 1 DAS did not include the section "Client Requirements"; that appears for the first time in the Scheme 2 DAS stating that the Development is for a family home.
40. There is nothing to suggest that Scheme 1 was an application by the applicant to develop a home meaning the sole or main residence of that person. It is not at all known if this is the sole or main residence of the applicant. The applicant is the Director of Reilly Developments Limited (Company number 03552933 and see also appeal reference APP/A1720/W/18/3214358). The Ecology Report for the property (dated September 2023) is commissioned by Reilly Developments Ltd.
41. The Council will be alive to the need to ensure that the applicant, in seeking to rely on the exemption, will need to provide sufficient evidence to show that they benefit from that exemption. Further, the position is that the land is not exempt under regulation 8 where it is then sold with planning permission to a third-party purchaser to develop the land in accordance with that permission (see self-build definition). Plainly, the need to calculate BNG arises at the time of the application being determined and cannot be conditioned. Any grant of planning permission that exempts the BNG requirement now in force would have to be made personal to the applicant as it is non-transferable, and to the extent necessary, a local land charge should be put on the property to that effect to ensure the conditions of the statutory criteria are met.
42. In any event, the applicant must comply with BNG. Given the location of the Site close to the RAMSAR and SAC designations, EBLP policy DM11 requires development to seek a net gain of biodiversity *'through the protection, enhancement, and connection of existing and provision of new habitats and features of nature conservation interest compatible with the native biodiversity characteristics of the Borough.'*
43. The applicant has fundamentally failed to demonstrate how it will achieve onsite biodiversity net gain.

Trees

44. In our Scheme 1 letter (paras. 21-24), we drew the Council's attention to mistakes in the Arboricultural Statement in that trees identified as present had in fact been removed and the presence of those trees is material to any development in the OBCA. We now also refer to the Council's decision dated 3/5/24 under Town and Country Planning (Tree Preservation) (England) Regulations 2012 (ref NC/22/92747) granting the application to remove a large clump of Sycamore trees on the boundary for the purpose of "allowing landscaping" (See G11 marked on Fig 2).

Fig. 2



45. The applicant's Arboricultural statement submitted with the Scheme 2 application also confirms the felling of one tree 'G1C' (mature, 5m, likely fruit tree), and the Development is within the root protected area of 'T2C' (mature, 14m Bay laurel), 'T3C' (middle-aged, 14m Ash), and 'T4C' (mature, 14m Bay laurel). There is also encroachment within the root protected area of T6C (mature, 14m Ash) and T7C (mature, 14m Oak).
46. While it is anticipated that T6C and T7C will tolerate 'minor encroachment' within their RPAs the nature of the Development which includes major excavation works, will seriously disrupt the soil and hence the Urban Design officer's comments dated 13/12/23 state *'The large footprint is leaving too little around the site and potentially interfering with the root protection of the existing trees, putting pressure on those trees.'*
47. Therefore, the Site has a number of mature trees that will either be felled or whose root protection areas are at risk of damage by the Development and these trees provide significant levels of amenity due to their size (14+m) and their location.
48. These issues are not unfamiliar to the High Court, and we have been involved in another case where the presence of trees that had been felled by a developer were material to protection of the South Downs National Park Rye v Secretary of State for Levelling Up & Ors [2024] EWHC 358 (Admin)) (judgment enclosed with this letter).
49. Further, we understand that National Rail has recently felled trees along the Site's boundary. We do not know what approval National Rail required or obtained for felling works, but as a more general point the removal of trees on the Site's boundary should prompt the need to fully consider the stability of the Site and whether it can withstand extensive landscaping. It appears to our client there is an increased risk of a landslide taking account of the absence of tree roots (given their

importance to the substructure of the steeply sloped land) together with the presence of groundwater (see above).

Sustainable Development

50. The Council has declared a climate emergency, and the Climate and Environment Emergency Strategy 2020–2030, along with the supporting Climate and Environmental Emergency Action Plan – Update June 2020 and the NPPF apply. In short, there is serious doubt that the Development would improve the building's energy efficiency or use sustainable construction methods or materials. In any event, and for the reasons set out above, it is breaching a number of environmental planning controls.

Design/construction/ Environmental sustainability

51. The Design Officer's comments on 13/12/23 referred to consideration of sustainable development as, at best, an "afterthought".
52. Development must be environmentally sustainable development in accordance with EBLP DM2. The applicant has not addressed this at all in the Scheme 2 DAS despite the Design Review Panel when they sat on 16/1/24 finding:

"Equally, the topographical changes proposed to the site appear excessive and unnecessary, as does the decision to demolish the existing dwelling only to replace it with something of a very similar footprint in the same position. Adaption and reuse of the existing dwelling would work equally well, together with being far more environmentally conscious."

53. EBLP Strategic Policy SP S1, Delivering Sustainable Development, requires, inter alia, development to "*maintain local environmental quality, including avoiding damage to, and where possible enhancing, the existing valued urban and rural environments in the Borough and heritage assets*"
54. The Site across the River Hamble is countryside, and the property sits adjacent to Character Zone 2 in the OBCA. The Development will have a visually urbanising impact on the countryside to the detriment of the character of OBCA and the open and spacious character of the OBSPA.
55. EBLP Strategic Policy SP S1, Delivering Sustainable Development, also requires development to "*maintain, enhance, extend and connect the natural habitats within and landscape value of the Borough, extending natural habitats into new and existing development to achieve an environmental net gain.*"
56. The need to achieve biodiversity net gain appears to be a policy requirement and as above the applicant's position that there is no reasonable likelihood of protected and priority species being caught by the Development is entirely at odds with the designations and to accept this position would further fail to deliver sustainable development.

Pre-application advice

57. The Applicant's covering letter refers to pre-application advice. This is not publicly available. It is not known what advice was given. It does not bind the Council, and nor does it outweigh the numerous reasons (not necessarily limited to set out above) that the application should be refused.

Conclusions

58. As well as being contrary to the development plan (specially EBLP BU7) meaning the application should be refused on that basis alone, there is no identified public benefit from a replacement residential dwelling, and the harm is not outweighed taking account of the significant weight that

should be given to the desirability of preserving or enhancing the character or appearance of the OBCA and OBSPA.

Yours faithfully

A handwritten signature in black ink, appearing to be 'RBS' with a stylized flourish underneath.

RICHARD BUXTON SOLICITORS

Encl.

Scheme 1 Objection 12/01/2024

Rye v Secretary of State for Levelling Up & Ors [2024] EWHC 358 (Admin))

Photo of Site from River Hamble June 2024

Hampshire & Isle of Wight LXXIV Sheets 66, 74 - OS Six-Inch Map pub. 1870

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12 January 2024

Eastleigh Borough Council
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Attn: Planning Department

BY EMAIL ONLY: planning@eastleigh.gov.uk

Copy to: Gary Osmond, Senior Planning Officer (gary.osmond@eastleigh.gov.uk)

Dear Council

Demolition and re-build of Cherry Court ("the Development")
Cherry Court, Salterns Lane, Bursledon, Southampton, SO3 8DH ("the Site")

OBJECTION

1. We are instructed by Mrs Sandra Milton-Tayler and Mr David Milton-Tayler who object to the proposal. Our clients live at Saltacre, Salterns Lane, Bursledon, SO3 8DH.

Background

2. Cherry Court is a 4 bedroom dwelling located within the Old Bursledon Conservation Area ("**the Conservation Area**") and within the Old Bursledon Special Policy Area ("**the Special Policy Area**").
3. The Development seeks consent for the demolition of the existing 4 bedroom dwelling and replacement with a new 4 bedroom dwelling, including excavation for a larger lower ground floor comprising a cinema and entertainment room, living room and outdoor cooking area. In total the Development encompasses a 455.3sqm footprint, an almost 67% increase on the 272.5sqm of the existing dwelling per 3.9 of the Planning, Design and Access Statement ("**the D&A**").
4. In addition to the larger footprint, the boundary between adjacent neighbours at Orchard Hill and Lynce Grove would be reduced by the Development from 26m to 20m per 3.9 of the D&A.
5. The Development adds a ground-floor terrace which runs the breadth of the south-facing exterior, and a further first floor balcony running along approximately 50% of that same side. Owing to the flat-roof design, these rear balconies sit at a higher elevation than the previous first-floor terrace, according to drawings at 3.6 of the D&A.

6. Additionally, larger windows are proposed at ground level on the East siding and at first floor level on the West.

Eastleigh's Local Plan

7. The planning policies governing the area are set out within the Local Plan 2016-2036. Policy BU7 is a key relevant policy which allows for extensions and replacement dwellings within strict constraints. BU7 provides:

"1. Residential extensions and replacement dwellings in the Old Bursledon Special Policy Area as defined on the policies map will be permitted provided they:

- a. do not increase the volume of the original dwelling (as existing when the conservation area was first designated in 1982) by more than 25%. Further extension beyond this limit will not be permitted;*
 - b. have regard to the impact of the development on the space between buildings and the openness of the area, ensuring that the character of the undeveloped landscape between buildings is conserved and enhanced;*
 - c. do not create a dwelling disproportionately larger than the one that is being extended or replaced;*
 - d. are subservient to and in proportion to the existing building in form, scale and design;*
 - e. do not contribute to the cumulative urbanisation of the area; and*
 - f. are not otherwise detrimental to the character of the area as viewed from the River Hamble."*
8. Other Local Plan policies relevant to the consideration of the Development include: DM26- Residential Extensions and Replacement Dwellings in the Countryside S8- Historic Environment, DM12- Heritage Assets, and DM1- the general criteria to assess the impact of new development on residential amenity.

The Old Bursledon Conservation Area and Hamble-le-Rice and Hound Conservation Area 2008 Appraisal SPD ("the 2008 SPD")

9. At the time off the previous local plan, the Council adopted the 2008 SPD for the Old Bursledon Conservation Area. This identifies the Old Bursledon Conservation Area at Annex D as *"characterised by its low-density housing, narrow lanes, woodland, open fields and views over the River Hamble estuary, with the scattered housing served by narrow country lanes with well- established hedgerows, banks, walls and trees. These country lanes and open layout are an essential part of its character and a distinctive feature of the local area."*

The Old Bursledon Conservation Area Appraisal

10. The Conservation Area Policy was updated in 2012 following the adoption of the Old Bursledon Conservation Appraisal and Management Proposals SPD (**"the CA Appraisal"**).
11. The CA Appraisal protects generous plot sizes in proportion to buildings (at sections 4.21 and reiterated at 4.30). It also protects against the erosion of plot sizes to avoid harmful urbanisation as explained at 4.31 *"when implementing policies, particular regard will be had for the impact of proposed development on the space between buildings and the openness of the area, with the expectation that the character between the buildings will be conserved and enhanced"*.
12. The importance of open space and high quality design is further evidenced at 4.40 which states *"development proposals that would contribute to the cumulative urbanisation of the area, or otherwise be detrimental to the character of the area as viewed from the River Hamble will not be permitted"*.
13. In addition the Development's expanded footprint and modern glazing and appearance is at odds with the general character of the Salterns Lane and its immediate surrounds, as it is illustrated on page 60 of the onwads, constituting the type of "Unsympathetic modern development" the CA Appraisal seeks to avoid.
14. The intent to maintain the character and appearance of the Conservation Area's existing buildings is seen in the almost absolute prohibition on demolition and rebuilding in the previous Local Plan, as detailed at Appendix A 170.B of the CA Appraisal- where rebuilding was only acceptable on basis of dereliction¹, or enhancement of the appearance of the area.
15. In relation to the Local Plan, the Development contravenes Policy BU7 in these material ways:
 - (i) On the developer's own admission, the Development exceeds the 25% overall volume increase as stated at 6.3 of the D&A. Policy BU7 (a) imposes a mandatory ground for refusal, stating that an "extension beyond this limit will not be permitted" which is absolute.
 - (ii) The calculations provided in the D&A in calculating the volume increase value should be scrutinised with the 67% increase in footprint value independently. The Development is disproportionately larger, see Policy BU7 (c). Careful attention should be paid to the drawings and attached statements **contained within the D&A. We note no individual numerical measurements accompany the plans to allow local residents to verify this assertion.**

¹ We note no building survey of the existing building fabric has been included with the application.

- (iii) The reduction of 6 metres separation distance between neighbouring properties to the East and West plainly reduces the expansive plot size and openness of the area, both recognised as fundamental elements of the Conservation Area's character as cited in the CA Appraisal at 4.21
- (iv) There appears to be (or has already been) a loss of the extensive tree belt, the removal of which at the Southern and Western end of the Site runs contrary not only to BU7 (b) as regards openness of landscape, but also to BU7 (f) as regards the character of the Conservation Area as viewed from the River Hamble.
- (v) The proposed wrap-around glazing and bank of elevated bedrooms present a marked departure both from the design features of the existing dwelling and from the neighbouring dwellings in the Conservation Area, as identified in the SPD at 4.155 onwards, which goes to BU7 (d), as does the introduction of glazing-at height to the skyline, cumulatively contributing to the urbanisation of the Area -BU7 (e).
- (vi) When read together, these policy documents set out a clear vision for the retention of the Conservation Area's rural character: in development as a ratio to plot size, maintenance of expansive open space, density of flora and emphasis on appearance.

Loss of Amenity

16. The D&A does not consider the impact on neighbouring amenity of the added and elevated windows, elevation and extension of balconies or significantly reduced space between the dwelling and its neighbours to the East and West. Taken cumulatively, the overall Site Development would present a far more imposing and overlooking structure to the immediate neighbours. It is therefore inaccurate at 3.9 of the D&A to state that there will be no impact on the amenity of the surrounding neighbours and the Development would contravene Local Plan Policy DM26 designed to protect residential amenity.

Design and appearance

17. As noted above, the Development contains large areas of glazing, in contrast to the former building, and a continuous run of glazing to new bedrooms above the height of the original first floor. This is achieved by the addition of a flat roof, allowing for large feature glazing. The scale of this glazing is a main feature of the design.
18. The D&A references Bauhaus and modernist architectural influences and states the Development intends to replicate these influences from the existing dwelling. That argument is not convincing given the sheer scale and monolith facades of the proposal. It is simply not credible to cite Bauhaus to justify a departure from the surrounding buildings and overall architectural heritage of the Conservation Area.

The Planning (Listed Buildings and Conservation Areas) Act 1990 ("the 1990 Act")

19. S72 of the 1990 Act imposes a general duty on the Local Planning Authority to exercise its planning functions by paying special attention to the desirability of preserving or enhancing

the character or appearance of that area. This duty is incumbent on a decision maker as regards considering any development within this designated conservation area, especially as to whether the Development enhances the appearance of the Conservation Area. For the reasons mentioned in paragraphs 16-18 of this letter, the Development would harm the Conservation Area and is a material factor against the grant of planning permission.

20. The NPPF at paragraph 212 treats favourably development which enhances or better reveals the significance of a Conservation Area. It is clear that the Development in its proposed form would neither enhance nor add anything in keeping with the general appearance or character of the Conservation Area.

Trees, Landscaping and Foliage

21. The Arboricultural Statement at 3.11 makes the emphatic statement that no trees will be impacted by the Development. However, our instructions are that tree removal has already been undertaken at the Site in preparation for starting works on the Development, some of which may have occurred in 2022 under notice of intent NC/22/92747 contrary to this statement.
22. The Applicant's Arboricultural Statement, even in its revised form, is lacking in a quantified tree survey, isolation of trees, pictorial survey of the Site and statement of precise intentions regarding removal of foliage.
23. The Arboricultural Statement at 8.19 limits its assessment of the trees (no 7) identified to be "significantly affected by the development", i.e. those in direct proximity to the existing dwelling. No foliage or trees have been identified or quantified in the lower half of the Site next to the Railway where removal has been reported.
24. For this reason, the Arboricultural Statement is incomplete and deficient for its incompleteness, and misleading as to the Applicant's intended extent of foliage and tree removal at the Site.

Ecology and the Habitat Regulations Assessment

25. The Council's Ecology Officer's response to the Applicant's Ecology Report highlights the report's absence of any consideration of the Development's impact on Great Crested Newts. The Officer notes the Development lies within a "red impact risk zone" for the newts. This absence is notable because of Saltern Lane's obvious proximity to the Solent Maritime SAC, Solent and Southampton SPA, Lincegrove and Hackett's Marshes SSSI, with the River Hamble, a designated Ramsar Site, lying 105 metres due south.
26. It is widely-known the newts are a listed species attracting full protection under the Habitats Regulations. Their recorded presence triggers a mandatory full assessment compliant with the Regulations and as required by the Local Plan as part of the Sustainable Drainage System ("SuDs") programme, applicable to this Development under Policy DM6. We note no SuDs assessment has yet been submitted as part of the application. The need for a fuller assessment is reflected in the Assistant Newt Officer's recommendation of a

Reasonable Avoidance Measures programme devised by a qualified ecologist, to mitigate adverse effects.

27. Both the Ecology Officer and Assistant Newt Officer note the intention to remove foliage around the boundary and general landscaping. As the Council's tree response notes, and as outlined at paragraphs 21-25 of this letter, the Arboricultural Statement lacks detail on the retention of existing trees and foliage at Appendix 1, and landscaping in general. This provision of limited information constrains the Officers' capacity to advise as to impacts on the protected species identified and any suitable mitigation strategies. The Officers did not have the full scope of the intended tree removal and landscaping works before them at the time of issuing their responses and have therefore been unable to make a complete assessment.
28. The ecological/habitat assessments remain incomplete and deficient for these reasons. An incomplete appraisal of the risk of harmful impacts to protected species potentially puts the Council at risk of breaching their duty under section 40 of the Natural Environment and Rural Communities Act 2006. The recorded presence of the newts within 250m of the Site is a material planning consideration.

Conclusion

29. There is no justification to depart from planning policy and the strict requirements for redevelopment of residential properties in this historic and sensitive conservation area. It is fundamental to sound planning decision-making that the decision-maker require the Applicant to provide a clear justification for any such departure and none is provided. For this reason, the application should be refused.

Yours faithfully

A handwritten signature in black ink, appearing to be 'RBS', written over a horizontal line.

RICHARD BUXTON SOLICITORS



Neutral Citation Number: [2024] EWHC 358 (Admin)

Case No: AC-2023-LON-000285

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2024

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

DR CAROLINE RYE
- and -

Claimant

**SECRETARY OF STATE FOR LEVELLING UP,
HOUSING AND COMMUNITIES**
-and-

First
Defendant

DEREK WARWICK DEVELOPMENTS
-and-

Second
Defendant

SOUTH DOWNS NATIONAL PARK AUTHORITY

Third
Defendant

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Scott Stemp (instructed by **Moore Barlow Solicitors**) for the **Second Defendant**

Hearing date: 15 November 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 22 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Deputy High Court Judge Karen Ridge :

1. This claim for statutory review is brought by the Claimant under section 288 of the Town and Country Planning Act 1990. The Claimant seeks the quashing of a planning permission which was granted on 6 December 2022 by decision letter of the First Defendant's Planning Inspector following a successful, planning appeal. The site which was the subject of the planning appeal was The Queens Hotel, High Street, Selborne, Alton GU34 3JH (the site).
2. The planning permission allowed the conversion and extension of the existing Queens building and barn to form 5 aparthotel suites (C1), a field study centre and tap room (mixed class F.1 and sui generis) and one detached dwelling (C3) within the grounds, with associated parking and landscaping ('the Appeal Proposal') for the site which is located in the village of Selborne in the South Downs National Park. The Third Defendants are the Local Planning Authority for the area in which the site is located. They have played no part in these proceedings.
3. The claim was issued on 11 January 2023. It was brought on two grounds. On the 21 June 2023 Upper Tribunal Judge Cooke, sitting as a Judge of the High Court, granted permission to proceed on ground 1 and refused permission on ground 2. Ground 1 concerns an allegation that the Inspector made a material error of fact in relation to the trees on the site.
4. On the 2 October 2023 the First Defendant, the Secretary of State for Levelling Up, Housing and Communities, entered into a consent order. The recitals in that consent order state the following:

“AND UPON the 1st Defendant agreeing that the Decision was rendered unlawful by a material error of fact that was relied on by the Planning Inspector as making the development acceptable in landscape, character, and Conservation Area terms (“Ground 1 of the Claim”) and that the Decision would not have been the same had it not been rendered unlawful.

AND UPON the 1st Defendant agreeing to consent to a quashing order under Ground 1 of the Claim.”
5. The consent order ended the First Defendant's participation in this action. The Second Defendant continued to contest the claim and was represented at the substantive hearing.

LEGAL PRINCIPLES

6. The relevant principles are agreed between the parties. In *Bloor Homes East Midlands Ltd. v. Secretary of State for Communities and Local Government and another* [2014] EWHC 754 (Admin) at 19, Lindblom J. (as he was) said:

“(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28). ”

7. There is no duty for an Inspector to refer to each and every item of evidence nor refer to every material consideration *Bolton MDC v. Secretary of State for the Environment* (1996) 71 P&CR 309. A s288 challenge may fail if the decision-maker would have reached the same conclusion without regard to any identified error *Simplex (GE) Holdings v. Secretary of State for the Environment* [1998] 3 PLR 25.
8. A material error of fact can render a decision unlawful if four criteria are met (*E v Secretary of State for the Home Department* [2004] EWCA Civ 49):
 - “i) There is a mistake to an existing fact.
 - ii) The fact is uncontentious and objectively verifiable.
 - iii) The Claimant is not responsible for the mistake.
 - iv) The mistake played a material (but not necessarily decisive) part in the Decision. ”
9. The ratio and tests of E have been applied in the context of a s.288 statutory planning challenge in *Kensington and Chelsea RLBC v Secretary of State for Communities and Local Government* [2017] EWHC 1703 (Admin) and in *Wainhomes (North-West) Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 2294 (Admin).

THE FACTS IN RELATION TO THE PLANNING APPEAL

10. In January 2016 the Queens Hotel ceased trading and closed for business. Up until then, the hotel had traded as a public house with hotel accommodation and a separate function room. Following closure in 2016, there were applications for re-development by the owners of the site who are the second Defendants (D2) within these proceedings. Each of those applications was unsuccessful and permission was refused by the National Parks Authority (the Third defendant). An application for conversion and alterations to form 4 residential dwellings and the erection of one additional dwelling was refused planning permission in February 2019 and dismissed at appeal in October 2019.
11. On 18 Sep 2021 a planning application, reference SDNP/20/04118/FUL, was submitted for the conversion and extension of the existing Queens building and barn

to form 5 aparthotel suites, a field study centre, and a tap room and one detached dwelling within the grounds, together with associated parking and landscaping. The Appeal Proposal included the retention of the mature trees to the rear of The Queens, with the exception of the Holly Tree. That application was refused planning permission on 1 October 2019 for two reasons. The second reason related to the effects of the new building, increased parking provision, landscaping and access alterations which it was determined would have an unacceptable impact on the landscape character of the area and the Conservation Area, contrary to stated development plan policy and national policy in the National Planning Policy Framework.

12. An appeal was submitted against the refusal of planning permission by D2 to the Planning Inspectorate on 20 December 2021.
13. Until May 2022, the eastern boundary of the Queens (also referred to as the rear of the Queens) had a belt of mature trees made up of Ash, Holly, Cyprus, Spruce and Apple trees. In the period between the submission of the planning appeal and the Inspector's site visit, D2, as landowners, submitted a proposed Notification of Proposed Tree Works to the Parks Authority pursuant to section 211 of the Act. That notification required the Parks Authority to give its consent (or otherwise) to the proposed Tree Works because they were in a conservation area. The wording of the proposed works was as follows:

“T1 3 x Mature Ash -Remove,

T2, 1 x cherry - Remove,

T3 2 x Thuja - lift canopy from current height of 2.5m to a height of 3.5 to 4m,

T4 3x Holly - remove and replace with fruit trees or hedging,

T5 mature apple - lift canopy from 2.5m to a height of 3.5 to 4m,

T6 - mid-life spruce - remove and replace with fruit tree or hedging”
14. The tree works proposal sets out the justification for removal and cutting back of the various trees. Consent was given on 10 May 2022. The Tree Works Consent is entirely separate to the consideration of an application for planning permission. It is to ensure that local planning authorities control works done to trees in conservation areas.
15. On the 13 May 2022 the Claimant emailed the case officer at the Planning Inspectorate alerting them to the intended felling of the trees and asking if a site visit could be conducted as a matter of urgency. The case officer replied to say that an Inspector had not yet been appointed and that “the removal of the trees will be a material change to site so I will make sure this is drawn to the Inspector's attention in due course”.
16. Subsequently the authorised tree works, comprising felling and canopy lifting, were completed on 16 May 2022.

17. The planning application and appeal were supported by a suite of documents which included The Tree Protection Plan [HB/431] and an Arboricultural Method Statement [HB/406]. The numbers (1 – 8) on the Tree Plan correspond to the T1 – T8 Trees within the Statement. Under the section entitled ‘Discussion’ the Statement sets out [HB/426]:

“One tree (T5) requires removal as a result of the proposed development, as it lies within the proposed new access to the new car parking area. It is also proposed to remove two limbs from tree T1 for Health & Safety reasons, as these are leaning over the existing car parking area and could present a future hazard. The removal of these limbs will not affect the overall health or visual amenity of this tree. Both of these trees are a part of an existing line of trees to the rear of the site and their removal will not have a significant impact on the overall appearance and visual amenity provided by these trees. ”

18. The appeal proposal therefore included the removal of one Holly Tree (T5 on the Tree Plan), with the remainder of the trees along the access road depicted as being retained.
19. On appeal, one of the two key issues was the effect of the proposal on the character and appearance of the surrounding area. The Parks Authority had contended that the proposal represented overdevelopment of the site which, it said, would have an unacceptable impact on the landscape character of the area and the Selborne Conservation Area. The Parks Authority’s Statement of Case which submitted on the planning appeal notes that

“The subsequent loss of space within the application site, when viewed from the access road which leads to the properties to the north (and the access for the proposed barn), would result in a ‘busier’ and more intense form of development which would appear somewhat cramped, given the access and parking area wedged between the new apartment suite and the dwelling to the north of the car park, which would introduce more built form abutting the car park area. In these respects, the proposals would constitute and overdevelopment of the site which would be apparent within the streetscene ”

20. During the appeal process D2, as appellants, made Final Comments in May 2022 which included the following:

“2.25: The Appeal Scheme would preserve and enhance the character and appearance of the Selborne Conservation Area and the setting of nearby listed buildings. The development would have no adverse impact on the amenities of neighbouring residents and the landscaped nature of the site would be retained through the retention and provision of trees and hedgerows.

2.34 In their comments of 16/11/20 the Landscape Officer advised that, ‘Parked cars do not create the most appropriate or characteristic edge to Selborne, this space should be revisited’. In recognition of this and the ‘countryside edge’ that forms the eastern edge of the development site and the designated greenspace immediately beyond this, the car

parking for the tourist accommodation was moved internally to the site to protect this sensitive rural 'interface'. The new integrated car parking court will sit behind the belt of mature Cyprus, Holly, Ash and Spruce trees which will serve to shield the cars from longer distance views. The amendments to the proposal were made at the explicit request of the LPA's Landscape consultee and are considered to constitute betterment of the pre-existing relationship of the site with the countryside edge."

21. The authorised Tree Works had therefore resulted in the felling of mature trees which had been depicted as to be retained on the Tree Protection Plan and which formed part of the appeal proposal. The removed trees included three mature ashes (T1, T1a and T8), a cherry (T2), and a spruce (T6). The ashes would not be replaced, and the spruce would be replaced with either a fruit tree or hedging. The Cyprus (T3 and T4) and Apple (T7) would be retained but pruned.
22. The appeal was duly allocated to an Inspector appointed by the First Defendant. The Inspector then carried out a site visit on 8 November 2022. By decision letter (DL) dated 6 December 2022 the appeal was allowed and planning permission was granted.

THE DECISION LETTER

23. The DL deals with the issue of character and appearance at paragraph 20 onwards. Paragraphs 20-22 set the scene in terms of the location of the buildings within the settlement and their layout within the site. The Inspector then goes on to describe the proposals. At paragraphs 28-29 she considers the impact of the new building on the character and appearance of the area given the proposed landscaping.

"28. The positioning of this new building would entail the removal of the existing hedgerow which lines the edge of Huckers Lane, and which contributes in part to the introduction of the verdant character to the north. Despite this, due to its height and low eaves level, the new building would not obstruct longer views to the countryside to the north and views of mature trees would remain apparent from the High Street. For these reasons despite the dilution in rural character at this point, I do not find the removal of the hedgerow would be harmful to the significance of the SCA.

29. The proposals would retain trees at the back of the site with the exception of one tree positioned at the car park access, which would be removed. Those trees at the back of the appeal site would continue to form the backdrop to the development and contribute to the appreciation of open space to the rear. The protection of the retained trees could be adequately secured by condition and the supporting plans indicate a no-dig method would be used in construction of the parking areas close to those trees. I consider that the alterations to the access onto Huckers Lane would not cause visual harm or conflict with the character of the area, given the varied nature of other vehicular accesses in the wider area. "

24. The Inspector goes on to conclude that the proposal would preserve the character and appearance of the Conservation Area. Then, after finding in favour of the proposal on both issues, the Inspector concludes that planning permission should be granted and goes on to consider the imposition of appropriate conditions (DL40-DL46). At paragraph 42 she said:

“To protect the character of the area, conditions are required which secure protection of the retained trees on the site, secure the scheme of soft landscaping and ensure replacement of any trees which die within a five year period, in order to ensure that the soft landscaping becomes established. ”

25. The condition imposed read as follows:

“5) Throughout the construction process, including demolition phases, the trees to be retained on the site shall be protected in full accordance with the details contained in the document ‘Arboricultural Method Statement and Tree Survey’ by Partridge Associated, dated 8 March 2021 and drawing 2247/1B. ”

DISCUSSION

26. Mr Riley-Smith contends that the Claimant’s case is straightforward. It is that the Inspector was under the mistaken belief that some of the trees which were to be retained on the site, as part of the appeal proposal, had not been felled.
27. There can be no dispute that the landowners had felled trees that were depicted as proposed to be retained on the Tree Protection Plan. In the appeal the Tree Protection Plan clearly refers to one Holly tree being removed and the pruning of branches from another tree. The works undertaken as part of the Tree Works Consent resulted in the removal of a number of mature trees which had been depicted as being retained. The trees which were depicted as retained in the appeal proposal but which were felled included three mature ash trees (T1, T1a and T8), one cherry tree (T2) and one spruce tree (T6). I am satisfied that this fact is objectively verifiable and uncontentious.
28. It cannot be said that the Claimant was responsible for the mistake. Indeed, it was the Claimant who was seeking to draw the implications of the Tree Works consent to the Inspector’s attention.
29. The remaining matters in dispute therefore revolve around the first and fourth criteria in the E case, namely whether the Inspector was mistaken as to an existing fact and secondly whether that mistake played a material (but not necessarily decisive) part in the Decision.
30. As to mistake of fact, I must start by noting that at no point in the DL is the Tree Works Consent referenced. That is important given that the effect of the tree works consent was to render the Tree Protection Plan out of date in terms of the trees which would be retained. At DL29 the Inspector states her understanding that the proposal would retain trees at the back of the site *‘with the exception of one tree positioned at the car park access which would be removed’*. That statement is an accurate reflection of the position as represented by the Tree Protection Plan.

31. Mr Stemp contends that the Inspector would have been aware of the removal of the trees on the site visit. At the date of the site visit the Holly tree T5 had been removed but the DL refers to one tree which 'would be removed'. That clearly anticipates a future removal of a tree on the site. It is indicative of a lack of awareness as to the trees which had been removed and the trees proposed to be retained under the appeal proposal which no longer existed. If the Inspector had appreciated that some trees which were proposed to be retained, had in fact already been removed, it is logical to expect this to have been recorded as the baseline position against which the subsequent assessment as to the effects on character and appearance was to be made.
32. Mr Stemp sought to persuade me that a fair reading of DL29 would indicate that the Inspector was saying that some trees would remain at the back of the site when the proposal was built out. However, that does not take account of the context in which the word 'retain' is used throughout the DL. The Tree Protection Plan refers to retained trees meaning those trees which are existing and which are to be protected and kept as part of the appeal scheme. DL29 when describing the effects of the proposal uses the word 'retain' and the condition imposed seeks to retain the trees by reference to the Tree Protection Plan. The word retain is consistently used throughout and I do not accept that inserting the word 'existing' before the word retain in DL29 would be necessary to render good the Claimant's submission that retain means to continue to have. The DL stands to be read as a whole and when read as a whole, the assessment is clearly based on the understanding that the retained trees would be those existing trees as depicted to be retained on the Tree Protection Plan.
33. The Inspector goes on to confirm that retention of the trees could be secured and protected by the imposition of a condition [DL29]. This is reinforced at DL42 when the Inspector again sets out the requirement for a condition to 'secure protection of the retained trees on the site' by reference to the Tree Protection Plan. In order to impose such a condition the Inspector had to be satisfied that it passed the necessary policy tests set out at paragraph 56 of the National Planning Policy Framework. Those tests require, inter alia, for conditions to be enforceable and precise. The requirement to protect retained trees which had already been felled was clearly not enforceable and nor was it precise. The imposition of such a condition supports a finding that the Inspector was under a mistaken belief.
34. It is relevant to note that three of the trees proposed to be retained on the Tree Protection Plan, T1, T1a and T8 were outside the red line area and condition 5 would only bite against those trees within the red line. It is unclear as to whether the Inspector was aware of this matter. There were clearly a significant number of plans associated with the appeal, they are recorded in condition 2. Notably there is no red line depicted on either the landscape plan or the Tree Protection Plan, so it would have required a read across from another plan to understand which of the trees on the Tree Protection Plan were within the red line.
35. If the Inspector was aware of the three trees outside the red line, and had intended to impose the condition requiring protection of the retained trees on site, the trees to be retained on site included the removed trees T2 and T6 and the Inspector's analysis at DL29 contains no reference to these trees having been removed. This is distinctly at odds with her care in describing the proposals as retaining '*trees at the back of the site with the exception of one tree positioned at the car park access*'. [my emphasis]

36. Mr Stemp also pointed out that the Arboricultural Method Statement was effectively imposing areas of no dig and root protection areas in relation to trees which were no longer there. He said that it rendered part of the condition otiose and that fairness demanded that there was an appreciation as to the evolution of the proposal and the history of the site. The point however remains that the imposition of this condition and the requirement to carry out development in accordance with the Tree Protection Plan is indicative of a conclusion on the part of the Inspector that, at the very least, it was necessary to protect and secure the trees depicted as to be retained within the red line.
37. Mr Stemp argued that the tree works provided that the felled trees T2 and T6 would be replaced and in that way they would effectively be “retained”. That is not a good point. The tree works consent required replacement of the cherry with an ornamental cherry and replacement of the spruce with a fruit tree or hedging. I do not accept that the word retain effectively encompasses the felling of a tree and its replacement with something different.
38. I remain satisfied that, even if the Inspector had appreciated the point about condition 5 only protecting trees within the red line, she was still under a misapprehension as to the trees proposed to be retained. I am satisfied that there was a mistake as to an existing fact and now turn to consider whether that mistake played a material part in the decision.
39. The second main issue before the Inspector was a consideration of the impact of the proposal on the character and appearance of the area, with particular reference to the Selborne Conservation Area. This matter is considered at DL20 onwards when the Inspector commences an assessment of the character of the conservation area. DL21 and DL22 go on to consider the location of the site and the existing development on site and the contribution which it makes to the conservation area. Consideration of the effects of the appeal proposal commences at DL24 and continues.
40. At DL28 the effect of the new building is considered and for reasons set out the Inspector concludes that the removal of an existing hedgerow would not be harmful. At DL29 the Inspector is assessing the backdrop to the development comprising the trees at the back of the site. Her assessment confirms that the trees at the back of the appeal site would continue to form the backdrop to development and the alterations to the access road (which would include the removal of one tree) would cause visual harm or conflict with the character of the area.
41. The Park Authority’s concern was that the new development on the site would create a busier and more intense development when viewed from the access road. This concern was the one which was being addressed in DL29.
42. It is of note that the felled trees (under the tree works) had been relied upon by D2 in promoting its appeal. This is evidenced by the appeal statement referring to the removal of the holly tree and contending that the removal of the two limbs from T1 will not affect the overall health or visual amenity of this tree. That statement goes on to say that both trees (namely the Holly Tree and T1) are part of an existing line of trees and their removal will not have a significant impact on the overall appearance and visual amenity provided by these trees. The words ‘these trees’ refer to the existing line of trees and the proposition is that the trees which would remain would

still provide visual amenity and their overall appearance would not be significantly impacted.

43. The mature tree belt comprised the three ashes which were described as being between 16.5 metres and 17.5 metres high. If I take the point that these were outside the ambit of condition 5, that still leaves the Cherry Tree at 7.5metres and the spruce at 14 metres.
44. At DL29 the Inspector is relying on the retention of trees in continuing to form the backdrop when she concludes that the alterations would not cause harm. That conclusion fed into her overall conclusion in DL30 that the proposal would preserve the character and appearance of the Conservation Area.
45. I am satisfied that the Inspector's mistake as to the retained trees being in existence played a material part in her decision. The importance of retaining the trees was reinforced by the imposition of a condition which was deemed necessary to make the development acceptable. I am satisfied that all four criterion in E are met and these matters render the decision unlawful for the reasons given.
46. Mr Riley-Smith sought to persuade me that it was significant that the first Defendant, acting on behalf of the Secretary of State and charged with deciding whether to defend the claim against the decision of his Inspector, has now acquiesced to the quashing of the decision letter on ground 1. He argues that this concession should carry significant weight given that the nature of the challenge is fundamentally an argument about what the Inspector thought.
47. I accept that the concession may have been arrived at on the basis that it was accepted that the Inspector was under a material misapprehension. However, I equally accept Mr Stemp's submission that there may be some other reason for acquiescing to the quashing of the decision. I have arrived at my own conclusions regarding the legality of the decision letter based on the submissions in light of the evidence and the contents of the decision letter.
48. Mr Stemp contends that the Court can be satisfied that the Inspector found that the two remaining trees (which were present on the site visit) constituted an acceptable backdrop. He refers me to the photograph taken immediately after the felling on 20 May 2022. Consequently, he relies on the Simplex case and section 31(3D) of the Senior Courts Act 1981 to contend that it is highly likely that the outcome would not have been substantially different in the event that the Inspector had not made the mistake.
49. With regard to the photograph in the bundle at [HB42], I note that it was taken at 20 May 2022 and depicts the ash tree stumps immediately after felling. However, I also note that the site visit was undertaken by the Inspector on 8 November 2022, some 6 months later. It is not possible to know or to make assumptions about how the site visit was conducted and what the Inspector saw at the time of her visit.
50. Having concluded that there was a mistake as to a fact which was material to the exercise of the planning judgment of the Inspector, I am not in a position to make any determination as to whether or not the appeal proposal would have succeeded had the material mistake not been made. The mistake was material and went to the heart of

the exercise of her planning judgment on key points in relation to the second issue. For these reasons I am not satisfied that it was highly likely that the decision would have been the same. The decision must be quashed on ground 1.

51. Counsel are invited to draw up an appropriate order for my approval.



