Neutral Citation Number: [2020] EWHC 958 (Admin)

Case No: CO/2285/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 22/04/2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

SPITFIRE BESPOKE HOMES LTD	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
WARWICK DISTRICT COUNCIL	**Interested Party**

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- -

Paul G. Tucker QC and Freddie Humphreys (instructed by **Lodders LLP**) for the **Claimant**
Jacqueline Lean (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not appear or make representations.

Hearing date: 6 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10am on Wednesday 22 April 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's clerk Karen.Welford@Justice.gov.uk.

Mrs Justice Andrews:

INTRODUCTION

1. This is a claim for statutory review under s.288 of the Town and Country Planning Act 1990 of the decision of the Defendant's Planning Inspector dated 10 May 2019, dismissing the Claimant's appeal against the refusal by the Interested Party ("the Council") of planning permission for:

   "*demolition of all existing buildings on site (with exception of existing substation) and the development of two detached dwelling houses and six apartments … together with access from Northumberland Road and associated engineering*"

   on land at Huntley Lodge, 47 Northumberland Road, Leamington Spa ("the proposed development").

2. The approach that the Court should take in a challenge under s.288 is so well-rehearsed that I need not set it out again in this judgment. Suffice it to say that I have had the seven principles helpfully adumbrated by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 at [19] well in mind.

3. The Claimant's primary contention is that the Inspector erred in his application of s.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, ("LBCAA") which required him to "*pay special attention to the desirability of preserving or enhancing the character or appearance of [the conservation area]*". "Preserving" in this context means "doing no harm to": *South Lakeland District Council v Secretary of State for the Environment* [1992] 2AC 141 per Lord Bridge at 150A-G.

4. There is also a separate complaint of procedural unfairness, which relates to a separate issue on which the Inspector made a finding against the Claimant, namely, non-compliance with the Council's supplementary planning document ("SPD") on residential amenity. This was not a matter that had originally been relied on, but it was raised in the Council's Written Statement on the appeal and responded to by the Claimant in a Rebuttal document before the Inspector considered the appeal.

5. For the reasons set out below, I consider that there is no merit in either of these grounds of complaint, and that the claim must therefore be dismissed.

FACTUAL BACKGROUND

6. The site of the proposed development is within the Royal Leamington Spa Conservation Area ("RLSCA"). Huntley Lodge is a non-designated heritage asset ("NDHA") located in the middle section of Northumberland Road, which mostly comprises individually designed interwar houses with some 1950s infills. The initial building is a significant Victorian villa, which was constructed in the mid to late 19th Century. It was conceived as half of a pair of semi-detached properties, but the other half was never built. Huntley Lodge was the first building to be constructed in that section of the road.

7. The original building was extended by a front wing across the whole width, which is the element the Inspector found positively addressed Northumberland Road. The building was subsequently extended to the south (facing Northumberland Road) on a number of occasions, in a manner which detracts from the more historic original. The southerly extensions comprise three elements: a two storey flat roofed element completed in white render, a two storey buff bricked element with a low pitch and section of gable front; and a two storey element with two asymmetric mono-pitches in a red brick. These extensions were described as "unsympathetic" in a Guide to the Conservation Areas published by the Council and quoted by the Inspector.

THE DECISION

8. In his decision letter the Inspector identified four main issues: the effect on Huntley Lodge as a NDHA; the effect on the RLSCA; the effect on highway safety and the convenience of residents in terms of parking; and whether the proposal would provide sufficient amenity space for the proposed occupiers. The "effect" in question was the effect of the proposal for which permission was sought, and therefore involved the demolition of all the existing buildings on the proposed development site (apart from the sub-station) and the construction of the two houses and six apartments in their place.

9. Part 16 of the NPPF includes the following provisions of relevance to the first two issues identified by the Inspector:

   Paragraph 190: *Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this into account when considering the impact of a proposal on a heritage asset to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal.*

   Paragraph 193: *When considering the impact of a proposed development on the significance of a designated heritage asset great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.*

   Paragraph 197: *The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non- designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."*

10. No complaint is made about the way in which the Inspector dealt with the first of the four issues. He made the finding that Huntley Lodge was a NDHA, and therefore the provisions of the Warwick District (2011-2019) Plan Policy HE3 (relating to designated heritage assets) were inapplicable to it. The relevant Local Plan Policy was HE2, which he would go on to consider when addressing the second issue. He then carried out a nuanced appraisal of the different parts of Huntley Lodge. He stated in paragraph 12 that it was clear that the Council's view of the significance of the asset related to the 19th Century part, rather than the extensions to the south.

11. The Inspector then specifically considered the significance of that original part of the building, describing it as a "*reasonable example of its type and age*", but concluding that its significance was limited because other buildings in the close vicinity were constructed later and in a different style, and there were other more significant Victorian villas in the area at both ends of Northumberland Road. The Inspector concluded in paragraph 17 (the final paragraph of this section) that the proposal would result in the total loss of the NDHA and this must weigh against the proposal. He said he would consider this further in the planning balance section of his decision (which he did).

12. The next section of the decision letter is entitled "the RLSCA". In this section, the Inspector considered Policy HE2 and those obligations in part 16 of the NPPF that related to the impact of the proposed development on the conservation area, as well as his statutory obligations under s.72 of the LBCAA.

13. Local Plan Policy HE2 provides, so far as is material, that:

"*There will be a presumption in favour of the retention of unlisted buildings that make a positive contribution to the character and appearance of a Conservation Area. Consent for total demolition of unlisted buildings will only be granted where the detailed design of the replacement can demonstrate that it will preserve or enhance the character or appearance of the conservation area."*

14. In paragraph 19 of the decision letter, which is the paragraph upon which the Claimant focuses, the Inspector said this:

"*the question of whether the existing building represents a positive building in the conservation area depends on how the building is considered. If the whole of the historic Huntley Lodge, together with the alterations and extensions to the south are considered together, then the overall composition detracts from the character and appearance and thus the significance of the RLSCA. However if it is just the historic Huntley Lodge, then this acts as a positive building for the reasons stated above, and because of its presence in the street scene. Given that by definition a building includes part of a building, the correct approach would be to conclude that this consideration should relate only to the more historic building, and therefore it should be considered as a positive building in the RLSCA."*

15. The Inspector then referred to policy HE2 (which he quoted) before quoting s.72 of the LBCCA. He said, at paragraph 21:

"Consideration here relates to the RLSCA, not to the fact that Huntley Lodge is a non-designated heritage asset in its own right. The proposal needs to be judged in the context of the RLSCA as a whole, not just the area in which the appeal site is located."

This was an entirely proper approach.

16. He went on to describe the proposed development in some detail in paragraphs 22-27, describing how the proposed new buildings would appear tall and bulky and finding that the two new houses did not follow one of the prevailing design characteristics in the area. He described how the dormer windows would have a visual effect of closing the space between buildings, which would detract from the current sense of space between

buildings. He then referred to the lack of parking spaces in paragraph 28, before concluding in paragraph 29:

"overall, the proposal would be harmfully out of keeping with the appearance of the street scene and thus with the character and appearance of the RLSCA. I will consider this further in the planning balance below. As the proposal would not preserve or enhance the character or appearance of the RLSCA it would be contrary to policy HE2 of the WLDP as set out above, and would not, for the purposes of this policy, represent a justification for the loss of the existing positive building in the RLSCA."

17. After sections considering the remaining two "main issues" that he had identified, namely parking (which is not relevant to this claim) and amenity space, which is the subject of Ground 2, the Inspector devoted the final section of his decision to the planning balance. He said, in paragraph 43:

"The proposal would result in the loss of a non-designated heritage asset, the loss of a positive building in the RLSCA and the replacement design would be harmful to the character and appearance of the RLSCA and would not represent a justification for the loss of the positive building in the RLSCA. In the terms of the Framework this would represent less than substantial harm to the significance of the designated heritage asset although, as stated above, special attention should be given to the desirability of preserving or enhancing the appearance or character of that area. In line with paragraph 196 of the Framework this harm should be weighed against the public benefits of the proposal….

He then considered the benefits and commented as follows in paragraph 45:

While the loss of the southern part of the existing overall building would be beneficial, any replacement building needs to at least preserve the character and appearance of the RLSCA and for the reasons set out above, this would not be the case."

18. He concluded, in paragraph 47, that overall the public benefits did not outweigh the harm from the loss of the NDHA and to the significance of the RLSCA.

GROUND 1 – s.72 of the LBCAA

19. The Inspector rightly identified that the effect on Huntley Lodge itself as a NDHA, and the effect of the proposed development on the RLSCA were two distinct issues that he needed to address. Paragraph 197 of the NPPF, referred to expressly in paragraph 14 of the decision letter, relates to the former issue, which he addressed in the first section of his decision. The effect on the RLSCA had to be assessed by reference to Local Plan Policy HE2, the salient parts of the NPPF and s.72, all of which were addressed in the second section. The Claimant's complaint is confined to the way in which the duty under s.72 was approached.

20. The duty under s.72 is a duty to give special attention to the desirability of preserving or enhancing the character and appearance of the conservation area. As Lindblom J stressed in *R (Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin) at [43], giving "special attention" means more than giving weight to those matters in the planning balance. There is a strong statutory presumption against granting permission for a development that would fail to preserve the character or appearance of a conservation area.

21. Self-evidently any consideration of the impact of a proposed development on the character or appearance of a conservation area with a view to determining whether it would preserve it, involves an assessment of the existing character and appearance of the conservation area, a consideration of the extent to which the proposed development would fit in with that character or appearance, and a value judgment being formed as to whether the proposed changes are positive, negative or neutral in terms of their overall effect. The current character and appearance of the *conservation area* is not confined to the character and appearance of the building or buildings on the development site, a point which the Inspector evidently had well in mind.

22. In this case, the Inspector decided as a matter of planning judgment that the proposed development was so out of keeping with the character and appearance of the street scene that it was positively harmful to the character and appearance of the RLSCA. That goes beyond a mere failure to preserve the existing character and appearance of the conservation area. That assessment is only open to challenge if it was informed by a material error of law.

23. *Bohm v Secretary of State for Communities and Local Government* [2017] EWHC 3217 (Admin) was a case concerning a proposal to demolish and replace a NDHA in a conservation area. The fact that the NDHA made a positive contribution to the conservation area was not in issue. When applying the test in what was then paragraph 135 of the NPPF (now paragraph 197) the planning inspector formed the view that the existing building was not a landmark building and that its limited local heritage interest did not weigh heavily in favour of its retention. She described the design of the proposed replacement building as acceptable and said that it promoted and reinforced local distinctiveness. Therefore, she concluded there would not be an adverse impact from the total loss of the NDHA. Turning to the duty under s.72 of the LBCAA, which she dealt with in paragraph 16 of her decision, the inspector reiterated that the positive contribution of the building was limited, and held that in this regard, the net effect of the provision of the new dwelling and thereby the removal of the NDHA would at worst be neutral, as what was special about the conservation area would not be harmed.

24. The claimant in that case argued that in discharging her duty under s.72 the planning inspector should first have considered the impact of the loss of the existing building, and in doing so she should have attached special importance to the preservation and enhancement of the conservation area. She should have then gone on separately to identify what public benefits there were which might outweigh the harm to the conservation area from the demolition of the NDHA. It was submitted that the loss of a building which makes a positive contribution to the conservation area must necessarily cause harm to the conservation area, and that harm must be given considerable importance and weight.

25. The Judge, Nathalie Lieven QC, rejected that two-staged approach. She said, at [33], that when considering the impact of the proposal on the conservation area under s.72 it is the impact of the entire proposal which is in issue. In other words, the decision maker must consider not merely the removal of the building which made a positive contribution, but also the impact on the conservation area of the building which replaced it. She must then make a judgment on the overall impact on the conservation area of the entire proposal before her.

26. As regards the inspector's discharge of the s.72 duty, the Judge quoted from paragraph 16 of the decision and described it as "an entirely correct approach". She said this at [36]:

> "*Section 72 requires the overall effect on the CA of the proposal to be considered. There is no requirement for a two-stage process by which the demolition part of an application has to be considered separately from the proposed new development."*

27. On behalf of the Claimant, Mr Tucker QC contended that the Inspector fell into error in the present case because he failed to consider the impact of the removal of the building as a whole from the conservation area, which was what the application proposed, and only took account of the impact of the removal of the part of Huntley Lodge that made a positive contribution. He submitted that nowhere in the decision is there a comparison between the overall effect of the built form on the significance of the conservation area, and the effect of the proposed development in that regard. All that the Inspector considered was whether part of the building made a positive contribution to the conservation area, and that was a legally erroneous approach.

28. Mr Tucker pointed out that in the run up to the appeal, the Claimant had taken issue with the approach taken by the Council to the heritage and conservation issues, and had specifically criticised the Council's consideration of the different elements of the existing building rather than looking at the building taken as a whole. In the light of this, he said that the Inspector was aware that each party was advocating a difference in the correct approach to these issues, and paragraph 19 of the decision letter had to be considered against that background.

29. Mr Tucker submitted that if the Inspector had considered the contribution made by the existing building *as a whole*, he would have concluded that the overall character and appearance of the existing building detracts from the character and appearance, and thus the significance of the RLSCA, as that is what he had expressly stated in paragraph 19. Comparing that state of affairs with the proposed development, even if the latter also detracted from the character and appearance of the conservation area, could have meant that at the very least the overall impact on the RLSCA was neutral.

30. Indeed, Mr Tucker submitted it was possible that replacing an existing overall unsympathetic development with another unsympathetic development could produce a benefit in conservation terms, for example if the new development was considered less of an eyesore and more in keeping with the conservation area than what was there already. By singling out the aspect of the existing building that made a positive contribution, the Inspector was not carrying out the proper comparison exercise envisaged in *Bohm* and as a result he did not discharge his duty under s.72.

31. An obvious problem with the Claimant's prescriptive cumulative approach to assessing how the existing building impacts on the conservation area is that, in a case where there is a building which comprises elements which contribute positively (both historically and aesthetically) to the conservation area and elements which do not, then whenever the unsympathetic elements are more extensive, the contribution to the conservation area which is made by the aspects which do contribute to it would be eclipsed by them. In consequence the impact of their loss on the conservation area would not be properly considered at all. It is not unusual for a heritage building to have unsympathetic extensions. When forming a view of the current character and appearance of the conservation area, the decision maker must surely be entitled to

take into consideration the positive as well as the negative or neutral elements of the existing building or buildings. The degree to which each element contributes to the overall assessment is a matter of planning judgment.

32. In any event, I consider the Claimant's criticism of the Inspector's approach to be fundamentally misconceived.

33. First, I do not regard *Bohm* as laying down any relevant principles. That case was not concerned with how the duty under s.72 should be discharged in a situation where the existing building is a mix of heritage and non-heritage elements, and parts of it contribute positively to the character and appearance of the conservation area whilst other parts do not. Indeed, there was no dispute in that case that the building did make a positive contribution, even though it had fallen into serious disrepair.

34. The Judge in *Bohm* merely rejected a mandatory two-stage analysis of the impact of the proposed development on the conservation area comprising (a) an assessment of the effect of the loss of the existing building(s) followed by (b) a separate assessment of the benefits of the proposed replacement(s), in favour of the holistic assessment adopted by the decision maker. There is nothing in that case that prescribes how that holistic assessment should be conducted. That is not surprising, given that the impact of the proposed development on the character and appearance of the conservation area is quintessentially a matter of planning judgment. There is nothing in *Bohm* which mandates the approach espoused by the Claimant of confining the decision-maker's appraisal of the status quo to consideration of the overall effect of the existing building on the conservation area, rather than permitting a more nuanced appraisal of the contribution made by its different elements.

35. Secondly, I am not persuaded that there is any legal principle that, when discharging the duty under s.72, the decision-maker is constrained to look only at the impact of the existing buildings taken as a whole on the conservation area, and cannot take account of any positive contribution made by individual components, if he or she considers that contribution to be of significance and relevance to the overall assessment. An overall assessment of character and appearance involves taking into consideration anything the decision maker reasonably considers to be relevant in making that assessment. It was a matter for the Inspector to decide how to gauge the overall effect on the conservation area of losing the existing building and replacing it with the proposed houses and apartments. There is no justification for imposing such a fetter on a matter of planning judgment and nothing in s.72 requires it.

36. Thirdly, the Claimant's case involves taking one paragraph of the decision letter out of context and treating it as underlying the Inspector's assessment of the overall impact of the proposed development on the conservation area when, on a true and fair reading, that was not so. In paragraph 19 of the decision letter, the Inspector was not addressing s.72 at all. He was considering whether the existing unlisted building made a positive contribution to the character and appearance of the RLSCA, and therefore whether as a matter of local policy there was a presumption in favour of its retention. That was something he was specifically obliged to consider under Policy HE2, which relates specifically to NDHAs and how they impact on the conservation area.

37. As the informed readership of the decision letter would have appreciated, the phrase "positive contribution" does not appear in s.72. It is language used expressly in Policy

HE2. The requirements of that Policy and of the NPPF are separate from the duty under s.72, though they are likely to be relevant to the overall assessment under that section. The Inspector had to consider each of them in this section because they all relate to the effect of the proposal on the RLSCA.

38. It was therefore in the context of Policy HE2 that the Inspector considered the question whether he was obliged to look at the overall impact of the whole building, including its extensions, on the conservation area, (discounting any positive contribution made by part of it); or whether he could treat the building as making a positive contribution because the parts of it that gave rise to its status as a NDHA did so. He knew that the proposal was for demolition of the whole building, which would inevitably involve demolishing those aspects of it which made a positive contribution to the conservation area as well as those aspects which did not. He decided that it was a legitimate approach to consider whether any part of the unlisted heritage building made a positive contribution to the character and appearance of the RLSCA, and if it did, to treat the building as making a positive contribution for the purposes of Policy HE2.

39. Although the Inspector's interpretation and application of Policy HE2 forms no part of the Claimant's challenge, it was plainly open to him to take that view. Indeed, confining himself to considering the impact of the building as a whole would have involved disregarding any positive contribution made by the historic part, with the effect that the presumption in Policy HE2 could not apply, however significant the original building might be to the character and appearance of the conservation area. That would plainly undermine the purpose of that Policy.

40. In the first section of his decision letter the Inspector had already addressed the impact of the proposal on the NDHA itself under Paragraph 197 NPPF, and decided for those purposes to focus on the Victorian building, which was the only part to which the Council attached any significance for heritage purposes. Policy HE2 is also concerned with NDHAs and how to approach the impact on the conservation area of a proposal which would involve their total loss. The Inspector's interpretation and application of Policy HE2 was consistent with his approach to the Paragraph 197 appraisal, which (rightly) has not been criticized.

41. Policy HE2 not only required the Inspector to assess whether the existing unlisted building made a positive contribution to the character and appearance of the RLSCA but, as the proposal involved the total demolition of that building, to consider whether the detailed design of the replacement could demonstrate that it would preserve or enhance the character or appearance of that conservation area. To that extent, there was some overlap with the duty under s.72, which also involves an assessment of whether the proposed replacement would preserve the character or appearance of the conservation area.

42. Mr Tucker contended that even if paragraph 19 was concerned with Policy HE2 it made no difference, because the assessment under that Policy fed into, and thus had the effect of skewing the assessment under s.72. That conclusion does not follow from the premise. It cannot be inferred from the Inspector's interpretation of and application of Policy HE2 that when he made his assessment under s.72 he confined his appraisal of the existing character and appearance of the conservation area to the positive contribution made by that part of Huntley Lodge, or that he ignored the visual

impact of the rest of the building. Whilst there is some overlap and a degree of linkage between all the various policy considerations pertaining to the impact of the proposed development on the conservation area, the focus under s.72 is on the overall effect of the replacement on its character and appearance. The loss of the positive contribution to that character and appearance made by the heritage asset is just one of many factors that has a bearing on that overall assessment.

43. Finally, there was no error in the way in which the Inspector discharged his duty under s.72. The Inspector did not turn to consideration of that duty until paragraph 21. It cannot be inferred from what he said in paragraph 19 of the decision letter that when making the overall assessment required under s.72, the Inspector failed to make a proper evaluation of the character and appearance of the conservation area, or limited himself to consideration only of the historic parts of the building and the contribution made by them to that character and appearance. Indeed, what he said in paragraph 21 and the detailed analysis that follows gives rise to quite the opposite inference.

44. Section 72 requires an overall assessment of the likely impact of a proposed development on the conservation area, and not just that part of it where the development site is located, as the Inspector rightly recognized in paragraph 21. As part of that overall assessment he was entitled to take into consideration any aspects of the existing building which made a positive contribution to the conservation area, and to consider the impact on the conservation area of the loss of those aspects.

45. When it came to making that assessment in this case, the Inspector knew that only part of the existing structure made a positive contribution to the character or appearance of the conservation area. He was plainly alive to the fact that the rest of the building did not; he had said as much in other parts of his decision, including paragraph 19. Indeed, he went on in paragraph 45 to accept that the loss of the southern part of the building would be beneficial, though in his view that benefit did not outweigh the loss of the original building. But the key part of his decision so far as s.72 is concerned is his assessment in paragraph 29 that "*overall, the proposal would be harmfully out of keeping with the appearance of the street scene and thus with the character and appearance of the RLSCA."*

46. In making that holistic assessment the Inspector was not simply comparing the proposed development with the loss of the parts of Huntley Lodge that made a positive contribution to the conservation area. There is no justification for interpreting the decision in that way. The appearance of the street scene included the unsympathetic extensions to Huntley Lodge as well as the various inter-war and 1950s neighbouring properties and the other Victorian villas at either end of Northumberland Road. The Inspector had considered the heights and designs of other properties in the road and the space between them and how the new development would compare with them. He was plainly envisaging what the impact would be on the street scene if the existing buildings were demolished and replaced by two houses and a block of apartments constructed in accordance with the designs for the proposed development.

47. Reading this decision letter as a whole, and considering the way in which the Inspector drew the various elements together in the final section, particularly the way in which he dealt with the heritage aspects in the planning balance, there is simply no foundation for the Claimant's criticism. The Inspector looked at the matter in the round, took into

account factors he was entitled to take into account, and formed a legitimate conclusion that the proposed replacement of the existing building would be harmfully out of keeping with the character and appearance of the RLSCA. Therefore, when he came to consider the planning balance, he applied the strong statutory presumption against the grant of permission. In so doing, he discharged his statutory duty under s.72.

48. In any event it is plain from paragraphs 22-27, 29 and 45 of the decision letter that it was the nature of the proposed replacement buildings that ultimately proved fatal to the Claimant's application. The Inspector described their appearance as "*harmfully out of keeping with the appearance of the street scene*". Even if the Inspector had proceeded on the basis that the existing building, taken as a whole, made a negative rather than a positive contribution to the RLSCA, I am satisfied that the outcome for the Claimant would have been the same. For all the above reasons this Ground fails.

GROUND 2 – PROCEDURAL UNFAIRNESS

49. The principles of natural justice apply as much to written appeal processes (such as the one adopted in the present case) as they do to oral hearings. All cases in which a breach of these principles is alleged will turn on their own facts, but the real issue, viewed objectively, is whether the party making the complaint has had a "fair crack of the whip". In this context, as in any other case where a breach of the rules of natural justice is alleged, the questions for the Court to decide are whether the complainant (i) knew the case it had to meet and (ii) had a reasonable opportunity to adduce evidence and/or make submissions to meet it: *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470 at [62].

50. There is no doubt that the issue concerning the lack of amenity space arose somewhat late in the day. The Council refused planning permission for the proposed development in March 2018. In May 2018, it adopted a new Residential Design Guide SPD. The new Guide now had minimum size requirements for private amenity areas for all new residential development. Whilst the two proposed detached houses and two of the six apartments that formed part of the proposed development had sufficient private amenity areas to meet this guidance, the remaining four apartments did not.

51. The Council raised this matter for the first time in March 2019, in paragraphs 4.25 and 4.26 of its Written Statement on the appeal, even though it had been informed of the receipt of the appeal by the Planning Inspectorate on 2 August 2018. That delay was rightly criticized by the Inspector in his partial costs award.

52. In the Written Statement, the Council explained that the updated Residential Design Guide post-dated the original refusal of permission and set out the reasons why the development did not accord with the Residential Design Guide or Local Policy BE3. The Council contended that this constituted an additional reason for refusal of the application and dismissal of the appeal. No mention was made of the possibility of a contribution by the developer to off-site amenity space to make up for this deficiency, although that is something that the Policy envisaged.

53. In the Rebuttal document, also served in March 2019, this new objection was addressed by the Claimant in paragraphs 5.15 to 5.19. It pointed out that the Policy provides that:

> "*for flats amenity space may be communal but should form a consolidated area. Provision for amenity space and gardens must be set within the context of ensuring that inefficient use of land is avoided. Therefore, in situations where the standards*

cannot be achieved e.g. high density housing developments, the Council will seek to work jointly in agreement with developers to provide an upgrade to nearby offsite amenity space which will be available to the general public."

54. In the light of that provision the Claimant made the following points:

i) That the guidance allows for dialogue between the Council and developers to secure contributions to upgrade suitable alternative amenity space offsite if it is not possible to provide it on site;

ii) The Council had made no such request to the Claimant, and had not provided an explanation as to why this solution would be inappropriate in the present case;

iii) It invited the Inspector to attach no weight to what it described as "this contrived additional reason for refusal" and said that if there had been genuine concern of potential harm arising, then the Council would have made a request for an off-site contribution;

iv) It pointed out that the Claimant had previously offered to make a contribution to off-site amenity space within a unilateral undertaking, albeit to overcome non-compliance with a different policy, HS4, which had been one of the original grounds for refusal of the application but was no longer pursued. (Policy HS4 expressly required contributions from residential developments to provide, improve and maintain appropriate open space, sport or recreational facilities).

55. The thrust of the Claimant's response was that the Inspector should not treat this as a serious objection to the grant of planning permission because if the Council really had any concerns about the lack of amenity space for four of the flats, it would have sought to enter into a dialogue with the Claimant about the provision of off-site contribution by way of mitigation. The Claimant had already demonstrated its willingness to provide such a contribution, albeit in the context of non-compliance with a different policy. For those reasons the Claimant invited the Inspector to attach no weight to this factor in the planning balance.

56. Although the Council did not raise the possibility of a contribution to mitigate the non-compliance, the Claimant chose to address it in its response. The fact that there was a possible solution to the lack of amenity space which had not been explored was put forward as a reason why the Inspector should not treat the non-compliance as a factor weighing against the grant of permission.

57. Nowhere in the Rebuttal document did the Claimant make any complaint about being unable to respond to this new ground of objection to the proposed development, or suggest that it needed more time in which to do so. On the contrary, the Claimant positively invited the Inspector to consider the matter, but to attach no weight to what it tacitly accepted was its non-compliance with the SPD. The Claimant did not suggest that if he was minded to attach weight to the non-compliance, it should be given a further opportunity to enter into dialogue with the Council to try and resolve the issue. That course was open to the Claimant in any event. It is no answer to that point that the Council had not indicated that it would be amenable to an offer of a contribution.

The Claimant could have asked it. Since the Claimant was aware that the policy allowed for mitigation in a case where it was not possible to comply (though the Inspector thought there *was* a practical means of substantial compliance), it could have made an offer to the Council, or asked the Council to provide it with a figure.

58. The Inspector rightly identified the issue of amenity space as one of the four issues he needed to resolve. He addressed this issue in paragraphs 38-43 of the decision letter. He began by explaining that the Design Guide sought to provide further information pursuant to various policies in the Local Plan, including Policy BE3 which relates to outdoor amenity space. Policy BE3 was adopted pursuant to the 2012 version of the NPPF and seeks to ensure that development has acceptable standards of amenity for future users and occupiers. The Inspector noted that the 2019 version of the NPPF goes further than this, in that paragraph 127 seeks a high standard of amenity for future users.

59. Having considered the requirements of the Design Guide, the Inspector found (in accordance with the Council's submissions) that on the current layout of the proposed development the amenity space met the requirements for the two houses and two of the six proposed flats, but not for the occupants of the remaining four flats. However, he pointed out that the intervening fence could easily be removed, and the whole provided as communal space for the occupiers of all six flats, secured by a planning condition. He said that this would provide $101m^2$ with the standard seeking $120m^2$ – implying that the shortfall could be regarded as acceptable in the overall scheme of things. The Inspector plainly thought the matter was capable of resolution by the imposition of a planning condition, without the need for any separate s.106 agreement or contribution to amenity space elsewhere.

60. In Paragraph 41, the Inspector said that, given the importance of securing a high standard of amenity for future users, there would be insufficient on-site amenity space for the occupiers of the flats. He added that "*there is no contribution secured to any off-site area to mitigate this deficiency*". This was just a statement of fact, not a criticism; as with the point he had made about moving the fence, he was just pointing out that there were steps that might have been taken to deal with the issue, but they had not been taken. However, the key finding was that of non-compliance with the SPD, rather than the absence of any steps which could have been taken to address it.

61. The Inspector concluded in paragraph 42 that as there was insufficient amenity space for the proposed occupiers, the proposal would be contrary to Policy BE3, the Design Guide and paragraph 127 of the NPPF. This was a factor he took into account in the Planning Balance section at paragraph 43, although he only devoted a sentence to it.

62. The Inspector did not accede to the Claimant's submission that he should attach no weight to the non-compliance because there were ways in which it might be mitigated. He was entitled to take that course, and the Claimant took the risk that he would. The Claimant had a fair opportunity to join issue with the new allegation that the amenity space was inadequate. It chose not to contest the allegation of non-compliance, presumably because the Council was correct about the lack of amenity space for the four flats (as the Inspector found). It chose instead to seek to persuade the Inspector to treat the lack of amenity space as a matter of no importance. It did not ask for an opportunity to meet the objection before he embarked upon making his decision.

63. In the light of this, it was somewhat difficult to discern the basis upon which the Claimant was contending that there had been procedural unfairness, let alone unfairness leading to significant prejudice. Mr Tucker submitted that if the Inspector was going to make a point about the lack of provision of off-site contribution to mitigate the deficiency in amenity space, fairness required that he should have contacted the Claimant, raised the issue of a contribution being secured by way of a s.106 agreement, and invited further submissions. That would also have given the Claimant the opportunity to liaise with the Council to resolve the issue regarding amenity space in that manner. He also submitted that the Inspector chose to give weight to the non-compliance without asking if it could be resolved.

64. I am wholly unpersuaded by that argument. There is nothing in the decision letter that unfairly took the Claimant by surprise or raised some new adverse point with which it had been given no prior opportunity to deal. Procedural fairness did not require the Claimant to be given a second bite of the cherry or to be given a chance to overcome a valid objection to the grant of planning permission before the decision was made. The Inspector was under no obligation to go back to the parties and ask them whether they could reach agreement on a solution such as moving the fence before he carried out his task, which was to consider and rule on the issues on appeal. Indeed, as I have already pointed out, the tenor of the Claimant's Rebuttal appeared to be encouraging the Inspector to get on with making his decision on the basis of the material already before him.

65. I am satisfied that the Claimant was aware that the Council was alleging that it had provided insufficient amenity space for four of the flats, it had an adequate opportunity to address that complaint in the context of the appeal and it did so. Procedural fairness did not require the Inspector to go back to the Claimant and tell it that he was going to reject the submission that he should give no weight to the non-compliance and give it a second opportunity to address the same ground of objection. The fact that the Claimant, with the benefit of hindsight, may have wished to address the issue differently is no justification for impugning the decision on procedural fairness grounds.

66. Mr Tucker sought to place reliance on the fact that the Inspector was critical of the Council when he made a partial award of costs against it. It is apparent from his costs decision that the Inspector considered the Council could and should have reviewed its position and raised the objection as to the lack of amenity space within a reasonable time after 2 August 2018 instead of waiting until March 2019 to do so. He was particularly critical of the Council's failure to consider whether the lack of amenity space could have been resolved by conditions (the amalgamation of the individual amenity areas which he had suggested in his main decision). He made the point that refusing planning permission on a ground capable of being dealt with by conditions risks an award of costs. The Inspector concluded that the Claimant was put to unnecessary and wasted expense in responding to this issue, which could have been avoided had the matter been properly thought through by the Council.

67. In circumstances in which unreasonable behaviour by one party to a planning appeal causes the other to incur unnecessary expense, there is jurisdiction to make a costs award, and the Inspector exercised that jurisdiction; but that does not indicate that there was any procedural unfairness to the Claimant. It is one thing to find that a party has been put to unnecessary expense in responding to an allegation which could have been raised earlier and might have been resolved had that occurred. It is quite another to find that that party

had no proper opportunity to respond to that allegation. In this case there was an opportunity to respond and it was taken.

68. In any event, even if the issue of amenity space had been resolved before the Inspector made his decision, it would not have produced a positive benefit weighing in favour of a grant of planning permission. If the breach was mitigated, then the negative factor of non-compliance with the SPD would become neutral at best. Without it, there was still ample justification for the Inspector's decision. There can be no doubt that he would have refused the grant on the heritage and conservation issues alone. In the light of this, the Claimant's assertion that it has suffered "substantial prejudice" by not being afforded an opportunity to resolve the issue before the decision was made, is completely unsustainable.

69. The second ground of challenge also fails.

CONCLUSION

70. It follows that this claim must be dismissed.