



OUR REF: 3568/SC

PLANNING, DESIGN & ACCESS STATEMENT

LONG ACRE PEAR TREE LANE SHORNE DA12 3JT

1 INTRODUCTION

- 1.1 This statement is prepared in support of a full planning application submitted on behalf of the landowners Mr and Mrs J and L King seeking permission for the following development:

Demolition of existing detached dwelling and erection of replacement dwelling and associated works including removal of existing outbuildings and swimming pool, a re-sited pedestrian and vehicular access from Pear Tree Lane and the stopping-up of the existing access.

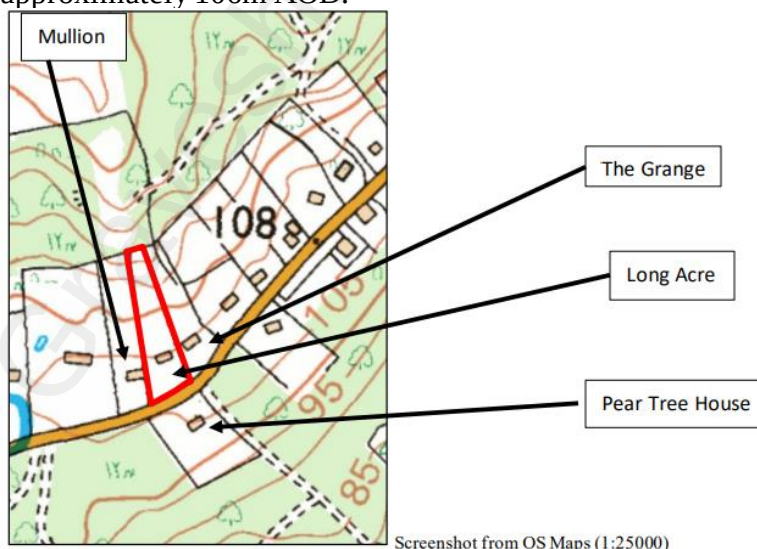
The new dwelling is intended to be occupied as a family home by the applicants.

- 1.2 The application is accompanied by existing and proposed block/site plans, floor plans and elevations of the current and proposed dwellings, a topographical survey plan, Preliminary Ecological Appraisal and a Bat and Reptile survey report. Also provided is confirmation that the applicant is participating in the District Level Licence scheme in respect of Great Crested Newts.

2 SITE CONTEXT

- 2.1 Long Acre is situated on the north side of Pear Tree Lane approximately 1km north east of its junction with Tanyard Hill/The Ridgeway and 750m south west of the junction with the A226 Gravesend Road. It is situated within a ribbon of substantial detached dwellings of various styles that are sited within large plots. The dwellings on the southern side of the road are more sporadic and more interspersed with woodland. There are three dwellings that neighbour the application property. To the east of the site is 'The Grange' and to the west 'Mullion.' A further detached dwelling, 'Pear Tree House' lies to the south of the site on the southern side of Pear Tree Lane.

- 2.2 Pear Tree Lane effectively forms a ridge with land levels falling either side of the road as can be seen in the map extract below. Adjacent to the site, Pear Tree Lane is approximately 106m AOD.



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- 2.3 The overall land associated with the property and its established residential curtilage extends to approximately 0.37ha in area. It is occupied by an existing detached two-storey dwelling located towards the southern end of the site where land levels flatten out. The existing dwelling was approved and erected in the late 1950s by Strood Rural District Council/Kent County Council under references TH/6/57/55 (outline) on 02/05/1957 and TH/6/59/319 on 30/11/1959.
- 2.4 The property was constructed shortly after the permission was granted. Permitted development rights were not removed on the permission.
- 2.5 The existing house can best be described as ‘of its time’ in the architectural approach and detailing. It is two-storeys in height with a slightly sloping monopitch roof. It has a mixture of buff brick, timber black painted cladding and white painted rendered external walls. It is set back some 35m from the north side of Pear Tree Lane. The house extends at a height of two-storeys across almost the full width of the 36.7m wide plot being 30m in width plus a 3.0m wide single-storey car port on its western side. The existing pedestrian and vehicular access are tight-up against the boundary on the eastern side of the site frontage to Pear Tree Lane. There is a swimming pool and a pool building located in the rear garden. The land to the rear falls steeply towards the site’s northern boundary, so much so, that views of the Thames Estuary are available over the woodland beyond the site boundary.
- 2.6 The application site is located within the Metropolitan Green Belt. It has no other designation. To the north of the property is woodland within a Local Wildlife Site identified by the Kent Wildlife Trust, Cole Wood within this wider LWS area, is classified as Semi-natural Ancient Woodland. On the southern side of Pear Tree Lane wrapping around but not including the site of Pear Tree House is a Site of Special Scientific Interest, Great Crabbles Wood, part of which is also classified as Semi-natural Ancient Woodland.

3 PROPOSALS

- 3.1 Full planning permission is sought for the demolition of the existing dwelling and the erection of a new detached dwelling and associated works including a re-sited pedestrian and vehicular access from Pear Tree Lane and the stopping-up of the existing access.
- 3.2 The proposed new vehicular and pedestrian access will be centrally sited within the plot frontage. The front boundary will comprise post-and-rail fencing set-back from the highway with planting behind, the area in front of the fence within the vision splays will be laid to lawn. The entrance gates will be set-back a minimum of 5.2m from the edge of the highway to allow for a vehicle to pull off the road whilst the gates are opened. The current access is tight against the eastern site boundary which severely restricts visibility. The new location of the access will improve visibility from the access looking to the east (i.e. in the direction of the A226 Gravesend Road).
- 3.3 The proposed dwelling will be positioned in a broadly similar location to the existing dwelling on the site at approximately 39m north of Pear Tree Lane. The house will be
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two-storeys above ground level with two sections of double-pitched roof and central valley and incorporate a basement. The basement will be screened from view from outside the site but will take advantage of ground levels within the site and have access to a sunken terrace area immediately at the rear of the property leading upwards via steps into the wider garden beyond.

- 3.4** The rear garden area closest to the existing and proposed dwellings is to be re-profiled due to the need to remove the existing swimming pool and pump house. If required, a suitable condition could be imposed securing submission of proposed site levels with cross-sections that would exist upon completion of the development. A landscape masterplan accompanies the application. Full landscaping details can be secured by means of an appropriate condition.
- 3.5** The proposed house will be set-in between 6.4m (front) and 6.2m (rear) approximately from the eastern boundary and there will be a gap of between 14.5m (front) and 11.6m (rear) approximately from the two-storey flank wall of the new house and between 6.5m (front) and 5.1m (rear) from the single-storey garage on the western side of the house.
- 3.6** This compares to the current separation of the two-storey existing dwelling from the boundary of 2.8m (east side) and 3.7m (west side). In fact, on the west side of the dwelling, an existing single-storey car port structure attached to the two-storey flank wall of the garage takes the development up to the western flank boundary.
- 3.7** The 'rectangular' form of the existing dwelling means that it is effectively only one room deep, and therefore, much wider at (33m including car port/30m excluding car port) than it is deep, with a current maximum depth of approximately 14.2m. The proposed dwelling will be 'squarer' in form and have a slightly greater overall depth at around 15.8m, but with a considerably reduced overall width of 24.6m (including the attached garage, 16.9m for the dwelling itself). But this depth will be concentrated within the site and considerably set-in from the eastern and western site boundaries.
- 3.8** The existing dwelling has an overall height of between (approximately) 5.2m to 5.65m at the front rising to between 5.9m to 6.5m at the rear due to its mono-pitch roof design. The proposed dwelling will have an overall ridge height of approximately 8.4m and an eaves height of approximately 5.7m.
- 3.9** External materials for the proposed dwelling include a clay tile roof, a red stock facing brick, white powder coated aluminium windows with stone cills and surrounds. Larger opening/folding windows/doors at the rear will also be white powder coated aluminium.

4 PLANNING HISTORY

- 4.1** Previous relevant planning history that is available from the Council's records for the Long Acre site is as follows;
19570055: Development of land for not more than two dwellings: APPROVED 02/05/1957

19590082: Erection of bungalow and garage: APPROVED

15950319: Site for erection of house and garage: APPROVED 30/11/1959

19780341: Replacement of existing mono pitched roof with gable ended double pitched roof and the erection of extensions at ground and first floor level to provide a replacement double garage and additional single garage and carport a play room an enlarged bedroom and an additional bedroom and the carrying out of elevational alterations: APPROVED 22/06/1978

19870925: Erection of a two storey side extension to form an enlarged garage with a bedroom over erection of a side and rear extension at first floor level to form an ensuite bathroom lounge and enclosed balcony erection of a front extension at first floor level to form an enlarged landing and cupboard, erection of a single storey front extension to form an open porch and the construction of pitched roofs over the entire building: APPROVED 20/01/1988

19880401: Widening of existing vehicular access and erection of a front boundary wall, wall mounted railings and entrance gates varying in height from 1.6m to 3.4m: REFUSED 01/08/1988

19880653: Erection of side extension at first floor level to form a snooker room: APPROVED 30/09/1988

19940081: Erection of 2.75m high chain link perimeter fencing around proposed tennis court on one of two alternative sites, I or II: REFUSED 12/12/1994

19950814: Erection of 2.75m high chain link angle iron perimeter fencing around proposed tennis court: APPROVED 31/01/1996

20220731: Single storey rear extension with a depth of 8.00 metres, maximum height of 4.00 metres and eaves height of 4.00 metres: PRIOR APPROVAL REQUIRED AND REFUSED 01/08/2022

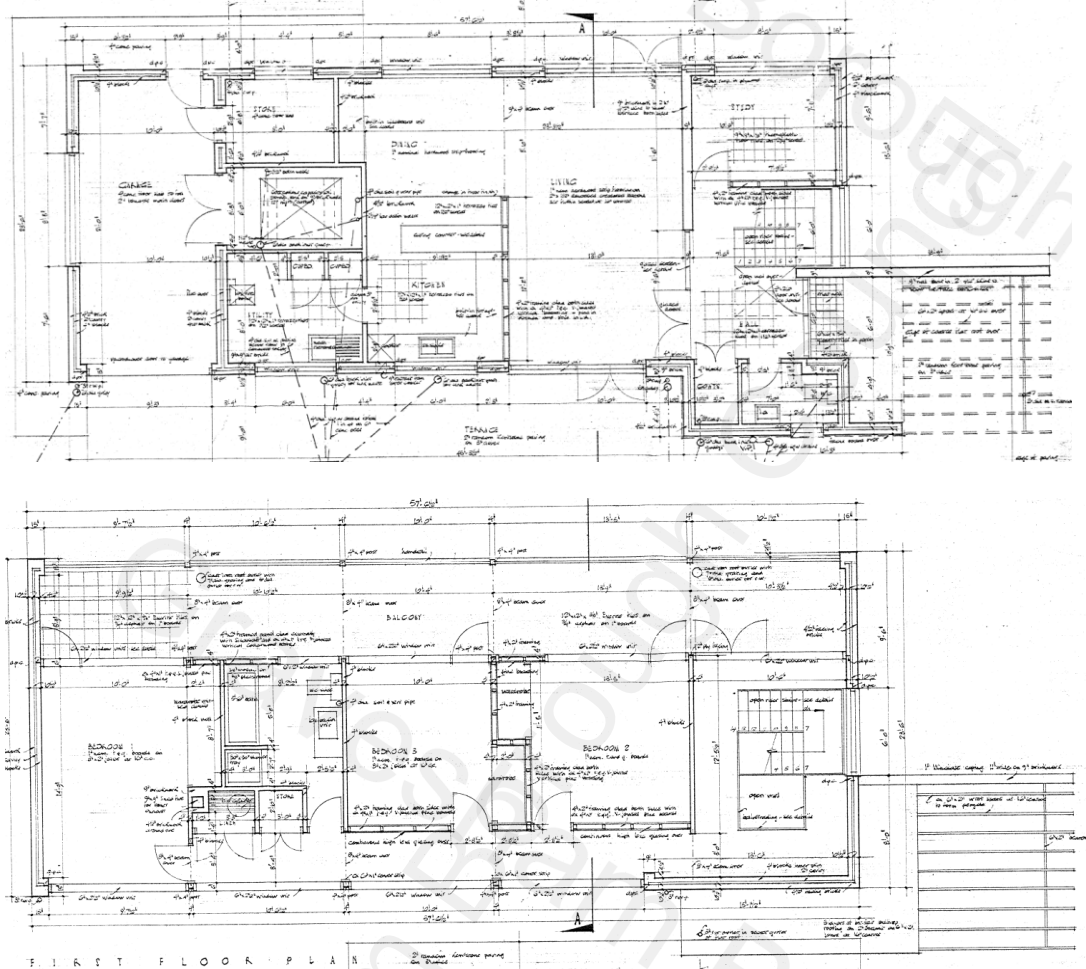
20220742: Prior approval for enlargement of the dwellinghouse by the construction of an additional storey: PRIOR APPROVAL REQUIRED AND REFUSED 11/08/2022

20220769: Application for a Lawful Development Certificate in respect of the proposed erection of a detached outbuilding over the existing swimming pool in the rear garden, this will include a gym, changing room and plant room: CERTIFICATE GRANTED 05/09/2022

20220880: Single storey rear extension with a depth of 8.00 metres, maximum height of 4.00 metres and eaves height of 2.50 metres: PRIOR APPROVAL NOT REQUIRED 12/09/2022

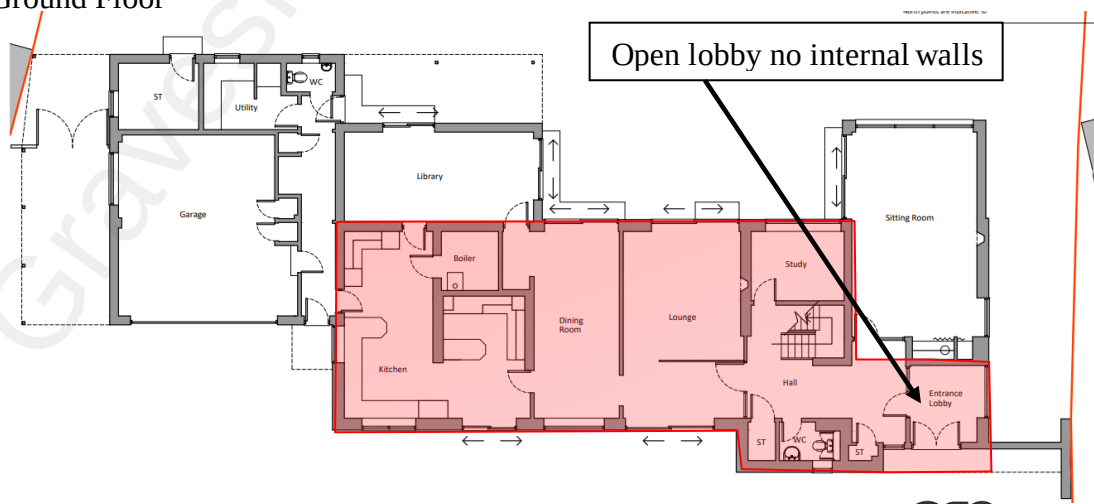
4.2 The evolution of the house from when originally approved to the current form and layout, is set out in the following paragraphs (4.3 to 4.14).

- 4.3 The ground and first floor layout of Long Acre as originally approved in 1959 is shown on the two extracts from the submitted and approved plans as follows;

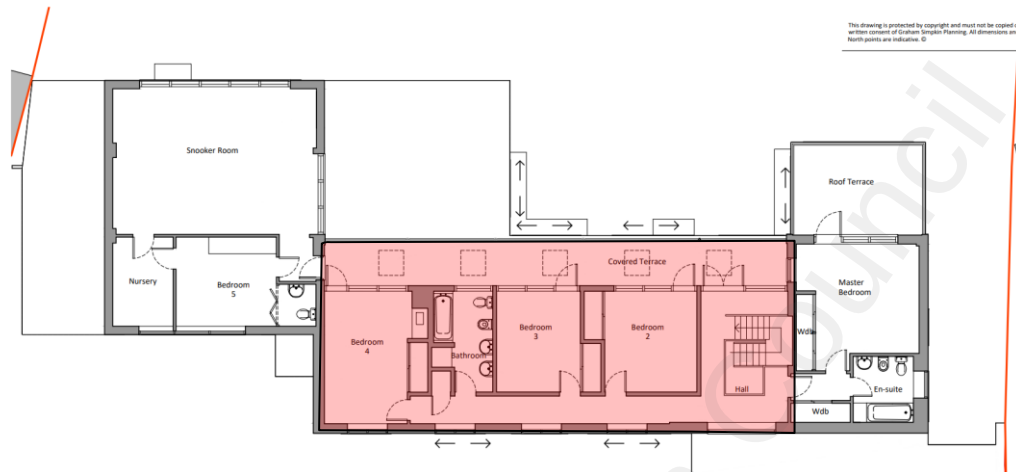


- 4.4 The extent of the original house is more clearly highlighted in red below on the ground and first floor layouts of the house as it currently exists.

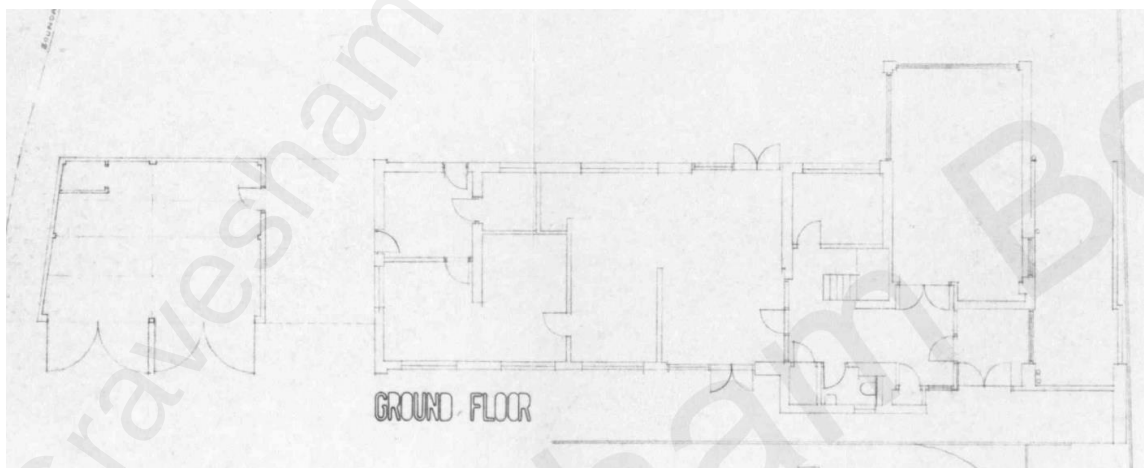
Ground Floor

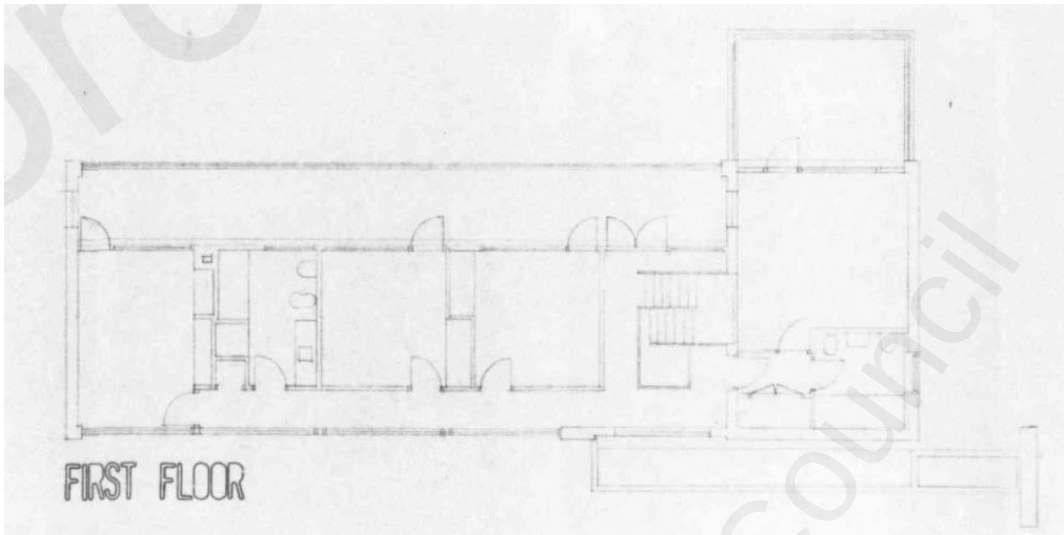


First Floor

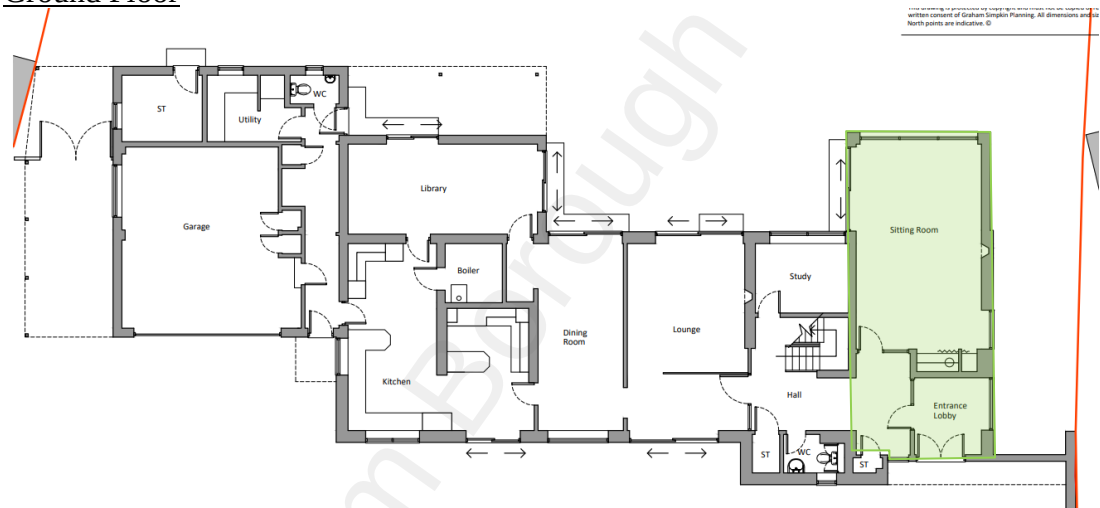


- 4.5 By 1978 the house had been further extended with a two-storey side extension to the east and a garage/car-port to the west side of the house as can be seen from the existing plans submitted with application 1978034. These are reproduced below. There is no available record of any applications relating to these extensions but the committee report for application 19870925 indicates that the garage to the west was added in 1961 (later demolished/replaced) and the eastern side extension was added in 1969. The green highlighted areas on the two subsequent plans have been superimposed on the ground and first floor layout of the house as it currently exists to provide additional clarity.

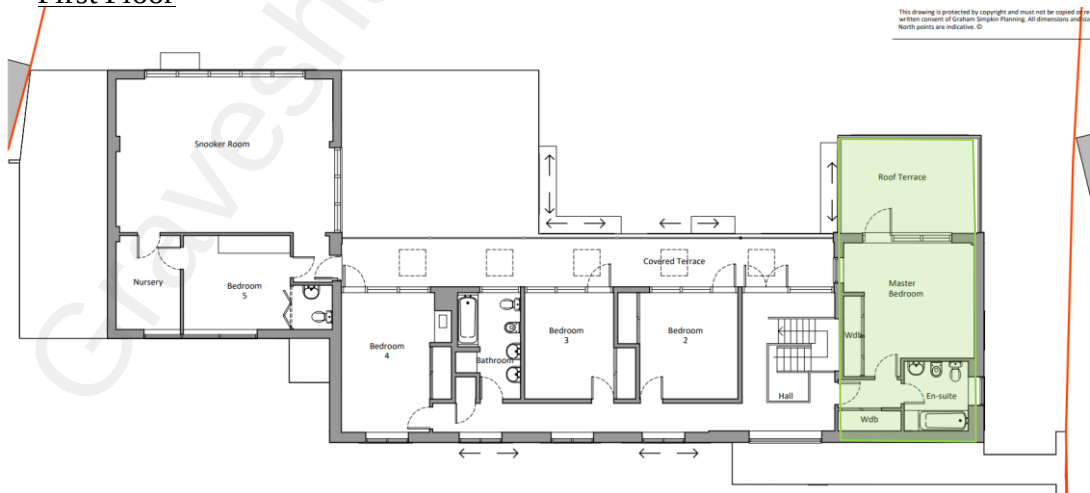




Ground Floor

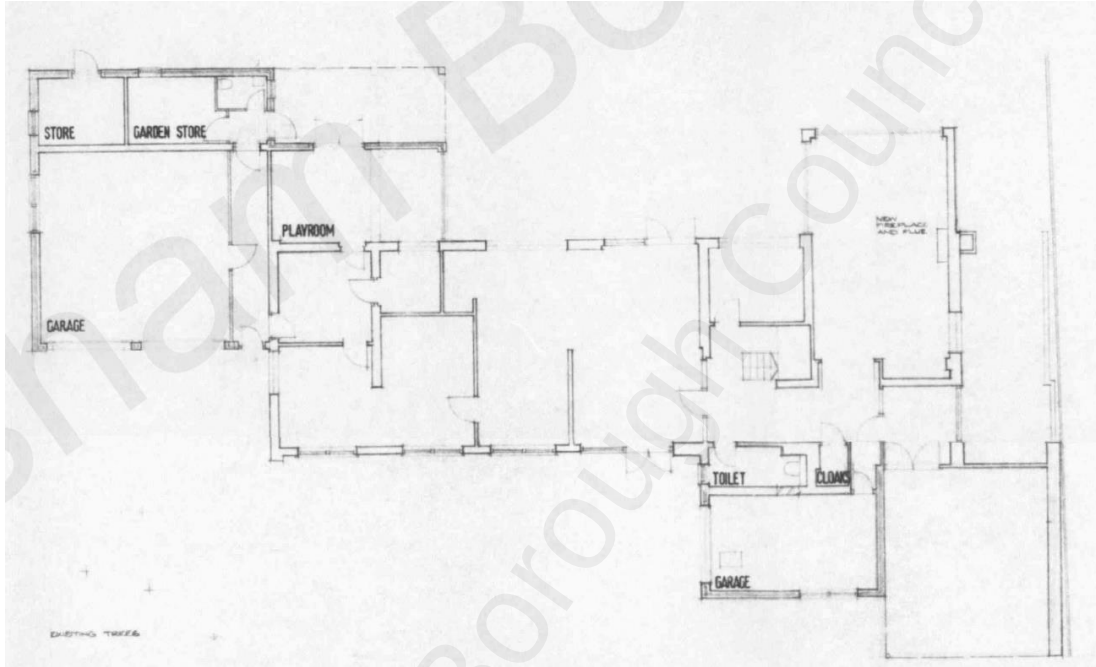


First Floor

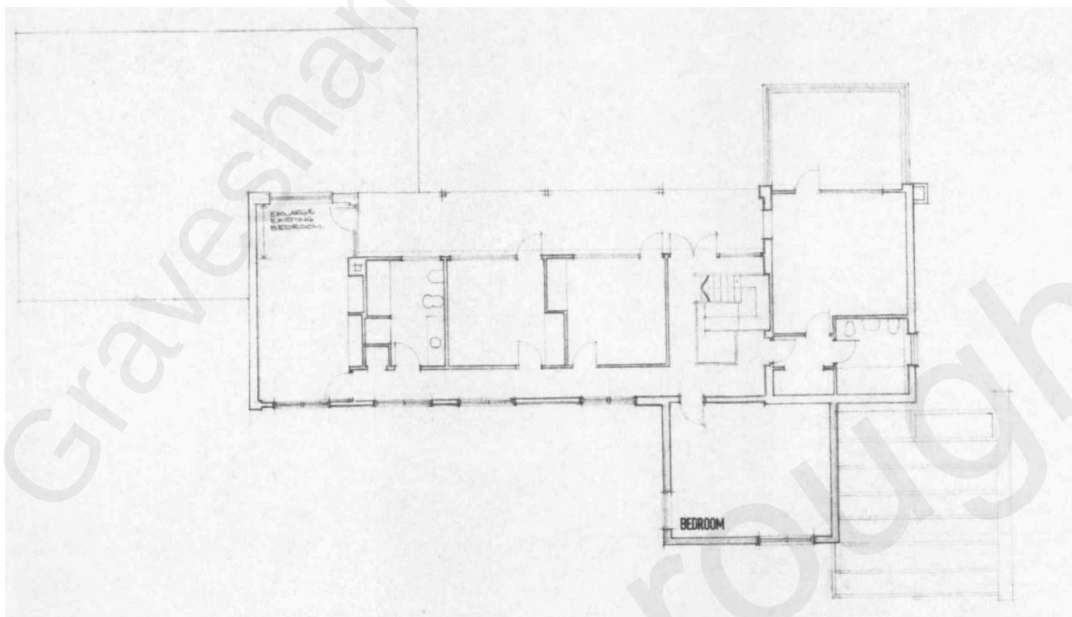


- 4.6** Application 19780341 proposed the following additions at ground and first floor level. At ground floor level, the 1961 garage/car port on the west side was to be replaced, a new playroom added and a new garage/car port and covered entrance area at the front. At first floor level a new first floor bedroom at the front was approved along with an extended bedroom on the west side.

Ground Floor as proposed and approved (19780341)



First Floor as proposed and approved (19780341)

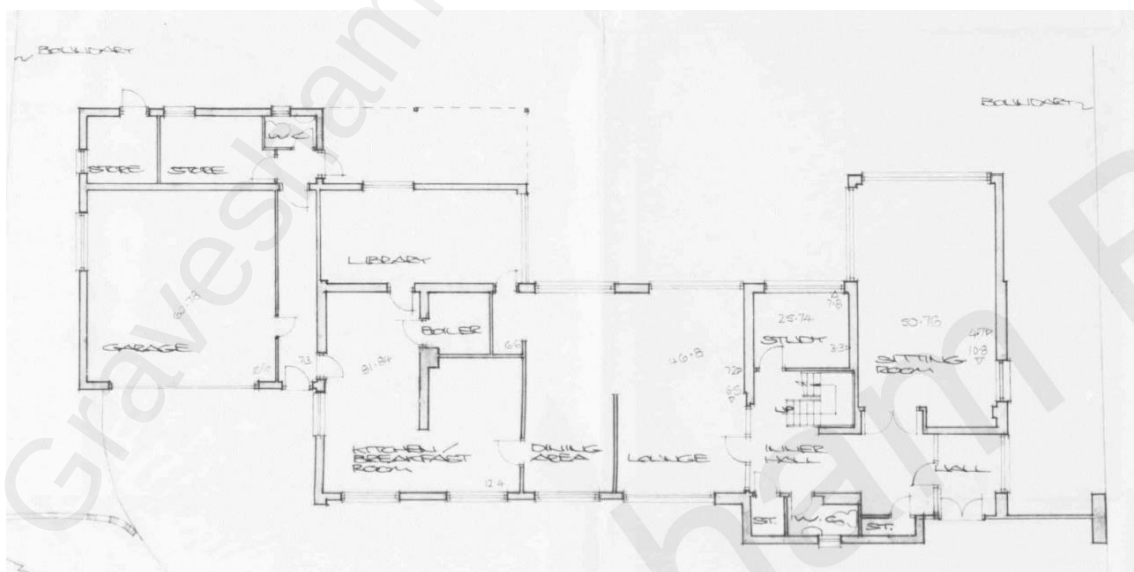


A pitched roof was also approved across the main part of the house under application 19780341, which would raise the ridge to approximately 9m.

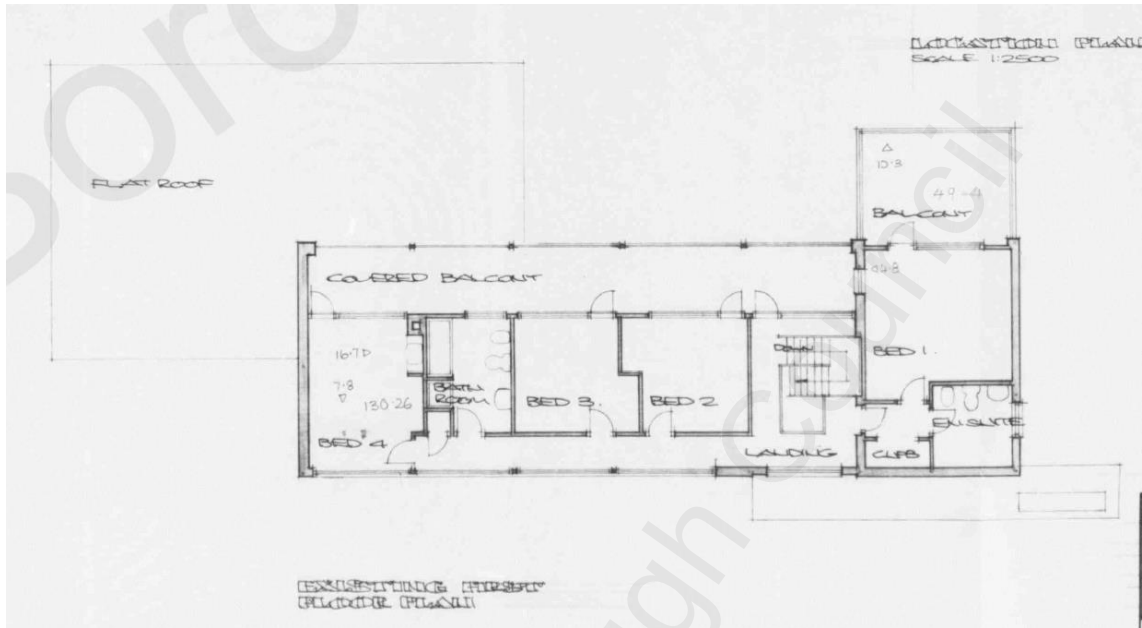


- 4.7 By the time application 19870925 was submitted, the existing plans indicated that application 19780341 had been partially implemented with the addition of the ground floor extensions previously approved but not the first floor bedroom extension or front extensions.

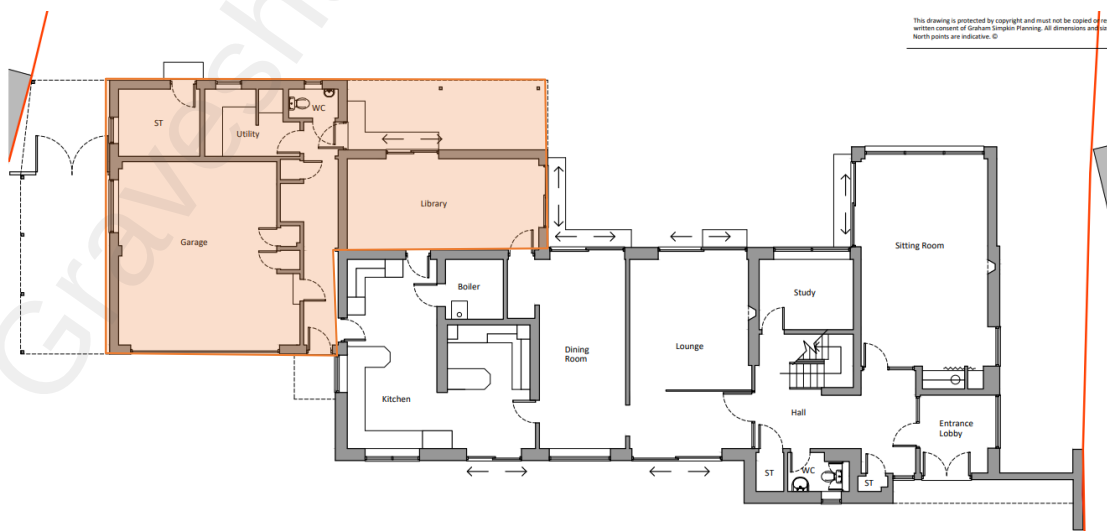
Ground Floor as existing as shown on application 19870925



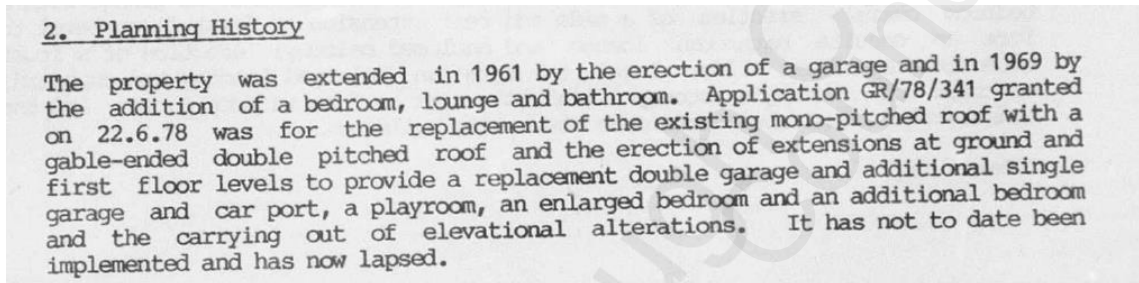
First floor as existing as shown on application 19870925



- 4.8 There were no conditions that were required to be discharged imposed on application 19780341. Given that development has been partially carried out and undertaken in accordance with the planning permission, it would still be lawful for the remaining elements of the approved development to be implemented, namely, the single and two-storey front extensions and the provision of the pitched roof as approved. The subsequently implemented permission (application 19880653) would not preclude this taking place.
- 4.9 The implemented ground floor additions approved under application 19780341 are highlighted in orange on the floor layout of the house as it currently exists below.

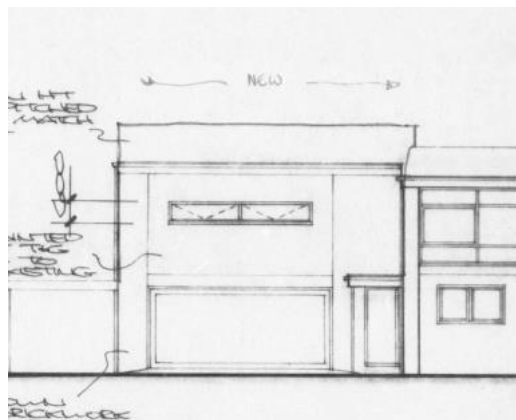
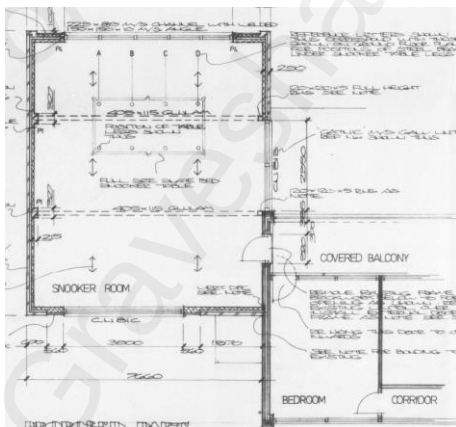


- 4.10** Application 19870925 proposed a new two-storey western side extension with a very significant front addition to the garage which would then have projected 2.3m beyond the existing front wall of the house together with the addition of a first floor above, a first floor extension at the front on the eastern side, along with a new pitched roof over the entire dwelling as proposed to be enlarged.
- 4.11** However in the Committee report that considered the application, it is erroneously stated that application 19780341 had lapsed without implementation.

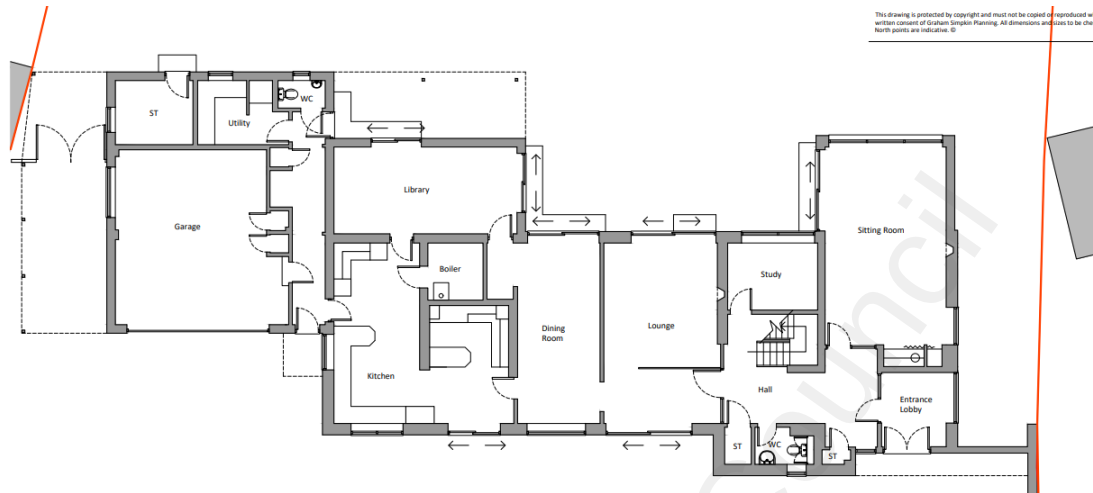
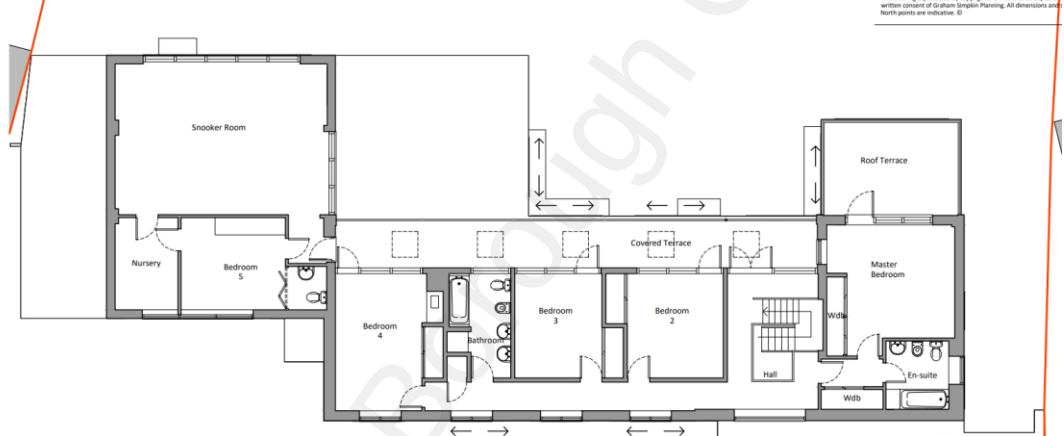


As demonstrated in paragraphs 4.8 and 4.9 above, this is clearly not the case.

- 4.12** Although approved, no part of the development approved under application 19870925 has ever been carried out.
- 4.13** A first floor extension (approved as a snooker room) above the garage on the west side of the house was added following planning permission being granted under application 19880653. This has also clearly been implemented. Internally however, the snooker room was reduced in size and a fifth bedroom and a nursery were provided. The external dimensions remain as approved, as does the fenestration. No conditions on the permission precluded this change and as there were no external changes the revised internal layout did not require permission. This further extension does not preclude implementation of the remaining elements of application 19780341.



- 4.14** The extent of Long Acre as it now exists taking into account all the previously permitted extensions and additions that have been implemented is therefore as follows.

Ground FloorFirst Floor

- 4.15** As will also be noted from the schedule of the site's planning history set out in paragraph 4.1 above, it has now been certified that the dwelling can be further extended by an 8m deep single-storey rear extension projecting from rear wall of the original house and the provision of a detached curtilage building over the existing swimming pool in the rear garden of the property.
- 4.16** Pre-application advice (Gravesham ref: PRE20220073) was sought in February 2022. A site meeting took place on 19 April 2022 with the formal response being received on 10 May 2022. A copy of the advice received is attached at **Appendix One**. In summary, the main points arising from the advice are as follows
- Accepted that replacement of existing buildings is acceptable in the Green Belt
 - Advised however that the proposed dwelling is materially larger than the original and that Very Special Circumstances would therefore need to be demonstrated and the overall size and scale carefully re-assessed.
 - Advised that a potential fall-back position would need to be clearly demonstrated as part of any VSC case.
 - The proposed design approach was considered to be an improvement on the existing dwelling, but the advice recommended changes to the design of the roof/gable treatments and assessment of the extent of hardstanding areas

- Confirmed that there is unlikely to be any adverse impact on amenity of neighbouring properties.
- Confirmed that the change to the access is likely to be acceptable subject to appropriate vision splays being provided

5 PLANNING POLICY

- 5.1 Section 38(6) of the Planning and Compensation Act 2004 requires that where regard is had to the Development Plan, decisions should be made in accordance with the development plan unless material considerations indicate otherwise. The statutory Development Plan for the District comprises currently comprises the 2014 Gravesham Core Strategy (CS) and the ‘saved’ policies of the Local Plan 1994. Both were subject to a review by the Council in 2019 which was not subject to any formal external examination. The Kent Minerals and Waste Local Plan and Minerals and Kent Minerals Sites Plan, both adopted in 2020, also form part of the Development Plan.
- 5.2 The application site does not lie within a safeguarded area identified in the Kent Minerals and Waste Local Plan, as such, the application proposals are not affected by the Minerals and Waste Local Plan. It is not allocated in the Kent Minerals Sites Plan.
- 5.3 Copies of relevant Development Plan Policies are attached at **Appendix One**.
- 5.4 The Core Strategy was adopted in 2014 and subject to a non-examined review in 2019. This is now approaching 10 years old and contains a broad range of overall strategic and thematic policies. Policy CS01 sets out a presumption in favour of sustainable development, Policy CS02 sets out where development should be located. Policy CS11 seeks to ensure development should mitigate impacts on the transport network and public transport networks as required, Policy CS12 seeks the preservation and where possible enhancement of biodiversity and landscape character. Policies CS14 and CS15 seek to ensure an appropriate mix of dwelling types at appropriate development densities respectively. Policy CS18 requires development to address the implications of Climate Change and Policy CS19 sets out design criteria that development proposals should seek to follow.
- 5.5 Other policies relating to day-to-day Development Management are set out in the 1994 Local Plan which is now rapidly approaching 30 years since its original adoption and it is also 15 years since some of its policies were reviewed and ‘saved’ by the Government in 2007. It significantly pre-dates both the NPPF and NPPG. However, it is the only source of Local Policy guidance in respect of proposals for replacement dwellings in the countryside, which in Gravesham is primarily Green Belt.
- 5.6 Policy C12 sets out a range of criteria on which proposals are judged against a backdrop of a ‘strong presumption against allowing the replacement of existing dwellings.’ These require the dwelling to be replaced to be original and in permanent use as a dwelling and advises that only modest enlargement would be permitted. It defines modest enlargement (in a footnote to the policy) as not in any case ‘greater than one third of the floorspace of the existing dwelling excluding garage(s) and outbuildings.’ In a separate footnote to the policy, original is defined as ‘a building in

permanent residential use on 1st July 1948 or subsequently erected as a permanent dwelling in accordance with planning permission in that behalf. Policy T1 seeks to ensure development proposals will be adequately served by the highway network and Policy P3 advises that the Borough will adopt Kent County Council parking standards.

- 5.7 The National Planning Policy Framework 2021 sets out Government Policy on a range of issues relating to the formulation and adoption of Development Plans and the determination of planning applications. It is considerably more up to date than the Development Plan currently in force in Gravesham.
- 5.8 The NPPF places achieving sustainable development at its heart (para 7) and advises at paragraph 8, that there are three overarching objectives, economic, social and environmental that are interdependent and should be pursued together to achieve net gains across all three objectives. Paragraph 10 advises that there is a presumption in favour of sustainable development which lies at the heart of the Framework (NPPF). Paragraph 11 advises that development plans and decisions should apply a presumption in favour of sustainable development. For decision making the Framework advises that this means;
- ‘c) approving development proposals that accord with an up-to-date development plan without delay; or*
- d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date¹, granting permission unless:*
- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed²; or*
- ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.’*
- 5.9 It is recognised that the site is within the Green Belt. However, given that the Development Plan policies applicable to the development can be considered as out of date as the Council cannot demonstrate a 5-year supply of available and deliverable housing sites and in terms of the Housing Delivery Test are facing the ‘presumption to grant’ sanction, the so called ‘tilted balance’ in paragraph 11(d) can still apply if the development is considered to be appropriate development.
- 5.10 Section 5 in relation to the supply of homes, at paragraph 60, it confirms the Government’s objective to significantly boosting supply and that it is important to

¹ (NPPF footnote 8) This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years.

² (NPPF footnote 7) The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 180) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 67); and areas at risk of flooding or coastal change.

ensure that a sufficient amount and variety of land can come forward where it is needed. Paragraph 69 of the NPPF acknowledges that small and medium sized sites can make an important contribution to meeting the housing requirement of an area, and are often built out relatively quickly. To promote the development of a good mix of sites local planning authorities should (amongst others) support the development of windfall sites through decisions.

- 5.11** Paragraph 119 states that decision should promote an effective use of land in meeting the need for homes. Paragraph 120 expands on this point by promoting and supporting the development of under-utilised land and buildings, especially if this would help to meet identified needs for housing. Paragraph 124 adds that decisions should support development that makes efficient use of land, taking into account (amongst others) the desirability of maintaining an area's prevailing character and setting.
- 5.12** It is noted that the application of paragraphs 60, 69, 119-120 and 124 all do not depend on whether an authority has a five-year housing land supply (5YHLS).
- 5.13** Section 12 of the NPPF provides guidance and policy on achieving well designed places. Paragraph 126 states that good design is a key aspect of sustainable development, is indivisible from good planning, and should contribute positively to making places better for people. A bespoke design solution has been provided for this site; the resultant development will be of a high quality.
- 5.14** Section 13 provides guidance on protecting Green Belt land. The NPPF at paragraphs 137 and 138 clearly sets out the purposes of the Green Belt.

'137. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.'

138. Green Belt serves five purposes:

- a) to check the unrestricted sprawl of large built-up areas;*
- b) to prevent neighbouring towns merging into one another;*
- c) to assist in safeguarding the countryside from encroachment;*
- d) to preserve the setting and special character of historic towns; and*
- e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.'*

- 5.15** In terms of the impact of the currently proposed development on the purposes of the Green Belt as set out in the NPPF, it is clear that the proposed development will not be contrary to the stated purposes of the Green Belt:
- It will not add to the sprawl of a large built up area.
 - It will not result in neighbouring towns merging into one another.

- It will have no impact on the countryside in terms of encroachment. It is already previously developed.
- It will not have any impact on the setting and special character of a historic town.
- It will not have any impact on urban regeneration. The proposals are a one-for-one replacement dwelling.

The proposal's impact on the openness of the Green Belt, in the sense as set out in Paragraph 137 of the NPPF, is considered in greater detail below. It is important to note that the site is already partially developed and that the existing dwelling and its curtilage fall under the definition of previously developed land as defined in the NPPF.

- 5.16** Paragraphs 147 to 151 provide policy guidance on proposals affecting the Green Belt. Paragraph 147 advises that inappropriate development is by definition harmful to the Green Belt and should not be approved except in very special circumstances, with paragraph 148 adding;
- 'When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.'*
- 5.17** Paragraph 149 advises that construction of new buildings in the Green Belt is inappropriate but sets out a number of exceptions to this as follows;
- a) buildings for agriculture and forestry;
 - b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;
 - c) the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
 - d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
 - e) limited infilling in villages;
 - f) limited affordable housing for local community needs under policies set out in the development plan (including policies for rural exception sites); and
 - g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:
 - not have a greater impact on the openness of the Green Belt than the existing development; or

– not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority.

- 5.18** It is considered that the redevelopment of the existing dwelling, which is classified as previously developed land, falls within the exceptions under (d) and (g) as set out in paragraph 149 and is potentially appropriate development.

6 PLANNING ISSUES

- 6.1** It is considered that there are four main planning issues in this case, Green Belt, Design, Impact on Local Character and Residential Amenity and last but not least Biodiversity and Ecology and these are addressed below under separate sub-headings.

7 GREEN BELT

Appropriateness of the development

- 7.1** The application site is located in the countryside outside a defined settlement but within an existing area of sporadic residential development albeit located within the Green Belt. It is necessary therefore to firstly consider whether the proposed development would constitute appropriate development in the Green Belt.
- 7.2** The Council's saved Policy C12 in the 1994 Local Plan is at odds with the very much more recent policy guidance in the NPPF as to what constitutes appropriate development.
- 7.3** Policy C12 refers to a 'strong presumption against allowing the replacement of existing dwellings' whereas the specific exceptions set out in paragraph 149 of the NPPF specifically allows for the replacement within same use of an existing building subject to the caveat that it is not materially larger than the one it replaces.
- 7.4** Furthermore, Policy C12 refers to the original dwelling (as first built in this case with it being post 1948) and sets a limit on further expansion from that point, whereas the NPPF does not make that distinction and makes no reference to the dwelling being original simply referring to the replacement of an existing building.
- 7.5** This approach is on the face of it is more logical as an existing building (prior to its replacement) has an impact on the Green Belt in the form in which it currently exists, and which has been allowed through permissions granted or has been (or could be) achieved through 'permitted development' entitlements.
- 7.6** On the face of it therefore, the proposals for Long Acre to replace the dwelling as currently exists can be considered as appropriate development in the Green Belt in terms of the provisions of the NPPF, provided that the issue of the whether the proposed size of the replacement dwelling is materially larger is satisfactorily addressed.

- 7.7 The existing dwelling as it currently stands following the various extensions that have been approved and implemented has an overall internal floorspace of some **430.51m²** and a volume of **1504m³**. If the remaining unimplemented (but nevertheless extant) two and single-storey front extensions and the provision of the pitched roof granted under application 19780341 were constructed, this increases to approximately **510m²** and **2081m³** in terms of floorspace and volume respectively.
- 7.8 The proposed dwelling presented to the Council for discussion at pre-application stage indicated a total floorspace of **627.56m²** (including 163.62m³ basement) and a volume of **2387.8m³**.
- 7.9 The dwelling as now proposed following consideration of the Council's pre-application advice, comprises a floorspace of **600.92m²** (including 141.58m² basement) and a volume of **2260m³** including basement and garage.
- 7.10 On the face of it therefore, the dwelling as proposed could still be considered materially larger than the existing building and thus constitute inappropriate development. It is necessary therefore to consider whether there are Very Special Circumstances pursuant to paragraphs 147 and 148 of the NPPF to allow the development.
- Very Special Circumstances
- 7.11 As noted above, the NPPF guidance, which is considerably more recent and therefore more up to date than the very old saved 1994 Local Plan Policy C12 which must now be considered out of date, does not refer to or define an existing building in the context of the Green Belt as an 'original building.' For the purposes of considering whether a proposed building is materially larger or not then it is legitimate firstly, to consider the building as it currently exists and secondly for the assessment to include consideration of any permitted development i.e. a fall-back.
- 7.12 As indicated above, following consideration of the pre-application advice, the difference between the current dwelling as exists and the proposed dwelling is some 170.92m² in terms of overall floorspace and 755.85m³ in terms of volume. This can be considered to be a material increase.
- 7.13 However, there is a very clear fall-back position that exists and has been established. This has two elements;
- The remaining unimplemented but extant elements of the planning permission 19780341.
 - A further clear fall-back position has been identified and established by way of appropriate formal applications as recommended in the pre-application consultation response. As can be seen from the planning history of the site set out earlier, a Lawful Development Certificate has been granted for a new curtilage outbuilding within the rear garden to cover the existing swimming pool and provide other ancillary incidental uses and the Council has also confirmed that Prior Approval is not required for the construction of an 8m rear extension to the original dwelling.

The effect of these is illustrated in **Appendix Two**.

- 7.14** The front extensions and provision of the pitched roof under 19780341 would increase the floorspace and volume of the existing dwelling to approximately **510m²** and **2081m³** respectively. A difference of approximately 79.49m² in terms of floorspace and 577m³ in terms of volume above the dwelling as it stands.
- 7.15** Importantly, the ridge of the main roof would also be raised to approximately 9m in height in comparison to the 8.4m proposed for the new dwelling.
- 7.16** The approved 8m rear extension has an internal floorspace of 115.96m² and a volume of 389.565m³ and the approved outbuilding an internal floorspace of 144.14m² and a volume of 470.67m³. Added to the current dwelling that would result a total internal floorspace of approximately **690.614m²** and a volume of some **2364.385m³**.
- 7.17** This is considerably in excess of the floorspace and volume of the replacement dwelling as now proposed at **600.92m²** and **2260m³** respectively (a difference of 89.684m² in floorspace and 104.85m³ by volume).
- 7.18** Taking the remaining extant parts of application 19780341 into account, which construction of the rear garden building or the approved rear extension would not preclude, that would rise to approximately **770.104m²** (floorspace) and **2941.2m³** (volume), a difference of 169.184m² in floorspace and 681.4m³ by volume above that of the proposed replacement dwelling.
- 7.19** The extant permissions for further alteration and additions to the dwelling clearly demonstrate that they would result in a dwelling of greater volume and floorspace and would thus be materially larger than that proposed.
- 7.20** It is contended that an appropriate fall-back position has thus been demonstrated taking into account the key legal case in this regard, *Mansell vs Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314. The full judgement is attached at **Appendix Three**.
- 7.21** In summary, the main relevant points are:

(Paragraph 5) Ground 2 of the Court of Appeal decision specifically addresses *whether Tonbridge and Malling Council was entitled to accept there was a real prospect of the fallback development being implemented*.

This specific ground is critically analysed in the Court's judgment, and whether the appellant had demonstrated a real prospect of the fallback position was clearly and fully considered. The Court ultimately concluded that there is a relatively low bar to demonstrate a real prospect of a fall-back position.

Paragraphs 22 – 37 of the decision set out how Lord Justice Lindblom confirmed the legal considerations in determining the materiality of a fall-back position as a planning judgement were:

- the basic principle is that for a prospect to be a “real prospect,” it does not have to be probable or likely: *a possibility will suffice*;

- there is no rule of law that, in every case, the “real prospect” will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker’s planning judgment in the particular circumstances of the case in hand.

7.22 Lord Justice Lindblom concluded that the clear desire of the landowner to develop the site was sufficient to demonstrate there was a real prospect to the GPDO fall-back position in this case he therefore gave material weight to such a fall-back position.

7.23 Therefore in the light of the conclusions in this judgement, for a fall-back position to be given material weight in the decision-making process, there simply needs to be a possibility of it occurring. This therefore means that it does not physically have to be built, or indeed even a consent awarded for the development. The term possibility simply sets out that it could happen.

7.24 In relation to this current proposal to replace the existing dwelling, the applicant has not only set out an intent to utilise the permitted development rights available to the property, but has obtained consent for such rights by way of the separate applications submitted to the Council and the subsequent positive decisions that have been made by the Council. In addition to this, the remaining unimplemented parts of the alterations and additions to the house approved under application 19780341 remain extant and can be constructed at any point.

7.25 The level of accommodation now potentially provided in Long Acre through the approved extensions and other alterations that can lawfully be undertaken is broadly equivalent to that proposed in the new dwelling. They have been designed to be implemented and fully integrated into the existing dwelling and to update and enhance the accommodation on the site. The provision of the pitched roof would provide an enhancement to the current dwelling and opportunity would also be taken to change the elevational treatment such as removing existing timber cladding and upgrading windows and doors also without the need for planning permission.

7.26 The applicant has therefore met the legal requirements of establishing a true fall-back position.

7.27 The fall-back would result in larger dwelling in terms of floorspace and volume than the proposed replacement dwelling and thus by definition result in a dwelling materially larger and more harmful to the Green Belt than its proposed replacement.

- 7.28** This fall-back position is therefore a relevant positive material consideration to which significant weight should be attached when determining the application and considering whether Very Special Circumstances exist that are sufficient to warrant granting permission.

Impact on Openness

- 7.29** Notwithstanding the above conclusion, it is also important to consider the impact of the development on the openness of the Green Belt.
- 7.30** In a spatial sense, the figures provided earlier clearly show that the proposed dwelling would comprise a smaller development in terms of floorspace and volume than that which could be alternatively provided through the extension and alteration of the current dwelling and the provision of the building over the swimming pool.
- 7.31** It is also the case that in a visual sense the development will also improve the openness of the Green Belt through the design of the proposed dwelling and its siting including the increased separation from the site boundaries proposed in the new application and in comparison to the extant permissions for further alterations to the dwelling that have been secured.
- 7.32** Drawing nos. 3568.15 and 3568.16 effectively and clearly demonstrate this point as they provide a comparison between the proposed dwelling and the existing (with the extant permissions in place).
- 7.33** It is worth noting that this comparison does NOT include the remaining elements of 19780341 which would add the front extensions and the pitched roof which as approved has an east-west ridge across almost the full two-storey width of the existing dwelling (not above the existing garage/snooker room at the western side) and would thus be considerably bulkier in appearance than the new dwelling.
- 7.34** The current dwelling is separated from the eastern site boundary by 2.8m and 3.7m on its western side. In fact, on the west side of the dwelling, an existing single-storey car port structure attached to the two-storey flank wall of the garage takes the development up to the western flank boundary. The existing dwelling has an overall width of 33m, including the car-port on the western side. Some 30m of this is at two-storeys in height. Visually, the existing dwelling currently fills the plot from side-to-side.
- 7.35** The proposed house will be set-in approximately 6.4m to 6.2m from the eastern boundary and there will be a gap of between approximately 14.5 to 11.6m from the two-storey flank wall of the new house and between 6.5m to 5.1m from the single-storey garage on the western side of the proposed house. The proposed dwelling would have an overall width of 24.6m (including the attached single-storey garage, but at two-storeys its width would only be 16.9m, some 13.1m shorter than is currently the case.

- 7.36 This will result in a significantly more open setting for the dwelling and a consequent substantial improvement in terms of its visual impact and as a consequence the openness of the site.
- 7.37 The 'rectangular' form of the existing dwelling means that it is effectively only one room deep, and therefore, much wider than it is deep. With the addition of the 8m rear extension, the maximum overall depth would be approximately 16.5m.
- 7.38 The proposed dwelling will be 'squarer' in form and have an overall depth of around 15.8m, which is less than the exiting dwelling would be with the 8m rear extension added.
- 7.39 Furthermore, built development would be consolidated into one place on the plot in comparison with what can lawfully be erected.
- 7.40 It is contended therefore that the proposed dwelling would not have an unacceptable impact on the openness of the Green Belt.
- 7.41 It is also contended as set out in paragraph 5.15 earlier, that the proposed development will not have an adverse impact on the five principal purposes of the Green Belt as set out in the NPPF.

Green Belt Conclusions

- 7.42 To conclude, the NPPF is clear that the replacement of an existing building that is not materially larger is acceptable development in the Green Belt.
- 7.43 Development Plan Policy recognises this in respect of replacement dwellings but is in conflict with the more recent NPPF guidance in that it stipulates that there is a strong presumption against permissions for replacement dwellings and also stipulates that whether a dwelling is materially larger is based on that of the original dwelling. The NPPF does not make that distinction stating instead that the replacement of an existing building in the same use provided that it is not materially larger is not inappropriate development in the Green Belt.
- 7.44 Case Law confirms that a fall-back position is material consideration. The applicant has demonstrated they have met the legal requirements in seeking to establish a fall-back position, and have demonstrated that the proposed new dwelling will result in an overall reduction in footprint and volume when compared to that fall-back position. In addition the design and siting of the dwelling will result in an improvement to the visual openness of the Green Belt. This is a benefit that carries significant weight in the overall planning balance. It is contended that Very Special Circumstances have been demonstrated that would allow permission to be granted.
- 7.45 It is of course necessary to consider all other details of the proposals against remaining relevant Development Plan policies and applicable government advice.

8 DESIGN

- 8.1** The design of the current Long Acre is very much ‘of-its-time’ and reflected a contemporary approach of late 1950s design, compared to that of nearby older and more ‘traditionally’ designed neighbours, such as Mullion and Pear Tree House in particular. The property is faced in a mixture of brick, white render and vertical timber cladding, which is looking ‘tired.’ Given the views to the north towards the Thames Estuary, the emphasis of the original design was to take advantage of these through the extensive rear terracing and glazing at ground and first floor level. This was at the neglect of the elevation facing Pear Tree Lane.
- 8.2** It is fair to say that the existing dwelling and its original design approach have not aged well.
- 8.3** The proposed dwelling has taken a more traditional approach to its design and reflects elements of the ‘traditionally designed’ dwellings (of varying ages) found elsewhere along Pear Tree Lane. Unlike the existing dwelling, the proposed house has been designed with a dual aspect that address both the street and the views to the north. Opportunity has also been taken to centralise the dwelling within the plot and increase the separation to the site boundaries.
- 8.4** The house would be faced in red brick with stone cills and surrounds to the windows under a clay tile roof.
- 8.5** The comments on design made by the Council at pre-application stage have been reviewed and the proposed dwelling amended.
- The area of the proposed basement has been reduced.
 - A major change has been made to the design of the roof which now has a two pitched roof sections with a central valley.
 - On the rear elevation the rear gable feature has also been amended.

As indicated earlier, the overall depth of the dwelling is no greater than that presented by the approved extensions and furthermore the increased separation from the side boundaries has further reduced any impact on the adjacent properties.

9 IMPACT ON LOCAL CHARACTER AND RESIDENTIAL AMENITY

- 9.1** With regard to the character of the area generally, this takes the form of large, detached dwellings of varying styles and sizes in generous plots and with mature landscaping within the plots. The dwellings are however, located at different distances from the highway and some of the plots are more open to view and visible as part of the streetscene. The plots are separated by tracts of woodland, more so on the southern side of Pear Tree Lane.
- 9.2** In visual terms relating to the character and amenity of the wider area as a whole, Long Acre is a contained site. This is as a result of the alignment of Pear Tree Lane and the landscaping within the site itself and in the immediately surrounding area. It is not visible in the street in either long or medium distance views. The other dwellings
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situated to the north east/east and west/south-west and south of Long Acre (The Grange and Mullion and Pear Tree House adjacent to the site are assessed below) are separated by considerable distance from the application site and due to the alignment of Pear Tree Lane and existing landscaping/woodland are not read as part of the overall streetscene in the setting/context of Long Acre.

- 9.3** The proposed dwelling will maintain the status-quo in this regard and will not appear out of character or context. There is no defining character or style in the immediate area that will be so adversely impacted by the proposed dwelling as to warrant refusal.
- 9.4** The proposed development has also been considered in terms of any potential impact on the amenities of adjacent residential properties, of which there are three, Pear Tree House on the south side of Pear Tree Lane, The Grange to the east and Mullion to the west.
- 9.5** Immediately to the east of the site is a detached and extended two-storey property 'The Grange.' The construction of the property is probably contemporary with Long Acre i.e. dating from the 1950s/early 1960s but has taken a different architectural route through the use of a double-pitched roof (approximately 6.7m to the ridge), but nevertheless using a similar external palette of facing brick and white render. In common with Long Acre, The Grange is set a considerable distance from the highway behind a landscaped front garden. Due to the landscaping on the boundary between the two properties and the bend on Pear Tree Lane, The Grange and the application property Long Acre are not readily viewed in conjunction with each other. The Grange is sited close to the common boundary between the properties and a later extension on its north-west corner is sited adjacent to this boundary. The common boundary is well landscaped with hedges and trees. Whilst glimpses of The Grange through the planting are possible, they are only available immediately adjacent to Long Acre itself. The Grange has, no first floor or ground floor windows directly facing towards the application site.
- 9.6** To the west of the site is a detached and extended two-storey property 'Mullion.' Mullion is an older property than Long Acre probably dating from the 1930s and is akin to 'Arts and Crafts' style in its appearance with leaded light windows, half-timbered/rendered gables and plain clay tiled roof with dormer windows. It has been extended in the past.
- 9.7** Mullion is sited 2m-3m closer to Pear Tree Lane and therefore has a slightly higher floor level than Long Acre. It maintains a well landscaped front garden in common with the other properties in the area. A swimming pool building (approximately 4.3m to the ridge at the lower ground level behind the house) located to the rear of the house and approximately 2m from the common boundary with Long Acre was linked to the house with a small extension (some 5.4m to the ridge above adjacent ground level) following a permission granted in May 2002. The main house is approximately 8.5m to the ridge and set some 2.5m from the common boundary. A side facing first floor dormer window to a bedroom is located in the east elevation facing towards the front garden area of Long Acre.

- 9.8** In a similar manner to The Gables, the relationship of Long Acre and Mullion is not readily apparent in the wider streetscape. It is only when within the curtilage of either that the two can be seen in the same context. In addition, due to the alignment of Pear Tree Lane and the fact that both properties directly face the highway, they are at a slight angle to each other in any event
- 9.9** The proposed dwelling would be sited some 13.7m from the common boundary with Mullion and would not result in any unacceptable loss of privacy or light.
- 9.10** To the south of the site on the opposite side of Pear Tree Lane is 'Pear Tree House.' This is a detached dwelling set approximately 28m from Pear Tree Lane at its closest point, with a separation distance between the front elevations of the two buildings as proposed (across Pear Tree Lane) of approximately 68m. Pear Tree House is also at a slightly lower level than the highway given the area's topography. Pear Tree House in common with the application site has a landscaped front garden and is well screened from the highway. The proposed dwelling or the re-aligned access would not result in any unacceptable loss of privacy to the occupiers of Pear Tree House given the substantial separation that exists and the intervening road and landscaping on both properties.
- 9.11** The proposed development will have an acceptable impact on the character of the area and will not result in any unacceptable loss of privacy or amenity to adjacent and nearby dwellings.

10 BIODIVERSITY AND ECOLOGY

- 10.1** Policy CS12 of the Core Strategy seeks to protect and enhance Green Infrastructure and to ensure no net loss of biodiversity in the Borough. The Thames Estuary and Marshes SPA and Ramsar sites are an important and integral part of the Borough's Green Infrastructure, but they have increasingly been under recreational pressure from residential development in nearby areas on an in-combination basis, which has affected their role and existing biodiversity.
- 10.2** A mechanism was put in place in 2015 following discussion with Natural England and the affected North Kent Authorities seeking to mitigate this in-combination impact and which led to the initiation of a SAMMS payment regime, which raises funds to undertake mitigation work to offset recreational impact. This is applied to all proposed residential development situated within 6km of the SPA/Ramsar Sites that would result in the construction of net additional dwellings.
- 10.3** The application site is within the 6km zone. However, in this case it is a replacement dwelling which is proposed, which will mean there will be no net increase in the number of dwellings on the site. As such it is considered that the proposals do not fall under the agreed SAMMS strategy and that no mitigation payment is required.
- 10.4** Following an initial Preliminary Ecological Appraisal in February 2022 which recommended further Bat, Reptile and Great Crested Newt investigation, the application is supported by a bat and reptile survey undertaken during the survey

seasons with the final report dated September 2022. The PEA and subsequent surveys were undertaken on behalf of the applicants by Calumma Ecological Services.

Great Crested Newts

- 10.5** The applicants are committed to using the District Level Licence approach in relation to Great Crested Newts (GCN) and the application is accompanied by a signed Impact Assessment and Conservation Payment Certificate confirming that the proposed development has been accepted onto the District Level Licencing scheme.

We can therefore advise the Council can be satisfied that Natural England will grant an EPS (European Protected Species) licence if planning permission is granted and that favourable conservation status of GCN will be maintained through the implementation of strategic mitigation.

Reptiles

- 10.6** As set out in the report a presence/absence survey has been undertaken in accordance with survey procedure guidelines. The survey work did not reveal the presence of reptiles in the survey area (see Page 16 and Appendix One of the report). The applicants intend to undertake habitat enhancement and management measures which are described in more detail below.

Bats

- 10.7** No bats were observed emerging from any of the buildings. However, droppings were found within the pump house building adjacent to the swimming pool and samples taken and sent for analysis. The results of this analysis found these droppings to be brown long eared bat. This species was, however, not observed emerging from any buildings during the survey.

Foraging activity was observed with common pipistrelle (*Pipistrellus pipistrellus*) and soprano pipistrelle (*Pipistrellus pygmaeus*) foraging and commuting activity observed and recorded around the rear garden area treeline and occasionally to the front of the property. Five noctule (*Nyctalus noctula*) passes were recorded by all surveyors, which were likely to be commuting high above the survey area.

The activity during the dawn survey was generally lower compared to the evening surveys. Two brown long eared bats were observed commuting across the site, with a single noctule and soprano pipistrelle pass recorded respectively.

- 10.8** As part of the application proposals the pump house building will be demolished. The reason for this is that the existing swimming-pool it serves will be removed and it will thus have no future purpose. Furthermore, the building has also been subject to rat infestation which has caused a few issues on neighbouring land and properties in recent months which the applicants have sought to address.

- 10.9** Paragraph 99 of Circular 06/2005 advises that; *‘It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted,*

otherwise all relevant material considerations may not have been addressed in making the decision.'

The paragraph continues;

'The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted. However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development. Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, before the permission is granted. In appropriate circumstances the permission may also impose a condition preventing the development from proceeding without the prior acquisition of a licence.'

- 10.10** The applicants have followed all relevant and appropriate guidance in the preparation and submission of this application, the site has been assessed, subsequently identified species-specific surveys have been undertaken and recommendations made. As a result of this work, it is acknowledged that the pump building is home to a potential (albeit low-key) day/transitional bat roost. Given this, it is also accepted that an EPS licence will be required prior to its demolition. The EPS licence can only be applied for and granted following the granting of a planning permission. Presence/absence survey work has been undertaken and the need for mitigation has been identified as necessary. The application proposals have sought to provide alternative roosting provision both within the garden and within the proposed new house itself as detailed in the submission.
- 10.11** In the light of the advice in Circular 06/2005 and the NPPG, given that the potential impact of the proposed development on a protected species has clearly been identified prior to any planning permission being granted and as no further survey work is required, it would be appropriate to secure, by means of a suitably worded precedent condition, the submission of a detailed mitigation scheme based on the principles set out in the application to include the protection of the pump building during development and the timing phasing of any of the works to the building relative to the construction of the new dwelling and the provision of the alternative bat roosts. Such a mitigation scheme would be an essential element of the EPS Licence application in any event.

Mitigation and enhancement

- 10.12** The Reptile/Bat survey report included a number of recommended biodiversity/habitat enhancement measures including.
- Bird nesting boxes. Fixed not less than 3m above ground and facing north to east
 - Bat roosting boxes.
 - A replacement roost would have to be installed within any new building. Due to the low numbers of bat and the small space presented by the pump house a large roof void space is not recommended. Instead installing an equivalent wall

cavity within the new build roof void space would be sufficient to replace this location. This would consist of a Habitat Box 001. A suitable roof void equivalent to the space present would be installed which would be 2m by 2m with a height of 2m at the apex. This would simulate the approximate dimensions of the pump house. Suitable access tiles would be required, with an entrance and separate exit, installed at least 3m above ground. The location of this roost replacement feature would be confirmed once the full design of the new building is available.

- Ecologically sympathetic soft landscaping that provides shelter and nectar for invertebrates such as bees.
- Creation of log/habitat piles that provide shelter for amphibians and reptiles.
- Eradication of non-native species such as Japanese Knotweed.
- Any close boarded (or similar fencing) that is solid from ground level will be fitted or supplied with *hedgehog gates* installed in the fencing, within the proposed site. The gates consist of semi-circular holes (measuring 0.13 m x 0.13 m) cut into the bottom of the fence to allow the movement of hedgehogs into adjacent areas of land.

10.13 As can be seen from the submission a landscape masterplan for the site has been prepared and submitted as part of the application. The measures recommended above have been included within the application proposals including the replacement bat roost which has been integrated into the roof of the new house. The northern end of the garden will be planted and managed less formally, specifically with the enhancement of biodiversity in mind.

10.14 The applicants have commenced the removal of Japanese Knotweed that is present in a small part of the rear garden close to the northern boundary using an approved contractor who is following appropriate procedures.

10.15 It is considered that the application proposals have addressed the issues of potential impact on both Protected Habitats and Species subject to the submission of a mitigation strategy/method statement relating to the works to the pump house and alternative bat roost provision. This can legitimately be made the subject of an appropriate precedent condition.

A number of enhancement measures have been included within the application that will improve the biodiversity and habitat within the site in accordance with Development Plan policy and NPPF and NPPG guidance.

11 OTHER ISSUES

11.1 The site is less than 1ha in area and located within Flood Zone One so a Flood Risk Assessment is not required. Surface water drainage will be dealt with by utilising a SuDS based approach.

11.2 This is a one-for-one replacement of an existing dwelling and as such issues relating to the sustainability of its location are not truly relevant. Although, it is recognised

that the occupiers are likely to be largely reliant on the private car for their day-to-day needs.

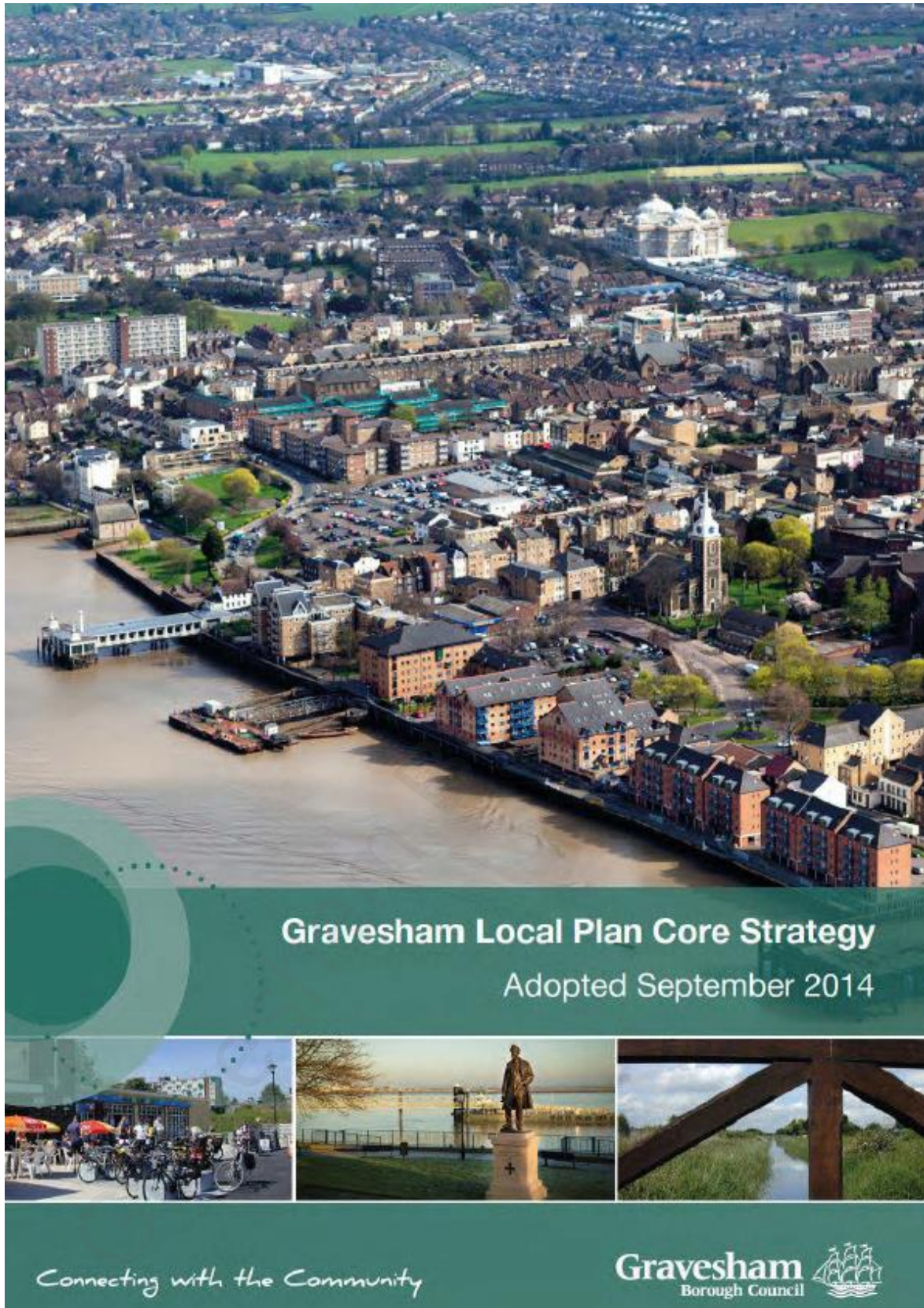
- 11.3** An appropriate level of car parking provision is proposed and the alterations to the access point will improve highway safety generally through the provision of improved vision splays either side of the access with any fencing and landscaping set behind the splays and the re-siting of the gate that would allow a vehicle to wait wholly off the carriageway whilst the gates are opened.

12 CONCLUSIONS

- 12.1** The proposals will have limited wider landscape impact and also have no unacceptable adverse impact on the overall character of the area or the amenities of the occupiers of nearby and adjoining dwellings. These are factors that should be given considerable weight in favour of the proposals.
- 12.2** The proposals would also not be in conflict with the five purposes of the Green Belt as set out in paragraphs and of the NPPF. This also weighs heavily in favour of the proposals.
- 12.3** Whilst the new dwelling is clearly larger than the existing dwelling on the site as it currently stands, and thus could be considered as inappropriate development in the Green Belt, a clear fall-back position has been secured and demonstrated and this amounts to Very Special Circumstance sufficient to allow the development.
- 12.4** The proposed dwelling will not as a result of this clear fall-back position be materially larger than that which it replaces as could be extended and improved. Indeed, it will occupy a smaller overall area of the site and be of a lower overall volume and floorspace and thus be beneficial overall to the openness of the Green Belt. This is of significant weight in favour of the development.
- 12.5** All other aspects of the proposals are in accordance with Development Plan policy and applicable National guidance. As such planning permission should, in accordance with the advice at paragraph 11(c) of the NPPF, be approved without delay.

APPENDIX ONE

DEVELOPMENT PLAN POLICIES



Policy CS01: Sustainable Development

4.1.6 Planning applications that accord with the policies in the development plan for Gravesham will be approved without delay, unless material considerations indicate otherwise.

4.1.7 When considering development proposals the Council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework and in this Core Strategy. It will work proactively with applicants jointly to find solutions which mean that proposals can be approved wherever possible, and to secure development that improves the economic, social and environmental conditions in the area.

4.1.8 Where there are no policies relevant to the application or relevant policies are out of date at the time of making the decision then the Council will grant permission unless material considerations indicate otherwise, taking into account whether:

- **Any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole; or**
- **Specific policies in that Framework indicate that development should be restricted.**

Policy CS02: Scale and Distribution of Development

4.2.24 The development strategy for the Borough is to retain and improve the existing stock of housing and suitable employment land and to make provision for the Borough's objectively assessed need for at least 6,170 new dwellings delivered at a variable rate as follows; at least 325 dwellings per year for 2011/2012 – 2018/2019, at least 363 dwellings per year for 2019/2020 – 2023/2024, at least 438 dwellings per year 2024/2025 – 2027/2028, and at least 186,490 sq m gross employment floorspace (within use classes B1, B2 and B8) during the plan period.

4.2.25 Development will be distributed throughout the Borough as follows: around 3,890 new dwellings and around 186,490 sq m gross employment floorspace (within use classes B1, B2 and B8) will be provided in the Opportunity Areas at Northfleet Embankment and Swanscombe Peninsula East; Gravesend Riverside East and North East Gravesend; Ebbsfleet (Gravesham) and Gravesend Town Centre and on land at the Coldharbour Road Key Site; around 2,280 new dwellings will be provided on other sites in the urban area and rural settlements inset from the Green Belt.

4.2.26 The strategy prioritises development in the urban area as a sustainable location for development. This will be achieved by:

- Promoting regeneration by prioritising the redevelopment and recycling of underused, derelict and previously developed land in the urban area. This will be principally through redevelopment of former industrial sites in the Opportunity Areas of Northfleet Embankment and Swanscombe Peninsula East, and Gravesend Riverside East and North East Gravesend to create new residential neighbourhoods and employment areas;
- The continued development of a new sustainable mixed use community in the Ebbsfleet (Gravesham) Opportunity Area, which will include the provision of high quality employment floorspace;
- Revitalising the Gravesend Town Centre Opportunity Area as a focal point for retail, leisure, cultural and tourism facilities and small scale office provision to serve the needs of the Borough whilst preserving and enhancing its character as a riverside heritage town; and
- Bringing forward a range of suitable sites in other parts of the urban area for residential and employment
- development, including Land at Coldharbour Road Key Site.

4.2.27 In the rural area, development will be supported within those rural settlements inset from the Green Belt and defined on the Policies Map. Development outside those settlements, including affordable housing and proposals to maintain and diversify the rural economy, will be supported where it is compatible with national policies for protecting the Green Belt and policies in this plan. The extent of the Green Belt is defined on the Policies Map. A strategic Green Belt boundary review will be undertaken

to identify additional land to meet the housing needs up to 2028 and to safeguard areas of land to meet development needs beyond the plan period, while maintaining the national and local planning purposes of the Green Belt.

Policy CS11: Transport

5.5.38 New developments should mitigate their impact on the highway and public transport networks as required. As appropriate, transport assessments and travel plans should be provided and implemented to ensure the delivery of travel choice and sustainable opportunities for travel. Transport assessment work is required to be undertaken in accordance with national and local policy guidance, and to identify detailed highway and public transport network requirements and management arising from the development.

5.5.39 Sufficient parking in new development will be provided in accordance with adopted parking standards which will reflect the availability of alternative means of transport and accessibility to services and facilities.

5.5.40 The Council will support proposals which improve public transport provision and facilities in the Borough. In particular, it will:

- seek to maintain and expand, where justified, segregation lanes for Fastrack and existing bus priority measures elsewhere;
- require Key Sites to include provision for buses;
- support the development of transport hubs at Gravesend Town Centre and Ebbsfleet (in Dartford Borough Council area) to provide high quality interchange facilities between bus, rail, walking and cycling; and
- Ensure an adequate supply of public car parking.

5.5.41 The Council will seek improvements to walking and cycling facilities and networks in the Borough including provision in new development as appropriate. These should provide improved access to Gravesend Town Centre and Ebbsfleet and to other services and facilities in the Borough. In particular, the Council will seek the provision of pedestrian and cycle links between Northfleet and Ebbsfleet stations and along the River Thames, as part of the proposed Thames Estuary Path.

5.5.42 Land required for the possible future extension of Crossrail and to protect the High Speed 1 (HS1) railway is safeguarded on the Policies Map and proposals that would prejudice these will be refused.

5.5.43 The Council will support proposals which improve the efficiency of freight transport and provide opportunities for alternatives to road transport where possible. The Council will safeguard wharves, as shown on the Policies Map, subject to the provisions of paragraph 5.1.36 of Policy CS07 (Economy, Employment and Skills).

5.5.44 The Council will support proposals which facilitate the use of the River Thames for passenger transport and enable cruise liners to visit the Borough.

Policy CS12: Green Infrastructure

5.7.22 A multifunctional linked network of green spaces, footpaths, cycle routes and wildlife stepping stones and corridors will be created, protected, enhanced and maintained. The network will improve access within the urban area, from the urban area to the rural area and along the River Thames. The key parts of the network are identified on Figure 19: Strategic Green Infrastructure Network.

5.7.23 Sites designated for their biodiversity value will be protected, with the highest level of protection given to internationally designated Special Protection Areas, Special Areas of Conservation and Ramsar sites, followed by nationally designated Sites of Special Scientific Interest, followed by Local Wildlife Sites and then by other areas of more local importance for biodiversity.

5.7.24 There will be no net loss of biodiversity in the Borough, and opportunities to enhance, restore, re-create and maintain habitats will be sought, in particular within the Biodiversity Opportunity Areas shown on the Strategic Green Infrastructure Network map and within new development.

5.7.25 Where a negative impact on protected or priority habitats/species cannot be avoided on development sites and where the importance of the development is considered to outweigh the biodiversity impact, compensatory provision will be required either elsewhere on the site or off-site, including measures for ongoing maintenance.

5.7.26 The overall landscape character and valued landscapes will be conserved, restored and enhanced. The greatest weight will be given to the conservation and enhancement of the landscape and natural beauty of the Kent Downs Area of Outstanding Natural Beauty and its setting. Proposals will take account of the Kent Downs Area of Outstanding Natural Beauty Management Plan, the Gravesham Landscape Character Assessment, and the Cluster Studies where relevant.

Policy CS14: Housing Type and Size

5.10.8 The Council will protect the mix of housing in the existing housing stock and will resist the conversion of family sized residential units to smaller properties.

5.10.9 The Council will expect new housing development to provide a range of dwelling types and sizes taking into account the existing character of the area and evidence of local need to create sustainable and balanced communities.

5.10.10 Sheltered housing and extra care housing for people with special needs will be supported on suitable sites in areas with access to a range of services that provide for the needs of future occupants.

Policy CS15: Housing Density

5.11.5 Sites will be developed at a variety of densities, depending on their location and accessibility to public transport. The form and density of housing will vary across the larger sites, in response to accessibility and other characteristics of each part of the site. Variations in density across a site should be used to develop different character areas.

5.11.6 All new housing will be developed at a density that is consistent with achieving good design and does not compromise the distinctive character of the area in which it is situated. Subject to this overriding consideration:

- Within the urban area, new residential development will be expected to achieve a minimum density of 40 dwellings per hectare. In suitable locations close to the transport hubs of Gravesend Town Centre and Ebbsfleet, higher densities will be sought;
- In the rural area, new residential development will be expected to achieve a minimum density of 30 dwellings per hectare.

5.11.7 Development proposals that fail to make efficient use of land for housing, having regard to the character and location of the area, may be refused planning permission.

Policy CS18: Climate Change

Flood Risk

5.14.36 With the exception of the previously developed sites along the Thames Riverside (see Policies CS03, CS04 and CS05) and those other regeneration sites which have already been evaluated in accordance with the sequential and exception tests at the application stage, development will be directed sequentially to those areas at least risk of flooding.

5.14.37 Proposals in areas at risk of flooding must be accompanied by a Flood Risk Assessment (in accordance with national policy and Environment Agency standing guidance as appropriate) and a Flood Risk Management Plan (if required) to demonstrate that they are adequately defended and safe over their lifetime. Planning permission will be refused for schemes which do not pass the sequential and exception tests.

5.14.38 The Council will prioritise the maintenance, improvement or replacement of flood defence infrastructure over other land uses where relevant. In addition to meeting their own flood defence and management needs, the Council will expect new development to take advantage of opportunities to reduce the causes and impacts of flooding from all sources where it is technically and financially feasible.

Water Quality

5.14.39 As part of its approach to climate change and environmental improvement, the Council will have regard to the delivery of the Water Framework Directive and associated Thames River Basin Management Plan objectives to support water bodies being progressively improved to “good” status over the plan period.

Sustainable Drainage and Surface Water Run-Off

5.14.40 The Council will seek to minimise the impact of drainage from new development on waste water systems. In particular, the Council will:

- Require that surface water run-off from all new development has, as a minimum, no greater adverse impact than the existing use; and
- Require the use of Sustainable Drainage Systems on all developments where technically and financially feasible.

Water Demand Management

5.14.41 The Council will seek to manage the supply of water in the Borough and reduce the impact of new development on the supply of potable water as much as possible. In particular, the Council will:

- Require all new homes to be built to at least level 3/4 of the Code for Sustainable Homes in terms of water use (105 litres per person per day consumption). Where it can be demonstrated that a development is unable to meet these standards, or the additional standards set out below, permission will only be granted if provision is made for compensatory water savings elsewhere in the Borough;
- Seek 5% of homes on Key Sites to act as exemplars by meeting level 5/6 of the Code for Sustainable Homes in terms of water use (80 litres per person per day consumption);
- Require all non-residential developments of 1,000 sq m and above to meet the BREEAM "excellent" standards of water efficiency and include provision for the collection of rainwater; and
- Support proposals to retrofit existing residential properties in ways which reduce water consumption.

Carbon Reduction

5.14.42 The Council will seek to reduce the overall carbon footprint of the Borough. In particular, the Council will:

- In the context of national policy on the transition to zero carbon development via amendments to Part L of the Building Regulations, require proposals for development of the Key Sites throughout the Borough and other major development elsewhere in the Gravesend Town Centre Opportunity Area to consider the potential and include proposals for low carbon and renewable energy generation, including combined heat and power. Where choosing not to do so, applicants must submit evidence which demonstrates that compliance is not technically or financially feasible or that improved fabric energy efficiency or an allowable solution results in improved carbon saving benefits;
- Support stand-alone decentralised, renewable or low carbon energy development where it is compatible with national policies for protecting the Green Belt and where it accords with policies in this plan, in particular those relating to Development and Design Principles, Transport, Green Infrastructure, and Heritage and the Historic Environment; and
- Support other proposals which lead to a reduction in carbon footprint including the retrofitting of existing homes and businesses, including local initiatives based on carbon off-setting via allowable solution

Policy CS19: Development and Design Principles

5.15.14 New development will be visually attractive, fit for purpose and locally distinctive. It will conserve and enhance the character of the local built, historic and natural environment, integrate well with the surrounding local area and meet anti-crime standards. The design and construction of new development will incorporate sustainable construction standards and techniques, be adaptable to reflect changing lifestyles, and be resilient to the effects of climate change. This will be achieved through the criteria set out below:

- Using the collaborative approach advocated in Building for Life 12 and in line with the guidance set out in Kent Design, the design, layout and form of new development will be derived from a robust analysis of local context and character and will make a positive contribution to the street scene, the quality of the public realm and the character of the area. Account will be taken of the scale, height, building lines, layout, materials and other architectural features of adjoining buildings. Account will also be taken of the wider site context, including strategic views, site topography, the significance of heritage assets and features of townscape and landscape value which contribute to local character and sense of place;
 - New development will encourage sustainable living and choice through a mix of compatible uses which are well connected to places that people want to use,
-

including the public transport network, local services and community facilities; encourage sustainable travel; enhance Green Grid links and encourage healthier lifestyles;

- New development will be located, designed and constructed to:
 - safeguard the amenity, including privacy, daylight and sunlight, of its occupants and those of neighbouring properties and land;
 - avoid adverse environmental impacts from pollution, including noise, air, odour and light pollution, and land contamination; and
 - not pose an unacceptable risk or harm to the water environment, including the quality and/or quantity of ground waters, surface waters, wetlands and coastal water systems;
- The design and layout of new residential development, including conversions, will accord with the adopted Residential Layout Guidelines;
- New development will be designed in an inclusive way to be accessible to all members of the community;
- New development will provide appropriate levels of private and public amenity space;
- New development will include details of appropriate hard and soft landscaping, public art, street furniture, lighting and signage and will ensure that public realm and open spaces are well planned, appropriately detailed and maintained so they endure;
- Car parking will be well related to the development it serves;
- New development will protect and, where opportunities arise, enhance biodiversity and the Borough's Green Infrastructure network. Support will be given to environmental enhancements where opportunities arise;
- New development will be fit for purpose and adaptable to allow changes to be made to meet the needs of users;
- The design and layout of new development will take advantage of opportunities to build in resilience to the effects of climate change. This will include protection against flood risk, where relevant, delivering carbon reduction, provision for low carbon and renewable energy, and minimising energy consumption and water use;
- New development will incorporate appropriate facilities for the storage and recycling of waste; and
- The layout of new development will create a safe and secure environment and provide surveillance to minimise opportunities for crime and vandalism.



Policy C12

There will be a strong presumption against allowing the replacement of existing dwellings which will only be set aside if the following criteria are satisfied:-

- (i) The existing dwelling must be an "original dwelling"* in permanent use as a dwelling. Proposals for the replacement of dwellings which are not "original" but which have gained immunity from the enforcement of planning control will be considered on their individual merits, having regard to their origins, their location and the nature of the accommodation they currently provide.*
- (ii) The existing dwelling must be in an appropriate location, meaning that it must be well related to existing roads and to essential services and must be in or close to an established rural settlement. The only exception to this criterion will be where the proposed replacement dwelling is required on the site for an agricultural worker, where the standard agricultural occupancy condition will be imposed.*
- (iii) The replacement dwelling must be of similar scale and mass to the existing dwelling and must be no larger than the existing dwelling, unless it can be demonstrated that modest enlargement+ is required to allow the provision of essential basic amenities such as a bathroom, toilet or kitchen, which currently do not exist or are clearly inadequate or to meet the special needs of the occupants.*
- (iv) The internal layout of the replacement dwelling shall not be such as to facilitate its later subdivision.*
- (v) The replacement dwelling should normally occupy the same site as the existing dwelling. Where it is agreed that the replacement dwelling may be located elsewhere on the plot, adequate safeguards# will be required to ensure the demolition of the existing dwelling.*
- (vi) The existing or proposed means of access, including access for fire fighting appliances, must be satisfactory.*
- (vii) The existing or proposed site drainage and means of soil and waste disposal must be satisfactory.*

Footnotes:

- * "Original dwelling" for the purpose of this policy and policy C13 means a building in permanent residential use at 1st July 1948 or subsequently erected as a permanent dwelling in accordance with planning permission in that behalf.
- + In such cases the modest enlargement should not in any case be greater than one third of the floorspace of the existing dwelling excluding garage(s) and outbuildings and the replacement of bungalows by dwellings of two or more storeys will be resisted.
- # "Adequate safeguards" will normally mean a planning condition and/or a formal agreement under Section 106 of the Town and Country Planning Act 1990.

Policy T1

The Local Planning and Highway Authorities will consider the impact on the transport system and on the environment of traffic generated by new development and will wish to ensure that all proposed developments are adequately served by the highway network identified on the Proposals Map.

Policy P3

The Borough Council will expect development to make provision for vehicle parking, in accordance with the Kent County Council Vehicle Parking Standards, as interpreted by Gravesham Borough Council, unless justified as an exception. All vehicle parking provision should normally be made on the development site. In the case of proposals for development in Class B1, as defined in the Town and Country Planning (Use Classes) Order 1987, the Borough Council will expect car parking provision to be made at the standard for offices and will also require lorry parking and manoeuvring areas to be provided, unless the applicant is willing to enter into an agreement to restrict the uses to which the permission relates.

APPENDIX TWO

Floorspace comparison

Gravesham Borough Council

	Floorspace (m ²)	Volume (m ³)
Existing dwelling	430.51	1504
LDC Outbuilding	144.14	470.67
8m rear extension	115.96	389.565
TOTAL (A)	690.61	2364.2
19780341	79.49	577
RESULTANT TOTAL (B)	770.10	2941.2
PROPOSED DWELLING	600.92	2260
Difference to new dwelling Scenario (A)	+89.69	+104.2
Difference to new dwelling Scenario (B)	+169.18	+681.20

APPENDIX THREE

**Michael Mansell vs Tonbridge and Malling Borough Council:
[2017]EWCA Civ 1314**

Court of Appeal Judgement

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE GARNHAM
[2016] EWHC 2832 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2017

Before:

The Chancellor of the High Court
Lord Justice Lindblom
and
Lord Justice Hickinbottom

Between:

	Michael Mansell	<u>Appellant</u>
	- and -	
	Tonbridge and Malling Borough Council	<u>Respondent</u>
	- and -	
	(1) Croudace Portland (2) The East Malling Trust	<u>Interested</u> <u>Parties</u>

Ms Annabel Graham Paul (instructed by **Richard Buxton Environmental and Public Law**)
for the **Appellant**

Mr Juan Lopez (instructed by **Tonbridge and Malling Borough Council Legal Services**)
for the **Respondent**

The interested parties did not appear and were not represented

Hearing date: 4 July 2017

Judgment Approved by the court for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Should the judge in the court below have quashed a local planning authority's grant of planning permission for the redevelopment of the site of a large barn and a bungalow to provide four dwellings? That is what we must decide in this appeal. It is contended that the authority misdirected itself in considering a "fallback position" available to the landowner, and also that it misapplied the "presumption in favour of sustainable development" in the National Planning Policy Framework ("the NPPF") – a question that can now be dealt with in the light of this court's recent decision in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893.
2. The appellant, Mr Michael Mansell, appeals against the order of Garnham J., dated 10 November 2016, dismissing his claim for judicial review of the planning permission granted on 13 January 2016 by the respondent, Tonbridge and Malling Borough Council, for development proposed by the first interested party, Croudace Portland, on land owned by the second interested party, the East Malling Trust, at Rocks Farm, The Rocks Road, East Malling. The proposal was to demolish the barn and the bungalow on the land and to construct four detached dwellings, with garages and gardens. Mr Mansell lives in a neighbouring property, at 132-136 The Rocks Road – a grade II listed building. He was an objector.
3. It was common ground that the proposal was in conflict with the development plan. Rocks Farm is outside the village of East Malling to its south-east, within the "countryside" as designated in the Tonbridge and Malling Borough Core Strategy. The site of the proposed development extends to about 1.3 hectares. The barn, about 600 square metres in area, had once been used to store apples. The bungalow was lived in by a caretaker. The application for planning permission came before the council's Area 3 Planning Committee on 7 January 2016. In his reports to committee the council's planning officer recommended that planning permission be granted, and that recommendation was accepted by the committee. The officer guided the members on the "fallback position" that was said to arise, at least partly, through the "permitted development" rights for changes of use from the use of a building as an agricultural building to its use as a dwelling-house, under Class Q in Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO").
4. Mr Mansell's challenge to the planning permission attacked the officer's approach to the "fallback position" and his assessment of the proposal on its planning merits. Garnham J. dismissed the claim for judicial review on all grounds. Permission to appeal was granted by McCombe L.J. on 21 February 2017.

The issues in the appeal

5. The appeal raises three main issues:
 - (1) whether the council correctly interpreted and lawfully applied the provisions of Class Q in the GPDO (ground 1 in the appellant's notice);

- (2) whether the council was entitled to accept there was a real prospect of the fallback development being implemented (ground 2); and
- (3) whether the council misunderstood or misapplied the “presumption in favour of sustainable development” (ground 3).

Did the council correctly interpret and lawfully apply the provisions of Class Q?

6. When the council determined the application for planning permission the permitted development rights under Class Q were in these terms, so far is relevant here:

“Q. Permitted development

Development consisting of –

- (a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order; and
- (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwellinghouses) of that Schedule.

Q.1 Development not permitted

Development is not permitted by Class Q if –

- ...
- (b) the cumulative floor space of the existing building or buildings changing use under Class Q within an established agricultural unit exceeds 450 square metres;
 - (c) the cumulative number of separate dwellinghouses developed under Class Q within an established agricultural unit exceeds 3;
- ...
- (g) the development would result in the external dimensions of the building extending beyond the external dimensions of the existing building at any given point;
 - (h) the development under Class Q (together with any previous development under Class Q) would result in a building or buildings having more than 450 square metres of floor space having a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order;
- ...”

The permitted development rights under Class Q are subject to several “Conditions” in paragraph Q.2, none of them controversial here.

7. In section 6 of his main report to committee for its meeting on 7 January 2016 the officer dealt at length with the “Determining Issues”. In discussing those issues he considered the “fallback position” in paragraphs 6.14 to 6.19:

“6.14 In practical terms for this site, the new permitted development rights mean that the existing agricultural barn could be converted into three residential units. Some representations point out that only a proportion of the barn could be

converted in such a manner (up to 450sqm) but the remainder – a small proportion in terms of the overall footprint – could conceivably be left unconverted and the resultant impacts for the site in terms of the amount of residential activity would be essentially the same. The building could be physically adapted in certain ways that would allow for partial residential occupation and the extensive area of hardstanding which exists between the building and the northern boundary could be used for parking and turning facilities.

- 6.15 The existing bungalow within the site could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building. Such a scenario would, in effect, give rise to the site being occupied by a total of four residential units albeit of a different form and type to that proposed by this application. This provides a realistic fallback position in terms of how the site could be developed.
- 6.16 I appreciate that discussion concerning realistic ‘fallback’ positions is rather complicated but, in making an assessment of any application for development, we are bound to consider what the alternatives might be for a site: in terms of what could occur on the site without requiring any permission at all (historic use rights) or using permitted development rights for alternative forms of development.
- 6.17 In this instance a scheme confined to taking advantage of permitted development would, in my view, be to the detriment of the site as a whole in visual terms. Specifically, it would have to be developed in a contrived and piecemeal fashion in order to conform to the requirements of the permitted development rights, including the need to adhere to the restrictions on the floor space that can be converted using the permitted development rights.
- 6.18 I would also mention that should the applicant wish to convert the entire barn for residential purposes, above the permitted development thresholds, such a scheme (subject to detailed design) would wholly accord with adopted policy. Again, this provides a strong indicator as to how the site could be developed in an alternative way that would still retain the same degree of residential activity as proposed by the current application but in a more contrived manner and with a far more direct physical relationship with the nearest residential properties.
- 6.19 The current proposal therefore, in my view, offers an opportunity for a more comprehensive and coherent redevelopment of the site as opposed to a more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights.”
8. For Mr Mansell, Ms Annabel Graham Paul submitted to us, as she did to the judge, that the officer’s advice in those six paragraphs betrays a misunderstanding of the provisions of Class Q in the GPDO, in particular sub-paragraphs Q.1(b) and Q.1(h). She argued that the restriction to 450 square metres in sub-paragraph Q.1(b) applies to the total floor space of the agricultural building or buildings in question, not to the floor space actually “changing use”. Before the judge, though not in her submissions in this court, Ms Graham Paul sought to bolster that contention with a passage in an inspector’s decision letter

relating to a proposal for development on a site referred to by the judge as “Mannings Farm”. The inspector had observed that “[the] floor space of the existing building ... far exceeds the maximum permitted threshold, of 450 sq m, as set out in [sub-paragraph] Q.1(b)”, and that “the intention is to reduce the size of the building as part of the proposal but Q.1(b) clearly relates to existing floorspace and there is no provision in the GPDO for this to be assessed on any other basis”.

9. Garnham J. rejected Ms Graham Paul’s argument. In paragraph 30 of his judgment he said:

“30. In my judgment this construction of paragraph Q.1(b) fails because it disregards the definition section of the Order. The critical expression in subparagraph (b) is “*the existing building or buildings*”. Paragraph 2 of the Order defines “*building*” as “*any part of a building*”. Accordingly, the paragraph should be read as meaning “*the cumulative floor space of the existing building or any part of the building changing use ...*”. If that is right, it is self-evident that the limit on floor space relates only to that part of the building which is changing use.”

10. The judge found support for that conclusion in several inspectors’ decisions, one of them a decision on proposed development at Bennetts Lane, Binegar in Somerset. In correspondence in that case the Department for Communities and Local Government had pointed to the definition of a “building” in the “Interpretation” provisions in paragraph 2 of the GPDO. Because that definition included “any part of a building”, their view was that “in the case of a large agricultural building, part of it could change use ... and the rest remain in agricultural use” (paragraph 32 of the judgment). However, as was accepted on both sides in this appeal, the court must construe the provisions of the GPDO for itself, applying familiar principles of statutory interpretation.

11. In paragraph 34 of his judgment Garnham J. said this:

“34. Ms Graham Paul contends that that construction of subparagraph (b) means that it adds nothing to subparagraph (h). I can see the force of that submission and, as a matter of first principle, statutory provisions should be construed on the assumption that the draftsman was intending to add something substantive by each relevant provision. Nonetheless, giving the interpretation section its proper weight, I see no alternative to the conclusion that Class Q imposes a floor space limit on those parts of the buildings which will change use as a result of the development. In those circumstances, I reject the Claimant’s challenge to the Officer’s construction of the Class Q provisions in the 2015 Order.”

12. Ms Graham Paul submitted that this interpretation of the relevant provisions would render sub-paragraph Q.1(b) of Class Q redundant, because sub-paragraph Q.1(h) already limits the residential floor space resulting from the change of use under Class Q to a maximum of 450 square metres. The statutory provisions for permitted development rights in the GPDO ought to be interpreted consistently. The interpretation favoured by the judge, submitted Ms Graham Paul, depends on reading into sub-paragraph Q.1(b) the additional words “any part of a building” after the words “the existing building or buildings”, which, she said, is wholly unnecessary. Statutory provisions ought to be construed on the

assumption that the draftsman was intending to add something of substance in each provision. The judge's interpretation offends that principle, said Ms Graham Paul, because it would, in effect, subsume sub-paragraph Q.1(b) into sub-paragraph Q.1(h). Only her interpretation of sub-paragraph Q.1(b) would enable sub-paragraph Q.1(h) to add something of substance to the provisions of Class Q. And in principle, Ms Graham Paul argued, it makes good sense to prevent, without an express grant of planning permission, the partial conversion of large agricultural buildings to accommodate residential use, leaving other parts of the building either in active agricultural use or simply vacant.

13. Ms Graham Paul sought to reinforce these submissions by pointing to other provisions of the GPDO where similar wording is used: Class M, which provides permitted development rights for changes of use of buildings in retail or betting office or pay day loan shop use to Class C3 use, and states in sub-paragraph M.1(c) that development is not permitted if "the cumulative floor space of the existing building changing use under Class M exceeds 150 square metres"; and Class N, which provides permitted development rights for changes of use from specified sui generis uses, including use as an amusement arcade or centre, and use as a casino, to Class C3 use, and states in sub-paragraph N.1(b) that development is not permitted if "the cumulative floor space of the existing building changing use under Class N exceeds 150 square metres".
14. I cannot accept Ms Graham Paul's argument. I think the judge's understanding of Class Q was correct. The provisions of Class Q relating to the scope of permitted development rights should be given their literal meaning. When this is done, they make perfectly good sense in their statutory context and do not give rise to any duplication or redundancy.
15. The focus here is on the provisions as to development that is "not permitted" under paragraph Q.1, and in particular the provisions of sub-paragraphs Q.1(b) and Q.1(h). Sub-paragraph Q.1(b) establishes the "cumulative floor space of the existing building or buildings" that is "changing use under Class Q ...". The limit on such "cumulative floor space ..." is 450 square metres. This restriction is stated to be a restriction on the change of use, not on the size of the building or buildings in which the change of use occurs. Sub-paragraph Q.1(b) relates to a single act of development in which the building in question, or part of it, is "changing use". The floor space limit set by it relates not to the total floor space of the building or buildings concerned. It relates, as one would expect, to the permitted development rights themselves, which apply to the "cumulative" amount of floor space actually "changing use under Class Q". The use of the word "cumulative" in this context – as elsewhere in the GPDO – is perfectly clear. It connotes, in relevant circumstances, the adding together of separate elements of floor space within a building or buildings, or, again in relevant circumstances, a single element of floor space, which in either case must not exceed 450 square metres. The total floor space of the building or buildings concerned may itself be more than 450 square metres. But the cumulative amount of floor space whose use is permitted to be changed within that total floor space must not exceed 450 square metres.
16. This interpretation of sub-paragraph Q.1(b) avoids arbitrary consequences in the application of the permitted development rights under Class Q. It does not make the availability of those rights for a qualifying "agricultural building" depend on the total floor space of the building itself. It would not, therefore, create a situation in which the permitted development rights under Class Q would be available for a building whose total floor space was 450 square metres, but not for a building with a floor space of 451 square

metres or an area greater than that. If the consequence is that the permitted development rights, when fully used, would result in a building partly in use as a dwelling-house and partly still in agricultural use, that is an outcome contemplated by the GPDO. I see no difficulty in that.

17. Had the draftsman intended to confer permitted development rights under Class Q only to a building or buildings whose total floor space was not more than 450 square metres, the relevant provision would have been framed differently. There would have been no need to use the word “cumulative” or some other such word. The provision would simply have stated, for example, “the total floor space of the existing building or buildings within an established agricultural unit in which the change of use under Class Q is being undertaken does not exceed 450 square metres”. But that is not what sub-paragraph Q.1(b) says, or, in my view, what it means.
18. Nor can I see how an interpretation of sub-paragraph Q.1(b) in which the restriction of 450 square metres applies not to the floor space actually changing use but to the total floor space of the building or buildings in which the change of use is taking place can be reconciled with the definition of “building” in paragraph 2 of the GPDO as including “part of a building”. Unless one disapplies that part of the definition of a building to sub-paragraph Q.1(b), one must read that provision as meaning “the cumulative floor space of the existing building or buildings or part of a building changing use under Class Q ... exceeds 450 square metres” (my emphasis). That understanding of sub-paragraph Q.1(b) would not sit happily with the concept that the restriction of 450 square metres applies not to the floor space changing use but to the total floor space of the building itself.
19. My interpretation of sub-paragraph Q.1(b) does not leave sub-paragraph Q.1(h) redundant. Sub-paragraph Q.1(h) achieves a different purpose. It prevents, for example, a change of use as “permitted development” in an agricultural building of which part is already in Class C3 use, or an aggregation of successive changes of use through separate acts of development, that would result in more than 450 square metres of floor space in a building or buildings being in Class C3 use. Neither of those outcomes would necessarily be prevented by sub-paragraph Q.1(b).
20. Finally, there is nothing in the provisions of Class M and Class N, or in any other provision of the GPDO, to suggest a different understanding of Class Q. The provisions in sub-paragraphs M.1(c) and N.1(b) also contain the word “cumulative” in referring to the floor space “changing use”, not to the total floor space of the “existing building or buildings” in which the change of use is taking place. And in both Class M and Class N the draftsman has also included a provision – respectively in sub-paragraphs M.1(d) and N.1(c) – stating that “the development (together with any previous development under [the relevant class]) would result in more than 150 square metres of floor space in the building having changed use under [the relevant class]”. Although we are not deciding those questions, it seems to me that the same analysis would hold good for those provisions too.
21. In my view, therefore, the officer did not misrepresent the permitted development rights under Class Q in his advice to the committee on the “fallback position”. The provisions of Class Q were correctly interpreted and lawfully applied.

Was the council entitled to accept that there was a real prospect of the fallback development being implemented?

22. Garnham J. accepted that the council was entitled to conclude that there was a “realistic” fallback. In paragraphs 36 and 37 of his judgment he said:

“36. In paragraph 6.15 of the report the Officer concluded that the fall back position was “realistic”. In my judgment he was entitled so to conclude. The evidence establishes that there had been prior discussions between the Council and the Planning Agent acting for the East Malling Trust who owns the site. It was crystal clear from that contact that the Trust were intending, one way or another to develop the site. Alternative proposals had been advanced seeking the Council’s likely reaction to planning applications. It is in my view wholly unrealistic to imagine that were all such proposals to be turned down the owner of the site would not take advantage of the permitted development provided for by Class Q to the fullest extent possible.

37. It was not a precondition to the Council’s consideration of the fall back option that the interested party had made an application indicating an intention to take advantage of Class Q. There was no requirement that there be a formulated proposal to that effect. The officer was entitled to have regard to the planning history which was within his knowledge and the obvious preference of the Trust to make the most valuable use it could of the site.”

23. The judge accepted the submission of Mr Juan Lopez for the council that the committee did not have to ignore fallback development that included elements for which planning permission would be required and had not yet been granted. He noted that “[the] building could be converted, so as to provide dwelling houses limited in floor space to 450m² by the construction of internal walls without using the whole of the internal space of the barn” (paragraph 40). And he went on to say (in paragraph 41):

“41. In my judgment therefore, it would have been unrealistic to have concluded that, were the present application for permission to be rejected, the interested party would do nothing to develop this site. On the contrary it was plain that development was contemplated and that some development could have taken place pursuant to Class Q. The Council was entitled to have regard to the fact that there might be separate applications for permission in respect of some elements of the scheme and to advise that appropriate regard must be had to material planning considerations including the permitted development fall back position. Accordingly I reject the second element of the Claimant’s challenge on ground 1.”

24. Ms Graham Paul criticized the judge’s approach. She said it would enable permitted development rights under the GPDO to be relied on as a fallback even where there was no evidence that the landowner or developer would in fact resort to such development. The judge did not consider whether the council had satisfied itself that there was a “real prospect” of the fallback development being implemented (see the judgment of Sullivan L.J. in *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* [2009] J.P.L. 1326, at paragraph 21). The “real prospect”, submitted Ms Graham Paul, must relate to a particular fallback development contemplated by the

landowner or developer, not merely some general concept of development that might be possible on the site. Only a specific fallback makes it possible for a comparison to be made between the planning merits of the development proposed and the fallback development. The relevance of a fallback depends on there being a “finding of actually intended use as opposed to a mere legal or theoretical entitlement” (see the judgment of Mr Christopher Lockhart-Mummery Q.C., sitting as a deputy judge of the High Court, in *R. v Secretary of State for the Environment and Havering London Borough Council, ex parte P.F. Ahern (London) Ltd.* [1998] Env. L.R. 189, at p.196).

25. Ms Graham Paul said there was nothing before the council to show that either the East Malling Trust or Croudace Portland contemplated the site being developed in the way the officer described in his report. On the contrary, the conversion of the barn for residential use – as opposed to its demolition and replacement with new dwellings – seems to have been regarded as impracticable or uneconomic. The East Malling Trust’s planning consultant, Broadlands Planning Ltd., had submitted a “Planning Statement” to the council in December 2013, seeking the council’s advice before the submission of an application for planning permission. In that document two possible schemes for the site were referred to (at paragraph 26). Neither could have been achieved using permitted development rights. One involved the retention of the barn and its conversion to four dwelling-houses, the other a “wholesale redevelopment of the site”, perhaps with the replacement of the bungalow, to create five new dwellings. In a letter to Broadlands Planning Ltd. dated 30 January 2014 the council’s Senior Planning Officer, Ms Holland, said she was “not convinced that the proposal would result in the building being converted, but rather [that] large portions would be removed and a new building created”. And the East Malling Trust’s marketing agent, Smiths Gore, in a letter to potential developers dated 27 February 2014, suggested it was “unlikely that a developer would contemplate the conversion of the Apple Store”. There was, said Ms Graham Paul, no other contemporaneous evidence to lend substance to the fallback scheme to which the officer referred in his report, and no evidence of the council trying to find out what, if anything, was actually contemplated. The evidence did not demonstrate a “real prospect” – as opposed to a merely “theoretical” prospect – of such a development being carried out. The judge should have recognized that the fallback development referred to in the officer’s report was not a material consideration.
26. I cannot accept that argument. In my view the officer did not misunderstand any principle of law relating to a fallback development. His advice to the members was sound.
27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
 - (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.
 - (2) The relevant law as to a “real prospect” of a fallback development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.’s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As

Sullivan L.J. said in his judgment in *Samuel Smith Old Brewery*, in this context a “real” prospect is the antithesis of one that is “merely theoretical” (paragraph 20). The basic principle is that “... for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice” (paragraph 21). Previous decisions at first instance, including *Ahern* and *Brentwood Borough Council v Secretary of State for the Environment* [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, “... “fall back” cases tend to be very fact-specific” (ibid.). The role of planning judgment is vital. And “[it] is important ... not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge’s response to the facts of the case before the court” (paragraph 22).

- (3) Therefore, when the court is considering whether a decision-maker has properly identified a “real prospect” of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the “real prospect” will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker’s planning judgment in the particular circumstances of the case in hand.
28. In this case, in the circumstances as they were when the application for planning permission went before the committee, it was plainly appropriate, indeed necessary, for the members to take into account the fallback available to the East Malling Trust as the owner of the land, including the permitted development rights arising under Class Q in the GPDO and the relevant provisions of the development plan, in particular policy CP14 of the core strategy. Not to have done so would have been a failure to have regard to a material consideration, and thus an error of law.
29. That the East Malling Trust was intent upon achieving the greatest possible value from the redevelopment of the site for housing had by then been made quite plain. The “Planning Statement” of December 2013 had referred to two alternative proposals for the redevelopment of the site (paragraph 26), pointing out that both “[the] redevelopment and replacement of [the] bungalow” and “[the] conversion of the existing storage and packing shed” were “permissible in principle” (paragraph 35). The firm intention of the East Malling Trust to go ahead with a residential development was entirely clear at that stage.
30. In my view it was, in the circumstances, entirely reasonable to assume that any relevant permitted development rights by which the East Malling Trust could achieve residential development value from the site would ultimately be relied upon if an application for planning permission for the construction of new dwellings were refused. That was a simple and obvious reality – whether explicitly stated by the East Malling Trust or not. It was accurately and quite properly reflected in the officer’s report to committee. It is

reinforced by evidence before the court – in the witness statement of Mr Humphrey, the council’s Director of Planning, Housing and Environmental Health, dated 18 March 2016 (in paragraphs 6 to 24), in the witness statement of Mr Wilkinson, the Land and Sales Manager of Croudace Portland, also dated 18 March 2016 (in paragraphs 4 to 7), in the first witness statement of Ms Flanagan, the Property and Commercial Director of the East Malling Trust, dated 17 March 2016 (in paragraphs 4 to 6), and in Ms Flanagan’s second witness statement, dated 17 June 2016 (in paragraphs 2 to 5).

31. As Ms Flanagan says (in paragraph 2 of her second witness statement):

“2. At paragraph 6 of my first witness statement, I state that there was no doubt that the Trust would consider alternatives to the preferred scheme. To further amplify, the Trust (as a charitable body) is tasked with obtaining best value upon the disposal of its assets. A number of alternative uses were considered for the site, including industrial uses. However the Board was aware that a residential scheme of some type would provide the best value for the application land, even were that to include a conversion of the existing agricultural building.”

Ms Flanagan goes on to refer to Smiths Gore’s letter of 27 February 2014 (in paragraphs 4 and 5):

“4. ... This letter ... states that at that time [Smith Gore’s] opinion was that it was unlikely that a scheme of conversion would be contemplated by any developer. However, this letter pre-dated the permitted development rights that subsequently came into effect in April 2014. By the time the planning application had formally been submitted, these permitted development rights were in effect.

5. Had no other scheme proven acceptable in planning terms, and if planning permission had been refused for the development the subject of the planning application, the Trust would have built out a “permitted development” scheme to the fullest extent possible in order to realise the highest value for the land, in order to thereafter seek disposal to a developer.”

32. That evidence is wholly unsurprising. And it confirms the East Malling Trust’s intentions as they were when the council made its decision to grant planning permission in January 2016, by which time the current provisions for “permitted development” under Class Q of the GPDO had come into effect. It states the East Malling Trust’s position as landowner at that stage – as opposed to the view expressed by an officer of the council, and an opinion by a marketing agent in a letter to developers, almost two years before. It is consistent with what was being said on behalf of the East Malling Trust in its dealings with the council from the outset – in effect, that the site was going to be redeveloped for housing even if this had to involve the conversion and change of use of the barn to residential use. It reflects the fiduciary duty of the trustees. And it bears out what the council’s officer said about the “fallback position” in his report to committee.

33. I do not see how it can be said that the officer’s assessment of the “fallback position”, which the committee adopted, offends any relevant principle in the case law – in particular the concept of a “real prospect” as explained by Sullivan L.J. in *Samuel Smith Old*

Brewery. It was, in my view, a faithful application of the principles in the authorities in the particular circumstances of this case. It also demonstrates common sense.

34. The officer did not simply consider the fallback in a general way, without regard to the facts. He considered it in specific terms, gauging the likelihood of its being brought about if the council were to reject the present proposal. In the end, of course, these were matters of fact and planning judgment for the committee. But the officer's advice in paragraphs 6.14 to 6.19 of his report was, I believe, impeccable. He was right to say, in paragraph 6.14, that the "new permitted development rights" – under Class Q in the GPDO – would enable the barn to be converted into three residential units; in the same paragraph, that the building "could be physically adapted in certain ways that would allow for partial residential occupation ..."; and, in paragraph 6.15, that the bungalow "could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building". He was also right to say, therefore, that the site could be developed for "four residential units albeit of a different form and type to that proposed by this application". All of this was factually correct, and represented what the council knew to be so. It did not overstate the position. It went no further than the least that could realistically be achieved by way of a fallback development – through the use of permitted development rights under Class Q and an application for planning permission complying with policy CP14.
35. The officer also guided the committee appropriately in what he said about the realism of the "fallback position". At the end of paragraph 6.15 of his report he said that the fallback development he had described was "a realistic fallback position in terms of how the site could be developed". He was well aware of the need to take into account only a fallback development that was truly "realistic", not merely "theoretical". He came back, in paragraph 6.16, to the question of "realistic 'fallback' positions", again reminding the members that this was what had to be considered. He went on to acknowledge, rightly, that the council had to consider what could be achieved "using permitted development rights for alternative forms of development". The context for this advice was that in his view, as he said in paragraph 6.15, he was dealing with "a realistic fallback position". He went on in paragraph 6.17 to consider what "would" happen if a scheme taking advantage of permitted development rights came forward. And in paragraph 6.18 his advice was that a redevelopment involving the conversion of "the entire barn for residential purposes, above the permitted development thresholds ... would wholly accord with adopted policy". That was a legally sound planning judgment. The same may also be said of the officer's conclusion in paragraph 6.19, where he compared the proposal before the committee with the "more piecemeal form of development that would arise should the applicant seek to undertake to implement permitted development rights".
36. In short, none of the advice given to the council's committee on the "fallback position" can, in the particular circumstances of this case, be criticized. It was, I think, unimpeachable.
37. In my view, therefore, the council was entitled to accept that there was a "real prospect" of the fallback development being implemented, and to give the weight it evidently did to that fallback as a material consideration. In doing so, it made no error of law.

Was the judge right to conclude that the council did not misunderstand or misapply the “presumption in favour of sustainable development” in the NPPF?

38. Paragraph 14 of the NPPF states:

“14. At the heart of [the NPPF] is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.

...

For decision-taking this means:

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
 - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
 - specific policies in [the NPPF] indicate development should be restricted.”

39. In *Barwood v East Staffordshire Borough Council* this court stated its understanding of the policy for the “presumption in favour of sustainable development” in the NPPF, and how that presumption is intended to operate (see paragraphs 34 and 35 of my judgment). In doing so, it approved the relevant parts of the judgment of Holgate J. in *Trustees of the Barker Mill Estates v Secretary of State for Communities and Local Government* [2016] EWHC 3028 (Admin) (in particular paragraphs 126, 131, 136, and 140 to 143). Three simple points emerged (see paragraph 35 of my judgment). The first and second of those three points need not be set out again here. The third, however, is worth repeating – because it bears on the issue we are considering now. I shall emphasize the most important principle for our purposes here:

“ ...

- (3) When the section 38(6) duty is lawfully performed, a development which does not earn the “presumption in favour of sustainable development” – and does not, therefore, have the benefit of the “tilted balance” in its favour – may still merit the grant of planning permission. On the other hand, a development which does have the benefit of the “tilted balance” may still be found unacceptable, and planning permission for it refused This is the territory of planning judgment, where the court will not go except to apply the relevant principles of public law The “presumption in favour of sustainable development” is not irrebuttable. Thus, in a case where a proposal for the development of housing is in conflict with a local plan whose policies for the supply of housing are out of date, the decision-maker is left to judge, in the particular circumstances of the case in hand, how much weight should be given to that conflict. The absence of a five-year supply of housing land will not necessarily be conclusive in favour of the grant of planning permission. This is not a matter of law. It is a matter of planning judgment (see paragraphs 70 to

74 of the judgment in [*Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin)].”

40. The judgments in this court in *Barwood v East Staffordshire Borough Council* entirely supersede the corresponding parts of several judgments at first instance – including, most recently, *Reigate and Banstead Borough Council v Secretary of State for Communities and Local Government* [2017] EWHC 1562 (Admin). In those cases, judges in the Planning Court have offered various interpretations of NPPF policy for the “presumption in favour of sustainable development”, and have explained how, in their view, the presumption should work. There is no need for that to continue. After the decision of the Court of Appeal in *Barwood v East Staffordshire Borough Council*, it is no longer necessary, or appropriate, to cite to this court or to judges in the Planning Court any of the first instance judgments in which the meaning of the presumption has been considered.
41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a “doctrinal controversy”. But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker’s own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain – because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see paragraph 22 of my judgment in *Barwood v East Staffordshire Borough Council*). That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court’s interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court’s review of a planning decision, not the hypercritical approach the court is often urged to adopt.
42. The principles on which the court will act when criticism is made of a planning officer’s report to committee are well settled. To summarize the law as it stands:
 - (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxtou Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of*

Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin), at paragraph 15).

- (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
- (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.

43. Was the officer's advice to the members in this case flawed in that way? I do not think so.

44. In paragraph 6.1 of his report the officer said:

“6.1 As Members are aware, the Council in its role as Local Planning Authority is required to determine planning applications and other similar submissions in accordance with the Development Plan in force unless material considerations indicate otherwise. ... The NPPF and the associated [Planning Practice Guidance] are important material considerations.”

He went on to consider the relevant policies of the development plan, in particular policies CP11, CP12, CP13 and CP14 of the core strategy, and then advised the committee, in paragraph 6.6:

“6.6 With the above policy context in mind, it is clear that the proposal relates to new development outside the village confines (on land which is not defined as “previously developed” for the purposes of applying NPPF policy), is not part of a wider plan of farm diversification and is not intended to provide affordable housing as an exceptions site. Consequently, the proposed development falls outside of the requirements of these policies and there is an objection to the principle of the proposed development in the broad policy terms.”

and in paragraph 6.7:

“6.7 It is therefore necessary to establish whether any other material planning considerations exist that outweigh the policy objections to the scheme in these particular circumstances.”

45. In paragraph 6.8 the officer acknowledged, in the light of the relevant guidance in the Planning Practice Guidance, that “the policies contained in ... the NPPF are material considerations and must be taken into account”, and, in paragraph 6.9, that since the core strategy had been adopted in 2007 it was “necessary to establish how consistent the above policies are with the policies contained within the NPPF”. His advice in paragraphs 6.10 to 6.13 of his report was this:

“6.10 With this in mind, it must be noted that paragraph 49 of the NPPF states that applications for new housing development should be considered in the context of the presumption in favour of sustainable development. Paragraph 50 of the NPPF emphasises the importance of providing a wide choice of high quality homes, to widen opportunities for home ownership and create sustainable, inclusive and mixed communities. Paragraph 55 states that in order to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities.

6.11 These criteria all demonstrate a clear government momentum in favour of sustainable development to create new homes and drive economic development. The proposed development would create four high quality new homes on the very edge of an existing village settlement.

6.12 A further indicator of such emphasis is borne out of the recent changes to the regime of permitted development rights set out by national government by the Town and Country Planning (General Permitted Development) Order 2015. This allows for far more development to take place without the need for planning permission from Local Authorities and generally provides a steer as to government’s thinking on how to boost the country’s economy through the delivery of new homes.

6.13 Such continued emphasis from government is a material consideration that must be balanced against the policy context set out in the TMBCS.”

46. I have already referred to the officer's advice on the "fallback position" in paragraphs 6.14 to 6.19 of his report. In paragraphs 6.20 to 6.42 he considered the planning merits of the proposal and its advantages by comparison with the fallback development, drawing the committee's attention to relevant policies both in the core strategy and in the NPPF. He advised that the design and density of the proposed development were acceptable and beneficial (paragraphs 6.20 to 6.23). In paragraph 6.24 he said:

"6.24 With these considerations in mind, particularly the emphasis contained within the NPPF concerning sustainable development generally, the impetus behind the provision of new homes, the benefits of removing existing structures and the permitted development "fallback" position, it is my view that, on balance, other material considerations can weigh in favour of the grant of planning permission."

47. He concluded that the effects of the development on the settings of listed buildings and the setting of East Malling Conservation Area would not be harmful (paragraphs 6.25 to 6.30). He also found the proposed arrangements for access to the site and for car parking acceptable (paragraphs 6.31 to 6.36). He advised that "... the existing barn could be partially converted and the existing access retained for use by those units which arguably could have a greater impact on amenity in terms of activity, noise and disturbance than the proposed development simply by virtue of the greater degree of proximity to the existing residential properties" (paragraph 6.33). He told the committee that in his view it "would be counterproductive to seek affordable housing contributions as this would merely limit the ability of the Trust to recycle funds to provide wider support for the Trust" (paragraph 6.37). And the loss of Grade 2 agricultural land was "not ... a justifiable reason to refuse planning permission ..." (paragraph 6.39).

48. The final paragraph of the officer's report is paragraph 6.42, where he said this:

"6.42 In conclusion, it is important to understand that the starting point for the determination of this planning application rests with the adopted Development Plan. Against that starting point there are other material planning considerations that must be given appropriate regard, not least the requirements set out within the NPPF which is an important material consideration and the planning and design of the proposal for the site in the context of the permitted development fallback position. The weight to attribute to each of those other material planning considerations, on an individual and cumulative basis, and the overall balance is ultimately a matter of judgement for the Planning Committee. My view is that the balance can lie in favour of granting planning permission."

49. In recording the argument on this issue in the court below, Garnham J. noted Ms Graham Paul's submission that "the presumption in favour of sustainable development set out in paragraph 14 of [the NPPF] was not operative" in this case – because the development plan was in place and up-to-date and the council was able to demonstrate a five-year supply of deliverable housing sites (paragraph 43 of the judgment). Ms Graham Paul had conceded that "sustainability may be capable of being a material consideration in considering a conflict with a development plan". What the officer had done in paragraph 6.10 of his report, said the judge, had been "to invite the committee to note the effect of paragraphs 49, 50 and 55 [of the NPPF]". It was not suggested that those paragraphs of the

NPPF had been misrepresented. Nor was it suggested that the officer had failed to point out that the proposed development “fell outside the local plan”; he had done that in paragraph 6.6 of his report. In those circumstances, said the judge, “it cannot sensibly be argued that the officer misled the committee in any material respect” (paragraph 47). The judge also rejected the submission that paragraphs 49, 50 and 55 of the NPPF were irrelevant. He observed that the NPPF “provides for a presumption in favour of sustainable development which it says should be seen “as a golden thread” running through decision-taking”. He added that “[the] weight to be given to those considerations in any given case is a matter for the planning authority but it cannot, at least on facts such as the present, be said that the underlying principle is irrelevant” (paragraph 48). He rejected the submission that the officer had not justified the departure from the development plan. The officer’s report, he said, “accurately and fairly sets out the competing considerations and it was a matter for the judgment of the planning authority how those considerations were resolved” (paragraph 49).

50. In the submissions they made to us at the hearing, though not in their respective skeleton arguments, both Ms Graham Paul and Mr Lopez recast their arguments in the light of what this court has now said about the “presumption in favour of sustainable development” in *Barwood v East Staffordshire Borough Council*, including the basic point that the presumption is contained solely in paragraph 14 of the NPPF (see paragraph 35 of my judgment in that appeal). They were right to do so.
51. It was common ground before us, as it was in the court below, that the “presumption in favour of sustainable development” did not apply to the proposal. And the council’s officer did not advise the committee that it did. As Ms Graham Paul acknowledged, the only reference to the “presumption in favour of sustainable development” in the officer’s report is in the first sentence of paragraph 6.10. But, she submitted, in view of what the officer said in that paragraph of the report, and also in paragraph 6.42, we should conclude that the committee took the presumption into account as a material consideration, which it ought it not to have done. Ms Graham Paul did not submit that the proposal was given the benefit of the so called “tilted balance”. But she argued that the effect of the officer’s advice was that the “presumption in favour of sustainable development” was one of the “requirements set out within the NPPF ...”, which the officer treated as “an important material consideration” and a significant factor weighing in favour of the proposal in the planning balance.
52. I disagree. In my view the argument fails on a straightforward reading of the officer’s report, in the light of the judgments in this court in *Barwood v East Staffordshire Borough Council*. I do not accept that the officer counted the “presumption in favour of sustainable development” as a material consideration weighing in favour of planning permission being granted.
53. The reference to the “presumption in favour of sustainable development” in paragraph 6.10 of the officer’s report is a quotation of the first sentence of paragraph 49 of the NPPF, not of paragraph 14. The quotation is correct. In the same paragraph of the report the officer also referred to two other passages of policy in the NPPF, namely paragraphs 50 and 55. The policies are correctly summarized. The common factor in those three passages of NPPF policy is not the “presumption in favour of sustainable development”. It is the promotion, in national planning policy, of sustainable housing development. That this is

what the officer had in mind in this part of the report is very clear from what he went on to say in paragraphs 6.11, 6.12 and 6.13, and then in paragraph 6.24.

54. In those paragraphs the officer was not purporting to apply the “presumption in favour of sustainable development” to the proposal. Nor did he advise the committee that the presumption was engaged, or that it was, in itself, a material consideration weighing in favour of the proposal. He referred, in paragraph 6.11, to “[these] criteria” – meaning the matters to which he had referred in paragraph 6.10 – as demonstrating “a clear government momentum in favour of sustainable development to create new homes and drive economic development”; in paragraphs 6.12 and 6.13 respectively, to “such emphasis” and “[such] continued emphasis from government”; and in paragraph 6.24 to “the emphasis contained within the NPPF concerning sustainable development generally ...” (my underlining). The language in those paragraphs is very distinctly not the language one would have expected the officer to have used if he thought he was applying the “presumption in favour of sustainable development”. The intervening and subsequent assessment, culminating in his final conclusion on the planning merits of the proposal in paragraph 6.42, is concerned with its credentials and benefits – and advantages when compared with the fallback – as sustainable development.
55. Paragraph 6.42 of the officer’s report does not, in my view, betray a misunderstanding of NPPF policy for the “presumption in favour of sustainable development”. The advice given to the committee in that paragraph was not inaccurate or misleading. The officer did not undertake the planning balance in terms of the policy for “decision-taking” in paragraph 14 of the NPPF. There can be no suggestion that, contrary to his earlier conclusion and advice in paragraphs 6.6 and 6.7 of his report, he was treating this as a case in which the proposal accorded with the development plan, so that it was to be approved “without delay” under the first limb of the policy for “decision-taking” in paragraph 14. Nor can it be suggested that, contrary to the whole tenor of his assessment of the proposal in paragraphs 6.1 to 6.41, this was a case in which the development plan was “absent” or “silent” or any “relevant policies” of it were “out-of-date”, so that the second limb of the policy for “decision-taking” in paragraph 14 applied.
56. This case is clearly and materially different from *Barwood v East Staffordshire Borough Council* – a case that shows what can go wrong when a decision-maker is misled as to the meaning and effect of government policy for the “presumption in favour of sustainable development”. Here the officer did not commit an error of the kind made by the inspector – and conceded by the Secretary of State – in that case: the mistake of discerning a “presumption in favour of sustainable development” outside paragraph 14 of the NPPF and treating that wider presumption as a material consideration weighing in favour of the proposal (see paragraphs 43 to 48 of my judgment in *Barwood v East Staffordshire Borough Council*). The officer did not say, as the inspector did in *Barwood v East Staffordshire Borough Council*, that “where a proposal is contrary to the development plan [the “presumption in favour of sustainable development”] is a material consideration that should be taken into account” (paragraph 12 of the decision letter in that case). Unlike the inspector in that case (in paragraphs 37 to 41 of his decision letter), he did not bring the “presumption in favour of sustainable development” into the balancing exercise as a material consideration (see paragraphs 26 and 29 of my judgment). And, in my opinion, it cannot realistically be suggested that the members would have thought they were being invited to apply that presumption in government policy, or to give it weight as a material consideration, in their assessment of the proposal.

57. The “presumption in favour of sustainable development” did not, in fact, feature as a material consideration to which the officer gave any positive weight when undertaking the planning balance. The exercise he conducted in paragraph 6.42 of his report was an entirely conventional and lawful balance of other material considerations against the identified conflict with the development plan, as section 38(6) of the Planning and Compulsory Purchase Act 2004 requires. It was, in fact, a classic example of that provision in practice. This is not to say that in his assessment of the proposal he had to refrain from considering the extent to which it complied with relevant NPPF policies – in particular, in the specific respects to which he referred, the sustainability of the proposed development in the light of NPPF policy, as well as its compliance with relevant policies of the development plan. That was a perfectly legitimate, and necessary, part of the planning assessment in this case. Had the officer left it out, he would have been in error, because he would then have been failing to have regard to material considerations. But he did not make that mistake. He assessed the proposal comprehensively on its planning merits, exercising his planning judgment on the relevant planning issues. He took into account the sustainability of the proposed development in the light of NPPF policy, but without giving it the added impetus of the “presumption in favour of sustainable development”. I cannot fault the advice he gave.
58. Finally on this issue, I do not accept the suggestion made by Ms Graham Paul in reply that the council’s response to Mr Mansell’s solicitors’ pre-application protocol letter, in its solicitors’ letter dated 22 February 2016, can be read as conceding the error for which Ms Graham Paul contended. In fact, it squarely denied that error. Having referred to the quotation of the first sentence of paragraph 49 of the NPPF in paragraph 6.10 of the officer’s report, it acknowledged that the proposal was a “departure from the development plan” and that the development plan was not “absent” or “silent” nor were relevant policies “out-of-date”. It then said that neither the officer nor the committee had treated the “presumption in favour of sustainable development” under paragraph 14 of the NPPF as “operative” in this case. It acknowledged, therefore, that neither of the limbs of the policy for “decision-taking” in paragraph 14 of the NPPF could have applied here. And it said that the officer’s report “does not begin to suggest otherwise”. I agree.
59. It follows that this ground of appeal must also fail.

Conclusion

60. For the reasons I have give, I would dismiss this appeal.

Lord Justice Hickinbottom

61. I agree with both judgments. Without diminishing my concurrence with anything my Lords have said, I would wish expressly to endorse the observations of Lindblom L.J. in paragraphs 39-40 to the effect that, in future, reference to pre-*Barwood v East Staffordshire Borough Council* authorities on the meaning and operation of the presumption in paragraph 14 of the NPPF should be avoided; and in paragraph 41, supported by the further comments of the Chancellor, on the respective roles of planning decision-makers and the courts in planning cases.

The Chancellor of the High Court

62. I too agree with Lord Justice Lindblom's judgment, but would add a few words from a more general perspective. In the course of the argument, one could have been forgiven for thinking that the contention that the presumption in favour of sustainable development in the NPPF had been misapplied in the planning officer's report turned on a minute legalistic dissection of that report. It cannot be over-emphasised that such an approach is wrong and inappropriate. As has so often been said, planning decisions are to be made by the members of the Planning Committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and the courts must give them space to undertake that process.
63. Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a planning officer's report. An appeal will only succeed, as Lindblom L.J. has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common-sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied.
64. It is also appropriate to reiterate what Lindblom L.J. said at paragraph 35 of the *East Staffordshire* case to the effect that planning decision-makers have to exercise planning judgment as much when the presumption in favour of sustainable development is applicable as they do when it is not. The presumption may be rebutted when it is applicable, and planning permission may be granted where it is not. In each case, the decision-makers must use their judgment to decide where the planning balance lies based on material considerations. It is not for the court to second guess that planning judgment once it is exercised, unless as I have said it is based on a distinct and material defect in the report.
65. I agree that this appeal should be dismissed.