UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 104 (LC)
UTLC Case Number: LCA/41/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – ***certificate of appropriate alternative development – appeal site in Green Belt – certificate granted by Council for 11 or 12 dwellings – previous outline planning permission for 14 dwellings granted in 2015 – certificate sought for development of nine dwellings – held that planning obligations policies apply to smaller development – appeal allowed – certificate varied – section 18 Land Compensation Act 1961***

IN THE MATTER OF AN APPEAL UNDER SECTION 18
LAND COMPENSATION ACT 1961

BETWEEN:

(1) ROBERT LOCKWOOD
(2) MRS ANGELA LOCKWOOD
(3) IAN MELVILLE **Claimants**

and

HIGHWAYS ENGLAND COMPANY LIMITED **Respondent**

Re: Land and premises to the south of
The Thatched Cottage and
1 Grays Corner Cottages,
Baker Street,
Orsett,
Essex, RM16 3LJ

Before: A J Trott FRICS

Sitting at: The Royal Courts of Justice, Strand, London WC2A 2LL
on
4 January 2019

Meyric Lewis, instructed by Charles Russell Speechlys LLP, for the Appellants
The Respondent did not appear and was not represented.

The following cases are referred to in this decision:

Fletcher Estates (Harlescott) Limited v Secretary of State [2000] 2 AC 307
Rooff Limited v Secretary of State [2011] EWCA Civ 435
Tescan Limited v *Cornwall Council* [2014] UKUT 408 (LC)
Tesco Stores Limited v Dundee City Council [2012] UKSC 13
Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 ALL ER 636
Harringay Meat Traders Limited v Secretary of State [2012] EWHC 1744 (Admin)
Porter v Secretary of State for Transport [1996] 3 ALL ER 693
Barnwell Manor Wind Energy Limited v East Northants DC [2004] EWCA Civ 137
Secretary of State v West Berkshire DC [2016] EWCA Civ 441

DECISION

Introduction

1. This is an appeal under section 18 of the Land Compensation Act 1961 ("the 1961 Act") against a certificate of appropriate alternative development ("CAAD") issued on 30 April 2018 by Thurrock Council as local planning authority ("the Council").

2. The appellants are Mr Robert Lockwood and Mrs Angela Lockwood, who own the property known as Thatched Cottage, Baker Street, Orsett, Grays, Essex, RM16 3LJ and adjoining land, and Mr Ian Melville who owns the neighbouring property known as 1 Grays Corner Cottages.

3. In their notice of reference to the Tribunal the appellants wrongly identified the respondent authority as the Council. The proper respondent to an appeal made by the person entitled to an interest in the land the subject of a section 17 certificate is the acquiring authority: section 18(1) of the 1961 Act. In this case the acquiring authority is Highways England Company Limited ("Highways England").

4. Highways England responded to the appeal on 20 July 2018 and submitted a statement of case in which they said:

> "8. In terms of the appeal commenced by the Claimant under section 18 of the [1961 Act], the Acquiring Authority is not positioned to comment on the planning merits of the application in the same way as the decision-maker, the Council. Save that, the Acquiring Authority does not have any objection in principle to the forms of development referred to in the CAAD.
>
> 9. On this basis, the Acquiring Authority does not intend to file detailed submissions on the merits of the decision reached by the Council or the appeal brought by the Claimant..."

5. On 29 August 2018 Highways England confirmed that it did "not intend to participate further in the … proceedings".

6. Mr Meyric Lewis of counsel appeared for the appellants and called Mr Barry Murphy BA(Hons), MRUP, MRTPI, a partner at DWD LLP, as an expert planning witness.

Background

7. The appeal site is located adjacent to, and below the level of, the junction of Baker Street and Stanford Road in Thurrock. Vehicular access is from Baker Street at the junction with Long Lane. The site, which measures 0.67 hectares, is irregular in shape and is used in part for the

open storage of vehicles, skips, boats and materials. Following reconfiguration of the local road network a significant amount of the site comprises sections of former highways. There are established boundaries to the north, east and south. The site is within the Green Belt.

8. The appellants' property was shown on the indicative route of Highways England's Lower Thames Crossing Project. Mr and Mrs Lockwood served a blight notice on Highways England on 19 July 2017 which was accepted on 15 August 2017. Mr Melville served a blight notice on 15 November 2017 which was accepted on 6 December 2017. A further blight notice was served by Mr and Mrs Kirk, the owners of 2 Grays Corner Cottages, the property adjoining Mr Melville's house to the west, on 28 July 2017. This was accepted on 12 September 2017.

9. The acquiring authority's acceptance of the blight notices meant it was deemed to have served a notice to treat in respect of the claimants' (i.e. appellants') interests in land two months after the date of service of the blight notices: section 154 of the Town and Country Planning Act 1990 ("the 1990 Act"). Acceptance of the blight notices also enabled the appellants and Mr and Mrs Kirk to apply to the local planning authority for a CAAD: section 22(2)(b) of the 1961 Act.

10. Mr and Mrs Lockwood and Mr Melville made a joint section 17 application for a CAAD in relation to part only of their respective land holdings on 5 March 2018[1] ("Application No.1"). Mr and Mrs Lockwood made a separate section 17 application on the same date in respect of a further area of land immediately south of the Thatched Cottage and north of the larger joint application site ("Application No.2"). Mr and Mrs Kirk also made a section 17 application on 5 March 2018[1] on part of their land ("Application No.3").

11. Application No.1 (reference 18/00353/CAAD) sought a certificate for the development of nine residential units comprising seven detached houses (in two different designs) and a pair of semi-detached houses. An "indicative layout" plan together with plans and elevations of the proposed house types accompanied the application.

12. Application No.2 (reference 18/00355/CAAD) sought a certificate for the development of a detached single-storey dwelling with a separate double garage to replace "a range of mainly timber framed buildings" presently arranged to provide two granny annexes. The application was accompanied by an indicative layout plan and elevations.

13. Application No.3 (reference 18/00356/CAAD) sought a certificate for the erection of two detached dwellings with ancillary garages.

14. The three CAAD applications therefore sought a combined total of 12 residential units.

[1] The applications were validated on 5 March 2018

Planning History

15. Mr Lockwood made three unsuccessful planning applications to develop the land adjacent to Thatched Cottage:

(i) Reference 07/00595/OUT

This outline application was made on 4 June 2007 and was for the development of eight 4 and 5-bedroom detached dwellings. It was refused on 10 August 2007 on three grounds:

(a) It was inappropriate development within the Green Belt;

(b) The site lay within a Landscape Improvement Area and the proposed development would be contrary to policy; and

(c) The proposal did not include provision of any contribution towards education and primary healthcare, contrary to the Council's adopted policies.

(ii) Reference 08/00030/OUT

This outline application was made on 14 January 2008 and was again for the development of eight 4 and 5-bedroom detached dwellings. It was refused on 11 March 2008 on the same three grounds as application reference 07/00595/OUT.

(iii) Reference 13/00845/FUL

This detailed application was made on 27 August 2013 and was for the development of two detached houses. It was refused on 22 October 2013 for three reasons:

(a) It was inappropriate development within the Green Belt;

(b) The applicant had failed to include a legal agreement for a contribution to the delivery of strategic infrastructure; and

(c) The applicant had failed to demonstrate that the proposals would result in a satisfactory living environment.

Planning application reference 14/00912/OUT

16. On 12 August 2014 Mr Tony Cole of Colestone Property Management Limited made an outline planning application for the development of 14 dwellings with garages on "land adjacent to Thatched Cottage" (Reference 14/00912/OUT). All matters were reserved. The planning application site included land owned by Mr and Mrs Lockwood (but excluding the land now forming the subject of CAAD Application No.2), that part of Mr Melville's property which

subsequently formed part of CAAD Application No.1 and part of Mr Kirk's property, but less than that which subsequently formed the subject of CAAD Application No.3.

17. Although all matters were reserved the application included an illustrative block plan which showed the proposed 14 dwellings located in a strip aligned along the southern boundary of the combined site with the remainder (majority) of the application land being left undeveloped.

18. The application was considered by the Council's Planning Committee on 23 October 2014. The planning officer recommended refusal on four grounds:

(i) The proposal was inappropriate development in the Green Belt and there were no very special circumstances to justify the grant of permission;

(ii) The applicant, contrary to policy, had failed to include a legal agreement providing for a contribution to the delivery of strategic infrastructure;

(iii) The proposal failed to respond to the sensitivity of the surroundings and would result in poor quality living conditions due to the proximity of the A1013 (Stanford Road); and

(iv) The applicant had failed to demonstrate that the proposal would not lead to an intensified use of Baker Street or Stanford Road.

19. At the Planning Committee meeting Mr Lockwood referred to a letter he had received from a council officer describing the land as "previously developed derelict land" which members felt undermined the officer's recommendation. The members decided to defer the application to enable a site visit to be held.

20. The outline planning application was reconsidered at the meeting of the Council's Planning Committee on 13 November 2014 where it was resolved that the application be tentatively agreed but deferred to the next meeting to allow: (i) officers to draft a report explaining the implications of making a decision contrary to the planning officer's recommendation; and (ii) a full update on the completion of a legal agreement.

21. The Planning Committee considered the planning officer's further report on 8 January 2015. The planning officer maintained his recommendation for refusal on each of the previous four grounds. By a majority vote the Planning Committee resolved to grant planning permission subject to conditions and to the applicant entering into a suitable section 106 agreement. The committee considered permission should be granted:

> "Due to the history of the site (including it being highways land previously), housing need, the location of the site between three roads and screened by a raised embankment, the potential reduction in anti-social behaviour and other similar applications being permitted in close proximity. It was also considered that the application would enhance the area by tidying it up and reducing the unsightliness of it."

22. Although Colestone Property Management Limited was the applicant, and despite not owning the whole of the planning application site, Mr and Mrs Lockwood entered into a unilateral undertaking on 25 March 2015 pursuant to section 106 of the 1990 Act under which they covenanted (as the developer): (i) not to commence the development under planning permission 14/00912/OUT until they had paid the Council the Discounted Residential Unit Standard Charge of £70,000 (£5,000 per residential unit); and (ii) to transfer the freehold of five of the residential units to a registered provider of affordable housing.

23. The Council granted conditional outline planning permission on the same day that the unilateral undertaking was completed by Mr and Mrs Lockwood (25 March 2015). Condition 2 required that an application for the approval of the reserved matters should be made to the local planning authority before the expiration of one year from the date of the permission.

24. On 18 March 2016 Mr Lockwood submitted an application for the approval of reserved matters pursuant to the outline permission but described the proposal not as one for 14 dwellings but instead as a "scheme consisting of 8 No. 4 bedroom detached properties with attached garages and 1 No. 4 bedroom property with attached car port and detached single garage." On 9 September 2016 the Council advised the appellant that it was unable to determine the application as submitted because:

> "The description of the outline planning consent… refers to 14 dwellings with garages. The current application … seeks approval of reserved matters for only 9 dwellings. This is not within the ambit of the outline consent …"

Mr Lockwood then appealed against the Council's failure to determine the application within the prescribed period.

25. In his appeal decision the planning inspector said at paragraph 15 that there was:

> "Little reason to suggest that details for a lesser development of 9 dwellings although not consistent with the precise wording of the outline description, would not fall within the ambit of such a substantively unfettered outline permission for 14 dwellings."

But he went on to say at paragraph 20 that:

> "Notwithstanding the relatively unfettered character of the outline permission itself, that permission is only granted on the basis of, and in conjunction with, a unilateral undertaking requiring affordable housing and on such terms [as are] set out in the submitted deed."

The inspector continued at paragraph 25:

> "The planning permission has to be read in the context of, and in conjunction with, the planning obligation.
>
> 26. Considering both matters conjunctively and in the round, I therefore conclude, as a matter of fact and degree, that the submitted reserved matters are materially different

from the terms of the approved outline scheme and cannot be considered as compatible with that original approval."

26. For these reasons the inspector dismissed the appeal on 6 September 2017.

The CAAD applications

27. The Council determined the three section 17 applications on 30 April 2018. They attached the same plan to each decision. This showed the total area of land included in the applications within a single boundary delineated by a broken black line. It also showed hatched green and marked "A" the strip of land that was identified in the illustrative plan for residential development in planning application reference 14/00912/OUT (see paragraph 17 above). The Council therefore appear to have considered the applications together.

Application No.1

28. This application is the subject of the present appeal. In the statement of case that accompanied their section 17 application the appellants described the alternative development they considered appropriate to be a development of nine dwellings (seven detached houses in two house types and a pair of semi-detached houses) all providing family size accommodation. An illustrative layout showed the proposed houses distributed across the whole of the application site.

29. The Council determined that the following would be appropriate alternative development for the purposes of section 14 of the 1961 Act:

A. Use as a paddock
B. Use as amenity space in association with the residential use of Thatched Cottage.
C. The construction of not fewer than 11 and not more than 12 dwelling houses on that part of the application site [hatched] in green [and marked "A"] on the plan.

30. Each use was subject to conditions. Insofar as relevant to alternative use C (residential development) those conditions were that the houses could be semi-detached or in terraces and must not exceed two-storeys and roof pitch in height. The dwellings were not to be in the form of flats. Each dwelling was to have a garage or other off-street parking. The existing concrete apron was to be removed, as were all outbuildings. There was to be a landscaping scheme for the remainder of the application site, i.e. that part of the site north of the green hatched area marked "A". Permitted development rights were removed.

31. Condition 5 stated:

"There shall be [a] mix (in conjunction with development on the adjoining land bounded by the broken black line) of approximately equal proportions of 2 bedroom, 3 bedroom

and 4 bedroom units. Either 35% of the total number of dwellings shall be affordable or a commuted payment equating to 35% of the total number of dwellings shall be made."

32. In addition to these conditions the Council said that there would need to be a planning obligation securing: (i) the regulation of the development of the application site and adjoining land bound by the broken black line; (ii) a financial contribution towards education (totalling £9,505 per qualifying residential unit); and (iii) the basis for the provision of affordable housing or the making of a commuted payment.

33. In its statement of reasons the Council referred to outlining planning permission reference 14/00912/OUT and noted that (in the illustrative plan) all the units were within the area hatched green and marked "A" and said, "the Council would not have approved a layout which involved building beyond this area." The Council had decided when granting outline planning permission that the history of the site justified inappropriate development in the Green Belt within the green hatched area "but not elsewhere within the present [CAAD] application site". The principle of inappropriate development on the remainder of the application site had not been established and there were no very special circumstances to justify its residential development.

34. Thatched Cottage is a listed building and the Council said it was necessary to keep the area north of the green hatched land undeveloped in order not to harm its setting. The Council also said that it was important to avoid circumvention of the affordable housing threshold (more than 10 units) by piecemeal development and "any residential development within the area bounded by the broken black line needed to be regarded as a single residential development."

Application Nos. 2 and 3

35. The CAADs issued by the Council in respect of these two applications identified appropriate alternative development as including residential development. In the case of Application No.2 (Mr and Mrs Lockwood's other application) this was for the change of use of the existing building to use as a single dwelling house or its replacement by a single-storey building. In the case of Application No.3 (Mr and Mrs Kirk) the certificate referred to the construction of one or two dwelling houses on that part of the application site marked "A" (i.e. the land hatched green). In both cases the Council imposed a condition that the development of the application land site should be "regulated in conjunction with the adjoining land shown on the annexed [Council] plan with a broken black line, if more than 10 units are provided in total" in which case 35% of the total number of dwellings should be affordable, or a commuted payment made. A planning obligation would be required to achieve this and the CAADs stated that: "the commuted payment and the education contribution would be calculated in the manner set out in 18/00353/CAAD (i.e. Application No.1).

Statutory Provisions

36. On an appeal to the Upper Tribunal under section 18 of the 1961 Act (as amended by the Localism Act 2011) the Tribunal "must consider the matters to which the certificate relates as if

the application for a certificate under section 17 had been made to the Upper Tribunal in the first place" (Section 18(2)(a)).

37. Section 17(1) requires, on appeal, the Upper Tribunal to certify whether or not "there is development that, for the purposes of section 14, is appropriate alternative development in relation to the acquisition."

38. Section 17(5) states that if a certificate contains a statement under section 17(1)(a) that there is development that is appropriate alternative development it must also –

> "(a) identify every description of development (whether specified in the application or not) that in the [Upper Tribunal's] opinion is, for the purposes of section 14, appropriate alternative development in relation to the acquisition concerned, and
>
> give a general indication –
>
> (i) of any conditions to which planning permission for the development could reasonably have been expected to be subject,
>
> …
>
> iii) of any pre-condition for granting the permission (for example, entry into an obligation) that could reasonably have been expected to be met."

39. Under section 18(2)(b) the Tribunal on any appeal against a CAAD:

> "must –
>
> (i) confirm the certificate, or
>
> (ii) vary it, or
>
> (iii) cancel it and issue a different certificate in its place,
>
> as the Upper Tribunal may consider appropriate."

40. Section 14 of the 1961 Act, as amended by the 2011 Act, states:

> "14(1) This section is about assessing the value of land in accordance with rule (2) in section 5 for the purpose of assessing compensation in respect of a compulsory acquisition of an interest in land.
>
> …
>
> (3) In addition, it may be assumed –
>
> (a) that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development to which sub-section (4)(b)(i) applies …

(4) For the purposes of this section, development is "appropriate alternative development" if –

…

(b) on the assumptions set out in sub-section (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided –

(i) on that date …"

41. Section 70 of the 1990 Act sets out the general considerations for the determination of planning applications. It provides in sub-section (2) that:

"In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application and to any other material considerations."

42. Section 70(2) requires the decision-maker to have regard to "material considerations" when granting planning permission, but under section 70(3) the power to grant permission having regard to material considerations is made expressly subject to, inter alia, section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 which states:

"In considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest, which it possesses."

43. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") states:

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

The Legal Framework of the Decision

44. The effect of these statutory provisions is that the Tribunal must consider whether development is appropriate alternative development by reference to the "relevant valuation date". That date is defined in section 5A(3) of the 1961 Act:

"If the land is the subject of a notice to treat, the relevant valuation date is the earlier of –

(a) the date when the acquiring authority enters on and takes possession of the land;

(b) the date when the assessment [of the valuation of land in accordance with section 5, rule (2)] is made."

In this appeal, where a blight notice has been accepted and a deemed notice to treat served but entry onto the land has not yet been taken, the relevant valuation date is still in the future. This presents obvious difficulties in considering what might be appropriate alternative development at that time.

45. In each case the Council considered the CAAD applications by reference to the relevant planning policies as they were two months after the date of service of the blight notice. That is not the relevant valuation date but is the date upon which the appellants became entitled to make an application for a CAAD: section 154(2)(b) and (3)(b) of the 1990 Act and section 22(2)(b) of the 1961 Act.

46. The appellants did not dispute the Council's assessment of the planning policy at 19 September 2017, being the date two months after the service of the blight notice by Mr and Mrs Lockwood (although the equivalent date in respect of Mr Melville's blight notice was 15 January 2018 – see paragraph 8 above). But as Mr Lewis acknowledged in his skeleton argument, section 5A(1) and (3) "does not sit easily with Section 14(3) in a blight notice case such as this."

47. In the absence of any provision dealing with a deemed notice to treat it is necessary to have regard to section 5A(3). Subsection (a) does not apply because possession has not yet been taken. Subsection (b) only applies when the valuation assessment has been made, an assessment which it appears the parties wish to achieve by negotiation. In my opinion, in circumstances such as these where a section 18 appeal has been made before entry has been taken, and where the Tribunal is not being invited to determine the compensation payable at the same time, the appellant must be taken to be willing to have the terms of the CAAD determined on the basis of policy at the date of determination. That is the closest date to the date of entry for which a policy framework can reliably be identified and without speculating about future policy changes. One way of looking at it might be to say that, by bringing the appeal when they have, the appellants have waived the right to rely on any relevant changes of policy which might occur before the date of entry or assessment.

48. The Tribunal is considering the application de novo and is not constrained by the schedule of reasons given by the Council in its decision on the CAAD application(s).

49. In determining the appeal the Tribunal should apply ordinary planning principles: see *Fletcher Estates (Harlescott) Limited v Secretary of State* [2000] 2 AC 307 per Lord Hope at 324 and *Rooff Limited v Secretary of State* [2011] EWCA Civ 435 per Carnwath LJ (as he then was) at paragraph 5. Those ordinary planning principles are set out in section 70 of the 1990 Act and section 38(6) of the 2004 Act.

50. Section 38(6) of the 2004 Act refers to a determination that is required to be made under the Planning Acts. The definition of the Planning Acts is contained in section 117(4) of the 2004 Act and does not include the 1961 Act. The consequences of this for the determination of an

appeal under section 18 of the 1961 Act were analysed at paragraph 65 in *Tescan Limited* v *Cornwall Council* [2014] UKUT 0408 (LC) where the Tribunal, Mr A J Trott FRICS, determined that regard should be had to the development plan in accordance with section 38(6) of the 2004 Act.

51. The Tribunal is therefore required to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from that plan. The requirements for interpreting the provisions of a development plan were considered by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13: see Lord Reed at paragraphs 17 to 19. What constitutes a "material consideration" is a matter of law; what weight should be given to it is solely a judgement for the decision-maker: see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 per Lord Hoffmann at 657 [13].

52. The Tribunal must be satisfied on the balance of probabilities that planning permission would have been granted for the description of development applied for and it does not have to assess more precisely the prospects of that development happening or of the permission being implemented: see *Harringay Meat Traders Limited v Secretary of State* [2012] EWHC 1744 (Admin) per McCombe J at paragraph 11 and *Porter v Secretary of State for Transport* [1996] 3 All ER 693 per Stuart-Smith LJ at 704e.

53. The Government's updated guidance on *Compulsory Purchase Process and the Crichel Down Rules* (February 2018) gives guidance about what a section 17 certificate should contain at paragraph 263:

> "If giving a positive certificate, the local planning authority must give a general indication of the conditions and obligations to which planning permission would have been subject. As such the general indication of conditions and obligations to which the planning permission could reasonably be expected to be granted should focus on those matters which affect the value of the land. Conditions relating to detailed matters such [as] approval of external materials or landscaping would not normally need to be indicated. However, clear indications should be given for matters which <u>do</u> affect the value of the land, wherever the authority is able to do so.
>
> Such matters would include, for example, the proportion and type of affordable housing required within the development, limitations on height or density of development, requirements for the remediation of contamination or compensation for ecological impacts, and significant restrictions on use, as well as financial contributions and site-related works such as the construction of accesses and the provision of community facilities. The clearer the indication of such conditions and obligations can be, the more helpful the certificate will be in the valuation process."

54. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 applies in this appeal because Thatched Cottage is a listed building. Where section 66(1) applies the decision-maker cannot simply treat the desirability of preserving (i.e. not harming) the setting of a listed building as a material consideration to which they can attribute such weight as they see

fit. In *Barnwell Manor Wind Energy Limited v East Northants DC* [2004] EWCA Civ 137 Sullivan LJ said at para 29:

> "… Parliament's intention in enacting section 66(1) was that decision-makers should give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise."

Planning Policy

1. Development Plan

55. At the date of the hearing (4 January 2019) the main local plan document for the Council was the Core Strategy and Policies for Management of Development ("the Core Strategy"). The Core Strategy was originally adopted on 21 December 2011 and was updated on 28 January 2015 to ensure consistency with the National Planning Policy Framework ("NPPF") which was introduced in March 2012.

56. The policies of the Core Strategy which are relevant to the present appeal are:

Core Strategic Spatial Policies ("CSSP")

(i) CSSP1: Sustainable Housing and Locations

57. New residential development will be directed to previously developed land ("PDL") so as to protect the surrounding countryside and the Green Belt. Up to 92% of new residential development is planned to be on PDL. Development will only be permitted on Green Belt land where it is specifically allocated for residential development and where it is required to maintain a 5-year housing land supply. Nevertheless, the Council recognise that locations continue to be identified for the release of Green Belt land for housing. This is to be done in accordance with policies CSTP1 and CSSP4 to help maintain a rolling 5-year supply of "available and deliverable" housing land over the plan period to 2026. Part 3 of the policy (Spatial Distribution of Proposed Housing: Broad Locations 2009-2021) says that as at 1 April 2009 there was potential capacity for 120 dwellings on PDL and green field Green Belt land at several small sites. The policy explicitly does not preclude the continuation of one-off green field or PDL Green Belt land release for small housing sites where proposals could demonstrate "very special circumstances".

(ii) CSSP4: Sustainable Green Belt

58. The broad aim of the Council's policy is to maintain the purpose, function and open character of the Green Belt in Thurrock in accordance with PPG2 for the plan period (2001-

2026). The appeal site does not fall within any of the areas identified in the plan to be released from the Green Belt in order to contribute to the housing supply to 2021.

Core Strategic Thematic Policies ("CSTP")

(i) CSTP1: Strategic Housing Provision

59. The Council was required to deliver a minimum of 18,500 dwellings between 2001-2021 of which 13,550 remained outstanding at the date of the Core Strategy, 4,950 dwellings having been built between 2001 and 2009. Of the remaining sites 12,480 units were to be built on PDL and 1,070 units on green field/Green Belt sites. The Council made an indicative provision for a further 4,750 dwellings from 2021 until the end of the Plan period in 2026.

60. Proposals for residential development are to be design led in a way that will seek to optimise the land use in a manner compatible with local context. Excessive density of development is to be resisted where this would lead to a poor quality of life and undermine the Council's commitment to delivering sustainable neighbourhoods. New residential development is to provide a range of dwelling types and sizes to reflect the Council's housing needs.

(ii) CSTP2: The Provision of Affordable Housing

61. The Council will seek a minimum of 35% of the total number of residential units to be built as affordable housing. To meet this target the Council will seek to achieve, where viable, 35% affordable housing "on all new housing developments capable of accommodating 10 or more dwellings or sites of 0.5 ha or more irrespective of the number of dwellings."

(iii) CSTP24: Heritage Assets and the Historic Environment

62. The Council will preserve or enhance the historic environment by, inter alia, promoting the importance, and encouraging the appropriate use, of heritage assets, including their fabric and settings. All development proposals will have to demonstrate that they are the most appropriate for the heritage asset and its setting.

Policies for Management of Development ("PMD")

(i) PMD2: Design and Layout

63. All design proposals must respond to the sensitivity of the site and its surroundings and to optimise potential of the site while mitigating adverse impacts. Proposed development must contribute positively to the character of the area and its surroundings.

(ii) PMD4: Historic Environment

64. The Council will ensure that the fabric and setting of heritage assets, including listed buildings, are appropriately protected and enhanced according to their significance. In doing so the Council will follow the approach set out in the NPPF in the determination of applications affecting the Council's heritage assets including the expectation that the relevant historic environment record will be consulted and the heritage asset assessed using appropriate expertise where necessary.

(iii) PMD6: Development in the Green Belt

65. The Council will maintain, protect and enhance the open character of the Green Belt in accordance with the provisions of the NPPF. Planning permission will only be granted for new development in the Green Belt provided it meets as appropriate the requirements of the NPPF, other policies in the Core Strategy and the specific policies of PMD6 concerning, for example, extensions and the replacement of buildings.

(iv) PMD16: Developer Contributions

66. Where a proposed development is acceptable in principle, but will give rise to negative impacts that could not be controlled by planning conditions, the Council will seek to secure planning obligations under section 106 of the 1990 Act and in accordance with the NPPF and any other relevant guidance. The Council will secure where appropriate the robust, sustainable and effective delivery of infrastructure within Thurrock by seeking different types of contributions from new development. This policy on planning obligations was to be supported by a Developer Contributions Supplementary Planning Document. The matters that may be covered by such obligations include, insofar as relevant, affordable housing and a contribution towards education and training based on a formula standard charge.

67. Together the spatial, thematic and management of development policies form the basis for the determination of planning applications.

68. The Council resolved to "pursue" the development of a Community Infrastructure Levy ("CIL") policy in February 2011. Work was commenced on its production but at a meeting of the Council's Cabinet on 11 March 2015 it was resolved to suspend such work and to develop a new CIL alongside the New Local Plan for Thurrock. Until the new CIL is prepared developer contributions continue to be sought in accordance with the Core Strategy Policy PMD16: Developer Contributions. At the Council's cabinet meeting in March 2015 the Head of Planning and Growth, in liaison with the Growth Board, was authorised to oversee the production of an Infrastructure Requirement List which will be used in the negotiation of section 106 agreements. At the date of the hearing this list was not published on the Council's website, albeit it was referred to, and no details of how planning obligations are to be calculated were available.

2. The New Thurrock Local Plan

69. The Council began work on a new local plan in February 2014. In December 2018 the Council issued the second stage of its Consultation Document on Issues and Options. The consultation exercise closed on 8 March 2019. The timetable contained in that document states that a draft local plan will be prepared by 2020 and published in 2021. Submission and Examination in Public is expected to take place "from February 2022" with adoption of the Plan in September/October 2022.

70. In July 2018 the Association of South Essex Local Authorities ("ASELA")[2] produced a statement of common ground which sets out ASELA's intention to prepare a Joint Strategic Plan ("JSP") to cover their administrative areas. The JSP will set out a spatial strategy for the development of South Essex including for the scale and distribution of housing. But it will not allocate specific sites for development. The new local plan will not be submitted for examination and adoption until after the JSP has been adopted.

3. National Planning Policy Framework ("NPPF")

71. The NPPF, first published in 2012, was revised in July 2018 and replaced in February 2019. The latest version of the NPPF "includes minor clarifications to the revised version published in July 2018." None of those clarifications materially affect the parts of the 2018 NPPF that were referred to in the appellants' evidence and submissions at the hearing and which are considered in this decision. Account must be taken of the NPPF when preparing the development plan, and is a material consideration in planning decisions (paragraph 2[3]). At the heart of the framework is a presumption in favour of sustainable development. That presumption means decision-takers, where the development plan policies are out of date, should grant planning permission unless, under paragraph 11:

(i) the application of policies in the NPPF that protect areas or assets of particular importance provides a clear reason for refusing the proposed development; and

(ii) 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.

Reference to policies being out of date includes, for applications for residential development, situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer) 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.

72. Section 5 of the NPPF deals with the delivery of a sufficient supply of homes. An identified need for affordable housing is expected to be met on-site unless:

[2] Basildon, Brentwood, Castle Point, Rochford, Southend-on-Sea and Thurrock
[3] References are to the 2019 version unless otherwise stated.

(a) off-site provision or an appropriate financial contribution in lieu can be robustly justified; and

(b) the agreed approach contributes to the objective of creating mixed and balanced communities.

Paragraph 63 states:

> "Provision of affordable housing should not be sought for residential developments that are not major developments, other than in designated rural areas (where policies may set out a lower threshold of 5 units or fewer). To support the re-use of brownfield land where vacant buildings are being re-used or redeveloped, any affordable housing contribution due should be reduced by a proportionate amount."

73. Paragraph 73 states that local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement/need (with an appropriate buffer).

74. The NPPF recognises small and medium sized sites can make an important contribution to meeting housing need and says that local planning authorities should identify, through the development plan and brownfield registers, land to accommodate at least 10% of their housing requirement on sites no larger than 1 hectare (paragraph 68). In section 11 the framework says that planning policies and decisions should give substantial weight to the value of using brownfield land within settlements for homes and other identified needs (paragraph 118(c)). Local planning authorities are encouraged to take a proactive role in identifying and helping to bring forward suitable sites on brownfield registers (paragraph 119).

75. Section 13 of the framework is concerned to protect Green Belt land to which the Government attaches great importance:

> "143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 144. In 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."

The construction of new buildings is generally to be regarded as being inappropriate in the Green Belt.

76. Section 16 of the framework deals with conserving and enhancing the historic environment and requires an applicant for planning permission to describe the significance of any heritage assets affected by a proposal sufficient to understand its potential impact. Any harm to, or loss of, the significance of a designated heritage asset "should require clear and convincing justification" (paragraph 194). If a proposed development would lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse

consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss (paragraph 195). Where a development proposal would lead to less than substantial harm, such harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use (paragraph 196).

4. Planning Practice Guidance

77. At the date of the hearing the relevant Planning Practice Guidance on planning obligations was that published in May 2016. Paragraph 31 of the guidance considers whether there are any circumstances where infrastructure contributions through planning obligations should not be sought from developers. The guidance states that:

> "There are specific circumstances where contributions for affordable housing and tariff style planning obligations (section 106 planning obligations) should not be sought from small scale and self-build development. This follows the order of the Court of Appeal dated 13 May 2016[4], which give legal effect to the policy set out in the written ministerial statement of 28 November 2014 and should be taken into account.
>
> These circumstances are that:
>
> Contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1,000 square metres (gross internal area).
>
> …"

78. This guidance was updated on 15 March 2019 in line with the new NPPF published in July 2018 and replaced in February 2019 (see paragraph 71 above). The equivalent paragraph to paragraph 31 of the 2016 version is paragraph 23 which now reads:

> "Provision of affordable housing should only be sought for residential developments that are major developments.
>
> For housing development, major development is defined in the National Planning Policy Framework as development where 10 or more homes will be provided, or the site has an area of 0.5 hectares or more."

Unlike the 2016 version, the updated version of the guidance does not refer in this paragraph to "tariff style planning obligations". Paragraph 8 of the updated guidance deals with contributions towards education:

> "Plans should support the efficient and timely creation, expansion and alteration of high-quality schools. Plans should set out the contributions expected from development. This should include contributions needed for education, based on known pupil yields from all

[4] See *Secretary of State v West Berkshire DC* [2016] EWCA Civ 441

homes where children live, along with other types of infrastructure including affordable housing."

These education contributions are not restricted in the guidance to major developments.

5. Brownfield Land Register

79. Under the Town and Country Planning Act (Brownfield Land Register) Regulations 2017 each local planning authority must prepare and maintain a register of previously developed land within their area in respect of each parcel of land which:

(a) has an area of at least 0.25 hectares or is capable of supporting at least 5 dwellings;

(b) is suitable for residential development;

(c) is available for residential development; and

(d) where residential development is achievable, i.e. it is likely to be developed within 15 years of the date of entry on the Register.

80. The Council's Brownfield Land Register, as at December 2017, included the appeal site as site CSMO2. It is described as "Land adjacent to Thatched Cottage, Baker Street, Orsett" and is included as a "permissioned" site of 0.5482 hectares capable of providing a minimum of 14 dwellings.

6. Housing land supply

81. The Council's Issues and Options (stage 2) Consultation Document, December 2018 gives details of the latest Housing Land Availability Assessment. Taking a base date of October 2017, the assessment showed a total of 6,478 units coming forward over a 15-year period. Depending upon the methodology used the minimum housing need assessed over that period was 22,287 units between 2018-2037 (19 years) or 31,763 units between 2014-2037 (23 years).

82. The issues and options document states that the number of identified sites:

"… is insufficient, and falls significantly short of meeting the Borough's [Objectively Assessed Needs] calculated using either method. The [NPPF] guidance states that where there are insufficient sites, the assessment should be revisited to review the tests and constraints blocking sites; if this does not result in enough sites, the guidance states that it may be necessary to consider how housing needs can otherwise be met.

In order for the Local Plan to identify sufficient land to meet Thurrock's OAN, the plan-making process will need to consider whether it is possible to provide additional development capacity through the redevelopment of land in the ownership of the Council

and through a change in planning policy which currently protects allocated employment sites and Green Belt land from housing development."

83. The document goes on to consider the possible use of designated Green Belt land for future housing development and concludes:

> "The Council considers that given the acute shortage of land currently identified as being available to meet Thurrock's full objectively assessed housing need over the Plan period, that the exceptional circumstances required by the NPPF to justify changes to Green Belt boundaries can be clearly demonstrated."

The case for the appellants

84. In summary the appellants say that:

(i) There is no sustainable planning objection to the proposed scheme for nine dwellings on the appeal site based on an asserted lack of "very special circumstances" or otherwise.

(ii) The proposed scheme would not require any affordable housing contribution because it is below the relevant policy threshold (more than 10 units).

(iii) The planning officer's report to the Council on Application No.1 said that in granting the 2015 outline planning permission both the provision of affordable housing and the contribution of £70,000 towards education represented very special circumstances in favour of development on Green Belt land. The report said:

> "The provision of affordable housing is considered a very special circumstance as the Council cannot demonstrate a five year housing supply."

Mr Murphy said that the minutes of the Council's Planning Committee meetings on 13 November 2014 and 8 January 2015 made no specific reference to affordable housing. At the November meeting some members were recorded as taking the view that planning permission should be granted, inter alia, due to "housing need". Similar wording was used in the January minutes. The shortage of housing land supply was not limited to affordable housing and the provision of *any* housing should be given the same weight as a very special circumstance as affordable housing.

(iv) The reference in the planning officer's report to the contribution to education being a very special circumstance was not supported by the Council meeting minutes which made no reference to it.

(v) The January 2015 Council meeting minutes recorded the grounds on which outline planning permission was granted:

(a) the history of development on the site;

(b) housing need;

(c) the location of the site between three roads and screened by an embankment;

(d) the potential reduction in anti-social behaviour; and

(e) similar residential planning applications having been permitted nearby.

Mr Murphy said these factors remained relevant to Application No.1 and should be afforded the same weight as previously when considering whether very special circumstances existed in favour of the proposed development. Given that the application was for less than 10 units, the question of a contribution to education did not arise.

(vi) The inclusion of the appeal site on the Council's latest Brownfield Land Register was an additional very special circumstance not previously considered by the Council.

(vii) The density of residential development on the other four nearby sites in the Green Belt that had been granted residential planning permission ranged from 5.7 dwellings per hectare to 31 dwellings per hectare. The proposed density of development on the appeal site was 13.43 dwellings per hectare which was greater than that of three of those sites.

(viii) Mr Lewis submitted there were no policy or planning reasons to justify the Council's statement that "it was important to maximise the usage of land that was suitable for housing development" or that "the proposal fails to make the maximum use of the green area." Application No.1 had to be considered on its merits and there were clear and persuasive planning reasons why a nine dwelling scheme, justified by very special circumstances, should be certified as appropriate alternative development. There was no sound planning reason for the Council's insistence on increasing the number of dwellings to "push it over the line" triggering the policy for the provision of affordable housing and a contribution towards education.

(ix) The Council were wrong to give the protection of the setting of the listed Thatched Cottage as a reason for its decision to restrict development to the green land. Mr Murphy said this issue did not feature in any of the reports to the Planning Committee concerning the 2014 outline planning application nor in the minutes of its meetings. The Council's Historic Buildings Advisor ("HBA") did not object to the outline application. The HBA commented on Application No.1 on 14 March 2018 and said:

> "In principle the erection of additional dwellings on this site is acceptable and presents an opportunity to improve the setting of both listed buildings as well as recreating a sense of place…
>
> For the purpose of this application … I can confirm that the erection of additional two-storey detached and semi-detached residential dwellings would be acceptable on this site subject to design and detail."

The HBA also considered Application Nos. 2 and 3 to be acceptable subject to design and detail. Mr Murphy noted that Application No.2 was closer to the Thatched Cottage than the proposed nine houses under Application No.1.

(x) The Council said that the proposal was designed to avoid the threshold for affordable housing and involved piecemeal development of the area bounded by a broken black line (see paragraph 27 above). Mr Murphy said that the appeal site could be developed on its own without prejudicing the development of the neighbouring sites of Application Nos. 2 and 3. Application No.1 should be considered on its planning merits and the Council had no adopted planning policy requiring adjacent sites to be assessed together when considering the application of affordable housing thresholds.

Discussion

85. There are several reasons why the appeal site is suitable for residential development:

(i) Outline planning permission was granted in 2015 for the development of part of the site for 14 houses;

(ii) It is a brownfield site having been used previously as a Council storage yard and comprising 60% by area of former highways land. It is included as a "permissioned" site of 0.5482 hectares[5] on the Council's Brownfield Land Register;

(iii) There is a significant shortfall in the Council's housing land supply;

(iv) The HBA accepted the proposed development in principle subject to design and detail. There were no objections from the other consultees apart from Highways Development Control who required further information;

(v) The appeal site is already bordered by major roads;

(vi) The proposed development would improve the appearance of the site and alleviate current problems of anti-social behaviour; and

(vii) There are four other Green Belt sites in the vicinity which have been granted residential planning permission.

86. Given the Council cannot demonstrate a five-year supply of deliverable housing sites, the presumption in favour of sustainable development under paragraph 11 of the 2019 NPPF applies (referred to as the tilted balance). In these circumstances the relevant development plan and other policies for determining the application are held to be out of date and planning permission should be granted unless either the application of policies in the NPPF that protect areas or assets of particular importance, such as land designated as Green Belt or a designated heritage asset,

[5] Planning application 14/00912/OUT states the site area as 0.72 hectares. Mr Murphy says that the appeal site measures 0.6658 hectares.

provides a clear reason for refusing the development proposed; or the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies of the NPPF as a whole (see paragraph 11(d)).

87. The appeal site is in the Green Belt where there must be very special circumstances ("VSC") to allow inappropriate development such as housing (NPPF section 13). In my opinion the suitability and deliverability[6] of the appeal site for residential development constitute VSC which mean the site's designation as Green Belt and the status of Thatched Cottage as a listed building do not provide a clear reason for refusal or outweigh the benefits of the proposal.

88. The Council considered that the VSC necessary to allow development on the appeal site were only engaged if there were an allocation of affordable houses and a contribution towards education. The Council said that this required a development of at least 11 houses on the appeal site or for the sites of the three CAAD applications to be considered together, i.e. a total of 12 houses. The Council thought the appellants, by reducing the proposed development on the appeal site to only nine houses, were trying to avoid the policies invoking the provision of affordable housing and developer contributions. Furthermore, reducing the size of the proposed development did not maximise the contribution of the appeal site to the shortage of housing land and "would serve only to dilute the VSC that was found to be acceptable in 2015."

89. I have no doubt that the CAAD application for a reduced number of houses to that contained in the 2015 planning permission and the appeal against the Council's decision that the construction of between 11 and 12 dwellings would be appropriate alternative development, was motivated, or primarily so, by a desire to avoid triggering the policy for affordable housing and/or a contribution towards education.

90. But the appellants did not avoid the Council's affordable housing policy CSTP2 by reducing the proposed development to nine units; that policy also applied to sites of 0.5 hectares or more irrespective of the number of dwellings. Mr Murphy said that policy CSTP2, which was adopted in 2011[7], was superseded by a written ministerial statement issued by the Department for Communities and Local Government on 28 November 2014. This said that sites of 10 units or less, and which have a maximum gross floor space of 1,000m^2, should not be subject to affordable housing and tariff style contributions. But the ministerial statement was itself superseded by the revised NPPF issued in July 2018 (as subsequently replaced in February 2019) and by the updated Planning Practice Guidance published in March 2019. Policy CSTP2, in referring to a site area of 0.5 hectares, is consistent with the revised framework and guidance.

91. Because the updated PPG was published after the hearing the appellants were invited to make further submissions and Mr Murphy provided a written response in early May 2019. He said paragraph 23 of the updated PPG was now consistent with paragraph 63 of the 2019 NPPF and "sets the relevant threshold for the provision of affordable housing at '*major developments.*'"

[6] As per the definition of "Deliverable" on page 66 of the Glossary in the 2019 NPPF.
[7] The policy was not amended in the amended version of the Local Development Framework adopted in January 2015.

Mr Murphy says that "major development" is defined in paragraph 2(1) of part 1 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended) ("DMPO"). Insofar as relevant that paragraph states:

> "'major development' means development involving any one or more of the following –
>
> …
>
> (c) the provision of dwellinghouses where –
>
> (i) the number of dwellinghouses to be provide is 10 or more; or
>
> (ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i);
>
> (d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more;
>
> …"

Mr Murphy continues:

> "The appropriate threshold for when planning obligations should not be sought from developers is now 'major developments'. For housing development, the NPPG paragraph 23 refers to a site area of 0.5 hectares or more and goes on to say or as otherwise provided in the DMPO."

92. I do not accept Mr Murphy's analysis. The relevant part of paragraph 23 of the updated PPG states:

> "For housing development, major development is defined in the National Planning Policy Framework[8] as development where 10 or more homes will be provided, or the site has an area of 0.5 hectares or more. For non-residential development it means additional floorspace of 1,000 square metres or more, or a site of 1 hectare or more, or as otherwise provided in the [DMPO]".

The full stop at the end of the first sentence constitutes a break and the expression "or as otherwise provided in the [DMPO]" does not refer to housing development. The reference to the DMPO only relates to non-residential development.

93. That the definition of major development in the DMPO is not deemed to be incorporated into the same definition in the NPPF is demonstrated by paragraph 16 of the earlier 2016 PPG:

> "*How does the 10-unit threshold relate to the statutory definition of major development?*
>
> For the purposes of section 106 obligations only the definition of 10-units or less applies. This is distinct from the definition of major development in article 2 of the [DMPO]."

[8] Glossary at page 66.

94. In my opinion, given the size of the appeal site, which Mr Murphy takes as 0.67 hectares, the proposed development is major development and the policies for affordable housing and developer contributions apply to the proposed development described in Application No.1.

95. Policy CSTP2 seeks to achieve "where viable" 35% affordable housing on all new housing developments. The NPPF expects 10% of the homes built in major developments to be available for affordable home ownership "as part of the overall affordable housing contribution from the site."[9] The Core Strategy acknowledges that the viability of redeveloping a brownfield site is "necessarily more challenging" than a green field site and states "where appropriate the Council will assess deliverability issues when considering particular residential proposals in the light of all relevant economic and market factors operative at the time." There was no evidence about the viability of the proposed development but the appellants entered into a unilateral undertaking in March 2015 in which they agreed to transfer five out of 14 residential units (35.7%) as affordable housing and to pay a contribution of £70,000 towards education. That is a strong indication that the viability of the development is not likely to be an issue bearing in mind that the policies apply pro rata to the size of the development.

96. The Council say that the development scheme contained in Application No. 1 is materially different to that which was granted planning permission in 2015. In my opinion the only significant differences are the number of houses proposed and their siting. The 2015 scheme comprised a thin linear development of mainly semi-detached houses fronting a cul-de-sac to the south leaving a large part of the site vacant between the proposed and existing houses. Ostensibly this part of the site was left undeveloped to protect the setting of Thatched Cottage, but the need for such a gap is not supported by the Council's HBA's comments in respect of Application No.1. I do not accept that only the area of land marked green on the Council's plan (which is drawn around the houses proposed under the 2015 planning permission) is suitable for residential development. To restrict the development in this way fails to maximise the design potential of the site while achieving no additional benefits in the protection of the setting of Thatched Cottage.

97. The green land, to which the Council would restrict development, includes land owned by Mr and Mrs Kirk at 2 Grays Corner Cottages and which does not form part of the appeal site. Excluding the development on such land reduces the number of units on that part of the green land that was also part of the appeal site from 14 to 11. I do not consider the difference between nine and 11 units to be material, particularly when the proposed development under Application No.1 provides a more varied layout and unit design.

98. I share the concerns of the HBA about the illustrative layout of the development of the appeal site that accompanied Application No.1, although some of the criticisms appear to have been resolved (or at least ameliorated) in the layout plan showing the redevelopment of all three CAAD application sites that appeared at page 188 of the trial bundle, e.g. the design of plot 6 has been improved by apparently reducing the size of plot 5. But there is still the problem, identified by Highways Development Control, of the access to plot 6 being directly onto the junction. This

[9] NPPF July 2018, paragraph 64.

would be an unacceptable arrangement. As I noted at the hearing the plan which accompanied Application No.1 does not show a turning head at either end of the cul-de-sac and is therefore a defective design. The combined application plan shows a turning head at the western end of the cul-de-sac but this is located on land owned by Mr and Mrs Kirk and therefore outside the control of the appellants.

99. Despite these concerns I consider that it should be possible to design a scheme on the appeal site that allows for its development by nine houses in compliance with relevant policies; but the illustrative plans which have been produced to date do not achieve this and would need to be revised.

100. I agree with Mr Murphy that the factors which the Council identified as contributing to the satisfaction of the very special circumstances test still apply to the proposal contained in Application No.1. Importantly, the affordable housing and developer contribution policies, contrary to Mr Murphy's opinion, are still applicable to the numerically smaller scheme since the site is larger than 0.5 hectares. I think the Council could sustain its policy of requiring 35% of affordable housing and a contribution towards education of £5,000 per unit. That would mean three of the proposed nine houses would have to be made available for affordable housing and a contribution of £45,000 towards education would be required.

101. In my opinion the factors I have identified in paragraph 85 above, taken collectively and in consideration of relevant policy, support the principle of residential development on the appeal site and constitute very special circumstances. Planning permission for the proposed development of nine houses could reasonably have been expected to be granted.

102. Mr Lewis's submissions about piecemeal development are nugatory in the light of my finding that the affordable housing and developer contribution policies will apply independently to the proposed development of the appeal site even though the number of houses has been reduced from 14 to nine.

Determination

103. I allow the appeal and vary the section 17 certificate issued by the Council on 30 April 2018 as shown in the revised certificate in Appendix A.

104. Section 17(10) of the 1961 Act provides that in assessing the compensation payable to the appellants, there must be taken into account any expenses reasonably incurred by them in connection with the issue of a certificate under section 17, including expenses incurred in connection with an appeal under section 18 where, as here, any of the issues are determined in their favour.

105. I therefore direct that the appellants' expenses reasonably incurred with the section 17 application and the appeal are to be taken into account as part of the compensation by the acquiring authority as yet to be agreed or determined.

Dated: 20 June 2019

A J Trott FRICS

Member, Upper Tribunal (Lands Chamber)

APPENDIX A

LAND COMPENSATION ACT 1961

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND AND PREMISES SOUTH OF THATCHED COTTAGE AND 1 GRAYS CORNER COTTAGES, BAKER STREET, ORSETT, ESSEX, RM16 3LJ

PURSUANT to the Tribunal's powers under section 18 of the Land Compensation Act 1961 and for the reasons in the Tribunal's decision dated 17 June 2019:

(1) The certificate under section 17 of the Land Compensation Act 1961 by Thurrock Council on 30 April 2018 IS VARIED

(2) IT IS CERTIFIED that if the said land had not been proposed to be acquired by Highways England Company Limited using compulsory purchase powers, planning permission could reasonably have been expected to be granted for development of the following descriptions:

A. Use of a paddock
B. Use as amenity space in association with the residential usage of the Thatched Cottage

in both cases subject to the conditions contained in the Council's certificate dated 30 April 2018

C. The construction of nine dwelling houses subject to the following conditions:

1. The dwelling houses shall be either detached or semi-detached

2. Conditions 2 to 4 inclusive of paragraph C of the Council's certificate dated 30 April 2018

3. Three of the dwellings shall be affordable or an equivalent commuted payment shall be made

4. Conditions 6, 8 and 9 inclusive of paragraph C of the Council's certificate dated 30 April 2018

5. A vehicle turning head shall be provided at both ends of the cul-de-sac

A planning obligation would be required to secure (i) the affordable housing, or a commuted sum for off-site provision in lieu: and (ii) an education contribution of £45,000.
