Neutral Citation Number: [2023] EWHC 2919 (Admin)

Case No: CO/1648/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of TATIANA MILNE-SKILLMAN)

Claimant

and

HORSHAM DISTRICT COUNCIL

Defendant

and

KINGSWOOD VILLAGE LIMITED

Interested Party

- -
- -

Mr Richard Harwood KC (instructed by **David Cooper & Co**) for the **Claimant**
Mr James Neill (instructed by **Horsham District Council**) for the **Defendant**
The Interested Party did not attend and **was not represented**

Hearing date: **24 October 2023**

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APPROVED JUDGMENT

Mrs Justice Lieven DBE :

1. This case concerns a challenge to Horsham District Council's ("the Council") decision to make a 'non-material' amendment under s.96A Town and Country Planning Act 1990 ("TCPA") to an outline planning permission for employment development at Brinsbury Fields, Brinsbury College, Pulborough ("the site"). The amendment was to delete the requirement in Condition 1 of the outline planning permission to develop in accordance with the landscape master plan, parameters plan and proposed plot layout plan. The Claimant lives in close proximity to the site and is accepted to have locus in the proceedings.

2. The issue in the case is whether the removal of those plans from the Condition was a non-material amendment for the purposes of s.96A TCPA.

3. The Claimant was represented by Richard Harwood KC, and the Defendant was represented by James Neill. The Interested Party did not attend and was not represented.

4. The Grounds of challenge advanced by the Claimant are:

    (i) the Council misinterpreted the outline planning permission if it considered that Condition 1 did not require compliance with the parameters and landscape plans and, subject to a potential correction (the wrong revision being listed), the layout plan;

    (ii) the Council made an error of law in considering that a perceived 'error' in a planning permission could justify a s.96A variation when the only relevant question is what is the effect of the proposed change?

    (iii) the Council made an error of law in considering that a condition on an outline planning permission cannot require compliance with a landscape masterplan, parameters plan or layout plan;

(iv) the Council made an error considering that the inclusion of the landscape, parameters and layout plans in Condition 1 was an error;

(v) the Council failed to consider, or misunderstood, the effect of the proposed change, which is to lift the footprint and floorspace limits in the outline planning permission.

5. As is so often the case, the Grounds are in reality different ways of advancing the same issue, namely the meaning and effect of Condition 1 and the scope of s.96A TCPA.

6. Permission to apply for judicial review was granted by Lang J on the papers.

The facts

7. The site is 6.8 hectares of open, undeveloped agricultural land to the east side of the A29 Stane Street, approximately 500m north of Brinsbury College and south of the small settlement of Adversane. The area is rural in character and in open countryside. A concurrent application was submitted for the development of the southern half of the field with car showrooms, workshops and commercial units under DC/16/2963.

8. In the outline planning application the development was described as:

> *"Outline planning permission (with all matters reserved except for access from Stane Street (A29)) for up to 6 commercial buildings comprising a mix of B1, B2 and B8 Use Classes."*

9. The application form had left at '0' all of the entries for the floorspace proposal. The Design and Access Statement included a similar version of the layout plan referred to in Condition 1, with the same building footprint and plot size figures. The Planning and Heritage Statement said at para 4.2.1:

> *"Whilst the application is for Outline approval, the application is accompanied by an indicative layout and masterplan which illustrate*

> *how the site could come forward based on a six unit scheme (Figure 6) and how the proposal has been designed to link with the adjacent proposed Harwoods Group development. This quantum of development is considered to be acceptable …"*

10. The statement included an Illustrative Masterplan with plot and unit sizes and the rectangular blocks of the six buildings. It also said at paragraph 4.4.1:

> *"A landscape masterplan has been produced and which encompasses both the application site and the Harwoods Group site to the south, and demonstrates that the proposals have been landscape led and incorporate planting within the site and along the boundaries together with SuDS features integrated into the landscape design."*

11. An Environmental Impact Assessment ("EIA") screening opinion was adopted, which concluded that EIA screening was required for the application site, but that there was no likely significant effect on the environment and so EIA was not required.

12. The committee report on the outline application dated 17 October 2017 included in the description of development 'up to a maximum combined floor area of 14,068sqm', however this figure was not included in the later decision notice. The report explained that officers had sought to restrict the quantum of the development at para 1.3:

> *"The indicative site layout and parameters plan details six units set either side of a central access road, with each building varying in size from 1,500sqm to 3,700sqm in size and 7- 8m in height. Whilst this application is in outline a number of concerns were raised by officers relating to the extent of development across the site. To seek to address this the applicants amended the indicative layout to re-order the position of the 6 units, reduce the size of one of the units by 1,145sqm, increase the landscape buffer to the A29 to 35m, reduce the indicative degree of hard surfacing within the site, and include a footpath link to the adjacent development site under consideration to the south."*

13. The floorspace total was also referred to in paras 6.2, 6.32 and 6.70. Para 6.32 said:

> *"The final layout, scale, appearance and landscaping of the development are reserved matters however a parameters plan, indicative site layout plan and indicative landscape masterplan encompassing both this site and the concurrent full application site on the southern half of the field has been submitted. The plans show that the proposed development as submitted would consume the majority of the 6.8ha site with hardstandings and built structures, interspersed with grass and tree planting between plots, along the access road, and as buffers on all sides of the site. The parameters and indicative layout plans detail the six units would have a total footprint of up to 14,068sqm (21% of the site) with the frontmost two units up to 7m in height to ridge and the rearmost four units up to 7- 8m in height."*

14. There are frequent references in the Officer's Report to the plans being illustrative or indicative. There is a tension in the Officer's Report between the clear acknowledgement that the application is in outline, with all matters reserved except for access, and the reference to precise floor spaces and layouts for landscaping as part of the argument for why the development was acceptable. The level of floorspace was relevant to the asserted employment benefits of the proposal, and the layout and landscaping was relevant to the acceptability of the proposal in terms of impact on the countryside.

15. Planning permission was granted on 26th January 2018 for:

> *"Outline planning permission (with all matters reserved except for access from Stane Street (A29)) for up to 6 commercial buildings comprising a mix of B1, B2 and B8 Use Classes …*
>
> *to be carried out in accordance with Application No. DC/17/0177 submitted to the Council on 31/01/2017 and subject to compliance with the plans/documents and conditions specified hereunder."*

16. 32 conditions were applied to the permission. Condition 1 was:

"1. Plans Condition: The development hereby permitted shall be carried out in accordance with the approved plans listed in the schedule below.

Schedule of plans/documents:

Plan Type	Description	Drawing Number	Received Date
Details plan	Landscape master plan	LLD1047/02	27.01.2017
Layout plan	Parameters plan	P105 P1	12.09.2017
Layout plan	Proposed plot layout	P104 P4	27.01.2017
Location plan		P110	27.01.2017
Location plan	Site location	P111	27.01.2017

Reason: For the avoidance of doubt and in the interest of proper planning."

17. The Landscape Masterplan Strategy was drawn to a scale of 1:500@A0 and indicated building footprints, hard and soft landscaping areas with details such as:

"Proposed - Native Tree Planting (Standard Select) (Standard) 10 -12 cm girth size; Standard (Select) Nursery Stock. 08 -10 cm girth size; Standard Nursery Stock"

18. The Parameters Layout and Sketch Views plan was drawn at 1:2000@A3. It showed the footprint of six dual pitched buildings with maximum ridge heights of 7 or 7-8

metres; along with some indicated planting, a building line set back from the road and sketch drawings. Notably one of the frontage buildings was limited to a maximum height of 7m, whereas all the other buildings had the somewhat confusing legend of maximum height 7-8m.

19. The Proposed Plot Layout plan rev P4 (1:1250@A3) shows the six units in block form, with floorspaces and uses for each building. Plot sizes are indicated, with roadways, operational hardstanding and car parking areas shown.

20. There is undoubtedly an inconsistency between the plans that were attached to Condition 1. The building footprint locations, shape and size differ distinctly between the parameters (and landscape masterplan) and plot layout plan P4. In particular, units 1, 4 and 6 are different sizes and unit 6 is positioned further away from the A29 on the northern boundary in the parameters plan. There is a later plot layout plan in the application documents (P104 P7) which matches the footprints on the parameters plan and landscape masterplan. Revision P4 bears a later date than P7 on the drawing itself (which may explain the Condition) although the revisions are set out in sequence. It can be seen from this that neither the developer nor the Council carried out a thorough review of the documentation at the point that the permission was granted.

21. The next two Conditions, the first of which was misnumbered as ‘1’ read, as relevant:

> *“1.*
>
> *a) Approval of the details of the layout of the development, the scale of each building, the appearance of each building, and the landscaping of the development (hereinafter called "the reserved matters") shall be obtained from the Local Planning Authority in writing before the relevant phase of the development is commenced.*

> *b) Plans and particulars of the reserved matters referred to in condition (a) above, relating to the layout of the development, the scale of each building, the appearance of each building, and the landscaping of the development, shall be submitted in writing to the Local Planning Authority and shall be carried out as approved.*
>
> *...*
>
> *Reason: To enable the Local Planning Authority to control the development in detail and to comply with Section 92 of the Town and Country Planning Act 1990.*
>
> *3. The submission of reserved matters applications pursuant to this Outline application shall demonstrate compliance with the following Parameter Plans submitted as part of the Outline application to fix the development principles:*
>
> *- Red Line Boundary (Drawing No. P110);*
>
> *- Parameters Layout- building heights only (Drawing No. P105 REV P1);*
>
> *Reason: To enable the Local Planning Authority to control the development in detail in accordance with the NPPF."*

22. Condition 4 provided for the later submission and approval of a phasing plan. Condition 13 required full details of hard and soft landscaping works within a Phase to be approved 'within the relevant Reserved Matters application'. These would have to accord with parts of the Preliminary Ecological Appraisal.

23. A reserved matters application was submitted on 24 December 2020, which the accompanying Planning Statement said aligned with the 'approved parameters plan' and the 'approved proposed plot layout plan (ref: 104 P7) and Landscape Masterplan Strategy' (para 2.9 and 2.11 respectively). HGH Consulting ("HGH") for the Claimant told the Council that the reserved matters drawings departed so far from the outline permission drawings that they were invalid. The reserved matters application has not been determined.

The non-material variation application

24. An application for a 'non-material variation' of the planning permission was made by Kingswood Village Limited on 15 August 2022 for 'Non-material amendment to Conditions 1, 2 and 13 to clarify plans and reflect the status as on the outline permission.' The proposed change to Condition 13 was subsequently dropped.

25. The officer 'assessment sheet' said:

> *"In ongoing consideration of Reserved Matters application DC/20/2596, it has arisen that there are anomalies in conditions 1 (Approved Plans) and 1 (Reserved Matters)."*

26. It noted an objection submitted on behalf of the Claimant by HGH. The officer planning assessment was as follows:

> *"PLANNING ASSESSMENT*
>
> *The main consideration of this application is whether the proposed alterations can be considered as non-material amendment to the approved scheme in accordance with Section 96A of the Town and Country Planning Act 1990 (as inserted by S190 of the Planning Act 2008). The discretion rests with the Council to decide to whether the revisions would constitute a non-material amendment to a planning permission, which would not take it outside the scope of the original permission.*
>
> *Condition 1 (Approved Plans)*
>
> *The application was outline, with Access only, with all other matters reserved. It is clear from reading the development description and all accompanying documents that the inclusion of the landscape masterplan, parameters plan and layout plan within condition 1 is inconsistent with this. It is also inconsistent with condition 1 (now 2) and condition 3. When reading the permission as a whole, a common sense reader would arrive at the conclusion that these plans were included in condition 1 clearly in error. Any residual ambiguity a reader may have is resolved by referring to the wider documentation with the application which at no point claims these documents are final for approval at this stage of the two-stage planning process.*

The requested amendment to the plans listed would therefore reflect the outline status of the application, the other conditions on the planning consent, and all other documentation submitted. Therefore, the effect of the proposed change on the planning permission as originally granted to exclude reference to the Landscape Master Plan LLD1047/02 (Received 27.01.2017), Parameters Plan P105 P1 (Received 12.09.2017), and Proposed Plot Layout P104 P4 (Received 27.02.2017) from the approved plans list, would be non-material as it simply clarifies the permission granted is Outline.

The comments from HGH Consulting have been carefully considered however s.96A expressly allows for conditions on a planning permission to be amended, as directly referred to above. This inevitably and purposefully allows for non-material amendments to be made to a planning notice. In this regard the argument that the Council cannot make a non-material amendment to a planning decision is unfounded.

Condition 1 (Reserved Matters)

This condition is mis-numbered as a second condition 1. The effect of the proposed change on the planning permission as originally granted to the requested amendment for the condition to be re-numbered as Condition 2 would be non-material as it is simply corrects an administrative error.

Conclusion

It is considered for the reasons given above that the proposed amendments are considered non-material under Section 96A of the Town and Country Planning Act 1990."

27. The decision notice was issued on 9 March 2023. This amended Condition 1 to read:

"1. Plans Condition: The development hereby permitted shall be carried out in accordance with the approved plans listed in the schedule below.

Schedule of plans/documents:

Plan Type	Description	Drawing Number	Received Date

Location plan		P110	27.01.2017
Location plan	Site location	P111	27.01.2017

Reason: For the avoidance of doubt and in the interest of proper planning."

28. It also renumbered the second Condition '1' as '2'.

The Law

Section 96 Town and Country Planning Act 1990

29. Section 96A TCPA provides for a power to make non-material changes to planning permissions or permission in principle. It states (so far as is material):

> *(1) A local planning authority may make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material.*
>
> *(2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission or permission in principle as originally granted.*
>
> *(3) The power conferred by subsection (1) includes power to make a change to a planning permission—*
>
> *(a) to impose new conditions;*
>
> *(b) to remove or alter existing conditions.*

30. The question of whether the amendment of a planning permission amounts to a non-material amendment is a matter of planning judgement subject to challenge on normal

judicial review principles, including *Wednesbury* irrationality (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 22); *Swire v Canterbury City Council* [2022] EWHC 390 (Admin) at [123].

31. An outline planning permission may, and invariably is, granted subject to a condition specifying reserved matters for subsequent approval. Conditions on outline permissions frequently refer to the proposal or development being carried out in accordance with the submitted applications and plans, see *R v Newbury DC ex p Chieveley Parish Council* [1999] PLCR 51 at [60]. The precise relationship between the plans referred to in the outline permission and the reserved matters varies on the facts of the different cases. In EIA development it is common to have a condition referring to parameter plans and an indicative master plan so that the details to be approved remain within the scope of the likely significant environmental effects assessed for the project, see *Swire v Canterbury City Council* [2022] EWHC 390 (Admin) at [12] and the reference to *R v Rochdale MBC ex p Milne (No 2)* [2001] Env LR22. In *R (Village Concerns) v Wealden DC* [2022] EWHC 2039 Dove J held, on the facts of that case, that a condition on an outline planning permission could specify a given quantum of development.

32. In *Swire* an outline planning permission contained conditions which required development to be 'in accordance with' or to 'accord with' approved parameters plans (Conditions 6, 8, 9, 10 – see [36-37], [55-56] and Annex). These parameter plans included land use, building heights and building densities, and open space, [45] and [48]. Holgate J addressed the meaning of ' in accordance with' at [42];

> *"42. The degree of conformity required by condition 6 depends upon a combination of interrelated factors: the meaning and effect of the words "in accordance with", the nature of the parameter plans to which*

> *condition 6 relates, and how condition 6 sits with other conditions of the OPP. ...*
>
> *43. The phrase "in accordance with" in condition 6 means "in agreement or harmony with; in conformity to; according to" (Oxford English Dictionary). The dictionary examples given show that a draftsman of a planning permission may go further by adding language so that, for example, the development must be carried out "exactly" or "strictly" in accordance with particular plans. The natural meaning of the phrase "in accordance with", taken by itself, does not connote that degree of conformity ...*
>
> *...*
>
> *60. ... the phrase "in accordance with", along with the references to the principles of the parameter plans, also make it clear that the permission does not require rigid adherence to those plans, particularly where the plans are schematic or diagrammatic in nature."*

33. The Supreme Court in *London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33 confirmed the following general principles applicable to the interpretation of a planning permission (by reference to *Trump International Golf Club Ltd v Scottish Ministers* [2015] UKSC 74):

> a. *"When construing the interpretation of words in a condition in a public document, the court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense" (at [16];*
>
> b. *"Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved ... It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively*

> *cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission … But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation." (at 18) (underlying added).*

34. The "well established rules" referred to in the paragraph above include the rules set out in *R v Ashford Borough Council, ex parte Shepway District Council* [1999] PLCR 12 at [19]. In summary they are:

a. *"the general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions"*

b. *Secondly, it is not appropriate to refer to the planning application itself and other extrinsic evidence "unless the application is incorporated into the permission by reference. In that situation the application is treated as having become part of the permission. The reason for not normally having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application";*

c. *"For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as " … in accordance with the plans and application" or " … on the terms of the application … ," and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted"*

d. *Fifth, "[if] a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue.".*

35. It is permissible to correct an error in a condition by way of construction: see, for example, *Newark and Sherwood District Council v Secretary of State for Communities and Local Government* [2013] EWHC 2162 (Admin) at [90].

36. Where an inconsistency arises between the terms of the permission granted and a condition, it is permissible to look at other extraneous material to assist in resolving that inconsistency: *Newark* at [86].

37. General principles of construction fall to be considered when construing a planning permission: see *Newark* at [18]. In appropriate circumstances, it is permissible to read documentary provisions as being subject to addition, omission or even substitution.

38. Mr Neill relies on caselaw, as set out below, concerning mistakes in contractual documents. Although this caselaw may be of some relevance, it needs to be treated with caution given the impact on third party rights from the grant of a planning permission, as opposed to the private nature of a contractual agreement. In particular, the intention of the parties is much less likely to be relevant in construing a planning permission than it is in the construction of a contract.

39. As regards a contractual document, where there is a mistake, rectification may not be necessary and in certain circumstances the mistake can be dealt with by way of construction: Chitty on Contracts (31st edn) Vol 1 [5-113], citing Brightman LJ in *East v Pantiles Plant Hire Ltd* (1982) EGLR 111 at [112]:

> *"It is clear on the authorities that a mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake."*

40. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, Lord Hoffmann (at 1114 [22] to [25]) cited and approved this passage in *East*, subject to two qualifications: first, that correction of mistake by construction is just part of a single task of interpreting the agreement in context, in order to get as close as possible to the meaning which the parties intended. Secondly, in deciding whether there is a clear mistake, the court is not confined to reading the "face of the instrument", without regard to the background and context, which must always be taken into consideration. He went on to state that:

> *"… there is no limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."*

The submissions

41. Mr Harwood submits that the Council erred in law in holding that the plans were included in Condition 1 "in error"; that the Condition should be read as if the plans were not included; and therefore that it was not a non-material amendment to remove them.

42. He submits that the natural and ordinary meaning of Condition 1 is that the development should be carried out in accordance with the listed plans. He relies on *Swire* for the proposition that "in accordance with" does not have to mean in strict accordance with. Therefore, there is a difference in effect between Condition 1 and Condition 3, the latter being more specific.

43. He accepts that there were inconsistencies in the plans but says that does not mean that Condition 1 is a nullity or unenforceable. In respect to the inconsistency between

the plans only does he accept that there is some ambiguity in the permission. However, he submits that it is not lawful to use s.96A simply because there is some ambiguity in terms of which plan applies.

44. He relies on *Swire* for the proposition that "in accordance with" can be interpreted broadly and take its precise meaning from the context and does not necessarily mean in strict conformity with the relevant plans.

45. Mr Neill, on behalf of the Council, submits that the outline planning permission should be read as not requiring compliance with the three plans. The inclusion of the plans was clearly "in error", and as such it can be corrected by construction of the permission, see *Newark* at [90]. There was a clear error and it can be addressed by construction of the permission to not require conformity with the plans. Therefore s.96A was not material because the plans did not need to be followed as a matter of construction.

46. He relies heavily on the terms of the permission and its reference to all matters being reserved, save for access. Condition 1 does not impose restrictions on the scope of the reserved matters, but rather purports to require compliance with the plans for the purposes of "the development." In oral submissions he placed considerable reliance on the use of the word "development" in Condition 1, as opposed to "reserved matters" in Condition 3. He also submits that the language of Conditions 1 and 3 does not make sense if Condition 1 requires the development to be in accordance with the three plans. Condition 3 is the only condition where the Council consciously imposed a constraint on the scope of the reserved matters application. Therefore, he submits, Condition 1 purports to go outside the scope of the outline permission.

47. He did accept in oral argument that the Council's case involved a "fairly radical re-interpretation" of the condition but submitted that was allowable under the caselaw.

Conclusions

48. The key issue in this case is to establish the meaning and effect of Condition 1. In order to do that exercise I need to apply the principles set out in *Trump* and consider the natural and ordinary meaning of the words, the purpose of the consent, any other conditions and common sense. I also have to have in mind that this is a public document, with impacts on third parties and the broader public interest.

49. On the face of Condition 1 it is clear what it means. The development has to be carried out in accordance with various plans. That is not difficult, and it is perfectly possible. There is some inconsistency between those plans, particularly in respect of how far set back are the frontage buildings. However, such inconsistencies are not themselves unusual, and it seems reasonably clear that the layout plan P4 should have been superseded with P7.

50. There is a clear tension between Condition 1, and the permission stating that all matters save access are reserved, and to a lesser degree with the terms of Condition 3. However, it is in my view a very long step from accepting that there is such a tension, and finding that Condition 1, save the reference to the location plan, is of no effect and can be excised under s.96A.

51. I note that the developer did not suggest, when the permission was granted, that there was any error within it, nor did they seek to appeal. Further, they have not sought subsequently to vary the condition under s.73 TCPA, which would be the normal procedure if they wished to develop without reference to the plans. Nor does either

the developer or the Council argue that the condition is a nullity, or on its face unenforceable. It plainly has a meaning and is capable of being enforced.

52. I do accept that the tension between the different parts of the permission means that there is ambiguity within the meaning of *Shepway* and it is therefore legitimate to have regard to extrinsic material. The relevant extrinsic material here is the application, but also the officer's report. The latter is relevant because even if the application indicates that the plans were intended only to be illustrative, the Council may still have intended to give them legal effect through the mechanism of Condition 1.

53. Mr Neill is correct that the application, and its accompanying documents, refer to an outline application, and the layout plan has a note "detailed layout to be secured as part of future reserved matters application(s)".

54. The officer's report shows, in my view, some rather muddled thinking. The opening paragraph refers to all matters save access being reserved. However, immediately after that paragraph it states:

> *"1.3. The indicative site layout and parameters plan details six units either side of a central access road, with each building varying in size from 1,500sqm to 3,700sqm in size and 7-8m in height. Whilst this application is in outline a number of concerns were raised by officers relating to the extent of development across the site. To seek to address this the applicants amended the indicative layout to re-order the position of the 6 units, reduce the size of one of the units by 1,145sqm, increase the landscape buffer to the A29 to 35m, reduce the indicative degree of hard surfacing within the site, and include a footpath link to the adjacent development site under construction to the south."*

55. In the conclusions section of the report the benefits are justified, inter alia, on the basis of up to 14000m2 of employment floorspace, a figure which can only have

come from the layout plan. In the overall balance at paragraph 6.71, very specific reference is made to the mitigation in respect of visual impact. This can again only be a reference to pulling back the buildings from the site boundary on the A29, and the restricted heights of the buildings, as shown on the disputed plans.

56. In my view the members reading the officer's report (or the commonsense reader) would have considered that those parameters were being fixed, at least in broad terms, otherwise they could not have placed any reliance on the "mitigation", which was being advanced as critical to the planning balance. It could be said that this was simply a reference to what could be achieved at reserved matters stage. However, a fair reading of the report suggests fixed parameters rather than simply what might be agreed in the future.

57. Reverting to the construction of the words of Condition 1, I take from *Swire*, that "in accordance with….", can to some degree take its meaning from its context. Mr Neill is correct that the relevant conditions in *Swire* vary between one which relates to the reserved matters and one which fixes the outline, but I do not read Holgate J's judgment as suggesting that such precise differences will necessarily be determinative. It would have been much clearer if Condition 1 had said "in broad or general accordance with ….", but it is often the case that permissions could be more clearly written with the benefit of hindsight. Equally, it should probably have said "Reserved matters should be submitted to be in broad or general accordance with….". However, I do not give the weight to the use of the word "development" rather than "reserved matters" that Mr Neill urges.

58. Mr Neill relies heavily on the inconsistency between the plans referred to, but that accepted inconsistency does not in itself form a basis for using s.96A to delete all the

relevant plans. Such an approach does not accord with the natural reading of the Condition itself.

59. For these reasons I find for the Claimant on Ground One - that the Council erred in law by misinterpreting the outline planning permission. It was wrong to consider that Condition 1 did not require compliance with the plans referred to. The effect of this error was that the deletion of the plans was a material change and the use of s.96A was itself unlawful. It is not necessary to formally determine the other Grounds, which are merely different ways of analysing the same issue.