Neutral Citation Number: [2018] EWHC 2102 (Admin)

Case No: CO/7/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (Planning)

Date: 08/08/2018

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

THE QUEEN **(on the application of John Matthews and Mary Urmston)**	**Claimants**
- and -	
CITY OF YORK COUNCIL	**Defendant**
-and-	
OCTOPUS HEALTHCARE DEVELOPMENTS LIMITED	**Interested Party**

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Mr Killian Garvey and Mr Jonathan Easton (instructed by **Walton & Co (Planning Lawyers) Limited**) for the **Claimants**
Mr Ian Ponter (instructed by **City of York Council Legal and Governance**) for the **Defendant**
Mr John Barrett (instructed by **Walker Morris LLP**) for the **Interested Party**

Hearing dates: 16 and 20 July 2018

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Approved Judgment

Her Honour Judge Belcher :

1. In this matter the Claimants challenge the Defendant's decision dated 21/11/17 to grant planning permission (the "2017 Permission") to the Interested Party for the demolition of an existing care home and the erection of a new 64-bedroom care home with car parking and landscaping on land at 1 Fordlands Road, York (the "Site"). The existing care home on the Site was closed in 2012 and had provision for 31 beds. The Claimants each owns property close to the Site and are affected by the proposed development.

2. The Statement of Facts and Grounds ("SFG") contains 5 Grounds of Challenge. The first two Grounds relate to the First Claimant only. On 7/02/18 HHJ M Raeside QC granted permission to bring these proceedings, giving permission to the First Claimant on all Grounds, and to the Second Claimant on Grounds 3 to 5. Ground 3 is no longer pursued.

3. Unfortunately, Mr Garvey was unable to attend on the second day of the hearing. This case was originally listed for 16 and 17 July. Unfortunately, I was unwell and the case did not proceed on 17 July. On enquiries being made as to suitable dates when all three Counsel were available and when the matter could be listed in front of me, it became clear that the matter was unlikely to resume until September. I then received a message to say that the parties could return on 20 July. It was only on 20 July that I discovered that Mr Easton was covering the case on behalf of Mr Garvey, and I am very grateful to Mr Easton for standing in in that way, and for his assistance in the case.

4. References in this Judgment to the Trial Bundle will be by Tab number followed by the page number, for example [8/104].

Ground 1: The First Claimant had a Legitimate Expectation of being notified about the date of the Planning Committee meeting, and this was breached.

5. The planning application was validated by the Defendant on 11/08/17. The First Claimant filed objections on 07/09/17 [2/54] objecting to the proposed name for the new home and alleging that insufficient car parking was provided to service the development. The Second Claimant filed objections on 26/10/17 [12/349-354] on a number of issues including harm to heritage assets, flooding issues, inadequate sequential test, the presence of bats, and highway safety and parking. She too asserted that the proposed parking provision within the development was inadequate. The Defendant's position is that by email dated 9/11/17, all objectors were notified of the date of the planning meeting. Mr Matthews denies having received that email.

6. The Council's Statement of Community Involvement ("SCI") dated December 2007 includes the following:

> "Being Involved at the Planning Committee
>
> 10.10 If you have commented on an application being considered by the Area or Main Planning Committee, the Council will advise you about the time and place of the meeting. The dates of the meeting are also available on the

> Council's website (www.york.gov.uk), and are displayed on the Notice Board outside the Guildhall. ……" [1/33]

7. There is no dispute in this case that Mr Matthews, having filed written objections, had a legitimate expectation of being notified about the date of the Planning Committee meeting. Mr Matthew's evidence is that he received no communication from the Council between 26 September and 21 November, when he received the decision notice. He states that he has checked his emails thoroughly (including junk files) and can find no record of an email of 9/11/17 from the Council, and nor did he receive such an email and delete it. He states that had he known about the meeting, he would have taken the opportunity to speak to the Committee Members against the scheme, and that he is significantly prejudiced as a result of being deprived of this opportunity to address members who would have been able to consider his objections following his oral presentation [12/497: Witness Statement of John Matthews: paragraphs 6-8].

8. The Defendant's position is that Mr Matthews was duly notified of the Planning Committee meeting. In her Witness Statement, Rachel Smith, a Development Management Officer at the Council, and the case officer in relation to the planning application leading to the 2017 Permission, states that the Council's computer system shows that on 9 November 2017, seven emails were sent, (six to the objectors, and one to the developer's agent), advising them of the Planning Committee meeting [12/157: paragraph 4]. She produces screenshots from the Council's computer system as evidence of that fact. At [12/206] is a screenshot showing that the document OBJPT (the letter advising objectors of the committee date and site visit) was sent to 6 recipients on 9/11/17. There is a further document AGTPT sent on the same date, which Mr Ponter advised me means that the relevant letter was sent to the agent rather than to an objector.

9. The Council does not keep copies of all emails sent as to do so would overload the data storage capacity. Accordingly, the system only holds the data (date of meeting and address) that was inserted within the standard notification letter template [12/157: Witness Statement of Rachel Smith, paragraph 5]. Mr Garvey submitted that the Claimant's evidence is quite clear that he was not notified, and that the Defendant's evidence to the contrary is unsatisfactory. He submitted that the screenshots do not provide full information as to what was sent and to whom. He pointed to the fact that no one from the Council is saying "I sent the email, and here it is". He submitted there is no evidence that the email was in fact sent and that at best the court is looking at an internal automated system saying that it appears to have been sent.

10. There is no dispute that Fulford Parish Council did receive the email of 9/11/17 notifying them of the Planning Committee meeting. Mrs Urmston confirmed that on the first day of the hearing. Mr Garvey pointed to the fact that in the screenshot at [12/203A], there is a tick box column headed "In Error", which has a tick against the email of 9/11/17 to Fulford Parish Council, but not for any of the others, and yet Fulford Parish Council did receive its email. He submitted that the Council's evidence is far from satisfactory, and that I should accept the clear evidence from Mr Matthews that he was not notified, and that he has checked his email, including junk folders.

11. In between the first day of the hearing on Monday 16 July, and the second day of the hearing on Friday 20 July, a Witness Statement of Mr Eamonn Keogh dated 18 July

2018 was filed and served on behalf of the Interested Party. Mr Keogh is the planning agent for the Interested Party. There was no objection to the introduction of this further evidence at that stage. In his Witness Statement Mr Keogh confirms that he received an email from the Council timed at 10:26 on 9 November 2017. The email is exhibited to his Witness Statement and simply reads "Please See Attached". He confirms that 'the attached' was a letter, also exhibited to his Witness Statement, advising him of the time and place of the Planning Committee meeting. In addition, Mrs Urmston attended the second day of the hearing with a copy of the similar email and letter which were received by Fulford Parish Council. The email to Fulford Parish Council is timed at 10.28 on 9 November 2018. It is noteworthy that the sent times recorded on each of those emails corresponds with the times ascribed to those emails on the Council's system [12/206A]. Whilst there is no dispute that Mrs Urmston was notified of the Planning Committee meeting and indeed attended it, there is no evidence either way as to whether she personally received the email of the 9 November which, according to the Council's automated system, was sent to her. The email which she produced to show that the documents had been served on the Fulford Parish Council, includes an email from the Clerk of the Parish Council forwarding it to members including Mrs Urmston. At the very least she was notified via the Parish Council. However, she has never asserted in evidence that she was not notified personally.

12. One of the points that Mr Garvey sought to make to persuade the court that Mr Matthews' evidence on this point ought to prevail over the evidence of an automated system, was that the Council had failed to adduce any evidence that any of the alleged recipients of the seven emails sent to objectors on 9/11/17 had been received. This is a point he made in his Reply to the Defendant's Summary Grounds of Resistance ("SGR") and the Interested Party's Summary Grounds ("SG"). Plainly this point has fallen away. Nor do I attach any significance to the tick in the "in Error" column on [12/203A], given that I now have evidence that 1 of the 7 e-mails was received by someone other than Fulford Parish Council.

13. Mr Ponter, for the Defendant, submitted that the court now has clear evidence that two of the emails were sent and received, namely those to the Parish Council and to Mr Keogh. Leaving aside Mr Matthews, of the other four recipients, none has complained to the Council that he or she was not notified of the meeting. In those circumstances, Mr Ponter submitted that the preponderance of the evidence is that all seven emails were sent and received. He reminded me that Mr Matthews accepts receiving the email from the Council sent to the same email address on 21/11/17 and which is the first entry at [12/203A]. Mr Barrett, on behalf of the Interested Party, pointed to Mr Matthews' Witness Statement which confirms receipt of emails from the Council to the same email address both before and after 9/11/17 (Witness Statement of John Matthews: [12/497], paragraphs 5 and 6).

14. Mr Ponter invited me to find on the evidence that the email was duly sent to Mr Matthews. Mr Barrett went further and submitted that I should find not just that it was sent, but also that it was received by Mr Matthews. I have no hesitation at all in finding that the email of 9/11/17 with attached letter giving details of the date and place of the Planning Committee Meeting was duly sent by the Council to Mr Matthews. It does seem very surprising that Mr Matthews received all the other emails sent by the Council, but allegedly not the email of 9/11/17. On the other hand,

Mr Matthews evidence is clear that he did not receive it, and that he has checked junk mail folders, and that he did not receive the email but delete it. That evidence is not necessarily inconsistent with my finding that the email was duly sent.

15. I asked Mr Ponter what the position would be if I were to conclude that the email and letter notification of the Planning Committee meeting had been duly sent, but that, for whatever reason, Mr Matthews had never received it. I asked him whether that would be adequate notification. Mr Ponter submitted that Mr Garvey has raised no objection in principle to the use of the email system to notify Mr Matthews of the date and time of meetings. Nowhere has it been suggested that the Council should have used some other form of notification instead of, or in addition to, email. He submitted that in those circumstances, a finding that the email was duly sent is the end of Ground 1, because the Council has discharged its obligation to notify the First Claimant of the date and place of the Planning Committee meeting.

16. It is correct that the Grounds, Mr Garvey's written Reply and his submissions all went to the inadequacy of the Council's evidence in support of their contention that the email had been sent. Indeed, Mr Garvey submitted that the Council's evidence amounts to no more than an internal automated system saying that the e-mail appears to have been sent, and he invited me to prefer the Claimant's evidence on that basis. He plainly approached the case on the basis that I had to decide whether or not the email was sent.

17. Mr Easton submitted that the obligation under paragraph 10.10 SCI is ".. To advise .." an objector about the time and place of the meeting. He submitted that in circumstances where an email was sent but not received by Mr Matthews, the advice of the meeting was not effective, and amounted to a failure to comply with paragraph 10.10 SCI. He submitted that simply sending a batch of emails was not sufficient to comply with the obligation.

18. In my judgment, where an individual such as Mr Matthews makes it clear that he is content to correspond with the Council by email, the Council's obligation to advise him of the date and time of the Planning Committee meeting, is discharged by the sending of an email with that information, even if it was not in fact received by Mr Matthews. It is noteworthy that Mr Matthews continued to correspond with the Council by email, and indeed his complaint to the Council that he had not been notified of the date and place of the Planning Committee Meeting was a complaint he chose to send to the Council by email dated 4/12/17 [12/506]. In my judgment, there is force in Mr Ponter's submission that, in the absence of a challenge to the use of the email system for such notification, a finding by me that the email was duly sent would be the end of Ground 1. Accordingly, I reject Ground 1.

19. I am mindful that in reaching that conclusion it is not technically necessary for me to make a finding as to whether Mr Matthews in fact received the email. However, in case there is a challenge to my conclusion in paragraph 18 above, I think it right that I resolve that dispute of fact. I recognise that I have not heard oral evidence from Mr Matthews, but, as I have already said, it seems very surprising that in all the email traffic, this one particular email should not be received by him. I recognise that is possible, but if I have to resolve the issue of fact, notwithstanding that there has been no oral evidence and no cross examination, I consider that the preponderance of

evidence is such that I should conclude that Mr Matthews did in fact receive the email, and that he is mistaken when he asserts he did not.

20. In the light of those findings, the issue of whether Mr Matthews suffered any prejudice does not arise. However, mindful of the possibility of further challenge to the findings I have already made, I consider I should address the issues of prejudice. Inevitably I do so on the basis, contrary to the express findings I have made, that Mr Matthews was not duly advised of the date and place of the Planning Committee meeting.

21. In support of his submissions that Mr Matthews has suffered prejudice by reason of not being able to address Members at the committee meeting, Mr Garvey relied upon the decisions of Ian Dove QC (then sitting as a Deputy High Court Judge) in *R.(Kelly) v London Borough of Hounslow* [2010] EWHC 1256 (Admin) ("*Kelly*"), and of John Howell QC (sitting as a Deputy High Court Judge) in *R. (Holborn Studios Limited) v Hackney LBC* [2017] EWHC 2823 (Admin) ("*Holborn Studios*").

22. In *Kelly*, the Claimant had objected to a proposed grant of planning permission. Under the local planning authority's SCI, the Claimant was entitled to be invited by letter to attend the committee meeting. A letter was duly sent to the Claimant but, owing to a delay, the letter was sent out late such that the Claimant only received the letter on the date of the committee meeting which meant that he was deprived of the opportunity to address the committee. The Defendant argued, inter alia, that the failure to notify the Claimant would have made no difference. That argument was rejected by the Judge. He found that the officer's report in that case was a model of good practice and that it set out and appropriately summarised the objections raised by the Claimants and then responded to them on behalf of the officers. He then continued, at paragraph 26 in his judgment, as follows:

> "However, it seems to me that if that sufficed to adequately consult the claimants in a way imagined by the Statement of Community Involvement, then the defendant would not have offered the opportunity to address the meeting. The basis of offering that opportunity is, no doubt, that it is the members who decide the application, having heard the oral presentation by the officers and read their report. Oral presentation of the objector's case affords the opportunity of persuading the members to depart from the officer's recommendation. It is clear that, in relation to issues concerning residential amenity and the impact of the proposals on the conservation area, matters of judgement were at stake. Although Mr Harwood, on behalf of the defendant, says the claimants have not said in detail what they would have said to the committee, in my judgment, the concern here is not that there was some new point that might have been made but that the claimants would have had the opportunity to present their argument and also respond to the oral presentation of the application made by the officers to the committee, to give rise to the opportunity to persuade members to a view that differed from the officers, as contemplated implicitly by the statement of community involvement"

The Judge went on to say that an objector's oral presentation of his case to the committee is a significant feature of the Defendant's consultation procedures and that he was unpersuaded that there could be no difference to the decision if the Claimants were given the opportunity to address the committee. He concluded that the Claimants had been prejudiced by the breach of the legitimate expectation that they would have the opportunity to address the committee.

23. Similarly, in *Holborn Studios*, the Judge was considering a situation in which objectors had been denied the opportunity to make adequate oral presentations to the planning committee, where the application had been amended and the objectors had not been consulted on the amendments. Defence counsel in that case submitted that the decision would inevitably have been the same, regardless of any oral representations made by the objectors. The Judge stated as follows:

> "121…….This assumes that there is nothing that any representation about such changes could have contained, and the extent to which any representations might have been supported by others had the amendments been the subject of re-consultation generally, could not have made any difference to the outcome.
>
> 122. Determining that representations, which have not been heard, would inevitably have made no difference is a matter about which great caution is required in any event. If asked public authorities must consider whether, and may be persuaded, to depart from their own policies…….
>
> 123. That caution is reinforced by the fact that matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this court generally speaking to anticipate what the outcome would be if a planning authority has had regard to representations that they have not considered"

24. In the light of those authorities, Mr Garvey submitted that Mr Matthews was plainly prejudiced in this case by not being able to present oral objections to the Planning Committee, and that this Court cannot properly conclude that any such representations would have made no difference to the outcome.

25. Mr Ponter accepted the principle set out in those authorities, and further accepted that made his task difficult on the issue of prejudice. Nevertheless, he submitted that this is a case in which the court could properly find that Mr Matthews was not in fact prejudiced by his inability to attend the Planning Committee meeting. He first sought to rely on the fact that Mrs Urmston did attend the Planning Committee meeting and that she addressed Members. However, in response to questions from me Mr Ponter had to accept that the Council has put no evidence before the court that the inadequacy of car parking was raised by Mrs Urmston when she addressed the meeting. Mr Ponter told me that the meeting was recorded and there is a pod cast still available on the Council's website. No doubt that would have been transcribed had Mrs Urmston addressed the issue of car parking. Furthermore, in the Minutes of the Planning Committee meeting at [11/131], it is recorded that Mrs Urmston spoke in

objection to the application, questioning the figures used in the Flood Risk Sequential Test, and that she asked Members to defer the application. There is no mention that she raised the issue of car parking.

26. In those circumstances, Mr Ponter was forced to rely upon a submission that any prejudice to Mr Matthews was overcome by Mrs Urmston having the opportunity to raise the parking issue when she addressed the Planning Committee meeting. I have no hesitation at all in rejecting that submission. The prejudice identified in the cases of *Kelly* and *Holborn* is based upon the fact that representations, which might have been made, might have made a difference. Even if, on the facts of a particular case, it might be possible to conclude that any potential prejudice had been addressed by another objector addressing the meeting and covering the points in issue, the fact that another objector had the opportunity to address the meeting on those points, but did not in fact take it (no doubt on the facts of this case because she was addressing other issues), cannot, in my judgment, begin to address the issue of any prejudice suffered by Mr Matthews.

27. Mr Ponter's second point on prejudice is a stronger one. On 7/3/18 the Interested Party resubmitted a planning application for the Site, but with some differences from the earlier application (the Resubmitted Application"). There was a Planning Committee meeting in relation to the Resubmitted Application on 11/7/18, and planning permission was granted on that date (the "2018 Permission"). Mrs Urmston has filed a Witness Statement dated 12/7/18 (not included in the Bundle), which sets out that Mr Matthews was unable to attend the Planning Committee meeting in relation to the Resubmitted Application, so he prepared a written statement which was read to the Planning Committee. A copy of the statement which was read to the Planning Committee is exhibited to Mrs Urmston's Witness Statement as 'MU3'. It includes the following paragraph:

> "I do continue to object strongly to the insufficient number of parking spaces for a home of this size. There is a severe shortage of on street parking in this area and it is unquestionable that this situation will be made much worse if the application is approved in its current form."

28. Mr Ponter submitted that statement represents what Mr Matthews would have said to the Planning Committee on 16/11/17 regarding the insufficiency of car parking. Notwithstanding that statement, the 2018 Permission was granted. The points made about car parking made no difference to the outcome in July 2018, and Mr Ponter submitted that they would have made no difference had Mr Matthews attended and made them to the meeting in November 2017.

29. In response to this point, Mr Easton submitted that if I were to accept this argument, it would allow the planning authority to override the SCI and simply rerun the process. He submitted that a planning authority could ignore the SCI, wait to see if someone challenges the grant of planning permission on the basis that they had not been notified of the meeting, and then go through the whole process again. Whilst that is possible, it would involve bad faith in deliberately ignoring and avoiding the provisions of the SCI. Planning authorities do make mistakes. However, there is no evidence that could possibly support any suggestion of bad faith in this case. In fairness, Mr Easton did not suggest there was. He was seeking to make a more

general point, but I consider it a rather desperate attempt to try and meet the factual position in this case which tends to support there being no prejudice to Mr Matthews.

30. Accordingly, I find that on the particular facts of this case, that Mr Matthews did not suffer any prejudice as a result of his inability to attend the Planning Committee meeting on 16/11/17. Had his objections in relation to parking matters made a difference at the Planning Committee meeting in relation to the Resubmitted Application, that would be strong evidence that his objections would have been likely to have made a similar difference in November 2017, but the contrary is equally true. I accept the submission that the fact those matters made no difference in July 2018, shows that Mr Matthews in fact suffered no prejudice by reason of his inability to attend the meeting in November 2017.

31. It follows, that even if, contrary to the findings I have made, I was satisfied that the Council was in breach of its obligation to notify Mr Matthews of the November 2017 Planning Committee meeting, he in fact suffered no prejudice as a result. It would follow that even if Ground 1 was made out, I would nevertheless decline to quash the planning permission on Ground 1 on the basis that no prejudice resulted from the breach.

Ground 2: Contrary to the SCI, the Council failed to consult the First Claimant about Amendments to the Proposed Development.

32. At the outset, I raised with Mr Garvey whether this Ground was now academic as this issue has been addressed in the process of the Resubmitted Application, in that it has been agreed that the crossing point will be moved, and that the agreed new location will be incorporated into a S278 Agreement. In response, Mr Garvey relied, firstly, on the fact that the S278 has not been finalised, and secondly, on the fact that unless quashed, it is still open to the Interested Party to proceed on the 2017 Permission, even though it has more recently obtained the 2018 Permission.

33. Mr Ponter, on behalf of the Council, submitted that this Ground is now entirely academic, notwithstanding that the S278 Agreement is not in place. He reminded me that the evidence before the court is that all concerned, Mr Matthews, the developer, and the Council, are happy with the proposed new location for the crossing. Mr Ponter submitted that the preponderance of the evidence lies in this issue having been resolved for the purposes of the S278, even if other issues remain unresolved.

34. I regret I cannot accept that submission. Whilst it appears that all parties are currently agreed as to the proposed new location, that does not necessarily mean the position will remain unchanged between now and the completion of the S278 Agreement. I indicated that I would be concerned to deprive Mr Matthews of a remedy on Ground 2 (if I decide the Ground is made out) on the basis of an un-finalised agreement, however likely it may seem at the present time that the S278 Agreement will reflect the current agreement between all those concerned.

35. Mr Barrett submitted that at the time the Planning Committee made their decision leading to the 2017 Permission, the precise location of where the dropped kerbs would be was not fixed, precisely because it would have to be the subject of a S278 Agreement. He submitted that whether one is considering Condition 18 of the 2017 Permission [8/109], or Condition 16 of the 2018 Permission (set out in 'MU1'), which

repeats the earlier Condition, it is clear that two things have to happen, firstly, the submission by the developer of plans to the Council, and secondly, the Council's agreement to those plans. He submitted that the First Claimant's current complaint is misdirected and that the vehicle for any challenge is not, therefore, the planning permission, but should be a challenge either to the plans submitted by the developer for the purposes of those conditions, or a challenge to the local planning authority's decision to accept such plans. He also submitted that there is a further point of challenge open to Mr Matthews, namely a challenge to the Section 278 Agreement itself. In other words, he suggests that this challenge is to the wrong decision and is premature. This point was not taken in the SG.

36. In any event, Mr Easton submitted the point is misconceived. He referred me to Condition 3 of the 2017 Permission [8/105] which provides that the development thereby permitted shall be carried out in accordance with the listed plans and other submitted details. That list includes plan TR-003 B. That is the plan which appears at [12/247], and which shows the dropped kerbs and tactile paving in precisely the location objected to by Mr Matthews. Mr Easton further pointed out that if this planning permission was not challenged, there is the possibility that the developer might subsequently apply to discharge Condition 18. Whilst that seems unlikely, I accept it is a theoretical possibility. Mr Easton further submitted that if Mr Matthews did not challenge the planning permission now, but later sought to challenge a S278 Agreement based on the plan at [12/247], he would be met with the obvious response that his challenge should have been to the planning permission itself. In my judgment, that submission is correct. It seems to me that any challenge to the location of the crossing as set out on the plan TR003 B must be made in the context of a challenge to the 2017 Permission which expressly grants permission on the basis of that plan.

37. I therefore reject the submissions of the Council and Interested Party that Ground 2 is an academic Ground. I therefore turn to the substance of Ground 2. The Council's SCI includes the following:

> "Amendments to Schemes
>
> 10.6. Amendments to the scheme may be sought through negotiation with the applicant. The council will consult all respondents again, and other consultees as appropriate, if the amendments are significant or would directly affect a neighbour." [1/32]

38. On 14/9/17 the Council did consult the First Claimant about revised plans associated with the development [12/501-502]. On 31/10/17 the Council received a further revised plan from the Interested Party. This included dropped kerbs and tactile paving on both sides of Germany Lane in a location directly facing the First Claimant's living room window. The Council concedes that the First Claimant was not consulted on this revised plan, because in the opinion of the case officer, the change was not significant and would not directly affect a neighbour [12/158: Witness Statement of Rachel Smith, paragraph 6]. The First Claimant was not aware of the amendment by way of dropped kerbs and tactile paving prior to the decision to grant planning permission.

39. Mr Matthews considers that the location of the crossing points is such as to intrude on his privacy, and is likely to result in noise as pedestrians will congregate outside his window. He does not accept the Council's assertion that the crossing point forms 'a natural desire line' for persons crossing the road. He asserts that users currently cross Germany Lane by numerous different routes. He states he has seldom seen any person crossing in a straight line to the point directly under his window [12/498; paragraphs 13 and 14].

40. Mr Garvey submitted that, whilst in her Witness Statement Rachel Smith asserts that in her opinion the amendment would not affect Mr Matthews, there is no evidence that the Council even considered the question of re-consultation. He submitted that there is no evidence that the Council asked themselves the question whether they needed to re-consult, or, alternatively, that the Council thought that the amendment did not affect anyone, but that others might think it did. This, he submitted, is the same as the situation in *Holborn*.

41. Mr Garvey further submitted that Rachel Smith's evidence that she did not think this significantly adversely impacted or directly affected Mr Matthews might be her opinion or her planning judgement, but this is not a judgement expressed by the Planning Committee. He submitted that Rachel Smith could, and should, have put it into her Report that she had made the decision not to re-consult and then set out the reasons, and that would have provided the Planning Committee with an opportunity to exercise the planning judgement if they agreed with it, or to say that there might be issues here on which we need to consult.

42. Mr Garvey further submitted that the conclusion that it did not affect anyone else was irrational in any event. He asserted that this is a crossing point directly outside the First Claimant's living room window and there is no evidence that the Council asked, at any stage, what might be fair to the First Claimant. He submitted that nowhere in the Council's letter responding to Mr Matthews' complaint, in their response to the pre-action protocol letter, or in Rachel Smith's Witness Statement is the question of what was fair to the Claimant in these circumstances engaged with. He submitted this falls squarely within the points made in the Holborn case.

43. As already stated, the Resubmitted Application was considered by the Council's Planning Committee on 11/7/18. A copy of the Officer Report to Committee in respect of the Resubmitted Application is exhibited to Mrs Urmston's Witness Statement ('MU1'). At paragraph 4.63 of the Officer Report relating to the Resubmitted Application, there is specific reference to the objection received from a neighbouring occupier with regard to the location of a pedestrian crossing outside his window. The Report goes on to say that the dropped kerb and tactile paving to facilitate crossing by those in a wheelchair or the visually impaired is considered to be minor in effect and in a location where there are likely to be existing people crossing the road.

44. In his written statement to that Planning Committee (also exhibited to Mrs Urmston's Witness Statement as 'MU3'), Mr Matthews states that he objects very strongly to the location of the crossing point directly underneath his main living room window and that it would have a serious impact on his privacy and outlook. He also refers to concerns about noise and disturbance. He goes on to refer to recent meetings he has had with the architect for the development who has assured him that the Council has

agreed to move the crossing point a little further along the pavement so that it would have a smaller impact on his peace and privacy. He indicates that he would be satisfied with this solution, but trusts that the committee will ensure that the crossing will actually be moved in line with the assurances he has received.

45. The Planning Committee meeting on the Resubmitted Application was the subject of live recording. I am told that the podcast is still available on the Council's website. I have been provided with some excerpts from the transcript which are the final exhibit to Mrs Urmston's Witness Statement ('MU4'). The Chair, Councillor Ann Reid MBE, asked the applicant's agent, Mr Keogh, to confirm that the crossing point would be moved, which he did. He confirmed it was to be the subject of a S278 Agreement. In expressing support for the proposal, the Chair indicated that she had taken into account that the crossing point that was the cause of concern to a resident was going to be moved and that would be dealt with under a S278 Agreement.

46. Mr Garvey submitted that the fresh planning application and the way this issue was dealt with evidences the prejudice suffered by Mr Matthews in not being consulted on the original amendment to include the dropped kerbs and tactile paving, and being deprived thereby of the opportunity to make representations on the amendment. Mr Garvey pointed to the fact that Mr Matthews took up the opportunity to make representations on the Resubmitted Application, representations which, Mr Garvey submitted, have clearly made a difference, a fact which underscores that consultation was required. He submitted the Council should have recognised that even if the Council thought it was minor and of no impact, others affected by it, and Mr Matthews in particular, might take a different view. He submitted that Mr Matthews has plainly been prejudiced by the failure to consult on this amendment in the first application.

47. Mr Ponter submitted that whether an amendment falls within paragraph 10.6 SCI is a matter of planning judgement and is something which cannot be challenged unless it is irrational. He pointed to the fact that when looking at the scale of the development overall, the introduction of dropped kerbs and tactile paving (there being no proposals for lighting or signage at this crossing) represents a tiny part of it, something he submitted is relevant to the planning judgement to be made. Paragraph 10.6 SCI does not deal simply with whether amendments are significant. As a separate question, there is the issue to be considered as to whether a proposed amendment would directly affect a neighbour. Nevertheless, this plainly still requires a judgement to be made.

48. Mr Ponter submitted that there is an important point of principle here, namely that it is self-evident that the planning authority does not have to re-consult on everything. Indeed, Mr Garvey did not seek to argue that every amendment required re-consultation. In those circumstances, Mr Ponter submitted that the Council has to make a judgement as to whether alteration in question falls within paragraph 10.6 SCI. He further submitted that the focus of Mr Garvey's oral submissions was one of fairness to Mr Matthews. Mr Ponter submitted that the SCI itself puts in place a process which seeks to achieve fairness. That is clear from the aim set out in paragraph 3 of the SCI [1/9], and expressly picked up at paragraph 8.3 in the section dealing on Consultation on Planning Applications and Involving the Community [1/28]. He submitted that the question of fairness is achieved by the SCI itself, and that all that is left to Mr Matthews is a belated allegation of irrationality which amounts to no more than a dispute on the merits.

49. Mr Ponter submitted that there is no irrationality challenge in the SFG. He pointed in particular to Paragraph 5.2.1 and the statement there that "The amendments will make a significant impact upon the First Claimant's privacy and thus it was only fair that he be consulted on the changes". Mr Ponter submitted that does not amount to a statement or challenge based on irrationality. He submitted that for all the reasons set out in Rachel Smith's Witness Statement, this was a planning judgement that she was entitled to reach.

50. In the Council's SGD, the point was expressly made that this Ground was not an irrationality challenge [12/145: paragraph 15]. This was not picked up in the Reply and was raised for the first time in Mr Garvey's skeleton. Mr Ponter submitted that underscores the weakness of now introducing a claim of irrationality, and is no more than a disagreement on the merits.

51. In relation to Mr Garvey's suggestion that it was for the Planning Committee to decide whether Mr Matthews would be directly affected by the amendment, Mr Ponter pointed out that this suggestion appears nowhere in the Claimant's SFG. Further, he submitted that there is absolutely no basis to suggest that the planning officer did not have sufficient authority to make that decision. He submitted that Mr Garvey has pointed to nothing to support his argument that a judgement made under paragraph 10.6 SCI must be made by the Planning Committee.

52. Finally, in relation to Ground 2, he submitted that Rachel Smith's Witness Statement in this case does not amount to retrospective rationalisation. This is not a case where there was a statutory obligation to give reasons as to why there should be no further consultation, unlike the statutory obligation under the Housing Act 1985 in *R v City of Westminster* (1996) 28 HLR 819, which is relied upon by Mr Garvey. Mr Ponter submitted that there was no question of Miss Smith altering any reasons for making her decision. He submitted that her Witness Statement expresses obvious reasons for not re-consulting, namely that the amendments were minor in effect and did not have any direct effect on any neighbour.

53. Mr Barrett also submitted that the issue of whether the amendment would directly affect a neighbour is a planning judgement, not amenable to challenge save on the grounds of rationality or *Wednesbury* unreasonableness. Mr Barrett submitted that the point for the crossing in this case was chosen as, in the judgement of the Defendant's Highway Officer, it represents the "desire line", that is the location where most pedestrians would choose to cross in any event. That being the case, he submitted that there is no prejudice to Mr Matthews in any event.

54. In response, Mr Easton submitted that the judgement to be made under paragraph 10.6 is not a planning judgement (as to the extent of the effect of the amendment), but rather a judgement as the custodian of the fair and proper application of the SCI. He accepted that the planning officer could properly conclude in the exercise of her planning judgement that the amendment had no effect, but he submitted it is a totally different function when deciding whether there should be re-consultation with a neighbour pursuant to paragraph 10.6 SCI.

55. In support of this point he referred me to paragraph 91 of the judgment in the *Holborn* case which reads as follows:

> "In my judgment, having regard to the only record of their reasoning, which is in the minutes, officers appear to have assumed, because the changes proposed were "positive", and would not cause "any significant adverse impact", *in their view*, that there was no need to re-consult. But that was not the right question nor an answer to it. The question they need to consider was whether, without re-consultation, any of those who were entitled to be consulted on the application would be deprived of the opportunity to make any representations that they may have wanted to make on the application as amended. It does not follow that, because officers may have welcomed the changes and did not consider that they would have any adverse impact, others might not take a different view. It is plain, for example, from the Report, that one of the main issues raised on the unamended application was that "insufficient levels of affordable housing are proposed". Its complete deletion, and the reduction in the number of residential units proposed, may not have been regarded as "positive" changes by others. Similarly, those concerned with the design of the building may or may not have regarded the changes proposed as "positive" and may have wished to make representations on such matters. Moreover, even changes that may have appeared to officers to be a "positive" response to representations already made may be ones that those who made them would wish to make representations about, as Holborn Studios did in relation to the removal of columns in the basement studios."

56. Mr Easton submitted that that paragraph shows that what underlines the issue here is fairness and community involvement, rather than a planning judgement. He submitted that what the planning officer should have asked herself is whether this was an amendment that would directly affect a neighbour. He submitted it was self-evident that this amendment would directly affect Mr Matthews, because it was considered by the Planning Committee on the Resubmitted Application and the crossing was moved as a consequence. He submitted that the Council failed properly to follow its SCI having regard to the overarching principle of fairness, and paragraph 91 in the *Holborn* case, and that it was irrational to conclude that there would be no direct effect.

57. Mr Ponter urged caution when considering the *Holborn* case. He pointed to the fact that the SCI in that case expressly stated that changes to a scheme may be negotiated with the applicant in order to resolve objections but that in those cases there is no legal requirement to re-consult stakeholders, although the council may re-advertise and re-consult for a 14-day period (quoted at paragraph 26 in the judgment in *Holborn*). Therefore, the court was considering the circumstances in which an obligation to re-consult might arise in very general terms. In this case, he submitted, the SCI itself is drafted in such a way as to incorporate fairness into the system, and therefore the issue is properly one of a planning judgement as to whether the proposed amendments would have a direct effect on a neighbour.

58. In my judgment, the planning officer plainly must consider the terms of paragraph 10.6 of the SCI. The planning officer must consider whether any amendments are significant, or whether any amendment would directly affect a neighbour. In my judgment those decisions necessarily involve planning judgement. How else is a planning officer to decide whether an amendment is significant? How else is a planning officer to decide whether an amendment would directly affect a neighbour? In assessing whether an amendment would directly affect a neighbour, it is inevitable that the planning officer must have regard to what the amendment is in reaching that assessment. In this case the planning officer concluded that because of the very minor nature of the amendments by the introduction of dropped kerbs and tactile paving, that would not directly affect Mr Matthews. Plainly Mr Matthews does not agree with that, but in my judgment, that is not the issue.

59. If the approach to be taken is that advocated by Mr Matthews' Counsel, it would effectively require the planning judgement to be ignored and for the Council to simply ask itself whether, as a matter of fairness, it is necessary to re-consult any particular neighbour. Whilst Counsel for the Claimant submitted it is self-evident that the amendment directly affects Mr Matthews, in my judgment that ignores the planning decision which must be made and which must inevitably form part of that assessment. Having considered all the submissions carefully, I agree with Mr Ponter's submissions that, in reality, this amounts to a disagreement by the Claimant with the planning judgement reached which concluded that he is not directly affected by what the planning officer considered were very minor changes. I do not accept that it is self-evident that Mr Matthews is directly affected as a neighbour. If it were, then no doubt this would have been drafted as an irrationality challenge from the outset. The planning judgement required inevitably involves an assessment of what the amendment amounts to when considering whether it would directly affect a neighbour.

60. Nor do I consider the fact that there has been agreement to move the crossing as part of the process of the Resubmitted Application to be evidence which supports the fact that there should have been re-consultation in the first place. Any responsible developer, keen to successfully obtain planning permission and to progress development, will do its best to meet objectors and to try and meet their concerns, without necessarily accepting that those concerns would form the basis of any successful challenge in a court of law. There is obvious commercial sense in trying to resolve objections amicably where possible.

61. Accordingly, I reject the challenge on Ground 2. For completeness, and in case of further challenge, I shall deal very briefly with the issue of prejudice in relation to Ground 2. Had I found Ground 2 to be made out, I would have had no hesitation in concluding that Mr Matthews had been prejudiced by not being re-consulted, for all the reasons set out in the decisions in *Kelly* and *Holborn*. In the absence of a completed S278 Agreement it cannot be said that the crossing will definitely move to the new proposed location, and therefore prejudice would be made out.

Ground 4: The Officers Report ("OR") contained an Error of Fact as regards the need for care homes within the locality, which remained uncorrected at the Planning Committee meeting.

62. There is no dispute that the question I have to determine in relation to each of Grounds 4 and 5, is whether there was a mistake in the OR which significantly misled the Planning Committee about material matters, which mistake was left un-corrected.

63. The Council's Committee Report dated 16/11/17 stated as follows at paragraph 3.34:

> "An analysis of provision distribution by population also shows that there is a shortfall in the Fulford area and, if the area is expanded to take in other, close by, wards, the provision is even more acute. Fulford and Heslington Ward has only 33 care beds per 1000 population over 75. Neighbouring Fishergate Ward has only 10 beds per 1000 over 75s and Guildhall Ward only two beds per 1000 over 75s. Taking the central, south and east areas as a whole, in which Fulford sits, the provision is just 12 beds per 1000 over 75s. This area has a high incidence of population which is over 75 years of age. Our optimum provision is 110 beds per 1000 over 75." [5/67]

This was repeated verbatim at paragraph 4.18 of the Committee Report in the section entitled 'Principle of Development'.

64. At section 4.20 [5/73-75] the Committee Report then moves on to consider 'FLOOD RISK' and the sequential test, the test used to steer development to Flood Zone 1 where possible. Where there are no reasonably available sites in Flood Zone 1, local planning authorities should consider reasonably available sites in Flood Zone 2 applying the Exception Test if required. Only if there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 be considered, taking into account the flood risk and vulnerability of land uses and applying the Exception Test if required. The majority of the proposed development on the Site lies within Flood Zone 2, with a small part within Flood Zone 3. The Report goes on to note that the Environment Agency Guidance on applying the sequential test will usually be applied over the whole local authority area unless there are functional or relevant objectives in the local plan. The Report then cites once again the figures for care bed needs (as set out in paragraph 63 above) and states:

> "It is considered that this identified need, together with the closing of the existing care home in 2012, demonstrates the functional reasons for applying the sequential test over a more limited search area." [5/74: paragraph 4.22]

65. In the Conclusion Section the same point appears in these terms:

> "5.1. When considering the planning balance, as some harm is identified to the setting of the adjacent Conservation Area, the more restrictive policies in the NPPF relating to conservation of heritage assets apply, rather than the "tilted balance" in favour of sustainable development in paragraph 14 of the NPPF. In the planning balance, the application site is a brownfield site in

> a sustainable location that is currently occupied by a vacant care home. It has been demonstrated that York has an undersupply of good quality residential and nursing care accommodation. Whilst the need is citywide, Fulford and Heslington Ward has only 33 care beds per 1000 population over 75. Optimum provision is 110 beds per 1000 over 75."

66. Following publication of the Committee Report, Fulford Parish Council wrote to the council highlighting what they considered to be errors in the report regarding the provision of care home beds in Fulford. The letter sets out corrections to the figures for the provision of care home beds and states:

> "Therefore, Fulford has an overprovision of approximately three times the optimum requirement…..
>
> Therefore, Fulford and Heslington Ward has an overprovision of significantly more than double the optimum requirement.
>
> If the parishes of Fulford and Heslington are considered together rather than the Fulford and Heslington Ward, the overprovision would be even higher due to the additional 30 beds at the Lodge situated within Heslington Parish….
>
> Therefore, Fishergate Ward is only one bed short of the optimum provision…" [4/57-58]

The letter goes on to invite the Council to consider the above points and either remove the application from the agenda or recommend to the Committee that it be deferred to a later date.

67. The Council did not respond to that letter. However, it did re-consult the Programme Director for Older Persons Accommodation, who provided a note addressing the figures [12/445 – 448]. An Update to the Committee Report was produced [6/97]. Under the heading "Re: Flood Risk and Sequential Test" appears the following:

> "Since the Report was written, Fulford PC have provided more up-to-date figures based on completions and census information, which they say shows that there is not a lack of provision in that more restrictive area of search.
>
> Further information has been provided by Adult Social Care:
>
> > While the <u>current</u> number of beds in this area just about meets the city's bed planning criteria (11 beds per 100 people over 75), not all of them deliver the range of services that we require and, of particular relevance, 70% of the 127 beds are not available to citizens: <u>90 of those beds (at Connaught Court) are restricted to use exclusively by people involved in the Masonic Orders and, therefore, not available to all citizens of the city.</u>

> If we exclude from our calculations supply these restricted use beds at Connaught Court then each ward in this area has an absolute shortfall in supply when compared to the test of need. A shortfall that increases over time.
>
> Your officers are therefore satisfied that these factors are sufficient in order to justify a more narrow area of search in respect of the Sequential Test. In addition, the developer has submitted a high level assessment of the likelihood of finding alternative suitable sites. Taking a pragmatic approach to the matter, as advocated by statutory guidance, the Sequential Test has been met."

68. At the planning committee meeting itself, the defendant's planning officer reported that the Report included a paragraph that talked about an existing need in Fulford, and that is not correct and that what the Parish Council have said in that area is correct. This was then discussed in the context of the sequential test, and she concluded "So we've taken into account all those factors and still consider that the sequential test has been passed. But it's important that if members make a decision on this application that they are making it in response to that". This information is taken from Paragraph 4.3.9 of Mr Garvey's skeleton. I was told this is transcribed from the podcast of the meeting. There is no dispute as to its accuracy. I note that in the Minutes of the Planning Committee meeting it is recorded, amongst other things, that Officers provided an update to Members, updating them on the Flood Risk and Sequential test [11/130] and that Officers clarified in response to Member questions that the Sequential Test had been met.

69. Mr Garvey submitted that whilst the Council have accepted that they got the figures wrong, this was only in the context of the sequential test. He submitted the Council did not even engage with the implications beyond the sequential test, despite the Parish Council bringing it to their attention. He submitted that the planning balance set out in paragraph 5 of the committee report (and set out at paragraph 65 above) is flawed because it is based on the figures for local bed needs, being figures which the officers have subsequently accepted are incorrect. He submitted the error is plainly a material factor that the figures go from there being an acute need locally, to there being over provision, and that this is a highly material factor when considering the planning balance. The finding of heritage harm disengages the tilted balance and engages a presumption against heritage harm. However, the OR indicates that planning permission should be granted because of the need for care homes locally. Mr Garvey submitted that that is a material error of fact, and the reason for the grant of planning permission is flawed. He submitted that the updating of the figures for the purpose of the sequential test, cannot save the failure to update the figures for the purposes of planning balance.

70. Mr Ponter submitted that the officer Update at [6/97] corrected the factual errors as to the provision of care beds in the local area. It is clear that in response to the letter from Fulford Parish Council, Miss Smith consulted Adult Social Care and then produced her Update Report for the Committee. Mr Ponter pointed to the fact that there is no complaint now made by the Claimants as to the accuracy of the information on local need set out in the Update Report. Accordingly, he submitted that this is a Council which has acknowledged the error in its Report, has provided an

Updated Report containing accurate information, and thus the material matters have been corrected.

71. He submitted that it is irrelevant that the update report is headed "Re: Flood Risk and Sequential Test". The corrected information, whilst accepting that the current number of beds in the local area just about meets the city's bed planning criteria, nevertheless makes it clear that each ward in the area has an absolute shortfall in supply when compared to the test of need, a shortfall that increases over time. This is because 90 of the existing beds are restricted to use exclusively by people involved in the Masonic Orders and, therefore, are not available to all citizens of the city [6/97]. Mr Ponter submitted that the Committee was given accurate information about local need, information which was available to it when it performed the planning balance in deciding whether the application should be allowed or refused. All that needs to go into that process is accurate information and that, he submitted, is exactly what has happened in this case. Mr Barrett adopted these submissions.

72. In response to this, Mr Easton urged that the context of the amendments must be understood. He submitted that because this was a grant of planning permission, members should be taken to have adopted the reasoning in the Committee Report as corrected by their planning officer. The corrections are dealt with under flood risk and sequential test. There is nothing in the Minutes of the meeting to suggest that members asked about or took it on themselves to reconsider the question of the principle of development, or to recalibrate the planning balance in the light of the corrected need figures. The letter from Fulford Parish Council which raised the errors in the figures made it clear that the correct figures were important to a number of key issues including the principle of development, the application of the sequential test and the balancing of the proposals benefits versus harm [4/58]. However, by the Update Report, the Planning Committee was only told about the corrected figures in the context of flood risk and the sequential test.

73. Mr Easton pointed to the fact that the erroneous figures appear in the OR at paragraph 4.18 in the section entitled PRINCIPLE OF DEVELOPMENT [5/72-72], and in paragraph 4.40 in the section entitled HERITAGE ASSESSMENT AND DESIGN [5/75]. Mr Easton submitted that nowhere is there any evidence of a reassessment or recalibration of the corrected figures in the planning balance, or any evidence that the members took the correct figures into account when considering those matters. There is no evidence as to whether there was an assessment of the weight to be applied to the corrected figures and whether the undersupply could still be described as "significant" which is how it is described in both paragraphs 4.18 and 4.40. He submitted that those factors inevitably fed into the Conclusions at 5/85, and the consideration of the planning balance. The members were not invited to reconsider the position in the light of the amended figures. The Conclusions paragraph 5.6 reads as follows

> "Officers have given great weight in the planning balance to the impact of the development on the setting of the adjacent Fulford village conservation area. It is considered however that given the low level of less than substantial harm, the public benefits of the delivery of elderly Persons accommodation together with the jobs to be provided in the sustainable location, outweigh the level of harm identified. It is not

> considered that any other material considerations have been raised that would outweigh the benefits of development."

Mr Easton made the point that this conclusion is drawn in the context of the earlier paragraphs of the report detailing "a significant undersupply" in the provision of quality nursing care beds in the locality.

74. He referred me also to the Minutes of the meeting and in particular the Minute noting that officers provided an update to Members updating them on the flood risk and sequential test [11/130] and that officers provided clarification in response to member questions which included the issue of whether the sequential test had been met [11/131]. He submitted that this clearly showed that, insofar as there was a correction to the figures, it was perceived by Members to be relevant to the sequential test only. There is no evidence at all that either the principle of development or the overall planning balance was recalibrated in the light of the corrected figures. In those circumstances, Mr Easton submitted that the Members were significantly misled. He submitted that at best there was a partial correction relating to the flood risk and sequential test, but no correction in respect of the important and material respects of the principle of development and the overall planning balance.

75. I am mindful of the law in relation to ORs and which has been set out in all Counsels' skeleton arguments. In summary, I recognise that an OR must not be construed as if it were a statute, and is addressed to a knowledgeable audience. What must be considered is the overall fairness of the report in the context of the statutory test. The report must be read as a whole and in a common-sense manner, bearing in mind is addressed to an informed readership. The court should focus on the substance of the report to see whether it has sufficiently drawn Members attention to the proper approach required by the law and to material considerations.

76. In my judgment there is real cause for concern in this case where corrections have been made but have been identified in express terms by the planning officer as relevant to one part only of her Report, namely the issue of flooding and the sequential test. Flood risk and the application of the sequential test, unsurprisingly, formed a complete section of the OR under the heading "FLOOD RISK" [5/57: paragraphs 4.20 -4.27]. It would not be unreasonable for members to conclude that an update under the heading "Re: Flood Risk and Sequential Test" was referring to corrections to that part of the OR only. Whilst the readership is an informed readership, it plainly has to rely upon the OR to assist it in reaching its decision. In *Lawrence v Fen Tigers Limited* [2014] UKSC 13, at 219 Lord Carnwath said:

> "I have found that a planning officer's report, at least in cases where the officers recommendation is followed, is likely to be a very good indication of the council's consideration of the matter, particularly on such issues as public interest and the effect on the local environment. The fact that not all the members will have shared the same views on all the issues does not detract from the utility of the report as an indication of the general thrust of the council's thinking"

77. Applying that dictum to the OR in this case, leads me to the conclusion that in the absence of clear correction pointing to all relevant areas of the Report where the

correction impacts, the Council's consideration of the matter was led by areas of the Report which were uncorrected and were material matters. I reject the submissions of Mr Ponter and Mr Barrett that provided the figures are corrected, the court can, in effect, assume that members corrected them for all purposes. That flies in the face of the way the corrections are headed by direct reference to the flood risk and the sequential test. I also consider it significant that members sought clarification that the sequential test was met, which must raise the inference that they were concerned about the corrections in that particular context. This was, unsurprisingly, a substantial Report running to 37 pages, and covering a number of substantive issues. I accept Mr Easton's submission that there is nothing from which this court could properly conclude that the corrected figures were taken into account by Members when considering fundamentally important issues such as the principle of development and the planning balance. In those circumstances I conclude that the overall effect of the Report was to significantly mislead the committee about the level of undersupply in the local area and which was left uncorrected in relation to the issues of the principle of development and the planning balance.

78. By Section 31(2A) Senior Courts Act 1981, the High Court must refuse to grant relief on an application for judicial review if it appears to the Court to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. Neither Mr Ponter nor Mr Barrett sought to persuade me that I should refuse relief based on this section, but I am obliged to consider it.

79. I do not consider Section 31(2A) assists me in this case. In my judgment, for me to conclude that it is highly likely that the outcome for the Claimant would not have been substantially different if there had been accurate information in relation to need by reference to the issues of the principle of development and the planning balance would necessarily involve me deciding those very planning issues on the assumption of the corrected information. Matters of planning judgement are matters for the decision-makers and not for this court. In my judgment, I cannot properly conclude that the outcome for the Claimant in this case would not have been substantially different if the conduct complained of had not occurred. I have no doubt this is why neither Mr Ponter nor Mr Barrett sought to rely on S31(2A). In those circumstances I find Ground 4 is made out and it follows that the planning permission must inevitably be quashed.

Ground 5: the OR contained an Error of Fact as regards the need for care homes across the Local Planning Authority's jurisdiction and/or failed to provide reasons for its identified need.

80. The Committee Report suggested the following need for care provision for York as a whole:

> "3.31. Using national benchmarks, York is currently short of 657 residential and nursing care beds and, because of the anticipated 50% increase in the 75+ population in the city and the expected closure of care homes which are no longer fit for purpose, we anticipate that, should no new care homes be built, that shortfall will have risen to 962 by 2020 and 1,644 by 2030. Even if all current planning applications for C2 developments

> are approved, York will still have a SHORTFALL in care bed provision of 672 in 2020, rising to 1354 in 2030. The shortage of good quality care accommodation in the city, if not addressed, would have a profound and negative impact on the care and health "system" in York, leading to potential delays in people leaving hospital beds, people continuing to live in inadequate accommodation and diminished support for informal carers. The lack of appropriate accommodation in old age also has a serious and detrimental effect on the health and well-being of each individual concerned." [5/66-67]

Mr Garvey submitted that no explanation has been provided as to the provenance of these figures.

81. On 15/11/17, the day before the Council granted the 2017 Permission, the Council published a Memorandum relating to a different care home in the Clifton area of York (LPA reference: 17/02420/FULM) which stated as follows:

> **"2. Strategic Housing Market Assessment (SHMA)**
>
> "2.1 A SHMA addendum was undertaken in 2016 and is based on the (2014-based) subnational population projections (SNPP) published by ONS in May 2016….."
>
> 2.4 Additionally, the analysis highlights a potential need for an additional **32 bed spaces per annum** for older people (aged 75 and over) in the 2012-32 period….
>
> **3. Conclusion**
>
> Based on the findings of the SHMA addendum (2016), there is a potential need for 32 care home bed spaces per annum in York.
>
> Further comment on required need for care home bed spaces needs to be sought from colleagues in Housing in order to factor in the number of proposed closures of local authority care homes in York.
>
> The DM officer will need to consider whether number of proposed closures results in a higher level of need for new bed spaces as based on the SHMA figure alone, there does not appear to be a need for this 66 no. bed care home especially given the recently approved application (17/00476/FULM) for the erection of a three- four story 74 no. bedroom care home in York". [7/102 -103].

There is no dispute that the figures contained within this memorandum are consistent with the figures contained within the SHMA [See 12/384].

82. The figures set out in that Memorandum were repeated in the Committee Report dated 18/1/18 on that planning application [12/456; paragraph 3.8]. Notwithstanding the smaller identified future need in the Committee Report of 18/1/18, the identified shortfall in future housing is bigger than the identified shortfall in the Committee Report relating to the Site. In the January report it is stated that using national benchmarks, York is currently short of 657 residential and nursing care beds and, because of the anticipated 50% increase in the 75+ population in the city and the expected closure of care homes which are no longer fit for purpose, it is anticipated that, should no new care homes be built (other than those which currently have planning consent), that shortfall will have risen to 791 by 2020 and 1,473 by 2030. The identified shortfalls for York in the report for the Site were 672 in 2020, and 1,354 in 2030.

83. Mr Garvey submitted that the Council has produced, on consecutive days, wildly different figures relating to the need for care homes in York. In the Committee Report relating to the Site, it is stated that

> "The Council's Forward Planning team has advised the provision of additional care home bed space supports the Local Plan's emerging approach, and reflects evidence from the Strategic Housing Market Assessment regarding likely demand due to demographic changes over the period to 2032 and beyond"
>
> This position is backed up by information from the Council's Adult Social Care team who state that York has a significant under-supply of good quality residential and nursing care accommodation which will continue to rise if no new care homes are built." [5/72: paragraph 4.17- 4.18]

That paragraph then continues and sets out the analysis and figures in relation to local provision which I have set out in full when considering Ground 4 above. That is the only reference to the SHMA in the Committee Report in respect of the Site.

84. Mr Garvey submitted that the manner in which the Committee is being told about need on a citywide basis when considering the Site appears flawed and is inconsistent with the SHMA, the Council's own Memorandum of 15/11/17 and the Officer's Report of 18/1/18. The provenance of the figures in the Committee Report on the Site appears to be "from Adult Social Care". However, there is nothing to say if the figures are correct, and they are plainly not informed by the SHMA, notwithstanding it is relied upon in the other Council documents.

85. Mr Garvey submitted that in the light of the principle of administrative consistency (per *North Wiltshire DC v SSE* [1992] 65 P&CR 137), the Council are obliged to maintain some consistency in the manner in which they report their own need for care homes. He pointed to the fact that the day before the Planning Committee meeting for the site, and some nearly 2 months later the Council was relying upon lower figures as to need, whereas for this application on the Council's own land, it is saying that the need is a higher figure. Accordingly, he submitted that it is either the case that the need for housing in the York area as a whole was wrong and thus there was a material error of fact that was left uncorrected, or the Council has failed to provide reasons to

justify its conclusions as regards the higher stated need for care homes. He reminded me of the importance attributed to the need for care homes and the weight to be attached to that benefit in the context of the planning balance contained in the in the Conclusion in the Committee Report of 16/11/17 [5/85]. He submitted that, in those circumstances, the court should quash the planning permission.

86. Mr Ponter submitted that the different figures, far from reflecting an inconsistency in approach, are different because there is a different basis for each of the sets of figures. The figures set out in the OR at [5/66-67] (York wide shortfall in care bed provision of 672 in 2020, rising to 1354 in 2030) is on the basis of expected closures of care homes which are no longer fit for purpose, and that all current applications for C2 developments are approved. This information was provided by Adult Social Care and, as previously pointed out, the accuracy of the figures is not challenged. Whilst Mr Garvey submitted that there is no explanation for those figures, Mr Ponter submitted that does not matter based on the observations of Judge LJ in *Oxton Farms and Others v Selby District Council* [1997] WL 1106106. Mr Ponter submitted there is no obligation to give a detailed analysis behind the figures.

87. In the memorandum of 15/11/17, the figures (potential need of 32 care home bed spaces per annum in York) are simply based on the SHMA Addendum, and are subject to express caveats at paragraphs 3.2 and 3.3 that further comment on required need for care home bed spaces should be sought from colleagues in Housing in order to factor in the number of proposed closures of local authority care homes in York, and that the DM officer will need to consider whether number of proposed closures results in a higher level of need for new bed spaces [7/102-103].

88. In relation to the figures in the Committee Report of 18/1/18 on the Clifton application, those figures take into account anticipated closures and schemes which have planning permission. They do not take into account planning applications for which there is no existing consent, figures which were taken into account in the OR on the challenged decision. This explains why the figures for the shortfall are higher in the January 2018 Committee Report because they do not allow for any figures in connection with existing applications for planning permission which have not been determined.

89. Mr Ponter submitted that there are three different bases for the three different sets of figures and that there are, therefore, no inconsistencies between them at all. He submitted that the Claimant's suggestion that the planning committee was misled at the meeting on 16/11/17 cannot be sustained. I accept that submission. Whilst at first sight the differences in the figures appear very surprising, when the detail is considered the differences can be properly explained. It might be sensible for there to be a uniform approach to the way in which these figures are presented with agreement as to whether or not future need should be calculated including provision within applications which have not yet been determined. There might be cases where a lack of consistency of that sort in reporting matters to Members would support a successful challenge by way of judicial review. I do not consider this case to fall within that category.

90. Mr Barrett also brought to my attention the figures in the Committee Report for the purposes of the Resubmitted Application and which is exhibited as 'MU1' to Mrs Urmston's Witness Statement. He pointed to paragraph 3.33 where the need figures

are different again, now being a shortfall York-wide in bed provision of 725 in 2020, rising to 1,407 in 2030. He submitted that these figures should be compared with those in the Planning Committee Report on the Clifton application. Both figures have reduced by 66 between the Clifton Report and the Report on the Resubmitted Application. That he submitted is for the simple reason that the Clifton application was granted thereby bringing 66 further beds into the supply. He submitted that this reinforces the points made by Mr Ponter.

91. At first sight that appears an attractive submission, but as Mr Ponter pointed out the figures in the Clifton report take into account anticipated closures and schemes with planning permission, but not all planning applications. The figures at paragraph 3.33 of MU1 specifically refer to those shortfall figures applying even if all current applications for C2 care home developments are delivered. The more proper comparison would appear to be with the figures in the Committee Report for the purposes of the challenged planning permission, and far from being a reduction of 66, there is an increase of 53 in each case. However, the figures in 'MU1' are not the subject of challenge in this application and I need consider this point no further.

92. In relation to the figures which are challenged in these proceedings, I accept Mr Ponter's submissions, and I reject the challenge on Ground 5.

93. To summarise my conclusions, I reject Grounds 1, 2 and 5, but I find that Ground 4 is made out and that the planning permission must, therefore, be quashed.