Neutral Citation Number: [2017] EWCA Civ 1315

Case Nos: C1/2016/4031 and C1/2016/4092

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ADMINISTRATIVE COURT**
**PLANNING COURT**
**MRS JUSTICE LANG DBE**
**[2016] EWHC 2462 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2017

**Before:**

**Lord Justice McFarlane**
**Lord Justice Lindblom**
**and**
**Lord Justice Flaux**

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| **Between:** | **Case No: C1/2016/4031** |
| **Zipporah Lisle-Mainwaring** | **Appellant** |
| **- and -** | |
| **Niall Carroll** | **Respondent** |
| **And between:** | **Case No: C1/2016/4092** |
| **Secretary of State for Communities and Local Government** | **Appellant** |
| **- and -** | |
| **Niall Carroll** | **Respondent** |

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**Mr Paul Brown Q.C.** (instructed by **Richard Max and Co. LLP**) for the **Appellant in the first appeal**
**Ms Katrina Yates** (instructed by **the Government Legal Department**) for the **Appellant in the second appeal**
**Mr Richard Harwood Q.C.** (instructed by **Mishcon de Reya**) for the **Respondent in both appeals**

Hearing date: 10 May 2017

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

**Lord Justice Lindblom:**

*Introduction*

1. Did an inspector who allowed appeals against the refusal of planning permission for the change of use of a building from storage use to residential use err in law in rejecting an objector's argument that the appeals should be dismissed to make it possible for the building's previous use as offices to be resumed? That is the question at the heart of these two appeals. The relevant legal principles are well established. No novel issue of law arises.

2. The appeals are against the order of Lang J., dated 12 October 2016, allowing the application of Mr Niall Carroll under section 288 of the Town and Country Planning Act 1990 for an order to quash the decision of the inspector appointed by the Secretary of State for Communities and Local Government to determine five appeals made by Ms Zipporah Lisle-Mainwaring under section 78 of the 1990 Act against refusals of planning permission by the Royal Borough of Kensington and Chelsea Council. The proposals before the inspector were for development at 19 South End, London W8, premises owned by Ms Lisle-Mainwaring – which I shall call "No.19". Mr Carroll owns the adjoining premises at 18 South End – which I shall call "No.18". He objected to the proposals. The inspector held an inquiry into the appeals in December 2015. In a decision letter dated 12 February 2016 he allowed two and dismissed the other three. We are concerned only with the two he allowed, in both of which the proposal involved the change of use of No.19 from storage use within Class B8 of the Town and Country Planning (Use Classes) Order 1987 to Class C3 use as a dwelling-house. In the first appeal before us the appellant is Ms Lisle-Mainwaring; in the second, the Secretary of State. The respondent in both is Mr Carroll. The council has played no active part in the proceedings. Permission to appeal was granted by the judge.

*The issues in the appeals*

3. The main issues are common to both appeals. They are:

    (1) Did the judge approach Mr Carroll's application under section 288 correctly, having regard to the principles governing the relevance of alternative proposals or uses in the making of a planning decision (grounds 1 and 2 of both appeals)?

    (2) Did the judge err in concluding that this could be regarded as an "exceptional case", in which an alternative Class B1 office use for No.19 was a material consideration (ground 3)?

    (3) In any event did the inspector make any material error of law (ground 4)?

*The essential facts*

4. South End is in Kensington, to the south of Kensington Square. For many years, until 2011, the building at No.19, a three-storey building in a terrace, had been in office use within Class B1. It has a somewhat complicated history, which need not be recited in full. The building at No.18 was owned and occupied by the company that had the lease of No.19. It too had been in office use, but by the time it was acquired by Mr Carroll it was in residential use, within Class C3. The lease of No.19 as an office building expired in 2011, the tenant having failed to assign or sub-let. In August 2012 Ms Lisle-Mainwaring acquired No.19, outbidding Mr Carroll.

5. In May 2013 Ms Lisle-Mainwaring applied for planning permission for the change of use of No.19 to Class C3 use, and for the construction of a basement extension. That application was refused by the council in July 2013. Ms Lisle-Mainwaring appealed, but before her appeal was determined she changed the use of No.19 to storage use within Class B8. Such a change of use was lawful as permitted development under Class B of Part 3 in Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995. In July 2014 Ms Lisle-Mainwaring's appeal was allowed, the inspector having accepted that there was no basis in development plan policy for opposing a change of use from the lawful Class B8 use to Class C3. Supperstone J. quashed that decision on 17 February 2015, and ordered that the appeal be re-determined (*Carroll v Secretary of State for Communities and Local Government and others* [2015] EWHC 316 (Admin)).

6. In November 2013 Ms Lisle-Mainwaring applied for planning permission for the demolition of the building at No.19, the excavation of a basement and the construction of a new building above it, and a change of use from Class B8 to Class C3 use. The council refused that application in May 2014. Again, Ms Lisle-Mainwaring appealed. That appeal was allowed in January 2015, but the decision was quashed by consent in June 2015.

7. In August 2014 and in November 2014, Ms Lisle-Mainwaring made two applications for planning permission for the demolition of the building, a change of use from Class B8 to Class C3 use, and the construction of a new dwelling-house – in the first proposal with a basement, in the second without. Neither of those applications was determined by the council, and Ms Lisle-Mainwaring appealed against non-determination.

8. On 22 July 2015 Ms Lisle-Mainwaring made yet another application for planning permission, this time for the change of use of No.19 from Class B8 to Class C3 use. That application was not determined, and again Ms Lisle-Mainwaring appealed.

9. That is how there came to be five appeals before the inspector at the inquiry in December 2015.

10. The inspector dismissed the three appeals in which a basement was proposed. The other two, to which he referred as Appeal C and Appeal E – which were the appeals for non-determination of the applications made in November 2014 and July 2015 – he allowed. These are the two appeals with which we are concerned.

*The relevance of alternative proposals or uses in a planning decision*

11. Section 70(2) of the 1990 Act requires that, in dealing with an application for planning permission, the decision-maker must have regard to the provisions of the development plan, so far as is material to the application, and to "any other material considerations". Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that "[if] regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise". This provision embodies a "presumption in favour of the development plan", as Lord Hope of Craighead described it in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1449H (see also the recent decisions of this court in *Secretary of State for Communities and Local Government v BDW Trading Ltd. (T/A David Wilson Homes (Central, Mercia and West Midlands))* [2016] EWCA Civ 493 and *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893).

12. The general principles for determining whether a particular matter is a material consideration in a planning decision are well established (see the speech of Lord Scarman in *In re Findlay* [1985] 1 A.C. 318, at p.334B-D; and the judgment of Carnwath L.J., as he then was, in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P. & C.R. 19, at paragraph 23). Any consideration relating to the use and development of land is capable of being a planning consideration, but the question of whether a particular consideration is material in any particular case will depend on the circumstances (see the speech of Lord Scarman in *Westminster City Council v Great Portland Estates Plc* [1985] A.C. 661, at p.670C-E, and the judgment of Cooke J. in *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281, at p.1294G-H).

13. The desirability of preserving an existing use of land may be a material consideration when a decision is made on a proposal for a different use. In *London Residuary Body v Lambeth London Borough Council* [1990] 1 W.L.R. 744, Lord Keith of Kinkel observed (at p.751H to p.752B) that the decisions of the Court of Appeal in *Clyde & Co. v Secretary of State for the Environment* [1977] 1 W.L.R. 926 and the House of Lords in *Westminster City Council v British Waterways Board* [1985] 1 A.C. 676 did not lay down a "competing needs test" as a matter of law. At most, they established that "the desirability of preserving an existing use … is a consideration material to be taken into account … , provided there is a reasonable probability that such use will be preserved if permission for the new use is refused".

14. The existence of an alternative site for a particular development may also be a material consideration. But that is not generally so. In *Trusthouse Forte Hotels Ltd. v Secretary of State for the Environment* (1986) 53 P. & C.R. 293, Simon Brown J., as he then was, stated five basic principles (at pp.299 and 300), including "(1) … [the] fact that other land exists … upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site; (2) [where], however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. … ; (3) [instances] of this type of case are developments, whether of national or

regional importance, such as airports, … coalmining, petro-chemical plants, nuclear power stations and gypsy encampments … ; (4) [in] contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices … ; [and] (5) [there] may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability[, and this] would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong …". In *R. (on the application of J. (A Child)) v North Warwickshire Borough Council (sub nom. R. (on the application of Scott Jones) v North Warwickshire Borough Council)* [2001] P.L.C.R. 31, Laws L.J., having reviewed the authorities, including *Trusthouse Forte Hotels*, said (at paragraph 30 of his judgment), that "all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances", and that, generally, "… such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question" (see also the judgment of Sales L.J. in *R. (on the application of Luton Borough Council) v Central Bedfordshire Council* [2015] EWCA Civ 537, at paragraph 71, citing Carnwath L.J.'s judgment in *Derbyshire Dales District Council*).

15. There will also be cases where it is contended that a potential alternative future use of, or proposal for, the site on which development is proposed is a material consideration. Here too the law is clear. The leading case is *R. (on the application of Mount Cook Land Ltd.) v Westminster City Council* [2003] EWCA Civ 1346, a decision of this court. With the agreement of Clarke and Jonathan Parker L.JJ., Auld L.J. set out (in paragraph 30 of his judgment) six general propositions, which he accepted as "correct statements of the law and … a useful reminder and framework when considering issues such as this":

> "30. …
>
> (1) in the context of planning control, a person may do what he wants with his land provided his use of it is acceptable in planning terms;
>
> (2) there may be a number of alternative uses from which he could choose, each of which would be acceptable in planning terms;
>
> (3) whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any;
>
> (4) in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms;

(5) where … an application proposal does not conflict with policy, otherwise involves no planning harm and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant;

(6) even in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight."

16. The proposed development in that case, said Auld L.J., "if considered on its own, would not be harmful in a planning sense and would enhance the [building] and Conservation Area of which it is part". The argument was, however, that the proposal, "if considered alongside [the] alternative proposals, would or could be harmful in a wider planning sense of frustrating or endangering a more favourable solution for the [building] and the [Conservation] Area" (paragraph 31). Auld L.J. went on to say that, in his view, "where application proposals … would amount to a preservation or enhancement in planning terms, only in exceptional circumstances would it be relevant for a decision-maker to consider alternative proposals, not themselves the subject of a planning application under consideration at the same time (for example, in multiple change of use applications for retail superstores called in by the Secretary of State for joint public inquiry and report)"; that "even in an exceptional case, for such alternative proposals to be a candidate for consideration as a material consideration, there must be at least a likelihood or real possibility of them eventuating in the foreseeable future if the application were to be refused"; and that "[if] it were merely a matter of a bare possibility, planning authorities and decision-makers would constantly have to look over their shoulders before granting any planning application against the possibility of some alternative planning outcome, however ill-defined and however unlikely of achievement … [and] would be open to challenge by way of judicial review for failing to have regard to a material consideration or of not giving it sufficient weight, however remote" (paragraph 32). Weight was essentially a matter of "planning judgment". But the court should not be "shy in an appropriate case of concluding that it would have been irrational of a decision-maker to have had regard to an alternative proposal as a material consideration or that, even if possibly he should have done so, to have given it any or any sufficient weight so as to defeat the application proposal" (paragraph 33). Those conclusions found support in the judgment of Laws L.J. in *North Warwickshire Borough Council*, having regard to relevant authority including *Trusthouse Forte Hotels*. Although that case had concerned a possible alternative site for the development proposed, the approach adopted by Laws L.J. seemed "equally applicable" (paragraph 34).

17. Auld L.J. also referred to the first instance decisions in *South Buckinghamshire District Council v Secretary of State for the Environment* [1999] P.L.C.R. 72 and *Nottinghamshire County Council v Secretary of State for the Environment, Transport and the Regions* [2002] 1 P. & C.R. 30 (a decision of Mr Christopher Lockhart-Mummery Q.C., sitting as a deputy judge of the High Court). There was, he said, "nothing in [those] cases to support the view that, where … there is no likelihood or real possibility of an alternative proposal proceeding if the planning application under consideration were refused, … it should be refused anyway against the bare possibility of that or some other alternative more beneficial scheme eventuating". It would be, he thought, "highly harmful to the efficient and otherwise

beneficial working of our system of planning control if decision-makers were required to consider possible alternatives, of which, on the facts before them, there is no likelihood or real possibility of occurrence in the foreseeable future" (paragraph 35).

18. He concluded that the alternative proposals for the building were not material considerations, or, if they were material, that the local planning authority could properly give them "negligible weight" (paragraph 36). It "had an obligation to consider [the] application on its own merits, having regard to national and local planning policies and any other material considerations, and to grant it unless it considered the proposal would cause planning harm in the light of such policies and/or considerations" (paragraph 38).

19. Subsequent authority has not disturbed the principles identified in *Mount Cook* (see, for example, the judgment of Sullivan L.J. in *R. (on the application of Langley Park School for Girls Governing Body) v Bromley London Borough Council* [2010] 1 P. & C.R. 10, at paragraphs 44 to 52; and the judgment of Carnwath L.J. in *Derbyshire Dales District Council*, at paragraphs 15 to 28). In *Langley Park School for Girls Governing Body*, Sullivan L.J. said (in paragraph 52):

> "52. … There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether harm (or the lack of it) might be avoided. … At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm."

*The inspector's decision letter*

20. The inspector identified six "main issues" in the appeals before him, the first two of which arose in all five appeals: first, "the current established use of the appeal property", and second, "the effect of the proposed change of use in terms of the loss to the area of commercial use" (paragraph 21 of the decision letter).

21. On behalf of Mr Carroll, though not by the council, it was contended that the lawful use of No.19 was still Class B1 office use, and that a change of use from that use to Class C3 use would be contrary to policy CF5 of the council's Consolidated Local Plan, adopted in July 2015. If that argument were not accepted, it was Mr Carroll's case, and the council's, that the loss of Class B8 storage use would itself be contrary to policy CF5. And if that argument too were rejected, the inspector was urged to dismiss the appeals in any event, because, it was said, the change of use of No.19 from Class B1 office use to Class B8 storage use had been merely an attempt to avoid an objection based on policy CF5, and, if planning permission were now refused, Class B1 use would be resumed.

22. Policy CF5, "Location of Business Uses" states, so far as is relevant here:

"The Council will ensure that there is a range of business premises within the borough to allow businesses to grow and thrive; to promote the consolidation of large and medium offices within town centres; …

To deliver this the Council will, with regard to:

Offices

a. protect … medium sized offices within the employment zones, higher order town centres, other accessible areas and primarily commercial mews … … ."

Paragraph 31.3.28 of the local plan confirms that "[business] uses are considered to be those which fall under class B of the Use Classes Order, and include office, light industrial and storage uses".

23. In a passage of his decision letter headed "Class of Use of 19 South End", the inspector recorded that "[the] Council accepts, as a matter of common ground with the Appellant, that the appeal site has been in storage use, Class B8, since at least January 2014, when the Council resolved this to be the established use and issued a lawful development certificate (LDC) based on the evidence of inspections by its own officers and the Valuation Office Agency (VOA)" (paragraph 27). In fact, it seems that such a certificate was never actually issued, but nothing turns on that. The inspector then referred (in paragraph 28) to Mr Carroll's assertion that the use of No.19 was still Class B1 office use:

> "28. This LDC is disputed by the Rule 6 party on grounds that the building has been, and remains, in office use Class B1, having merely been stripped out since it was vacated by the last office user in 2011. The allegation is that the claimed Class B8 use has simply been contrived by the Appellant as a means of obtaining a change to the higher value residential use Class C3, on the basis that neither CLP Policy CF5, nor any other policy, would prevent this. In the alternative that residential use is not permitted, the Rule 6 party contends that the future of the building lies within Class B1 use for economic reasons and viability. These matters are addressed below in connection with the loss of commercial use."

24. The inspector reminded himself that the "the determination of the established use of a site is a matter of objective assessment of the character of the actual activity taking place there, rather than the subjective intentions of the Appellant or whether the activity is of a commercial or private nature" (paragraph 32). His conclusions on the current, lawful use of the site were these (in paragraphs 33 to 35):

> "33. From direct inspection, the practical use of the building did not appear contrived for the purpose of the accompanied site visit and it was clear that the property was occupied by stored items over most of the ground floor and much of the first floor, with some items also kept on the top floor of the three storey building. There was no vestigial office use in evidence to which a partial Class B8 use might have been

ancillary. Although not fully occupied by stored material on every floor, the property appeared as a single planning unit demonstrably in storage use.

34. The VOA and the Council as reputable public bodies plainly found no ground for non-acceptance of the testimony of the Appellant in connection with the second, successful LDC application. The Appellant was entitled to implement the change of use to Class B8 and it is not appropriate subjectively to interpret her past conduct or anticipate her future actions regarding the appeal property.

35. In all the circumstances, on a proper objective assessment, the current established use of the appeal property is to be regarded as storage under Class B8 of the Use Classes Order."

25. He went on to consider the "Loss of Current Commercial Use of 19 South End to Residential Use". He accepted that "[on] the evidence available and for the purpose of determining these appeals, it is appropriate to regard Policy CF5 as protecting the existing Class B8 use of the appeal premises as well as Class B1 to the extent that it might, in the alternative, apply" (paragraph 45). Under the heading "Planning Effect", he tackled the question of "whether the loss of the present commercial use would conflict with … Policy CF5 in the present case". He bore in mind that "[the] Council admits that the loss of the appeal site from Class B8 to residential use does not necessarily constitute a breach of Policy CF5 and that this remains a matter of planning judgement" (paragraph 46). And he concluded (in paragraphs 52 to 54):

"52. The Council nevertheless raises the concern that reversion to business from residential use is unlikely ever to occur and that to allow these appeals would set a precedent for a serious erosion of the range of business uses contrary to the strategic aim of Policy CF5. Fundamentally though, any future case would require to be decided on individual merit, including evidence of strong economic reasons that the proposal would be inappropriate.

53. As a matter of judgment in the present five appeals, such evidence as is available that the change of 19 South End to residential use would result in an inappropriate reduction in the range of uses available is largely un-quantified and fails to provide strong economic reasons for refusing it.

54. To the extent therefore that the present use of the appeal property is for storage Class B8, the proposed change of use in all five appeals is not to be regarded as in conflict with CLP policy CF5."

26. The inspector turned then to what he described as "Fallback Positions". As to the first, based on the permitted development rights in Class P of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"), he said (in paragraph 55):

"55. In the alternative outcome that the loss of Class B8 use were found to be in conflict with Policy CF5, the Appellant would rely on a claimed fallback position that the use of the appeal building could be changed to residential Class C3 under Class P … . The Appellant contends that this right could apply to the appeal

property once the requisite four-year qualifying period of Class B8 use had expired, no later than January 2018, and before the right expires in April 2018. Leaving aside the very short time for physical change to residential use, it would not have been appropriate to anticipate that turn of events, in case of further changes in planning legislation and circumstances in the interim. Instead, it would have been necessary to determine this aspect of the matter in the light of current circumstances wherein that permitted development right does not apply. Accordingly this potential fallback position would carry minimal weight."

27. Secondly, in paragraph 56, the inspector considered a further alternative, once more against his earlier conclusions:

> "56. In the different alternative outcome that the extant use of the appeal property were found to remain in Class B1 as offices, the Council, supported by the Rule 6 party, maintains that refusal would still be justified under Policy CF5. In itself, there is merit in this contention because it is the essentially undisputed evidence of the Council that, properly disregarding hope value of future change to residential use, the appeal property would be viable in office use. Moreover, it would justify protection in terms of Criterion a of Policy CF5, as a medium-sized office development in an accessible area, close to the town centre and not subject [to] any of the exclusions of that criterion. Despite the foregoing finding that the current use of the appeal site is properly to be regarded as Class B8, the Council would further contend that the loss of a building that could potentially revert to Class B1 as permitted development should nevertheless be regarded as a material consideration. For reasons explained above in connection with the issue of the present use class of the site however, such an eventuality cannot properly be anticipated in relation to these appeals. The prospects of reversion to Class B1 and the loss of that use contrary to Policy CF5 accordingly also carry minimal weight in connection with these five appeals."

28. The inspector found no other valid planning objections to the proposals in Appeal C and Appeal E. As for Appeal C, he concluded that the proposed development "would … result in a degree of enhancement to the character and appearance of the Kensington Square [Conservation Area]". And none of the proposed developments would, in his view, harm the setting of neighbouring Conservation Areas (paragraph 80). The development proposed in Appeal E "would have a neutral effect on any [Conservation Area] and so would preserve their character and appearance", and the development proposed in Appeal C "would result to a material degree in the enhancement to the South Kensington [Conservation Area]" (paragraph 81). He also concluded that "the change of use of the appeal premises would result in an additional unit of family accommodation contributing to Borough housing land supply", and that "the benefit of an additional dwelling is material to the determination of each of the appeals" (paragraph 85). At the end of his decision letter he concluded, in respect of each of the five appeals, that "[with] respect to CLP Policy CF5, there is no objection to the proposed change of use to residential development, Class C3" (paragraphs 90 to 93).

29. Under the heading "Overall Planning Balance and Conclusions on Appeal C", he said this (in paragraph 92):

"92. With respect to CLP Policy CF5, there is no objection to the proposed change of use to residential development, Class C3, whilst the additional dwelling that would result would be a material benefit of the development. The degree of enhancement of the Kensington Square CA due to the replacement dwelling would also be a further material benefit. The development would accordingly comply with the development plan taken as a whole. Appeal C therefore succeeds in line with the presumption of the NPPF in favour of sustainable development, subject to the conditions discussed above."

His conclusions under the heading "Overall Planning Balance and Conclusions on Appeal E" (in paragraph 93) were similar:

"93. With respect to CLP Policy CF5, there is no objection to the proposed change of use to residential development, Class C3. In the absence of other material factors for or against the proposal, the development would comply with the development plan taken as a whole. Appeal E therefore succeeds in line with the presumption of the NPPF in favour of sustainable development, subject to the conditions discussed above."

*Lang J.'s judgment*

30. Lang J. accepted the argument presented to her on behalf of Mr Carroll that the inspector had erred in his conclusions on the "potential reversion" of No.19 to Class B1 use. She acknowledged (in paragraph 27 of her judgment) that in *Mount Cook* Auld L.J. had not "intended to preclude consideration of a future potential use as a material consideration in an appropriate case". Auld L.J.'s statement of the law in paragraph 30 of his judgment was "said to be a distillation of existing law, not a departure from it". He had "cited with approval … the judgment in … *Nottinghamshire County Council* … , where the Judge concluded that the Secretary of State acted lawfully in treating potential use of the site as a school as a material consideration and refusing residential development because of the desirability of preserving the option of using the site for educational use, as originally identified in the Development Plan".

31. Although the case law had not been cited to him, *Mount Cook* was, said the judge, "a well-known case of which an experienced Inspector would be aware", and "[the] issue was placed squarely before him in the parties' closing submissions" at the inquiry (paragraph 30). She then said (in paragraph 31):

"31. It is common ground among the parties that the Inspector, at paragraph 56, did decide that the loss of a potential reversion to Class B1 ought to be treated as a material consideration. In my judgment, he was entitled to do so, for the reasons put forward by [Mr Carroll] and [the council] … . He accepted that Class B1 use was viable and would justify protection under Policy CF5 criterion (a) as a medium-sized development in an accessible area, close to the town centre. Applying the principles in paragraph 30 of Auld LJ's judgment in *Mount Cook*,

the Inspector was entitled to conclude that the grant of planning permission for residential use would result in "planning harm", namely the permanent loss of the potential reversion to Class B1 use as permitted development. Class B1 use was authorised and existed for many years. It would result in the loss of premises for office use of a type which Policy CF5 expressly protected. I do not accept [the] submission [for the Secretary of State and Ms Lisle-Mainwaring] that the "planning harm" to which Auld LJ referred in paragraph 30(4) & (5) necessarily excludes any planning harm arising from the loss of potential alternative use. This is an unduly restrictive interpretation and inconsistent with the authorities Auld LJ was considering earlier in his judgment e.g. *Nottinghamshire County Council* and the fall-back cases."

and (in paragraph 32):

"32. Even if I am wrong on that point, I consider that the Inspector was entitled, in the exercise of his discretion, to treat this as an exceptional case, under paragraph 30(6), because of the prior B1 use of the property, the continuing authorisation for B1 use under permitted development, and the local planning policy protecting office use (Policy CF5). I do not accept [the] submission [for the Secretary of State and Ms Lisle-Mainwaring] that paragraph (6) cannot be relied upon because the Inspector did not make an express finding of exceptionality. The Inspector was not writing an examination paper on planning law, and no one assisted him by providing a copy of the judgment in *Mount Cook*. However, I observe that it would have assisted the Court if the Inspector had given fuller reasons to explain the precise basis upon which he reached his conclusions on this issue."

32. The judge observed that "it appears from paragraph 56 of the Decision that the Inspector misdirected himself in law in his consideration of the possible future reversion to Class B1 use as a material consideration" (paragraph 33). It was "common ground", she said, that he was referring there to his conclusions under the heading "Class of Use of 19 South End" (paragraph 34). Although he had been mistaken in his belief that the council had issued a certificate of lawful use for Class B8 use, he had "correctly identified" the lawful use of No.19 as Class B8 use "by reference to the objectively assessed use, rather than the subjective intentions or motives of the owner or occupier" (paragraph 35). But the judge continued (in paragraph 36):

"36. However, when considering the weight to be accorded to the material consideration of potential reversion to Class B1 use, it was relevant for the Inspector to consider, from an objective standpoint, what the likely future actions of the owner of the property would be (whether the owner was [Ms Lisle-Mainwaring] or another owner in the future). The Inspector erred in disregarding this consideration, apparently on the grounds that "*it is not appropriate subjectively to interpret her past conduct or anticipate her future actions regarding the appeal property*". On the authorities and in the circumstances of this case, he was required to make an objective assessment of the likelihood of reversion to Class B1 use, when deciding the question of weight, and his Decision indicates that he did not do so."

33. There had been, said the judge, "substantial evidence at the Inquiry that a reversion to Class B1 use from Class B8 use was likely, on commercial grounds, if planning permission for residential use was refused" – in particular, the evidence of Mr Clack, a valuer called as a witness for the council, that "… a property owner could make a competitive return from the property in B1 use", the evidence of Mr Lomas, a planning officer called as one of the council's witnesses, who had "accepted Mr Clack's opinion", and the evidence of Mr Abbott, Mr Carroll's planning consultant, who had "agreed that … reversion to B1 use was the most likely outcome" (paragraph 37 of the judgment). This was all relevant evidence on the question of "whether or not a potential reversion to Class B1 use could be anticipated". But the inspector had neither stated any reasons for rejecting it nor even referred to it (paragraph 38). He had given "minimal weight" to Ms Lisle-Mainwaring's "fall-back position" of changing the use of No.19 to Class C3 use as permitted development. So that "could not have been the explanation for [his] conclusions on the reversion to Class B1 use, and his Decision does not suggest that it was" (paragraph 39). His "erroneous approach to the material consideration of potential reversion to Class B1 use may have affected the outcome of the appeals", and it would be "inappropriate" for the court to exercise its discretion not to quash the decision (paragraph 40).

*Was the judge's approach correct?*

34. As I have said, Auld L.J.'s judgment in *Mount Cook* represents the relevant principles of law as they stand. Those principles align with the most fundamental principle of development control decision-making: that an application for planning permission must be determined on its own merits, in accordance with the statutory scheme – in particular, the provisions of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act (see paragraph 11 above). If the proposed development is acceptable in its own right, an alternative proposal is normally irrelevant. The corollary, emphasized by Auld L.J. in *Mount Cook*, is that only in "exceptional circumstances" will an alternative proposal be a material consideration. Even in such an "exceptional case", if the alternative proposal is to be a material consideration it must not be "inchoate or vague", and there must also be at least a "real possibility" of its being implemented in the foreseeable future if it is to justify the refusal of planning permission.

35. Ms Katrina Yates, for the Secretary of State, and Mr Paul Brown Q.C., for Ms Lisle-Mainwaring, criticized the judge's approach as being inconsistent with those well settled principles.

36. On behalf of Mr Carroll, Mr Richard Harwood Q.C. resisted that criticism, submitting that the judge's approach was correct and a true reflection of the case law taken as a whole. In this case Class B1 use was specifically protected under policy CF5. In principle, the frustration of a site's potential use when that use has been identified in an adopted or emerging development plan or a planning brief is, or can be, a material consideration (see, for example, in addition to *Nottinghamshire County Council*, the first instance decisions in *Bloomsbury Health Authority v Secretary of State for the Environment* (unreported, 27 July 1992), *Jackson Properties Ltd. v Secretary of State for the Environment*, (unreported, 9 December 1997), and *Stroud College v Secretary of State for Transport, Local Government and the Regions* [2002]

EWHC 655 (Admin)). As the Court of Appeal recognized in *Mount Cook*, however, it is not necessary for the alternative use to have been identified in a plan (see, for example, Sir David Cairns' judgment in *Clyde*, at p.936E). There is, Mr Harwood submitted, no significant distinction to be drawn between existing and potential uses in this respect. If the other use under consideration – be it existing or potential – is desirable, preventing it from coming about may cause planning harm. That was so here, said Mr Harwood.

37. In my view Lang J. was right to say (in paragraph 27 of her judgment) that in *Mount Cook* Auld L.J. was not intending to preclude consideration of a future potential use as "a material consideration in an appropriate case". The question is, therefore: what is an "appropriate case"? In the light of Auld L.J.'s judgment, an "appropriate case" would clearly have to be one that was abnormal, or, as he put it, "exceptional". This is plain from paragraphs 30 and 32 of his judgment, where he said that if the "application proposal does not conflict with policy, otherwise involves no planning harm and … includes some enhancement, any alternative proposals would normally be irrelevant" (paragraph 30(5)), and that if a proposal "would amount to a preservation or enhancement in planning terms, only in exceptional circumstances would it be relevant for a decision-maker to consider alternative proposals …" (paragraph 32).

38. To frame the relevant principles in the way he did in *Mount Cook*, it was not necessary for Auld L.J. to conclude that *Nottinghamshire County Council* – or any other similar case determined at first instance – had been wrongly decided on its particular facts. And in my view there is, in any event, no justification for reading the principle of alternative proposals "normally" being "irrelevant", and relevant "only in exceptional circumstances" – Auld L.J.'s formulation in paragraphs 30(5) and (6) and 32 of his judgment – as being qualified or diluted by the deputy judge's judgment in that case. As Ms Yates submitted, if Auld L.J.'s judgment was, as Lang J. acknowledged, "a distillation of existing law, not a departure from it", that "distillation" was this court's distillation of the operative principles in all the previous cases relevant to the concept of a potential alternative use as a material consideration – including *Nottinghamshire County Council*.

39. That, I think, is quite clear from what Auld L.J. said in paragraphs 34 and 35 of his judgment. In paragraph 34 he endorsed the relevant reasoning of Laws L.J. in *North Warwickshire Borough Council*, which underscored the proposition that it was only in "exceptional circumstances" that a consideration of alternative sites would be relevant, and that, in general, such "exceptional circumstances" would particularly arise where the proposed development involves "conspicuous adverse effects" on the application site itself. The concept of "exceptional circumstances" drawn by Auld L.J. from the authorities relating to alternative sites, and now confirmed as applicable also to potential alternative uses, represented a clarification of the law in this particular context. Nothing that he said in paragraphs 30 to 36 of his judgment can properly be read as weakening the concept of "exceptional circumstances" as an essential part of the relevant principles. Nor can the first instance decision in *Nottinghamshire County Council* be taken as having that effect. In that case, it should be remembered, the site on which planning permission had been sought for the development of housing had been allocated for educational use in the local plan, and the inspector had dismissed the subsequent appeal, having concluded that although the site was

suitable for housing it would be premature to eliminate the option of providing a primary school on the site, given that a school was likely to be needed.

40. Ms Yates and Mr Brown argued that the judge's reasoning in paragraph 31 of her judgment cannot be reconciled with the principles set out in paragraph 30(3), (4) and (5) of Auld L.J.'s judgment in *Mount Cook*, and amplified by him in paragraphs 31 and 32. A crucial point in those principles, they submitted, is that the decision-maker must establish whether the "proposed use" would itself cause or involve "planning harm judged according to relevant planning policies …", when "considered on its own", as opposed to its being, or possibly being, "harmful in a wider planning sense of frustrating or endangering a more favourable solution" (paragraphs 30(3) and 31).

41. Mr Brown submitted that if the "loss" of the benefit of a possible alternative use would itself normally qualify as "planning harm" as referred to by Auld L.J. in paragraph 30(3), (4) and (5) of his judgment, the principle stated in paragraph 30(6) and paragraph 32 that alternative proposals will be relevant only in "exceptional circumstances" would be negated. Ms Yates contended that this would undo the real burden of what Auld L.J. was saying – that the court should seek to avoid creating a situation in which, as he put it (in paragraph 32), "planning authorities and decision-makers would constantly have to look over their shoulders before granting any planning application against the possibility of some alternative planning outcome …". Both Mr Brown and Ms Yates pointed to the judgment of Lang J. in *Hawksworth Securities Plc v Peterborough City Council* [2016] EWHC 1870 (Admin), in which she rejected an argument that the local planning authority, when it granted planning permission for the redevelopment of a shopping centre, had failed to deal as it should with the risk that this would render a rival scheme unviable – on the basis that competition between the two projects could not properly be "characterised as "planning harm" of the type which the court in *Trusthouse Forte* and *Mount Cook* envisaged would trigger a requirement to consider an alternative site", and the scheme under consideration was, "of itself, in accordance with planning policy and had no planning disadvantages …" (paragraph 55 of her judgment).

42. I think there is force in that argument. As Mr Brown submitted, the status of an alternative use as a material consideration does not itself depend on the possible consequences – good or bad – of that alternative use not being brought about. The notion that it does would be inimical to the six principles in paragraph 30 of Auld L.J.'s judgment in *Mount Cook*. Essential to those six principles is that a comparison between the development actually proposed and an alternative development is not generally a necessary or relevant exercise. As Sullivan L.J. emphasized in *Langley Park School for Girls Governing Body* (in paragraph 52 of his judgment), if a proposed development is inherently acceptable because it would do "little or no harm", it will not normally be necessary for the decision-maker to go further and consider whether some other proposal for the site might be even more acceptable, or at least no less so. The same principle is also to be seen in the authorities on the potential materiality of alternative sites, in particular the concept of the proposed development being "desirable in itself" but having "conspicuous adverse effects" on the application site, as opposed merely to the benefits of developing an alternative site being foregone (see paragraph 30 of Laws L.J.'s judgment in *North Warwickshire Borough Council*). It was this concept that Auld L.J. (in paragraph 34 of his judgment in *Mount Cook*) saw as "equally applicable" to the principles he

articulated in the context of alternative proposals (in paragraphs 30 and 32). If a possible alternative use would always be a material consideration when it had the potential to provide greater benefits than the proposal in hand, or if it were always necessary for the decision-maker to consider whether that would be so, the principles in paragraph 30 of Auld L.J.'s judgment would have to be recast, and the concept of "exceptional circumstances" abandoned.

43. The judge referred, in paragraph 31 of her judgment, to the inspector's conclusion in paragraph 56 of his decision letter that a Class B1 use of No.19 "would justify protection" under policy CF5 of the local plan. But it is important to keep in mind that the starting point for what the inspector said in paragraph 56 was an assumption made by him in the "alternative" to the conclusions he had already reached and expressed as to the extant and lawful use of No.19, which was Class B8 storage use. The premise here was "that the extant use of [No.19 was] found to remain in Class B1 as offices", rather than in Class B8 use. In the light of his preceding analysis, therefore, that premise was false. Specifically, it was contrary to his earlier conclusion, in paragraph 35, that "the current established use of [No.19] is to be regarded as storage under Class B8 …", which then informed his conclusion in paragraph 54 that "[to] the extent … that the present use of [No.19] is for storage Class B8, the proposed change of use in all five appeals is not to be regarded as in conflict with CLP policy CF5". In other words, in the inspector's planning judgment, lawfully exercised as it clearly was, the proposed change of use accorded with the development plan.

44. Those two conclusions, in paragraphs 35 and 54 of the decision letter, were unequivocal. They are also, in my view, quite unimpeachable. They were, in fact, the basis for the inspector's final conclusions on Appeal C and Appeal E, in paragraphs 92 and 93, where he stated in respect of both that the proposed development would "comply with the development plan taken as a whole".

45. The first of the two hypotheses considered by the inspector in paragraph 56 of the decision letter – the supposition that his conclusion as to the existing and lawful Class B8 use of No.19 was wrong, and that the existing and lawful use, contrary to that conclusion, was Class B1 office use – was not, it seems to me, the kind of situation to which the *Mount Cook* principles truly apply. Those principles are concerned with the potential relevance of alternative future uses to the use proposed. They do not contemplate a different lawful, existing use of the site in question for the purposes of comparing the benefits of that hypothetical existing use with the use proposed. They apply to the proposal for which planning permission has actually been sought, and the relative advantages or disadvantages of that proposal by comparison with some relevant and realistic alternative to it. They do not require the decision-maker to put to one side the actual proposal under consideration – in this case, as the inspector clearly accepted, a proposed change of use from Class B8 use to Class C3, not a proposed change of use from Class B1 to Class C3.

46. The second hypothesis described in paragraph 56 is that the lawful, existing use of No.19 was indeed, as the inspector had concluded, Class B8 use, but that a resumption of Class B1 use in place of that lawful, existing use might be contemplated if planning permission for the appeal proposals were refused. However, as the inspector made plain, this was not, in his view, a realistic prospect. As he put it in the penultimate sentence of that paragraph, "such an

eventuality cannot properly be anticipated in relation to these appeals". So, as he went on to say in the final sentence of the paragraph, "[the] prospects of reversion to Class B1 and the loss of that use contrary to Policy CF5 … carry minimal weight in connection with these five appeals". Once again, he found himself dealing with a merely theoretical possibility, not a real one. Had his conclusion been expressed in terms of the *Mount Cook* principles, and assuming for the moment that this could properly be regarded as "an exceptional case", it would clearly have been that this hypothetical alternative must be discounted as having no "likelihood" or "real possibility" of coming about, and that "little or no weight" should be given to it. In substance, that is what he concluded.

47. In my view, therefore, one should not take the inspector's conclusions in paragraph 56 of his decision letter to mean that, as the judge put it in paragraph 31 of her judgment, "the grant of planning permission for residential use would result in "planning harm", namely the permanent loss of the potential reversion to Class B1 use as permitted development", and "would result in the loss of premises for office use of a type which Policy CF5 expressly protected". That is not, it seems to me, what the inspector was actually saying. His essential conclusion was that, in spite of the potential viability of office use in No.19 if "hope value" for residential use were to be disregarded, the resumption of such use "cannot properly be anticipated". This does not mean that the proposed residential development "would result" in there being no resumption of office use. On the contrary, it means that in the inspector's judgment, whilst office use might in theory be viable once the necessary works to reinstate it had been undertaken, such use was not in fact likely to be resumed if planning permission for residential development were refused. There could therefore be no proper objection to the proposed residential use of No.19 on the basis that it would prevent office use being resumed. Otherwise, the inspector's final conclusions in paragraphs 90 to 93 simply could not have been as they were.

48. For those reasons I am unable to share the judge's conclusions in paragraph 31 of her judgment.

*Did the judge err in concluding that this could be regarded as an "exceptional case"?*

49. Ms Yates and Mr Brown criticized the judge's conclusion, in paragraph 32 of her judgment, that the inspector was "entitled … to treat this as an exceptional case, under paragraph 30(6)" of Auld L.J.'s judgment in *Mount Cook*.

50. Mr Harwood again defended the judge's reasoning. At the inquiry neither Mr Carroll nor the council had based their case on an "exceptional circumstances" argument. There was no need for them to do so. But, Mr Harwood submitted, the judge was right in paragraph 32 of her judgment to describe the circumstances here as "exceptional". Ms Lisle-Mainwaring had changed the use of No.19 to Class B8 storage use as a means of gaining planning permission for Class C3 residential use, thus avoiding the effect of the presumption in policy CF5 against changes of use of office premises to dwellings. She was only able to do this because permitted development rights for changes of use from Class B1 to Class B8 use – in Part 3, Class B, of the Town and Country Planning (General Permitted Development) Order 1995 – had been enlarged in May 2013.

51. The judge referred to three factors that would, in her view, have qualified as "exceptional circumstances" in this case: first, "the prior [Class] B1 use of [No.19]"; second, "the continuing authorisation for [Class] B1 use under permitted development"; and third, "the local planning policy protecting office use (Policy CF5)".

52. All three of those factors, it is true, are referred to by the inspector in paragraph 56 of the decision letter. He plainly took them into account. But it is necessary, as always, to read the decision letter fairly as a whole. Here, in my view, it would be wrong to focus only on paragraph 56. One must also take into account, in particular, what the inspector said in paragraphs 46 to 54, and his final conclusions in paragraphs 90 to 93. When that is done, I do not think it can be said that the inspector did regard this as a case in which there were "exceptional circumstances" to justify consideration being given to Class B1 use as an alternative to the Class C3 residential use proposed.

53. The rival arguments as to the relevance and application of the *Mount Cook* principles in this case have formed the main contest in the proceedings and in the appeal. But they were not ventilated in the same way before the inspector. It was only after the *Mount Cook* principles had been raised by the Secretary of State and Ms Lisle-Mainwaring in their summary grounds that Mr Carroll himself sought to rely upon them. There is no doubt that at the inquiry it was contended on behalf of Mr Carroll that the loss of the opportunity for Class B1 use to be resumed in No.19 was a material consideration in Ms Lisle-Mainwaring's appeals, and that significant weight should be given to it. But that contention was not explicitly based on the *Mount Cook* principles. It was not suggested to the inspector that there were "exceptional circumstances" in this particular case to engage the question of a possible preferable alternative use for No.19 being a reason for the refusal of planning permission, let alone what those "exceptional circumstances" might be. Nor were the *Mount Cook* principles relied upon by Ms Lisle-Mainwaring in countering Mr Carroll's objection. Her case before the inspector was, essentially, that her proposals for No.19 were acceptable in their own right, when tested against relevant planning policy and in the light of all other material considerations. And that case clearly succeeded.

54. In the circumstances it is scarcely surprising that the inspector did not express any conclusion on the question of whether "exceptional circumstances", in the sense contemplated by Auld L.J. in *Mount Cook*, had been shown to exist as a justification for treating a possible alternative Class B1 use of No.19, or the loss of the possibility of such use, as a material consideration. Neither side invited to him to do so. He cannot fairly be criticized for failing to do it, nor can it be said that he therefore erred in law. As Ms Yates and Mr Brown submitted, it was not up to him to infer from the case that was presented to him in opposition to Ms Lisle-Mainwaring's appeals a case that was not (see the judgment of Pill L.J. in *Francis v First Secretary of State* [2008] EWCA Civ 890, at paragraph 36). And in any event, if his conclusions on the acceptability of the appeal proposals and the likelihood of any suggested alternative use actually being put into effect were legally sound and explained with proper and adequate reasons, which in my view they very clearly were, the fact that he did not grapple with the question of "exceptional circumstances" does not matter. The lack of any conclusion on that question is not a flaw in his decision.

55. Were there any "exceptional circumstances" in this case? I do not think there were. This was, in truth, a perfectly unexceptional case. The proposals in Appeal C and Appeal E were nothing out of the ordinary in themselves. Nor did they give rise to any unusual planning issue. The site was not specifically allocated in the local plan for any particular use. The proposals themselves were straightforward. They were for the redevelopment and change of use to residential of a single, three-storey building, now used for storage, previously for offices. They were found by the inspector to comply with relevant planning policy – including the salient policy in the local plan, policy CF5. As the inspector also concluded, they were not harmful in any other respect. And not only that, they held in prospect significant planning benefit. None of the three factors referred to by the judge seems to me to have been "exceptional", and the inspector – rightly, I believe – did not say that they were.

56. But in any event, as I have said, even if the inspector had thought that this was an "exceptional case", his conclusions in paragraph 56 of the decision letter, and in particular his conclusion that there was no real possibility of a Class B1 use coming about if he dismissed the appeals, would have been enough on their own to exclude the "loss" of such use from the ambit of material considerations under the *Mount Cook* principles. In so far as a different view was taken in the court below, again I cannot agree.

*In any event did the inspector make any material error of law?*

57. Ms Yates and Mr Brown submitted that the judge was wrong, in paragraph 31 of her judgment, to focus on the question of whether the inspector was "entitled" to treat the loss of a possible reversion to Class B1 use in No.19 as a "material consideration". The question was not whether he was "entitled" to do that, but whether this was a "material consideration" – a consideration to which he was bound to have regard in making his decision.

58. As Auld L.J. stressed in paragraph 33 of his judgment *Mount Cook*, the court should not hesitate, "in an appropriate case", to conclude that it would have been "irrational" for a decision-maker to have had regard to an alternative proposal as a material consideration, or to have given it "any or any sufficient weight so as to defeat the application proposal". The proposals before the inspector in Appeal C and Appeal E complied with the development plan, were not otherwise harmful, and were also beneficial. Under the principles referred to by Auld L.J. in *Mount Cook*, therefore, this was not a case in which alternative uses or proposals for the site would normally be material considerations. On the contrary, it was a case in which that would only be so if "exceptional circumstances" required it. And the inspector identified none.

59. But that, said Ms Yates and Mr Brown, was not all. On the evidence before the inspector, the concept of Class B1 use being resumed in No.19 was merely theoretical. There was, in fact, no scheme for such use – not even one that could be described, in Auld L.J.'s words, as "inchoate or vague". The council's case before the inspector was founded on the contention that No.19 was, and should remain, in Class B8 use. It was not in dispute that Class B8 use had been, and remained, viable. The viability of Class B1 use had also been asserted in Mr Clack's evidence, on the basis that No.19 had no "hope value" for residential use in Class C3. But it was quite clear that Ms Lisle-Mainwaring had no intention of reinstating Class B1 use.

And there was also ample evidence – to which the judge did not refer – demonstrating that it would make no sense, economically or commercially, to do so. In the circumstances no rational decision-maker in the inspector's position could have concluded that the prospect of a Class B1 use being resumed in No.19 was a material consideration in this case. And even if it were to be treated as a material consideration, it could only rationally have been given negligible weight. This, in effect, is what the inspector did in paragraph 56 of his decision letter, where he gave the "prospects of reversion to Class B1 and the loss of that use contrary to Policy CF5" only "minimal weight". Either way, the net result is the same.

60. Mr Harwood submitted that the inspector was entitled to treat the loss of the potential for a reversion to Class B1 use in No.19 as material consideration. It was, plainly, a consideration relating to the use and development of land, and thus a planning consideration, and, in view of the council's intention, manifest in policy CF5, to promote and defend office uses, it was a material consideration. The inspector rejected Mr Carroll's case on this point not because the loss of the prospect of a reversion to Class B1 use would not be planning harm, but, wrongly, because he thought this prospect could not realistically be anticipated. Objectively, it could. The judge was right to observe, in paragraph 37 of her judgment, that there had been "substantial evidence" at the inquiry that a reversion to office use was likely if planning permission for change of use to residential use was refused. The inspector was right, in paragraph 55 of his decision letter, to discount the possibility of permitted development rights for a change of use from Class B8 to Class C3 being taken up. And he was right, in paragraph 56, to conclude that "hope value" for residential use should be disregarded, to acknowledge that Class B1 office use would be viable – indeed, such use would be more viable than Class B8 use – and to remind himself that permitted development rights existed for a change of use from Class B8 to Class B1. His error was that he failed to consider whether reversion to Class B1 office use was objectively likely. On redetermination, submitted Mr Harwood, it is highly likely that an inspector would find that this was, at least, a real possibility.

61. In my view, largely for the reasons I have already given in dealing with the previous two issues, the submissions made by Ms Yates and Mr Brown on this issue are also correct. Five conclusions emerge.

62. First, as I have already said, it is important to keep in mind that the inspector's conclusions in paragraph 56 of the decision letter were explicitly in the alternative to his main analysis, in which he had found that the lawful use of No.19 was Class B8 use, not Class B1 use, that there was no remaining trace of Class B1 use, and that the proposed change of use from Class B8 use to Class C3 use was not in conflict with policy CF5 of the local plan. His discussion of the hypothetical loss of a Class B1 office use, and its consequences, was not part of the main assessment on which he based his decision to allow both Appeal C and Appeal E.

63. Secondly, again as I have already said, he did not conclude that in this case there were "exceptional circumstances" to justify treating a possible alternative use as a material consideration in accordance with the *Mount Cook* principles.

64. Thirdly, he did not conclude that a reversion to Class B1 use was in fact likely, or realistic.

65. Fourthly, as Ms Yates and Mr Brown submitted, I do not think that in the circumstances of this case the inspector could properly regard the prospect of a reversion to Class B1 use, or the loss of that prospect, as a material consideration in the decisions he had to make. And even if he did regard it as a material consideration, I do not think he could reasonably give it "any or any sufficient weight … to defeat the [appeal proposals]", as Auld L.J. put it in paragraph 33 of his judgment in *Mount Cook*. The inspector's conclusion, at the end of paragraph 56, that the prospect of a reversion to Class B1 use, and the hypothetical loss of such use contrary to policy CF5, carried "minimal weight in connection with these five appeals", was both logical and legally sound. He had in mind here his prior conclusions "in connection with the issue of the present use class of the site". In the light of those earlier conclusions, his conclusion now – that a potential reversion to Class B1 use was "an eventuality" that could not "properly be anticipated in relation to these appeals" – was a proper basis for giving only "minimal weight" to the possible resumption of that use being foregone. Expressed in that way, this was plainly a conclusion not merely as to the subjective intentions of Ms Lisle-Mainwaring herself, but as to the objective likelihood of a Class B1 use being resumed, whether by her or by anyone else.

66. Fifthly, the inspector could have gone still further than he did. As Mr Brown submitted, there was very strong evidence before him that the prospect of Class B1 use being revived was not realistic. He noted in paragraph 28 of his decision letter that No.19 had been "stripped out since it was vacated by the last office user in 2011", and, in paragraph 33, that there was now "no vestigial office use in evidence …" and, "[although] not fully occupied by stored material on every floor, the property appeared as a single planning unit demonstrably in storage use". No proposal had been identified for the resumption of Class B1 use. It was Ms Lisle-Mainwaring's case at the inquiry that considerable work would be required to reinstate such use, at considerable cost. She, as the freehold owner of No.19, had no intention of undertaking that work. And there would have been no point in her, or anyone else, doing so. There was no need to do it to bring about a viable use of No.19; the current Class B8 use was viable, as the parties agreed. And in the light of the inspector's conclusion in paragraph 54 of the decision letter that the change of use from Class B8 use to Class C3 was "not to be regarded as in conflict with [local plan] policy CF5", there was no need to do it to achieve residential value. As Mr Brown pointed out, in the valuation evidence given for the council by Mr Clack it had been accepted that Class B1 use would only be viable in No.19 if there were no "hope value" for residential use. However, given the inspector's conclusion that the residential use of No.19 – in place of its present Class B8 use – complied with development plan policy, the "hope value of future change to residential use" was not merely a hope. It was a reality. In the face of that reality, the evidence said to support the prospect of a resumption of Class B1 use could hardly be regarded as cogent.

67. Mr Brown drew our attention to some of the evidence the inspector heard on valuation and viability. It is not for us to assess that evidence. It was, however, before the inspector. And although he did not refer to it expressly, it was entirely consistent with his conclusion that the prospect of reversion to Class B1 use could carry only "minimal weight". It clearly supported the view that there was no economic or commercial realism in that prospect. Mr Clack did not dispute that Class B8 use was itself a viable use. He accepted that No.19 could be let for such use at a rent in excess of £60,000 per annum. There was also evidence before the inspector that the office tenants who had vacated No.19 in 2011 had done so because it was no longer

suitable for their requirements, and that efforts to sub-let or assign their lease had been unsuccessful. Mr Clack's evidence was that, if Class B1 use were to be resumed, No.19 would attract a higher rent than it would in Class B8 use – he suggested an annual rent of £140,000. But he acknowledged that this would require a capital expenditure of at least £895,000 to adapt it for such use. He also accepted that if No.19 were valued at a level reflecting its potential residential use in Class C3, and assuming the purchase price of £4.75 million paid by Ms Lisle-Mainwaring, its development in Class B1 office use would not be viable, given that its residual value in such use was only £1.4 million. That evidence, Mr Brown submitted, is at odds with the judge's observation in paragraph 37 of her judgment that there was "substantial evidence at the Inquiry that a reversion to Class B1 use from Class B8 use was likely, on commercial grounds, if planning permission for residential use was refused". Such evidence was also, said Mr Brown, clearly relevant to the "objective assessment of the likelihood of reversion to Class B1 use" to which the judge referred in paragraph 36; but she did not, apparently, bring that evidence into account.

68. Those submissions seem right. However, I think it is enough for us to hold, as I am sure we can, that the inspector had before him compelling evidence to sustain his conclusion that only "minimal weight" should be given to the prospect of a reversion to Class B1 use and to the "loss" of such use. The fact that this conclusion did not result from a strict application of the *Mount Cook* principles does not in the end matter. The inspector's approach, and the conclusion to which it led, were, if anything, generous to Mr Carroll. I cannot see how his conclusion could have been more favourable to Mr Carroll's cause had the *Mount Cook* principles been applied with full rigour to the evidence he heard, including the evidence on valuation.

69. Mr Brown also relied on the permitted development rights available to Ms Lisle-Mainwaring for a change of use from Class B8 to Class C3 use. But this point adds nothing to the conclusion, which in my view is clear, that the inspector got to the right destination, albeit not by the more demanding route indicated in *Mount Cook*.

70. This issue, therefore, like the previous two, must in my view be decided in favour of the Secretary of State and Ms Lisle-Mainwaring. The inspector made no material error of law. If he erred at all, he erred in favour of Mr Carroll, and his error was, in any event, insignificant and of no consequence to his decision.

71. In conclusion, the basic analysis here is simple. As I said at the outset, these appeals raise no novel issue of law (see paragraph 1 above). The issues that arise can and should be viewed in the context of a classic exercise of planning judgment by a decision-maker in discharging his duty under section 38(6) of the 2004 Act. The inspector concluded that the proposals in Appeal C and Appeal E were in accordance with the development plan, including, of central relevance here, policy CF5. It followed that, applying the "presumption in favour of the development plan", he had to grant planning permission for them unless material considerations indicated otherwise. He found that material considerations did not indicate otherwise. There were considerations weighing in favour of planning permission being granted – in particular, in Appeal C, the enhancement of the character and the appearance of the conservation area, and, in both Appeal C and Appeal E, the creation of an additional dwelling. And both proposals, he concluded, complied with the "presumption in favour of

sustainable development" in the NPPF (see *Barwood v East Staffordshire Borough Council*). No other material considerations weighed against approval (see paragraphs 29 and 30 above). So this was a case in which, on a proper application of the principles in *Mount Cook*, an alternative proposal or use would normally be irrelevant (see paragraphs 15 to 19 above). No "exceptional circumstances" arose (see paragraph 55 above). And in any event the inspector gave no significant weight to the "loss" of Class B1 use as an alternative use to the proposed use in Class C3. He was lawfully entitled to do that (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* (1995) 1 W.L.R. 759, at p.780F-H). His decision, therefore, should not have been quashed.

*Conclusion*

72. For the reasons I have given, I would allow these appeals, and restore the inspector's decision.

**Lord Justice Flaux**

73. I agree.

**Lord Justice McFarlane**

74. I also agree.