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Case No: CO/4766/2019 & CASE NO: CO/2426/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2021

Before:

James Strachan QC (Sitting as a Deputy Judge of the High Court)

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Between:

THE QUEEN **-on the application of-** **PAULA FRASER**	**Claimant**
- and - **SHROPSHIRE COUNCIL**	**Defendant**
-and- **THE WREKIN HOUSING TRUST**	**Interested Party**

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- -

Mr Ben Fullbrook (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Killian Garvey (instructed by **Shropshire Council Legal Department**) for the **Defendant**
Ms Thea Osmund-Smith (instructed by **Wrekin Housing Trust** for the **Interested Party**

Hearing dates: 14-15 October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 11 January 2021.

MR JAMES STRACHAN QC (Sitting as a Deputy Judge of the High Court):

Introduction

1. The Claimant challenges the lawfulness of two separate grants of planning permission by the Defendant to the Interested Party to provide extra care residential development on land known as Pauls Moss in Whitchurch, Shropshire ("the Site").

2. "Extra care" is a term used by the Interested Party to describe specialist housing for persons over 55 years of age intended to enable them to live independently, but with access to a range of on-site care and support as they grow older, or develop greater care needs.

3. The Site is the location of Pauls Moss House a "non designated heritage asset". It is not statutorily listed, but makes a positive contribution to a statutorily designated conservation area within which it sits. There are other buildings on the Site which have been used as "supported living" apartments. They are now considered not to be fit for purpose.

4. The Interested Party originally proposed redevelopment involving the demolition of Pauls Moss House. Its planning application for that scheme was refused by the Defendant. The two subsequent planning applications in identical form permitted by the Defendant are based on retention of Pauls Moss House. The description of the development permitted is:

> "Re-development to include conversion of house to form cafe/community hub and flats; erection of 71 sheltered residential apartments; erection of health centre building; landscaping scheme including removal of trees; formation of car parking spaces and alterations to existing vehicular access".

5. The first of the revised applications was granted by decision notice dated 18 October 2019. The Claimant was granted permission to bring her judicial review claim against that decision ("JR1") by Neil Cameron QC (Sitting as a Deputy High Court Judge) on 10 February 2020 on two grounds: (1) a claim of unlawful direct discrimination on grounds of age in the approach to open space; (2) a claimed breach of the public sector equality duty ("PSED") imposed under section 149 of the Equality Act 2010 ("the EA 2010").

6. The second revised application for the same development was granted by decision notice dated 28 May 2020. The Interested Party submitted it in light of JR1, providing further information about the open space proposed. In determining it, the Defendant sought to address those two grounds of challenge raised in JR1. The second decision notice was issued shortly before the substantive hearing of JR1 was due to take place. The substantive hearing was adjourned by consent. The Claimant subsequently issued a further claim challenging that second decision notice ("JR2").

7. The claim in JR2 has been dealt with on a "rolled up" basis alongside the relisted substantive hearing for JR1. The Claimant's proposed grounds of challenge for both JR1 and JR2 are essentially the same. They are set out in Re-Amended Statement of Facts and Grounds for JR1.

8. The Claimant's principal complaint is relatively simple. She is not opposed to the principle of redeveloping the Site to provide extra care residential accommodation. She believes the scheme the Defendant has permitted fails to provide adequate open space for its intended residents.

9. Despite the relative simplicity of this concern, there are than five grounds of challenge advanced against each decision which I summarise as follows:

   i) Ground 1 – a misinterpretation of policy MD2 of the Defendant's adopted development plan as to the open space required.

   ii) Ground 2 – a failure to act consistently with the approach to open space applied to the earlier refusal of the proposal involving demolition of Pauls Moss House.

   iii) Ground 3 – a failure to have regard to material considerations, or the making of a material error of fact, or acting irrationally regarding open space.

   iv) Ground 4 - direct or indirect discriminated on grounds of age or disability in respect of open space.

   v) Ground 5 – a failure to have due regard to the PSED under the EA 2010.

10. All parties submitted that the principal focus should be on the Defendant's second grant of permission challenged in JR2. The logic is that if that decision was unlawful, the earlier decision challenged in JR1 would almost certainly be as well (given the same grounds articulated). By contrast, if that decision was lawful, the challenge under JR1 may well become academic to a significant degree, albeit questions as to relief and costs will remain at large. That said, all parties relied to differing degrees on the history of all three planning applications. This has necessitated consideration of the complex factual background which I seek to summarise in this judgment.

11. The parties also agreed it would be sensible to hear full argument on each of the five grounds before determining the formal question of permission that arises on the rolled-up hearing of JR2.

12. The hearing took place by video conferencing with the co-operation of the parties. The Claimant was represented by Mr Fullbrook. The Defendant was represented by Mr Garvey. The Interested Party was represented by Ms Osmund-Smith. I am very grateful to each of them for the clarity and helpfulness of their written and oral submissions, along with the way in which the submissions on both claims have been consolidated, so far as practicable.

Open Space

13. Before turning to the chronology of events, it is helpful to identify the main policy documents dealing with open space on which the parties focused.

14. Policy MD2 is a development plan planning policy contained in the Defendant's Site Allocations and Management of Development ("SAMDev") Plan, adopted on 17 December 2015. It deals with a number of aspects of "Sustainable Design". There

are seven stated requirements for a development proposal to be considered acceptable. The fifth relates to landscaping and open space as follows:

> "MD2: Sustainable Design
>
> Further to Policy CS6, for a development proposal to be considered acceptable it is required to:
>
> …
>
> 5. Consider design of landscaping and open space holistically as part of the whole development to provide safe, useable and well-connected outdoor spaces which respond to and reinforce the character and context within which it is set, in accordance with Policy CS17 and MD12 and MD13, including. [sic]
>
> i. Natural and semi-natural features, such as, trees, hedges, woodlands, ponds, wetlands, and watercourses, as well as existing landscape character, geological and heritage assets and;
>
> ii. providing adequate open space of at least 30sqm per person that meets local needs in terms of function and quality and contributes to wider policy objectives such as surface water drainage and the provision and enhancement of semi natural landscape features. For developments of 20 dwellings or more, this should comprise an area of functional recreational space for play, recreation, formal or informal uses including semi-natural open space;
>
> iii where an adverse effect on the integrity of an internationally designated wildlife site due to recreational impacts has been identified, particular consideration will be given to the need for semi-natural open space, using 30sqm per person as a starting point.
>
> iv. ensuring that ongoing needs for access to manage open space have been provided and arrangements are in in place for it to be adequately maintained in perpetuity.
>
> …"

15. The explanatory text to Policy MD2 explains (amongst other things) that:

> "3.6 … Policy MD2 builds on Policy CS6, providing additional detail on how sustainable design will be achieved. In applying these requirements, consideration should also be given to more detailed national guidance on design set out within good practice….

> "3.13 Adequate open space is set at a minimum standard of 30sqm per person (equivalent to 3ha per 1,000 population). For residential developments, the number of future occupiers will be based on a standard of one person per bedroom. For non-residential development, open-space should be design-led, informed by the character and context of the development proposed, together with any requirement identified in the relevant Place Plan and the environmental networks approach set out in Policy CS17 and the Natural Environment SPD. For developments of 20 dwellings and more, the open space needs to comprise a functional area for play and recreation. This should be provided as a single recreational area, rather than a number of small pockets spread throughout the development site, in order to improve the overall quality and usability of the provision. On very large sites, it may be appropriate to divide the recreational open space into more than one area in order to provide accessible provision across the development. In such instances it is important that each recreational area is of a sufficient size to be functional. The types of open space provided need to be relevant to the development and its locality and should take guidance from the Place Plans. The ongoing needs for access to manage open space must be provided for and arrangements must be in place to ensure that the open space will be maintained in perpetuity whether by the occupiers, a private company, a community organisation, the local town or parish council, or by Shropshire Council."

16. Reference has been made to the Defendant's "Open Space Interim Planning Guidance" document dated 2012 ("the 2012 Guidance"). This is not part of the adopted development plan itself.

17. Section 3 of the 2012 Guidance is entitled "Local Quantity Standard". It draws on typologies of open space expressed in what was then a draft version of the National Planning Policy Framework intended to replace national policy previously articulated in Planning Policy Guidance 17 ("PPG17"). Paragraph 3.2 of the 2012 Guidance identifies that a local assessment of all types of open space provision had been conducted between 2009-2018 by consultants acting on behalf of the former district and borough councils in Shropshire (excluding Telford and Wrekin). This was consolidated in 2010 into what was described as a PPG17 Study. Paragraph 3.4 identifies that the resulting open space quantity standard was based on "PPG17 Study evidence-based standards" for the following open space typologies: local parks, amenity open space (termed amenity greenspace in PPG17), provision for children, provision for young people, natural and semi-natural open space, and allotments.

18. The reference to "amenity greenspace in PPG17" is a reference to the definition of open space contained in the Annex to PPG17. The typology of open spaces included:

> "v. amenity greenspace (most commonly, but not exclusively in housing areas) – including informal recreation spaces, greenspaces in and around housing, domestic gardens and village greens."

19. The PPG17 Study for the councils identified is one of the documents identified in the list of "Key Evidence" for the formulation of Policy MD2 (see Note 4 in the SAMDev Plan).

20. Paragraph 3.5 of the 2012 Guidance states that development would be expected to be designed with adequate open space on site to meet a local quantity standard shown in Table A. This assumed occupancy of a development of one person per bedroom. The 'Open Space Quantity Standard' in Table A is "3.00ha per 1000 population (equivalent to 30 square metres per person)". The term open space used in Table 3 is subject to a footnote which states:

> "Includes the following typologies referred to in the PPG17 study as local parks, amenity open space, provision for children, provision for young people, natural and semi natural open space and allotments."

21. Paragraph 3.6 of the 2012 Guidance stated (with the bold text as in the original):

> "3.6 The quantity standard of 3 hectares per 1000 population is the starting point for negotiations between the Council and developers and is the minimum requirement for the provision of open space. In certain circumstances increased provision may be required in order to meet Policy CS6 and Policy CS17, as elaborated in section 4 below."

22. The current version of the National Planning Policy Framework ("NPPF") contains its own definition of "open space". The Annex 2: Glossary of the NPPF states:

> "**Open space**: All open space of public value, including not just land, but also areas of water (such as rivers, canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity."

The First Application

23. In 2018 the Interested Party submitted an application to the Defendant (reference number 18/05901/FUL) for planning permission for:

> "Proposed re-development to include the demolition of Pauls Moss and associated supported living accommodation; erection of one building comprising 74 supported residential units; health centre, pharmacy, central hub space of cafe and community rooms; 85 car parking spaces, alterations to existing vehicular access, creation of two new vehicular accesses (Rosemary Lane and Dodington); landscaping scheme including removal of trees; link to adjacent public open space". ("**the First Application**")

24. The proposed site plan shows Pauls Moss House and the other buildings on the Site being replaced by a new health centre and a new circular "Hub" building attached, in turn, linked to the new residential units. These new buildings surrounded an enclosed

courtyard area in the centre. An open air terrace was to be provided attached to the Hub building overlooking the courtyard which was at a lower level.

25. The accompanying Design and Access Statement stated:

> "A key connecting feature between the Extra Care and the new Health Centre is the circular Hub and central public plaza which will bring people together and will become the focal point of the scheme. The area is accessible for all key user groups and offers the opportunity for the Café to spill out into a south facing terrace for users to enjoy. The vibrant Hub, with its communal facilities, will not just be easily accessible for the Extra Care residents, but will also act as an attraction inviting people from the wider community to engage with each other providing opportunities to develop new relationships across all age ranges and backgrounds …".

26. To the south of the new buildings, a raised roof terrace area for residents was proposed, along with access to another potential "raised terrace" area immediately to the south of this. This is shown on land outside the Site, on land within a public open space known as Queensway Park. The plans showed a potential ramped access from that raised terrace into Queensway Park below.

27. The First Application attracted opposition on a number of different grounds, including the loss of Pauls Moss House as a heritage asset. The Queensway Playing Fields Association objected to the proposed terrace and access from the Site. The Claimant objected on various grounds, including the lack of sufficient open space. She commissioned architects to produce a design of an alternative scheme for extra care units for the Site showing what she considered to be significantly better open space arrangements. She considered the alternative could provide the same quantum of development proposed by the Interested Party, but with 40% more open space. She sought pre-application advice from the Council about this alternative scheme which was that to the effect that the alternative delivered "satisfactory open space" in qualitative terms, but it failed to meet a 30 sqm minimum per person overall so it would need to be redesigned.

28. The First Application was the subject of an officer report ("OR1") to the Council's Planning Committee for a meeting on 25 June 2019. OR1 recommended refusal of the application.

29. Paragraph 4.11 of OR1 recorded the objection from the Defendant's Parks and Recreation Manager (withdrawing an earlier response) as follows:

> "*Due to matter brought to our attention regarding the access from the development down to the existing POS we have reconsidered our comments on this planning application.*
>
> *We wish to withdraw our comments made to the Planning application 18/05901/FUL and refer back to our initial comments that we made at the PREAPP stage.*

> *Under Shropshire Council's SAMDev Plan and MD2 policy requirement, adopted 17th December 2015, all development will provide adequate open space, set at a minimum standard of 30sqm per person (equivalent to 3ha per 1,000 population). For residential developments, the number of future occupiers will be based on a standard of one person per bedroom.*
>
> *For developments of 20 dwellings and more, the open space needs to comprise a functional area appropriate to the development. This should be provided as a single area, rather than a number of small pockets spread throughout the development site, in order to improve the overall quality and usability of the provision.*
>
> *The types of open space provided need to be relevant to the development and its locality and should take guidance from the Place Plans. The ongoing needs for access to manage open space must be provided for and arrangements must be in place to ensure that the open space will be maintained in perpetuity whether by the occupiers, a private company, a community organisation, the local town or parish council, or by Shropshire Council.*
>
> *Based on the current design guidance the development will deliver 102 bedrooms and therefore should provide a minimum of 3060m2 of usable public open space as part of the site design.*
>
> *Currently the site design identifies only a small area of POS provision and therefore it does not meet the MD2 policy requirement. The site must be redesigned and altered to meet the policy requirements.*
>
> **The earlier response indicated**:
>
> *There are 102 bedrooms within this development and in previous comments we have stated that 3060sqm of POS is required. Within this planning app they are providing 627sqm of POS in a central point and then 212 sqm of raised terrace with access via a ramp and steps to the existing Public Open Space below the site. It appears that the applicant has agreed to link this development with the existing Public Open Space which is classified as Parks and gardens on the PPG17 so long as the access is provided an offsite contribution should be appropriate to account for the loss of POS within the development*."

30. Paragraph 4.17 of OR1 recorded the objection from Queensway Playing Fields Association confirming refusal of consent to the direct access proposed. Section 6.4 of OR1 set out the officers' analysis of the proposal in terms of visual impacts, landscaping and open space provision, citing Policy CS6 and SAMDev Policy MD2.

At paragraph 6.4.5 officers referred to the Design and Access Statement on the stated role of the Hub and central public plaza, but officers explained their views as follows:

> "6.4.6 Whilst acknowledging the provision of the public plaza it should be noted that this is the only significant public open space provided within the development which proposes on site residential accommodation containing 102 bedrooms within this development as well as the new Health Centre and associated café, hairdressers etc. 102 bedrooms are proposed as part of the on-site residential development and the Council's Parks and Open Space Manager has stated that this would require 3060 square metres of public open space. The applicants propose 627 square metres of POS in a central point as referred to above as well as 212 square metres of raised terrace (part of which appears to be outside of the application site red line in accordance with the plans submitted for planning consideration), with access via a ramp and steps to the existing Public Open Space, below the site in accordance with detail in support of the application. They indicate that they have agreed to link this development with the existing Public Open Space, (Queensway Park), which is classified as Parks and Gardens. However, a letter of objection from Queensway Playing Fields Association indicates that no consent has been given for entry onto Queensway Park from the Paul's Moss site and that further still this part of the park is a Nature Reserve and would be totally detrimental to wildlife that has been established in that area.
>
> 6.4.7 Clearly whilst it is accepted that future residents of any development on site are not likely to require significant provision of private gardens/open space and therefore it could be argued that space provision in accordance with policy guidance in this instance is not essential, the application proposes a substantial shortfall in open space provision and this is considered unacceptable, given the scale of the development as proposed, as residents are likely to require some form of open space provision on site and it is noted the central public plaza will be used by users of the café in accordance with information in support of the application. Whilst the applicants have indicated access to the adjoining Queensway Park, there appears to be no consent to this and as such it is considered open space provision and landscaping on site is inadequate and the lack of open space further contributes towards the overriding concern of over development of the site and visual impact, which in turn leads to an overwhelming detrimental impact on the surrounding area. Given the above in relation to landscape and visual impact it is considered by Officers that the development is contrary to Policies CS6, CS17, MD2 and MD12 of the local plan as well as the NPPF on this matter."

31. At paragraph 6.6.26 of OR1 officers referred to the Claimant's alternative scheme commenting that it provided some "considerable improvements in design and layout terms in relation to the scheme subject to this application."

32. At the hearing Mr Fullbrook introduced a further document provided by officers for the Committee meeting summarising additional letters that had been received since preparation of OR1. One was from the Interested Party relying on its operation of other Extra Care schemes within and outside Shropshire with less outdoor amenity space than proposed for the Site. It relied specifically an Extra Care scheme in Ellesmere with 18.8sq m of open space per bed space, claiming that the planning officer for that scheme had expressed satisfaction with it. The Interested Party contrasted the proposed 29.9sq metres per person it was proposing in its scheme, a calculation based on what it considered to be 3,384.5 square metres of open space being provided for 113 bed spaces using what it said was the same approach to calculation adopted for the Ellesemere scheme – inclusion of communal open gardens, paths, planting beds, roof terraces, but not car parking areas or roadways etc. Mr Fullbrook referred, in particular, to the officer response in that document which included the following:

> "Both sites referred to by the applicants were brownfield sites and neither were located within a Conservation Area.
>
> There has also been significant policy changes since the processing of the applications referred to.
>
> With regards open space requirements the proposal under consideration falls well short of that required by current policy and is in any case also for use by the public, (Café alongside the only usable open space provision on site to which info indicates will be available for users of the café). Highlighting paths as being open space etc is not considered appropriate and usable open space is clearly limited and the plans even indicate open space as a terrace within Queens Park which is clearly outside the application site red line!
>
> Pauls Moss site is alongside Queens Park, however it has been made clear in comments to the application that access into this from the site is not going to be agreed and further still the part of Queens Park adjacent to the site is not suitable for provision of public access owing to its ecological nature.
>
> The Ellesmere Road scheme was a more mixed residential use site. The extra Care facility is a stand along [sic] with its own parking provision. This is significantly different to the Witchurch proposal.
>
> …"

33. Mr Fullbrook submits (with particular reference to Ground 2) that a different and inconsistent approach was subsequently adopted by the Defendant's officers to the

calculation of open space for the Second and Third Applications. I return to that submission shortly.

34. The Defendant agreed with the officers' recommendation to refuse. The decision notice dated 28 June 2019 gave four reasons for refusal. The first concerned the loss of Pauls Moss House and the effect on the conservation area. The second related to the proposed mass and scale of the scheme considered (amongst other things) to represent overdevelopment, be incongruous to the built form and urban grain and overbearing on the character of the surrounding area. The fourth reason concerned loss of trees. The third reason concerned open space as follows:

> "3. The application proposes insufficient open space and landscaping provision on a site considered over-development. Further still it has not been adequately demonstrated that off-site provision and connectivity can be provided as indicated in information submitted in support of the application. The application is considered contrary to Policies CS6, CS9 and CS17 of the Shropshire Core Strategy, Policies MD2, MD8, MD12 and S18 of the SAMDev and the National Planning Policy Framework."

The Second Application

35. As a result of that refusal the Interested Party redesigned its proposals for the Site. It submitted a second planning application (19/03861/FUL) in September 2019 for:

> "Re-development to include conversion of house to form cafe/community hub and flats; erection of 71 sheltered residential apartments; erection of health centre building; landscaping scheme including removal of trees; formation of car parking spaces and alterations to existing vehicular access". ("the Second Application")

36. This proposal now involved the retention and re-use of Pauls Moss House. The previously proposed Hub building (containing the connecting "central public plaza") was also removed and replaced with an area of open space outside Pauls Moss House. This area of space joined with an open area in the north western corner of the site next to the main car park. The number of residential units was reduced from 74 to 71.

37. The accompanying Planning Statement referred to other changes intended to address the reasons for refusal. In respect of open space, it stated (amongst other things):

> "The scheme is now revised and both site landscaping and open space provision is different in extent and quantity from that proposed previously.
>
> A high quality hard and soft landscaping design will be delivered as an integral part of the overall scheme.
>
> The use of materials, texture, colour and the imaginative use of planting will result in high quality, unique external spaces.

> Carefully considered public and private realms with landscape gardens and external terraces are provided to encourage outdoor dining and relaxation.
>
> The aim has been to provide a safe and secure environment for people to live in without being isolated from their local communities. Indoors and outdoors spaces have therefore been designed to meet Secure by Design accreditation.
>
> An open paved public plaza space is proposed directly outside the main house which runs between Paul Moss and the proposed health centre. This generous outdoor, public amenity space will be a mix of paved hard surfacing including Breedon gravel, soft landscaping, feature trees and boxed hedging and street furniture. This pedestrianised space allows the safe movement of people and will hopefully encourage more community integration whist residents and visitors alike enjoy this outdoor landscaped space.
>
> It is proposed that 15 benches will be placed within the plaza for people to enjoy this high quality space.
>
> It is contested [sic] that there is the following planning support for the open space provision and arrangements as set out as follows:
>
> • The proposal is of much better quality than the existing provision
>
> • The open space and landscaping proposals do meet the needs of the residents and visitors
>
> • The council have established precedent for high quality open space provision at a lesser size than they consider policy requires when such space is designed and intended to be used by older people".

38. As to the previously proposed link to Queensway Park, the Planning Statement stated:

> "… It had been proposed to offer to link the site to the adjacent open space to the south of the site. This proposal was never taken up or supported at the time by the custodians of this and accordingly the proposal is not included within the revised scheme.
>
> The applicant however remains prepared and willing to link this site with the adjacent open space if that is supported locally.
>
> The lack of any link to this space within the present is however no ground for planning objection or concern."

39. A new Design and Access Statement dated August 2019 was submitted. This identified that the "Community Hub" would now sit within the retained Pauls Moss House, with a Café space. It included the following statements:

> "The Pauls Moss development revolves around the concept of a "Community Hub" principle. The Hub sits at the heart of the scheme within the Pauls Moss house itself. The existing three storey red brick house has proved to be a focal point for the community in terms of its retention and its for this reason that the community uses have been located in this part of the development.
>
> Local people who wished to see the existing house retained in any future development proposals for the Pauls Moss site will now be able to use the house when accessing the Hub Café and Community Room which will provide a focal point for the community living not only at Pauls Moss and Pauls Moss Court, but in the wider Whitchurch area.
>
> …
>
> … The overall footprint of the scheme has been reduced considerably with the Hub element of the project located within the ground floor of the Pauls Moss house as opposed to a new building. The number of Extra Care apartments have also been reduced in number from 74 to 71. The area of open space on the site has increased by over 450sqM and meets Shropshire Council's core policies …
>
> …
>
> … An attractive, private courtyard garden is located in the centre of the scheme and will offer a tranquil, private space for Residents, the wider public being encourage to make full use of the Hub and its own outdoor terrace space.
>
> The apartments themselves wrap around the courtyard with additional amenity space being provided by individual private, external balconies, a small roof terrace accessed from the central glazed corridor on the first floor along with a lower ground floor south facing terrace located adjacent to the Resident's Hobby/Activity Room."

40. The proposed site plan in that document showed the footprint of the buildings with the retained Pauls Moss House and the area of open space proposed where the Hub building had previously been. This was described in the Design and Access Statement in the same terms as the Planning Statement, as was the possibility of a link to Queensway Park. In respect of other areas, it stated:

> "…The outdoor courtyard space is divided between the Extra Care at the lower level accessed from the Lower Ground Floor

> Plan and the upper public terrace positioned between the Paul Moss house and the new Health Centre. A stepped landscaped retaining structure separates the upper public outdoor terrace from the lower Extra Care private garden. This will provide colour and texture all year round offering an attractive outlook for Residents.
>
> In addition to the lower ground private garden spaces to the Extra Care there is an outdoor roof terrace proposed which is accessed from the first floor. The outdoor roof space will have coloured paving flags and raised planting beds and will offer an alternative outdoor amenity space to that provided in the central courtyard.
>
> Finally, within the development site itself there is a smaller, private Resident's outdoor raised terrace space which is accessed from the lower ground level. This South facing amenity space allows outdoor activities to take place in association with the Hobby/ Activity Room which is located nearby."

41. Objects to the scheme commissioned AH Design Architecture to provide a "Wellbeing and Environmental Appraisal" of the Second Application which was submitted to the Defendant. That appraisal welcomed the retention of Pauls Moss House as positive development, but considered there still to be a list of problems with the new design. It set out criticisms in respect of green space in Section 5. The authors considered there to be "a lack of usable outdoor space for the residents" and stated that "[o]utdoor space is one of the most significant aspects of design for 'Extra Care' living", noting its significant therapeutic benefits for older people. The authors included their own calculation of the open space within the scheme, concluding that it fell well short of what they calculated to be a policy requirement of 3,210 sqm.

42. The Claimant also commissioned a review from the architects of her alternative scheme. By detailed letter dated 14 October 2019, those architects wrote to the Defendant setting out various criticisms. They contended it was "substantially the same as the refused scheme" and that it "severely limited" communal open space, and failed to take account of "nationally accepted good practice standards for the design of residential accommodation for people over the age of 55" which emphasise that "readily accessible open space…is a positive and necessary facility to be included in the accommodation care and recovery of elderly people". Their letter also alleged an approach that discriminated on the basis of age and disability.

43. The Second Application was considered in new officer's report ("OR2") for a meeting of the Defendant's Planning Committee on 15 October 2019. OR2 recommended approval subject to the imposition of conditions. Section 2 included a description of the scheme. Paragraph 2.5 identified the retention of Pauls Moss House, with the Community Hub element of the scheme located within it. Paragraph 2.7 referred to the Hub as being for community integration, identified the provision of 71 extra care residential units and the health centre and then stated that:

> "… [t]he proposed hub with community meeting room, café and dining areas will encourage social interaction between Residents and the wider public who are encouraged to make full use of the facilities on offer."

44. Paragraph 2.8 referred to the Health Centre to the east as having "views out onto the adjacent central open public plaza via fully glazed double height waiting area" and identified that: "[t]he glazed atrium space is located opposite the main entrance into the Pauls Moss house which provides clear views of the house from inside the Health Centre as well as creating an open vista of the Paul Moss house from outside the Health Centre as one moves around the site."

45. Paragraph 4.4 of OR2 set out the consultation response of the Defendant's Parks and Recreation Manager:

> "**SC Parks and Recreation Manager (no objections)**, has responded to the application indicating:
>
> *The resubmitted application shows the addition of public open space within the development and Officers are content with the proposals and have no further comments to make.*"

Mr Fullbrook contends that the Manager was making no representations as to the quality of the open space provided.

46. Paragraph 4.11 of OR2 referred to public comments. Key planning issues in the 14 letters of objection were summarised, including a concern of overdevelopment. A letter of objection from Whitchurch Allotment and Community Orchard Association was set out. 9 letters of support were identified.

47. Section 5 of OR2 set out the officers' appraisal. Paragraph 5.1.3 identified the relevance of Policy MD2 of the SAM Dev Plan as part of the policy context. Section 5.4 dealt with visual impact, landscaping and open space provision. It included the following analysis (with the formatting shown):

> "5.4.5 The applicant's Planning Statement indicates a key connecting feature between the Extra Care and the new Health Centre is the circular Hub and central public plaza which will bring people together and will become the focal point of the scheme. The area is accessible for all key user groups and offers the opportunity for the Café to spill out into a south facing terrace for users to enjoy. The proposal includes a paved public plaza space directly outside the main house which runs between Pauls Moss and the proposed health centre. This outdoor, public amenity space will be a mix of paved hard surfacing including Breedon gravel, soft landscaping, feature trees and boxed hedging and street furniture.
>
> 5.4.6 The applicants have submitted a visual impact assessment and this concludes that the scheme will have only negligible or slight effects on visual setting, consideration has

> been given to the surrounding Conservation Area, setting of Paul's Moss House and the setting of listed buildings located outside of the application site. The changes to setting that the construction of the proposed buildings (whilst acknowledging they are larger in scale than those to be replaced), in relation to the historic landscape are also considered slight.
>
> 5.4.7
>
> - The applicants planning statement indicates that the proposal is of much better quality than the existing provision on site and compared to the previous application for development on site subsequently refused in that this proposal includes provision for Open space and landscaping proposals to meet the needs of the residents and visitors
>
> - The council have established precedent for high quality open space provision at a lesser size than they consider policy requires when such space is designed and intended to be used by older people.
>
> 5.4.8 Whilst it is acknowledged that this application does not provide for the standard required open space in relation to bedroom ratio in respect of standard residential development, it is acknowledged that this application is for bedroom development for persons mostly in extra care needs, who in the vast majority of cases would not require private open space and that managed communal open space would be a much better provision. It is considered that the proposed open space on the site will contribute towards attracting and inviting people from the wider community to engage with each other providing opportunities to develop new relationships across all age ranges and backgrounds."

48. Paragraphs 5.4.10-11 then dealt with trees and vegetation and it then continued:

> "5.4.12 It is accepted that future residents of the development on site are not likely to require significant provision of private gardens/open space and therefore it could be argued that space provision in accordance with policy guidance in this instance is not strictly essential. However in order to ensure the development is executed to a high standard with consideration to the Pauls Moss House and the open space plaza area in front of the Mansion House as proposed, as well as the other pockets of open space, and the overall contribution towards the Conservation Area, it is recommended that conditions are attached to any approval notice issued, in order to ensure adequate consideration to this matter. With consideration to the issues as discussed it is considered the concerns on this matter as outlined in the previous refusal for the site are addressed to an acceptable standard.

> 5.4.13 Given the above in relation to landscape and overall visual impact, on balance and overall in consideration of the circumstances it is considered by Officers, that the development is broadly in accordance with Policies CS6, CS17, MD2 and MD12 of the local plan as well as the NPPF in relation to landscaping and visual impacts."

49. Section 5.8 of OR2 dealt with "The Planning Balance", in light of section 38(6) of the Planning and Compulsory Purchase Act 2004. It set out the officers' view that, on balance, the proposal complied with the relevant policies of the local plan and the NPPF stating (amongst other things):

> "5.8.2 Having carefully considered the proposal against adopted planning policy and guidance, it is considered that the proposal on balance, (with consideration to the public benefits this scheme will offer to the wider community), complies with relevant policies of the local plan and the NPPF. … Landscaping and open space provision whilst minimal in area, as long as this is executed to a high standard is on balance considered acceptable. …"

50. The same overall view of compliance with the development plan, including Policy MD2, and with the NPPF was set out in conclusions at section 6. Paragraph 8.3 of OR2 was entitled "Equalities". It stated:

> "The concern of planning law is to regulate the use of land in the interests of the public at large, rather than those of any particular group. Equality will be one of a number of 'relevant considerations' that need to be weighed in Planning Committee members' minds under section 70(2) of the Town and Country Planning Act 1990."

51. Officers provided a verbal update to members at the committee meeting itself. The committee resolved to grant planning permission subject to the imposition of conditions. Planning permission was subsequently issued by notice dated 18 October 2019. A condition was imposed on the permission (condition 11) requiring full details of hard and soft landscaping to be approved before ground works are commenced, although the Claimant submits (amongst other things) that this condition does not deal with the amount of open space provided.

The JR1 Claim

52. On 29 November 2019 the Claimant filed her Claim Form in JR1 challenging that decision on three grounds. In addition to the two identified above, there was a third alleging that it was irrational for the Council to conclude that the proposed development would cause no harm to the significance of the conservation area.

53. The Defendant and Interested Party filed Summary Grounds of Resistance opposing the grant of permission. In so doing, the Interested Party filed a witness statement from Ms Jane Kind dated 23 December 2019 in which she stated:

> "27. The revised Proposed Development that was granted planning permission provides an additional 382.5sqm of open space compared to the original Planning Application (Ref. 18/05901/FUL). **Drawing No 2361/SK69** is attached at Appendix 2.
>
> 28. This drawing illustrates the open space that WHT considers to be the open space for the purposes of Policy MDD2, and which equates to 3002 sqm. That equates to 28.05 sqm per person.
>
> 29. It should be noted that WHT has **not** included open spaces such as landscaped buffer zones, which incorporate 'opportunities for environmental enhancement" in accordance with the Council's Open Space Interim Planning Guidance (2012). Also, no allowance has been made in these calculations for the private internal communal open space, or private apartment balcony areas."

54. The Claimant filed a Reply. It disputed the Interested Party's open space calculations. Permission for the claim to proceed on the two grounds identified above was granted by the Deputy Judge on 10 February 2020, but permission for the third ground relating to the conservation area was refused. The Claimant has not renewed any application to proceed with that ground, so it is unnecessary to say more about it. Ms Kind filed a second witness statement dated 17 March 2020. She noted the dispute about her open space calculations and expressed the view that the dispute turned on questions of judgment as to the useability of the open space. The substantive hearing for JR1 was listed to be heard on 11 June 2020.

The Third Application

55. Following the grant of permission in JR1, the Interested Party decided to submit a further planning application (20/01284/FUL) to the Defendant on 25 March 2020 ("the Third Application"). It was for the same form of development permitted for the Second Application. The accompanying Planning Statement dated 10 March 2020 stated at paragraphs 1.1 and 1.6:

> "1.1 This application is a resubmission of previously approved planning application (19/03861/FUL) in respect of this site and this development.
>
> …
>
> 1.6 This fresh, 3rd planning application remains unaltered in any physical or factual way from the approved 2nd planning permission [i.e. 19/08361/FUL]. This submission is made having regard to the claim for Judicial Review made by an interested party, which is challenging the grant of planning permission, and which is also based on factual inaccuracies so far as the challenge relates to the quantum of open space."

56. Section 2 referred to the determination of the Second Application. Section 3 dealt with certain aspects of planning policy and the statutory framework. Section 4 dealt with what it considered to be main matters, identifying in paragraph 4.1 that the Planning Statement addressed "the Conservation Area, open space and other community benefits".

57. So far as open space is concerned, the Planning Statement put forward further analysis and provided alternative calculations of the amount of open space proposed as follows:

> "The calculation of "Open Space" is to some degree subjective and can be calculated in many ways". The National Planning Policy Framework contains a broad definition of "open space" as being:
>
> > *"All open space of public value, including not just land, but also areas of water (such as rivers, canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity."*
>
> This section of the planning statement considers the calculation of open space that can be of public value and/or act as visual amenity in accordance with the statement above. It then goes on to define the planning context around this. In particular it identifies the policy that requires that *adequate open space of at least 30sqm per person that meets local needs in terms of function and quality is provided*. Previous calculations have been undertaken and figures have been stated by the applicant that do not take account of all of the available space. The 3002m2 of open space previously quoted by the applicant is wrong. The calculation excluded some planting beds which should have been part of the calculation and which have been added back in, hence the resulting increase. A visual to demonstrate this calculation is shown in drawing number SK78B (Appendix B) which provides the first detailed analysis of the areas of open space and illustrates three options of calculation, which are:
>
> Option 1 – All areas of open space that act as a visual amenity are measured including upper floor balconies, open ground floor patio areas and landscaped buffer zones which are only accessible through the car parking areas.
>
> Option 2 – All areas of open space that act as a visual amenity are measured including open ground floor patio areas, but excluding upper floor balconies and landscaped buffer zones which are only accessible through the car parking areas.
>
> Option 3 – All areas of open space that act as a visual amenity are measured but excluding, open ground floor patio areas, upper floor balconies and landscaped buffer zones which are

> only accessible through the car parking areas and entrance zones"
>
> All of the above options have been measured using a computer aided design package to ensure an accurate measurement to be undertaken. The results for each of the options are shown below:
>
> Option 1 – 4681m2 of open space
>
> Option 2 – 4014 m2 of open space
>
> Option 3 – 3468 m2 of open space
>
> Given that the scheme provides for 71 apartments with 36 of these being two bedroomed and 35 being one bedroomed it is reasonable to assume up to a maximum of 107 residents could potentially be living in this development. At this maximum level of occupation and by the council's 30 sqm standard this development would have a quantitative need for 3,210 sqm of open space. Based on the lowest figure measured within Option 3 it actually provides for an additional 138 sqm of open space above and beyond the IPG quantitative standard by delivering 3,468 sqm of gross open space and this excludes landscaped buffer zones, balcony's and patios areas [sic]."

58. In relation to the "quantity and quality" of open space in light of the fifth requirement of Policy MD2, it contended:

> "Comment
>
> This development provides for some 3,468 sqm of open space which exceeds the 3210 sqm of open space required by this general open space policy.
>
> More importantly perhaps is that the quality of the open space being provided is carefully designed and landscaped open space which uses high grade materials and which is designed to serve the needs of the users of the site. It has been designed by the applicant who has considerable knowledge of providing high quality specialist housing with open space that is appropriate and beneficial for the residents. The applicant has significant experience and understanding of their tenants needs, and how to best provide and maintain quality open space to meet these needs.
>
> There are no designated wildlife sites or semi natural open space directly impacted upon by this development. Finally, the council are satisfied that the open space can and will be managed by the applicant as a responsible social landlord."

59. Further commentary on open space policy was set out at paragraph 4.26. This submitted that Policy MD2 originated from the 2012 Guidance, but the status of that document was unclear. It considered open space provision against the 2012 Guidance, referring to the content of the Design and Access Statement and relying upon the previous analysis of the officers in paragraphs 5.4.9-5.4.11 of OR2. Section 5 set out conclusions and contentions that:

> "- The provision of open space to serve this development complies with national planning policy.
>
> - The quality of open space to serve this development complies with policy MD2 and the development plan in quantitative, but more importantly, qualitative terms.
>
> - The applicant considers that the quantity of open space to serve this development complies with the quantitative requirements of policy MD2. Even if the council takes a different view on this matter any spatial shortfall claimed in provision is more than met by the quality of the open space which is specifically designed to meet the needs of its users and the council's policy requirement for high quality open space provision.
>
> …
>
> 5.2 For all of the above reasons it is considered that this development is wholly compliant with all local and national planning policies. Moreover to avoid doubt, should it still be considered that there is some shortfall in the quantity of open space to serve the development (it is not considered there is), then this would have to be balanced against all the other planning benefits inherent in this proposal and as set out above and in all the application drawings and reports."

60. The Claimant, along with others, submitted objections to the Third Application including a further detailed letter from her architects dated 15th May 2020. That letter expressed the architects' strong opinions that the proposed open space was inadequate in various respects both in terms of quantity and quality. It took issue with the Interested Party's calculations in light of Policy MD2 and the explanatory text. It set out detailed criticisms of the Interested Party's inclusions of various areas, including private amenity areas, landscape buffers, the paved footpath and permitter areas, along with criticisms of the quality and accessibility of the central amenity area and a failure to comply with the 'Housing Our Ageing Population Plan for Implementation" ("HAPPI") Report emphasising the importance of a pleasing natural environment.

61. The Third Application was considered in a third report to the Defendant's Planning Committee ("OR3") for a meeting on 27 May 2020. The officers recommended approval. Paragraph 1.6 of OR3 explained:

> "The current application is a resubmission of [the] previous approved application, which is currently subject to judicial

> review proceedings. Councillors are advised not to treat the previous application as a material consideration in favour of the grant of planning permission in the determination of the current application."

62. Section 2 set out a description of the development. It again explained the retention of Pauls Moss House and relocation of the Community Hub into it (as previously set out in paragraphs 2.7 and 2.8 of OR2). Paragraph 2.7 of OR3 stated that the Community Hub within Pauls Moss House comprised of a community meeting room, café and dining areas "will encourage social interaction between Residents and the wider public who are encouraged to make full use of the facilities on offer."

63. Section 4, as before, dealt with representations and consultation comments on the Third Application. Many were the same as for the Second Application. For example, paragraph 4.8 of OR3 recorded the Council's Conservation and Archaeology Manager's lack of objection and the unchanged position on the Second Application was restated. Within those comments, the Manager expressed views on the open space arrangements indicating a belief in relevant differences between the scheme originally proposed for the First Application, and that proposed in the Second and Third Applications arising from the retention of Pauls Moss House. The Manager took the view that:

> "… The site will be re-landscaped to provide both amenity space for the residents of the extra-care facility and a new public plaza between and adjacent to the Health Centre and mansion house.
>
> …
>
> The proposed new public plaza, if executed well, also has the potential to provide both a new setting for the retained mansion and a new area of public open space for the town as a whole. Together with the terraces on the south-west of the mansion and the glazing on the western elevation of the Medical Centre, these elements of the proposed scheme should ensure that the retained mansion remains the focal point on the proposed developed site. With reference to Paragraph 200 of the Framework, they should also better reveal the significance of this part of the Conservation Area, and the positive contribution the mansion house makes to it, to both residents and visitors. …".

64. Paragraph 4.9 recorded no objection from the Council's Housing department, with its views that there was an increasing need for this type of accommodation and the scheme would provide "71 much needed affordable rented homes for residents over the age of 55 with care requirements". The department stated that it had seen from recent completed schemes of Extra Care facilities that the provision did not just meet a need, but improved the health and well-being of residents living in the apartments. It considered that the location of a new health facility on the site would add to the benefits that the scheme would bring. Paragraph 4.10 recorded no objection from the

Defendant's Parks and Countryside department and reiteration of the comments made on the Second Application.

65. Paragraph 4.12 onwards dealt with public comments. Paragraph 4.13 noted the receipt of four letters of objections and summarised their contents, including objections to the open space provision. Paragraph 4.14 noted receipt of four letters of support. OR3 then set out in full the letter of objection from the Claimant's architects.

66. Section 6 set out the officers' appraisal. Section 6.1 dealt with the principle of the development and why officers considered it to accord with the development plan. This included the view that it complied with Policy CS6. Paragraph 6.4 dealt with visual impact, landscaping and open space provision. Having referred to Policy CS6, CS 17, MD2 and MD12, paragraph 6.4.5 referred to the definition of "older people" in Annex 2 of the NPPF as follows.

> "People over or approaching retirement age, including the active, newly- retired through to the very frail elderly; and whose housing needs can encompass accessible, adaptable general needs housing through to the full range of retirement and specialised housing for those with support or care needs."

The analysis continued as follows:

> "Thus, this recognises the point that older people can have a wide range of care needs. The residential element of this application is focussed on older people with mostly extra care needs. Thus, their needs are not being considered on the basis of age. Rather, their needs are being considered specifically on account of them requiring extra care."

67. Paragraph 6.4.6 noted that the proposal was for extra care development and referred to the following definition in the national Planning Practice Guidance:

> "**Extra care housing or housing-with-care**: This usually consists of purpose- built or adapted flats or bungalows with a medium to high level of care available if required, through an onsite care agency registered through the Care Quality Commission (CQC). Residents are able to live independently with 24 hour access to support services and staff, and meals are also available. There are often extensive communal areas, such as space to socialise or a wellbeing centre. In some cases, these developments are known as retirement communities or villages - the intention is for residents to benefit from varying levels of care as time progresses."

68. Paragraph 6.4.7 of OR3 identified that this definition was adopted for the purposes of the report. It noted that the definition referred to "extensive communal areas" and expressed the view that this was what the open space in the development would provide. Paragraphs 6.4.8-6.4.9 of OR3 sought to deal with that part of JR1 concerning the PSED as follows:

> "6.4.8 The Claimant's application for judicial review asserted that the Council were having regard for a protected characteristic under the Equality Act 2010. The characteristic was considered to be either age or disability. For the avoidance of doubt, residents in extra care housing are not being considered on account of their age and any such resident is not necessarily disabled. Rather, the prospective residents of the proposal ought to be considered as individuals with extra care needs. Thus, it is not accepted that the public sector equality duty within section 149 of the Equality Act 2010 applies to these individuals.
>
> 6.4.9 However, as an abundance of caution, members ought to consider whether the development will meet the tests set out in the public sector equality duty in any event and thus members should have regard to the need to:
>
> > *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act 2010 towards disabled/older people;*
> >
> > *(b) advance equality of opportunity between older/disabled people and persons who do not have these protected characteristics;*
> >
> > *(c) foster good relations between persons who are disabled/older and persons who do not have these protected characteristics.*
>
> Further, members ought to have regard to the need to:
>
> > *(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
> >
> > *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
> >
> > *(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*
>
> The proposal is considered to meet all of these factors in any event."

69. It then turned to the assessment of the open space as follows:

> "6.4.10 The proposal does offer less open space than is required by Policy MD2 of the development plan. However in

> order to ensure adequate social meeting space and relaxation area for residents and to provide choice of living arrangements within Whitchurch and surrounding area it is vital that any space is of high quality. The Planning Statement indicates that a key connecting feature between the Extra Care and the new Health Centre is the circular Hub and central public plaza which will bring people together and will become the focal point of the scheme. The area is accessible for all key user groups and offers the opportunity for the Café to spill out into a south facing terrace for users to enjoy. The proposal includes a paved public plaza space directly outside the main house which runs between Pauls Moss and the proposed health centre. This outdoor, public amenity space will be a mix of paved hard surfacing including Breedon gravel, soft landscaping, feature trees and boxed hedging and street furniture. The site plan also contains other pockets of open space for the benefit of residents on site."

70. The third sentence of OR3 paragraph 6.4.10, and what follows, was in essentially the same terms as paragraph 6.4.5 of OR2 (see above) in referring to a "circular Hub" and "paved public plaza space", save that the last sentence of the paragraph has been added. Paragraph 6.4.11 of OR3 then essentially repeated paragraphs 5.4.6 and 5.4.7 of OR2 (see above), but reformatted into a single paragraph with two bullet points as follows:

> "6.4.11 The applicants have submitted a visual impact assessment, and this concludes that the scheme will have only negligible or slight effects on visual setting, consideration has been given to the surrounding Conservation Area, setting of Paul's Moss House and the setting of listed buildings located outside of the application site. The changes to setting that the construction of the proposed buildings (whilst acknowledging they are larger in scale than those to be replaced), in relation to the historic landscape are also considered slight.
>
> - The applicants planning statement indicates that the proposal is of much better quality than the existing provision on site and compared to the previous application for development on site subsequently refused in that this proposal includes provision for Open space and landscaping proposals to meet the needs of the residents and visitors
>
> - The council have established precedent for high quality open space provision at a lesser size than they consider policy requires when such space is designed and intended to be used by older people."

71. Paragraph 6.4.12 of OR3 included some of what had been in paragraph 5.4.8 of OR2, but the remainder of the paragraph, and the subsequent paragraphs, contained amended or additional analysis as follows:

"6.4.12 Whilst it is acknowledged that this application does not provide for the standard required open space in relation to bedroom ratio in respect of standard residential development, it is acknowledged that this application is for development for person mostly in extra care needs. It is considered that the managed communal open space offered by this proposal would be a much better provision than simply requiring open space in accordance with the bedroom ration within Policy MD2. It is considered that the proposed open space on the site will contribute towards providing choice in living arrangements and attracting and inviting people from the wider community to engage with each other providing opportunities to develop new relationships across all age ranges and backgrounds. Thus, the open space being offered is better than simply the bedroom ratio stipulated by Policy MD2. Furthermore, the open space is of a much better design and quality than the open space for most developments of this nature. It is acknowledged that alternative plans have been proposed by objectors, however, officers are of the view that these alternative plans do not meet the same design quality and sense of integration that the current proposals would achieve.

6.4.13 Accordingly, whilst in terms of quantum the proposal offers less open space than stipulated by Policy MD2, the proposal offers better quality than would be required to comply with Policy MD2. This would make a better proposal irrespective of the intended residents of the development. However, it is considered that, having particular regard to the fact the prospective residents will mostly be in extra care needs, the open space in particular will be well suited to their needs. Indeed, this sort of managed communal space will effectively encourage participation in public life, as people of all ages will be attend and interact at this open space and thus, it will foster good relations in this sense between the prospective residents and those not in extra care needs. It will also assist with meeting the needs of those in extra care through allowing them to have further interaction with members of the public in this sense, including some of whom may have mobility issues. Moreover, the circular routes of the open space will further enhance the sense of integration and provide for an attractive walking space for many prospective residents.

6.4.14 In summary, the open space is far better in terms of quality as opposed to quantity than Policy MD2 requires. It is not considered that this same quality could be achieved whilst increasing the quantum of open space, as this would inevitably lead to amendments to the scheme that would undermine the sense of integration that is achieved through the current design.

> 6.4.15 It ought to be noted that the ongoing judicial review suggested that there was some disadvantage/discrimination towards the prospective residents. However, to the contrary, officers have worked with the applicant to secure the best possible design and open space provision. Through this engagement, officers are satisfied that an acceptable scheme has been arrived at – this being acceptable irrespective of whether this was for those in extra care or for the public at large. Albeit, officers are of the view that the proposal does meet the needs of those in extra care in particular, including the fact that those in extra care benefit from extensive communal areas, which the open space on offer would provide.
>
> 6.4.16 In the event that the public sector equality duty does apply, contrary to the view of officers, on account of the residents being elderly or disabled, officers are of the view that the duty is still discharged. Officers have worked to ensure that a scheme of open space is delivered that is better than the requirements of Policy MD2 would require. Indeed, the quality of the open space, with the sense of integration offered through the central hub and circular routes makes the specific open space on offer better, irrespective of who it is intended for. But this particularly applies to those in extra care, many of whom may have mobility issues and, irrespective of mobility issues, benefit from extensive communal areas, which this managed open space would provide.
>
> 6.4.17 Officers' views, therefore, remain from the previous application. However, members are reminded to not treat the previous approval as a material consideration in the determination of the current application and ensure that they consider matters afresh."

72. Paragraph 6.4.18-19 dealt with the issue of trees and vegetation. Paragraphs 6.4.20-21 then continued:

> "6.4.20 It must also be appreciated that the development is for creation of new accommodation for use as extra care facilities and does not replace any existing extra care facility and thus does not prejudice potential future occupants in need of extra care but aims to provide wider choice in living arrangements for residents of the surrounding Community. In order to ensure the development is executed to a high standard with consideration to the Pauls Moss House and the open space plaza area in front of the Mansion House as proposed, as well as the other pockets of open space, and the overall contribution towards the Conservation Area, it is recommended that conditions are attached to any approval notice issued, in order to ensure adequate consideration to landscaping. With consideration to the issues as discussed it is considered the

> concerns on this matter as outlined in the previous refusal for the site are addressed to an acceptable standard.
>
> 6.4.21 Given the above in relation to landscape and overall visual impact, on balance and overall and in order to provide the Community with a wide choice of living arrangements, in consideration of the circumstances, it is considered by Officers, that the development is broadly in accordance with Policies CS6, CS17, MD2 and MD12 of the local plan as well as the NPPF in relation to landscaping and visual impacts and that there is not conflict in relation to the Equality Act 2010 as the proposal simply is aiming to provide the local community with choice in living arrangements as the type of residential development to be offered is considered to be in short supply and this is reflected in the wide amount of support the proposed development, (as a whole), has received to previous applications for development on site of this nature."

The Claimant submits no explanation is provided by officers in OR3 officers as to why it was considered that the qualitative requirements of Policy MD2 were exceeded.

73. Section 7 of OR3 dealt with "The Planning Balance" in light of the statutory provisions. Officers returned to the question of Policy MD2 and stated (amongst other things):

> "7.2 It is acknowledged that the proposal does not offer the quantum of open space specified by Policy MD2. However, Policy MD2 is a multi-faceted policy that addresses numerous points. The proposal gains support from the policy through responding positively to local design aspirations, responding to local heritage concerns, including natural and semi-natural features and demonstrating good standards of sustainable design (amongst other things). Thus, the proposal is in conformity with Policy MD2 on balance, notwithstanding the fact that the open space quantity set out in the policy is not met.
>
> 7.3 However, even if it was considered that this gave rise to some conflict with the policy, it is not considered that this minor breach would warrant a finding of conflict with the development plan as a whole (per R.(oao William Corbett) v Cornwall Council [2020] EWCA Civ 508)*. Thus, it is not considered that this gives rise to any conflict with the development plan. However, even if that is wrong, the weight to be attached to any such breach ought to be minimal, given that the open space that is offered is superior in quality to the overwhelming majority of open space that accompanies development of this nature. By contrast, the benefits of the proposal, applying the statutory test in s.38(6) of the Planning and Compulsory Purchase Act 2004, would still suggest that

> there would be material considerations that ought to outweigh any such conflict.
>
> (* Court of Appeal judgment that held that that notwithstanding a proposal's conflict with some policies in a development plan which can pull in different directions, a local planning authority is entitled to conclude that it complied with the development plan as a whole bearing in mind the relative importance of the policies in play and the extent of the compliance or breach)
>
> 7.4 Accordingly, no matter the approach to Policy MD2, the proposal should still be granted planning permission.
>
> 7.5 Having carefully considered the proposal against adopted planning policy and guidance, it is considered that the proposal on balance (with consideration to the public benefits of this scheme will offer to the wider community), overall complies with relevant policies of the local plan and the NPPF … Landscaping and open space provision whilst minimal in area, as long as this is executed to a high standard is on balance considered acceptable. …"

74. Section 8 set out the officers' conclusions, repeating a view that there was compliance with the local plan policies, including Policy MD2, which led them to recommend the grant of planning permission. Shortly before the meeting, the officers also produced an "Additional Representation" document for members. It stated as follows:

> "In the judicial proceedings relating to the previous grant of planning permission, the Claimant advanced the argument that the prospective residents have a protected characteristic which engages the public sector equality duty (either age or, in the alternative, disability). As members will be aware from the officer report, this is disputed. However, as an abundance of caution, members have been asked to consider whether the public sector equality duty would be satisfied in any event.
>
> To summarise the officer advice, whilst the quantum of open space provided is less than required by Policy MD2, the quality is greater than what would otherwise be provided. Thus, the provision of open space is a benefit of the proposal. Also, there is a legitimate aim of providing better quality open space, which justifies reducing the quantum of open space here.
>
> The Claimant argues that any such view on this can only be reached through considering a number of factors. This is disputed, however, to satisfy the Claimant's concerns, each of the Claimant's points are addressed below.
>
> *The extent of any shortfall in the provision of open space*

Policy MD2 requires 30sqm of open space per person (i.e. per bed space). Officers are of the view that, in their judgement, the proposal would offer 27sqm of open space per person.

The Claimant disagrees with this figure and calculates that the proposal would have a 67% deficit of open space on a best-case scenario. Officers are of the view that, as a matter of planning judgement, open space has been excluded from this calculation. However, even accepting this provision, the conclusions in the officer report remain valid. Indeed, even if the deficit was greater than this by comfortable margin (say up to 80%), the conclusions would remain the same.

The benefits of open space to elderly residents or residents with "extra care needs"

The open space that is being provided is far better in terms of quality than the quantum required by Policy MD2 for the reasons set out in the officer report.

The reasons why the prospective residents would not be able to use, or need to use, as much open space as any other person

This is not relevant. The open space being offered, having regard to the specific design proposed, offers superior open space than simply meeting the quantum of open space in the policy.

Whether these reasons would apply to all of the residents or just some, and if so how many (the Council itself admits that people in Extra Care accommodation will have a wide range of needs

The open space will be better for all residents, irrespective of their specific needs.

The harm that would be caused by providing less open space than required by Policy MD2

It is not thought that this will give rise to any harm. However, even if it was thought that there was some harm generated by a technical breach of the policy (which is denied), this is overcome by providing a superior design and quality of open space.

Whether the Council's objectives could be accomplished by any other means

The objective of providing superior open space cannot be achieved by other means, as alternative proposals would be

> inferior in design terms and would not provide open space of the same quality.
>
> *Whether and to what extent the benefits of its approach outweighed the harm*
>
> Officers are of the view that the superior quality open space provided by the proposal justifies any harm."

75. This document identifies the officers' view that the scheme included 27sqm of open space per person; the Claimant notes that it does not explain how that figure has been calculated and contends that it does not explain what had changed from when the Defendant's Parks Officer calculated open space on the First Application, or the way in which officers approached open space on that First Application in excluding perimeter paths. In response, the Defendant submits out that the 27sqm calculation did not include the footpath and adjacent planting areas and is therefore not inconsistent with the officers' approach to the First Application. It notes that prior to the committee meeting, officers sought further information from the Interested Party about the open space calculations. In response, the Interested Party sent an email dated 27 May 2020. This attached a drawing illustrating the calculations for the Interested Party's three options; but it also stated:

> "… if you were minded to omit the footpath and adjacent planting area, which run parallel along in the internal access road from the disabled parking bays adjacent to the Health Centre down to the disabled parking bay to the south of the site close to Number 1 Pauls Moss Court which we consider to be part of the residents visual amenity and recreational walking space, the resulting open space calculation would be 27.05 sqM per bedroom."

76. At the Committee meeting, members were presented with a slide show of plans and images of the existing site and the proposed scheme. These included three dimensional images of the proposal from various vantage points and the proposed landscape strategy for the scheme. The Defendant resolved to approve the Third Application. Planning permission was issued by notice dated 28 May 2020. Condition 10 required approval of full details of hard and soft landscaping by the Defendant.

77. In light of this grant of permission, the Defendant filed a witness statement from Ms Garrard dated 28 May 2020 in the JR1 proceedings. This exhibited OR3, the Update and the Decision Notice. As noted above, the parties agreed to vacate the substantive hearing of JR1 scheduled for 11 June 2020. By order of Thornton J on 11 June 2020 the hearing was adjourned and permission was granted to the Defendant to rely upon the statement of Ms Garrard.

78. The Claimant issued her claim in JR2 on 9 July 2020. She also sought to amend the claim in JR1 to advance the same five grounds of challenge against both decisions. The Defendant and Interested Party filed Summary Grounds of Resistance for JR2. On 12 August 2020 Sir Wyn Williams ordered a "rolled up" hearing in respect of JR2 to be listed with JR1, and granted permission for the amendment of the grounds in

JR1, with provision for Amended Detailed Grounds of Resistance from the Defendant and Interested Party in JR1.

Legal Framework

79. The correct approach to judicial reviews claims of this kind is not in dispute. The relevant principles were authoritatively summarised in *Mansell v. Tonbridge & Malling BC* [2019] PTSR 1452 in which Lindblom LJ stated at [41]-[42]:

> "41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. …
>
> 42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of

> Lewison L.J. in *Palmer v Herefordshire Council* [2016 EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

80. The Claimant also relied upon of the following propositions:

i) The interpretation of development plan policies is a question of law to be determined by the Courts: *Tesco v Dundee CC* [2012] UKSC 13.

ii) A local planning authority ought to have regard to its previous similar decisions as material considerations in the interests of consistency. It may depart from them if there are rational reasons for doing so, and those reasons should be briefly explained: *R (Irving) v Mid Sussex DC* [2019] EWHC 3406 (Admin), Lang J at [75];

iii) A planning permission will be unlawful where it has been granted on the basis of a mistake as to an existing fact, where the fact was objectively verifiable, the claimant was not responsible for the mistake, and the fact played a

material, though not necessarily decisive, part in the decision: *R (Watt) v Hackney LBC* [2016] EWHC 1978.

81. As to the discrimination grounds, the Claimant relies upon the prohibition of discrimination in the provision of a service to the public under section 29(6) of the EA 2010. The Claimant contends that the essential principles as they apply to this case are as follows:

i) Direct discrimination arises where a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others: see ss. 13 & 15 of EA 2010.

ii) Less favourable treatment is a broad concept: it is not necessary for B to have suffered any material or tangible loss: *Chief Constable of West Yorkshire Police v Khan* [2001] 1 WLR 1947 (HL) per Lord Hoffman at [52-3].

iii) In determining whether a person has been discriminated against on the basis of a protected characteristic the court will look at the factual criteria that determined the decision, as opposed to decision maker's motive: *R (E) (Respondent) v Governing Body of JFS* [2010] 2 AC 728 (SC) per Lord Phillips PSC at [20].

iv) A protected characteristic need only have had an influence that is more than trivial to satisfy the "because of" test in ss.13 & 15: *Chief Constable of Norfolk v Coffey* [2020] ICR 145 per Underhill LJ at §64, citing with approval the judgment of Simler J in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090.

v) Indirect discrimination (under s.19 of the EA 2010) will arise when an apparently neutral provision, criterion or practice would put persons with the protected characteristic at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The term "provision, criterion or practice" should be construed broadly and may include a one-off policy decision: see *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin) at [118-9].

vi) Discrimination on the basis of age and/or disability may be justified if A can show that A's treatment of B was a proportionate means of achieving a legitimate aim. This requires the application of a four-stage test: (1) Is the objective sufficiently important to justify limiting a fundamental right? (2) Is the measure rationally connected to the objective; (3) Are the means chosen no more than is necessary to accomplish the objective? (4) Is the impact of the rights infringement disproportionate to the likely benefit of the impugned measure? (*Aster Communities v Akerman-Livingstone* [2015] AC 1399 (SC) per Baroness Hale DPSC (as she was) at [28].

vii) Where a Court is required to review whether a measure adopted is proportionate, it must undertake the proportionality exercise itself: *Aster Communities* (supra) at [38]. This is different from the exercise that a Court would undertake when reviewing a planning policy or judgment. Further,

proportionality "must be measured not just generally, but also in the specific context of the objectives set out in s.149, and the clear guidance of the Court of Appeal in relation to the PSED. Thus, in the context of a policy, if a choice exists between a method which discriminates against an ethnic group, and one which does not, or one which advances the specified objectives in s.149 , and one which does not, there must be good proportionate reason advanced by the policy maker to choose the former pair and not the latter": *Moore and Coates v SSCLG* [2015] JPL 762 per Gilbart J at [122].

viii) Section 136 of the EA 2010 imposes particular requirements in respect of the burden of proof in discrimination cases. It is for the claimant to present a "prima facie" case of discrimination – i.e. one from which a reasonable tribunal could conclude that discrimination has occurred. The burden then shifts to the public authority to prove that it has not committed an unlawful act of discrimination: *Base Childrenswear v Otshudi* [2019] EWCA Civ 1648 per Underhill LJ at [18] (quoting with approval from the judgment of Mummery LJ in *Madrassay v Nomura International* [2007] EWCA Civ 33).

82. In respect of the protected characteristics listed in s.4 of the EA 2010, the Claimant notes:

i) Section 5 defines "age" as including a reference to persons of the same age group; a reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages group.

ii) Section 6 defines "disability" with Schedule 1, Part 1 of the EA providing further assistance with some of the terms used, with the Equality Act 2010 (Disability) Regulations 2010/2018 identifing certain conditions which are not to amount to impairments.

83. Section 212(1) of the EA 2010 identifies that an effect will be "substantial" if it is more than trivial.

84. Section 149 of the EA 2010 sets out the PSED. The Claimant relies upon principles set out by McCombe LJ in *Bracking v Secretary of State* [2014] Eq LR 60 at [25], and the Claimant seeks to rely upon the following propositions in particular:

i) The duty to have due regard falls on the decision maker personally. What matters is what they knew and took into account. A decision maker cannot be taken to know what his or her officials know.

ii) The decision maker must be aware of the duty to have due regard and to the matters that bear upon the exercise of that duty. The duty must be exercised in substance, with rigour, and with an open mind, on the basis of a proper appreciation of the risk and extent of any adverse impact of the decision on the equality objectives and the desirability of promoting them. General regard to issues of equality is not the same as having specific regard by way of conscious approach to the statutory criteria. What is required is a "structured attempt to focus upon the details of equality issues".

iii) The PSED imposes a duty of enquiry.

iv) Failure to draw members' attention to the harmful effects of a planning decision on those with a relevant protected characteristic is a material error of law (see *Buckley v Bath and North Somerset* [2018] EWHC 11551 (Admin) at para. 40 per Lewis J).

v) The effect of s.149 is one of substance and not form (see *Buckley* at [36]).

Analysis

85. I agree with the approach suggested by all parties that I should deal first with each of the five grounds of challenge advanced in JR2 for the reasons that have already been outlined. I will return to deal with the implications of that analysis for the claim under JR1.

Ground 1 - Misinterpretation of Policy MD2

86. Under Ground 1 Mr Fullbrook submits that Policy MD2, properly interpreted, sets out a minimum quantitative requirement of 30 sqm of open space per person that must be provided, and that the policy makes no provision for any shortfall in quantity to be offset by the quality of the space provided. He submits the proposed development did not meet this minimum requirement and therefore conflicted with Policy MD2. Accordingly, he argues the Defendant was wrong to conclude that the development proposed for the Third Application was in accordance with the policy and such a conclusion must inevitably have involved a misinterpretation of Policy MD2.

87. Secondly, he submits that Policy MD2 means that all of the open space must also meet certain qualitative criteria: it must be "an area of functional recreational space", where assistance on this is set out in paragraph 3.13 of the explanatory text as meaning that it should be a single area, as opposed to multiple "small pockets"; and it must also all be usable for recreation (as the Defendant's Parks Manager identified in the consultation response to the First Application). He submits the open space the Council has included in its 27sqm per person calculation does not meet these criteria as: (a) it is not comprised of a single space; (b) it is not all usable for the purposes of recreation, such as the footpath in close proximity to private bedrooms or verges; and (c) it is, for the most part, no different in size or quality from that proposed in the First Application which the Defendant refused.

88. Both Mr Garvey and Ms Osmund-Smith submit that the Claimant's allegation that there is an inevitable breach of Policy MD2 in having less than 30sqm of open space per person has been raised for the first time in the Claimant's skeleton argument and was not advanced in JR1 previously. They submit the Claimant's interpretation is incorrect in any event. In broad terms, they argue that the question of whether or not there is compliance with Policy MD2 in terms of the quality and quantity of open space is a matter of planning judgment which was exercised by the Defendant. The Defendant concluded that there was a quantitative shortfall below the standard, but it was entitled to conclude that the quality of what was provided resulted in compliance with Policy MD2. They also rely upon the alternative analysis contained in

paragraphs 7.2-7.4 of OR3, including the judgment that even if Policy MD2 were not met, the proposal overall complied with the development plan and, even if it did not comply with the development plan, there were other material considerations that justified the grant of planning permission in any event.

89. In response to the reliance on paragraphs 7.2-7.4 of OR3 Mr Fullbrook submits it is impossible not to conclude that the Council was determined to grant permission regardless of the terms of its own development plan. He also contends that there is an inconsistency between that approach and the Defendant's approach to the First Application (as dealt with further under Ground 2) and argues that:

    i) The open space provided by the First Application was 73% less than Policy MD2 required. This was identified as a "substantial shortfall" and no reference was made to the quality of the space. It is now inconsistent and unlawful for the Defendant to say it would grant permission for the Proposed Development even if the shortfall were calculated to be 80%, where no explanation is provided for the inconsistent approach.

    ii) The decision in *R (Corbett) v Cornwall Council* referred to in paragraph 7.3 of OR3 does not assist the Defendant because in that case the local authority was able to point to other policies justifying a finding of compliance with the development plan despite conflict with one policy, but no such other policies are identified in paragraph 7.3 of OR3 in this case. In any event, he submits for such a conclusion to stand the Council would still have to show that it correctly interpreted the policy in question and it has not. Furthermore, he argues that Policy MD2 is clearly expressed as a minimum requirement to ensure a high quality living environment for residents of new housing, such that a failure to meet it cannot readily be displaced by reliance on other policies. He contends that the Council has not explained how a conflict with Policy MD2 could amount to a conflict with the development plan in the context of the First Application (see OR1 paragraph 8.1), but not the Second or Third Applications.

90. It is evident the Claimant did not articulate the specific concerns about Policy MD2 she now advances in her original grounds under JR 1. There has, however, been some lack of clarity about the quantity of open space at various points which may go some way to explaining this.

91. For the First Application the Interested Party did place some reliance upon the Site's proximity to the open space at Queensway Park and the potential for a link to be created to it, along with open space being proposed on the site itself. Once it became apparent that the link to Queensway Park was not secured, the Defendant's Parks and Recreation Manager objected to the First Application on the basis that there was a minimum requirement for 3,060 sqm usable open space and the site design provided "only a small area of POS provision" which the Manager considered did not meet the Policy MD2 requirement. The First Application was refused by the Defendant in circumstances where OR1 expressed the view that the only significant open space provided in that scheme was 627 sq m in size and this was considered to be insufficient.

92. The Second Application involved a redesign of the proposals, including the public plaza element on site (to which I return). The Interested Party's supporting Design and Access Statement referred to an increase in provision of open space on site by over 450 sqm, but it did not set out an overall quantification. The consultation response from the Defendant's Parks and Recreation Manager makes it clear that the Manager was satisfied with the new arrangements, but no quantification of open space is given. In reporting the Second Application to the Defendant's Planning Committee, the officers acknowledged that the amount of open space provided on site did not meet the standard required based on the bedroom ratio, but they did not quantify the amount they considered to be provided and, consequently, the extent of any shortfall.

93. In response to the Claimant's challenge under JR1, the Interested Party filed evidence from Ms Kind with a calculation of open space in the Second Application - namely, 28.05 sq m per. A drawing was provided. By the time of the Third Application for the same form of development, the Interested Party's calculation had changed and it said Ms Kind's calculation had been incorrect. Three alternative calculations were provided. Each suggested provision of more than 30sqm per person. By contrast, in OR3 the officers concluded that less than the minimum standard was being provided. In the Additional Representation document officers quantified the amount as being 27 sq m of open space per person.

94. With the benefit of hindsight, it would have been preferable if: (a) the Interested Party had provided its own accurate calculations of open space when submitting each application; and (b) the officers, in turn, had set out their own calculations when reporting each application to the Defendant's Planning Committee. But it is also important that any earlier lack of clarity about the respective position of the parties is not compounded now.

95. It is wrong to suggest (as Mr Fullbrook did) that the Interested Party ever accepted that the amount of open space proposed by the First Application was limited to 839sq m. The Interested Party's additional letter representation on the First Application (summarised in the officers' update report on that application) makes it clear it did not. It took the view there 3,384.5 sqm of such space on site, representing 29.9sqm per person for that scheme.

96. Mr Fullbrook's error was repeated in his reliance on either: (a) the Interested Party's Design and Access Statement for the Second Application, referring to the redesign resulting in an increase of open space provision of over 450sqm; or (b) Ms Kind's evidence referring to a 382.5 sqm addition. He argued the Interested Party must have been agreeing that the Second Application only provided 1289sqm of open space in total, comprising 839sqm from the First Application and 450 sqm (at most) from the redesign.

97. I agree with Ms Osmund-Smith that this is comparing "apples with "pears". The Interested Party has never agreed that the First Application only had 839sqm of open space. It believed there to be 3,84.5sq m in that scheme. It is wrong therefore to attribute to it the view that the additional open space in the Second Application was additional only to 839sqm for the First Application.

98. This serves to illustrate an important point about open space calculations. They will necessarily depend upon differences in view as to what counts as open space in any particular scheme. The different typologies of open space to which the 2012 Guidance itself refers indicates how differences can arise. Open space might be public open space (ie space which is available for use by the public generally) or private open space (space which may not be available for use by the public at large). There can be different types of private open space. There can be communal open space (ie space which is only available for communal use by residents of a particular development or area such as a shared garden) or more private open space, not available for communal use (such as a private garden). There can be differences in view as to whether an open area in a development should count towards the totals, as exemplified in this case.

99. Problems can arise if the term open space is used in different ways by different people. For example, the Claimant places particular reliance on the Park Manager's consultation response on the First Application referring to a requirement for "useable public open space", later abbreviated to "POS". The area measuring 627sqm referred to by the Manager in that original scheme in fact included the area of enclosed courtyard intended as communal open space for the residents of that scheme, not for the public at large.

100. It is important to bear in mind that differences of view affecting the calculations will arise because of different judgments made about what should be counted. Subject to any specific policy requirements arising from the terms of Policy MD2 itself (to which I return below), the nature of the term open space will normally call for such planning judgments to be made about whether open areas within a scheme count as open space or not. That will inevitably depend upon the characteristics of that space for the specific scheme in question. There may be strong differences of view. Ultimately, however, these are matters of planning judgment for the decisionmaker, rather than the Court, subject to intervention only on legitimate grounds of judicial review.

101. There has been a lack of clarity about the open space calculations at various points. One thing that is clear, however, is that by the time the Defendant's members made their decision on the Third Application, they would have been very well-placed to make their own judgment about the open space on offer. They had the plans showing the detailed layout of the scheme (including a landscape strategy). They were given a slideshow including those relevant plans. They were undoubtedly aware of the competing views from the Interested Party and the Claimant (through her architects). They had the views of their own officers acknowledging a shortfall below the standard, but taking the view that the quality of what was provided made it acceptable. They could see for themselves what was on offer. They would have been very well-placed to reach a judgment on whether they considered it to be acceptable.

102. The Claimant's case focuses on the quantitative requirements referenced in Policy MD2. But any quantitative assessment will still depend to some degree upon what, as a matter of planning judgment, is accepted to be open space that can count towards the calculation. This judgment will be informed by the specific characteristics of what is provided in the design.

103. There is nothing novel about this. A need for a judgment was inherent in the typologies of open space identified in the Annex to PPG17, on which the Defendant's open space quantity standard in its 2012 Guidance is said to be based. One of the typologies was as "amenity greenspace" which could include informal recreation spaces, as well as greenspace in and around housing. This involved a judgment as to what greenspaces in and around housing might properly be counted as such amenity greenspace.

104. Policy MD2 does not remove the scope for judgment. The fifth requirement of Policy MD2 refers to "adequate open space of at least 30sq m per person that meets local needs in terms of function and quality and contributes to wider policy objectives". This does include an objective standard as to the amount of open space to be provided (at least 30 sqm per person). But the application of that standard requires the decision-maker to exercise judgment as to what constitutes open space for inclusion within that calculation.

105. The exercise of such a judgment under Policy MD2 means differences in view may well arise. Those are differences with which the Court will not generally interfere absent recognised unlawfulness in the decision-maker's judgment such as a misinterpretation of policy, a failure to take into account a relevant consideration, or irrationality.

106. Turning to the Claimant's contentions in these respects, the Claimant argues that Policy MD2 includes a requirement that for developments of 20 dwellings or more the open space must comprise "an area of functional recreational space for play, recreation, formal or informal uses including semi-natural open space" and this excludes any ability to aggregate different areas of open space provided within a development. Mr Fullbrook submits that the words "an area" in Policy MD2, properly interpreted, must mean there is a requirement for a single area. He refers to paragraph 3.13 of the explanatory text as supporting this interpretation.

107. Consistent with well-established principle, caution needs to be exercised to avoid falling into the trap of treating such policy wording, or indeed the explanatory text, as it if were a contract or statute, particularly in this case. For example, the explanatory text in question begins by stating that for such developments of 20 dwellings or more "the open space needs to comprise a functional area for play and recreation" (my emphasis). If this is read literally as a requirement, the explanatory text can be seen to more prescriptive than the policy itself. The policy refers to recreational space being for one of a number of different uses: play, recreation, formal or informal uses. It does not require it to be an area for play and recreation. Moreover, such prescription would make little practical sense if applied as a rule. I agree with Ms Osmund-Smith that there is no obvious reason why the policy would insist upon delivery of play areas in a scheme for extra care residential units. This exposes the basic danger of reading such policy and explanatory text as if they were words in a contract or statute.

108. The explanatory text continues by stating that the functional area for schemes of 20 dwellings or more "should be provided as a single recreational area, rather than a number of small pockets spread throughout the development site, in order to improve the overall quality and usability of the provision." Yet in the next sentence it also identifies that on "very large sites, it may be appropriate to divide the recreational open space into more than one area in order to provide accessible provision across the

development". All of this is consistent with the absence of the imposition of rules, consistent with the commonsense of the language itself in the use of words like "should" rather than "must".

109. The general rationale for the desirability of a single recreational area for such schemes, as opposed to small pockets spread throughout the development site, is straightforward. The policy and the explanatory text are directed towards the provision of a meaningful open space area within such developments, rather than a mechanistic approach which might enable the mathematical requirement to be met through the provision of pockets of open space, spread throughout a development site as a whole. But it also clear from that explanatory text that this is not to be interpreted in an inflexible way. The explanatory text specifically contemplates the provision of more than one area on "very large sites". This approach is supportive of a policy that is to be interpreted with commonsense and with an appropriate degree of flexibility, referable to the development proposal in question. The words of the explanatory text themselves call for a judgment as to what constitutes "a very large site" for these purposes. It is obvious that the provision of more than one recreational area for such very large sites is not intended to represent a breach of Policy MD2 itself. This itself indicates that a strict interpretation that the words of Policy MD2 impose a strict requirement for a single open space area for all developments of 20 dwellings or more is unlikely.

110. Policy MD2 not only needs to be interpreted in a commonsense way, but also in light of the policy as a whole. Policy MD2 is concerned with "Sustainable Design". That is a broad concept with a number of different elements. I agree with the thrust of Mr Garvey's submission that it is, in that sense, a "multi-factorial" policy. There are various elements identified in the achievement of "sustainable design. That said, I do not regard describing the policy as "multi-factorial" diminishes the relevance of each of the seven requirements identified in the policy. The policy is essentially criteria-based in nature. Under its terms, it treats each of the seven numbered paragraphs as requirements for a development to be considered acceptable. On the ordinary and natural reading of the policy, I consider it is necessary to meet the requirements of each of the seven numbered paragraphs in order to satisfy the policy. But that still begs the question as to what each paragraph in fact requires and, in this case, paragraph 5 in particular.

111. The first part of paragraph 5 of Policy MD2 (read with the opening part of Policy MD2) identifies that a development proposal is required to "consider design of landscaping and open space holistically as part of the whole development, to provide safe, useable and well-connected outdoor spaces which respond to and reinforce the character and context within which it is set …". Whether such a requirement is satisfied by a development proposal is emphatically one which requires the exercise of planning judgment. The nature of a requirement to consider design holistically in this way is intrinsically qualitative in nature.

112. Paragraph 5 specifies certain matters that must be included as part of this process. It is here under subparagraph ii), that the question of the quantity of open space arises. One of the matters for inclusion is "providing adequate open space of at least 30 sq m person that meets local needs in terms of function and quality and contributes to wider policy objectives …", with the further specific provision in respect of developments of 20 dwellings or more (set out above).

113. This leads to the Claimant's arguments: (1) the proper interpretation of these provisions in Policy MD2 is that there is a mandatory quantitative requirement for all residential development to include at least 30 sq m of open space (in addition to qualitative requirements), which for developments of 20 dwellings or more must be provided in a single area; and (2) if these requirements are not met, then Policy MD2 is breached. By contrast, relying on the language used at the outset of paragraph 5, the Defendant submits that whilst the matters referred to in subparagraph ii) are matters which must be included in the consideration of the design, failure to meet them does not necessarily mean that there is a breach of Policy MD2 in principle.

114. In the circumstances of this particular case, I have concluded that the difference in interpretation between the parties matters is ultimately academic. That is because the Defendant went on to consider whether or not to grant planning permission even if Policy MD2 were breached applying the Claimant's interpretation. The Defendant concluded that it should. As I set out further below, I consider it was lawfully entitled to reach that conclusion. But for the sake of completeness out of deference to the arguments heard, I will explain first why I am not persuaded the Claimant's stricter interpretation of Policy MD2 is correct.

115. I recognise that there is some basis for the Claimant's argument arising from the way the policy is expressed. The inclusion of a minimum quantitative standard for open space within subparagraph ii) of paragraph 5 goes some way to indicating that this is in fact a specific requirement of Policy MD2 itself, as does the identification of a requirement that there be "an area" for developments of 20 dwellings or more. But in the end it remains important to read the language used Policy MD2 as a whole, in light of the principles expressed by Lord Hope in the Supreme Court in *Tesco Stores Ltd v Dundee City Council*.

116. Although Policy MD2 is a criteria-based policy, the relevant criterion here in paragraph 5 is principally expressed in language which calls for the exercise of planning judgment. It is a requirement "to consider design of landscaping and open space holistically as part of the whole development to provide safe, useable and well-connected outdoor spaces which respond to and reinforce the character and context within which it is set". This is the overall assessment that is required. Although paragraph 5 refers to the provision of such outdoor spaces as including (amongst other things) the provision of adequate open space at least 30sq m and, for developments of 20 dwellings or more, the provision of "an area of functional recreational space", it is set within the context of requiring a development proposal to consider the design of landscaping and open space holistically to provide safe, useable and well-connected outdoor spaces.

117. Had it been the intention to treat these as mandatory open space requirements for all such developments (rather than requirements to be taken into account as part of a judgment to be made under paragraph 5 as to the overall provision of the landscaping and open space), the Policy could have articulated such a requirement far more clearly and simply. They could have been stipulated as specific requirements in their own right. Instead, the policy refers to the open space standards in a context where an overall judgment is required under paragraph 5 of Policy MD2.

118. It is fair to recognise that interpreting the policy in a way which embodied a requirement to meet such minimum standards would not necessarily be inconsistent

with a requirement for an additional judgment to be made about the quality of the open space overall. In the end, however, I consider that a strict and absolute approach to the minimum standards is less consistent with the overall language used in Policy MD2, as well as the explanatory text.

119. For example, on the Claimant's stricter interpretation, if sub-paragraph ii) were to be treated as intending to create minimum standards applicable to all cases in order to meet Policy MD2, then the provision of separate recreation areas on a very large site would result in a breach of Policy MD2. This would be so even though the explanatory text indicates that is not the intention. By contrast, if one treats compliance with paragraph 5 as requiring the exercise of a planning judgment, requiring consideration of the minimum standards expressed in sub-paragraph ii), then this problem does not arise.

120. I have no doubt that the policy is advocating the virtues of single areas of functional recreational space for such development, rather than isolated pockets. The general rationale for that is clear, as I have explained, but the language used in the policy is less consistent with this being treated as a mandatory requirement in all cases. It is expressed as "should" rather than "must". The explanatory text identifies a vice to be avoided (eg small pockets) but without articulating a strict and rigid requirement that this can only be achieved by a single space. Focusing open space in a single area for larger developments will clearly go some considerable way to improving open space provided, but I do not read this as going so far as precluding the provision of any potentially usable open space of potential value in other areas of a development site which can count towards the minimum quantity standard. The policy and the explanatory text, read as a whole, support the role of an exercise of planning judgment, rather than a rigid rule. Sensibly interpreted, they require the decision-maker to focus on the nature of such space for the particular development in question. Neither the policy, nor the explanatory text, explicitly state that other areas of open space provided within a development site are incapable of counting towards the overall quantitative provision. I consider that would involve reading the words too restrictively and literally in this context.

121. Although this does not affect my analysis, it is revealing that the Claimant's alternative scheme itself did not attempt to provide the open space in a single area. As Ms Osmund-Smith fairly points out the layout plan for that alternative shows open space provided in a number of different areas.

122. In light of this, I reach a similar view as to the role of the quantitative standard. It is clearly an important consideration for the purposes of compliance with Policy MD2, but it is not of itself determinative for the purposes of paragraph 5 of Policy MD2 which permits the exercise of planning judgment on whether that criterion is met, even if the minimum quantitative standard is not met by a particular scheme.

123. It follows from this analysis that I also do not accept the Claimant's submission that a requirement for open space to be usable precludes areas like a footpath in close proximity to private bedrooms being included. I do not see why a footpath provided within a development site for use by the residents would be incapable of use as open space. But ultimately the question of whether or not to include such areas is a matter of judgment for the decisionmaker. As it happens, it seems that the officers did not

include the area of the footpath in their calculations in either the First Application or the Third Application, contrary to what the Claimant has suggested.

124. In my judgment, a less strict interpretation of the Policy MD2 avoids creating artificial results. This does not mean that the minimum quantitative standards for open space, or the focus on the provision of a single recreational space for schemes of 20 dwellings or more under sub-paragraph ii), are unimportant. To the contrary, paragraph 5 of Policy MD2 requires proper consideration of the minimum standards and the nature of the space. It may well be that a failure to comply with the minimum open space standards results in a planning judgment that the requirement in paragraph 5 of Policy MD2 has not been met, with the consequence that a proposal conflicts with the Policy. But on what I consider to be the correct interpretation of this part of Policy MD2, this is a matter which calls for the exercise of planning judgment by the decision maker based on an assessment of the development proposal.

125. Again, although not a necessary part of analysis above, I consider the Defendant's 2012 Guidance to be consistent with that interpretation of Policy MD2. The 2012 Guidance sets out a minimum open space standard, but it does so against the context of the typologies of open space that derive from Annex A of PPG17. These typologies themselves require planning judgments to be made about what should be included as part of the necessary calculations.

126. Although I have dealt with the question of the difference of interpretation, I am satisfied that the difference in interpretation makes no difference in this case for the following reasons in light of paragraphs 7.3-7.5 of OR3.

127. I do not accept the submission from Mr Garvey that a breach of one requirement of Policy MD2 would not necessarily mean conflict with the policy as a whole. If (contrary to the interpretation I have set out above), paragraph 5 were to mean that there is a requirement to provide a minimum amount of open space for paragraph 5 to be met, then it seems to me that the proposal would not meet one of the specified criteria for Policy MD2 to be satisfied, even though the other criteria might be satisfied. However, in this case, the Defendant considered whether to grant planning permission assuming that Policy MD2 was breached.

128. In this respect, paragraph 7.3 of OR3 correctly identified the general principle that conflict with one policy in a development plan does not necessarily mean that there is conflict with the development plan as a whole: see *R(Corbett) v Cornwall Council* [2020] EWCA Civ 508. Officers concluded that if there was conflict with Policy MD2 because of the failure to meet the minimum standards referred to in Policy MD2, the breach was minor and the proposal did not result in a conflict with the development plan as a whole. In my judgment, officers were entitled to express such a view and members were entitled to accept it.

129. It is important to bear in mind the overall analysis of the development contained in OR3 as a whole. I do not attempt to set it out in detail here. It is clear from reading the report as a whole that the proposed development of the site engaged different strands of policy in the development plan. Some of that policy gave strong policy support for the development proposed, including the provision of needed extra care units on a previously developed site. I consider officers and members were entitled to reach an overall view that the proposal complied with the development plan as a

whole, even assuming for these purposes that proposal breached Policy MD2 in terms of a deficiency regarding open space, given the other policy support it enjoyed.

130. In any event, the alternative analysis did not end there. In the remaining part of paragraph 7.3 of OR3, officers went further. They considered what the position would be even if the conflict with Policy MD2 also led to a conflict with the development plan as a whole. Officers expressed their judgment that even in that scenario, the weight to be attached to the breach ought to be minimal given their opinion that "the open space that is offered is superior in quality to the overwhelming majority of open space that accompanies development of this nature." They went on to express their view that the benefits of the development proposal were material considerations which would outweigh any such conflict. This led to the views they expressed in paragraphs 7.4 and 7.5 that no matter the approach to Policy MD2, they considered that the proposal should be granted planning permission.

131. Again, in my judgment officers were entitled to express such views as a matter of their planning judgment. In so doing, they were considering what the result should be in accordance with the statutory duties that flow from section 38(6) of the Planning and Compulsory Purchase Act 2004, and section 70(2) of the Town and Country Planning Act 1990. By the same token, the Defendant's Planning Committee members were entitled to agree with the analysis of their officers.

132. In response to these paragraphs of OR3 Mr Fullbrook argues that "it is impossible not to conclude that the Council was determined to grant permission regardless of the terms of its own development plan." It is not entirely clear what, if any, unlawfulness he is alleging by that submission. It is not alleged, nor could it be on the facts, that the Defendant failed to have regard to its development plan, or failed to apply the relevant statutory tests. OR3 demonstrates that they did. In reality, the criticism appears to be of the fact that the Defendant considered the benefits of the proposal outweighed any conflict arising from the deficiencies of the open space in the scheme. That is not a criticism which articulates any unlawfulness of approach. To the contrary, the statutory framework makes it clear that a local planning authority has to determine an application in accordance with the development plan unless material considerations indicate otherwise. The Defendant was entitled to take the view on the facts of this case that other material considerations justified determining the application otherwise than in accordance with the development plan (assuming that the open space arrangements resulted in such conflict). It is inapposite to describe this as a determination to grant planning permission "regardless" of the development plan. It is, rather, a decision to grant planning permission having had regard to the development plan, cognisant of conflict with it, but based on a planning judgment that the other benefits of the scheme justify such a result.

133. Mr Fullbrook also criticised the officers' commentary in the Additional Representation document. Officers noted the Claimant's view that there was a 67% deficit on a best case scenario. Whilst disagreeing with that calculation, officers expressed the view that even if the deficit were greater than that expressed by the Claimant, say up to 80%, the conclusions in OR3 would remain the same. I can see how some concerns might arise about the way in which this point is expressed if read in isolation. It might be seen as some sort of mechanistic view that an 80% deficit in open space would be an acceptable shortfall, regardless of how it arose. But read in context (as it should be), I do not consider it bears that meaning, or should be read in

that way. It is evident from the document as a whole, and OR3, that the officers had given detailed consideration to the open space on offer. Read fairly and in context, officers were aware of the disagreements about how much of the areas within the scheme should be treated as open space. All that officers were doing is expressing their view that even if less of the area were included as open space in the mathematical calculations (in the way the Claimant was advocating), their overall views as to the benefits and acceptability of the scheme overall would remain the same.

134. In any event, this is not Mr Fullbrook's specific criticism of this advice. His argument is that it evidences an inconsistency of approach by the Defendant to the Third Application as compared with the First Application. He contends that the open space provided by the First Application was in fact 73% less than Policy MD2 required and that this was categorised as a "substantial shortfall" in the reason for refusal, without reference to the quality of what was on offer. He argues that in the commentary on the Third Application the Defendant was evincing an inconsistent intention to grant planning permission even if the shortfall for the scheme had been greater (at 80%) than the First Application.

135. In my judgment, there is no sound basis for this criticism.

136. First, it probably reading too much into OR1 to suggest that the Defendant's officers were carrying out a specific calculation that the total open space provision was 73% less than Policy MD2 required, and that it was consequently this percentage figure that represented the "substantial shortfall" identified in the reasons for refusal. Such an assumption hangs on the wording of paragraphs 6.4.6 of 6.4.7 of OR1 (set out above). It is not clear to me those paragraphs demonstrate such calculation. Officers were of the view in paragraph 6.4.6 that the "public plaza" in that scheme was the "only significant public open space provided" (emphasis added), set against the Defendant's Parks and Open Space Manager calculation that 3,060 sqm of public open space was required. They did not say it was the only open space. Officers refer to the applicant proposing "627 square metres of POS in a central point as referred to above as well as 212 square metres of raised terrace …". Having noted the absence of consent for a link with the latter, they then expressed the judgment as to there being a "substantial shortfall" which was unacceptable given the need for open space on site and the lack of consent to access Queensway Park.

137. There is some uncertainty in my own mind as to whether a distinction was being drawn in the Manager's consultation response and in these paragraphs between "public open space" as compared with "open space" generally. Moreover, it appears that the central courtyard may have been assumed at that point to be public open space, rather than communal open space for the residents. More fundamentally, it is doubtful that officers were purporting to carry out a specific calculation of the overall amount of open space actually being provided. Having reached the view that the only significant area of open space being provided was not acceptable and there was a substantial shortfall, the officers may not have thought it necessary to conduct a more detailed calculation of the level provided.

138. Even if the Claimant were right that such a calculation was being performed, there is a more fundamental problem in now relying upon any percentage figures for the First Application in the way the Claimant seeks to do. Such argument fails to acknowledge

the important differences between the design of the First Application and the design of the Second and Third Application. These differences were intended to address what had been regarded as a "substantial shortfall" of open space in the First Application. The redesign not only involved the retention of Pauls Moss House (to respond to the heritage concerns), but also introduced a new and larger area of open space in consequence. This new area of open space was created where the circular Hub building had previously been proposed. It was provided in addition to the courtyard area that was retained (no longer surrounded by buildings on all sides). The new area joined up with open space to the north. It also was designed to be public open space, in the sense that it would be accessible to residents and the general public alike (unlike the courtyard). The relevance of such changes is illustrated by, amongst other things, the fact that it overcame the previous objections of the Defendant's Parks and Recreation Manager, as well as heritage objections. As can be seen from another consultation response, the new area of open space was also considered to be beneficial in heritage terms in improving the significance of the retained Pauls Moss House.

139. Without needing to consider the different judgments that were expressed about the quality of the new open space, it is self-evident as a matter of fact from the plans that the area of open space being proposed with the Second Application was materially increased from that proposed in the First Application. Consequently whatever the extent of the "substantial shortfall" for the First Application, that shortfall was materially decreased by the proposals for the Second Application. So even if (as the Claimant contends) the officers had calculated the previous "substantial shortfall", the Second and Third Applications necessarily involved a lesser shortfall. The question of whether the increase in open space (and consequently decrease in the shortfall) sufficiently addressed the Defendant's concerns was pre-eminently a matter of judgment based on the scheme as a whole.

140. One of the problems with Mr Fullbrook's submission is that it misapplies the percentage figures and again he is not comparing "like with like". The figure of a 73% deficit he takes for the First Application assumes that the open space was limited to the public plaza area of 627 sq m and the southern terrace of 212 sq m (a total area of 838 sq m), when set against an overall requirement of 3,060 sqm. However, the Second and Third Applications increased the amount of open space provided in the way I have summarised. Any percentage deficit for the Second and Third Applications must necessarily have decreased as a result of the area of open space increasing.

141. Mr Fullbrook is mixing two things by taking that 73% deficit figure for the First Application and comparing it to the 80% reference in the commentary on the Third Application. For the Third Application the Claimant's representatives themselves were suggesting there was a 67% deficit (ie a reduction in the 73% deficit that they say arose on the First Application). Officers dealing with the Third Application were not accepting the Claimant's calculations of open space, but simply making the point that their views as to the acceptability of what was being proposed (having considered it in some detail) would not change even if one were to treat less of the area as open space than they had. The reference to 80% does not create any inconsistency of approach. This compares "apples with pears", or perhaps more accurately mixes "apples with pears", and distorts the point that is being made by the officers.

142. Mr Fullbrook's 73% deficit calculation is simply a percentage derived from calculating an area of open space within the First Application scheme, set against the notional requirement. That calculation will always be affected by what areas are treated as open space. The 73% deficit figure assumes the open space in the First Application was limited to the public plaza area and the southern terrace in that scheme. By contrast, the Second and Third Applications increased the area of open space available on the site as described above.

143. A calculated percentage deficit will fluctuate accordingly as a matter of simple mathematics depending on what judgments you make about what areas to include. If one were to make further reductions in the amount of open space treated as such for the purposes of the calculations based on the Claimant's planning judgments, with a resulting increase in the deficit, the mathematics may change, but not the officer's overall judgment that the amount of open space was acceptable for the scheme given the benefits they had identified (including judgments about quality). These judgments were different as a result of the significant changes that were made through the redesign of the proposals.

144. There is therefore no inherent inconsistency that arises in making reference to an 80% deficit figure in this context, as compared with the Claimant's calculations of a 73% deficit existing for the First Application. The schemes were different. The open space had increased with the Second and Third Application. And in any event, a percentage deficit only deals with quantity, it does not deal with the question of quality. The Defendant was entitled to reach planning judgments about the overall sufficiency of the open space by reference to the specific characteristics of the open space provided for the respective schemes.

145. Mr Fullbrook also seeks to distinguish the approach in *Corbett* by suggesting that the Defendant cannot point to other policies justifying a finding of compliance with the development plan, and suggesting no such policies are identified in paragraph 7.3 of OR3. I do not consider this to be a fair or realistic reading of OR3. There are a significant number of policies which the development proposal met, and which provided support for what was proposed as is apparent from reading the report as a whole. It was therefore open to the Defendant to reach a view that the proposal as a whole was compliant with the development plan even if Policy MD2 were not met in full. I do not consider it was necessary for the officers to repeat all of those policies in setting out that view.

146. Furthermore, Mr Fullbrook's submission provides no answer to the further analysis in the second part of paragraph 7.3. This went on to conclude that planning permission should be granted given the benefits of the proposal even if it did breach the development plan as a whole. The statutory scheme makes it clear that it is permissible to grant planning permission for development which does not accord with a development plan if there are material considerations which justify doing so. The Defendant thought there were. I cannot see any proper basis for challenging the lawfulness of that planning judgment.

147. Mr Fullbrook contends that the conclusions in paragraph 7.3 of OR3 can only stand if the Defendant correctly interpreted Policy MD2 which he says it did not. This argument is circular and incorrect. It does not address the reasoning in paragraph 7.3. Officers did not agree with the Claimant's interpretation of Policy MD2.

Notwithstanding such disagreement, they went on to consider what the result should be if the Claimant's interpretation were correct. They therefore considered what the outcome would be on the basis of the Claimant's interpretation.

148. Mr Fullbrook submits that Policy MD2 sets minimum requirements intended to ensure a high quality living environment for residents of new housing and this means that those requirements "cannot readily be displaced by reliance on other policies" . Properly analysed, this argument is simply expressing disagreement with the merits of the Defendant's judgment that a breach of the minimum standards in this particular case was outweighed by the other benefits of the scheme. The language Mr Fullbrook uses implicitly recognises this when he refers to the requirements not being "readily" displaced. He does not argue that the minimum requirements could never be displaced by other considerations. This therefore boils down to a disagreement with the judgment of the Defendant expressed in OR3 that the standards were displaced in this particular case. There is no sound basis for challenging that planning judgment.

149. Finally Mr Fullbrook contends that the Defendant has not explained how a conflict with Policy MD2 could amount to a conflict with the development plan in the context of the First Application, but not the Second or Third Application. This is a repeat of the argument I have already addressed above. It fails to recognise the material differences between the First Application on the one hand, and the Second and Third Application on the other. The Claimant's argument does not begin to address the differences between the development proposals, including the open space arrangements, that would inevitably inform an overall judgment as to a scheme's compliance with the development plan as a whole.

150. For these reasons, I reject the Claimant's challenge to the determination of the Third Application under Ground 1.

Ground 2 – The Defendant's Previous Approach to Open Space

151. Under this ground, the Claimant contends that the Defendant has acted inconsistently with its decision to refuse the First Application. She argues that the First Application related to development of almost exactly the same size and same type, on the same Site. She submits that although the scheme was changed so as retain Pauls Moss House, the essential nature of the development to provide extra care residential units had remained constant, along with the nature of the open space provided, and consequently the Defendant has failed to determine the Second and Third Applications consistently with its approach to the First Application.

152. Mr Fullbrook contends that this failure manifests itself in three ways:

i) First, he argues the Council adopted a different approach to the calculation of the open space in arriving at a figure of 27 sq m per person by including unusable marginal spaces which he says were rightly not included in the calculation carried out for the First Application.

ii) Second, he submits the Defendant adopted an inconsistent approach to the weight which it gave to the shortfalls in the amount of public space provided. For these purposes, he contends that the First Application contained 839sq m

of open space (presumably relying the Park and Recreation Manager's consultation response to which I have already referred). Taking this figure, he then adds what he says was the Interested Party's claim as to the additional open space created by the Second/Third Applications to state that a total of 1,180sq m was being provided, equivalent to 10.4 sqm per person, which he contends should also been treated as a "substantial shortfall", as was the conclusion for the First Application, without any reference to the so-called quality of the space and in where he argues "much of which was identical to the present scheme"). In this context he criticises again the comment that officers would have approved the Second and Third Applications even if the shortfall had been as much as 80%.

iii) Third, he contends the Council has adopted an unlawfully inconsistent approach to the use of some of the open space by members of the public. He argues that in OR1 the officers considered the presence of members of the public in the central plaza to be a disadvantage in reducing the amount of space available to residents, whereas in paragraph 5.4.8 of OR2 and paragraph 6.4.13 of OR3 the officers appeared to be identifying that the mixed use of open space would encourage participation in public life and allow residents to have further interaction with members of the public.

153. In my judgment, there is no real substance to these criticisms on proper analysis. First, and perhaps most fundamentally, I reject the basic premise that underlies this ground of challenge. I do not agree that the nature of the development proposals under consideration for the First Application on the one hand, and the Second and Third Applications were effectively the same in relation to open space, or sufficiently similar, to support the complaint of inconsistency in the first place. This is essentially for the reasons that I have already expressed in dealing with Ground 1.

154. It is fair to say that the open space provision for some parts of the Site were very similar, such as the smaller areas to the west and south of the new buildings (including the roof and ground floor terrace to the south). It is also fair to say that the principle of provision of communal open space for residents in a courtyard arrangement at the centre of the site had not changed. But all of this ignores the fundamental alteration that was made by retaining Pauls Moss House on site and removing the former Hub building in the arrangements. These differences can readily be seen from the Proposed Site Plans in the respective Design and Access Statements provided with the First and Second Applications and would have been apparent to officers and members.

155. In the First Application, there was an open air terrace attached to the Health Centre and Circular Hub buildings that enclosed the inner courtyard area. In the Second and Third Applications, the circular Hub building has been removed and a significantly larger area of open space created in its place in the area that now sites outside the retained Pauls Moss House and which now joins and forms part of the open area to the north and north west.

156. In my judgment it is fanciful to suggest such important alterations meant that the nature of the open space provided had remained constant. It had not. For this reason alone, it is unrealistic to invoke the principle of consistency in the way that the Claimant attempts to do. It involves ignoring the significant changes that occurred

from the redesign of the development proposals in response to the reasons for refusal. The Defendant was entitled to reach a different view as to the acceptability of the new open space overall consequent upon these changes.

157. Secondly, I do not consider the Claimant's claimed manifestations of the alleged inconsistency withstand real scrutiny anyway.

158. As to the first claimed manifestation, it is difficult to infer from OR1 that the officers were in fact carrying out detailed calculations of the type the Claimant suggests (for the reasons I have already explained). The Defendant found there to be a "substantial shortfall" of open space in the First Application in light of what it considered to be the only significant area of open space available in the courtyard. It was probably unnecessary for it to carry out any more detailed analysis of what additional smaller areas might have been included as open space as a matter of judgment. There is nothing inconsistent with that in concluding that the new area of open space created in the Second and Third Applications overcame the previous objection. This was also the view the Defendant's Parks and Recreation Manager. As a result of the intense focus on open space, officers of the Defendant did carry out more detailed calculations. In doing so, the officers of the Defendant were entitled to exercise their planning judgment as to what areas should be included for these purposes.

159. Even if I had thought there had been some inconsistency of approach, I would not have been persuaded it resulted in any error of law vitiating the decision on the facts of this case. As the officers made clear, however the mathematical calculations are ultimately performed, their conclusions about the overall acceptability of the open space in terms of quality and acceptability overall remained. In my judgment, the officers and the Defendant were entitled to reach that view as a matter of law.

160. The second apparent manifestation is groundless. It suffers from the same artificiality of analysis about the use percentages I have identified under Ground 1. I have some sympathy about a previous lack of clarity over the mathematical calculations. That has not been helped by the Interested Party's filing of evidence which it has now said was incorrect. Be that as it may, such previous lack of clarity does not provide a good basis for adding to any potential confusion in comparing "apples with pears", or perhaps more accurately put in this context "mixing apples with pears".

161. The third alleged manifestation is based on what is an over-forensic exercise of comparative analysis of the respective parts of OR1 on the one hand, and OR2 and OR3 overlooking the fundamental alteration to the public space arrangements that had occurred.

162. In paragraph 6.4.6 of OR1 the officers identified that the "public plaza" in question was the only significant public open space provided within the development. This appears to have incorporated the area of the communal courtyard area which was not to be a public plaza. Officers comments in OR1 that the central public plaza would be used by users of the café in accordance with the information in support of the application are somewhat elliptical, as it appears that the lower courtyard area was to be for the residents only, in contrast to the café terrace area. Officers were expressing overall dissatisfaction with this arrangement given its size and required function in that particular scheme. However I do not read this as officers expressing a general view that making open space available to the public (so enabling residents to mix with

the community) was necessarily disadvantageous. It was simply that the proposed arrangement in the First Application with the limited open space provided was unacceptable given the competing functions expected of that space.

163. By contrast, the Second and Third Applications redesigned the spaces available. The courtyard area remained for communal use of the residents only. In substitution for the more limited public terrace area overlooking that courtyard, a significantly larger area of public open space was created. Officers in OR2 and OR3 were assessing those new open space arrangements as a whole. Accordingly, there is no inconsistency in expressing the view at paragraph 5.4.8 of OR2 that the "proposed open space on the site will contribute towards attracting and inviting people from the wider community to engage with each other providing opportunities to develop new relationships across all age ranges and backgrounds". Officers were commenting on a different scheme, with a different layout, to that under consideration in the First Application. The redesign included a significantly larger area of public open space for such communal mixing. The same point applies to paragraph 6.4.13 of OR3 when officers identified the advantages of residents and the public being able to mix in public open space.

164. Far from highlighting an inconsistency in approach, I consider these paragraphs demonstrate a proper approach of giving careful scrutiny to the functionality and appropriateness of the open space on offer. As a result, the Defendant believed that the redesign of the open space was significantly better than previously proposed for the reasons they gave. Indeed, they considered the resulting quality overall in the redesign outweighed the failure to meet the quantitative standards.

165. I therefore reject the challenge made under Ground 2.

Ground 3 – Unlawful Conclusion

166. Under Ground 3, the Claimant alleges that the Defendant's conclusions as to the quality of the open space to be provided was otherwise unlawful in public law terms by reason of three factors: (1) a failure to take into account material considerations (2), having regard to a material error of fact, or (3) otherwise reaching an irrational conclusion. I agree with Mr Garvey and Ms Osmund Smith that some of these arguments involve repetition of points already made under Grounds 1 and 2.

167. As to factor (1), Mr Fullbrook contends that the Defendant failed to take into account a material consideration that the 2012 Guidance demonstrated that the 30sq m per person standard in Policy MD2 had been selected following a comprehensive assessment of local provision and local need. In order words, he submits, it was not an arbitrary figure and the Council was bound to have regard to this fact and there is no evidence it did.

168. There is no substance to this point. The minimum standard is identified in Policy MD2 of the adopted development plan itself. It therefore fell to be considered. It was considered in detail. The 2012 Guidance contains the same minimum figure. The 2012 Guidance is not part of the adopted development plan itself. The absence of any specific reference to the 2012 Guidance in OR3 is of no material consequence. The Defendant plainly had regard to the minimum standard through its detailed scrutiny of the scheme against Policy MD2. No point of substance arises from the complaint.

No one was suggesting that the minimum standard referred to in Policy MD2 was arbitrary. It was not treated as such by the officers or the Defendant in their determination. I cannot see what material difference additional specific reference to the 2012 Guidance in OR3 could or would have made to the determination.

169. It also does not follow because the 2012 Guidance was not specifically mentioned, that the Defendant failed to take it into account. The evidence in fact demonstrates the opposite. The 2012 Guidance was specifically identified and considered in the Interested Party's Planning Statement submitted with the Third Application. The objections from the Claimant's architect set out in full in OR3 make reference to that Planning Statement. The officers in OR3 make various references to that Planning Statement (as in paragraph 6.3.5 and paragraph 6.4.6). It is therefore clear that the officers of the Defendant must have had regard to the 2012 Guidance by virtue of having considered the Planning Statement anyway. In such circumstances, and where the standard itself was reflected in Policy MD2, there was no legal obligation on the officers to refer expressly to the 2012 Guidance in their report. The fact they did not does not mean that they or the Defendant failed to have regard to it.

170. It is therefore unnecessary to address the additional hurdle the Claimant would need to overcome of establishing that the 2012 Guidance was in fact a material consideration which the Defendant was legally obliged to take into account in any event.

171. The Claimant's argument on the 2012 Guidance also lacks any real merit on the facts. The Claimant did not raise this as a point of criticism when bringing her challenge under JR1 to the Defendant's determination of the Second Application. If the Claimant considered omission of reference in the officers' report to the 2012 Guidance to have been important, one would have expected the point to have been raised. It was not. As it happens, the Claimant was right not to do so for the reasons I have given.

172. Mr Fullbrook also argues that people obviously need ready access to a certain amount of open space for their wellbeing, and there are good grounds for suggesting that the requirement for elderly people and people with *"extra care"* needs to have access to adequate on-site open space are even greater than average. He submits that despite this, the Defendant decided it was prepared to approve the proposed development even if it had an 80% shortfall in open space (ie just 6 sq m of open space per person), but there is no evidence that in reaching this conclusion, the Council had any regard to the particular needs of the prospective residents for access to a minimum quantity of open space and he contends this was an obviously material consideration.

173. I do not consider these submissions to be well-founded. The way in which the Claimant seeks to rely upon the 80% deficit figure is misconceived in the way I have set out above. In addition, there is no substance at all to the contention that the Council failed to have regard to the particular needs of these prospective residents for access to a minimum quantity of open space. On any fair reading of OR3 and the Additional Representation document, that is precisely what officers were considering. They balanced the acknowledged shortfall in the quantity of open space against the perceived quality of the proposed open space and the particular needs of the prospective residents. The Claimant's real complaint is not that the Defendant failed to have regard to those particular needs, but that the Claimant has a different view on

whether the scheme addresses those needs. That difference in view, strongly held as it may be, is not a matter for this Court absent some irrationality in the conclusions reached (which I address separately below).

174. As to factor (2), the Claimant argues that the Defendant had regard to a material error of fact in OR2 and OR3 when referring to a *"circular Hub"* because the circular Hub building no longer existed in the Second and Third Applications. This is said to be an important mistake of fact as the connectivity allegedly provided by the circular Hub was one of the main reasons why the Council considered the open space provided by the proposed development to be of high quality, and of higher quality than the First Application. Mr Fullbrook argues it was this quality that was said to justify failure to meet the requirement for a minimum quantity of open space and it demonstrates the reasoning on this central question was deficient. He submits it was this reasoning (rather than the specific plans of the Site) which must be assumed to have persuaded the Committee to grant permission and, to this extent, they were materially misled.

175. Mr Mullineux, the case officer, provided a witness statement explaining this was intended to be a reference to "the layout of the public plaza and how it curves to meet the indoor area of the Hub now contained with the mansion house". Mr Fullbrook submits this explanation is not credible as: (a) it does not make sense, as there is nothing circular or even curved about that relationship, and OR2 and ORe identify the "circular Hub" as the connecting feature, rather than being connected to other features by way of the plaza as is now suggested; (b) the "circular Hub" was a specific feature of the First Application and was referred to as such (with a capital H) in the Design and Access Statement for that application and in the plans; and (c) it is obvious that the officer has simply copied the words "a key connecting feature between the Extra Care and the new Health Centre is the circular Hub" from paragraphs 6.4.5 of OR1 into paragraph 5.4.5 of OR 2 and paragraph 6.4.10 of OR3 without any regard to the fact that the circular Hub is no longer part of the scheme.

176. Mr Mullineux's witness statement illustrates the problem of evidence that seeks to explain the content of a report of this nature for a decision has already been taken. I would have been reluctant in principle to rely upon such evidence after the event to supplement, qualify or explain the reasoning in the report itself. It was the report (rather than Mr Mullineux's subsequent explanation of it) which was considered by the Defendant. I also do not find it to be of any material assistance anyway. Taking the reference in OR3 at face value, it is obviously an inaccurate description of the scheme. It is probably an unfortunate hangover from the description of the Hub building from OR1. But I am absolutely satisfied that it is not an error of any consequence, and certainly not a material error of fact that affected the decision, or gave rise to a materially misleading report

177. The circular Hub building had been removed in the Second and Third Applications. The community Hub was now provided within Pauls Moss House. All of this is crystal clear from any fair reading of the report as a whole, quite apart from all the application materials and illustrative material that the Committee members and officers had available to them. Any reader of the report would undoubtedly have known that the circular Hub building had been removed. The other parts of the report (which the Claimant does not address) make that clear. The drawings make it clear. The slide show made it clear. No one reading the reference to the "circular Hub" on which the Claimant has alighted would have understood differently. One of

the basic elements of the redesign responding to the First Application refusal was its removal. The Defendant's Planning Committee can have been in no doubt as to the correct position. This criticism of an inconsequential misdescription in the report goes nowhere.

178. As to (3), the Claimant claims the Defendant was irrational to conclude that: (a) the quality of open space provision would not be impacted by its accessibility, particularly in circumstances where the relevant policy required that space to be "usable"; (b) the justification for concluding that the space provided was of very poor quality is contained in the letter from the Claimant's architects and it is for the Court to determine whether, in light of these, the Council was still entitled to conclude that the open space was in fact of such high quality that it justified a complete departure from the development plan policy; and (c) even if the Council's submissions on the communal element of the open space are accepted (which they should not be), they do not address the fact that the Council previously regarded this to be a disbenefit; and (d) as a matter of logic, it is not possible to reach a conclusion that something is "better" than a particular standard, without first establishing what that standard is.

179. I do not consider there to be any realistic basis for these contentions. Some of them simply repeat points as to alleged inconsistency which I have already rejected. In short, the assessment of the overall adequacy of the open space, given an acknowledged shortfall in quantity, was a matter of planning judgment for the Defendant. There is clearly scope for a range of different views to be held, even strongly held. This is evidenced by the contrasting views of the Interested Party's professional team and the Defendant's officers, with those of the Claimant and her professional team. That does not mean that either side's competing opinions must be irrational in the *Wednesbury* sense. What is clear is that the committee members of the Defendant were conspicuously well-placed to come to their own judgment. They had all the necessary material before them. That included a full recitation of the letter of objection from the Claimant's architects in OR3 itself. They would have been well aware of the competing opinions and the reasons for them. It is not for the Court to make its own judgment on the merits of those competing views. The Claimant must establish that the Defendant's judgment was irrational in the *Wednesbury* sense. I cannot discern anything that is irrational in that sense in the Defendant's overall conclusions.

Ground 4: Direct and/or indirect discrimination on the grounds of age and/or disability

180. Under this ground, the Claimant submits that the Defendant has directly or indirectly discriminated on grounds of age or disability by permitting the Proposed Development to provide less open space than it would have required for a development serving younger and/or able-bodied people, and that the Defendant has failed to demonstrate that this is a proportionate means of achieving a legitimate aim.

181. The Defendant and the Interested Party both submit that there was no such discrimination. They submit, amongst other things, that the decision was not made on grounds of age or disability, and that a resident in extra care may not have the protected characteristic of a disability in any event. They also argue that there was no less favourable treatment anyway, that there is no discrimination in circumstances where residents would have a choice whether or not to accept the accommodation and, in relation to indirect discrimination, there is no relevant provision, criterion or

practice in place. They also submit that if there were any less favourable treatment of the type alleged it was proportionate for the reasons that are expressed in the report.

182. In response, Mr Fullbrook submits variously that:

i) The Defendant has not explained how it was able to conclude, on the one hand, that the Proposed Development does not provide as much open space as would be required for standard residential development (paragraph 6.4.8 of OR3), and on the other that it would be "acceptable irrespective of whether this was for those in extra care or for the public at large" (see paragraph 6.4.16 of OR3), so that in terms purely of the quantity of open space provided, the prospective residents of the Proposed Development have been treated less favourably to the detriment of their quality of living

ii) It does not follow that, just because a person is considered to have a disability for the purposes of the EA 2010, they will also qualify for statutory disability benefits – these are regulated by an entirely separate statutory scheme. The Defendant could reasonably be expected to have known that a significant proportion of the prospective residents were likely to have some form of disability for the purposes of the EA 2010. The Council's own evidence relating to the types of person for whom Extra Care accommodation may be suitable makes this clear.

iii) It is not good enough for the Council merely to say that it had regard to the prospective residents on account of their extra care needs rather than any protected characteristic such as disability. The Court "must explore the mental processes of the discriminator in order to discover what facts led him to discriminate". The Council refuses to say what facts about the extra care needs of the prospective residents justified its differential approach. It is submitted that these can only have been factors relating to their potential disability.

iv) There is nothing in the EA 2010 or otherwise to suggest that the victims of discrimination have to be identified at the time the discrimination occurs. To require this would be absurd and would effectively remove the majority of planning decisions from the scope of the EA, since the only way that the grant of planning permission can be challenged is by way of judicial review brought within six weeks and the identity of the people intending to use a particular development will often not be known until much later. It would also be contrary to the approach taken by the Court in other cases: see for example *LDRA Ltd v SSCLG* [2016] EWHC 950 (Admin) in which Lang J found that a planning authority failed to have due regard to the public sector equality duty when permitting development that would prevent (as yet unidentified) disabled people from accessing a riverside The fact that the proposed residents may choose to live somewhere else is not relevant to whether they have been treated less favourably. The law does not require material or tangible loss. A person who is denied a promotion at work on the grounds of his age will still have been discriminated against even if he had the option of taking a different, better-paid job somewhere elsewhere. In any event, as a matter of fact, it would appear that the residents will (at best) only have a limited choice about whether they live at the Proposed Development or not because there is a

shortage of social housing for older people (referring to paragraph 10 (ii)&(vi) of the first witness statement of Jane Kind [TB/338]).

v) The IP's suggestion (IPDGR§81) that the decision to grant planning permission in this case was not capable of amounting to a "provision, criterion or practice" for the purpose of s.19 EA is wrong. In *Ishola v TfL* [2020] ICR 1204, the Court of Appeal held that a one-off decision was capable of amounting to a "practice" if it denotes some form of continuum. The Interested Party and the Council appear to have accepted that there is an established practice of accepting the provision of less open space for elderly accommodation in Shropshire (see OR2§5.4.7). Accordingly, the Council's action in this case is perfectly capable of amounting to indirect discrimination.

183. In the end, notwithstanding the detail of those arguments and counter-arguments, I consider this ground of challenge fails for a simple reason. The evidence demonstrates that the Defendant did not permit the Proposed Development to provide less open space than it would have required for a development serving younger and/or able-bodied people. OR3 makes it clear that both officers and members concluded that the open space provision was considered acceptable regardless of the intended occupants of the scheme.

184. This conclusion is stated in terms in paragraphs 6.4.13 and paragraphs 6.4.15 of OR3. Notwithstanding the quantitative deficiency in open space below the standard, the Defendant considered that the overall quality of the open space was better than would be required to comply with Policy MD2 in this particular case and made for a better development proposal "irrespective of the intended residents of the development". They were satisfied that the proposal was acceptable "irrespective of whether this was for those in extra care or for the public at large". In such circumstances, I consider that any claim that there was discrimination in accepting such open space on grounds of age or disability cannot succeed.

185. Mr Fullbrook argues that this conclusion cannot be reconciled with those parts of OR3 in which officers acknowledge that the scheme did not provide as much open space as would be required for standard residential development. In my judgment, that involves a misreading of what is stated, when read fairly and as a whole. In those sections, officers were simply recognising that there was a quantitative deficiency of open space when measured against the standard which is set by reference to residential development (eg bed spaces). The level of open space was less than that which would be required for standard residential development measured against that standard. But as with any scheme (whether for standard residential development or extra car) officers would be able to balance any quantitative shortfall against the overall quality of what is proposed to reach a view on the acceptability of what was offer. Paragraphs 6.4.13 and 6.4.15 make it clear that is what they did for this scheme, irrespective of whether the development was for extra care residential units or residential units available to anyone. This is reinforced by the additional analysis in the Additional Representation document provided for the Committee meeting.

186. The officers did acknowledge that the application was for persons in extra care needs. This was taken into account in their assessment of the open space, but only in circumstances where had satisfied themselves that the proposed open space

arrangements were acceptable irrespective of the nature of the residents of the scheme.

187. It was in that context that officers concluded the open space was also particularly well suited for a scheme delivering extra care accommodation. They considered the open space would encourage integration between residents and the general public and the open space would be well suited to their needs. They took the view it would foster good relations between prospective residents and those not in extra care needs.

188. In short, the Defendant concluded the open space was acceptable regardless of who the residents might be; however, they went on to find that it was also particularly well suited in nature for extra care residents. I do not see how such analysis could be treated as constituting less favourable treatment to the extra care residents in the way the Claimant suggests, even assuming that issues of age and/or disability are engaged. The Defendant was identifying specific advantages of the open space for such residents, having concluded that the open space arrangements would be acceptable regardless of the occupancy of the scheme.

189. It is fair to say that such reasoning does not appear in OR2 in determining the Second Application. To the contrary, the reasoning expressed in those parts of OR2 like paragraphs 5.4.8 and 5.4.12 OR2 strongly indicate that the Defendant had accepted an argument that extra care residents would not be likely to require as much open space as would be required for standard residential development. It was in light of such reasoning that the Deputy Judge granted permission for this particular ground to proceed in JR1.

190. If the same reasoning had been replicated in deciding the Third Application, it would have been necessary to examine in more detail whether this approach did give rise to less favourable treatment on grounds of age or disability; and if so, whether any such less favourable treatment could be justified as proportionate in light of all the evidence. On the face of it there is potential force in the point that accepting a lower quantity of open space for extra care residents because they were extra care residents might amount to less favourable treatment. It might then be necessary to resolve the dispute between the parties as to whether this was potential direct or indirect discrimination on grounds of a protected characteristic in consequence of the nature of extra care (given, for example, there is a lower age limit that applies to obtain such accommodation), as well as questions of proportionality (given the potential force in the Defendant's argument that if discrimination did arise, the reasoning about the benefits of the open space and the delivery of the scheme might be capable of providing justification for it on grounds of proportionality).

191. However, the Third Application was not determined in that way. The Third Application was considered untrammelled by the previous decision on the Second Application. The Defendant expressly considered whether the proposed open space was acceptable irrespective of the nature of the proposed residents. They concluded it was. I consider that this was a judgment open to the Defendant on the facts.

192. Mr Fullbrook argued that paragraph 6.4.11 of OR3 represented advice from officers to members that the Defendant had established a precedent for high quality open space provision at a lesser size than they considered policy requires when such space is designed and intended to be used by older people. Both the Defendant and Interested

Party submitted that paragraph 6.4.11 was simply rehearsing a submission that had been advanced by the Interested Party previously in its Planning Statement, rather than an acceptance by officers of that submission. A similar attempt to rely on such a precedent had been rejected when dealing with the First Application.

193. I readily accept that paragraph 6.4.11 could have been more clearly expressed as recording a submission, rather than reflecting advice. However, when read in context with the report as a whole, I am satisfied that it would have been understood in that way. The relevant part of paragraph 6.4.11 is articulated as a second bullet point, where the first refers expressly to what the Applicant was contending in its Planning Statement. I consider the second bullet point would be understood as a contention of the Applicant, rather than advice from officers. Even if it had been misunderstood, it does not alter the effect of the subsequent analysis in OR3. This was an analysis based on examining the acceptability of the open space provided for this particular scheme in the way what one would have expected, rather than relying upon some other scheme as establishing some sort of precedent. That is consistent with the previous rejection by officers of the Interested Party's attempt to rely upon a precedent when dealing with the First Application.

194. For this reason, I reject the complaint under Ground 4.

Ground 5: Breach of the PSED

195. Under this ground, the Claimant submits that the Council failed to carry out its PSED and the duty is not satisfied simply by stating that the duty has been applied, as it is a duty of substance rather than form. In summary, the Claimant submits the Council did not undertake any assessment of (a) the particular needs of people with protected characteristics of age and/or disability for a specific quantity of open space; or (b) the harm that would be caused by not providing that quantity.

196. The Defendant and Interested Party submitted that the PSED did not apply in respect of the prospective residents of the proposed scheme because they were not being considered on account of their age or disability, but as individuals with extra care needs. They further submitted that the PSED was considered in any event.

197. As for Ground 4, I have reached the firm conclusion that this ground of challenge must be rejected on the facts in light of the consideration of the PSED by the Defendant evidenced by OR3 and the Additional Representation document.

198. I do not accept the Defendant and Interested Party's submission that the PSED was simply not engaged at all here because the Defendant was considering a scheme for extra care, and residents were being considered as individuals with extra care needs rather than on account of their age and disability. The fact, for example, that eligibility for extra care residential accommodation includes a minimum age limit itself makes this a difficult submission to pursue. But more fundamentally, the statutory terms of the PSED do not limit its application in the way suggested. It is a duty which (amongst other things) required the Defendant to have regard to the need to advance quality of opportunity between older/disabled people and persons who do not have those protected characteristics, to foster good relations between persons who are disabled/older and persons who do not have those protected characteristics, and to

encourage persons who share a relevant protected characteristic to participate in public life.

199. In fact the Defendant's submission is contradicted to a significant degree by the terms of OR3 itself. As I have already identified, having concluded that the open space provided in the Third Application was acceptable irrespective of the occupancy of the scheme, officers actually went on to consider the potential benefits of the open space for extra care residents in ways which reflect the specific considerations required under the PSED. It is inevitable that at least some of the extra care residents will share the protected characteristics. The perceived benefits of the open space that was being proposed in fostering integration of extra care residents with the public are discussed in OR3. In any event, the PSED is a general duty that applies to the Defendant when carrying out its functions. It is not a duty which directs a particular outcome, but it is a duty which needs to be performed. I therefore reject the submission that the PSED was not engaged at all in the determination of the Third Application.

200. On the facts, however, I am satisfied that the duty was performed and performed in the way required by in accordance with the principles derived by the Claimant from *Bracking* (above), even though it was incorrect to suggest that it needed to be performed only out of "an abundance of caution". In paragraph 6.4.9 of OR3 the members were directed specifically to the terms of the duty itself. As I have already said, the analysis of the quality of the open space provided in fact identified benefits that are relevant to the considerations required under the PSED, such as fostering good relations and promoting integration in public life.

201. In the Additional Representation document that was provided to members, further specific consideration was given to each of the specific matters that the Claimant had raised as not having been examined properly under the PSED in the determination of the Second Application. As it happens consideration of the PSED led to views being expressed by officers as to the extent to which the matters required for consideration by the PSED would actually be met by the proposed scheme. As I have already identified, the duty under the PSED is not cast in terms which require a specific outcome to be achieved. It is a duty to have regard to the need for the matters specified. However, the fact that officers considered the scheme to deliver objectives that need to be considered under PSED is not a basis for saying that the PSED was not performed. Similarly, the fact that the Claimant may not agree with the judgments as to the way in which the scheme might assist in fulfilling the considerations specified in the PSED is not a basis for arguing that under the PSED was ignored.

202. I therefore reject the challenge under Ground 5.

Conclusions on JR2

203. I consider that each of the Claimant's grounds of challenge crosses a low threshold of arguability. I therefore grant permission to the Claimant to bring the claim for judicial review in JR2 on each of the grounds. For the reasons identified above, however, I dismiss the claim on each those grounds.

JR1

204. In light of my conclusions in respect of JR2, I return to consider the substantive challenge to the Second Application under JR1.

205. Although many of the conclusions reached on grounds 1-3 of JR2 have direct application to the same grounds in JR1, the same is not necessarily true of grounds 4-5. However, the main relief sought in JR1 has become largely academic given the outcome of JR2. The dismissal of that claim means that the planning permission for the Third Application is lawful. The planning permission for the Second Application is in identical terms, save that it would potentially expire sooner if not implemented. There would be little practical purpose in quashing the planning permission for the Second Application even if there had been errors of law in granting it.

206. Moreover, the Court has a duty under section 31(2A) of the Senior Courts Act 1981 to refuse relief if it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Applying that test, I am satisfied on the evidence before me that if any of the conduct complained of in JR1 involved any error of law in light of the way the Second Application was determined, the outcome for the Claimant would not have been substantially different if that unlawful conduct had not occurred. In my judgment, the Defendant's fresh and lawful determination of the Third Application now conclusively establishes that. Contrary to Mr Fullbrook's submission, I do not consider that the determination of the Third Application constitutes "after the event" rationalisation of the type in issue in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin) which the Court should ignore for these purposes. It was a separate and fresh determination of a new planning application for which members were advised to ignore their previous determination of the Second Application.

207. The parties did not spend any material time at the hearing on separate submissions relating to the Second Application and JR1. In all these circumstances I do not consider it is either necessary or appropriate for me to lengthen what is already a long judgment on a separate analysis of whether the Second Application was lawfully granted in light of OR2. I am satisfied that it would not be appropriate to grant relief quashing the planning permission for the Second Application as a matter of discretion in light of the disposal of JR2 and, in any event, applying section 31(2A) of the Senior Courts At 1981.

208. I accept Mr Fullbrook's submission that JR1 did not become academic on the determination of the Third Application. If the Claimant had withdrawn JR1 at that point, her claim under JR2 would potentially have become academic. The JR 1 claim has only become academic in light of my conclusions on JR2. I also accept, by logical extension of the principles, that on the facts of this case, the separate and fresh determination of the Third Application does not provide relevant "after the event" elucidatory reasoning for the determination of the Second Application on Grounds 4 and 5. I have already identified some potential concerns about the reasoning in OR2 in relation to Ground 4. I have also rejected a submission in relation to Ground 5 on JR2 that the PSED was not engaged at all in relation to the determination of the Third Application. I consider the same conclusion would apply to the determination of the Second Application. I recognise it could be necessary for me to consider the merits of JR1 further to some limited extent in the event of a dispute between the parties

about costs, but I do not consider it necessary to do so further in disposing of the principal outcome of these claims.

209. Accordingly, despite the clear and persuasive nature of Mr Fullbrook's submissions, I dismiss both claims for judicial review.