

Neutral Citation Number: [2011] EWHC 86 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2011

Before :

MR JUSTICE OUSELEY

Between :

(1) KEITH GARNER
(2) KEITH GARNER LIMITED
(3) GERALD McAULLY
- and -

Claimants

ELMBRIDGE BOROUGH COUNCIL
-and-

Defendant

GLADEDALE GROUP LIMITED
-and-

1st Interested
Party

NETWORK RAIL INFRASTRUCTURE LTD

2nd Interested
Party

Mr Richard Drabble QC & Mr David Smith (instructed by Richard Buxton & Co Solicitors)
for the **Claimants**

Mr Simon Bird QC (instructed by Sharpe Pritchard & Co Solicitors) for the **Defendant**

Miss Mary Cook (SNR Denton UK LLP Solicitors) for the **1st Interested Party**

Mr Gregory Jones (Clifford Chance LLP Solicitors) for the **2nd Interested Party**

Hearing dates: 28th and 29th October 2010

Judgment

Mr Justice Ouseley :

Introduction

1. Elmbridge Borough Council granted planning permission on 16 June 2009 for a mixed development on land surrounding Hampton Court Railway Station, beside the Thames on the opposite bank to Hampton Court Palace (HCP), a Scheduled Ancient Monument and a Grade I listed building. The Grade 2 listed Lutyens Bridge over the Thames carrying Hampton Court Way passes the site to its west. The railway lines bisect the site with the terminus buildings to the west and north. The station is locally listed. The commuter car park is within the site on land to the east of the station. Between the station and the Thames is the derelict site of the former unsightly, single storey Jolly Boatman restaurant, at one time surrounded by hoardings.
2. The development permitted was the comprehensive redevelopment of Hampton Court Station, 66 residential units, retail and commercial floor space, a 46 bedroom hotel, which created the greatest controversy since it was closest to the Thames, and a 61 bedroom care home originally intended for occupation by the Royal Star and Garter Home. There was also a two storey underground car park, public open space and highway improvements.
3. The Council resolved to grant permission on 18 December 2008, the full Council approving the application by 29 votes to 24, with 5 abstentions. The reasons for the grant of permission were summarised as follows:

“The proposal follows the recommendations of a detailed Planning Brief for the site and although it has been the subject of strong objection from some quarters it has attracted a satisfactory response from English Heritage, an enthusiastic response from CABI, and would deliver the redevelopment and regeneration of one of Britain’s ‘Worst Wasted Spaces’ (CABI). The proposal has also met the technical requirements of specialist consultees such as the Environment Agency and Surrey County Council as Highways and Transportation Authority. The application has been considered against all the relevant national and local policies as well as the representations and consultation replies, and in all the circumstances it is concluded that on balance there are insufficient overriding reasons to refuse planning permission in the public interest.”
4. The Claimants were led by Mr Garner, a former employee of Historic Royal Palaces, HRP, the registered charity responsible for looking after Hampton Court Palace. He had been responsible for it until 2004, responding to previous planning applications and a planning brief on the Jolly Boatman site. The Claimants challenge the planning permission on the grounds that the Council had failed in its duty to have special regard to the setting of Hampton Court Palace and had failed lawfully to apply the sequential tests for development in a flood plain, set out in PPS 25 “Development and Flood Risk”. The Claimants also allege that the reasons for the grant of permission

were legally inadequate and that the relevant policies had not been summarised in the decision. The latter allegation in relation to the policies is undoubtedly correct.

5. This is a rolled-up hearing since permission was refused on the setting ground because of a want of standing and delay but not on its merits, and on the second ground because of a want of arguable merits as well. The issue of standing is not pursued. Delay was argued, but not strongly, as going to discretion. The background is set out in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006, dealing with a Protected Costs Order.

The statutory and policy framework for the setting of a listed building

6. Section 66 (1) of the Planning (Listed Building and Conservation Area) Act 1990 provides:

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

7. Mr Drabble QC for the Claimant, in oral submissions, relied on the exposition of the significance of a similar provision in relation to Conservation Areas in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 14 1, and submitted that it applied equally to listed buildings and their settings. The House of Lords held as follows:

“There is no dispute that the intention of section 277(8) is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria.”

8. Although Mr Jones for Network Rail Infrastructure Ltd urged caution over allowing the language of *South Lakeland District Council* to become a straitjacket for the thinking of a planning authority and that the language of the House of Lords was different from the language of the statute, and I see the force of that point, *South Lakeland District Council* is authoritative if not strictly binding on me as to the approach required. In reality it is very difficult to see how a local planning authority, having special regard to the desirability of preserving the setting of a listed building, could grant planning permission for a development which harmed it, without having

strong reasons for doing so. Section 66 does not permit a local planning authority to treat the desirability of preserving the setting of a listed building as a mere material consideration to which it can simply attach what weight it sees fit in its judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is the obvious consequence of the statutory language, rather than an illegitimate substitute for it.

9. PPG15 "*Planning and the Historic Environment*" dealt with the setting of listed buildings in this way:

"The setting is often an essential part of the building's character, especially if a garden or grounds have been laid out to complement its design or function. Also, the economic viability as well as the character of historic buildings may suffer and they can be robbed of much of their interest, and of the contribution they make to townscape or the countryside, if they become isolated from their surroundings, eg. by new traffic routes, car parks, or other development."

10. Para 2.17 dealt with the publicity to be given to an application which affected the setting of a listed building, but is relevant to what constitutes the setting of a building:

"The setting of individual listed buildings very often owes its character to the harmony produced by a particular grouping of buildings (not necessarily all of great individual merit) and to the quality of the spaces created between them. Such areas require careful appraisal when proposals for development are under consideration, even if the redevelopment would only replace a building. Where a listed building forms an important visual element in a street, it would probably be right to regard any development in the street as being within the setting of the building. A proposed high or bulky building might also affect the setting of a listed building some distance away, or alter views of a historic skyline. In some cases, setting can only be defined by a historical assessment of a building's surroundings."

Did Elmbridge Borough Council pay special regard to the desirability of preserving the setting of Hampton Court Palace and the Bridge?

11. It is common ground that the duty in section 66 was not mentioned in the Committee Report for the 18 December 2008 meeting and that the Committee Report does not contain the language of that statutory provision. It does not set out the duty in the language of *South Lakeland District Council* stating that if development would harm the setting of a listed building, there should be a strong presumption against the grant of planning permission. However, Mr Simon Bird QC for Elmbridge, Miss Mary Cook for Gladedale Group Limited, the owner of the Jolly Boatman site and the

developer, and Mr Gregory Jones for Network Rail, the landowner of most of the site, contend that in reality the statutory duty was fully complied with. I accept that, provided the issue has been approached in the right way, and that special regard has in fact been had to the desirability of preserving the setting of Hampton Court Palace and Bridge, the decision would not be erroneous in law simply because the statutory language or statutory test had not specifically been referred to; see for example *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, para 37 Dyson LJ:

“The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed. The form of words suggested by Mr Drabble to which I have referred above may not of itself be sufficient to show that the duty has been performed. To see whether the duty has been performed it is necessary to turn to the substance of the decision and its reasoning”.

12. Mr Bird argued that the report and decision had to be seen in the context of the careful consideration of development on this site and its relationship to Hampton Court Palace over a number of years and in the context of the Council’s longstanding rejection of the stance of HRP, which was particularly hostile to any development on the river frontage, especially were it larger than the Jolly Boatman restaurant itself had been.
13. In essence, Mr Bird submitted that the preservation of the setting of Hampton Court Palace was what the long consideration of development issues on the site and what the officer’s report to Council were centrally focussed on. Members must have concluded that the development preserved the setting of Hampton Court Palace. There was no suggestion in the report that its setting would be harmed, but that there were other planning objectives which outweighed that harm. These submissions require some analysis of how the development proposals on this site had been considered over at least 10-15 years.
14. As far back as 1986, Elmbridge Borough Council had prepared a Planning Brief for the Hampton Court Station and the Jolly Boatman site but no scheme which was both viable and acceptable had emerged. In 1999, still keen to encourage a “*sensitive and comprehensive*” development, the Council updated the 1986 brief so as to stimulate and guide possible new developments. The aims of the brief were:
 - “1. To promote a comprehensive development of the site, to include a comprehensive solution to access.
 2. To enhance the site’s role as a transport interchange.
 3. To ensure that the development enhances the East Molesey Conservation Area and provides a scheme of the highest architectural quality which respects its

location opposite Hampton Court Palace and adjacent to Hampton Court bridge.

4. To ensure that development maximises the opportunity to improve the frontage of the River Thames and to encourage a range of uses which promote the enjoyment of the River.
 5. To encourage environmental improvement of the site and the immediately adjacent highway.
 6. To enhance the site as a gateway to the borough, particularly for tourists visiting Hampton Court.
 7. To encourage a mix of uses appropriate to the site's location."
15. The description of the site in the brief specifically referred to the importance of Hampton Court Palace and Hampton Court Bridge, concluding: *"Given the importance of the setting of Hampton Court Palace and of the Thames river frontage, the site is extremely architecturally sensitive"*.
16. The reasons for the comprehensive approach were identified, one of which specifically related to the sensitivity of the site in relation to Hampton Court Palace, and another to pedestrian routes which featured in the case because of the importance of *"the visitor experience"*, leaving the station to cross the bridge to Hampton Court Palace:
- "2. The site is extremely visually sensitive and a co-ordinated approach to design, to achieve a development of quality given the prominent location, within a conservation area and opposite Hampton Court Palace is essential.
 3. The necessity to achieve optimal pedestrian routes between the station and Hampton Court Palace through the site".
17. The first reason however was the need for a co-ordinated solution to the problems created by the existence of 4 separate access points from the site on to Hampton Court Way, creating danger for cars and vehicular/pedestrian conflicts especially for visitors. The car park was accessed to the north of the station crossing the natural route for pedestrians visiting Hampton Court Palace.
18. Planning policy included the Thames Landscape Strategy in 1994, which had the status of supplementary planning guidance, in which one of the main landscape factors was the views from Hampton Court Palace and Bridge. Design issues required a full design statement and one that supported a detailed rather than a merely outline planning application. The statement should address the impact on the setting of Hampton Court Palace among other issues. A site analysis showing the importance of views from the Palace was included in the Planning Brief. It noted:

“However, as Plan 5 shows, the Jolly Boatman site is highly visible and therefore particular regard will be paid to the Jolly Boatman site and that part of the site fronting the Cigarette Island Park, given its location opposite Hampton Court Palace, adjacent to the Grade II Lutyens Listed Bridge, on the River Thames and within the East Molesey Conservation Area. Buildings of the highest quality of design will be required for these prominent locations and the applicants are encouraged to employ the services of architects who have a track record of designing excellent buildings in historic settings.”

19. No building should exceed three storeys plus pitched roof which was likely to mean that the buildings would be substantially less than the 50ft limit imposed by the South Western Railway Act of 1913 on any building within a 1½ mile radius of the Palace.
20. The Council’s aim was to ensure that development did not dominate the station building, was below the tree canopy of the park and fitted with the East Molesey Conservation Area. To that end, a landscape appraisal and a fully illustrated comprehensive landscape scheme was required paying particular attention to the frontages and perimeters of the site. The preferred land use mix for the Jolly Boatman site acknowledged this site to be “*extremely architecturally sensitive given its location in the Conservation Area and opposite Hampton Court Palace*”. It was suitable for a mix of high quality leisure uses of a quality of design commensurate with its location on the River Thames and opposite the Palace. A small hotel was appropriate but no more than 3 storeys high.
21. So far as the station site was concerned, the Planning Brief examined 2 options, noting at paragraph 9.5:

“The most important building frontage is along the Thames, where the site is particularly visually prominent when viewed from Hampton Court Bridge and Palace.”
22. The Cigarette Island frontage to the east would also need careful design to ensure acceptability from the Park, River and Palace. Residential development on the south and east parts of the site should not exceed 3 storeys and its quality of design would be “*key given the prominence of this area of the site from views of Hampton Court Palace*”.
23. The Planning Brief was subject to public consultation. HRP, through Mr Garner made its opposition to the brief clear. In particular, except for the possibility of a small kiosk on the Jolly Boatman site, its objection was and still is to urban development on the Jolly Boatman site and east of the station in particular, because of the visual relationship between the Palace and the south bank of the Thames, the relationship of the Palace to the station, and the loss of the views of Hampton Court Palace from passengers arriving by train. Such development would interfere with the “*Arcadian setting*” of Hampton Court Palace. The Director of Planning reported on this consultation after a meeting between the Council Planners and HRP to discuss these fundamentally different approaches.

24. HRP criticised the Brief for not responding to the sensitivity of views to and from the Palace, the importance of which the Brief acknowledged. HRP were invited to address Elmbridge Planning Committee members to explain its objection which Mr Parker, the Council's Head of Planning, said was extremely unusual and was done precisely because of the special position of Hampton Court Palace and the need to protect its setting. Mr Parker pointed out correctly that the areas HRP wanted to turn into parkland had not been parkland for a very long time since before the railway came in 1849 and since then had had sidings and a coal yard before the River Thames was realigned in the 1920s.
25. English Heritage, about whose stance there was considerable debate in Court, wrote on 28 October 1999 supporting the HRP position, and saying that it would object to any planning application based on the Planning Brief. There should be no extensive development on the site. It objected in principle to the nature, scale and intensity of development envisaged by the brief:
- “...few would be likely to question the desirability of a restored station building in an open parkland setting as envisioned by the Royal Palace [sic] in the long term. However, the proposal is not supported by any convincing evidence that its achievement would be financially feasible, and its long term pursuit ... would be contrary to the [Town Planning] Committee's previously expressed desire to promote an urgent and comprehensive development of the site after many years of neglect.”
26. But the Council rejected HRP's approach and adopted the Brief, though extending the East Molesey (Kent Town Conservation Area) for this reason:
- “In particular, it would help to ensure that all new development within the sites were of a high standard of design and in harmony with surrounding buildings, whilst protecting the Park and its trees, together with the setting of Hampton Court Palace, the River Thames and River Mole.”
27. In 2005, HRP commissioned an Historic Landscape Assessment and Landscape Development Strategy and Views Management Plan as the formal expression of its concerns about development. The Landscape Assessment included the following:
- “3.2 The appearance of the Surrey bank is a vital part of the arcadian setting of the Palace. Walking along Barge Walk, ever conscious of a backdrop of magnificent buildings and formal grounds, the observer sees the southern shore beyond the shining Thames. The ambience sought is an illusion to trees and meadow stretching away from the river. This same ambience is perceived in inviting glimpses from the West Front forecourt, the southern end of the Privy Garden or looking out from several magnificent windows within the Palace itself.
- 3.6 The Palace and its setting should also be enjoyed when walking from Hampton Court Station towards the bridge.

To this end views of the Palace across the river need to be opened up from the Surrey bank, framed by foreground and middle ground group of trees.”

28. Hampton Court Way had been an historic, though not always successful barrier to the eastwards spread of development apart from the railway:

“Substantial development on the Jolly Boatman and station sites, as promoted by the development brief, would effectively preclude the restoration of the historic landscape character of the area and further erode the arcadian setting of Hampton Court Palace in perpetuity.”

29. The Views Management Plan assessed the current situation thus:

“APPROACH FROM EAST MOLESEY ACROSS HAMPTON COURT BRIDGE

Assessment

This is perhaps the most important approach today, given the high number of visitors who arrive by train at Hampton Court Station and walk across the bridge to the Palace from East Molesey. It also has the greatest potential for opening tree-framed views across the River Thames to the Tudor Palace, that would help to orientate visitors and create a positive first impression that might better meet their expectations when arriving at an internationally important historic palace.

However, the dereliction of the prominent Jolly Boatman site and the air of neglect that pervades the Hampton Court train station currently dominate the character of the approach to the Palace from East Molesey.

The busy flow of traffic on the intimidating and imposing A309 further detracts from the appearance of this area and from first impressions of East Molesey in particular.

Views across to the Palace from Hampton Court Bridge are blocked by the avenue of Norway Maples within the West Front of the Palace.”

30. It recommended an urgent review of the Planning Brief and for plans to replace the landing stage, boat stores and tree planting to be promoted. These two documents were reported to the Elmbridge Borough Council and were part of HRP’s representations on planning applications in 2007 and 2008.
31. The importance, submitted Mr Bird, of all this history was that the Council’s consideration of setting did not start and finish with the officer’s report to full Council in December 2008, but rather the report was the last in a series of stages in which the

setting of the Palace and the avoidance of harm to it had been very seriously considered.

32. Gladedale made two applications which were numbered 2007/2970 and 2008/1600. The former became known as the “Boathouse Scheme”, the latter as the “Classical Scheme”. They differed in the design of the hotel at the north end of the Jolly Boatman site. The Classical Scheme was designed by Quinlan and Francis Terry and was the application eventually permitted. The Boathouse Scheme designed by other architects was refused. Gladedale provided the documents required by the Planning Brief with these applications. Part of the Environmental Statement was a Townscape Built Heritage and Views Assessment. It had identified a number of issues in discussion with both the Council and HRP, including the impact on the setting of the Palace and its gardens and the impact on the setting of Hampton Court Bridge. It identified with the Council and HRP the views to be assessed, including views to and from the Jolly Boatman site to the Palace, and to and from the Palace gardens and Hampton Court Bridge. The assessment made it clear that HRP and English Heritage had always objected in principle to any development on the Jolly Boatman site to the north or on the station car park.
33. The body of the assessment treated the setting of Hampton Court Palace as one of the heritage assets to be considered. It set out in paragraphs 3.3.3 – 3.3.6 a sufficiently accurate description of the correct approach to be adopted to the setting of listed buildings. It summarised the three HRP reports of 2005, describing HRP’s views and objections; then it analysed 12 character areas of which Hampton Court Palace, Hampton Court Park, the River Thames, Cigarette Island and the Railway were 5. It described the effect on Hampton Court Palace and Bridge in this way:

**“Hampton Court Palace (Scheduled Monument and
Grade I)**

The proposed development may be seen from certain viewpoints within the palace grounds. There will be an indirect effect on the setting of the palace. The effect on the setting of the palace is considered to be minimal as generally the development would be largely obscured by existing and proposed planting on Cigarette Island and the site itself. The point at which the headland development will come into fuller view is as one becomes aware of East Molesey and the high volumes of traffic on the road bridge. Thus the development will be associated with that urban experience, not the leafier stretches around the Privy Garden. The setting of the Palace consists of the River Thames, Hampton Court Park, the bridge and the settlements to the west and on the Surrey bank. The proposed development would not therefore introduce a new urban character into the setting of the Palace. The views assessment of agreed vistas presented later in this section also indicate that the effect on the views from Hampton Court Palace is minimal change only, and increasing nearer the bridge and with the main entrance area. The proposed improvements

to the station will provide a much enhanced environment for users, many of whom will be visiting the Palace.

Hampton Court Bridge (Grade II)

The Proposed development will have an indirect effect on the setting of the listed bridge. A new public space, Riverfront Square, will be created in front of the new hotel building and adjacent to the bridge. This will be an attractive, well designed area that will enhance the bridge's setting and provide improved viewing places for the bridge and the surrounding riverside environs"

34. The assessment included wire lines and photo montages which showed views out from the Palace and grounds and back towards them, from Hampton Court Bridge looking towards the Palace and the development site, and from the edge of Hampton Court Station towards the Bridge and the Jolly Boatman site. The commentary expressed views about the effect of the proposed development which to one degree or another were beneficial in the setting of the listing buildings. The assessment concluded that there would be no adverse effect on the setting of the Palace or Bridge. This document was before the Council when it reached its decision.
35. English Heritage responded on 20 December 2007 to the Boat House scheme application saying that it was *"particularly concerned at the likely impact of this development on views to and from Hampton Court Palace, its gardens and parks, the setting of the listed Hampton Court Bridge, the banks of the River Thames and the cumulative impact on the established character of East Molesey."* English Heritage had been closely involved in pre-application discussions. It was:

"...keen to encourage proposals which will improve significantly the currently extremely poor visitor experience of those arriving at Hampton Court Station, the currently semi derelict public realm between the Station, the River Thames and Cigarette Island Park, the setting of the grade II listed Hampton Court Bridge and preserve the existing semi-rural nature of views from Hampton Court Palace across the River to the Jolly Boatman site. Particular attention during these discussions has been given to the setting of the Palace, a scheduled ancient monument and its grade I Registered Gardens and Parkland, all of outstanding national and international importance."
36. English Heritage repeated its view that those objectives would best be achieved by an *"open, landscaped public space with a number of modest and carefully considered structures"* for visitor facilities *"not comprehensive and intensive urbanisation of the site."*

37. The initial pre-application discussions had led to the formal scheme being:

“...less harmful in its impact than initially feared, but English Heritage continues to have significant and fundamental concerns regarding a number of aspects of the scheme.

The hotel building proposed between the Station and the River is in terms of its height, scale, bulk and massing entirely inappropriate to this highly sensitive location. The introduction of such a substantially scaled structure onto a site which is currently undeveloped will have a major, adverse impact upon the established character and appearance on the setting of Cigarette Island Park, the Station and Hampton Court Bridge and in cross river views. This harm is particularly exacerbated by the detailed design of the building which is entirely inappropriate to the conservation areas and the wider setting in which it sits”

38. A meeting was suggested to find an agreed solution for the design, appearance and setting of the hotel which would ensure:

“that if the principle of such development is accepted in this location, the outstanding significance of Hampton Court Palace and its environ will be preserved and protected”

39. I note that this implies that whilst English Heritage would prefer a different solution in principle, it did not regard a hotel on the Jolly Boatman site as necessarily harming the setting of Hampton Court Palace.

40. On 6 August 2008, English Heritage provided its consultation response to the Classical Scheme and to changes to the Boathouse Scheme. It remained particularly concerned at the likely impact of development and enclosed a copy of its 20 December 2007 letter which “*sets out our views upon the principle of development of this site*”. It remained keen to encourage proposals which would improve significantly the setting of Hampton Court Station and views to and from the Palace. It continued:

“English Heritage does not wish to raise any objections to the proposed residential and commercial development to either side of the railway tracks and welcomes the erection of a new Royal Star and Garter Home, which will maintain the historic links of the Royal British Legion with this part of south west London. Also to be welcomed are much needed works of improvement and restoration to Hampton Court Station and the withdrawal of the previously proposed works of hard landscaping between Hampton Court Bridge and Cigarette Island Park, which we considered to be of a scale and design inappropriate to this stretch of the Thames.

English Heritage has long felt that the objective of enhancing the setting of the Palace, the Station and the appearance of this part of East Molesey would best be achieved by creating a landscaped public park or space between the Station and the Thames, containing a number of modest and sympathetically designed structures to provide facilities for visitors and residents alike. We continue to feel, as a matter of principle, that your Council should consider this approach very carefully.”

41. English Heritage referred back to its views in the December 2007 letter that the Boathouse Scheme would be entirely inappropriate to “*this highly sensitive location*” through its height, scale, bulk and massing, and that this harm would be exacerbated by the detailed design of the hotel. Having reminded Elmbridge Borough Council of its willingness to find a solution to the hotel “*if the principle of development in this location were accepted*”, it came to the Classical Scheme saying:

“English Heritage has been working closely with Gladedale Group Ltd and Francis Terry in the evolution of this redesigned building. We recognise that the floor space of the latest, proposed hotel building remains largely the same as the building we commented upon in 2007 but we feel that its design, appearance and architectural vocabulary all respond in a significantly more sympathetic fashion to this highly sensitive location and to the prevailing character of the place. The vernacular adopted harmonises with the varied but domestic scale of the architecture along this stretch of the Thames and, if built would have an infinitely less damaging impact upon views to and from the Palace and the environs of the Jolly Boatman site than the original proposal.

English Heritage considers that the latest proposals for the hotel building respect this advice and are based on a proper understanding of the significance of the place. The design for the new hotel is appropriate to its immediate and wider setting on both sites of the Thames

Should your Council decide to approve the proposal which includes the hotel designed by Quinlan and Francis Terry Architects it is essential that the high quality of their design for the hotel building and associated structures is matched by an equally high quality of detailing and execution. There needs to be a firm commitment from the Applicants to retain the service of these architects as the scheme develops.”

42. It maintained its objection to the Boathouse Scheme and, hoping that its comments would prove helpful, concluded:

“English Heritage wishes to secure a scheme which will complement the setting of significant heritage assets identified above and consider that if development on the site between the

Station and Thames is acceptable as a matter of principle, the designs submitted by Quinlan and Francis Terry Architects for a new hotel building, in conjunction with the designs submitted by Allies and Morrison for the residential and commercial development represent the most appropriate response to the site.”

43. HRP maintained its objection particularly to the bulk and height of the proposed hotel. It regarded the differences between the Boathouse and Classical Schemes as minor and the design of the latter as doing nothing to make the hotel more acceptable. The views of visitors from the train pulling into the station and then emerging from the station to cross the bridge would be lost or damaged. The development was being driven by viability and the cost of the two level underground car park. It remained of the view that the Jolly Boatman site should largely not be developed, though improvement to the station area was “*badly needed*” and it promoted its own 2005 report as the appropriate solution.
44. The Planning Sub-Committee (North) and the Full Planning Committee both went on site visits, looking at views to and from the Palace and on one visit went inside the Palace. The matter went to the full Council and the majority of councillors also went on a further site visit. The visits each lasted about two hours. Councillors walked across Hampton Court Bridge to the Palace, along the towpath beyond the Privy Garden and returned through the Palace Grounds. HRP representatives were on hand to answer questions and to point out views.
45. The officer’s report to the Council was thorough. It summarised objections and updated them including references to a 3,000 signature petition objection to the effect of the development on Hampton Court Palace. Mr Parker, the Head of Planning, also updated members orally on the representations which had been received. The report referred to the refusal of the Boathouse Scheme by the North Area Planning Sub-Committee and its recommendation that the Classical Scheme be permitted. Unsurprisingly, the description of the site and location pointed to the importance of Hampton Court Palace, and the fact that it was a “*key landmark*” on the Elmbridge Local Plan Proposals Map even though it was outside the Borough, (though the strategic views from the Palace into the Borough were to the east of the Cigarette Island Park, i.e. to the east of the site). It recounted the detailed planning history, since the refusal of an application in 1985 of unsuccessful endeavours to develop the site. Proposals had failed either because they were unacceptable or, if acceptable, they were not viable and so were not developed.
46. The current Planning Brief was set out in some detail. Subsequent changes in respect of flooding and affordable housing were described. It was not suggested that there had been any change in the importance of the setting of Hampton Court Palace. The report then commented, leading to some argument before me:

“An adopted Planning Brief is a material consideration in the assessment of any subsequent planning application. The normal assumption is that any application that follows the specifications in the Brief would be approved, unless there had been a material change in the planning circumstances that

rendered the Brief outdated or contrary to latest adopted policies.

However, an adopted Brief does not prevent the grant of permission for a development that departs from it, so long as that alternative development accords with adopted policies in the current development plan.”

47. The two development schemes were described, making it clear that the Classical Scheme hotel was of the same overall dimensions as in the Boathouse Scheme, but with different elevational treatment and in 3 storeys plus a mansard.
48. The consultation responses were set out in some detail. The English Heritage objection to the Boathouse Scheme referred to the inappropriate height, scale, mass and bulking of the hotel which would have an adverse impact on the character and appearance of the Cigarette Island Park, the Station, Hampton Court Bridge as well as cross river views. Mr Drabble drew attention to the absence of a reference to the appearance of the hotel in the summary of the English Heritage response to the Classical Scheme. I set it out because it was said to be misleading:

“Confirms that there is no objection to the residential/commercial development either side of the railway tracks and welcomes the Royal Star & Garter home. Continues to believe that a park between the station and the river, with only modest structures would achieve the most enhancement to the Palace and the area. However, the design and appearance of the Quinlan and Francis Terry hotel building is more sympathetic to the character of the area and less damaging to the impact on views to and from the Palace. The latest proposal respects English Heritage guidance and is appropriate to its immediate and wider setting. Suggests that the Allies & Morrison hotel scheme (2007/2970) be withdrawn and states that a call-in to the Secretary of State will be requested in the event that it is recommended for permission.”

49. The East Molesey Conservation Area Advisory Committee was critical of the architecture of both schemes. The London Borough of Richmond on Thames objected to both schemes in similar terms including in large part by reference to the effect they would have on the Palace.
50. The objection of HRP to both schemes was fully set out and I extract part:

“Consider that the Jolly Boatman site should be landscaped to reinforce and extend the rural parkland character of the River Thames and the site should not be redeveloped as it is considered that any development on the site would have a detrimental effect on the immediate setting of the Palace and the historical adjoining character of the area. The hotel building would dominate the river frontage due to its

orientation, bulk, external materials and the urban style landscaping and would have a detrimental effect upon the historic setting of the Palace as it would result in a proposal much larger than the existing buildings. The buildings on the railway site are considered to be a high density, monolithic scheme that will appear as a continuous wall when viewed from Hampton Court Palace. It is considered that the views from and to the Palace are significant and should be protected and the development by virtue of its scale, massing and height would have a significant impact upon the views of the Palace from the station and surrounding areas. The scale of the proposals also fails to maintain or enhance the unique character of the river and the terrace will further fail to contribute to the riverside ambience or rural character of the area.”

51. In reality, as Mr Bird submitted, HRP’s objection was making the same point on the principle of development which it had made in response to the Planning Brief and which generated the documents it produced to explain its views in 2005.
52. The officer’s report examined the planning considerations next. The first consideration was the extent to which the proposals complied with the Planning Brief. It explained how in reality the height of the proposed buildings met it. The section headed “*Viability Constraints*” is important because of the possible significance of the topic for members’ approach, but it featured more significantly in the arguments concerning the flood plain:

“One of the reasons why the sites have remained undeveloped in over 20 years has been the unusual costs associated with a comprehensive development.”

The need to replicate a station car park and provide safe access to it, as well as the works to the Highway and the station refurbishment and the need to carry out the development while maintaining a train service all add unusual costs. These have been amplified in recent years by the additional flood mitigation measures that are now required.

All of this means that any successful scheme has to include an amount of ‘value generating’ development sufficient to pay for these unusual works. Otherwise the comprehensive scheme would be undeliverable.

This has a number of implications. Some have suggested that the idea of a comprehensive approach should be abandoned, allowing the best parts of the site to be ‘cherry-picked’ and developed independently. But this would also abandon the opportunity to resolve certain of the current problems on the site – unsafe access being the prime contender. It would also lead to the danger that some run-down parts of the site would have no possibility of resolution short of public purchase or subsidy.

If a comprehensive approach is maintained, in line with the Planning Brief, then whatever development package is permitted needs to deliver sufficient revenue to pay the usual costs of development plus the unusual costs outlined in 8.2.3 above.

When assessing this it must be remembered that these unusual costs are effectively fixed, no matter how much development is permitted. It means that for any given mix of development there is a threshold below which the amount of development proposed would be unviable, and no developer would choose to implement it.

The developer has provided figures for the viability of the current application schemes (see attached letter). The costs quoted do not include figures for finance or acquisition, and it is evident that the schemes are already fairly marginal.

If changes were to be made – for example, reducing the amount of development on the Jolly Boatman part of the site – then corresponding increases would need to be made elsewhere. Alternatively the mix would have to change to allow a greater proportion of private housing, for example.

The scheme that has evolved includes a number of compromises concerning matters such as the amount of development and the development mix, and is seen as the optimum solution that meets the aspirations of the Planning Brief, while remaining viable – i.e. a scheme that the developer would be prepared to implement”.

53. Next followed the “*Built Assessment*” which began with a list of the relevant policies and the topics they covered. It concluded:

“In policy terms, there is no reason why, in principle, a hotel would have an adverse impact on the character and amenity of the area, including taking account of its riverfront setting and the proximity to Hampton Court Palace. As such, the provision of a hotel in this location would not conflict with local or national policy. However, the hotel must be of a suitable design and scale to accord with the very special characteristics and constraints of the site. Both proposals include a hotel of the same height and scale but with different architectural treatment of the elevations. Each will be considered in turn.”

54. Against that background the report then assessed each scheme. It said of the Boathouse Scheme that:

“The visual improvement of the site would indeed have a benefit but the design of the hotel must take account of the character of the area, which in this case includes the

Conservation Area, the riverside frontage and the setting of Hampton Court Palace.”

55. It contrasted the supportive views of CABE with the strong opposition of English Heritage, pointing out that a decision on whether the Boathouse Scheme had achieved the design and heritage objectives of local and national policy:

“must be reached in light of this very strong objection from English Heritage, in its capacity as the Government’s statutory adviser on the historic environment.”

56. The officer concluded:

“Accordingly, it is considered that the appearance of the ‘Boathouse’ scheme for the hotel would not protect and enhance the historic character of the area, including the views from Hampton Court Palace.”

57. The report reminded members of English Heritage’s position, saying:

“English Heritage remains concerned over the principle of developing the site but has worked with the applicants and Francis Terry in the evolution of the latest design for the hotel. It considered that the ‘Classical’ appearance results in a significantly more sympathetic development, which responds to the sensitive character of this location and is less damaging upon views to and from the Palace than the ‘Boathouse’ scheme. In summary, English Heritage concludes that the ‘design for the new hotel is appropriate to its immediate and wider setting on both sides of the Thames”.

58. The officer conclusion is important:

“In light of the comments from both CABE and English Heritage, as the Government’s advisers on design and heritage issues, the conclusion must be that the ‘Classical’ scheme for the hotel meets the policy criteria for achieving good design that respects its historic setting. There remains objection to this scheme from other interested parties and consultees, such as Historic Royal Palaces, the Hampton Court Rescue Campaign and the East Molesey CAAC, together with many letters from local residents. Yet there are also comments from the Council’s own conservation advisers and the Strategic section of Surrey County Council, who commend the high quality design of the ‘Classical’ hotel and conclude that less visual intrusion would result.”

59. Mr Drabble submits that the last part implies acceptance of visual intrusion by at least some supporters of the Classical Scheme.

60. In its overall conclusions, the report made these observations, starting with:

“This is a highly sensitive site, which because of its location opposite Hampton Court Palace has more than local significance. But it is also important to the community of East Molesey.”

61. It continued:

“There has been a very frustrating period in excess of 29 years during which it has been run-down. No successful scheme for development and improvement has emerged that has been good enough to achieve both planning permission and viability.”

62. Having referred to the poor state of the Jolly Boatman site, the missed opportunities, and the Planning Brief specifying the position and heights of buildings that would be “acceptable” plus appropriate uses, the report pointed out the strong opposition of HRP to any built development on the Jolly Boatman site. It continued:

“Nevertheless, after considering representations from bodies such as English Heritage, CABE and the Thames Landscape Strategy as well as Historic Royal Palaces, the Council confirmed in the 1999 Planning Brief that it was satisfied that a 3 storey (plus roof) landmark building could be erected on the Jolly Boatman site in a forward position, so long as the architecture was of the highest quality.

A further complication has been the unusual development costs associated with the site. This has been one of the longstanding impediments to development, and even before the ‘credit crunch’ it is evident that the scheme contained in the current application is only of limited viability. It is understood that at an early stage the applicant considered the possibility of not adding any building on the Jolly Boatman part of the site but unless significantly higher buildings had been built to the rear, the scheme would not have been viable.”

63. The development followed the Planning Brief very closely with the main deviation being at the riverfront where the hotel had been set back and angled slightly so as to be less assertive to the River Thames. Then:

“There are no significant issues that have arisen since adoption of the Brief that dictate departing from it. The flooding issue might have been one, as suggested by the Rescue Campaign. But after much work the engineers for the applicant have devised a solution that meets the requirements of the Environment Agency, and as assessed, it meets the Exception Test’ in Planning Policy Statement 25”.

64. It continued:

“Much weight must be given to the advice of the main national and county-level consultees: CABE, English Heritage, the

Environment Agency and Surrey County Council's Highway and Transportation Section. These have all examined the schemes independently from the Planning Brief.

With the exception of English Heritage and the Boathouse scheme (see below), all these consultees are supportive of the applications.

CABE in particular is enthusiastic, commending all aspects of the schemes – the design, mix, quantum, distribution of massing, high quality and public realm improvements. This is an unusually positive endorsement of a development of this type from such a body and obviously stands in direct contrast to the objections from Historic Royal Palaces – loss of opportunity for landscaped riverside, size, loss of views, harmful to setting of the Palace, traffic etc.

English Heritage advice is more considered and reflects the fine balance that ultimately exists between those with strong views in favour and those against. They have considered the likely impact of the development upon views to and from Hampton Court Palace (including its gardens and parks), the setting of the listed Hampton Court Bridge, the banks of the River Thames and impact upon the character of East Molesey. They confirm they have no objection to the residential/commercial redevelopment either side of the railway tracks and welcome the Royal Star & Garter home. They acknowledge the aspiration to create a park between the station and river, and comment that if this could be achieved it would deliver the most enhancement of the Palace and the areas. But they also acknowledge that the design and appearance of the 'Classical' hotel building has taken account of their advice and is appropriate in its immediate and wider setting'. Conversely they still feel that the original 'Boathouse' design for the hotel would have an adverse impact upon the character and appearance of Cigarette Island Park, the station and Hampton Court Bridge as well as cross river views.

In all these circumstances, and on balance, a recommendation is made to Grant permission for the revised scheme (2008/1600) – the 'Classical' Hotel building."

65. Before members considered this report Mr Parker referred to English Heritage's full written representations, commenting on them and at full Council giving a resume of the whole background. The two Committees were shown aerial photographs and historic maps of each site, as well as scheme perspectives. There was significant debate about the setting of the Palace with views expressed both for and against the development, hostile or otherwise to the proposal's impact on views to and from Hampton Court Palace.

66. Mr Parker interpreted the debate and vote as showing that the Council did indeed pay special regard to the desirability of preserving the setting of the Palace and Bridge.

Conclusions on setting

67. Reviewing the whole sequence of events from the Planning Brief, to the consideration of the 2005 Reports from HRP, to the form and detail of the application and its accompanying documents, and the manner in which Councillors visited the site and were advised in the officer's report, I am left in no doubt but that the desirability of preserving the setting of the Palace and the Bridge was one of the key issues, if not the key issue or consideration, in the decision, to which special regard was paid. It was not treated as just one among a large number of material considerations. Indeed, it would beggar belief, as Ms Cook put it, for the Council, dealing with a site so close to the Palace and Bridge, not to have had special regard to their setting.
68. In my judgment, the Council did comply with its statutory duty under s66 when deciding to grant permission for this development. It did so even though neither the statutory provision, nor its wording, were specifically referred to in the officer's report nor in the debate. It is difficult to see how anyone considering the setting of the Palace and Bridge could have thought other than that it was desirable to preserve the setting of the Palace and Bridge, and that if the setting was harmed, that would be an adverse factor which could not be overcome without sufficiently strong countervailing factors. So the *South Lakeland District Council* formulation did not need to be set out explicitly for the necessary thought process to take place.
69. The report did not suggest that the setting was harmed, or that in consequence some particular benefit had to be shown to outweigh the harm. The report, following on from the Brief, sought a development which would not harm the setting. Mr Bird is right that the probable inference is that those members who voted in favour of the grant of permission thought that the development would preserve the setting of the Palace and Bridge. It is probable that those who voted against it took the view that the setting was harmed; either view is a reasonable one of this development in this location. But it is also possible that some who voted for it took the view that some harm was done to the setting, but it is inconceivable that they still voted for the proposal without concluding that there were sufficiently strong countervailing factors. Why else would they have voted for it? There is no especial restriction on the factors which can lawfully outweigh such harm. This approach would comply with the statutory duty as well.
70. I also regard it as a factor telling in favour of the Council's argument, that the report did not emphasise the degree of unsightliness on the site currently, so as to produce a very low baseline against which the proposed development could be measured. In that sense, the preservation of all aspects of the existing setting was not desirable on any view, as HRP themselves fully recognised. They described the existing state of the Jolly Boatman site as disgraceful, detracting from the setting of the Palace. Language such as that which the Claimant alleges should have been used, focusing on the preservation of the setting, could have led to an undue focus on the desirability of preserving the development site in its current state, which was not what HRP or anyone else thought desirable at all. Or it could have led to the view that anything else would be better. But that was not the Council's approach. Although the Council disagreed that the only acceptable alternative to the existing state was HRP's

Arcadian vision, it was asking itself whether the development was acceptable as part of the setting of the Palace and Bridge, which was at least a sensible way of approaching its duty in relation to this particular site.

71. I make a few comments on the sequence of events, which supports my view. The purpose, content and language of the Planning Brief, adopted after public consultation and consultation especially with HRP, shows that development which was acceptable in its relationship to the Palace was vital; it had to respect the setting of the Palace and Bridge. Even if members were unaware of the history of the Brief, and the HRP response to it, it was embedded in the thinking and approach of Mr Parker, and members had it before them and its content was summarised.
72. The consultation on the Brief with HRP was particularly important since it showed what HRP thought was appropriate, was considered by the Council and rejected as unrealistic. But the Council did not say that because the HRP vision was never going to happen, any development was better than what there was and would remain. It aimed for a development which would not harm the setting of the Palace, and would be acceptable in its setting. Nor could it rationally follow that its rejection of the HRP or English Heritage vision meant that alternatives would be harmful.
73. The Council again considered HRP's views when presented with its three Reports of 2005. This mattered since it would have reinforced in the minds of officers and members, just how important an issue the protection of the setting of the Palace was for the consideration of development proposals.
74. The Brief required, and Gladedale Group submitted, a detailed planning application. One of the purposes of that is to elevate design and siting to issues which go to the decision whether to permit development, and enable the effect on setting to be judged with greater precision. The developer also produced as the Brief required, but as part of the Environmental Statement, its consultant's analysis of the setting and views before and after development. The views, to and from the Palace and from the Bridge over the site and Palace, were selected with the advice of HRP; so they were likely to focus on those aspects of the setting which mattered. This was all before the members. It could not help but emphasise to members the importance of setting, and the avoidance of harm, as the consultant concluded. And if members were focusing on setting and the avoidance of harm as one of the most important issues, I do not see how they can avoid having special regard to the desirability of preserving the setting, and would expect strong reasons for the grant of any permission which harmed it. The importance of the setting of the Palace could not have been in doubt.
75. The members undertook visits to the Palace grounds, with HRP officers on hand, which must have reflected and reinforced in their minds the importance of setting and the avoidance of harm.
76. The officer's report itself, in the many parts which I have quoted, makes it obvious that setting was one of the most important issues. It sets out the evolution of the Council's thinking, and the views of HRP and other objectors in a fair manner. That inevitably put a focus on setting. It discussed how English Heritage had considered the acceptability of the Classical Scheme. Setting and acceptability is what its Conclusions are really all about. It did not suggest that the setting was harmed or that, if harmed, that was a matter of no great moment. It did not seek to strike a balance

between harm and other issues. The recommendation “on balance” at the end does not signify such an approach. Rather, as the preceding paragraph makes clear, it acknowledges, that there are strong and respectable views on either side of the debate about whether there would be a degree of harm or not.

77. The report did not misrepresent English Heritage’s views. It made clear that English Heritage would have preferred to see the HRP vision become reality, and that its acceptance of the Classical Scheme was contingent on the Council rejecting that vision, which it had always done. The fact that the two hotel designs shared a common size, height and bulk and massing, but differed in external appearance because of their different elevational treatment, led to Mr Drabble’s criticism that there was no sound basis for rejecting one as harmful and accepting the other as innocuous, and that more should have been made of the objection in principle from English Heritage.
78. But the similarities between the two schemes were clear, as were the differences; the nature and basis of English Heritage’s objection in principle to any development on the Jolly Boatman site, shared with HRP, was clear, as was the acceptability to it of the Classical Scheme and the harm which the Boathouse Scheme would do. English Heritage was clearly putting forward a preferred future; it was not treating the Classical Scheme as a harmful, albeit least bad option. It treated it as acceptable i.e. harmless, though not as beneficial as in an ideal, but unattainable, world it would have liked. There was nothing misleading at all about the report. Members also had the full text of the English Heritage letters.
79. Mr Drabble also submitted that the members ought to have been told that they could and should consider the approach of the Planning Brief afresh, that they were not bound by it, rather than being told that the normal assumption would be that development which complied with it would be permitted. In my view, what the report said about the approach to the Brief contains no legal error. The clear implication that it should normally be applied unless there were changes of circumstance, plainly leaves it open to members to reconsider its approach.
80. The report drew attention to the way in which departures from the Brief should be considered; it discussed the relationship between the height limit in the brief and the proposed height of the hotel. There was nothing unlawful in what it said.
81. For all those reasons, I regard it, on analysis, as obvious that the Council fulfilled its duty.

Flood Plain

82. PPS 25 states that local authorities, in determining planning applications, should regard the PPS as a material consideration which may supersede development plan policies, and I would add Planning Briefs. They should ensure that planning applications were supported by site specific flood risk assessments (FRA) as appropriate, as was the case here, and should apply the sequential approach at a site level to minimise risk:

“by directing the most vulnerable development to areas of lowest flood risk, matching vulnerability of land use to flood risk”.

83. The importance of the sequential approach was emphasised in paragraph 14: it is central to the policy statement and “*should be applied at all levels in the planning process.*” It is described in paragraphs 16 and 17 in this way:

“LPAs allocating land in LDDs for development should apply the Sequential Test (see Annex D and Table D.1) to demonstrate that there are no reasonably available sites in areas with a lower probability of flooding that would be appropriate to the type of development or land use proposed. A sequential approach should be used in areas known to be at risk from other forms of flooding.

In areas at risk of river or sea flooding, preference should be given to locating new development in Flood Zone 1. If there is no reasonably available site in Flood Zone 1, the flood vulnerability of the proposed development (see Table D.2. Annex D) can be taken into account in locating development in Flood Zone 2 and then Flood Zone 3. Within each Flood Zone new development should be directed to sites at the lowest probability of flooding from all sources (see Annex C) as indicated by the SFRA.

If, following application of the Sequential test in Annex D, it is not possible, consistent with wider sustainability objectives, for the development to be located in zones of lower probability of flooding, the Exception Test can be applied as detailed in paras. D9-D14. The Test provides a method of managing flood risk while still allowing necessary development to occur.

The Exception Test is only appropriate for use when there are large areas in Flood Zones 2 and 3, where the Sequential Test alone cannot deliver acceptable sites, but where some continuing development is necessary for wider sustainable development reasons, taking into account the need to avoid social or economic blight and the need for essential civil infrastructure to remain operational during floods”.

84. Most of the site to the east of the station, where the underground car park and the residential care home would be, lies within the 1:100 year flood plain, Zone 3a in PPS 25 parlance. Almost the whole site, except the northwest portion where the hotel would be sited, is within the 1:100 year flood plain after increase by 20 percent to allow for the effects of climate change.
85. Annex D to the PPS defines Zone 3a as “*High Probability*” and says that more vulnerable uses such as residential care homes and dwelling should only be permitted if the “*Exception Test*” is passed. Annex paragraph D10 says that the Exception Test

should only be applied after the Sequential Test and when the more vulnerable uses cannot be located in lower risk flood plain zones.

86. D9 provides:

“For the Exception Test to be passed:

- a) it must be demonstrated that the development provides wider sustainability benefits to the community that outweigh flood risk, informed by a SFRA where one has been prepared. If the DPD has reached the ‘submission’ stage – see figure 4 of PPS12: *Local Development Frameworks* – the benefits of the development should contribute to the Core Strategy’s Sustainability Appraisal;
- b) the development should be on developable previously-developed land or, if it is not on previously developed land, that there are no reasonable alternative sites on developable previously-developed land; and
- c) a FRA must demonstrate that the development will be safe, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall”.

87. The officer’s report dealt with the need for the Sequential Test by pointing out that the applicants argued that the development at issue was driven by needs specific to the site of the development, that is to say particular improvements to the station rather than by development which could be located elsewhere. It therefore considered whether the Exception Test was met. I quote:

“The aim of the Sequential Test is to steer new development to areas at the lowest probability of flooding. The applicants argue that the development is driven by improvements to the railway station and so no alternative sites within Flood Zones 1 and 2 are suitable. There is a Planning Brief that encourages the comprehensive development of the site, which is required in order to provide visual enhancement and improvements to access. The proposed development is specific to the requirements of the application site and inextricably linked to the railway station. PPS25 states that if development is needed for wider sustainable development reasons in flood risk areas, it must satisfy the three criteria of the Exception Test. The criteria required that (a) it is demonstrated that the development provides wider benefits to the community that outweigh flood risk, (b) the development is on developable or previously developed land, and (c) the Flood Risk assessment demonstrates that the development will be safe without increasing flood risk elsewhere and, where possible, reducing flood risk overall.

In assessing Criterion (a), the Planning Brief is, again, relevant. The Council has prepared this document in order to see the site developed in a comprehensive manner to meet the conservation

and transportation needs of the area. At present, it is a ‘wasted space’ (CABE) and does little to enhance the very special nature of its surroundings. It is considered that the development would provide wider sustainability benefit to the community, economy, tourism and the area, in view of the advantages in visual terms and by meeting the aims of the Planning Brief, thus it meets the criterion.”

88. The report then dealt with criteria (b) and (c) referring to the applicants’ FRA and protective measures which would be taken, before concluding that the Exception Test had been passed and that the proposal was acceptable on flood risk grounds.

Conclusions on the flood plain and the Sequential Test

89. Mr Drabble’s submissions evolved considerably between the grounds and Skeleton Argument and oral submissions. Initially, it was contended that the Council had failed to apply the Sequential Test lawfully, and should have considered whether all the vulnerable uses needed to be there. But the Council’s answer is irrefutable: it was concerned with the regeneration of this particular site; finding other sites for the component parts of the development would have been pointless. The Sequential Test is not sensibly applicable to a mixed use development which has to be on a particular site to achieve its regeneration. That is why the Council could proceed swiftly to consider the Exception Test. On the face of it, the Council was entitled to find that that test was in turn satisfied.
90. Hence, the argument became that the Council should have considered whether all the elements were necessary for the viability of the regeneration of the site, and whether the vulnerable elements could be located out of the flood plain: the care home and residential uses in particular. (The hotel was a vulnerable use but not largely located in the flood plain.) The argument further evolved to the effect that in judging viability and scheme content, the Council ought to have taken, not the land price agreed between Network Rail and Gladedale, but the residual value of the land for development of what was permitted to be developed. This argument went both to the application of the Sequential Test and Exception Test.
91. The Council and Interested Parties objected to what appeared to be a wholly new and unformulated ground of challenge, alleging that the development had not been justified simply as an acceptable form of development but as one necessary for a viable regeneration. There is real force in that complaint, but the new points were answered effectively any way.
92. Viability had become an issue between Gladedale and the Council since the developer wanted to build no more than 10 percent of the residential units as affordable housing. The Council’s adopted policy required 30 percent affordable housing, and its new aim was 40 percent. Gladedale provided to the Council officers and to the surveyors for the Royal Star and Garter Home, in confidence, its viability appraisal. The latter accepted, and so advised the Council, that there was no prospect of any higher percentage of affordable housing than the 10 percent offered already. The scheme was already marginal, even for a developer such as Gladedale, which was prepared to work on lower assumed costs and returns for commercial reasons. Gladedale’s

viability appraisal was later provided in confidence to the Claimant, and a shortened version was used in Court.

93. It was clear, that unless that viability appraisal itself could be attacked, the officers had correctly advised members about the affordable housing percentage, and that the scheme was marginal. There was therefore no error of law, in applying the Sequential and Exception Test, in concluding that there was no scope for any profitable activities to be relocated off-site and for there still to be a viable regenerative development. The viability appraisal shows that there was no such scope.
94. So in argument, Mr Drabble attacked the viability appraisal, on the basis that it took as its starting point the agreed land price. Mr Drabble argued that the price agreed between Network Rail and Gladedale for Network Rail's land dictated the terms of the appraisal, whereas a residual price would show what the land was actually worth for the developments which could be put on the land.
95. This land price however, had been agreed some time ago, but was not yet embodied in a formal contract, although each of its parties regarded it as agreed, and not as something which either party would revisit. Network Rail needed some land price to "incentivise" it to participate in the development, otherwise it would not take part. This was the price agreed with the developer for that purpose. Network Rail was required by the Office of the Rail Regulator to achieve a return on its non operational assets, and this was re-invested for the benefit of the rail network. The Council thought that to be a fair approach, recognising that the land had been undeveloped for 25 years, and that a land owner needed an incentive to participate in development. The question for the planning authority was whether the outcome was acceptable. The proposal passed the Sequential Test as a site-specific development. It passed the Exception Test, especially since the Environment Agency had not objected to the development in the light of Gladedale's Flood Risk Assessment. Nor had it said that the Council's approach to the two tests erred.
96. Mr Drabble's argument is wrong. Neither test requires a viability appraisal or one in a particular form or on particular assumptions in order for lawful conclusions to be reached on its application. There was no need for officers to advise members that they had to make a different assumption as to land price from that which the landowner and developer had agreed, to redo the appraisal on that basis, by removing buildings and uses from their disposition in the flood plain, until some residual value was arrived at, which the Council might then, seemingly quite wrongly, assume was the minimum that Network Rail would take for selling its land to Gladedale. It was not for the Interested Parties to undertake a series of analyses showing the effect of various scheme changes and why the notional price available for the land would not persuade Network Rail to participate. The Claimant put in nothing to show some obviously worthwhile alternative had been ignored for development outside Zone 3a. This is going some way beyond an error of law on the interpretation or application of PPS 25, especially in the light of the evidence on risk. The relevant policies were considered, applied on their terms, and the relevant considerations taken into account.
97. Zone 3a, and yet more so Zone 3a increased for climate change, covered a very large part of the site. So the scope for development by redistributing uses out of the flood plain was in reality extremely limited, and the hotel was largely out of it anyway.

98. Mr Drabble also, in the same broad line of argument, attacked the two storey underground car park, because of its cost. This was not a good point. The accesses required to be re-arranged; car parking spaces were needed for commuters and visitors to the Palace. Were they to be at surface level, quite apart from the impact on any development above the enlarged car park, car and pedestrian conflict at the northern end of the site would be intensified since there was no way over the tracks, and no way round them save at that end. Underground access and parking was the obvious solution. This picking away at bits of the development in argument rather illustrated why there was a case for comprehensive development of the site as a whole, which the Brief had grasped. There is nothing in the flood plain points.

Reasons

99. The Town and Country Planning T&CP (General Development Procedure) Order 1995, as amended, requires in Article 22 that:

“(1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters and –

- a) planning permission is granted, the notice shall include a summary of their reasons for the grant and a summary of the policies and proposals in the development plan which are relevant to the decision;”

100. The reasons are short. The reference to there being “on balance...insufficient overriding reasons” to refuse permission, is inelegant but discloses no error of law. The fact that the reasons do not refer to s66 is not of itself an error of law. The reasons are broad but adequate. If inadequate for the statutory duty to give reasons, they are readily supplemented by reading the report to Council. I would grant no relief on that point.

101. There is no summary of policies, where there should be one. They are listed in the report but there is no summary of their import for the application, as opposed to a statement of the topics to which they relate. The relevant duty was not complied with, and is not wholly redeemable by reading the report. But it is a small omission and a waste of time to require it to be complied with now.

Overall

102. I shall grant permission on the setting point, but refuse relief. I refuse permission on the flood plain point since it is not arguable. I grant permission on the policy but not reasons point, but I refuse relief. I would not have refused relief on the grounds of delay on either main point if they had succeeded.