IN THE HIGH COURT OF JUSTICE **CLAIM NO:**

KING'S BENCH DIVISION

PLANNING COURT

APPLICATION FOR PLANNING STATUTORY REVIEW UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N

AWE PLC

Claimant

-and-

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

-and-

(1) T A FISHER & SONS LIMITED

(2) WEST BERKSHIRE DISTRICT COUNCIL

(3) OFFICE FOR NUCLEAR REGULATION

(4) SECRETARY OF STATE FOR DEFENCE

Interested Parties

STATEMENT OF FACTS AND GROUNDS

Due to the size of the Claim Bundle exceeding 20MB, the Claim Bundle has been split into a Core Claim Bundle and a Supplementary Claim Bundle in accordance with Annex 7 of the Administrative Court Judicial Review Guide 2023.

*References in the form **[CCB/XX/YY]** are to the Core Claim Bundle, with XX denoting the document/tab and YY denoting the page number within the bundle. References in the form **[SCB/XX/YY]** are to the Supplementary Claim Bundle, again with XX denoting the document/tab and YY denoting the page number within the bundle.*

References to DL/X are to paragraphs in the Inspector's Decision Letter

*Recommended Essential Reading: **[CCB/3/45-46]***

Introduction

1. This is an application for planning statutory review brought under section 288 of the Town and Country Planning Act 1990 ("**TCPA 1990**") by AWE Plc against the decision dated 8 August 2023 of the Defendant ("**the SoS**") allowing an appeal under section 78 TCPA 1990

by the First Interested Party ("**T A Fisher**") against the refusal of the Second Interested Party ("**WBDC**") to grant planning permission for the erection of 32 dwellings including affordable housing, parking and landscaping ("**the Scheme**") on land to the rear of The Hollies, Reading Road, Burghfield Common, Reading RG7 3BH ("**the Appeal Site**"). The SoS granted planning permission for the Scheme, subject to conditions ("**the Decision**")[1].

2. The Claimant ("**AWE**") is an arm's length Non-Departmental Public Body wholly owned by the Ministry of Defence ("**MOD**") (the Fourth Interested Party). The MOD is responsible for, amongst other matters, delivering the continuous-at-sea nuclear deterrent which is critical to the defence of our nation. AWE plc is responsible for delivering the whole life-cycle of nuclear warheads and plays a critical part in this role. Further information about AWE and MOD is set out below.

3. AWE and MOD were interested parties to the planning appeal that is the subject of this proposed claim pursuant to Rule 6(6) of the Town and Country Planning (Inquiries Procedure) Rules 2000. Further, the planning inspector acting on behalf of the SoS, ("the **Inspector**") concluded that granting consent for the Scheme would have an effect on AWE (see **DL/38**)[2]. AWE is therefore a person aggrieved under s.288(1) Town and Country Planning Act 1990.

Grounds of Challenge

4. In summary, the challenge is brought on four grounds (set out in more detail below):
    a. Ground 1: The Inspector failed to understand or take into account ONR's specialist technical evidence/advice as an expert statutory consultee or failed to give legally adequate reasons, for disagreeing with it.
    b. Ground 2: The Inspector erred in law by misinterpreting policy CS8 and therefore failed to apply the presumption against residential development in the Detailed Emergency Planning Zone around AWE B.
    c. Ground 3: The Inspector erred in law in respect of the assessment of the adequacy of the Offsite Emergency Plan.

[1] **[CCB/4/47-66]**
[2] **[CCB/4/54]**

d. Ground 4: The Inspector took into account irrelevant considerations and/or failed to take into account relevant considerations or failed to provide proper reasons in his assessment of the impact of the Scheme on AWE and on the public.

Background to the Claim

AWE and MOD

5. AWE is the operator of two licensed nuclear sites at Aldermaston ("**AWE A**") and Burghfield (**"AWE B**") and is responsible for the delivery of the whole life-cycle of nuclear warheads from concept design to disassembly. MOD is the landowner of AWE A and AWE B and also the owner of AWE and is responsible for delivering the nation's continuous-at-sea-deterrent. AWE A and B are the only locations in the UK that can provide these capabilities. A continuous-at-sea deterrent is essential as the ultimate guarantee of the nation's security. [3]

6. In addition to current operations, AWE is undergoing a programme of investment and change, including new-build facilities and refurbishment which seeks to consolidate, rationalise and modernise existing facilities. Now and in the future, AWE requires flexibility to be able to meet the needs of the MOD.[4]

7. The Secretary of State for Defence has overall responsibility for MOD, including defence nuclear operations. Within MOD, the Defence Nuclear Organisation (**"DNO"**) is responsible for delivering nuclear capability to deter the threat and protect the nation. The DNO sponsors the "defence nuclear enterprise", which includes the delivery of the UK's nuclear warheads, submarine capability, nuclear skills, defence nuclear infrastructure and day-to-day defence nuclear policy. The DNO is the MOD customer for the strategic capabilities provided by AWE.

8. AWE is regulated by, among others, the Office for Nuclear Regulation ("**ONR**") (the Third Interested Party) through two nuclear site licences (one for each site) issued under the Nuclear Installations Act 1965. ONR is also the health and safety regulator under the Health and Safety at Work etc. Act 1974.

[3] MOD, Person MD at para 3.2. **[SCB/13/551]**
[4] MOD, Person MD at para 5.1 **[SCB/13/552-553]**

The Radiation (Emergency Preparedness and Public Information) Regulations 2019

9. AWE is required to meet the operator requirements of the Radiation (Emergency Preparedness and Public Information) Regulations 2019 (**"REPPIR 2019"**).[5] REPPIR 2019 and its predecessor regulations REPPIR 2001 set out requirements for emergency planning around premises where work with ionising radiation takes place (subject to some exceptions which are not relevant to this claim).[6] REPPIR 2019 requires operators to carry out a hazard evaluation in order to identify hazards which have the potential to cause a "radiation emergency"[7] and, where such hazards are identified, the local authority is required to designate a detailed emergency planning zone ("**DEPZ**") and have in place an off-site emergency plan ("**OSEP**").

10. AWE is an operator under REPPIR 2019. It therefore has a duty to identify the hazards arising from working with ionising radiation which have the potential to cause a radiation emergency and to advise WBDC of the same. That assessment is known as the Hazard Evaluation and Consequence Assessment ("**HECA**"). Pursuant to the requirements of REPPIR 2019 it includes identifying hazards which are less likely, but have greater consequences.[8] The output of the HECA is communicated to WBDC via the Consequences Report[9]. This provides a recommendation of the minimum distance from AWE's sites for urgent protective action ("**UPA**").

11. REPPIR 2019 requires the local authority, WBDC, to designate a DEPZ around AWE B[10]. This cannot be smaller than the minimum UPA distance in the Consequences Report. WBDC must have in place an OSEP to mitigate the off-site effects of an emergency[11],

[5] **[SCB/35/939-1063]**
[6] See Regulation 3 REPPIR 2019 **[SCB/35/946]**.
[7] Defined in REPPIR 2019 as: "a non-routine situation or event arising from work with ionising radiation that necessitates prompt action to mitigate the serious consequences—
(a) of a hazard resulting from that situation or event;
(b) of a perceived risk arising from such a hazard; or
(c) to any one or more of—
(i) human life;
(ii) health and safety;
(iii) quality of life;
(iv) property;
(v) the environment;"
[8] See Regulation 5 **[SCB/35/949]** and Schedule 3 REPPIR 2019 **[SCB/35/1008-1017]**.
[9] See Regulation 7 **[SCB/35/951]**.
[10] See Regulation 8 **[SCB/35/952]**
[11] See Regulation 11 **[SCB/35/956-957]**.

having regard to the need, so far as possible, to avoid the occurrence of serious physical injury.[12]

12. An OSEP is fundamental. If no OSEP plan is in place where one is required, or if the OSEP is inadequate, regulation 10(4) of REPPIR 2019 prohibits the operator (in this case AWE) from working with ionising radiation.

13. The effect of regulation 10(4) is that if the OSEP were to be found inadequate, AWE would need to limit or cease its operations, which would prevent it from fulfilling its essential role in the delivery of continuous at sea nuclear deterrent.

14. REPPIR 2019 introduced a number of changes from REPPIR 2001. This was in order to reflect a more precautionary approach to assessing the likelihood and consequences of a radiological emergency. The changes to the regulations arose from lessons learnt after the meltdown of three reactors at the Fukushima Daiichi nuclear power plant in Japan in March 2011 and other changes to international nuclear regulation. Those changes include: (1) a requirement to assess faults that are less foreseeable but with more significant consequences and to include a range of weather conditions in the assessment; and (2) a change in responsibility for deciding the extent of the geographical zone in which it is proportionate to plan for protective action from the ONR or Health and Safety Executive to the local authority.

15. The combined effect of these changes was to significantly expand the DEPZ around AWE B (from a radius of 1600m to 3160m), with a consequent population increase within the DEPZ in terms of existing homes already built from 89 residential properties under REPPIR 2001 to 7,738 residential properties under REPPIR 2019[13]. The expanded DEPZ has therefore in and of itself set a far more challenging environment for the creation of an adequate OSEP.

16. The DEPZ was set by WBDC on 12 March 2020. The process for designating the DEPZ around AWE B was found to be lawful by the High Court in *Crest Nicholson Operations Ltd v West Berkshire DC* [2021] EWHC 289 (Admin).[14]

[12] See Regulation 1 **[SCB/35/940]**.
[13] WBDC, Richardson at paras 6.16-6.6.17 **[SCB/6/96-98]**
[14] **[SCB/43/1084-1112]**

17. The Appeal Site is located approximately 2km from AWE B and it is well within the DEPZ designated under REPPIR 2019. Under REPPIR 2001 it previously lay outside of the area where detailed emergency planning was required; but as of March 2020 it is situated well within the applicable DEPZ for which an adequate OSEP must exist.

The ONR

18. The ONR is the UK's independent nuclear regulator for safety, security and safeguards. Its mission is to protect society by securing safe nuclear operations. As the regulator of nuclear sites, ONR is required to enforce the provisions of REPPIR 2019.

19. The adequacy of the OSEP for a DEPZ is therefore a health and safety matter for ONR. ONR is the statutory regulator who determines if the OSEP is adequate or not.

The OSEP for this area

20. WBDC has in place an OSEP for the DEPZ around AWE B. This plan was produced following the changes brought about by REPPIR 2019[15].

21. The OSEP is a critical component of the "defence in depth"[16] approach to nuclear safety. It is one of a number of safety measures around AWE B: (1) to ensure that the risk of a radiation emergency is tolerable and as low as reasonably practicable; and (2) to minimise and mitigate any harm to the public in the event that a radiation emergency should occur. Failures or weaknesses in the OSEP cannot be compensated for through other areas of protection.[17]

22. The OSEP is a set of arrangements that must reflect local conditions and changing circumstances. Notwithstanding the focus of the Inspector's DL and the developer's approach, REPPIR 2019 does not solely focus on planning for the health effects of a radiological emergency (exposure to radiation). Its remit is significantly wider and it

[15] **[SCB/6/158-398]**
[16] Defence in Depth involves five layers of protection: (1) prevention of abnormal operation and failures, (2) control of abnormal operation and detection of failures, (3) control of accidents within the design basis, (4) control of severe plant conditions including prevention of accident progression and mitigation of the consequences of severe accidents and (5) mitigation of radiological consequences of significant releases of radioactive materials. See AWE, Person AW at para 10.7 **[SCB/14/577]**
[17] ONR, Rogers at para 21 **[SCB/8/434]**

includes wider health risks including psychological impact, consequential injuries, economic consequences and social and environmental factors.[18]

23. For AWE B, the relevant exposure pathways for radiation within the DEPZ include inhalation of suspended plutonium particles, short term external irradiation during the passage of the plume, long term inhalation after resuspension and long term external irradiation from ground contamination by the initial plume and ingestion of contaminated foods.[19]

24. The OSEP provides for an initial response to a radiation emergency at AWE B which involves alerting the public via an automatic telephone alerting system and advising everyone within the DEPZ to go inside and shelter for a period of up to two days. The initial alert would be for the whole DEPZ because the exact area affected would not be known until monitoring had been undertaken. Under certain weather conditions there is approximately 15 minutes from the time of the incident taking place for the Site Response Group to activate and the public to be informed. There is then only 10 minutes for the public to find and access suitable shelter for there to be a benefit from sheltering.

25. The OSEP also provides for immediate evacuation for those premises close to AWE B. and for subsequent evacuation as necessary to, among other things, facilitate the recovery process. The OSEP governs the response in the first days of the radiation emergency, after which point national structures take over, regulated by the Civil Contingencies Act 2004 and other legislation.

26. The emergency planning process required by REPPIR 2019 includes preparation, testing and review of the OSEP with statutory tests taking place at least every three years.[20]

27. It is important to note that the OSEP and ONR's assessment of its adequacy only takes account of development and consequently residential dwellings that already exist. It does not take account of committed development (ie that which has already been consented) but which has not yet been built. That committed development can, of course, be constructed at any time so increasing the burdens on the OSEP. Despite this point (and its significance for the testing that had taken place showing an already stretched OSEP) being made clear

[18] ONR, Ingham at para 13 **[SCB/9/444-445]**, ONR Statement of Case at para 61 **[SCB/5/69]**
[19] Consequences Report **[SCB/6/132-139]**
[20] ONR, Ingham at para 16 **[SCB/9/445]**; WBDC, Richardson at paras 6.20-6.21 **[SCB/6/99]**

in the evidence, it appears not to have been understood or properly taken into account in the Inspector's DL and his understanding of the limits of the OSEP.

28. Between 11 May 2021 and 15 February 2022 WBDC conducted a series of modular exercises which collectively formed the first statutory test of the new OSEP for existing development. These tests identified several areas requiring improvement including: (1) arrangements for people monitoring and associated decontamination; (2) arrangements relating to evacuation holding areas for displaced persons awaiting monitoring; (3) arrangements for managing the numbers and scale of displaced people, both those outside the DEPZ unable to return home and inside the DEPZ who require evacuation; and (4) arrangements for managing those who self-evacuate, including ensuring they undergo appropriate monitoring and decontamination.[21]

29. It will be readily apparent that these areas are particularly sensitive to population increases that may occur within the DEPZ.[22]

30. A further test was carried out in April 2023 (ALDEX-23) which identified similar issues that were evident during the 2022 exercises.[23]

WBDC's Planning Decision

31. T A Fisher submitted its application for planning permission for the Scheme on 31 January 2022. AWE and the MOD objected to the Scheme and made representations to WBDC in light of the DEPZ and the effect of adding further residential development into the area with the consequences for the OSEP.

32. The Emergency Planning Department of WBDC recommended refusal on the basis that public safety would be compromised as a result of the increase in population within the DEPZ.

33. The ONR also advised against granting permission on the basis that WBDC had not confirmed that the OSEP could accommodate the additional development. That remains the case to date.

[21] ONR, Statement of Case at para 38 **[SCB/5/64]**
[22] ONR, Statement of Case at para 39 **[SCB/5/64]**
[23] ONR, Ingham at para 25 **[SCB/9/446-447]**

34. WBDC refused planning permission on 1 June 2022[24]. WBDC gave three reasons for refusal. The first reason (failure to meet affordable housing requirements) was resolved during the course of the Inquiry. The third reason for refusal related to the loss of trees subject to a TPO with which the Claimant is not directly concerned. The second reason for refusal occupied the majority of the evidence and submissions at the Appeal and is a matter of fundamental concern to the Claimant:

> "*The application is part of an allocated housing site in the Council Local Plan [HSADPD of 2017]. In addition, it lies in the inner protection zone of the DEPZ for AWE site[B] at Burghfield. This public protection zone was formally altered in 2019, after the site was allocated and accepted in the HSADPD. Policy CS8 in the WBCS of 2006-2026 notes that [inter alia] within the inner zone, in order to be consistent with ONR advice, nearly all new as the additional residential population would compromise the safety of the public in the case of an incident at AWE. This accords with the advice to the application provided by the Council Emergency Planning Service, and the ONR.*
>
> *In addition, para 97 of the NPPF 2021 notes that [inter alia] "planning policies and decisions should promote public safety, and take into account wider security and defence requirements by – b] ensuring that operational sites are not affected adversely by the impact of other development in the area. Given the clear objection from both the AWE and the ONR to the application on this basis it is apparent that the application is unacceptable in the context of this advice.*
>
> *The Council accordingly considers that future public safety would be compromised if the development were to proceed, and potential harm would occur to the future capability and capacity of AWE Burghfield to operate effectively, in the light of the above. These are clear material planning considerations which, despite the site being allocated for housing in the Local Plan, are factors which a responsible LPA cannot set aside.*
>
> *The proposal is accordingly unacceptable*".

The Appeal

35. The Appeal proceeded by way of a planning inquiry ("**the Inquiry**") which took place between 6 June 2023 and 14 June 2023, with the first four days taking place at WBDC's offices and the final two days taking place virtually.

36. AWE and MOD applied for Rule 6 party status in the Appeal. This was granted on 3 April 2023. The ONR also applied for and was granted Rule 6 party status. AWE, MOD and the ONR all submitted evidence to the Inquiry and were represented by counsel. The Appeal was the first planning Inquiry relating to residential development within a DEPZ where the

[24] **[CCB/5/67-70]**

ONR has taken part (see ONR closing submissions[25]). It is also the first time AWE and MOD have attended a planning inquiry to object to proposals near AWE and submit their own evidence.[26]

Some of the Evidence at the Appeal

Effect of the Scheme Adequacy of the OSEP

37. The evidence to the Inquiry from the ONR was that the question of adequacy of the OSEP is binary: either it is adequate or it is not.[27] The ONR also advised that the OSEP is not infinitely scalable and there are "*real world constraints which limit the capability and capacity of the agencies that make up the emergency response*."[28]

38. WBDC and ONR's evidence was that the expansion of the DEPZ in 2020 had caused a step change in the complexity of the OSEP and increased challenges in its implementation.[29] In light of the significant population increases, emergency responders would be under "*exceptional pressure*".[30]

39. Although the ONR's position was that the OSEP is currently adequate, this was based on existing development in the DEPZ only (not committed development or the addition of further development such as that being proposed) and its position that the OSEP should not be subject to continual increase in burden. The ONR's conclusion was that the OSEP was already stretched. Moreover, it already required improvement in areas that would inevitably be likely to be sensitive to population increases.[31] The ONR was clear at the Inquiry that its consideration of the existing adequacy of the OSEP did not take into account development that had been consented but not yet built out. It was in this context that the ONR identified that incremental increases in population density were a matter of concern and the OSEP already faced a real challenge in remaining adequate simply in light of the

[25] **[SCB/30/863-866]**
[26] AWE and MOD's witnesses were granted anonymity by the Inspector in light of national security concerns (Person AW and Person MD respectively). This was also the approach adopted by the Court in respect of AWE's evidence in in *Crest Nicholson*. The AWE and MOD witnesses attended the Inquiry in person and gave evidence in open session.
[27] ONR, Closing submissions at para 8 **[SCB/30/864]**
[28] ONR, Closing Submissions at para 9 [**SCB/30/864]**
[29] ONR, Statement of Case at para 36 **[SCB/5/64]**
[30] WBDC, Richardson at para 7.15 **[SCB/6/103]**
[31] ONR, Ingham at para 27 **[SCB/9/447]**

already increasing burden of developments with consent. The ONR noted that WBDC had also identified the serious challenge to the adequacy of the OSEP from committed developments and the ONR agreed with that assessment. All of that was without the increased pressures from additional development then being proposed by the appeal scheme.

40. Both the ONR and WBDC's evidence was that the OSEP was sensitive to population increases and the finite resources of emergency responders. In particular, WBDC's witness described the difficulty with setting up and resourcing rest centres.[32] WBDC's evidence was that the increase of 77 individuals from the Appeal Site would add to the response and recovery requirements on top of those catering for the existing community.[33]

41. Thus the ONR's position in closing submissions was:

> *"The OSEP is stretched. It is presently subject to recommendations from the ONR arising out the statutory test in 2022 some of which relate to population density in DEPZ. The ONR's preliminary observations following ALDEX 23 in April were that there are further areas of improvement which the Council will be required to address in due course. As has been identified, there are a number of committed planning permissions which remain to be built out, and other significant sites within the DEPZ which require particular consideration in the OSEP. Incremental increases in population density are a matter of concern to ONR: the OSEP faces a real challenge in respect of remaining adequate in light of the already increasing burden of developments with consent. The Council explained its concern that the committed developments are already a serious challenge to adequacy. The ONR agrees with that assessment."*

The Evidence on Radiological Health Effects at the Appeal Site

42. T A Fisher presented to the Inquiry an analysis of the risk of individuals at the Appeal Site suffering radiological health effects in the event of a radiological emergency originating from AWE B.[34] That analysis sought to demonstrate that based on the low likelihood of a radiological event occurring it was unlikely that residents at the Appeal Site would be exposed to a material dose of ionising radiation (through inhalation of plutonium particles) and that they would be able to break shelter within an hour or two of the alarm being raised and would not have to shelter in place for the two day period envisaged by the OSEP.

[32] WBDC, Richardson at para 9.10 **[SCB/6/116]**
[33] WBDC, Richardson at paras 9.27-9.28 **[SCB/6/120-121]**
[34] T A Fisher Pearce **[SCB/11/466-517]**

43. AWE and MOD challenged the relevance of T A Fisher's evidence on radiological health effects on the basis that the "low risk" argument was irrelevant to the requirements of REPPIR 2019 or the operation of the OSEP. By the end of the Inquiry it was agreed that the risk to individuals at the Appeal Site was not relevant to the adequacy of the OSEP or to the way in which it would be operated in the event of a radiation emergency.

The Evidence on other impacts arising from a radiation emergency

44. AWE's evidence to the Inquiry was that the OSEP only deals with the first two days after the emergency. After that, there is a much longer period of recovery. Increasing the population within the DEPZ adds further individuals who may suffer the psychological effects of a radiation emergency (which are documented and were not in dispute in the Inquiry), more buildings to decontaminate and extended disruption to normal living and burdens on public authorities.[35]

The Evidence on the impact on AWE's Operations

45. AWE presented evidence to the Inquiry that increasing the population within the DEPZ has the potential to affect the continuous-at-sea-deterrent because, if there is increased pressure on the adequacy of the OSEP as a result of increased population, AWE's regulators may impose additional requirements or restrictions on AWE's operations. If WBDC cannot demonstrate to the ONR that it has an adequate OSEP, AWE would be unable to work with ionising radiation.[36] However, even before this point, AWE's evidence was that as a responsible operator it may self-limit operations, affecting its ability to support the continuous-at-sea-deterrent.[37]

46. Person AW'S evidence to the Inquiry was:

> *"AWE B is the only site in the UK that can provide the capabilities for the assembly, disassembly, handling and storage of nuclear warheads for the nation's nuclear deterrent. AWE B needs flexibility to be able to develop, expand and/or change its activities in response to MOD requirements for supporting [continuous-at-sea-deterrent] CASD. Increasing the population within the DEPZ can affect this support to CASD in 3 ways:*

[35] AWE, Person AW at paras 10.13-10.20 **[SCB/14/578-581]**
[36] REPPIR regulation 10(4)(b) **[SCB/35/954]**
[37] AWE, Person AW Rebuttal at para 4.2 **[SCB/23/778]**

*11.2.1 Increasing the risk of adversely affecting current licensable activities. A population increase carries a significant risk that regulatory permissions would be subject to future restrictions which may limit AWE's operations. In particular, if further residential development meant that WDBC could not demonstrate to ONR that it had an adequate off-site emergency plan, then under Regulation 10(4) of REPPIR 2019 [**CD 13.7**] AWE would be unable to continue to carry out work with ionising radiation, preventing AWE's ability to meet MOD's requirements in support of CASD."*

11.2.2 AWE being refused planning permission and/or other operating consents resulting in a limitation to its future operations. In order for AWE to meet MOD's future requirements it is likely there will be a need to amend, expand and develop operations at AWE B. There is a risk that future operational changes could be deemed to be unacceptable given a larger population in the vicinity of AWE B and required permissions, licence amendments and other consents refused. Given AWE B is the only site in the UK permitted to assemble, disassemble, handle and store nuclear warheads, preventing AWE's ability to obtain future operational permissions and consents would threaten the delivery of CASD.

11.2.3 An increase to the risk of public challenge or complaints against AWE's operations."

47. T A Fisher sought to counter this evidence by referring to the provision in REPPIR 2019 which gives a power to the Secretary of State to grant an exemption from REPPIR 2019. However, in a rebuttal proof of evidence, Person MD explained that exemptions are governed by specific Health and Safety policies within the MOD which seek to ensure that: (1) the MOD complies with all Heath and Safety and Environmental Protection legislation; and (2) where the MOD has derogations, exemptions or disapplications from Health and Safety legislation, there are policies and procedures in place which ensure that the outcomes are, as far as reasonably practicable, at least as good as those required by UK legislation.[38] Person MD explained that, in the context of REPPIR 2019 this meant that:

"*Put simply, if the Secretary of State for Defence was indeed minded to exempt AWE Burghfield from the legal requirements of REPPIR and a corresponding DEPZ, then MOD would be required to replace these regulations with an 'at least as good' Defence arrangement. Thus, should the population within the DEPZ continue to grow, then a Defence exemption would not mitigate the potential risks to AWE Burghfield's operations, as Dr Pearce proposes.*"[39]

[38] MOD, Person MD Rebuttal at para 3.3 **[SCB/24/820]**
[39] MOD, Person MD Rebuttal at para 3.6 **[SCB/24/820-821]**

48. Again this evidence and basic point is not addressed by the Inspector in his DL (as set out below) when purporting to rely upon this power in his reasoning.

The Inspector's Decision

49. By way of a DL dated 8 August 2023[40], the Inspector allowed the Appeal and granted planning permission for the Scheme. In summary, he found that the Scheme did not comply with the adopted Development Plan but that nonetheless the benefits in terms of delivering affordable housing outweighed the conflict with the Development Plan and other harms. The Inspector further relied on the fact that the Appeal Site had the benefit of an allocation for residential development as a reason to grant permission, notwithstanding the fact that he had found an overall conflict with the Development Plan. Relevant passages of the Inspector's DL are set out under each ground below.

Pre-Action Correspondence

50. On 4th September 2023 AWE and MOD sent a pre-action letter to the Defendant setting out the proposed grounds of challenge[41]. The Defendant's legal advisers have responded to confirm that they will not be responding to the pre-action letter but will respond to the Statement of Facts and Grounds if a claim is made[42].

Legal Framework

Challenges to Inspector's Decisions

51. The principles applicable to challenges under s.288 TCPA 1990 are well-established (see *St Modwen v SSCLG* [2017] EWCA Civ 1643 at 6):

> "*6. In my judgment at first instance in Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:*
>
> > *"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on*

[40] **[CCB/4/47-66]**
[41] **[CCB/7/78-96]**
[42] **[CCB/8/97-99]**

those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759 , at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in Sea Land Power & Energy

Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6 , at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137 , at p.145)."

Interpretation of planning policy

52. The proper interpretation of planning policy is a question of law for the court: *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13. The principles were recently re-stated by the Court of Appeal in *Corbett v Cornwall Council* [2022] EWCA Civ 1069 at 19:

"(1) Ascertaining the meaning of a development plan policy is, ultimately, a matter of law for the court, whereas its application is for the decision-maker, subject to review on public law grounds (see the judgment of Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] 1 WLR 1865, at paragraphs 22 to 26). The interpretation of planning policy should not, however, be approached with the same linguistic rigour as the interpretation of a statute or contract. Local planning authorities "cannot make the development plan mean whatever they would like it to mean" (see the judgment of Lord Reed in Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13; [2012] PTSR 983, at paragraphs 17 to 19). But as was said in this court in R. (on the application of Corbett) v Cornwall Council [2020] EWCA Civ 508 (at paragraph 66), "the professional officers of a local planning authority, and members who sit regularly on a planning committee, will not often be shown to have misinterpreted the policies of its development plan".

(2) In seeking to establish the meaning of a development plan policy, the court must not allow itself to be drawn into the exercise of construing and parsing the policy exhaustively. Unduly complex or strict interpretations should be avoided. One must remember that development plan policy is not an end in itself but a means to the end of coherent and reasonably predictable decision-making in the public interest, and the product of the local planning authority's own work as author of the plan. Policies are often not rigid, but flexible enough to allow for, and require, the exercise of planning judgment in the various circumstances to which the policy in question applies. The court should have in mind the underlying aims of the policy. Context, as ever, is important (see Gladman Developments Ltd. v Canterbury City Council [2019] EWCA Civ 699, at paragraph 22, and Braintree District Council v Secretary of State for Communities and Local Government [2018] EWCA Civ 610, at paragraphs 16, 17 and 39).

(3) The words of a policy should be understood as they are stated, rather than through gloss or substitution. The court must consider the language of the policy itself, and avoid the seduction of paraphrase. Often it will be entitled to say that the policy means what it says and needs little exposition. As Lord Justice Laws said in Persimmon Homes (Thames Valley) Ltd. v Stevenage Borough Council [2005] EWCA Civ 1365 (at paragraph 24), albeit in the context of statutory interpretation, attempts to elicit the exact meaning of a term can "founder on what may be called the rock of substitution – that is, one would simply be offering an alternative form of words which in its turn would call for further elucidation".”

Determination of Planning Applications

53. Section 38(6) Planning and Compulsory Purchase Act 2004 in conjunction with section 70(2) of the TCPA 1990 provides that if regard is to be had to the Development Plan, the decision-maker must decide the application in accordance with the Development Plan unless material considerations indicate otherwise.

54. The Development Plan has a statutory authority which must be recognised by the decision-maker (*City of Edinburgh Council v Secretary of Scotland* [1997] 1 WLR 1447 at 1458). This is not a simple weighting of the requirements of the plan against material considerations – the starting point is the plan which receives priority (*South Northamptonshire Council v SSCLG* [2013] EWHC 11 at 20.

55. The decision-maker is required to reach a conclusion as to whether or not the proposal accords with the development plan as a whole. There is no prescribed method for doing so but he must decide at some stage whether the proposal does or does not accord with the plan (see *R (oao Wyatt) v Fareham BC* [2022] EWCA Civ 983 at 79-80).

Advice from expert bodies / Statutory Consultees

56. The views of expert bodies and statutory consultees play an important role in planning decisions. The general position is that their views should be given “great” or “considerable” weight in planning decisions and any departure from their views should be explained by cogent and compelling reasons (see *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] Env. L.R. 33 at 112, *Wyatt* at 141 and *R (ota Mynnyd Y Gwynt Ltd) v*

Secretary of State for Business Energy and Industrial Strategy [2018] EWCA Civ 231 at 8).

57. In *R (on the application of Together against Sizewell C) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1526, Mr Justice Holgate referred to and endorsed the above principles. He further held that: (1) even when disagreeing with the views of an expert body, the relevant standard to apply in assessing the adequacy of reasons given is that set out in *Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153 and *South Bucks District Council v Porter* (No.2) [2004] 1 WLR 257; (2) the level of reasoning required when a decision maker disagrees with an expert body depends whether that view is *"an unreasoned statement or assertion, or a conclusion which is supported by an explanation and/or evidence.*" (at 106-108).

Grounds of Challenge

Ground 1: The Inspector failed to understand or properly take into account ONR's evidence/advice or failed to give legally adequate reasons, for disagreeing with it.

58. WBDC was required to consult the ONR about the application pursuant to paragraph 45 National Planning Policy Framework ("**NPPF**")[43]:

> "*Local planning authorities should consult the appropriate bodies when considering applications for the siting of, or changes to, major hazard sites, installations or pipelines, or for development around them*"

59. "Major hazard sites" are defined in the NPPF glossary as:

> "*Sites and infrastructure, including licensed explosive sites and nuclear installations, around which Health and Safety Executive (HSE) (and Office for Nuclear Regulation) consultation distances to mitigate the consequences to public safety of major accidents may apply*"

60. Policy CS8[44] of the WBDC Core Strategy also required consultation with the ONR. Further, the ONR is a statutory consultee for development such as the Scheme pursuant to paragraph

[43] **[SCB/38/1069]**
[44] **[SCB/36/1064-1066]**

18 and Schedule 4 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

61. The National Planning Practice Guidance ("**NPPG**") on Hazardous Installations further provides that local planning authorities should consult the ONR where they have been informed of consultation zones.[45]

62. The ONR is the expert statutory regulator of AWE and WBDC under REPPIR 2019. It is in the same position as other expert regulators, for example Natural England giving advice in respect of the Habitats Regulations. Its advice and opinions should be given considerable weight unless there is good reason not to (see *Wyatt* at 139 and 141) and cogent reasons are provided (*R (ota Mynnyd Y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 231 at 8).

63. On 13 August 2021, the ONR wrote to the Chief Executive Officer of WBDC's Planning Team and Emergency Planning Teams to advise of a change in approach to applications for development within the DEPZ.[46] The letter stated:

> *"ONR considers that a change is needed in its approach to proposed developments in the DEPZs and OCZs of the AWE nuclear sites. The reasons for this are outlined below:*
>
> - *The size of the AWE Burghfield DEPZ has substantially increased because of a redetermination prompted by REPPIR19 coming into force, significantly increasing the population that must be accommodated in the AWE Burghfield detailed off-site emergency plan.*
> - *The significant demographic challenge around AWE nuclear sites has been intensified by the cumulative effects of developments granted planning permission in the DEPZs and OCZs over many years.*
> - *The off-site emergency plans, produced following REPPIR19 coming into force, are due to be tested for the first time in 2021 and therefore the safety claims within the plans have yet to be adequately demonstrated; and*
> - *The volume of planning applications being made in DEPZs and OCZs remains high.*
>
> …

[45] https://www.gov.uk/guidance/hazardous-substances#Handling-development-proposals-around-hazardous-installations This section of the NPPG also provides that, for COMAH sites, advice from the COMAH competent authority that planning permission should be refused should not be overridden without the most careful consideration. AWE B is not presently a COMAH site. **[SCB/42/1077-1083]**

[46] **[SCB/1/6-8]**

…ONR is, in accordance with its Land Use Planning arrangements, likely to advise against any proposed development in [the DEPZ and OCZ] where the proposed development meets our consultation criteria and ONR has not received adequate assurance from the emergency planners that the development can be accommodated in the off-site emergency plan."

64. The ONR's land use planning policy[47] provides that:

"*ONR will state that it **does not advise against** the proposed development on planning grounds if, in its opinion, the following statements apply:*

- *the local authority emergency planners, if consulted, have provided adequate assurance that the proposed development can be accommodated within their existing off-site emergency planning arrangements (or an amended version); and*
- *the development does not represent an external hazard to a nuclear site or the planning function for the site that may be affected by the development has demonstrated that it would not constitute a significant hazard with regard to safety on their site.*

…

*In all other cases, where the above statements do not apply, the ONR Inspector will determine that ONR **advises against** the proposed development.*"

65. The ONR objected to the Scheme. Its objection submitted to WBDC stated[48]:

"*I have consulted with the emergency planners within West Berkshire Council which is responsible for the preparation of the off-site emergency plan required by the Radiation (Emergency Preparedness and Public Information Regulations) (REPPIR) 2019. They have not been able to provide me with adequate assurance that the proposed development can be accommodated within their off-site emergency planning arrangements. Therefore, ONR advises against this development, in accordance with our Land Use Planning Policy*"

66. The ONR's position at the Inquiry, as set out in its closing submissions[49] was:

a. Although the OSEP is currently adequate, it was already stretched and this was based only on development within the DEPZ that had been built out. The assessment of adequacy did not take into account development that has been consented but not built out and there were serious concerns about the OSEP's adequacy for any such additional development.

[47] https://www.onr.org.uk/land-use-planning.htm
[48] **[SCB/3/23-25]**
[49] ONR, Closing Submissions **[SCB/30/863-866]**

b. As the OSEP is stretched, any incremental increases were a matter of concern to the ONR. The ONR agreed with WBDC's assessment that committed developments were already a "*serious challenge to adequacy*".

c. WBDC was unable to make a positive case that the Scheme could be accommodated within the OSEP. The ONR had satisfied itself that WBDC's decision-making arrangements for recommendations were suitable and therefore it advised that planning permission should be refused and that the appeal should be dismissed.

67. The Inspector purported to deal with the ONR's concerns about the adequacy of the OSEP at paragraph 30 of the DL where he stated[50]:

> *"I accept the ONR's expert view that there are lessons to be learnt from the recent ALDEX-23 exercise to test the OSEP, and improvements to be made to ensure the latter's robustness including in relation to alternative accommodation, and monitoring. That said, it is undisputed that the existing OSEP is adequate to ensure public safety in the DEPZ in the event of an AWE B radiation emergency. Notwithstanding this, the Council, AWE, the MOD and ONR have expressed concern about potential for new housing in the DEPZ to undermine the adequacy of the OSEP.*"

68. In summarising the ONR's position in this way, the Inspector did not refer to the ONR's advice arising from the earlier statutory test in 2022 or the ONR's letter dated August 2021 to the Chief Executive of WBDC (see above) and failed to understand or address ONR's position as to the stretched nature of the OSEP even without committed development.

69. Instead, the Inspector took an approach of concluding that no quantitative "tipping point" analysis had been submitted to demonstrate that the Scheme would "*tip the OSEP into a state of being inadequate*" (DL/31) and he expressed a view that the emergency services would be able to accommodate the increase in 77 residents from the Scheme and that the Scheme would not tip the OSEP into inadequacy.

70. Pursuant to the legal principles set out above, the Inspector either failed to understand the ONR position, or was at the very least required to give considerable weight to the advice of the ONR that the application should be refused and, where departing from that advice, to give cogent reasons for disagreeing with its advice. The Inspector's conclusion did not comply with these requirements and is materially flawed. In particular:

[50] **[CCB/4/53]**

a. The adequacy of the OSEP is a health and safety matter (see ONR closing submissions[51]) for the ONR, as is the ONR's position that it is necessary for a developer to demonstrate and show that the OSEP can accommodate additional development (rather than the other way around). The Inspector failed to give any, let alone considerable, weight, to the ONR's overall advice as the relevant expert health and safety regulator that (i) the OSEP was stretched, (ii) should not be subject to continual increase in burden, (iii) is not infinitely scalable, and (iv) the Appeal should be dismissed in circumstances where there were already serious concerns about the OSEP's ability to deal with committed development, let alone any further grant of planning permission for new residential development of the kind before the Inspector.

b. The Inspector referred to only one aspect of the ONR's evidence (lessons learned from ALDEX-23) but failed to refer to ONR's evidence about the stretched nature of the OSEP based on existing development, and the serious concerns about the adequacy of the OSEP for committed development, and its concerns expressed in 2022 relating to population density and the ONR's endorsement of WBDC's assessment of the inability to demonstrate that the OSEP could accommodate further residential development.

c. The Inspector failed to give any cogent reasons as to why he disagreed with the ONR's overall advice in any event. The only reason he gave for finding that the OSEP could accommodate the Scheme was that no tipping point analysis had been submitted (DL/31) and an assertion that the modest scale of development would not result in "appreciable diminution of emergency services response levels". There is no requirement in REPPIR 2019 for any kind of quantitative analysis of adequacy of a tipping point, nor for imposing a burden on the ONR/WBDC in this context. The Inspector did not request any tipping point analysis, or give the parties any opportunity to make representations as to the appropriateness of any such analysis and such an onus on the ONR/WBDC is inherently unrealistic beyond that which the ONR had already identified in terms of the OSEP being stretched even without the effects of committed development and accordingly recommending refusal in the

[51] **[SCB/30/863-866]**

absence of a demonstration as to how the OSEP could cope with additional pressures.

d. The Inspector failed to refer to and engage with the reasons given by the ONR as to why the OSEP was already under pressure, with specific reference to the availability of facilities for monitoring, decontamination and evacuation and its evidence that its expert assessment was based on ongoing regulatory activity including attendance at the AWE off-site planning group (which includes the Council and blue light organisations).

e. The Inspector's assertion that the emergency services would not "*appreciably diminish*" (DL/31) was not based on any evidence and is purely speculative and without a proper evidential basis. In circumstances where there was no evidential basis for concluding positively that the OSEP could accommodate the development and where the expert regulator had advised against permission on the basis of concerns arising from two statutory exercises and regular engagement with the Local Authority it was incumbent on the Inspector to explain why it was that he rejected the ONR's advice. He did not do so.

f. Further or alternatively, the Inspector failed to take into account the ONR's advice, or to give proper reasons for departing from it, that a precautionary approach should be adopted in this context and the reasons why it gave that advice and that its concerns were long-standing:

> "*ONR's view is that the need for a precautionary approach needs to be understood in the context of the nature of the radiation emergency at this site (see sub-section 2.1.2):*
>
> *a. The recommended minimum distance of the DEPZ is the second largest for a GB nuclear site (i.e. the radiation emergency requires a comparatively large geographic response),*
> *b. The radiation emergency provides short notice (no more than 10 minutes) for the public to shelter to realise any substantive benefit from the sheltering; and*
> *c. The principal radionuclide is of a type that is particularly difficult to monitor (and so requires greater effort and resource from responding organisations).*
>
> *We highlight, for the inspectors information, that our concerns are well-established and pre date the Application: in August 2021, ONR wrote to the Chief Executive Officer at the Council (and three neighbouring local authorities) expressing concern that further development in the DEPZ would*

have the potential to impact upon the adequate implementation of the off-site emergency plan."[52]

and

"*ONR judges that there is substantial uncertainty as to whether OSEP can accommodate further development and that such uncertainty requires a corresponding substantial margin of safety, and so advises against the proposed development.*"[53]

and

"*It is difficult to imagine in those circumstances what might balance out nuclear safety in favour of the proposed development in circumstances where the nuclear safety regulator has indicated that its expert advice is that the proposed development should be refused. The ONR's objection should attract very significant weight in the planning balance.*"[54]

71. Further or alternatively there is no reasoning on the weight to be given to ONR's objection in the DL.

72. Nuclear safety is an area of highly technical expertise and close regulation from the body entrusted by statute to protect the public. The consequences of a radiation emergency are highly significant and inevitably complex. In contrast to *Sizewell*, where Natural England's advice was found to be assertions without supporting evidence[55] (see *Sizewell* at 111), ONR attended the Inquiry and gave detailed advice supported by written and oral evidence on this highly specialist topic. The test in *Akester* therefore applies to this Decision. The Inspector's failure to understand the ONR's advice, or to give considerable weight to it, or to provide a cogent explanation for disagreeing with the ONR (which must be implied from his decision to grant planning permission), was unlawful.

<u>Ground 2: The Inspector erred in law by misinterpreting policy CS8</u>

73. Policy CS8[56] of the WBDC Core Strategy provides:

"<u>*Nuclear Installations AWE Aldermaston and Burghfield*</u>

In the interests of public safety, residential development in the inner land use planning consultation zones of AWE Aldermaston and AWE Burghfield is likely to be refused planning permission by the Council when the Office for Nuclear Regulation (ONR) has

[52] ONR, Statement of Case at 42 **[SCB/5/65]**
[53] ONR, Statement of Case at para 74 **[SCB/5/71]**
[54] ONR closing submissions at para 19 **[SCB/30/868]**
[55] And where NE had failed to attend the Examination when specifically invited (see *Sizewell* at 112).
[56] **[SCB/36/1064-1066]**

advised against that development. All other development proposals in the consultation zones will be considered in consultation with the ONR, having regard to the scale of development proposed, its location, population distribution of the area and the impact on public safety, to include how the development would impact on "Blue Light Services" and the emergency offsite plan in the event of an emergency as well as other planning criteria. Consultation arrangements for planning applications will be undertaken with the ONR using the table below…"

The Table in CS8 provides that the ONR should be consulted for all residential development within the "Inner Zone" (0-1.5km from AWE B) and for all residential development for 20 or more dwellings in the "Middle Zone" (1.5-3km from AWE B).

74. The Core Strategy was adopted in 2012. At that time the relevant REPPIR regulations were REPPIR 2001 and ONR had designated three consultation zones: the Inner Zone, the Middle Zone and the Outer Zone. The Inner Zone was the area where detailed emergency planning and an adequate OSEP was required. As set out above, when REPPIR 2019 came into force, the DEPZ superseded the Inner Zone and expanded the area covered by it substantially.

75. WBDC's interpretation of its own policy, as well as that of AWE/MOD, was that the first sentence of policy CS8 applied to the Scheme as it fell within the inner consultation zone that was now represented by the DEPZ (where Policy CS8 contemplated the size of zones to change), and therefore policy identified that it was likely that permission should be refused because the ONR had advised against the Scheme. By contrast, T A Fisher's position sought to interpret policy CS8 differently and as being fixed by the previous consultation zone, such that only the second sentence of CS8 applied.

76. The Inspector addressed the interpretation of CS8 at paragraphs 9-12 of the DL:

"9. Policy CS8 states the distances from AWE B for the land use planning consultation zones in this Policy. These are 0 to 1.5km for the ICZ, 1.5 to 3km for the middle land use planning consultation zone (MCZ), and 3 to 5km for the outer land use planning consultation zone (OCZ). Also, Policy CS8's footnote 60 qualifies that consultation zones in the Policy are 'as defined by the ONR and shown on the West Berkshire Proposals Map'. Paragraph 5.44 of the explanatory text supporting Policy CS8 envisages the possibility of change to consultation zones 'as a result' of 'a less restrictive approach being taken by the ONR' and application of a 'less constraining population density'.

10. As such, Policy CS8's footnote 60 does not provide for land use planning consultation zone distances stated in the Policy to be changed by re-definition unless such change is shown on the West Berkshire Proposals Map. Which in this case it is

not. Furthermore, Policy CS8 states the dimensions of its land use planning consultation zones, the possibility of change to which is only envisaged in supporting text as being less restrictive, with less constraint on population density. By contrast, the DEPZ covers an area around more than five times larger than the ICZ stated in CS8. Also, judging by the ONR's stated concern about 'any' new development in the DEPZ4, there is a strong possibility of their objection to such development proposals. Consequently, to substitute the DEPZ for the ICZ in Policy CS8, as suggested by the Council would mean a substantially more restrictive approach to housing development in the East Kennet Valley area of the district.

11. As such, the suggested substitution of the DEPZ for the ICZ in Policy CS8 would alter the wording of this development plan policy, and be contrary to its qualifying footnote and explanatory text such that it would fundamentally change this adopted Policy's meaning and intent. Therefore, I cannot agree that Policy CS8 can accommodate substitution of the DEPZ for the ICZ. Thus, I take the stated consultation zones in Policy CS8, including the ICZ and MCZ to stand in application of this development plan policy.

12. With the appeal site located approximately 2km to the south-west of AWE B, the proposal is for a residential scheme that sits in the MCZ, outside the ICZ. Thus, the appeal proposal falls to be considered under the second sentence of Policy CS8. This means that the development proposal is to be considered in consultation with the ONR, having regard to a range of factors. These are the scale and location of the proposed development, the area's population distribution, the impact on public safety including how the development would impact on 'Blue Light Services' and the OSEP in the event of an emergency at AWE B, and as well as other planning criteria."

77. The Inspector took the view that the Scheme did not comply with the second sentence of CS8 and did not comply with the Development Plan as a whole (see DL/61).

78. It is well-established that the interpretation of planning policy is ultimately a matter of law for the court (see *Corbett* above at 19). In particular, policies are not rigid but flexible enough to allow for, and require, the exercise of planning judgement. The exercise of interpretation should take into account the context and underlying aims of the policy.

79. The Inspector's interpretation of CS8 was wrong. The correct interpretation of CS8 is that once the DEPZ was introduced, it became the up-to-date "inner consultation zone" for the purposes of planning decisions. This is for any or all of the following reasons:

(1) The DEPZ has the same basic purpose as the "inner consultation zone". The inner consultation zone and the DEPZ are the areas where detailed emergency planning and an adequate OSEP is required under the applicable REPPIR regime. Interpreted in light of well-established principles, the DEPZ superseded the previous smaller area of the inner consultation zone, interpreted consistently with the policy's object and purpose.

(2) Policy CS8 is designed to protect public safety and to ensure that development is tightly controlled in the area where an emergency offsite plan is required. Policy CS8 is intended to ensure that planning decisions are taken consistently with the REPPIR regime. It would be nonsensical for a change in REPPIR brought about by an increase in safety standards and a more precautionary approach to result in a more liberal approach to development within the area of the OSEP.

(3) The background to the policy is also relevant. CS8 was included in the Core Strategy so as to ensure that a clear policy reflected the high degree of constraint in the area where detailed emergency planning is required (at the time, the inner consultation zone) and so as to avoid the case-by-case approach taken by the Secretary of State in an appeal at Boundary Hall.[57] This context and purpose of policy CS8 is important and was not taken into account by the Inspector.

(4) The supporting text to CS8 (which is an aid to its interpretation) expressly envisages that consultation zones may change (see paragraph 5.44). It also contemplates the need to monitor committed and future development proposals in partnership with the ONR in light of potential cumulative effects of population increases surrounding AWE's sites (paragraph 5.42). The concept that consultation distances can change is also expressly contemplated by the NPPG for hazardous substances:

> "***Could the zones for consultation change over time?***
> *Changes may sometimes be required to consultation zones around sites that already have a consent for the presence of hazardous substances. The Health and Safety Executive/Office for Nuclear Regulation will keep the consultation zones under review and will inform the local planning authority if changes are appropriate. Similarly, the local planning authority should liaise with Health and Safety Executive/Office for Nuclear Regulation if it becomes aware of changed circumstances that might affect the consultation zone.*"[58]

(5) The Inspector referred to the fact that change was contemplated in policy CS8, but wrongly treated the supporting text as if it was a statute and concluded that it only contemplated change to make the zones less restrictive. On a proper understanding of the policy, there is no such limitation. It would defeat the purpose of ensuring public safety and consistency with REPPIR. Again, it is nonsensical that a policy directed at

[57] See AWE, Bashforth at paras 4.7-4.9 **[SCB/15/598-599]**
[58] https://www.gov.uk/guidance/hazardous-substances#Handling-development-proposals-around-hazardous-installations **[SCB/42/1077-1083]**

protecting the public from radiation emergencies could change to be less restrictive to reflect changes in circumstances but not to become more restrictive. As the policy expressly envisages change, it is sufficiently flexible to be applied to the Scheme in light of the changes brought about by REPPIR 2019.

(6) The Inspector relied on footnote 60 to policy CS8 which states that the consultation zones are as identified on the Proposals Map. He concluded that change to the consultation zones was not permitted unless it was shown on the Proposals Map. That ignores the first part of footnote 60 which describes the consultation zones "as defined by the ONR". The consultation zones defined by the ONR in its land use planning policy are now the DEPZ and the outer consultation zone OCZ. Further and in any event, footnote 60 does not state that zones can only change by updating the Proposals Map and the Inspector was wrong to conclude that it had that effect. The Proposals Map is not a development plan document and therefore cannot lawfully be used to limit the clear words of adopted planning policy.

80. Accordingly, the Inspector's interpretation of policy CS8 was wrong and amounts to an error of law. Had the Inspector applied the correct interpretation of CS8 and considered the Scheme against the first sentence of the policy, properly construed, his decision on the overall planning balance could well have been different so as to refuse permission.

81. Accordingly, the decision was unlawful and should be quashed.

Ground 3: Errors in respect of the approach to assessment of the adequacy of the OSEP

82. As set out above under Ground 1, the Inspector failed to refer to the detailed evidence given by ONR on the reasons underlying their concerns about the adequacy of the OSEP, particularly those relating to weaknesses in the OSEP arising from population growth (see ONR Statement of Case at 38-40[59] and 72-74[60]). These were obvious material considerations that the Inspector was obliged to take into account pursuant to the principles in *Samuel Smith Old Brewery (Tadcaster) and others v North Yorkshire County Council* [2020] UKSC 3.

[59] **[SCB/5/64-65]**
[60] **[SCB/5/71]**

83. The DL does not refer to the fact that the existing assessment of adequacy of the stretched OSEP was based on built development. Instead, the Inspector appears to have carried out his own analysis of population density (without giving the parties an opportunity to comment on it), taking into account development that has been consented but not yet built out (see DL/7[61]) and sought to suggest that there was unlikely to be a strain on emergency services arising from the Scheme together with other consented development. This was a materially flawed approach to the question of adequacy and did not reflect the evidence at the Inquiry.

84. Further, the Inspector failed to refer to or consider WBDC's evidence that its emergency response under the OSEP relies on finite resources, such as the availability of rest centres, radiation monitoring equipment and decontamination facilities. It is unclear from the DL whether the Inspector accepted or rejected this evidence and the reasons why he considered that the emergency services would be able to accommodate the Scheme, other than through his basic analysis of comparing existing population numbers to 77 additional residents from the Scheme. The absence of evidence to demonstrate how the stretched OSEP could satisfactorily accommodate the additional 77 residents in light of its finite resources to respond to an emergency was a principal controversial issue in the Appeal and the Inspector was obliged to consider it and give reasons for his conclusions. He failed to do so.

85. Accordingly, the decision was unlawful and should be quashed.

Ground 4: The Inspector took into account irrelevant considerations and/or failed to take into account relevant considerations in his assessment of the impact of the Scheme on AWE's operations, national security and on the public or failed to give proper reasons for his conclusions.

86. The Inquiry involved detailed evidence and submissions about a number of matters which are not mentioned at all in the Inspector's DL. These matters were central to the case advanced by AWE and ONR in support of their objections to the Scheme and were therefore mandatory material considerations on the basis that they were so obvious that they were required by law to be taken into account, alternatively they were principal controversial

[61] **[CCB/4/48]**

issues and the Inspector was required to state his conclusions on them with intelligible reasons, namely:

a. The significance of any impact on AWE's operations for national security;

b. The impact on public safety during the recovery period;

c. The "agent of change" principle in paragraph 187 NPPF;

d. The precautionary principle.

National Security

87. At paragraph 37 of the DL the Inspector accepted AWE's evidence that if the OSEP was found to be inadequate, regulation 10(4) of REPPIR 2019 would prevent it from working with ionising radiation and this would prevent AWE from meeting MOD's requirements in respect of the continuous-at-sea deterrent. He also accepted the evidence that increases in population around AWE B might constrain AWE's operational flexibility and future expansion plans might be constrained. The Inspector then concluded that this impact was "moderated" by a limited residual risk to the safety and wellbeing of individuals at the Appeal Site (DL/39); there was no evidence that ONR had written to AWE to raise a REPPIR 2019 concern (DL/39) and recently granted permission for a development with 49 dwellings in Wokingham borough has not "*tipped the OSEP into inadequa*cy" (DL/39[62]).

88. The Inspector's overall conclusion on this matter is flawed in a number of material respects because it takes into account irrelevant considerations and/or fails to take into account relevant considerations and/or is irrational:

(1) The Inspector sought to balance the impact of individuals at the Appeal Site in the event of a radiation emergency against the impact on AWE should the OSEP be found to be inadequate. It was common ground at the Inquiry that the individual risk to residents at the Appeal Site was irrelevant to the question of adequacy of the OSEP or REPPIR 2019. This was therefore an irrelevant consideration and/or it was irrational to seek to balance the impact on individuals against the impact on AWE arising from an inadequate OSEP as these are two unrelated considerations.

[62] **[CCB/4/54]**

(2) The Inspector relied on the absence of any formal regulatory action by ONR. However, this conclusion ignores: (1) the ONR's evidence that it had identified weaknesses in the OSEP that needed to be addressed; (2) the letter to WBDC Chief Executives in 2021 from the ONR stating that it had changed its advice on residential development in the DEPZ and (3) the ONR's evidence that its concerns were based on close regulatory contact with AWE and WBDC. Further, in its closing submissions, the ONR made it clear that enforcement was in contemplation:

> *"In that context, this is the first planning inquiry in which the ONR has taken part. That in itself is significant, and in the ONR's view, the last remaining element of the "toolkit" or "levers" which it may exercise in order to assure itself that the OSEP is, and remains, adequate. The next stage would be enforcement."*[63]

(3) The Inspector further relied on the fact that the grant of another development within the DEPZ had not affected the adequacy of the OSEP (DL/39). However, the evidence at the Inquiry was that the adequacy of the OSEP is assessed against built development, not consented development that has not yet been built and occupied. It was therefore wrong in principle or irrational to reduce the significance of the impact on AWE by reference to this factor.

(4) The Inspector concluded that if the OSEP was inadequate, the Secretary of State for Defence could grant an exemption under REPPIR 2019 (DL/40). However, the Inspector failed to refer to the MOD's evidence which explained that its policy was to ensure equivalence in matters of health and safety when exemptions are granted. Further and in any event, in circumstances where the Inspector concluded that he could not predict that the exemption would be invoked (see DL/40), it was irrational to rely on it to "moderate" the impact on AWE's operations.

(5) The Inspector did not take into account the evidence on the impact on AWE of adding further residential development within the DEPZ on the recovery phase of a radiological emergency, including potential liability for compensation and decontamination[64] and the effect on the public purse of these liabilities (see AWE

[63] ONR Closing Submissions **[SCB/30/865]**

[64] AWE Closing Submissions at para 26(2)(iii) **[SCB/31/878]**and AWE, Person AW at para 10.17 **[SCB/14/580-581]**

Closing Submissions at 26[65]). The Inspector did not refer to this evidence in the DL or weigh this material consideration in the planning balance at all.

(6) The Inspector did not address AWE and MOD's evidence that any impact on AWE's current or future operations would have significant consequences for the continuous-at-sea-deterrent.[66]

89. Alternatively, the reasons given for the Inspector's finding that there was "very limited harm" to AWE (see DL/61) were unintelligible and therefore unlawful.

Impact on residents and the public during the initial emergency and recovery period

90. It was not in dispute at the Inquiry that a radiation emergency is a complex event and after the initial emergency period when the OSEP is in operation there will be a long recovery period.

91. The Inspector considered the impact of the Scheme on the safety and wellbeing of the residents of the Scheme in the event of a radiological emergency by looking at the evidence of radiological health impacts arising from a radiation emergency (see DL/16-24[67]). It was not in dispute at the Inquiry that the evidence adduced by T A Fisher as to the effects of a radiation emergency on the occupants of the Scheme was limited to an analysis of the likelihood of radiological health effects and that this analysis was not relevant to actions taken under the OSEP or the adequacy of the OSEP itself.

92. The Inspector accepted T A Fisher's evidence on the radiation health effects of a radiation emergency on the residents of the Appeal Site (see DL/19). However, the Inspector failed to consider the evidence from AWE/MOD, WBDC and ONR about the complexity and other impacts of a radiation emergency both in the first days after a release of radiation and in the longer term. In particular:

a. The ONR's advice was that adding further residential development within the DEPZ affects the whole population of the DEPZ in the event of a radiation emergency.[68]

[65] **[SCB/31/876-878]**
[66] Person MD at 5.6 **[SCB/13/554]** and at 8.1.4 **[SCB/13/556]**
[67] **[CCB/4/50-52]**
[68] ONR, Statement of Case at para 44 **[SCB/5/65]**

b. It was common ground at the Inquiry that a radiation emergency can give rise to psychological impacts.

c. The Inspector failed to refer at all to the impacts on individuals at the Appeal Site during the recovery phase. AWE adduced evidence of the impacts on individuals during the recovery phase including prolonged exposure to radiation (which the Inspector accepted would occur but failed to consider the consequences of such exposure see DL/16 an DL/19) damage to property and relocation to carry out decontamination. The recovery phase is not referred to at all in the DL.

93. The issue of the impacts from recovery was a principal controversial issue in the Inquiry. AWE and WBDC's witnesses were cross-examined about their evidence on the impacts of the recovery phase and the issue of recovery was dealt with in opening and closing submissions. The DL does not refer to the above impacts at all or explain whether the Inspector accepted or rejected that evidence or whether he weighed them in the overall planning balance. AWE and MOD are left in substantial doubt as to what the Inspector concluded and why.

Paragraph 187 NPPF

94. Paragraph 187 NPPF provides[69]:

> "*Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.*"

95. AWE/MOD relied on paragraph 187 NPPF as part of their case that the Appeal should be refused. The Inspector accepted that AWE/MOD had a programme of future investment at AWE B and accepted the evidence that obtaining future consents may be more difficult if the population around AWE was permitted to grow. However, even though the Inspector found that there would be an adverse impact on AWE arising from the Scheme (DL/36-

[69] **[SCB/39/170]**

41[70]), the Inspector failed to grapple with the policy approach in paragraph 187 NPPF in the DL, or to weigh this conflict with the NPPF in the planning balance.

96. National policy is a material consideration in planning decisions and carries weight. Had the Inspector correctly directed himself to all of the relevant national policies, it is arguable that the Decision may have been different.

The Precautionary Principle

97. The Inspector failed to apply the precautionary principle to any of his analysis of the risks posed by increasing population density in the DEPZ. The precautionary principle is well-established in planning law (*Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302) and it was a key part of AWE/MOD's case at the Inquiry that a precautionary approach should be adopted in circumstances where there was any uncertainty about the impact of the Scheme on the adequacy of the OSEP and where the evidence was that the OSEP was already under pressure from existing built development. The Inspector failed to deal with this argument or to apply the precautionary principle at all to his assessment of the planning balance.

98. These errors individually and cumulatively render the Decision unlawful and liable to be quashed.

Conclusion and Relief Sought

99. On all or any of the above grounds, it is at least arguable that the Inspector's decision was in error and liable to be quashed. Accordingly, the Claimant seeks permission to proceed with this statutory review and in due course will be seeking a quashing order and an award of its costs of the statutory review.

JAMES STRACHAN KC

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18 September 2023

[70] **[CCB/4/53-54]**

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