Case No: CO/1173/2014

Neutral Citation Number: [2014] EWHC 3592 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2014

Before :

MR JUSTICE OUSELEY

- -

Between :

	(1) ANDREW MOORE **(2) MASSIMO TREBAR** **(3) ROBERT WAKELING**	**Claimant**
	- v -	
	SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **-and-** **WATFORD BOROUGH COUNCIL**	**Defendant** **Interested Party**

- -
- -

Jason Coppel QC and Hannah Slarks (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Zoe Leventhal (instructed by **The Treasury Solicitor**) for the **Defendant**
Robin Green (instructed by **Watford Borough Council**) for the **Interested Party**

Hearing dates: 25th July 2014
- -

Judgment MR JUSTICE OUSELEY

1. The Claimants are three allotment holders at the Farm Terrace allotments owned by Watford Borough Council, situated immediately south of the Watford Football Club ground, and close to Watford General Hospital. 60 of the 128 plots on the 2.63 hectare site are currently cultivated by 48 allotment holders, who are supportive of the Claimants. A year ago, there had been 77 allotments in use by 60 allotment holders, but the events leading to this litigation, and the closure of the list to new allotment holders on this site, have reduced their numbers.

2. On 3 December 2012, the Council resolved to appropriate these allotments to use as part

of a regeneration project known as the Watford Health Campus project, covering some 27 hectares. Appropriation would take place pursuant to the powers in ss122 and 123 of the Local Government Act 1972. After appropriation, the Council intends to transfer the allotments into the Watford Health Campus, a Local Asset Backed Vehicle, LABV, established as an LLP between the Council and Kier Project Investment Ltd, to bring this project to fruition.

3. The project itself does not, as a matter of its definition in various documents, mean only a project which includes the allotment site. A version of the Watford Health Campus project which received outline planning permission in 2010 did not include the allotment site. The inclusion of the allotments in the project came later, in 2012, as the project evolved.

4. Section 8(1) of the Allotments Act 1925 requires the consent of the Defendant, the Secretary of State for Communities and Local Government, to the appropriation of allotments. His consent was sought in an application made on 20 September 2013, supported by 32 appendices and including the Council's Cabinet Report of 3 December 2012. The Claimants and other objectors also made representations, although neither side saw the other's submissions. Consent was granted unconditionally in a decision dated 18 December 2013. It is that decision which the Claimants primarily challenge in this action.

5. This was the Council's second application for s8 consent. The Secretary of State had made an earlier decision consenting to the appropriation in May 2013, but the decision was quashed by consent on 28 August 2013, because the Secretary of State had failed to give adequate reasons for departing from his policy criteria for the grant of consent under s8 of the 1925 Act.

6. The major challenge to the December 2013 decision alleges that the Secretary of State was not informed, or was inaccurately and inadequately informed, about matters which were material, indeed central, to a fair and rational decision to make an exception to his policy in granting consent under s8 of the 1925 Act. Alternatively he, or the officials briefing him, misunderstood those factors as a result of misleading and incomplete information supplied by the Council. This also led to a breach of the Claimants' legitimate expectations as to how the policy would be applied; there was no proportionate public interest justification for overriding the Claimants' legitimate expectations that the Secretary of State's policy would protect their allotment tenancies.

7. The matter to which these contentions relate is first and foremost the viability and prospects of the Watford Health Campus Project coming to fruition. There are four aspects to this. (1) Would the project, albeit obviously in a different form, still be brought to fruition without the inclusion of the allotment site, and with what drawbacks and uncertainties? (2) What was the intended significance of the viability arguments and figures provided by the Council, notably showing a risk adjusted negative rate of return, in the absence of the allotment site, and how was that understood? (3) Was the Watford Hospital Health Trust (WHHT) committed to any particular form of scheme, and did the Council overstate or the Secretary of State misunderstand the firmness of its position? (4) What is the significance of changes to the project contemplated but not resolved upon

at the time of submission and decision, but which subsequently were adopted, and indeed two of which arose essentially wholly after the decision? These changes relate to the up to date position of the WHHT, an increase in the number of homes envisaged without the allotment site, the working out of a solution to building houses rather than flats alone on the flood plain, the abandonment of a costly multi-storey car park, and the use of part of the allotment site for Watford Football Club car parking. There had been no updated viability analysis to take account of those changes.

8. The December 2013 decision was also challenged on the secondary ground that, as a tenancy of an allotment was agreed in principle to be capable of being a "possession" for the purposes of Article 1 of Protocol No.1 to the ECHR, the s8 consent was an interference with rights of property which was neither in accordance with the law, nor one justified by the material before the Secretary of State or later presented to the Court. There was an Article 8 claim which adds nothing.

9. The Claimants also sought permission in their skeleton argument to amend their claim so as to challenge a further decision of the Secretary of State on 10 July 2014, whereby he refused to reconsider his December 2013 decision. On 3 July 2014, the Claimants had asked him to reconsider it in the light of the disclosures made by the Council on 27 June 2014 pursuant to an Order by Collins J. The Claimants said that the changes which had been made to the scheme and the Council's public statements about it, before his December 2013 decision, showed the fundamental flaws behind his consideration of the s8 consent application. But he had refused to reconsider it because he denied those flaws and said he was functus officio anyway. This challenge proceeded essentially on the same basis as that to the December 2013 decision itself.

The statutory and policy provisions

10. Section 8 of the 1925 Act provides:

> "Where a local authority has purchased or appropriated land for use as allotments the local authority shall not sell, appropriate, use, or dispose of the land for any purpose other than use for allotments without the consent of the Minister of Agriculture and Fisheries … and such consent may be given unconditionally or subject to such conditions as the Minister thinks fit, but shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable, …"

11. It was accepted in the Council's application that provision for the allotment holders was necessary and that new provision was reasonably practicable. It was contended that adequate provision for those displaced would be made. Although the allotment holders disputed the adequacy of the Council's intended alternative provision, and repeated their

discontent in witness statements before me, Mr Coppel QC on their behalf accepted that the Secretary of State's decision could not be challenged as unlawful on that ground.

12. The challenge relates to the way the Secretary of State applied his published policy on the granting of consent under s8, and not to the satisfaction of any statutory pre-condition to its grant. The policy consists of criteria contained in a letter to local authorities dated 27 February 2002. The criteria are that:

> "the allotment in question is not necessary and is surplus to requirement;
>
> adequate provision will be made for displaced plot holders, or that such provision is not necessary or is impracticable;
>
> the number of people on the waiting list has been effectively taken into account;
>
> the authority has actively promoted and publicised the availability of allotment sites and has consulted the National Society of Allotment and Leisure Gardeners; and
>
> the implications of disposal for other relevant policies, in particular development plan policies, have been taken into account."

13. The Secretary of State treats these requirements as cumulative. There is a new policy as from January 2014, which takes the same approach.

14. Ms Leventhal for the Secretary of State submitted that the Act gave a discretionary power to refuse consent to the appropriation of allotments which were in active use, even though they were adequately to be replaced, thus meeting one of the two alternative pre-conditions to the grant of consent. This was not at issue between the parties, and I express no conclusion about it. But I would not wish in this judgment to be thought to be agreeing that the proper construction of the Act permits criteria which Parliament has expressed as alternatives to be treated as cumulative; the scope of the discretion may not permit the Act to be interpreted in that way.

The decision letter

15. The policy criteria are referred to in the decision letter as criteria (a) to (e). The relevant parts of the decision letter read:

> "18. On criterion (e), the Secretary of State notes that the Council has had regard to the implications of disposal in other relevant policies, specifically the Council's Core Strategy (adopted January 2013) which designates the Watford Health

Campus as a Special Policy Area, with an objective to deliver a major mixed use development, including a new hospital. The Council considers that the loss of allotment land should be weighed against the significant possibility that, without the inclusion of Farm Terrace, the Watford Health Campus project would not be economically viable and that wider public benefits of improved hospital facilities, housing (including affordable housing) and green space will not be realised. The Secretary of State also notes that representations have been made that dispute this but he is satisfied that the wider policy objectives have been taken into account.

19. In light of the paragraph 13 finding that criterion (a) is not met, the Secretary of State now considers whether there are any exceptional reasons which justify a departure from his policy. The Secretary of State has particular regard to the Watford Health Campus project and the evidence submitted that the scheme would be likely to have a negative value of over £3m without the provision of the Farm Terrace Allotment site. In view of the public benefits of the project, the Secretary of State considers that the need to deliver a viable scheme represents, in his view, the exceptional circumstances to justify departure from his policy.

Decision

20…

21….

22. As stated in paragraph 4 the Secretary of State makes a decision in accordance with relevant policy unless there are exceptional reasons which justify departure from that policy. The Secretary of State accepts that criterion (a) is not satisfied as Farm Terrace is not surplus to requirements as it is an active site. Therefore a decision to appropriate Farm Terrace allotments would be a departure from policy and must be justified. The Secretary of State considers that there is a compelling argument in favour of the wider public interest that supports the granting of consent contrary to his own policy. This is because without the appropriation of the allotment site at Farm Terrace the Secretary of State considers it evidenced by the Council that Watford Health Campus project would not be economically viable and that wider public benefits of improved hospital facilities, housing (including affordable housing) and green space would not be realised."

16. All three paragraphs are inter-related. Mr Coppel QC for the Claimants contrasted the language of paragraph 18, the "significant possibility" that the Campus project would not be economically viable and that its wider pubic benefits would not be realised, with the seemingly firmer language of paragraph 22, the conclusion, omitting the words "significant possibility", that without the allotment site, the Campus project "would not be" economically viable, and that its wider public benefits would not be realised.

17. It is convenient at this stage to refer to the advice given by officials to the Secretary of State. A redacted version of this has been disclosed. The advice is the clear progenitor of the decision letter. There is no evidence that there was other written or oral advice, or that the Secretary of State personally considered the Council's supporting documentation, and Ms Leventhal did not suggest the contrary. Mr Coppel relied on this advice to support his contention that the Secretary of State did not understand what the Council was saying, because his officials did not do so either; even had the officials correctly understood the supporting material from the Council, the Secretary of State had failed to do so, because they had not conveyed it accurately enough to him, albeit in summary form.

18. The advice reads:

> "12…The Council are seeking appropriation of the Farm Terrace Allotments to support the Watford Health Campus, which is considered of significant importance and will secure (a) new hospital facilities (b) the delivery of up to 70 good quality homes, including 35% affordable housing (c) green space provision in West Watford and (d) up to 1600 jobs. The Council accept that the viability of the scheme is not strong with a report from Grant Thornton on behalf of the Council, assessing that, without the allotment land, the scheme would have a negative value of some £3.3m. The Health Campus Scheme has already received £7m funding from the Department of Health for a new access road and the Hertfordshire LEP has awarded the scheme £6m as recognition of its role in regenerating this area of Watford. Without the Farm Terrace Allotment site, the Council suggest that less housing provision would be made which would cast serious doubt on the scheme's financial viability.
>
> Conclusion
>
> 15. Whilst it is accepted that the Farm Terrace allotments are not surplus to requirements and therefore policy would indicate that this application should be refused, it is considered that without the space afforded by the allotment land, the viability of the Campus proposals would be questionable with a significant possibility of this becoming loss-making. Grant Thornton, on behalf of the Council, has assessed that without the allotment

land, the scheme would have a negative value of some £3.3m. We therefore conclude that the proposals for the Watford Health Campus, which is identified in the Council's Core Strategy as a Special Policy Area to deliver a major mixed use development project, represents an exceptional reason to grant consent contrary to the Secretary of State's policy due to the wider public benefits that the scheme will deliver."

The application by the Council

19. I start with this as its content is common to most of the Claimants' contentions. The application document from the Council to the Secretary of State was entitled "Information Needed to Consider Consent to Dispose of Allotments"; I call it the application document. It describes the "Nature of disposal" as being appropriation "to support a major regeneration scheme in" west Watford. This scheme is the Watford Campus Scheme, "of significant importance to the town and region", delivering "a range of outcomes" in the public interest locally and across south west Hertfordshire.

20. The project:

> "will secure:
>
> the opportunity to deliver new hospital facilities and services for south west Hertfordshire
>
> the delivery of good quality new homes
>
> much needed open, green space…
>
> purpose built, modern industrial premises…with up to 1600 jobs created
>
> improved infrastructure…[including better access to acute facilities at the hospital]
>
> the regeneration of 27 hectares of mainly brownfield land…."

21. The Council and WHHT were working together as partners in the project, with Kier providing the private sector expertise and finance. Appropriation was justified in the public interest because of the benefits including "optimal expansion space for Watford General Hospital", 1600-1900 new jobs, increased open space, and much needed family and affordable housing.

22. The advantages of appropriating the allotment land were then set out more specifically:

> "Farm Terrace allotments are located on land adjacent to the current Watford General Hospital site…due to their proximity to the hospital and their location within the area overall, they have been identified as the most suitable location for:
>
> - the expansion of hospital facilities and services in terms of cost effectiveness and the optimal configuration of WHHT's requirements for their Watford site. Without the allotments, WHHT's expansion aspirations will have less room to reconfigure as additional decant land will not be available. As well as the quality of the scheme being affected, the programme and cost of delivery of new facilities is likely to suffer as well due to the constricted nature of the hospital's site. The chance of disruption to operational facilities is also increased.
>
> - Family housing-the allotments are situated outside the flood plain that runs through a significant part of the site where only flats can be constructed. The allotment land, therefore, provides the opportunity for house with gardens.
>
> In addition…, the inclusion of Farm Terrace allotments would result in further public benefits:
>
> - the additional space… would mean a better designed and higher quality… scheme without the compromises [on density of the hospital and housing developments,] … "the provision of community space, and the quality of the public realm and public spaces….
>
> - the achievement of 35% affordable housing would be more difficult… as the viability of the scheme is marginal (see below).
>
> - underpinning the viability of the scheme. The viability of the scheme is not strong. With a circa £350m development cost and circa £40m upfront abnormal infrastructure costs (to address flooding, access, contamination and topography), the return on the scheme is a Net Present Value of under £10m. This is very marginal for a scheme of this scale and complexity. When delivery risk is factored in, the Net Present Value becomes negative (i.e. there is a significant possibility of the scheme becoming loss making without the allotment land, which could jeopardise the willingness of the LLP to take the scheme forward as currently intended)."

23. The uses proposed for the allotment site itself were described in this way in the application document: "the opportunity for optimal hospital expansion and therefore a better hospital redevelopment (approx 1.1 hectares or 40% of the allotment site)"; 1.5 hectares approximately for family housing, "currently estimated" at up to 70 homes; a community garden of some 0.4 hectares within one or other or both of those two areas. But it continued that it was "important to see the future use of the allotment land within the wider context" of the project. "Its use is intrinsically connected to the delivery of the vision and objectives of the scheme overall…." The scheme was a long-term project, up to 15 years, "that has at its heart the opportunity to provide expansion space for new hospital facilities and services for Watford and the wider west Hertfordshire community." This created the opportunity to improve the area surrounding Watford General Hospital "much of which is currently derelict, contaminated and unused." The application document noted the funding already received for infrastructure for the project in the form of a new road to improve access to acute services from the M1.

24. The application document then discussed the history of the project. It referred to the 2010 planning permission which had not included the allotment site. This appeared to have been based on a 2007 masterplan which relied on PFI financing. But after 2010, that had ceased to be an option. That political change and uncertain economic times had made the delivery of a major long-term mixed use scheme potentially more precarious financially. This had led to a review of the delivery of the scheme and in September 2012, after a tender, the LABV vehicle known as the Watford Health Campus Partnership LLP was created between Kier and the Council, and became responsible for the delivery of the scheme. WHHT was not yet a partner in the LLP; that awaited its attainment of Foundation Trust status. (There was a separate "Campus agreement" between the Council and the WHHT, covering WHHT's role in delivery of the project). The Department was told in the "summary of legal status" supporting the application document, that the structure of the LLP was a "50: 50 deadlocked" joint venture between the Council and Kier, which meant that all decisions had to be unanimous. So neither could force the other to proceed without the allotments.

25. (The Council's December 2012 Cabinet Report, submitted with the application, explained that it had proposed the inclusion of the allotment site in the light of feedback from potential developers who had considered the original scheme without the allotments and representations made by the WHHT about its future requirements; the masterplanning with Kier and the viability work done by Grant Thornton also pointed the Council in that direction.)

26. The "fundamental vision and objectives" for the Campus, according to the application document, were nonetheless unchanged by this mode of delivery for the scheme. The purpose of the Council's investment in the scheme was to achieve the various objectives for the hospital, jobs and housing, and urban improvement outlined earlier. "In addition, underpinning the financial viability of the development overall is now identified as critical to the scheme's success."

27. The Council provided next its analysis of the five main reasons for its view that the appropriation of the allotments would be in the public interest. The first main reason was "Providing expansion space for the re-provision of hospital facilities and services by

offering the degree of flexibility and scope WHHT require at their Watford site." The Watford General Hospital was the major acute hospital for West Hertfordshire serving around 500,000 people.

28. It continued:

> "The WHHT proposal indicates that, should the allotment land be available, around 40% would be needed to provide the optimal solution to their expansion requirements.
>
> The demand for treatment at Watford General Hospital has been such in the last 2-3 years that WHHT has had to make additional provision on its current site to accommodate the needs of its patients. This has meant that a significant amount of previous room for expansion has now been allocated and the Campus partnership has had to look beyond the hospital's current site for space that would best provide a better hospital redevelopment. WHHT has considered a number of different options for the re-provision of their facilities at its Vicarage Road site (the site of Watford General Hospital). Part of the allotment land has been identified as the preferred area for future provisions – not only because it offers the best configuration of hospital facilities and services, but also because it provides the most cost effective option. The Trust, therefore, is to expand south of their current facilities (see attached statement from Director of Strategy and Infrastructure, WHHT as well as the previous Trust's CEO…). This would enable them to better configure clinical and non-clinical facilities with public access/car parking adjacent to the existing Princess Michael of Kent building which will continue to host patient care services in the long term.
>
> It provides for less cramped facilities and re-providing south of their existing buildings is a more straightforward prospect than constructing new facilities literally in the middle of their current site. The 2007 plan of moving down and towards Willow Lane… is now not feasible due to the need to rebuild the hospital in phases and the location of a "surge" ward to the back of WHHT's acute assessment unit(AAU)…building in response to high levels of demand for patient care".

29. Mr Coppel pointed out that the "attached statement" had not been attached at all and appears not to have been forthcoming.

30. The application document then referred to what the Chairman of WHHT had said in December 2012, as reported to the Council's Cabinet, to the effect that the hospital would require a certain amount of decanting whilst work was underway, which would not be possible without the facilities to move from one location to another. The footprint

of the site without the allotments would make this very difficult and expensive and reduce the amount of flexibility required as the building work was taking place.

31. Another hospital executive had said, reported the application document, that the construction would necessarily be phased because the hospital had to remain operational at all times and all departments physically connected once the hospital was included. Without the allotments it would be very difficult to deliver sufficient space for full access between departments whilst building was in progress. The hospital did not have a "do nothing" option as redevelopment was the most appropriate option to provide model facilities, given its high, £60m, backlog of maintenance.

32. The second main reason was that the appropriation of the allotments would "secure more much-needed family housing." The statistical basis for this was spelt out. 2-4 bedroom houses were what the forecast steep rise in young families would require over the next ten years. The quantum of housing in the scheme came from the approved Core Strategy. The flood plain ran through a significant part of the site, with significant level changes, which restricted the amount and type of housing which could be built, especially family houses with gardens. The allotment land which was outside the flood plain provided the opportunity for houses with gardens. Seventy 2-4 bedroom family houses were envisaged on this land, along with the hospital area and a public garden. The inclusion of the allotment land would also provide greater financial support for 35% of the houses being affordable housing, in line with the approved Local Plan.

33. The third main reason concerned viability: appropriation of the allotments "would improve the viability of the Campus scheme and speed up the development of the site." As the allotments were not in the flood plain and were more easily developed, the financial viability of the scheme was "more likely to be secured" through their inclusion, allowing the many wider benefits to be realised. The Council rejected the suggestion that the inclusion of the allotments would simply provide a financial windfall. It repeated that the NPV, non-risk adjusted, would be £9.9m, although the Council apart from its land contribution would have incurred £4m in project fees and was investing £3m of revenue into its scheme and £1.6m in reproviding allotments together with other allotment improvements. A return of £9.9m was not "a strong viability threshold for a development cost of circa £350m producing only a 3% margin." The significant infrastructure and abnormal development costs made the scheme only "marginally viable" and it already relied on DOH grant funding of £7m and LEP interest free loan funding of £6m. Without the allotments, the scheme would have a negative £3.3m value when the risk adjusted discount rate was applied.

34. The Council then quoted from the Grant Thornton report of March 2013; the report itself was not supplied to the Department. The quote under the heading "Risk Adjusted Cashflows and Returns" commenced: "A series of risk adjusted cash flows and returns have been performed in order to allow WBC and WHHT to consider the impact of an adjusted discount rate, intended to reflect the perceived risk of the Kier proposal to WBC/WHHT. This exercise is inevitably subjective and WBC/WHHT should arrive at their own view as to whether the risk adjusted discount rate adopted constitutes a fair assessment of risk." Grant Thornton considered that for sensitivity testing purposes, a risk adjusted discount rate of 28.125%, for which rate it gave reasons, should be applied

"to the nominal cash flows and returns to WBC/WHHT."

35. The Council then produced a table extracted from the Grant Thornton report summarising the risk adjusted returns. All of the tabulations refer to the scheme without the allotments. The tabulations consider the NPVs with and without adjustment for risk. They consider separately the WBC net cash flows and net return and the WHHT net cash flows, and then the combined WBC and WHHT net cash flows and return, including land injection. This leads to the figures of a £9.9m return before risk adjustment and the negative £3.3m risk adjusted return.

36. The report comments: "As can be seen from the table above, the application of the risk adjusted discount rate serves to significantly erode the net cash flows to both WBC and WHHT over the life of the project. In particular, the NPV of net returns to WBC (including land) fall from £9,895k to a net present cost of (£3,369k), reflecting both the quantum of the discount rate applied and the long term time frame over which returns are anticipated to be received." It then refers to the NPV of WHHT, falling from just over £2m to £750,000, when risk adjusted. Key risks of the project included an increase in cost, particularly in the cost of infrastructure, economic risk which might affect Kier's ability to generate an acceptable return, counterparty risk i.e. the risk that Kier would have to ask the public sector to become the funder of last resort, and regulatory risk, i.e. changes in the accounting framework set by the Treasury and the Chartered Institute of Public Finance Accountants' Code of Practice.

37. The information then submitted by the Council was that the inclusion of the allotments in relation to housing provision increased land value by an estimated £7m. The land was outside the flood plain and not contaminated leading to a significant improvement in the value of the scheme overall. A scheme of about £350m with only a small net land value created significant nervousness from investors and the improved viability would improve the scope to attract external funding and future occupiers. As it was not contaminated, the allotment site would speed up development. In the short term the site would resolve logistical issues for the LLP in enabling the construction, mobilisation and use of the land as temporary "decant space" for displaced hospital car parking during construction of the new road before its use for new hospital facilities and family housing.

38. The fourth main reason for the appropriation of the allotment land was to "provide for a better designed scheme to be of sufficient size to make a greater overall improvement for residents of West Watford." The allotments occupied a "central and strategic position within the overall site" and their inclusion would assist considerably in achieving a quality of urban design. Various plans within the appendices to the application document were said to show the advantages and disadvantages of the inclusion or exclusion of the allotment site. The wider public use would be a more effective and efficient use of urban land, and their inclusion was "integral to the success of the overall design of the scheme."

39. The fifth main reason for appropriation was the removal of the impact on the amenity of allotment holders of the significant disruption which they would inevitably suffer during the 10-15 years of the Campus development.

40. The application document said that the detailed but still illustrative master plan, which would be the basis for the expected planning application, would indicate the improvements which the inclusion of the allotments would facilitate. It built on the one approved in 2008, and on the 2010 planning permission, "improving it and making it deliverable and more viable." The application also made clear that the master plan would continue to evolve after submission of the s8 consent application, through the forthcoming consultation process, and that the version of the master plan with that application was only its "current iteration".

(1)The Council's intention to proceed with the scheme in the absence of the allotments

41. Mr Coppel contended that the Council's true position was that a form of the scheme would still proceed even without the appropriation of the allotments, though it might very well not be economically viable. Whether through a scheme as in 2010 or as varied in some way many of the wider benefits could then still be achieved. This position was not stated or made clear in the application document: this did not itself state what the Council or the LABV would do if the allotment site were excluded: whether, and if so how, it would seek to alter the cost or content of the scheme and whether or not such a scheme so altered would or could still go ahead, despite a lack of positive return, though gaining in other respects. There was no clear statement in the application document that the Council or LABV would still expect a form of scheme to proceed, albeit weakened in various aspects. The Secretary of State's concern about the scheme's viability was that in the absence of the viability contribution which development of the allotment site would make, no scheme at all would proceed. Nothing else was said to amount to exceptional circumstances. In this context, Mr Coppel understandably focused on paragraph 22 of the Decision Letter. Thus, the Secretary of State either misunderstood or was misled about the Council's true position, and so made his decision on a false basis.

42. The application document was clear, in my judgement, that the Council still intended, if it could, to proceed with some other version of the scheme without the allotments. The Council envisaged that the scheme, albeit in a less satisfactory form, would not be precluded by the exclusion of the allotments. There are a number of references in the application document to the scheme proceeding without the allotments, which make that position perfectly clear. The most obvious is the fifth main reason for the appropriation, which is to spare the allotment holders 10-15 years of disruption to the tending of their allotments while the scheme is constructed. That necessarily assumes a scheme proceeding excluding the allotments. The benefits of appropriating the allotments also included greater room for reconfiguring the hospital and for decanting, easier construction, reduced disruption, and a better designed scheme. These are not the only such references, but asserting the comparative advantages of the inclusion of the allotments is only consistent with their exclusion not being fatal to the scheme proceeding, albeit in a less satisfactory manner to a less satisfactory conclusion. The language of the lengthy passages in the application document, which I have quoted above, dealing with viability, including "underpinning the viability of the scheme", "improving viability" and of risk, clearly means that the inclusion of the allotments helps the prospect of the scheme coming to fruition, though their exclusion does not preclude it. There is nothing in the application document saying that the inclusion of the allotments was the key to any version of the scheme proceeding at all. If the Council had been in a position to say that there would be no Watford Health Campus scheme at

all without the allotments, it would have made much of that point, since, if accepted, it would have been a powerful point for the Council to make. But it did not do so.

43. The application document properly reflects the Council's true position. The Council's position was not that a scheme would go ahead regardless of any want of viability: the scheme without the allotment site before adjusting for risk was of marginal viability; its viability was negative after adjustment for risk. There was no commitment by the Council to proceed regardless of its anticipated losses; the scheme would have to be adjusted, and would be less deliverable and less well designed; the lower viability put it at greater risk. Grant Thornton was not saying either in the extract from its report that the viability problems meant that the scheme could not go ahead without the allotments; that is the significance of its reference to "any differing qualitative aspects of the development."

44. The difference between whether a scheme would be precluded by the exclusion of the allotments, and whether their exclusion would create greater risks over its viability and so create greater uncertainty over whether it would proceed and when, is an important one. Viability, as Ms Leventhal for the Secretary of State and Mr Green for the Council submitted, was not a black and white issue, but involved reducing the risk of a scheme not proceeding or proceeding without long delays, shifting the degree of risk to one more favourable to the scheme proceeding- and being of a better quality. This was the position which the Council took in the application document. There is a crucial difference between intention and achievement in the area of major complex development. An alternative excluding the allotments bore greater financial risk, which an enhanced return to the Council with allotments would reduce; and it would be a less satisfactory scheme, affecting the willingness of occupiers to take it up. There was a greater risk that it would not come about or would perhaps be delayed. There is no contradiction between the Council's intention to proceed with the scheme without the allotments and a greater risk that it would be unable to do so without them.

45. Indeed, this analysis of the Council's position is in reality supported by much of the material which Mr Coppel deployed in relation to what he said was its true but different position. And I include material which post-dates the decision, since it is not the Council's case that there was no change in its position after the decision.

46. Mr Coppel submitted that the Council's reasons for "wishing to proceed with the scheme notwithstanding any concerns about its viability", as he misdescribed its position in reply, were only to be found by "delving deep" into the Cabinet Report of December 2012. But I see no material difference between the wording of the Cabinet Report and the passage in the application documents summarised above: "retention of a major hospital" becomes "facilitating re-provision of hospital facilities and services in this location"; the sentence "Hence the recommendation to move ahead with the scheme because of the regeneration benefits" was omitted; and the elaboration in the Cabinet Report of the increase in land value which the inclusion of the allotments would bring is very similar to what followed in the application document about the advantages to the scheme's viability: a significant improvement in the value of the scheme, improving the scope to attract external funding and future occupiers, improving the return to the Council, and pulling forward the pace of development. The December 2012 Cabinet

report noted that the scheme's viability without the allotments was "not strong", for much the same reasons as featured in the application itself. Delivery is "still challenging" for the Council, the report continued.

47. Mr Coppel also drew attention to a passage in Part B to the December 2012 Cabinet Report which referred to the Kier Masterplan, without the allotments, in these terms: "Officers and advisors are therefore as confident as we can be that Kier's Masterplan as outlined is one that is commercially viable." But it also said that the "inclusion of allotments will enable improved viability…." A number of factors could affect viability, including the flood mitigation measures, and programme delays. Financial close had not yet occurred. The public sector NPV was minus £1.3m. There was "clearly a risk that the Council will not see any return on this investment and close scrutiny of the viability of any development must occur before any part of the [redacted] is drawn down. The comfort that the Council can take is the fact that Kier will be unlikely to risk any of its own cash resources into a venture that will not be viable. For this reason the 50/50 partnership is extremely important." I add that it follows that the Council knew that it could not be forced to incur a loss by Kier.

48. Mr Coppel's Skeleton Argument referred to the Mayor of Watford saying in the local press on 2 August 2013 that if the Secretary of State refused consent on the anticipated second application "it is a big issue, we haven't been pretending about the impact of the allotments. We will carry on, it would make the scheme less viable and we would have to look at how to make it more viable. It would reduce the scope for the hospital, it will reduce the flexibility of housing and ultimately the scheme wouldn't be a really, really top scheme."

49. The First Claimant referred to a letter dated 30 September 2013 to the Secretary of State from the Council's Mayor, saying in response to the quashing of the first Secretary of State decision, "we will carry on, it **[**the exclusion of the allotment site] would make the scheme less viable and we would have to look at how to make it more viable".

50. Although other material relied on by Mr Coppel post-dated the Secretary of State's decision, he contended that it showed the position at the time of the application and decision. Miss England, who works on her daughter's allotment and provided evidence for the Claimants, was told by two representatives of Kier at the public consultation meeting on 18 January 2014 that the Health Campus project would still go ahead without the allotment site. Another Kier representative at the same consultation said much the same to Mr Moore. Ms Harvey gave like evidence. Making allowance for the nature of the conversation, which did not raise questions of degree of risk, but accepting that the answers were not qualified, nonetheless, I do not see that as significantly at odds with the Council's position that it intended to proceed with the scheme but there were greater risks to its being able to do so without the allotments.

51. Mr Moore also produced press reports of what the Mayor of Watford had said about the implications of the exclusion of the allotment site. On 24 March 2014 the Watford Observer reported that she had told it that success in this judicial review for the Claimants, which I take to involve the conclusion that the allotment site would be excluded from the scheme, would be a "real issue" so far underplayed; there would be

very clear consequences for the public purse and for the viability of the scheme; flexibility would be restricted; the scheme benefits would be put at risk because it would be a less viable scheme. A month later she told the same paper that the Health Campus project would carry on "one way or another"; the Campus would be redeveloped with or without the allotments; they played a significant role, without which the Council would have to build more houses more densely, but it would "crack on and make adjustments if we need to." This submitted Mr Green was consistent with but not the full statement of the Council's position as before the Secretary of State. I agree.

52. In June 2014 the Mayor told the Watford Observer that the issue with Farm Terrace was the viability of the project. "If you have to keep the allotments where they are we probably won't get the money back and won't get much of the profit." A spokesman for the Council said that the project was about regeneration of an area of west Watford including delivering space for healthcare facilities. But parts of the scheme would be unviable whilst others would be viable. Although the Council expected to recoup its costs and create profits, the length of the project meant that that depended on a wide range of factors over a 20 year period. The Watford Observer also reported her as saying that, with the allotments, the project would make a large profit for the Council; it was a good scheme which would make money. This was responding to criticism about how much money was being spent on legal and other consultancy costs. Mr Lewis said that this latter report was not a full report of what the Mayor had said, because it omitted her point that, without the allotments, viability was at risk with economic changes and with the allotments there was a greater likelihood of its proceeding. Again that does not to my mind help to show that the Council failed to put its position fairly and accurately before the Secretary of State.

53. In his first witness statement Mr Lewis also accepted that "a scheme for the redevelopment of Watford General Hospital and regeneration of the land around could be devised without including the allotments." But the inclusion of the allotments would create "the optimum scheme for the area" for a variety of reasons in the Cabinet report. He also made the point that the 2013 partnership agreement with Kier contained no provision dealing with the position were the allotments to be excluded. Mr Lewis repeated in evidence his view that the allotments were critical to the quality and viability of the scheme: without them viability was marginal; with them it moved to a positive risk assessed value. I see nothing in this material to cast serious doubt on the conclusion I reached as to the true position of the Council and its accuracy as conveyed to the Secretary of State in its application document; on the whole it supports my view.

54. Did the Secretary of State misunderstand what I regard as the true position of the Council as accurately presented in the application document? Mr Coppel's argument gains its real sting from the language of paragraph 22 of the Decision Letter. On the face of it, paragraphs 18 and 22 are contradictory. Paragraph 18, although dealing with criterion (e), summarised the Council's position as being that, without the allotments, there was a "significant possibility" that the scheme "would not be economically viable" and that its "wider public benefits" "will not be realised". Paragraph 19 then deals with exceptional circumstances referring to evidence that the scheme "would be likely to have a negative value of over £3m" without the allotment site. The Secretary of State considered "that the need to deliver a viable scheme" represented exceptional circumstances justifying a departure from his policy. In paragraph 22 he states the actual

decision. The Secretary of State identified a "compelling argument in favour of the wider public interest" justifying this departure. Without the appropriation of the Farm Terrace Allotments, the Secretary of State considered "it evidenced by the Council" that the scheme "would not be economically viable and that the wider public benefits of improved hospital facilities, housing (including affordable housing) and green space would not be realised." The "wider public benefits" are the same in paragraphs 18 and 22. Paragraph 22 is thus much firmer about what would happen to the scheme, if the allotments were not appropriated, than is paragraph 18.

55. Mr Coppel submitted that the Secretary of State reached a clear conclusion in paragraph 22 that the scheme would not proceed without the allotments, but that that conclusion was entirely unsupported by evidence. Ms Leventhal submitted that the Secretary of State did not conclude that the scheme would not proceed without the allotments. Her reconciliation was that he was accepting the Council's evidence in paragraph 18; but paragraph 22 was worded differently because it referred to the scheme components which would obviously not go ahead without the allotments because they were to be provided on the allotment site itself.

56. I accept her submission, but not her reconciliation of the paragraphs. I conclude that the Decision Letter just contains an omission in paragraph 22 and that the correct and intended reasoning is in paragraph 18. I also conclude that paragraph 18 is borne out by the Council's position in the application document, which he intended to accept. The critical sentence in paragraph 22 concludes that without the allotments, the scheme "would not be economically viable and [its] wider public benefits… would not be realised". The real difference between the two paragraphs is the omission in paragraph 22 of the "significant possibility" that it would not be economically viable, and that the wider public benefits would not be realised.

57. I reject Ms Leventhal's reconciliation of the two contradictory passages. The wider public benefits listed in paragraph 22 as those which the exclusion of the allotments site would eliminate cannot just be those which would be provided on the application site itself; the wider public benefits referred to in paragraph 22, which are on her argument the scheme components to be provided on the application site, are referred to in the same language as those in paragraph 18. It is not possible that the Secretary of State used identical language to refer to the whole scheme in paragraph 18, as he must have been, and part only of the scheme in paragraph 22.

58. Nor could he be talking about part only of the scheme in the two paragraphs, that is the part to take place on the allotment, since it makes no sense to talk of there being a significant possibility of those components not being realised without the allotment land, when the elimination of the allotment site would inevitably mean that the uses on that site would also be eliminated from the allotment land. Indeed, much of the Council's application document concerned the benefits for the scheme as a whole of the inclusion of the allotments, rather than the specific benefits of what would be put on the allotments site itself. And those specific benefits on the allotment site could not cover all hospital provision since that was at the core of the scheme and would have to be found a place, less satisfactorily, somewhere else without the allotment site. I also find it impossible to suppose that the Secretary of State changed his mind between the two paragraphs within

a few lines, ending up with inconsistent conclusions.

59. In rejecting Ms Leventhal's contention on behalf of the Secretary of State, I do not consider that I should regard her submissions or her skeleton argument as being the words of the Secretary of State, contrary to what Mr Coppel suggested. She made submissions, whether such submissions help her or not; she did not give evidence as to what he meant. But her submission carries with it the acknowledgment that, if her reconciliation of them is wrong, the language of the two paragraphs is clearly inconsistent, as it obviously is.

60. So the question becomes whether I can be satisfied that the analysis in paragraph 18 should be taken as what the Secretary of State meant rather than the conclusion in paragraph 22, since if it is the latter, the decision is clearly unlawful. The Secretary of State could not lawfully have concluded that the Council's case showed that, in the absence of the allotments, no Watford Health Project scheme would proceed for want of viability. The Council's case would have been misunderstood on a crucial point, and a conclusion reached unsupported by evidence. That would not be so if paragraph 18 represented the Secretary of State's views.

61. The Secretary of State's reasons for making the exception to his policy would be legally inadequate, if they left the Court in genuine doubt as to whether he had reached a lawful conclusion. Although there is no statutory obligation to give reasons, the Secretary of State has done so, and their lawfulness is open to challenge on that conventional basis, quite apart from any other sources of obligation to give legally adequate reasons in this case. The decision would be quashed for want of legally adequate reasons.

62. I do not think that the inconsistency can be resolved by treating paragraph 22 as overriding paragraph 18 simply because it is the decision paragraph, when paragraph 22 clearly draws on what has preceded it rather than being intended to develop it in any significant way. The stage in the decision letter process may be different but the essence of the determining issue, whether the public interest required an exception to policy, was the same throughout.

63. However, I am satisfied that the inconsistency is apparent rather than substantive, and is the result of omission, that paragraph 18 conveys the real basis of the decision and that it is paragraph 22 which contains the error. The Secretary of State intended to accept, as he said, the Council's application material. I have already explained my judgement that the Council did not say that there would be no scheme without the allotments. The evidence he accepted is reflected in paragraph 18 and not in paragraph 22. The Secretary of State concluded that the advantages to the scheme of the inclusion of the allotments and the greater prospect of its implementation were sufficient exceptional circumstances. Paragraph 22 is thus much firmer about what would happen to the scheme, if the allotments were not appropriated, than is paragraph 18. Paragraph 18 includes consideration of criterion (e) but is manifestly not confined to it, as the important sentence demonstrates. Paragraph 19 follows what is said in paragraph 18; "the need to deliver a viable scheme" the need to make the scheme more viable, reducing a significant possibility that it would not proceed. The reasoning has essentially been concluded, the exceptional circumstances identified. The conclusion in paragraph 22

simply omits the qualification embodied in the reasoning.

64. This is supported by what officials advised. The discussion of criterion (a) in paragraph 12 of their advice uses the language of "serious doubt" about the scheme's viability without the allotment site, and the conclusion in paragraph 15 refers to viability being "questionable with a significant possibility of this becoming loss-making." However, the appendices submitted with the Information and referred to in it did include alternative plans, with and without the allotment land, showing the differing effects on hospital relocation and alternative masterplans showing the scheme with and without the inclusion of the allotment land, which his advisers would have considered. The Secretary of State received no advice that the exclusion of the allotment site would preclude the scheme proceeding. His officials did not misunderstand, at least in that respect, what the Council was saying. He did not have a specific alternative to compare before him, but it is obvious he had the material from his advisers on which to conclude that a scheme without the allotments would probably be less satisfactory and less likely to come about, even though the Council would still try to bring about some Health Campus scheme.

65. I therefore cannot accept the contention that the Secretary of State actually concluded that the scheme would not proceed without the allotments. That, I should make clear, is not the same as holding that the Secretary of State concluded that a scheme was bound to proceed without the allotments. That is not the conclusion he reached either.

66. I mention at this stage one area of dispute between the parties which seems to me not to have the significance they attached to it. I accept Mr Coppel's submission that where the Secretary of State takes a decision, as here, he cannot be assumed to know everything in the papers submitted to his Department. He knows what he is told by his officials. If what they advise him is materially inaccurate because they have omitted an important factor or have misunderstood it, the decision cannot be saved by supposing, contrary to the facts, that the Secretary of State knew what his officials knew, but understood it properly. Ms Leventhal was taken aback by Mr Coppel's reference in reply to the main authority for that, *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154. But the proposition is not really at issue in this case. The first issue was whether the Secretary of State made an error not made by his officials in the passages in the decision letter which I have been ruling on, and the second issue is whether the officials misunderstood or misrepresented the evidence. But there is no evidence or suggestion that the Secretary of State took a different view from his officials, rather than relying on them, save for the inconsistency between paragraphs 18 and 22, where the error, if error it had been, was one of his and not their making.

67. Accordingly I reject this first ground of challenge.

(2)The viability of the scheme and the Council's return

68. A report from Grant Thornton, the accountants, entitled "Post Preferred Bidder – The Executive Summary Financial Report" dated around March 2013 showed separately the nominal Net Present Value and Internal Rate of Return for the Council (with its future partner, the WHHT,) and those for Kier. The return to Kier appeared to be healthy. This

is the report from which extracts were quoted by the Council in its application document in its case on viability, although not quoting the figures relating to Kier itself.

69. Mr Coppel contended in an argument developed after submission of his skeleton argument and after disclosure agreed shortly before the hearing, that the Secretary of State was wrong in his approach to viability, because he had wrongly assumed the Net Present Value and Return figures he was supplied with by the Council in the application document to relate to the project as a whole, but without the allotment site, whereas in fact they related the risk and return to the Council and WHHT alone. Accordingly, enhanced viability from the inclusion of the allotment land did not relate to the prospects of the project proceeding, but only to the return to the Council or to the Council and WHHT. The return to Kier had been ignored. The Secretary of State had not understood that, as his Decision Letter showed.

70. It followed, according to Mr Coppel, that the application document contained "false statements" by the Council as to the return on the scheme and its viability, in the fifth public benefit of including the allotment land: "underpinning the viability of the scheme". This referred to the NPV of under £10m, becoming negative after adjustment for risk, in relation to a £350m scheme. There were further "false statements" by the Council in the application document's third main reason for the inclusion of the allotments, "Improving the viability of the campus scheme". Again, the Council's commentary preceding the extract from the Grant Thornton report, related the NPV of £9.9m and the risk adjusted negative NPV of the scheme to the whole scheme value of £350m. Mr Coppel submitted that these statements could not reasonably be read as being confined to an examination of return to the Council/WHHT alone, and so would have been understood by the Secretary of State, and his officials, as covering the viability of the scheme without allotments for Kier as well. "False" is a word which, while it can mean "inaccurate", has darker connotations of deliberate and knowing inaccuracy. If Mr Coppel meant the latter, as I am afraid I think he did, there was no basis for it.

71. Mr Green is correct that the Grant Thornton report extract in the application document, dealing with the third main reason for the inclusion of the allotments clearly refers to the NPV and Internal Rate of Return to the Council or to the Council and WHHT. It referred to the risk adjusted cash flows and returns being calculated to reflect the risk to WBC/WHHT, who nonetheless should arrive at their own view as to whether the risk adjusted discount rate adopted constituted a fair assessment of risk. The tabulations from the report dealt separately with WBC and WHHT and then with the two combined. That led to the figures of £9.9m return before risk adjustment and -£3.3m after risk adjustment. The comment from the report about the effect of the risk adjusted discount rate is that it eroded the net cash flows to WBC and WHHT. The extract makes no mention of the NPV and return to Kier, although the role of Kier and the LABV/LLP is clearly set out.

72. The very figures in the section of the application document setting out the fifth advantage of the inclusion of the allotments and in the passage bracketing the Grant Thornton extract are clearly the same and derive from the Grant Thornton report. They therefore clearly relate to the NPV to the Council/WHHT. They can only sensibly be

read as referring to those two bodies. They do not relate to the return to Kier.

73. But that answer by Mr Green raised further questions later in my mind. What was the significance of the omitted return to Kier? How would one move from the negative return to the Council to the negative value of the scheme as a whole, if that is what the viability risk was based on, as it appeared to be? Why, if he was right, was that return measured against the value of the scheme as a whole, £350m, rather than against the WBC/WHHT contribution? After the Claimants' written reply was received, I asked for further submissions as to why the £9.9m and minus £3.3m, which related solely to the WBC/WHHT return, appeared to be set against a scheme value of £350m, which was the total value of the entire scheme. To put it another way, what was the Council's return, a return on?

74. The Council's answer was provided by Mr Lewis, its managing director. The answer, as best I understand it, is that the LLP partners have joint responsibility for the whole scheme, and that "The standard assessment of viability is a measure of gross development cost compared to profit or gross development value compared to profit. The assessment is equally relevant to the council as a partner in the LABV as it is to Kier." As I understand this, he is saying that this is the conventional way of expressing the return to either side, and the viability of the project to each party.

75. Mr Coppel countered by saying that the Council had not answered my questions, and the only investment by the Council was the land at £7.6m, on which the undiscounted cash flow to the Council yielded an undiscounted return of £37.6m. I find it difficult to accept that that could be a correct or complete analysis, although I have followed where he gets those figures from, since that would imply a very healthy return indeed to the Council, which is not what Grant Thornton, who have the greater expertise, were saying at all. If it simply provides a source for the figures which are to be found in the form of NPVs in the Grant Thornton extract, they do not advance the issue.

76. The real answer to Mr Coppel's point is that the Council was telling the Secretary of State in both of the passages described as "false statements" by Mr Coppel, that a negative return to the Council put the scheme at risk. The whole tenor of the extract from Grant Thornton is that the level of return, especially after risk adjustment, to the Council and WHHT is such that in financial terms, without the allotments, the scheme is going to make a loss to the Council and WHHT. As a 50:50 partner, if the scheme did not produce a better than negative return for it, there would be greater doubts over its viability and whether it would go ahead. It did not say that the scheme would not proceed; but there were greater risks to it with a negative return by the Council which the inclusion of the allotments would overcome. That is the case which the Secretary of State accepted. A Council's concern for public money and its return would not be assuaged by the fact that the partner developer would make a sufficient return. In those circumstances, the figures needed to focus on the position of the Council. Mr Coppel's submissions rather ignored the importance of risk, and the effect which its reduction can have on a decision to proceed with large projects. This was not an issue on which there was or could be a bright line distinction between a scheme which was viable and one which was not, one of which would proceed and the other of which would not. The financial viability issue related to risk and prospects, and indirectly to the relative qualities of the different

schemes which could emerge, with and without the allotments. Any local authority or Health Trust would have been aware that loss-making investment by it was at a much greater risk of not proceeding than one yielding a healthy positive return. It would not matter to that decision that the private sector might make a healthy profit if the public sector were to make a loss.

77. I do not understand for sure quite why the figures were presented in the way they were, but I am not prepared to hold that they were or underpin false or inaccurate statements. Even less am I prepared to hold that the essential point they conveyed to the Secretary of State, that the scheme was of marginal viability from the point of view of the Council even before adjustment for risk but that its viability from the same point of view would be strengthened by the inclusion of the allotments, was false. I am not prepared to elevate what may be imperfect understanding by me, and by others, of a point raised and considered as this one was, into evidence of an error of law or reasoning by the Council or Secretary of State.

78. It is my view that the advice to the Secretary of State also captures the essence of the point. This properly reflected, in its language of "significant possibility" and "serious doubt", the key risks and uncertainties as adumbrated by the Council in the application document, and which turn a marginally viable scheme negative after risk adjustment. Paragraph 18 of the Decision Letter makes the point clearly.

79. Mr Coppel pointed out that the advice of officials and the decision letter itself appear to treat the scheme itself as having a risk adjusted negative NPV of £3.3m. Ms Leventhal submitted that officials reading the application document, would have understood its purport as Mr Green described it, and that is how their advice to the Secretary of State should be understood as well. The language of their advice in both paragraphs 12 and 15 was that the "scheme would have a negative value of some £3.3m." That is very similar to the language of paragraph 19 of the decision letter: "…the scheme would be likely to have a negative value of over £3.3m" without the allotments. Whether or not the reference to "the scheme" is precisely how it should be put, it is clear that it is driving at the risk to a scheme if the Council's return is not improved by the inclusion of the allotments, and the advantage of a scheme improved by the inclusion of the allotments are lost. I accept Ms Leventhal's submission that the Court should not be over-ready to draw adverse inferences about what the decision-maker understood.

80. Mr Coppel also contended, in reply, that the inclusion of the allotments would reduce the Council's profits. That is not a contention which I am prepared to accept in the light of the material in the application documents, simply on the basis of so belated a development of a late argument, entirely unsupported by any sensible analysis of why that should be so. It ignores, so far as I understand it, any increase in the value of the land attributable to its development. The Secretary of State accepted, as he was entitled to do that the inclusion of the land, because of the enhanced value created by its development, would add to the return to the Council, and make the scheme more viable.

81. I do not accept his next suggestion in reply, which was really a merits critique of the way the Council presented its case to the Secretary of State, that the Secretary of State had no way of judging the difference which the inclusion of the allotments would make. It is

true that the only viability analysis is of the scheme without allotments. The negative return is met by the inclusion of the allotments. Granted that there is no specific figure, there is a sufficient description in the Council's application document of the degree of enhanced viability, and the need for that increase, to give him a lawful basis for his conclusion.

82. Mr Coppel raised a number of points as to why the land valuation of £7m should be viewed with scepticism, but those arguments are not for the Court on a review of lawfulness; as merits points they are hampered by the want of supporting material beyond Mr Coppel's own arguments, which I did not find self–evident or unanswerable in such a way as to move them from what was put forward as no more than a basis for scepticism to error of law.

83. This was not a case about the comparative viability of possible alternative schemes or their layout. Such an approach by the Council to the application was not necessary for a rational and lawful decision to be made on its application.

84. Accordingly, I reject this ground of challenge.

(3) The position of the WHTT on the project

85. Mr Coppel's next contention was that the Council represented the WHTT's position as firmer in relation to new facilities and the use of the allotment site than in fact it was. This meant that the Secretary of State treated the loss of new facilities to the hospital, without the allotment site, as more significant than the true facts warranted. Either the Council had misrepresented the known and true position, or the Secretary of State had misunderstood the evidence placed before him. The argument developed further in Mr Coppel's written reply than in his opening.

86. Mr Coppel said that the application did not mention the clinical review, which cast doubt over whether any hospital, services or land for them would be required in the future, and this omission was serious. He criticised the reference in the application document to the expansion "requirements" of the hospital when the hospital had no discernable requirements to which it was committed, however much it might have aspirations. A number of options were open to it but it did not as yet know what it wanted or if it could deliver what it might decide it wanted, or when; the lapse of time could be several years. It was untrue that the hospital had no "do nothing" option; and there never was going to be a new hospital. The Council had not told the Secretary of State that it was developing a masterplan which would provide flexibility for the hospital without the allotment land. Mr Coppel also relied on post-decision material to show what he contended was the position of the WHHT as at the time of the Council's application and of the decision.

87. I have set out extensively what the application document said about the nature of the facilities for the WHHT in the scheme, and the advantages which the inclusion of the allotments would bring in that respect. What is notable is that the document does not specify any particular facilities or services which are to be built on the allotment land nor any which their exclusion would preclude. It is cast in general language of "the most

suitable location", not the only location, for expansion of unidentified services and facilities in terms of cost effectiveness and optimal configuration. The section dealing with what would be placed on the allotment land is expressed in general terms for a longstanding project. The description of the first main benefit, which deals with the position of the WHHT, is in similar language.

88. First, I deal with whether the Secretary of State misunderstood what was in the application document. The advice to the Secretary of State did include in its summary of the importance of the Watford Health Campus project that it would secure "new hospital facilities". That is warranted by the material I have set out from the application document. There is nothing further in the Decision Letter of relevance to this issue beyond the paragraphs I have already cited. I am wholly unpersuaded that the Secretary of State misunderstood what the application document was saying about the hospital's need for the allotments site's inclusion in the scheme. The Secretary of State was well able to understand what was intended to be conveyed by the word "requirements" in the context of the surrounding explanatory material in the application. Nor would the absence of a "do nothing " option have conveyed to him that the inclusion of the allotment site was the only way in which new hospital facilities for Watford would be provided. That was not what the application document said; it said that there had to be some hospital development; that would be best provided by further or new facilities south of the existing site rather than on the existing site; the 2007 plan would not now work. But the WHHT could not just leave things as they were.

89. Second, I consider whether the application document, in the use of the words criticised by Mr Coppel, was misleading about the WHHT's true position. Mr Green contended that the evidence showed the commitment and involvement of the WHHT in the scheme, and the accuracy of what the application said about its position. Mr Lewis's first statement pointed out that the Health Campus Project was not taken forward in 2010 "mainly because of the change in potential financing options for Watford Hospital". The 2010 masterplan had been predicated on PFI financing but with the change of Government that was no longer available, which meant that the WHHT and the Council as the two main public sector partners in the scheme had to examine how best to deliver the Campus project in that changed climate. It was that which led to the procurement exercise to find a private sector partner able to provide expertise and finance to take it forward and that had led to the involvement of Kier.

90. The WHHT was a member of the operations group and attended partnership board meetings; it was contributing £9m to infrastructure development, and was a party to the Campus agreement of 18 June 2013 in which it committed certain of its land to the development; it had approved the LABV business plan at financial close and chaired the Campus forum. In 2012, the WHHT had published letters setting out the importance of the allotment site to provide the flexible space needed for the Trust's expansion.

91. The Project Director, according to Mr Lewis, had similarly been keen in November 2013 to ensure that notwithstanding the costs and revenue problems, the planning application would afford WHHT the flexibility to develop its strategy. Mr Farnsworth, a project officer for this project employed by the Council, said that the WHHT had been represented in design meetings in respect of the location and size of proposed new

buildings which had led to an update at a meeting on 1 August 2013. A further email had been provided to the LABV dated 13 December 2013 in respect of their requirements. The Operational Board Report of the Watford Health Campus LABV of 11 December 2013 received an update on the masterplan, which said that it maintained "flexibility for WHHT regardless of whether the allotments are appropriated following JR or not based on the existing [2010] consent". The Operations Group meetings in October 2013 and January 2014, were told the same. The planning strategy involved two applications "to safeguard against JR".

92. The statement of Ms Robson, Partnerships and Performance section head for the Council, exhibited an exchange of emails in August 2013, recognising that the two letters of support from the WHHT which would be in the current application would be a little out of date and seeking from WHHT an updated letter. That is the letter to which the application refers but which appears never to have come, although the WHHT said it was willing to provide one. That notwithstanding, her evidence was that the Trust was a committed partner on public record in support of the scheme.

93. To make that good, she referred to a letter from the WHHT Chief Executive dated 24 January 2014 saying that it was "absolutely clear that we are 100% committed to the project as we believe it offers significant benefits for our patients, staff and local people". The detail of this would depend upon the conclusion of the clinical strategy review.

94. In January 2014 the Associate Director for Strategic Development at the WHTT had said that it was not "absolutely certain" that the main hospital for West Hertfordshire would remain in Watford. The Trust was not in a position to redevelop any hospital buildings because it had not got the funds; "the Campus was about the facilities around the hospital". Currently it was not in a position to develop its facilities because it lacked DoH permission and had yet to secure funding, but the Trust was committed to providing new hospital facilities.

95. In April 2014 the Watford Observer reported that the Chief Executive of the WHHT had said that the scheme was giving the hospital "flexibility to redevelop". The Watford Observer on 22 May 2014 reported the Mayor of Watford as saying that "an actual brand-spanking new plonked-on the site hospital is highly unlikely." The original aspiration for a new 600 bed hospital in the development "would not be realised in view of the WHHT deficit". She said that the Trust had made it quite clear that that was its position. She accepted that this was a change from what she had said earlier, because circumstances had changed. She said that the position of the WHHT was that it was intending to have new facilities, given that its aspiration for a new hospital was highly unlikely. There would be new hospital buildings which would still be at the heart of the scheme, although the current plans only allocated space for future hospital buildings when the Trust's financial situation improved.

96. Mr Lewis accepted, in his third witness statement, that there were no firm current construction plans for the hospital, but asserted that the hospital was "absolutely clear that its buildings are not fit for purpose and the optimum space to safeguard for redevelopment is the allotment land and that it will, post its review of its clinical strategy,

set out its plans very clearly".

97. A letter dated 16 June 2014 in support of the current planning application for the Health Campus Project said that future expansion zones had been provided within the planning applications to safeguard land which enabled the WHHT "to develop an appropriate strategy for an efficient and effective hospital layout". The WHHT had worked closely alongside the project to develop these plans and to safeguard space in the optimum locations.

98. Mr Farnsworth, describing the development of the masterplan after the Secretary of State's decision and its evolution into the planning applications, described how the plans for the redevelopment or expansion of the hospital were being finalised within the WHHT's clinical strategy expected to be published in 2015. The WHHT had never suggested to the Council that its plans had changed; and he too referred to their letter in support of the planning application.

99. Mr Lewis, in his second witness statement of 26 June 2014, pointed to the limitation on the information which WHHT was able to provide whilst its clinical strategy was developed because of the impact of the strategy on cash flow and viability. But it had confirmed that without the allotments there would be sub-optimal expansion land for the Trust. The clinical strategy review covered the three hospital sites of the Trust and they did not want to pre-empt it by developing plans for any one particular site.

100. I shall assume that the information above was not materially different from that known to the Council at the time of its application so far as it concerns the requirements or aspirations of the WHHT, both in terms of certainty of proceeding and the specificity of the forms of hospital development for the allotment site, although clearly the masterplan has evolved since both application and decision, and there is now a planning application for the scheme with the allotments, and without.

101. Taking that position as the most favourable to the Claimants and the evidence does not permit a more refined analysis of what was known and when, I cannot conclude that the Secretary of State was misled by the Council as contended by Mr Coppel.

102. In summary, what this shows is that, although the precise nature of the facilities which would be provided on the allotment site was unknown and will not be known until the conclusion of the clinical strategy review, the WHHT foresaw the need to expand its facilities or re-provide facilities whether currently at Watford General Hospital or not, and has seen that need throughout the process. It has always seen some redevelopment of the outdated Watford General Hospital buildings as required, which will require space into which the facilities can be decanted and reprovided, so that the whole site can be reorganised, whether for an entity in its own right or as part of a larger reorganisation covering a number of sites. The most which can be said is that the WHHT does not know what specific facilities and services it can provide in pursuit of its intentions, but the inclusion of the allotment land is needed for optimal expansion whatever its form, given its proximity to the existing hospital. That, in my judgment, is all adequately conveyed in the application document, as the basis for the inclusion of the allotment land partly for

the hospital.

103. There has been a change in the WHHT's ability to achieve its one time desire for a wholly new hospital on the Watford site; when the WHHT recognised that that could not be achieved is not clear. However, the application document is not predicated on such a new 600 bed hospital on the site; facilitating that specific form of hospital development, and that alone, is not the justification at all for the inclusion of the allotment land. Rather its inclusion is predicated on the need for optimal expansion, and flexible provision of hospital facilities and services, unspecified in nature, for a more general improvement. I accept that the WHHT is far from specific as to what it proposes for the allotment site, and indeed for the hospital as a whole, but it is also clear, with obvious justification, that the hospital needs to develop, and that this land is well located to assist the provision of facilities and services, whatever likely form this provision takes.

104. The Secretary of State did not misunderstand and was not misled. I see no error of law in this third aspect of Mr Coppel's primary submission.

(4) The significance of changes to the scheme and its justification

(a) The position of the WHHT

105. I do not consider that there has been any significant change in WHHT's position. But I do not consider that a significant change arising after the s8 consent decision could make it unlawful. I have no sound evidence of a significant change before that date which should have been relayed to the Secretary of State, but which was not.

(b) Housing numbers

106. Mr Coppell contended that the Secretary of State had been misled over the number of houses which the scheme involved. In the application document, the Council referred to the final masterplan delivering a "range of around 600 good quality homes, including much needed affordable and family housing". Later, the same document summed the scheme contents as providing "circa 650" residential units over 15 plus years. Mr Coppell alleged that, in November 2013, between the application being lodged and the decision, the number of residential units proposed had increased from 600/650 to 750, with a beneficial effect on the viability of the scheme without the allotment housing. That should have led to a reconsideration of the need for the allotments to achieve or improve viability. Although Mr Coppel advanced no particular submissions about the legal framework for the consideration of whether proposed, as opposed to actual, changes between the date of application and decision were material, it remained his position throughout that the Secretary of State ought to have been told of the position as at the date of his decision, to avoid his making a decision in ignorance of a material consideration.

107. Mr Lewis exhibited an email from the Project Director of 10 October 2013 showing that in consequence of the lack of viability of the pre-let offices and the loss of the multi-

storey car park, the increased costs and reduced revenue "associated with the current iteration of the masterplan are currently generating some significant viability issues on the Campus". Further work was required to reduce the construction costs and to increase value before positive land values could be achieved. This meant that the design could not be frozen sufficiently to meet the then target planning submission date of 16 December 2013.

108. Mr Lewis, in his first statement, explained this further. An analysis of "Cost Considerations Through Design Evolution" dated 12 November 2013 noted that changes to residential car parking policy, increasing the car parking required, would not benefit the scheme. It was looking to reduce the car parking provision and to reduce the percentage of affordable family housing. This document, disclosed shortly before the hearing, shows that although the family housing on the allotment land was an advantage financially, the scheme was still "suffering viability issues" and the LABV should seek to reduce costs and increase revenues.

109. The masterplan was considered at monthly Operational Board meetings between August and December 2013. It is the Partnership Board above the Operational Board, which has the formal executive power in the LABV. The Council Cabinet has the executive power of the Council.

110. Mr Farnsworth's evidence for the Council was that the first documentary mention he could find of a housing figure greater than 650 was in an email dated 27 November 2013 to him from Kier, referring to 723 units. A report of 11 December 2013 to the LABV's Operational Board confirmed that the numbers had gone up to about 750. This was approved by the Partnership Board on 19 December 2013, with revised drawings, and presented to the Mayor and Cabinet on 6 January 2014, which approved it for public consultation. The Secretary of State was not told that this change was being contemplated.

111. Mr Lewis said, in his third witness statement, that the position was now worse than in the Grant Thornton March 2013 Report, without allotments, which informed the Council's submission to the Secretary of State. Grant Thornton have provided to the Council a letter dated 17 July 2014, which refers to the reduction in land value and total profit available, reducing the returns to the Council even from those anticipated in 2013, as I understand it.

112. The Secretary of State's decision preceded, by one day, the decision by the Partnership Board to approve the increase in houses to 750. It was however, a proposal which had been approved earlier at lower levels in the LLP. By 11 December 2013, the issue was to be reported to the Board on 18 December, with a decision imminent, and inferentially no controversy to impede approval.

113. What are the legal implications of the fact that the applicant did not tell the Secretary of State how the scheme was evolving in this respect? First, did the fact that no final decision had been taken mean that the potential for change on this aspect could not be material in law? The Council's point was not that it would not have told the Secretary of

State about the increase in housing had it been finalised before the decision; rather it was that the finalising of the change, at least in the masterplan, came too late to tell him. I accept, as a general proposition, that it would be unrealistic to expect every scheme change, mooted or approved, or change in circumstance to be placed before the Secretary of State. The date of application however does not in law crystallise all material considerations. The Secretary of State knew that the scheme was to evolve over the period of decision-making, and indeed thereafter, but that does not prevent particular actual or potential changes as at the date of decision being material factors for the decision itself. The fact that a potential change of importance has gone far through the internal approval process of the applicant can also be a material consideration, depending on the circumstances. The precise date at which the applicant's formal decision is taken cannot be crucial as to whether the Secretary of State has made his own decision in ignorance of a material factor.

114. I am satisfied that, if the potential change related to an issue of significance for the case put forward in the application, then the fact that it was close to being resolved upon is a material consideration for the Secretary of State's decision: should an exception to policy be made? Should he wait until a final decision has been reached? Should he now seek further information in order to reach a rational decision? A potential change is a material consideration if it could reasonably have affected the decision, if it is a point which a reasonable decision-maker ought to have ascertained before making a rational decision. Suppose that the proposal before the Board was that there should be no housing on the allotment site; it is inconceivable that that would be immaterial until a final decision.

115. Second, and this overlaps with the first issue, was this proposed change material in the sense that it could have affected the decision? In my judgement, it was. The fact that the housing figures were likely to be increased without the allotment site, by more than the housing envisaged on the allotment site is significant and material; since it has not been contended that the increase included housing on the allotment site. Family housing itself, regardless of viability, was also a main reason for taking the allotments.

116. This would not have been material only at the point of final approval for inclusion in the masterplan. The Secretary of State might have decided to await the final decision, or dismissed the point, or asked to see an analysis of its effect. The Secretary of State would also then have been told what effect that increase, taken by itself, would have on the viability of the scheme, and the case for the inclusion of the allotments. I accept that there was no updated viability analysis. He may or may not have accepted the significance of what the Council told him of changes adverse to the scheme's viability; inferentially the increase in housing numbers improved it. He might have been concerned that there was now anxiety over the scheme viability even with the allotments. He would then have been able to judge how important that was. It may not have altered the calculations, or balance of advantage, in the eyes of the Council, particularly in the light of other considerations of which the Secretary of State was unaware and unable to judge. But he had been asked to grant consent on the basis of a reasonably clearly stated number of family houses and other residential units. I judge that it could have reasonably affected the approach and decision of the Secretary of State, and so was a material consideration.

117. Third, what is the significance of the fact that the Secretary of State did not know of it? This point fits the framework of *E v SSHD* [2004] EWCA Civ 49: there was an established, objectively verifiable fact, existing at the time of decision, material to the decision, but not known to the decision-maker as a result of a mistake for which the prejudiced party was not responsible. The established fact here was not that a change was being considered; it was that a potentially significant change had reached the stage of report to the Board, with decision imminent, and inferentially, no controversy about approval.

118. Fourth, there is another way in which it can be put in the light of the Council's knowledge of the evolving position. The process of application, representation and decision, involves the decision-maker assuming, and he is entitled to assume, that he has been provided by the applicant with the relevant, up to date material, and that it is accurate, unless someone draws an issue to his attention. Indeed, it is difficult to see how the process of application, representation and decision can work without such an assumption. The applicant who maintains silence is in effect representing to the Secretary of State that there have been no relevant changes in the application up to the date of decision, at least where as here the factor is exclusively within the applicant's knowledge. Were there to be a change of significance between application and decision, he would expect to be informed of it, so that he made his decision on the basis of all material considerations, and not on the basis of some which were out of date. Extreme examples may illustrate the point without showing the limits of it: suppose that by the decision date the WHHT no longer needed the allotment land for its purposes. It is inconceivable that the Council could have taken advantage of a decision to consent to appropriation on the basis that it had needed the land at the time of the application. There would have been a failure on the part of the Secretary of State, albeit unintentionally, to take account of a material consideration. I do not see this as requiring disclosure on the basis of utmost good faith, nor is it the same as relying on an unknown inconvertible fact. The decision is based on a clear but implicit consideration that there have been no changes of materiality since the application was made. If that is wrong, the Secretary of State has relied upon an incorrect but material consideration.

119. The Council's further answer appears to be that there were countervailing factors which served to undermine viability, just as the increased housing was improving it. That is as may be, but the question is not how the Council then saw it or now sees it, but whether the Secretary of State ought to have known of it so that he could have the opportunity of reaching his own judgment on the point. I bear in mind also that there were opposing allotment holders asking him not to make an exception to his policy in relation to s8 consent.

120. The Grant Thornton letter of 17 July 2014 does not warrant the exercise of discretion against quashing the decision. There may be worse problems with viability than in September 2013, rather as Mr Lewis' first statement suggested, but that gives rise to further questions which the Secretary of State might have been in a position to consider, whatever conclusion he might come to on them, had he been told how potential masterplan changes were progressing.

(c)Development in the flood plain

121. Mr Coppel made much the same sort of point about the way in which the problem of development in the flood plain had been overcome, with the agreement of the Environment Agency. The Secretary of State had not been informed about this change, which, Mr Coppel submitted, undermined the case for the appropriation of the allotments and made the scheme's viability less dependant on housing on the allotment site. The flood plain had been seen in the application document as inhibiting the provision of the family housing, which therefore needed to be developed on the allotment land.

122. Mr Lewis gave evidence about the evolution of the process. On 10 September 2013 notes of a project meeting show that the flood alleviation work could be changed through an expanded culvert. On 9 October 2013, the scheme Operations Group meeting had been told that a revised flood mitigation strategy was being reviewed with the Environment Agency bringing the residential area named "Lakeside" out of the flood zone. On 13 November 2013, the Operations Board was told that discussions were ongoing but, if agreed, it would take all of the housing zones out of the flood plain. At the meeting on 11 December 2013, these discussions were still continuing. The Agency's acceptance of the solution is referred to in the Board report for a meeting on 22 January 2014. I accept that the Secretary of State was not informed of this development. As this conclusion was not known at the time of the s8 application, the Agency's position did not feature in it, according to Mr Lewis.

123. Mr Lewis explained a little more of the significance of the change: there would still be flats on the area most at risk of flooding and the flexibility was not significantly greater given the constraints. I see him as saying that the change is useful but not of great significance to the Council's case for the allotments, as he sees it. The number of flats shown in the flood plain had not altered.

124. Ms Ahrens, on behalf of the Claimants, said that she was told at a public consultation, by someone whom she thought to be from Kier, that in the light of the new alleviation works there would be some 30 houses on the flood plain area, around its perimeter.

125. I do not regard this change as having attained a sufficient degree of certainty by 18 December 2013 for its potential to be material. The mere fact of discussions which might if successful lead to a change, is not enough. There was no error of law in the Secretary of State's decision in his respect.

(d)The use of part of the allotment land for a car park

126. Mr Coppel's final point of this nature related to the fact that the LABV, and the Council, now intended that part of the allotment land should be used as a car park for Watford Football Club, a final indignity about which the Secretary of State was not informed. It certainly does not feature in the application document.

127. The Partnership Board meeting of 19 December 2013 received the masterplan drawings for the public consultation which showed 750 homes as deliverable and according to the minutes "also included the sliver of land on the allotments that could be used by the

Football Club for car parking as well as the 67 homes on the allotment land. It also confirmed the expansion space on the allotment land for the hospital's redevelopment". Mr Lewis' evidence was that he was not aware of the final masterplan showing a "sliver of land" illustratively indicated for Watford FC car parking until January 2014; and he was the officer responsible to the Council for the scheme. It was on 6 January 2014 that the LABV and the Mayor and Cabinet met to approve the masterplan for public consultation. He said that the masterplan merely showed that the scheme could accommodate the Club's requirements.

128. The proposal must have existed before 19 December 2013. The Council was unaware of it. I have no evidence that it would affect any figure or any part of the case put to the Secretary of State, beyond that there would be three fewer houses on the allotment land, from which a "sliver" of land which would be taken, which may be up to 20 percent of it. There is no evidence that the car parking affects the viability argument or public benefit arguments accepted by the Secretary of State, nor any obvious reason why that might be the case. I am not prepared to hold that he has ignored a material consideration.

Human rights

129. On the view which I have come to, this issue does not arise. The decision is not in accordance with law.

130. In the absence of the unlawfulness which I have found, I would have regarded the interference with the allotment holders agreed Article 1 Protocol 1 rights as justified and proportionate. I requested details of the tenancy, since that is germane to the argument on proportionality. The tenancy is normally terminable on 12 months' notice; s1(1) of the Allotment Act 1922, as amended. There are various obligations to cultivate, and the tenancy will be terminated after two years non-cultivation, putting it simply. The rent is £4.40 per 25 sq ms, increased annually by RPI.

131. I approach this as a deprivation rather than as a control of use case, though it has characteristics of the latter. That issue is debateable, but even if taken in favour of the allotment holders as a deprivation of property case, there was a perfectly sensible and sufficient public interest justification for taking the allotments, and there was adequate reprovision, although I accept that that would not have been taken up by some allotment holders, for reasons of travel, age, and starting again the years of toil to bring the plots to the standard of their existing ones. All would lose the benefits of their efforts which they could otherwise have reasonably expected to continue to enjoy. For these purposes, the Secretary of State had to ask himself whether the removal of the tenancies was justified by the public interests achieved. Recognising that there were human rights involved would not have altered the substance of the question he had to answer, and did. The balance was struck by him, but even without allowing any margin of discretion, I would have come to the same conclusion on proportionality as he did. Understanding the facts and arguments as did the original decision-maker, I would have concluded that the inclusion of the allotments made it more likely that the scheme would be implemented, and that, if implemented with the allotments it would be a better scheme, and that the appropriation was proportionate.

132. I am grateful to Ms Leventhal for identifying *A v Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706 for the analysis provided by Beatson LJ, paragraphs 67-91, of the difficult issue of how to square the function of review with the obligation to take into account, in the judgment of proportionality, material which may not have been before the decision-maker. In the end, I do not need to pursue it. In reality, there may be a later stage at which proportionality has to be judged and that is the stage of appropriation itself. This decision empowers the Council to appropriate the allotments; it is not the appropriation itself. It may not be sufficient for the Council to consider the circumstances as at the date of its application or as at the date of decision but as they stand when appropriation takes place. The real effect or purpose of the appropriation may have moved on in changed circumstances; and fall outside the intendment of the consent.

133. I do not accept that the nature of the decision to grant consent, in this case, nor the A1P1 argument, required the Secretary of State to call for, or the Court to consider, a specific alternative version of the scheme without the allotments, with a comparative viability assessment. That is not to say that a clear picture of what would happen with and without the allotments in terms of design, scheme content and viability would have been irrelevant. But that is not a necessary form of presentation for a lawful judgment on proportionality or justification to be made on the facts of this case.

The request to reconsider the December 2013 decision

134. The Claimants' solicitor's letter dated 3 July 2014 requested the Secretary of State to reconsider his decision on the basis that it was clear that his decision was based on material errors of fact. The first was that the benefits of the scheme would not be realised without the appropriation of the allotments; for this the Claimants relied on witness statements by Mr Moore, Ms England and Ms Murray, the Council's public statements in the press after December 2013 the reports of which Mr Moore exhibited, and the Operation Group minutes for the period September 2013 to January 2014, disclosed pursuant to the Order of Collins J on 20 June 2014, referring to provision for the scheme to go ahead with or without the allotments, and the flexibility for doing so. The second group of material errors also largely related to events after the December 2013 decision: the masterplan published weeks after the decision was said to be materially different from that submitted to the Secretary of State, and it was asserted that "These differences render the risk projections inaccurate." These differences included the 750 rather than 650 homes, no multi-story car park, and no pre-let offices for the hospital, and the new Watford FC car park on part of the allotment site. Revised cost projections had not been placed before the Secretary of State.

135. The Secretary of State refused the request on the grounds that he was functus officio, that he could not review his own decision and that there had been no material error. In my judgment, the Secretary of State was functus officio. He had granted his consent; there is no provision for that to neither be revocable, nor can his decision be regarded as a species of continuing decision up to the point of actual appropriation. It was a once and for all decision. The Council was entitled to act on it at any time. The question of material error is for the Court. I have dealt with it. I do not permit the informal application to amend the claim.

Conclusion

136. For the reasons which I have given, albeit on quite a narrow ground, this decision is quashed**.**