

Case No: C1/2015/2785

Neutral Citation Number: [2016] EWCA Civ 169  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM QBD, Planning Court**  
**Mr Justice Dove**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/03/2016

**Before:**

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**LORD JUSTICE LONGMORE**  
and  
**LORD JUSTICE LEWISON**

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**Between:**

	<b>JAMES JOSEPH HORADA (ON BEHALF OF THE SHEPHERD'S BUSH MARKET TENANTS' ASSOCIATION) &amp; OTHERS</b>	<b><u>Appellants</u></b>
	<b>- and -</b>	
	<b>SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT AND OTHERS</b>	<b><u>Respondents</u></b>

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**David Wolfe QC** (instructed by **Leigh Day**) for the **Appellants**

**Mr Charles Banner** (instructed by the **Government Legal Department**) for the 1<sup>st</sup>  
**Defendant; Rupert Warren QC** (instructed by **Gowling Wlg (UK) Llp**) for the interested  
**party**

Hearing date: 3 March 2016

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**Judgment** Lord Justice Lewison:

1. Everyone agrees that Shepherd's Bush Market is in need of regeneration. It has been going since 1914 and is in need of serious upgrading. The market is part of the social fabric of the area, and provides a retail offer that differs from and is complementary to that offered by Westfield and other retail property in and around Shepherd's Bush. The

character of the market is one of small independent traders providing a diverse mix of products in food, fashion and household, mainly to the local population. It provides a social function to the local community. It is ethnically diverse in its nature and offers the opportunity for independent businesses to trade in an affordable environment not found elsewhere in the area. Within the market there are 137 separate retail pitches, some housed in railway arches, some in shops and others in stalls occupying the central spine and eastern side of the market.

2. The importance of the market is recognised in the planning policies adopted by Hammersmith and Fulham LBC ("the Council"). Policy WCOA 3 states:

"Shepherds Bush Market and adjacent land

Regeneration of the market and other adjacent land to create a vibrant mixed use town centre development of small shops, market stalls, leisure uses, residential and possibly offices; in accordance with the Shepherds Bush Market Supplementary Planning Document. Development should encourage small independent retailers and accommodate existing market traders."

3. The planning framework accompanying this policy, which the Council adopted on 23 October 2013, recognised that any redevelopment scheme should repair and improve the market's physical fabric, expand the diversity of retail and:

"... crucially maintains existing traders and provides them with the security to ensure that the market can continue to operate without interruption and serve existing customers and communities."

4. In order to promote this planning policy on 30 March 2012 the Council granted outline planning permission for the phased redevelopment of the market as part of a mixed-use scheme. The overall development was described as:

"... phased redevelopment of Shepherd's Bush Market and adjoining land comprising the demolition of existing buildings, the refurbishment and enhancement of the market, and the construction of new buildings ranging from 2–9 storeys in height (plus basement) to provide up to 212 residential units (up to 27,977sqm); and up to 14,052sq.m of non-residential floorspace comprising up to 6,000sqm of market/retail floorspace (Class A1), up to 4,000sqm floorspace of Food and Drink Uses (Classes A3/A5), and up to 4,052sq.m of associated servicing facilities and ancillary uses; including provision of landscaping and amenity/public space; access and parking (up to 85 vehicular

spaces), up to 457 cycle parking spaces and associated works.”

5. The granted permission was subject to a number of conditions, of which the most important for present purposes were conditions 6 and 7. They said:

“6) Except in relation to the Drainage Works, no development shall commence until details of the Market Traders stalls and canopy design has been submitted to and approved in writing by the Local Planning Authority. The approved stalls and canopies shall be implemented before the stalls are occupied and shall be retained thereafter for the lifetime of the development.

7) No demolition or construction works shall commence until details of a market management plan have been submitted to and approved in writing by the Local Planning Authority. The market management plan will include, but is not limited to: timeline of the Drainage Works, operating hours, security, service charge, rent collection, tenant support, marketing and promotions. The contents of the market management plan are to be agreed with the Local Planning Authority prior to the lodgement of the application to discharge this condition. The development shall be carried [sic] and operated out in accordance with the approved details.”

6. In addition the developer, Orion Shepherd’s Bush Ltd (“Orion”), entered into a section 106 agreement with the Council. The most important part of that agreement for the purposes of this appeal was Schedule 15. Paragraph 2 required the owner (which for practical purposes can be taken to be Orion) to consult with traders to establish a Shepherds Bush Market Management Steering Group; and to “have regard” to the views of that group. Paragraph 4 imposed a rent freeze for the duration of the works. Paragraph 6 limited increases in service charge during that same period to 6 per cent per annum. Paragraph 7 required Orion, following consultation with the Shepherds Bush Market Management Steering Group, to adopt a lettings policy. The objects of the letting policy were to promote:

“7.1.1. the diverse nature and offerings within the market, including the uses and mix of business, to include specialisms in food, fabrics, furnishings, fashion and household goods within the market and that it remains a location for local and/or independent businesses and the goods on offer are appropriate to the market customer;

7.1.2. the regeneration of the market and improve its economic sustainability;

7.1.3. the nature and unique character of the market and that the

market remains a location for local and or independent businesses by way of:

7.1.3.1. the retention of existing traders;

7.1.3.2. the setting [of] criteria for attracting and selecting new local independent traders; and

7.1.3.3. the setting of rent and service charges levels on lease renewals and new leases will be affordable for small local businesses (entry-level)..."

7. Paragraphs 7.3 and 7.4 provided:

"7.3. The Owner shall provide no less than twenty-five (25) stalls within Shepherds Bush Market to be let or licensed on terms and conditions conducive to attracting local small-to-medium-enterprises and entrepreneurs, including those from ethnic communities seeking low-cost entry to business start-ups, having regard to the Shepherds Bush Market Lettings Policy

7.4. The Shepherds Bush Market Lettings Policy shall provide for a proportion of available units to be let on shorter term/periodic tenancies or licenses and at rents or fees designed to provide an opportunity for local small-to-medium-enterprises and entrepreneurs including those from ethnic communities seeking low-cost entry to business start-up."

8. Paragraph 8 required the setting up of a business continuity fund to meet claims for losses suffered as a result of the works.

9. In 2013 the Council made the London Borough of Hammersmith and Fulham (Shepherds Bush Market Area) Compulsory Purchase Order 2013 ("the CPO"). The order was made under the power given by section 226 (1) (a) of the Town and Country Planning Act 1990 to facilitate the development or redevelopment of land. Section 226 (1A) provides:

"But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects—

(a) the promotion or improvement of the economic well-being of their area;

- (b) the promotion or improvement of the social well-being of their area;
- (c) the promotion or improvement of the environmental well-being of their area.”

10. The purpose of the CPO was described thus:

“The CPO is jointly promoted by the Council and the developer. The Council has made the Order to regenerate the area of Shepherds Bush Market and to secure its future in the long-term. The scheme is intended to facilitate regeneration of the market through a mixed-use development designed to *“improve and expand the [Market's] trading space, increase the variety within the market area, and establish a long-term management plan to promote and sustain the market.”* The intention is to re-establish the market as a popular, sustainable and attractive London street market and a successful component of the Shepherds Bush Town Centre, which is coming under increasing competition from other developments within the Borough.”

11. Following over 200 objections to the CPO a planning inspector (Ms Ava Wood) held a public inquiry over the course of 10 days in 2013. The purpose of the inquiry was for her to make recommendations to the Secretary of State whether to confirm the CPO or not. It is long-standing policy (in order to secure compliance with the law) that a compulsory purchase order should only be made where there is a compelling case in the public interest. The overall question for the inspector (and for the Secretary of State) was whether that compelling case had been made out.

12. In paragraph [12.2] of her report the inspector set out that test and said that she proposed to address it under a number of heads:

- i) Does the purpose for which the land is to be acquired fit in with the adopted planning framework for the area? She concluded at [12.2.13] that it did.
- ii) Would it contribute to the economic, social or environmental well-being of the area? She concluded at [12.6.10] that it had the potential to do so; but said at [12.6.11] that those benefits would only materialise if the essential ingredients and uniqueness of the Market were retained. She concluded at [12.6.36] that the scheme did not provide adequate mechanisms for retaining the number, mix and diversity of traders, with the consequence that the scheme would not fully achieve the economic, social or environmental well-being sought.

- iii) Could the purpose be achieved by other means? She concluded at [12.11.1] that the Orion scheme was the only deliverable and viable option.

13. As the judge said, therefore, it was the inspector's conclusion on the second question that was "the fulcrum" of her recommendation that the CPO should not be confirmed. In section 4 of her report the inspector summarised the case for the Council and Orion. That case included the following elements:

"4.3.2 The character of the market is one of small independent traders providing a diverse mix of products in food, fashion and household, mainly to the local population, combined with a specialism in textiles and haberdashery which attracts customers from a much wider area. It is ethnically diverse in its nature and offers the opportunity for independent businesses to trade in an affordable environment not found elsewhere in the area.

4.3.9 The market also offers opportunities not available elsewhere for the local population (particularly among the ethnic communities) to establish small and start-up businesses in affordable premises, a role that will be enhanced by the regeneration scheme.

4.7.1 The Council has always maintained that protection and continued operation of existing traders is its central objective.

4.7.5 It was crucial for the Council to be assured that there were sufficient commitments from the developer to ensure retention of existing traders in the market and Goldhawk Road."

14. Affordability and the continuing operation of existing traders were therefore key components of the scheme. It is worth noting that what the Council and Orion relied on as giving protection to existing traders were the provisions of schedules 15 and 16 to the section 106 agreement. It was not suggested in the inspector's summary of the case for the Council and Orion that any particular additional protection for existing traders was to be found in the conditions attached to the planning permission.

15. In section 7.1 of her report the inspector summarised the objections made by the Shepherd's Bush Market Tenants' Association. They included:

"7.1.5 ... The owners have already begun to approach leaseholders asking for an exorbitant rent increase of £30 per sqft per annum. This is a real threat to tenants' livelihoods, as many businesses presently pay only £10 per sqft.

7.1.7 No funds are to be directed towards repairing or

refurbishing the interior of the arches. The arches are iconic to Shepherd's Bush market and its key original feature...

7.1.8 SBMTA and stall holders have repeatedly requested design proposals for the new stalls. But none has been forthcoming. Tenants are concerned that replacement stalls will not meet their needs.

7.1.13 ... The CPO will deprive members of any further trading opportunities, as members are only able to trade where rents are affordable. There is nowhere else for traders to go should the rents become affordable beyond reach."

16. Section 12 of the report contained the inspector's conclusions. It is necessary to set out large parts of it:

"12.6.10. Overall, the Orion redevelopment proposal has the potential to bring about significant improvements in the physical environment of the area, boost the area's economy and generate the social benefits associated with an improved market. The CPO would equally contribute to the area's wellbeing as an essential tool in facilitating delivery of those benefits.

12.6.11. The benefits described would only materialise if the essential ingredients and uniqueness of the market and the Goldhawk Road shops are retained. In other words, if the development provides the requisite financial as well as physical conditions for an independent, small-scale, diverse and ethnic mix of traders and shopkeepers to continue trading at the market and on the Goldhawk Road frontage. Those objectives rely on safeguards to ensure that existing businesses or new operators with similarly qualitative and diverse offerings are protected as far as possible during and after the redevelopment process. The effectiveness of Schedules 15 and 16 of the s106 Agreement is a vital element of the consented scheme in this regard and considered below."

17. She recorded at [12.6.12] that "[p]rotection and continued operation of existing businesses has been the Council's central objective". The Council was satisfied that there was sufficient protection and, after some initial ambivalence, the Mayor agreed. For market traders the protection lay in Schedule 15 to the section 106 agreement. At 12.6.14 she noted that a rent and service charge freeze would "provide a level of certainty during the construction period"; and at [12.6.15] that the letting policy would be "crucial to maintaining the unique nature of the market, and to retain as well as attract independent local retailers, through affordable rent levels." She referred to the requirement to establish a Continuity Fund and said at [12.6.16] that it would provide the necessary

protection against hardship and would provide financial certainty and assistance “during the interim period”.

18. The inspector then turned to consider condition 6. She pointed out that the form and details of the replacement stalls would only be confirmed when that condition was discharged and said at [12.6.17]:

“The stallholders therefore remain ignorant of the size, form, or positioning of replacement stalls. Equally, the sizes of retail units are unknown... Stall and shop holders will be offered new premises but not necessarily on a “like for like” basis.”

19. Her conclusion on that point at [12.6.18] was:

“Without knowledge of the replacement provision intended, the traders cannot fully comprehend their future, nor plan for it. That level of uncertainty is unacceptable and provides a poor basis for assessing the extent to which existing traders could or would relocate to the refurbished market. The s 106 provides no guarantees in that regard.”

20. She then commented on the very poor physical condition of the arches and said that they were “historically important elements of the market, forming the backbone to the trading environment.” She continued at [12.6.19]:

“Yet neither the Shepherds Bush Market Works (identified in the s 106) nor cost breakdown provided in evidence clarifies with any certainty that the arch units would be upgraded as part of the market refurbishment.”

21. She also said at 12.6.20 that the sketches images and examples referred to in the material supporting the planning application “give me little confidence that the replacement market will maintain the diversity and multi-ethnic culture of Shepherds Bush Market,” giving reasons for her conclusion. In essence she thought that what was proposed was much more up-market than the current Shepherd’s Bush market.

22. At [12.2.21] she said:

“The impasse with traders not wishing to engage due to lack of information and the developers unable to move forward without full knowledge of individual requirements is inhibiting progress. However binding/enforceable measures are needed to be assured that the replacement premises (stalls and shop units) would be suitable and affordable enough for traders to return to the site in



sufficient numbers and maintain the market's character. Moreover, businesses occupying the arch units must also be provided with the security that their premises would be upgraded to address the defects identified in the Parsons Brinkerhoff report and which fall within the owner's responsibility. In the absence of clear assurances along those lines, the social and environmental well-being sought is not likely to be achieved should the order be confirmed.”

23. She expressed her overall conclusion on this question as follows:

“12.6.36 The Orion scheme has been found by the Council (and the Mayor) to be policy compliant, as it would meet the London Plan and Core Strategy regenerative objectives. In doing so it has the potential to bring about the benefits described. Close examination of the evidence, however, has led me to conclude that the current Orion proposal lacks the mechanisms to be assured of retaining the number, mix and diversity of traders in the way explained above. They are vital to the distinctiveness of the market and the Goldhawk Road shops. Therefore, insofar as it would facilitate delivery of the redevelopment scheme promoted, the CPO would not fully achieve the social, economical and environmental well-being sought.”

24. In section 12.10 of her report the inspector drew the threads together. She referred to the protection offered by Article 1 of the First Protocol to the ECHR and to Article 8 of the ECHR. She referred to a number of measures that would be put in place for the protection of traders; but continued at [12.10.6]:

“12.10.6 All of that said, without full knowledge of the replacement accommodation in the new development, it is not possible to establish whether new trading conditions would be sufficiently affordable or suited to the needs of traders currently operating in the market. Lack of certainty regarding necessary upgrades to the arched premises also places a question mark over the long term trading and survival position of businesses occupying the arches. Equally, in the absence of measures to secure the affordability of replacement shop units, the commercial future of the Goldhawk Road shopkeepers cannot be assured. Without such certainties in place, there is some doubt in my mind whether the scheme granted permission (or any subsequent redevelopment proposal) could deliver on its promises of retaining if not all then the majority of traders and shopkeepers. They are vital to the market and to the vibrancy of

the area.

12.10.7 The order is not tied to any particular scheme but its purposes are not deliverable while the uncertainties highlighted prevail. The compelling reasons for it therefore fall away.”

25. She came to her final conclusion at [12.11.4]:

“12.11.4 As explained earlier, the guarantees and safeguards are not sufficiently robust to be assured that genuine opportunities exist for current traders or shopkeepers (or similarly diverse businesses) to continue trading in the market and Goldhawk Road. Without such assurances, there is a real risk that the market and replacement Goldhawk Road shops would not provide the ethnic diversity, independent or small scale retailing environment central to the appeal of this part of the town centre. While such uncertainties exist, the personal losses and widespread interference of private interests arising from confirmation of the order cannot be justified.”

26. A footnote to the first sentence of [12.11.4] referred back to paragraphs [12.6.18] to [12.6.21] which I have already quoted or summarised.
27. As a result the inspector recommended that the CPO should not be confirmed. Under rule 19 of the Compulsory Purchase (Inquiries Procedure) Rules 2007 the Secretary of State was required to give “notice of [his] decision and the reasons for it in writing.” This reflects the statutory duty to give reasons imposed on Ministers by section 10 of the Tribunals and Inquiries Act 1992.
28. The Secretary of State gave his written decision on 10 October 2014. He disagreed with the inspector. The key paragraphs of the decision letter are these:

“14 The Secretary of State has considered the Inspector's conclusions in relation to the extent the proposed purpose of The Order will contribute to the achievement of the economic, social or environmental well-being of the area at IR 12.6 at (IR 12.6.10). The Inspector concludes that overall the Orion proposal has the potential to bring about significant improvements in the physical environment of the area, boost the area's economy and generate the social benefits associated with an improved Market, with the order will equally contribute to the area's well-being as an essential tool in facilitating delivery of those benefits. The Inspector concludes (IR 12.6.11) that these benefits would only materialise if the essential ingredients and uniqueness of the

Market and the Goldhawk Road shops are retained and the development provides the requisite financial as well as physical conditions for an independent small scale, diverse, and ethnic mix of traders and shopkeepers to continue trading. The Inspector notes that these objectives rely on safeguards to ensure that existing businesses or new operators, with similarly qualitative and diverse offerings are protected as far as possible during and after the redevelopment process and that the effectiveness of Schedules 15 and 16 of the section 106 agreement are a vital element of the order scheme in this regard. The Inspector concludes at IR 12.6.36 that the order scheme would not fully achieve the social, economic or environmental well-being sought as it lacks the mechanisms to be assured of retaining the number mix and diversity of traders.

15 The Secretary of State has carefully considered the Inspector's conclusions on the order schemes contributions to well-being. The Secretary of State considers that sufficient safeguards are in place to ensure that regeneration of the market to create a vibrant mixed use town centre development will be achieved and that existing Market traders and shopkeepers or new operators with similarly qualitative and diverse offerings will be protected. The Secretary of State is satisfied that the Council will ensure that the policy requirements of WCOA3 will be met through a series of planning conditions that will be reviewed and approved by the Council and through the safeguards provided within the section 106 agreement which are enforceable by the Council. Therefore, the Secretary of State disagrees with the Inspector's conclusions and finds that the proposal will significantly contribute to the economic social and environmental well-being of the area.

...

21 The order should be confirmed only if there is a compelling case in the public interest to justify sufficiently the interference with the human rights of those with an interest in the land affected. The Secretary of State considers that the proposed purpose of the order, including the redevelopment and regeneration of the area, will significantly contribute to the achievement of the promotion or improvement of the economic, social and environmental wellbeing of the area. The Secretary of State considers that the purpose for which the land is being acquired fits in with the adopted planning framework for the area. The Secretary of State is satisfied that sufficient safeguards are in place to protect traders and shopkeepers through a series of planning conditions requiring the review and approval of the Council and through the section 106 agreement which can be

enforced by the Council to ensure that a development in line with the relevant planning framework can be delivered.

29. Paragraph [14] of the decision letter is the Secretary of State's understanding of the inspector's reasoning on the second question that she posed herself. Paragraph [15] contains his reasons for disagreeing with her answer to that question. To be a little more precise: the first sentence of that paragraph says that the Secretary of State has carefully considered the inspector's conclusion; the second and third sentences contain the Secretary of State's reasons for disagreeing, and the final sentence (introduced by the word "therefore") contains the Secretary of State's conclusion based on the two preceding sentences. It was not suggested that paragraph [21] of the decision letter added any material reasoning.
30. One undeniable fact is that the inspector recommended that the CPO should not be confirmed. We therefore need to ask: why? The first part of the answer is to identify what it was that the inspector thought the scheme ought to achieve. This, in my judgment, is to be found at [12.6.11] in which she said that the scheme had to provide "the requisite financial as well as physical conditions for an independent, small-scale, diverse and ethnic mix of traders and shopkeepers to continue trading at the market". Thus both financial and physical conditions were in play. It was, she said, necessary to protect both existing business and new operators "as far as possible *during* and *after* the redevelopment process". Schedule 15 to the section 106 agreement and the conditions attached to the planning permission were the mechanisms that she considered.
31. So far as financial conditions were concerned she found that the rent and service charge freeze would provide a level of certainty *during* the construction period. Since it was a freeze, that was clearly right. But since the rent and service charge freeze was time-limited, clearly it could offer no certainty after the construction period was over. Indeed the Council's case (recorded at [4.7.6]) was that once the construction period was over rent would "be determined by the market in the usual way". So she looked for mechanisms to provide what she regarded as necessary protection for existing traders after the construction period was over. At [12.5.17] she pointed out that the size of replacement premises was unknown. Since rent for retail property is charged at a rate per square foot, it is obvious that the size of a unit is a crucial factor in determining whether the rent is affordable. Her consideration of that aspect of financial conditions is at [12.2.21]. What she was looking for was "binding/enforceable measures ... to be assured that the replacement premises (stalls and shop units) would be ... affordable enough for traders to return to the site in sufficient numbers and maintain the market's character." She returned to the point at [12.10.6] where she said that it was not possible to establish whether "new trading conditions would be sufficiently affordable [for] the needs of traders currently operating in the market." She concluded that the guarantees and safeguards were not sufficiently robust to be assured that genuine opportunities existed for current traders to continue trading in the market. It is also important to stress that the inspector's concern was with the exiting traders. Since the question before her was not

merely a planning issue, but was the broader question whether a compelling case had been made out for expropriating the property rights of the existing traders, her concern with them was plainly justified. Moreover the Council's own case was that it was "crucial" to be "assured" that there were sufficient commitments from Orion "to ensure retention" of existing traders.

32. In dealing with the physical conditions the inspector focussed on the stalls and the arches. Her first point (at [12.6.17]) was that the traders did not know the size, form or positioning of the replacement stalls. She said at [12.6.18] that that "level of uncertainty" was unacceptable. As I have said, the size of the replacement stalls was clearly important to the affordability of replacement units because of the way in which retail rents are assessed. Then she turned to the arches. She pointed out at [12.6.19] that there was "no certainty" that the arches would be refurbished; and at [12.10.6] that without full knowledge that it was not possible to establish whether "new trading conditions would be suited to the needs of traders currently operating in the market. Lack of certainty regarding necessary upgrades to the arched premises also places a question mark over the long term trading and survival position of businesses occupying the arches."
33. Section 23 (2) of the Acquisition of Land Act 1981 entitles a person aggrieved by a CPO to challenge its validity in the High Court on the ground that a "relevant requirement" has not been complied with. A "relevant requirement" includes any requirement of rules made under the Tribunals and Inquiries Act 1992. The Compulsory Purchase (Inquiries Procedure) Rules 2007 were made under the Tribunals and Inquiries Act 1992; and consequently the duty to give reasons is a "relevant requirement". Where (as here) the challenge is based on a failure to comply with a relevant requirement, section 24 (2) of the 1981 Act empowers the court to grant relief if it is satisfied that the interests of the applicant have been "substantially prejudiced" by the failure to comply.
34. One of the purposes of requiring a decision maker to give reasons for his decision is so that those who are affected by the decision may themselves decide whether the decision is susceptible to legal challenge: *Save Britain's Heritage v No 1 Poultry Ltd* [1991] 1 WLR 153, 166. Thus in the well-known exposition of the content of the duty to give reasons in *South Bucks District Council and another v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 Lord Brown said at [36]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some

relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

35. The issue in that case was whether there were “very special circumstances” which outweighed the presumption against inappropriate development in the Green Belt, namely the retention by a Romany gypsy of a residential mobile home. In dealing with that issue Lord Brown said at [41]:

“To my mind the inspector's reasoning was both clear and ample. Here was a woman of 62 in serious ill-health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. All of this was fully explained in the decision letter (and, of course, described more fully still in the reports produced in evidence at the public inquiry). Should she be dispossessed from the site onto the roadside or should she be granted a limited personal planning permission? The inspector thought the latter, taking the view that Mrs Porter's “very special circumstances” “clearly outweighed” the environmental harm involved. Not everyone would have reached the same decision but there is no mystery as to what moved the inspector.”

36. In a case such as this one the Secretary of State is the primary decision maker. As Lang J said in *Wind Prospect Developments Ltd. v. Secretary of State for Communities and Local Government* [2014] EWHC 4041 (Admin) he is not reviewing or conducting an appeal against the inspector's decision. To paraphrase a famous saying: the inspector proposes; the Secretary of State disposes. Where the Secretary of State follows the inspector's recommendation it will be easy to infer that the Secretary of State has also adopted the inspector's reasoning. Is the position any different where the Secretary of State has disagreed with the inspector? In the *Wind Prospect* case Lang J was concerned with a recovered planning appeal, in which the inspector reported to the Secretary of

State, but the Secretary of State made the decision. At [38] she rejected the submission that the Secretary of State's duty to give reasons entailed "a detailed response to each step of the Inspector's reasoning, analysed paragraph by paragraph". At [39] she declined to impose "a standard which the Secretary of State must apply when disagreeing with the conclusions of an Inspector"; and followed Lord Bridge in *Save Britain's Heritage v No 1 Poultry Ltd* and Lord Brown in *South Bucks District Council and another v Porter (No 2)* by holding that "the degree of particularity required will depend entirely on the nature of the issues falling for decision."

37. There is, however, a corpus of authority that suggests that fuller reasons are required where the decision maker is disagreeing with a considered and reasoned recommendation. In *R (Ling) (Bridlington) Ltd v East Riding of Yorkshire County Council* [2006] EWHC 1604 (Admin) Sir Michael Harrison considered the adequacy of a summary of reasons for granting planning permission. He said at [50]:

"Fourthly, the adequacy of reasons for the grant of permission will depend on the circumstances of each case. The officer's report to committee will be a relevant consideration. If the officer's report recommended refusal and the members decided to grant permission, a fuller summary of reasons would be appropriate than would be the case where members had simply followed the officer's recommendation. In the latter case, a short summary may well be appropriate."

38. This was one of the paragraphs of his judgment that Sullivan LJ approved in *R (Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286 at [16]. That paragraph in Sir Michael's judgment was endorsed again by this court in *R (Telford Trustee No 1 Ltd and Telford Trustee No 2 Ltd) v Telford v Wrekin Council* [2011] EWCA Civ 896 at [23].

39. In *R (Siraj) v Kirklees Metropolitan Council* Sullivan LJ himself said at [15]:

"When considering the adequacy of summary reasons for a grant of planning permission, it is necessary to have regard to the surrounding circumstances, precisely because the reasons are an attempt to summarise the outcome of what has been a more extensive decision making process. For example, a fuller summary of the reasons for granting planning permission may well be necessary where the members have granted planning permission contrary to an officer's recommendation. In those circumstances, a member of the public with an interest in challenging the lawfulness of planning permission will not necessarily be able to ascertain from the officer's report whether, in granting planning permission, the members correctly interpreted the local policies and took all relevant matters into

account and disregarded irrelevant matters.”

40. He also contrasted the standard of reasoning to be expected from a local planning authority’s summary of reasons for the grant of planning permission and the (higher) standard to be expected from a decision letter of the Secretary of State. It is of course the case that a duty to give reasons does not entail a duty to give reasons for reasons; but nevertheless if disagreeing with an inspector’s recommendation the Secretary of State is, in my judgment, required to explain why he rejects the inspector’s view. Thus in *R (Cumbria CC) v Secretary of State for Transport* [1983] RTR 129, 135 Lord Lane CJ (with whom Ackner and Oliver LJ agreed) said:

“The material part of the decision letter was composed mainly, if not entirely, of bald assertions that the Secretary of State was not satisfied upon fact (a) or fact (b) or fact (c), without giving any reason upon which the lack of satisfaction was based. Such decision letters are unfair to the parties. The parties are unable to challenge the reasoning or the reasons, if any, which lay behind the decision. They are particularly reprehensible where the Secretary of State is differing from the commissioners and from the inspector who heard the appeal on matters of fact, as was the case here.”

41. It seems to me that this raises two questions as applied to this case:
- i) Did the Secretary of State correctly identify the principal important controversial issues; and if so
  - ii) Did he give adequate reasons for disagreeing with the inspector?
42. I have already said that the inspector’s concern was that there should be both financial and physical conditions both before and after the construction period to enable the mix of traders to continue trading at the market. She was satisfied that financial conditions were adequate during the construction period but not thereafter. She was not satisfied that she could be “assured” that replacement premises would be “affordable enough” for traders “to return in sufficient numbers”. That her emphasis was on existing traders returning to the market was confirmed by her repetition of her concern about the needs of traders “currently” operating in the market. The essential problem, as she saw it, was that rents would not be affordable for them.
43. Her concern about physical conditions was that the level of uncertainty was unacceptable; and that had a direct impact on the financial uncertainty for existing traders. She was also concerned that there was no guarantee that the arches would be put into an acceptable physical condition, even though they were the “backbone” of the



trading environment.

44. The inspector's ultimate conclusion was that the guarantees and safeguards were not sufficiently robust to be assured that genuine opportunities existed for current traders or shopkeepers (or similarly diverse businesses) to continue trading in the market. Her attention was, therefore, squarely focussed on the adequacies of the "guarantees and safeguards". The principal controversial issue, therefore, was whether the guarantees and safeguards were adequate.
45. Mr Banner, for the Secretary of State, and Mr Warren QC for Orion, argued that the decision letter was addressed to parties well aware of the issues involved and the arguments advanced; with the consequence that no further elucidation was required. Indeed Mr Banner submitted that the well-informed reader would have understood from paragraph [15] of the decision letter that the Secretary of State's reasons for his conclusions were:
  - i) Policy WCOA3 included the element of well-being necessary to satisfy at least one of the statutory objectives in section 226 (1A).
  - ii) The inspector had set the bar too high in requiring "assurance" or "certainty." Sufficient likelihood was the right test.
  - iii) The inspector had misunderstood the extent to which policy WCOA3 met the concerns that she expressed in the light of the fact that any application for consent for reserved matters would have to be decided by the Council in accordance with the development plan. That in turn meant that in considering, for example, details of the stalls under condition 7 of the planning permission, the Council would be bound to take into account the size of the proposed units and the consequent effect on rental levels.
  - iv) The lettings policy envisaged by paragraph 7 of Schedule 15 to the section 106 agreement had to be designed to promote both the unique character of the market and the retention of existing traders. In addition 25 units had to be offered at affordable rents, and those features of the letting policy amounted to a sufficient degree of rent control. The Council would be able to enforce compliance with the lettings policy by injunction.
  - v) The inspector was wrong to have thought that it was necessary for forward planning by traders for the details of replacement units to be "on the table" at the time of the inquiry. It was sufficient that the details would be known once approval under condition 7 of the planning permission had been given.

46. At one stage in his submissions Mr Banner also suggested that the refurbishment of the arches could be secured under condition 1 of the planning permission. I do not think that he persisted in that submission, and Mr Warren disavowed it. In the end Mr Banner accepted that the Secretary of State's reasoning did not touch the arches at all.
47. Mr Warren argued the point differently. He stressed the proposition that the standard of reasoning required by *South Bucks District Council and another v Porter (No 2)* was limited to a duty to consideration of the principal contested issues, and need not deal with every material consideration. What were the principal contested issues could be seen from the inspector's description of the way in which the various parties presented their respective cases to the inquiry. The question of financial safeguards and the physical concerns that the inspector had both as regards the arches and the replacement units were no more than "material considerations"; and did not need to be dealt with at all. The Secretary of State's decision was an evaluative judgment, based on exactly the same material as had been before the inspector. In those circumstances he was entitled to say no more than that he disagreed with her evaluation.
48. Let me quote again the two critical sentences in paragraph [15] of the decision letter:
- "The Secretary of State considers that sufficient safeguards are in place to ensure that regeneration of the market to create a vibrant mixed use town centre development will be achieved and that existing Market traders and shopkeepers or new operators with similarly qualitative and diverse offerings will be protected. The Secretary of State is satisfied that the Council will ensure that the policy requirements of WCOA3 will be met through a series of planning conditions that will be reviewed and approved by the Council and through the safeguards provided within the section 106 agreement which are enforceable by the Council."
49. I accept Mr Banner's submission that the decision letter must be taken to have been addressed to a well-informed readership. But in my view the reader of the decision letter would have had to have been not only well-informed but also psychic to have extracted from the two laconic sentences of paragraph [15] the elaborate chain of reasoning upon which Mr Banner relies. His reading of those two sentences seems to me to be far away from Lord Brown's exhortation to read decision letters "in a straightforward manner". Nor do I accept Mr Warren's submission that the matters which concerned the inspector can be downgraded to the status of material considerations which needed no explicit reasoning at all. They were, after all, the very reasons which persuaded the inspector to recommend that the CPO should not be confirmed.
50. Mr Warren submitted that paragraph [15] of the decision letter was couched in the classic language of an evaluative judgment; namely that the Secretary of State "considers" that the safeguards were "sufficient" to achieve the end in view. But the end in view, on the

Council's own case, was the protection and continued operation of existing traders which, it said, was its "central objective". In order to achieve that it was "crucial" for the Council to be "assured" that there were sufficient commitments from Orion to "ensure" retention of existing traders. The Council's case was never one of reasonable likelihood.

51. The Secretary of State's conclusions in paragraph [15] of the decision letter express the view that there are sufficient safeguards to ensure that "existing Market traders and shopkeepers or new operators with similarly qualitative and diverse offerings will be protected." It is by no means clear to me whether the Secretary of State was saying that the safeguards would enable existing traders to return in sufficient number to preserve the unique character of the market with the consequence that the inspector's concerns were unfounded; or whether he was saying that the position of existing traders did not matter because new operators with similarly qualitative and diverse offerings would be protected. The inspector's key concern about affordability was not mentioned at all, even though it was a hotly disputed part of the Council's case. Although the Secretary of State mentions policy WCOA 3 he does not attribute to it the significance that Mr Banner ascribes to it in meeting the objectives of section 226 (1A). It is also worth noting (although this is, perhaps, a small point) that whereas policy WCOA 3 says that development "should encourage small independent retailers *and* accommodate existing market traders" the Secretary of State's conclusion is that the safeguards will ensure that "existing Market traders and shopkeepers *or* new operators with similarly qualitative and diverse offerings will be protected". Nor does the Secretary of State explain *why* he disagreed with the inspector's appraisal of the adequacy of the guarantees and safeguards. All we know is that he disagreed.
52. The judge said at [40] to [42] that the inspector had not criticised or rejected the mechanisms in the section 106 agreement; and that the Secretary of State was in effect agreeing with the inspector. I disagree. If the inspector had not been critical of the section 106 agreement, it would be impossible to understand on what basis she recommended that the CPO not be confirmed. In my judgment the inspector was only satisfied with the section 106 agreement in so far as it related to the construction period. Her main point was that it was inadequate in the long term. If the judge was right about the Secretary of State's interpretation of the inspector's report, then I agree with Mr Wolfe QC that the Secretary of State misunderstood the report and did not, therefore, correctly identify one of the principal important controversial issues.
53. So far as the physical matters are concerned, the Secretary of State does not mention these explicitly in his rejection of the inspector's concerns. The inspector had referred to condition 6 of the planning permission but said that this produced an unacceptable level of uncertainty. She also expressed her concerns about the size of replacement units, not least because of the direct relationship between size and rent. She also thought that it was important that the arches should be put into an acceptable condition, but that there was no mechanism for achieving this. Once again it is unclear to me whether the view that the Secretary of State took was that there was certainty, with the consequence that the

inspector's concerns were unfounded; or that the level of uncertainty that the inspector thought was unacceptable was in fact an acceptable level. As far as the arches were concerned it is striking that the Secretary of State does not mention them at all. It is unclear to me whether the Secretary of State thought that they were unimportant, or accepted the inspector's view that they were important (the "backbone" of the trading environment) but thought that their upgrading could be assured, perhaps in the way that Mr Banner tentatively put forward. Again, we know that the Secretary of State disagreed with the inspector on the question of the replacement units and the arches, but we do not know why.

54. In short, although it is clear that the Secretary of State disagreed with the inspector's view that the guarantees and safeguards were inadequate he does not explain why he came to that conclusion. I do not consider that requiring a fuller explanation of his reasoning either amounts to requiring reasons for reasons, or that it requires a paragraph by paragraph rebuttal of the inspector's views. But it does require the Secretary of State to explain why he disagreed with the inspector, beyond merely stating his conclusion that he did. The two critical sentences in the decision letter are, in my judgment, little more than "bald assertions". The Secretary of State may have had perfectly good reasons for concluding that the guarantees and safeguards were adequate. The problem is that we do not know what they were. In those circumstances I consider that the traders have been substantially prejudiced by a failure to comply with a relevant requirement.
55. I would allow the appeal. It was agreed at the hearing of the appeal that the question of the appropriate form of relief would be decided later.

**Lord Justice Longmore:**

56. I agree with both judgments.

**Lord Thomas of Cwmgiedd, CJ:**

57. I also agree. I add a short observation to underline how important it is that reasons for decisions should be explained in terms the citizen affected can understand. Although the citizen can be taken to know the factual background and in this sense be well informed, the citizen affected by a decision is entitled to an explanation of the reasons in plain English which the citizen can understand.
58. It is very easy for any expert, whether the person be a lawyer or other professional, to speak in terms that are familiar to other experts in the field. That is, however, not a permissible approach when explaining the reasons for a decision to others, however well informed those others may be in the sense I have described. Experts must therefore guard against speaking in terms which can only be understood through the intermediary of a lawyer or other professional.

59. In this case, it was particularly important that a proper and easy to understand explanation be given by the Secretary of State for rejecting the Inspector's recommendation. The livelihoods of the traders are put at risk by the proposed development. The Inspector has given her reasons on a matter of vital concern to the traders in a way that could readily be understood by them. The Secretary of State must explain his decision in the same readily understandable way.