APP/C1570/W/20/3256619 (UTT/18/0460/FUL)

AIRFIELD WORKS COMPRISING TWO NEW TAXIWAY LINKS TO THE EXISTING RUNWAY (A RAPID ACCESS TAXIWAY AND A RAPID EXIT TAXIWAY), SIX ADDITIONAL REMOTE AIRCRAFT STANDS (ADJACENT YANKEE TAXIWAY); AND THREE ADDITIONAL AIRCRAFT STANDS (EXTENSION OF THE ECHO APRON) TO ENABLE COMBINED AIRFIELD OPERATIONS OF 274 000 AIRCRAFT MOVEMENTS (OF WHICH NO MORE THAN 16 000 MOVEMENTS WOULD BE CARGO AIR TRANSPORT MOVEMENTS (CATM)) AND A THROUGHPUT OF 43 MILLION TERMINAL PASSENGERS, IN A 12 MONTH CALENDAR PERIOD AT STANSTED AIRPORT

SUBMISSIONS ON BEHALF OF UTTLESFORD DISTRICT COUNCIL

IN RESPONSE TO A COSTS APPLICATION MADE BY

STANSTED AIRPORT LIMITED ON 12 MARCH 2021

[Page number references are to the printed page unless otherwise stated; [CD10.1] = Core Document 10.1; **[34]** = page 34 of the Costs Bundle accompanying these submissions]

Introduction

1 Over the course of 30 sitting days, from 12 January 2021 to 12 March 2021, three Inspectors ("the Panel"[1]) heard an appeal[2], brought by Stansted Airport Limited ("STAL") against a decision of the local planning authority, Uttlesford District Council ("UDC") ("the Appeal").

2 From inception of the Appeal on 24 July 2020, STAL had maintained that:

> '*...there was no reasonable or sound basis for UDC to reverse its original resolution to grant planning permission and ultimately, after a lapse of 14 months, to refuse permission. These actions, and its formulation of unclear, imprecise reasons for refusal have led to an avoidable appeal, creating delay and uncertainty, and wasted expenditure for the Appellant*' (Statement of Case §4.3)

[1] In what follows, it is assumed that where an individual Inspector commented or gave direction to the parties, that comment / direction is to be attributed to the Panel.

[2] By inquiry, pursuant to s.78 of the Town and Country Planning Act 1990

3 Thereafter STAL menaced UDC with the threat of costs but persistently refused to make the application, still less articulate what it would rely on to support it. Indeed, STAL even refused to confirm that one would be made.

4 Then, on the afternoon of the last day of the inquiry, as a coda to the whole proceedings, Queen's Counsel for STAL[3] made a costs application, conjuring a 22-page written submission setting out, for the first time, the application, its grounds, and what it was relying on to support it.

5 This is not how costs applications in planning inquiries are to be made.

6 It is an affront to the orderly conduct of inquiries. It is an affront to the fairness of the process. This Inquiry should not condone such behaviour. It is unforgiveable. If rejecting this inexcusably late application really leaves STAL deprived of costs, its remedy lies elsewhere.

7 These submissions and accompanying documents[4] constitute UDC's response to the costs application, submitted pursuant to directions issued by the Panel on 12 March 2021. They are divided into the following sections:

(1) Timing of the application
(2) Procedural history relating to the costs application
(3) Resulting unfairness and prejudice to UDC in responding to the costs application
    (i) Ensuring fairness to the recipient of a costs application
    (ii) Ensuring that matters relating to any costs application are properly ventilated and considered
    (iii) Avoiding delays by additional time having to be set aside to deal with a late costs application
(4) Relevant legal background
    (i) General legal principles applicable to costs applications
    (ii) Discussions at Planning Committees, Minutes, and Reasons for Refusal

[3] Mr. Thomas Hill QC
[4] A Costs Bundle and Authorities Bundle accompany these submissions.

(iii) Immateriality of advice on costs consequences to question of reasonableness

(iv) Proper scope of legal advice on material considerations

(5) Response to Grounds 1 – 3

(i) UDC's detailed consideration of the application

(ii) Reasonableness of the decision in January 2020

(iii) Substantiation of UDC's decision at the time it was taken through expert evidence on appeal

(iv) UDC's position after publication of the ESA on 16 October 2020

(v) Residual points under Grounds 1 – 3

(6) Response to Ground 4

(7) Response to Ground 5

(8) Conclusion

8 The timing of the application, and the way it has been allowed to be made, has caused prejudice to UDC in its ability fully and fairly to respond to it. Quite apart from that fatal flaw, the application is devoid of any merit and should be refused.

(1) Timing of the application

9 STAL waited until the very last minute to make its costs application, to reveal its grounds, and to reveal what it relied upon to support it.

10 STAL's 12 March application was not based on procedural matters or the conduct of UDC at this inquiry. Not at all. Rather, the costs application is founded upon and revolves around antecedent matters. What it is based on was just as manifest in July 2020 as it was in March 2021. The application is expressed to be based upon, first and foremost, the conduct of UDC in handling the application, involving factual matters which took place over 15 months ago (between November 2018 and January 2020), and which have been known to STAL since it lodged its appeal in July 2020.

11 The making of a costs application on the last day of an 8-week inquiry, based on historic factual matters known to the applicant for many months, is a repudiation of the guidance on costs

contained in the PPG. The PPG spells out the procedure that is to be followed for making such applications (ID: 16-035, emphasis added):

'*Applications for costs should be made as soon as possible, and no later than the deadlines below:*

- *In the case of appeals determined via the Householder Appeals Service, Commercial Appeals Service, appeals against the refusal of advertisement consent and appeals against tree preservation orders…*
- *In the case of appeals determined via written representations …*
- *In the case of hearings and inquiries:*
    - *All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions.*
    - *If the application relates to behaviour at a hearing or inquiry, the applicant should tell the Inspector before the hearing is adjourned to the site, or before the inquiry is closed, that they are going to make a costs application. The Inspector will then hear the application, the response by the other party, and the applicant will have the final word. The decision on the award of costs will be made after the hearing or inquiry.*

- *For all procedures, no later than 4 weeks after receiving notification from the Planning Inspectorate of the withdrawal of the appeal or enforcement notice …*

Anyone making a late application for an award of costs outside of these timings will need to show good reason for having made the application late, if it is to be accepted by the Secretary of State for consideration.'

12 The phrase '*as soon as possible*' is more stringent than '*as soon as reasonable*' or even '*as soon as practicable*'. It demands a higher degree of expedition: its yardstick is what is possible rather than what is reasonable or what is practicable. It is impermissible to dilute the meaning of the phrase by an application of the PPG that does not inquire as to when it would have been possible to make the application or, having ascertained that date, to brush over or make light of the time that elapses thereafter. And if the guidance in the PPG is not to be followed, that needs to be recognised and justification for the deviation articulated. To do otherwise is an error of law.

13 The relevant terms of the PPG are not new. They have been in place for years. The guidance is not to be ignored, least of all by those boasting three decades' experience of planning inquiries.

14 Rather, STAL's 12 March application was an expression — the first expression — of the particulars that lay behind the generalised criticism that STAL had made in its Statement of Case way back in July last year. These had all been known to STAL in July last year. But in defiance of the PPG, STAL elected — presumably on professional advice — to hold back on these so as to keep known to just itself how it would frame the application. This, of course, secured an advantage to it in the preparation of proofs, in the presentation of its witnesses and in the cross-examination of UDC's witnesses. STAL subordinated obedience to the requirements of the PPG to its own tactical interests.

15 This disobedience to the Guidance strikes at its rationale. The rationale for the Guidance is to ensure that costs applications are front loaded and are made when the basis for them arises, with a view to achieving three aims:

(1) Ensuring fairness to the recipient of a costs application in knowing at an early stage whether a costs application is to be made or is anticipated and on what basis;
(2) Ensuring that matters related to any costs application are properly ventilated and considered through relevant evidence heard and tested at the inquiry;
(3) Avoiding delays by additional time having to be set aside to deal with an application made at a late stage, which could otherwise have been dealt with during the scheduled inquiry.

16 As explained below (§63ff.), STAL's costs application confounds each of these aims. It amounts to an ambush of UDC and results in serious and substantial unfairness to UDC in responding to it.

(2) Procedural history relating to the costs application

17 By decision notice dated 29 January 2020, UDC refused planning permission for airfield works and additional aircraft stands at Stansted Airport so as to enable an additional 8 million passengers per year, resulting in a total throughput of 43 million passengers per year. The refusal was on the basis of four stated reasons for refusal (RFRs) contained in the Decision Notice at [CD12.10] (in summary):

(1) A failure to demonstrate that the proposal would not result in detrimental effects from aircraft noise.
(2) A failure to demonstrate that the proposal would not result in detrimental effects on air quality.
(3) The incompatibility of the additional emissions resulting from the proposal with climate change policy and targets.
(4) A failure to provide the necessary infrastructure to support the proposal or necessary mitigation to address the detrimental impact resulting from it.

18 On 4 February 2020, at one of a number of regular meetings between UDC Officers and STAL to discuss operational matters at Stansted Airport, officers were informed that STAL was considering a range of options as to how it might respond to the refusal of their application in January 2020, including a resubmission of the application, an NSIP, or an appeal **[3]**. On 3 March 2020, officers were informed that if an appeal were to be lodged, STAL would seek to update its Environmental Statement for the appeal. After that appeal was lodged in July 2020, upon enquiring as to the scope of that update, officers were told only that the base date would be updated together with revised air traffic forecasts **[4]**.

19 On 24 July 2020, almost 6 months after UDC's decision of 29 January 2020, STAL issued its appeal. Its Statement of Case referred, variously, to unreasonableness relating to [CD24.1, §§4.3, 4.15, 4.20, 4.31, 4.35]:
(1) UDC's decision to reverse its original resolution to grant permission in November 2018;
(2) The noise RFR given the negligible noise impacts and condition offered;
(3) A lack of technical evidence supporting the air quality RFR; and
(4) A lack of clarity and precision in the carbon and infrastructure RFRs.

20 It is not uncommon for an appellant to refer in an appeal to what it considers to be unreasonable behaviour, and to threaten to make a costs application, without ever making an application for costs. That is precisely why the PPG requires parties to be open and transparent about whether a costs application is likely to be made and to do so, as soon as the basis for such an application is known. Despite the references above to unreasonableness, no application for costs was threatened in STAL's Statement of Case, and no application was made.

21 By letter dated 12 August 2020, PINS issued its standardised start letter, directing UDC to submit its Statement of Case by 16 September 2020 **[5-9]**. On 20 August 2020, within one week of receipt of the start letter, UDC sought a 4 week extension to that deadline from PINS, explaining that the decision was an overturn of officer recommendation, meaning that external expert consultants would need to be instructed and briefed for the Appeal, that delays had been caused by the summer period and COVID-19 restrictions, that there was a wide range of potential issues (with STAL proposing to call 11 witnesses), that this was reflected in the estimated length of inquiry (40 days), and that there was no prejudice to STAL by such an extension **[10-12]**. By letter of the same date, STAL objected to any extension, without raising any prejudice **[13-14]**. The request for an extension was refused by email on 25 August 2020, with the Inspector stating that it is '*important that all parties are aware of the issues involved as soon as possible if the inquiry is to proceed efficiently*', and that UDC '*should be able to provide details of its reasons why it refused planning permission and the case it will make without delay*' **[15-16]**. The use of the phrase '*as soon as possible*' is to be noted – it is the same phrase as appears in the relevant paragraph of the PPG.

22 By late August, UDC had instructed its expert witness team. Just over 2 weeks later, on 16 September 2020, UDC duly submitted its Statement of Case which was directed to its RFRs. It concluded that [CD24.2, §§5.2-5.4] (in summary):

(1) Given both the nature of the proposal and the sensitivity of the site, the application was rightly subject to detailed evaluation by UDC.
(2) The proposal was recognised to be a very important development, and UDC had a heavy and enduring responsibility to its constituents in considering it.
(3) The consideration of the application through a sequence of meetings between November 2018 and January 2020 showed that UDC needed to be convinced about the nature and scale of effects that would result from the implementation of the planning permission, and importantly, the ability for those effects to be adequately mitigated.
(4) As an outcome of that process, UDC concluded that the information provided as at January 2020 fell short of that required to properly assess the environmental impacts associated with the application. Without that information, it was not possible to conclude on the nature of the impacts arising and, as a consequence, the adequacy of the proposed mitigation, leading to refusal of the application.

(5) UDC proposed to call expert witnesses to demonstrate the assessments which should be undertaken in relation to aircraft noise, air quality, and carbon emissions, which may require additional mitigation and alternative controls. If necessary measures were not feasible or enforceable, the appeal should be dismissed.

23 UDC's Statement of Case addressed the valid reasons why its consideration of the application had been lengthy and detailed, reflecting the scale and importance of the proposal, the environmental effects of which would be experienced for generations. UDC's Statement of Case also clearly signalled the prospect that adequate mitigation for the proposal was a key concern. Despite this, STAL did not approach UDC at any point after UDC's Statement of Case was submitted (or indeed at any point after its decision in January 2020) to discuss whether alternative or strengthened mitigation in the form of conditions could be agreed, and it was not until late in the inquiry that any meaningful discussion on mitigation was raised by STAL at all[5].

24 On 17 September 2020, in the normal way, PINS' Agenda for the forthcoming Case Management Conference included '*Costs*' as an item, putting the parties on notice that costs would be discussed (Agenda Item 12).

25 On 24 September 2020, at the Case Management Conference (CMC), Inspector Boniface observed that there was no costs application before the Panel, and said that, as such, he assumed there was no application to be made. The parties were asked directly whether any costs application was contemplated.

26 STAL – represented by Queen's Counsel - remained silent.

27 That silence in the face of the Inspector's observation and question signified that, despite having complained about UDC's refusal in its Statement of Case, STAL was making no costs application. It would have been obvious to STAL that that was what it was signifying to UDC and the Rule 6 party, Stop Stansted Expansion ('SSE'). The position was recorded in the Panel's

[5] Whilst comments on the general Conditions proposed by UDC were made by STAL, and updates to the s.106 were discussed, STAL did not approach or engage with UDC on Condition 15 – which was proposed by UDC on 4 December 2020 – until after 5 February 2021, once the aircraft noise, air quality, and carbon emissions sessions at the inquiry had completed. STAL proposed its Condition 10B (seeking to deal with Air Quality, but not Carbon Emissions) on 1 March 2021.

CMC note of 2 October 2020 at para. 34, together with a reference to the PPG as to the timing of any application for costs **[22]**:

> '*No application for costs is currently anticipated by any party. If an application is to be made, the Planning Practice Guidance makes it clear that they should be made in writing to the Inspector before the Inquiry or as soon as reasonably possible…*'

28 STAL did not write to suggest that this did not faithfully record STAL's position.

29 At the CMC, having previously indicated that its Environmental Addendum Statement would be published in late September[6], STAL sought, and was granted, additional time for the submission of its Environmental Statement Addendum (to 16 October 2020), in part in order to respond to points made in UDC's Statement of Case. This was recorded in the Panel's CMC note of 2 October 2020 (**[21]** §26). At the same time at the CMC, the parties were also directed to submit proofs of evidence by 8 December 2020 (1 week earlier than the usual 4 weeks before commencement of an inquiry) on the basis of the proximity of the Inquiry to the Xmas break (§28).

30 On 16 October 2020, STAL submitted its ESA. This was a substantial document, comprising 18 Chapters of main text (over 400 pages), plus numerous Appendices and a Non-Technical Summary in a total of 4 volumes [CD7.1-7.18, 8.1-8.9, 9.1-9.4, 10.1]. The base date for assessment was moved forward by 3 years (from 2016 – 2019) and it included a new set of air traffic forecasts which sought (inter alia) to account for the effects of the COVID-19 pandemic. Within the ESA, STAL took the opportunity to respond to matters raised in UDC's Statement of Case [CD10.1, p.2, last para.]. None of the responses set out in Appendix 2A asserted that UDC had behaved unreasonably [CD8.2]. Consistently with its stance at the CMC, STAL did not make a costs application at or about the time of it submitting the ESA. The added significance here is that by now STAL knew full well what UDC's case was and STAL had had a full month to analyse and absorb it.

31 On 3 December 2020, Mr. Coppel QC (representing UDC) telephoned Mr. Hill QC (representing STAL)[7] with a view to discussing draft "Condition 15". Condition 15 was a Condition formulated

[6] As recorded in its letter for the CMC dated 23 September 2020 **[25-26]**.
[7] Hereafter Mr. Coppel QC and Mr. Hill QC respectively.

by UDC's appointed expert team following its consideration of the ESA and the environmental effects predicted. It comprised a single mechanism to address and mitigate all of the environmental effects referred to in UDC's Decision Notice of January 2020 in the light of the environmental effects presented in the ESA, which had been published on 16 October 2020.

32 A meeting was arranged between Counsel for the day after, on 4 December 2020. On the morning of 4 December 2020, on a without prejudice and confidential basis, Mr. Coppel QC sent an email to Mr. Hill QC enclosing a draft of Condition 15 (with some parts of the Schedules to be filled) **[27-28]**. The email stated that at the meeting Mr. Coppel QC would explain how the Condition worked, the thinking behind the paragraphs, and answer any questions of understanding which Mr. Hill QC might have, so that Mr. Hill QC could take instructions from STAL and respond. The email stated that the draft, or something substantially the same, might serve to bridge the gap between UDC and STAL, or certainly narrow the gap sufficiently that whatever remained could be overcome. The meeting between Counsel took place at 4.30pm that day. No response to Condition 15 was made by STAL following that meeting. No application for costs was made by STAL after that meeting.

33 On 8 December 2020, pursuant to the directions issued at the CMC, proofs of evidence were exchanged. Each of UDC's proofs on aircraft noise, air quality, and carbon emissions, reviewed the application and the evidence before UDC when it took its decision in January 2020. Each proof expressly concluded that, in the view of the particular expert witness, UDC's decision was both reasonable and understandable[8]. UDC's planning proof came to the same conclusion, based on the expert opinions of UDC's other witnesses[9]. Some of STAL's evidence sought to analyse the strength of UDC's objection prior to the publication of its ESA on 16 October 2020. STAL's planning witness, Mr. Andrew, included a section in his proof on UDC's handling of the application [STAL/13/2, section 8].

34 Once again, no costs application was submitted by STAL.

35 On 22 December 2020, pursuant to the directions issued at the CMC (**[22]** §30), final timings for witness handling were sent to PINS by all parties. UDC's time estimates were duly based

[8] See Mr. Trow on aircraft noise at UDC/1/2, §§6.2, 8.8, and UDC/1/4, responding to paras. 3.1, 6.8.2, 8.1.1; Dr. Broomfield on air quality at UDC/2/2, §§113, 55-57, and UDC/2/4, p.9; Dr. Hinnells on carbon emissions at UDC/3/1, §§29, 99.
[9] See Mr. Scanlon on planning at UDC4/1, §2.3.

on the issues of difference arising out of the evidence submitted. Given that there was no costs application, UDC could not identify the matters upon which such an application would be based, still less work out which witnesses could speak to those matters or calculate the time needed for questioning them about those matters.

36 On 5 January 2021, rebuttal evidence was exchanged. None of STAL's rebuttal evidence sought to argue with UDC's expert evidence that UDC's decision was a reasonable one at the time it was taken[10]. As to UDC's position following the publication of the ESA and exchange of proofs of evidence, two points were raised (as relevant):

(1) STAL's Carbon-Technical witness, Mr. Vergoulas, asserted that it was unreasonable for UDC's carbon emissions witness, Dr. Hinnells, to make requests for further clarification of the ESA carbon projections in his proof [STAL/9/3, §31]. Following exchange of proofs, this point had been further discussed and addressed in the Statement of Common Ground on Carbon [CD25.5, 18 December 2020]. It also does not form part of STAL's costs application.

(2) STAL's planning witness, Mr. Andrew, included a section on Condition 15 in his rebuttal [STAL13/4]. Despite the meeting held between Counsel on 4 December 2020 during which Condition 15 was presented and explained, this was the first response received by STAL. The rebuttal proof asserted that it would be unreasonable for STAL to agree to a proposition that would effectively allow growth only in annual increments [§3.5]. This assertion disclosed a misunderstanding as to the meaning and effect of Condition 15 (UDC's Closing, §§124-135). No application for costs was made by STAL.

37 On 12 January 2021, the inquiry opened as scheduled. In making his opening remarks, Inspector Boniface once again drew all parties' attention to the PPG on the award of costs at inquiries. He stated that he was not inviting any such applications, but that if there were to be any, then they should be made '*at the earliest possible opportunity*', and certainly before the inquiry closes. When asked if any party had an intention to seek costs, Mr. Hill QC stated that it was a matter touched upon '*albeit very briefly*' in STAL's Opening. In response, Inspector Boniface stated that if there was an intention to seek costs, STAL should make everybody aware of it as soon as possible, so that there would be '*no surprises*' and everybody had an opportunity to address those matters. Mr. Hill QC stated that he completely understood that

[10] Mr. Cole's Rebuttal simply reiterated statements made in his proof that the noise RFR was unreasonable.

and that he also assumed that the Panel would want any application to be made in writing with an opportunity for the party to respond and then a final right of reply. Inspector Boniface agreed, but indicated that the Panel may hear those applications orally as well, but it would certainly be useful to have them in writing.

38 For the first time in its Opening submissions, STAL revealed that it was contemplating a costs application. In a single sentence, STAL said that it was giving a '*warning*' both to UDC and SSE that once the evidence was complete it would seek compensation for any wasted costs it was obliged to bear in prosecuting the appeal. STAL's Opening went on to comment that that was '*for another day*' [INQ1, §105-106]. No basis for any contemplated application, let alone a reasoned basis, was set out. No reference was made to the PPG or to paragraphs against which a costs application was contemplated.

39 Both UDC and SSE objected to the mere warning of a costs application at this stage, and the unfairness of the approach taken and suggested. In particular, UDC:

(1) referred the Panel to the PPG guidance (ID: 16-035);
(2) noted that when asked at the CMC in September 2020, the prospect of a costs application had not been raised by STAL (as recorded by the Panel);
(3) noted the lack of any application and any particulars as to its basis;
(4) stated that any costs application would affect the way in which evidence was given, namely the way in which UDC's witnesses would give their evidence, and the way in which STAL's witnesses might need to be cross-examined;
(5) stated that UDC's time estimates had been provided on the basis of no costs application and the inquiry schedule set accordingly, and that a costs application would affect those time limits.

40 "Warnings" form no part of the PPG in dealing with costs. What the PPG demands from a party seeking its costs is an '*application*' for costs – not a "warning" of one – and for it to be made '*as soon as possible*' – not "at the last moment possible". If Mr. Hill QC actually thought that uttering a "warning" was enough to wriggle out of what the PPG demands, he was wrong.

41 In response, Inspector Boniface reiterated – not for the first time - that any costs application should be made as soon as possible. He suggested that Mr. Hill QC share any details as to the

basis of its costs application with UDC outside of the inquiry. He requested that a formal application be made as soon as possible. He noted that a feature of the evidence before the inquiry and Opening submissions had been the process followed by UDC and whether the decision was justified. Whilst he was happy for that to be aired, those were matters for any costs application, and the Panel did not want to keep hearing about those matters in evidence. Rather, the inquiry should focus on the evidence before it now. The parties were asked to frame their evidence and arguments on that basis.

42 Pausing there, if it had not been obvious to STAL before, the Inspector's reiteration should have made it so. Absent a costs application founded upon or directed to the process that UDC had followed and the reasonableness of the decision, these were not matters in issue before the inquiry and so time with witnesses was not to be wasted on them.

43 Following that exchange, at no stage did Mr. Hill QC or STAL approach UDC either formally or informally to confirm that it would be seeking costs or to provide the basis of any application.

44 Having noted Inspector Boniface's comments, and the lack of any costs application against it, UDC did not spend inquiry time going over the history of the application which had been covered in its written evidence. To have sought to do so without a clear articulation by STAL as to exactly what facet of UDC's decision-making process was relied upon would have been impossible – or at least impossible without devoting days to chasing down every possible avenue of complaint: it had been a very involved decision-making process.

45 As part of examination in chief, each of UDC's expert witnesses on aircraft noise, air quality, and carbon emissions simply read out and confirmed the opinions contained in their written evidence that, at the time the decision was taken, UDC's decision was a reasonable one. Importantly, none of UDC's witnesses were challenged in cross-examination on these opinions, which had been stated in writing and confirmed orally. Rather, STAL spent a limited amount of time in cross-examination asking UDC's witnesses to confirm facts around the history of the application, without ever putting its case on unreasonableness, fairly and squarely, to any UDC witness.

46 In week 6 of the inquiry, on Wednesday 24 February 2021, and in advance of the sessions involving planning evidence, Inspector Jones requested an update from STAL as to its position

on any costs application, '*particularly bearing in mind what ha[d] been said previously*'. This presumably referred to the need for a costs application to be made as soon as possible.

47 On the same day, Mr. Hill QC responded that, having given an early indication that it was considering a costs application, final instructions on whether a costs application would be made could only be received after all of the evidence had been heard against the background of the case. As soon as the evidence had been completed, STAL would give an indication as to what would be forthcoming.

48 Mr. Coppel QC again responded and reiterated that no application had been made (whether against UDC or SSE). A marker was put down that, to the extent that any application related to matters which took place before the start of the inquiry, UDC may be seeking to recall witnesses, and that all questioning of UDC's witnesses and cross-examination of STAL's witnesses had been predicated on there being no costs application, which had accelerated matters at the inquiry. Mr. Hill QC responded that he did not want UDC to anticipate STAL's application before it was made, and then gave evidence to the inquiry that he himself had never made an application for costs in advance of the close of an inquiry, and that the guidance was clear that there was no imperative on any party to make an application prior to that time. If the application could have been made earlier and matters drawn to the attention of the parties earlier, then – he carried on - there may be something to say about that, but STAL's focus was how the case unfolded in the round once tested in cross examination. Inspector Jones noted that there was no application before the inquiry and if one were to be made, all parties affected would be given a '*full opportunity*' to respond. Inspector Jones confirmed from Mr. Hill QC that STAL's position was that there was a possibility of a costs application, but that Mr. Hill QC had no instructions on it at the moment.

49 Again pausing here, client instructions do not provide an escape route from the requirements of the PPG or from elementary principles of fairness. It is the duty of counsel to advise the client of the requirements and of the consequences of non-adherence. Mr. Hill QC's statement that only after the evidence had been completed would STAL give an indication as to whether it would be making a costs application was a further repudiation of the requirements of the PPG to make such applications '*as soon as possible*' and a deliberate ignoring of the repeated reminders given by the Panel.

50 Pursuant to that exchange and given the lack of any costs application to address in evidence, UDC did not spend time in examination in chief of its planning witness, Mr. Scanlon, covering the history of the application, which was a matter addressed in the written evidence. Based on the expert evidence of UDC's other witnesses, whose views had not been challenged by STAL on this point, Mr. Scanlon recorded that there was a failure to demonstrate that there would not be a detrimental effect on environmental conditions, and the refusal to grant permission was appropriate [UDC/4/1, §2.3]. As to the history of the application, in cross-examination, STAL's questions were limited to factual matters as to what officers had concluded previously and how the application had proceeded, the weight which officers gave to certain material considerations, what the minutes of meetings did or did not say, and the conclusions of the ES and ESA. At no point did STAL seek to challenge the view recorded by Mr. Scanlon that the decision was a reasonable one at the time it was taken.

51 At the end of week 7, on 5 March 2021, after all the evidence had been heard and after the Planning Conditions and Obligations session, Mr. Hill QC revealed that STAL would be making a single costs application against UDC (not SSE) for the full costs of the inquiry. Disregarding what he had told the inquiry on 24 February (i.e. that the application would be made after all the evidence had been heard), Mr. Hill QC did not then make the application and gave no grounds, particulars, or other indication of what it would contain.

52 Inspector Boniface then asked if STAL had prepared its costs application in writing. Mr. Hill QC responded that STAL were doing that, but that it was – now - in large part parasitic on STAL's closing submissions which were still being completed, and that it was STAL's intention to make its application after closing submissions and that the costs application would be available in writing thereafter. Mr. Hill QC's '*instinct*' was to allow UDC a 7 day period thereafter to respond in writing, then to allow STAL a further 7 day period for a final right of reply. Mr. Hill QC did not even pretend that it would not have been possible for STAL to have made the application sooner.

53 UDC reserved its position in relation to making a cross-application for costs. Mr. Coppel QC stated that the position was wholly unsatisfactory and wholly unfair on UDC. UDC needed to see exactly what was in the costs application in order to be able to respond to it. He stated that on seeing it and having the opportunity to respond, UDC may make a cross-application,

and quite possibly, there may be a need to recall witnesses to cover matters which would have been in issue had STAL indicated the basis for its costs application at an earlier stage.

54 Inspector Boniface enquired why the contents of STAL's application for costs would have a bearing on UDC's evidence. Mr. Coppel QC reiterated that UDC needed to know the basis for the costs application. If there were matters which were known to STAL before the start of the inquiry, but STAL had chosen not to disclose their basis for costs, that would have changed the way in which UDC had questioned UDC and STAL's witnesses. By not disclosing the basis for the costs application, STAL had been given an unfair advantage over UDC in presenting its case. Inspector Boniface asked whether UDC was in a position to agree to the costs application being dealt with in writing. Mr. Coppel QC confirmed as UDC had not yet seen the application UDC was not in a position to agree that, but that oral submissions were very likely to be needed. Inspector Boniface commented that he would be a little surprised if that were the case since – in the Inspector's view - much of UDC's evidence seemed to go to the point of costs.

55 On 11 March 2021, both SSE and UDC delivered their closing submissions. On the morning of 12 March 2021, STAL delivered its closing submissions. At the end of those submissions, Mr. Hill QC said that STAL would circulate its costs application over the lunch adjournment to allow the Panel an opportunity to consider whether it was content to follow the approach of dealing with costs by an exchange of written submissions. Inspector Boniface agreed with that approach, noting that that would give an opportunity for both the Panel and UDC to look over the application over lunchtime. He indicated that the Panel was minded to, or hopeful, that the costs application could be dealt with in writing, but they would see what the application said. Mr. Hill QC indicated that STAL would do that as soon as the inquiry was adjourned. The application was received 10 minutes later at 1310hrs. It consisted of 22 pages of submissions, based on 5 stated grounds, referable to the PPG. It is focussed on UDC's handling of the application between November 2018 and January 2020 – all well known to STAL by July 2020.

56 Fifty minutes later, at 1400hrs, the luncheon adjournment having concluded and the inquiry resumed, Inspector Boniface asked whether UDC was able to agree that the application could be dealt with in writing. Based on a first look at the application, Mr. Coppel QC objected to the timing of the application, reiterating points it had warned of previously, and in particular noting that the application was based on matters known to STAL before the inquiry

commenced, and that there was no legitimate reason for the application being made right at the last minute. Had the application been made at an early stage, in compliance with the PPG, those matters raised could then be covered in evidence and tested in cross-examination. Mr. Coppel QC stated that it was a totally unsatisfactory way for an application to be made. STAL had gained an unfair advantage by not disclosing the basis for its costs application in advance of the inquiry, which UDC had not had a chance to address in its evidence or to explore with STAL's witnesses. Mr. Coppel QC sought time to consider and take instructions on the application and to decide how to respond, whether with submissions, further documents, and / or the calling of further evidence. Directions were sought to allow UDC to suggest an appropriate way forward with a view to further case management by the Panel thereafter. The possibility of a cross-application for costs was raised based on the lateness of the application and consequential costs. Given the sums of money potentially involved, a proper time to respond was needed.

57 Inspector Boniface stated that the application and the matters raised should not have come as a surprise to UDC given the indication that a costs application would be made. In Inspector Boniface's view, there was nothing which explained why it would be necessary to recall witnesses. The Panel was minded to deal with the matter in writing. Mr. Coppel QC made clear that it needed a proper opportunity to take instructions on how the application could best be dealt with, without compromising fairness. The Panel then adjourned for 10 minutes to consider the way forward.

58 Having resumed, the Panel rejected UDC's suggested way forward. It ruled that, having heard the submissions of the parties, the Panel would deal with costs in writing. The reasons given for that decision were as follows: '*There has been a clear application, and provided the Council has sufficient time to consider it and make a response, there is no reason why that should be unfair or that it shouldn't adequately deal with the matter.*' No reference was made to the guidance in the PPG, still less was any attempt made to reconcile the timing with the requirement in the PPG that costs applications be made '*as soon as possible*'.

59 UDC was granted 28 days to respond to the application in writing (9 April 2021), with STAL having a further 14 days for a final written reply (23 April 2021). No opportunity to respond to STAL's reply was granted to UDC on the basis that any reply from STAL would not raise new matters.

(3) Resulting unfairness and prejudice to UDC in responding to the costs application

60 The costs application is for a full award of costs against UDC for the whole of the appeal. It is based on 5 separate grounds (in summary):

(1) Preventing development which should clearly be permitted

(2) Imprecise, vague and / or unsubstantiated reasons for refusal

(3) Refusing planning permission on grounds which were capable of being conditioned

(4) Seeking to impose Condition 15 which is unlawful and does not meet the policy tests for a condition

(5) Unlawfully revisiting the merits of Government policy

61 The primary focus of the costs application relates to historic matters leading to UDC's decision of January 2020. That is the basis for Grounds (1) to (3). Insofar as the submissions relating to those Grounds refer to evidence given at the inquiry, they seek to record purported concessions by UDC witnesses as to those historic events. Ground (4) relates to Condition 15, which STAL has known about since 4 December 2020 when it was shared with Counsel as a basis for discussion, and which STAL sought to address in its rebuttal evidence of Mr. Andrew submitted on 5 January 2021. Ground (5) applies both to the RFR on Carbon Emissions of January 2020 and the alleged pursuit of an unlawful approach to Government policy at appeal which, if true, would have been known to STAL from exchange of proofs on 8 December 2020 at the latest.

62 There is no legitimate reason why the costs application, focussed as it is on matters leading to UDC's decision of January 2020, could not have been made with the Appeal in July 2020, or soon after 16 September 2020, when UDC's Statement of Case was submitted. Grounds (4) and part of Ground (5) could have been raised well before the start of the inquiry on 12 January 2021. To the extent that STAL has relied on matters that post-date July 2020, they are introduced by STAL to deflect attention from the central plank of the costs application – that the January 2020 refusal was an unreasonable decision – and betray STAL's recognition that it needs to disguise it deliberate decision not to disclose the application it had intended to make from inception of its appeal.

(i) Ensuring fairness to the recipient of a costs application

63 It is a fundamental principle of fairness that a party to legal proceedings should know the case which it has to meet. In relation to costs applications in planning appeals, that is the reason why the PPG advises that costs applications should be made as soon as possible. That part of the advice was recorded in writing in the Panel's CMC note of 2 October, repeated to STAL by Inspector Boniface on the opening day of the inquiry 12 January 2020, and plainly motivated the raising of the issue by Inspector Jones on 24 February 2021. It is clearly envisaged within the PPG that a costs application can be made, identifying its basis, but then can be supplemented or added to if the manner of presentation at the inquiry itself gives grounds for doing so. The point is that it should be made early so that the party receiving it knows the case that it has to meet and the basis for it. Such an approach is consistent with ensuring fairness between the parties in dealing with such applications. It is a central tenet of all adversarial proceedings, whether called "inquiries" or "court proceedings" or "arbitrations".

64 Not only has STAL failed to follow the advice in the PPG, but it has acted in flagrant disregard of it and its rationale. It has done so in order to gain an unfair advantage over UDC. There is no lawful basis for disregarding the PPG as to the timing of costs applications. There is no lawful basis for allowing tactical favours to one party against another.

65 When asked directly by Inspector Boniface on 24 September 2020 whether any costs application was anticipated, STAL should have stated that a costs application was anticipated relating to UDC's refusal of the application. By remaining silent, STAL gave the false impression that matters raised in its Statement of Case were not matters which would form the subject of a costs application against UDC. When on 12 January 2021 Inspector Boniface again requested that any costs application be made as soon as possible and suggested that Mr. Hill QC share the basis of any potential costs application with UDC, STAL's failure to make any application, and Mr. Hill QC's failure to contact UDC to explain its basis, repeated the false impression that no costs application was contemplated against UDC, in circumstances where both UDC and SSE had been warned of the potential for a costs application in a single sentence in STAL's Opening.

66 Instead, STAL has operated under the radar in relation to its potential costs application, leading its own evidence and asking some questions of UDC's witnesses by stealth, without

disclosing the detailed basis and grounds for its anticipated costs application, which would have allowed UDC to challenge the evidence and to make a proper and full response.

(ii) Ensuring that matters relating to any costs application are properly ventilated and considered

67 Given that no costs application was made with the appeal in July 2020, no costs application was disclosed as being anticipated when STAL was asked in September 2020, no costs application was made when the ESA was published in October 2020, nor when proofs were exchanged in December 2020 (or thereafter), UDC provided its final time estimates for examination in chief of its witnesses and cross examination of STAL's witnesses on 22 December 2020 without including time to deal with costs matters. The inquiry schedule was set accordingly.

68 In reliance, first, on Inspector Boniface's clear indication on the opening day of the inquiry that, whilst historic matters relating to the justification for UDC's decision had been and could be aired, the Panel did not want to go over historic matters but wanted to focus on the evidence as it was now, and in reliance, secondly, on there being no costs application, UDC's witnesses dealt briefly with UDC's decision by reading out relevant parts of their written evidence, and then focussed on the environmental effects as reported in the ESA. STAL's witnesses were not, and could not, be cross-examined on as yet unknown and unparticularised costs matters.

69 Had a costs application been made at an early stage, in any event before the inquiry, and in a timely fashion, identifying what was relied upon for that application, UDC would have been in a position:

(1) to work out what lines needed to be pursued and calculate the additional time in examination in chief required of its own witnesses to deal with costs matters;
(2) to work out what sections of proofs needed to be tested by cross-examination of STAL's witnesses in relation to costs matters and to calculate the time needed for that; and
(3) to take instructions and submitted further documents and / or called further evidence as to historic matters relating to costs.

70 The importance of these cannot be over-stated. They are not empty assertions. Fundamentally, UDC has not been afforded the opportunity to cross-examine STAL's witnesses as to the reasonableness of UDC's decision in January 2020, based on the matters raised in STAL's costs application, rather than focussing for the inquiry on the planning merits of the position after the ESA was published, as directed by the Panel. Three specific examples – and there are others - illustrate the above points.

71 First, under Ground 1, the costs application makes the following point to support the claim that the application should clearly have been permitted (§43):

> '*None of the evidence before the inquiry has pointed to any shortcoming in the assessment undertaken in the ES, nor any failure to identify or consider any likely significant environmental effect, contrary to the evidence of Mr. Thompson who has explained the comprehensive assessment undertaken in the ES and ESA in his proof and rebuttal and in oral evidence.*'

72 The point completely ignores UDC's written evidence:

(1) On aircraft noise, Mr. Trow's expert view was that further assessment work should have been undertaken to further articulate and communicate the effects of the development within the ES [UDC/1/2, §8.8; see also §§5.13 and 6.2]. These shortcomings were clearly set out in Mr. Trow's rebuttal in response to the alleged comprehensiveness of the ES, and Mr. Cole's consideration of the WHO ENG2018 and noise effects on schools in his proof [UDC/1/4, responses to §§3.1, 6.8.2, and 8.1.1].
(2) On air quality, Dr. Broomfield's expert view was that there were shortcomings in the air quality assessment in the ES and further information should have been required on certain matters (e.g. levels of nitrogen dioxide in the Bishop's Stortford AQMA) [UDC/2/2, §§57 and 61; UDC/2/4, p.9].
(3) On carbon emissions, Dr. Hinnells's expert view was that the evaluation of the carbon emissions was flawed at the point of decision because it failed to acknowledge, grapple with or address evolving carbon emissions policy [UDC3/1, §§99, 24-29].

73 These expert views were made within the scope of the respective RFRs and formed part of those experts' judgments that the RFRs were reasonable, based on a review of the evidence before UDC when the decision was taken in January 2020.

74 Had the costs application and its basis been revealed to UDC before the start of the inquiry, UDC would have asked its witnesses to expand upon these views relating to the ES, and would have addressed the extent of their concerns, with specific reference to the EIA Regulations and / or one of the core principles of extant aviation policy, namely transparency, the need to have clear and transparent information, and the need for those affected by aviation to have a clearer understanding of the facts ([CD14.1], p.8, §3, referred to in UDC's Opening at [INQ2], §63).

75 Moreover, had STAL not kept mum about its costs application and its basis and, instead, followed PPG requirements by making its costs application before the start of the inquiry, UDC would have cross-examined STAL's expert witnesses on the adequacy of the ES (Mr. Cole, Dr. Bull, Mr. Robinson, and Mr. Vergoulas), and would have elected to cross-examine Mr. Thompson on EIA matters, with a view to putting its case as to the reasonableness of the concerns raised by its expert witnesses.

76 The opportunity to expand on these points in oral evidence and to test STAL's evidence on them, would have allowed the issue to have been properly ventilated, ensuring fairness between the parties. Instead, the inquiry has heard no oral evidence from UDC on the above points and has a partial picture of the evidence, which prejudices UDC.

77 Secondly, STAL notes more than once in its costs application that no-one was called by UDC to expand upon how UDC arrived at its decision (§§9, 24). No wonder. Had STAL not kept under wraps that it would be making a full costs application against UDC on the basis of the considerations before the Planning Committee between November 2018 and January 2020, that too is a matter which UDC would have addressed both in written and oral evidence. It would have been addressed by Mr. Scanlon taking more detailed instructions and presenting more detailed evidence in his proof and orally on the assessment of the application by UDC, so as to expand upon his view, that UDC's decision was a reasonable one at the time it was taken.

78 Further, had the costs application and its basis been revealed to UDC when it could and should have been made (i.e. in July 2020 or shortly thereafter), UDC would have cross-examined Mr. Andrew on the application history in more detail, with a view to putting its case as to the reasonableness of the decision at the time it was taken.

79 Instead, STAL revels in the advantage it has secured for itself, boasting in its costs application that it has '*fully explored*' these matters in cross-examination of Mr. Scanlon (§9) and criticising Mr. Scanlon for his alleged attempt to '*glide over*' a period of months in summarising the consideration of the application by UDC (§15). STAL "fully explored"[11] those matters in full knowledge of the application it had stowed away, but knew it was going to make. Mr. Scanlon cannot be criticised for summarising parts of the history of the application, when there was no costs application signalling that as an issue to be dealt with. The inquiry has not heard full evidence from UDC on these matters, and has a partial picture of the evidence, which prejudices UDC.

80 Thirdly, STAL asserts in its costs application that the delays in the consideration of the planning application were solely down to UDC (§41), repeating a point made in its closing that UDC's Planning Committee '*filibustered for 14 months*' following the resolution to grant (§280).

81 The point ignores relevant facts from the history of the application, which would have been explored and tested in evidence, as to the causes of any delay. SSE made requests of the SoS to call in the decision on the application in February and November 2018 (referred to in the list of Appendices to [CD12.15b]). As a result of those requests, on 7 November 2018, the SoS issued a direction to UDC not to issue any decision before the SoS had concluded whether to call in the application for determination **[29]**. The resolution to grant permission subject to a s.106 Agreement was passed after that on 14 November 2018. It was not then until 20 March 2019 that the SoS decided not to call in the decision [CD12.15a]. Thereafter, the s.106 Agreement was not signed by STAL until 12 April 2019 [CD15.1, p.9]. Thus, for a period of approximately 5 months after the 14 November 2018 resolution, any delays in completing consideration of the application were not due to UDC. The reasons why STAL agreed to extend the Planning Performance Agreement rather than appeal for non-determination, would also have been explored and tested (see below).

82 Further, STAL's assertion that the delays in considering the planning application were caused by UDC, amounted to filibustering, and were unreasonable, are at odds with their own statements at the time. The clear implication of STAL's costs application is that the new

[11] As explained above and below **(§§46, 50, 86, 104, 149, 155(1), 176)**, STAL did not properly or fairly put its case to UDC's witnesses.

administration at UDC were set on refusing the application, leading to the delays (§22). STAL claims that it proceeded in good faith to negotiate the s.106 Agreement in the belief that the decision notice would then be issued (§15), implying that it was bad faith that motivated members thereafter.

83 Yet, in addressing UDC's Planning Committee at the January 2020 meeting, STAL's CEO expressly stated that STAL '*recognised the challenges facing a new administration*' and that STAL had tried to be accommodating and respectful of UDC's wish to thoroughly examine the issues. He also thanked both UDC members and officers for the time and effort they had devoted to carefully and professionally considering the application, '*particularly over the past few months*' [CD13.4a, pp.49-50].

84 Nowhere in STAL's costs application or evidence has STAL acknowledged the delays caused by the SoS call-in, the reasonable time taken before the signing of the s.106 Agreement, or the comments of its own CEO in January 2020 in addressing UDC's Planning Committee.

85 Passing reference was made to the SoS call-in by Mr. Scanlon in cross-examination. Reference was made to the first part of the CEO's speech in cross-examination of Mr. Andrew. Given its importance to the costs application as now revealed, this was a wholly unsatisfactory way for this point to be dealt with in evidence. Had the costs application and its basis been revealed to UDC when it should have been (July 2020 or shortly thereafter), it would have explored these issues in far greater detail in Mr. Scanlon's evidence and in cross-examination of Mr. Andrew, particularly with a view to understanding the disjunct between the accusation now made of filibustering and STAL's recognition of the reasons for the delays through its CEO in January 2020.

86 Fourthly, the costs application refers to part of the July 2019 Minutes in order to make an allegation that the reallocation of financial reserves would be '*an improper use of these ringfenced funds*' (§22). That is a serious allegation of financial mismanagement aimed at a public body, in documentation submitted to a major public inquiry. Apart from noting this part of the Minutes with Mr. Scanlon in cross-examination, Mr. Hill QC did not actually put this allegation to Mr. Scanlon[12]. This is inexcusable, not least on professional grounds. The other suggestion made is that members approached the application with a closed mind, which again

[12] It is responded to in the witness statement of Adrian Webb **[1-2]**.

is a serious allegation which has not been put in oral evidence. Indeed, neither serious allegation is made in terms in the evidence produced by STAL.

87 Had UDC been made aware – as it should have been – that this was part of the costs application, UDC would have taken the opportunity to deal with it through its own witnesses, and through cross-examination of Mr. Andrew. This is the very sort of procedural injustice that the requirement of the PPG that costs applications be made '*as soon as possible*' is designed to forestall. It is not open for these to be brushed aside. Any departure can only be mandated by externalities.

88 As a result of STAL's decision to wait until the very last minute to reveal its costs application, its detailed basis and grounds, none of the above matters have been properly ventilated at this inquiry. This is significantly prejudicial to UDC's ability to respond to the application.

(iii) Avoiding delays by additional time having to be set aside to deal with a late costs application

89 UDC made its position clear that it would need proper time to take instructions and potentially call and / or recall witnesses to deal with matters contained in a late costs application, particularly where it related to historic matters which could have formed the subject of an application at an early stage. It made these points on the opening of the inquiry on 12 January 2021, in week 6 on 24 February 2021, in week 7 on 5 March 2021, and in response to the application on 12 March 2021, having been given 50 minutes to digest and take instructions on the 22 page application. UDC's proposal, that it be given adequate time to consider and take instructions on the application and respond with a way forward, would have led to delays, which were wholly avoidable had the costs application been made in a timely fashion. Importantly, they were delays which would have allowed for the costs application to be dealt with fairly between the parties – particularly by the party against whom the application is made - by the re-calling of witnesses who would have been tested on costs related matters. In the event, its proposal has been rejected by the Panel for the reasons set out by Inspector Boniface on 12 March 2021.

90 It is no answer to the above points to suggest that UDC has addressed its evidence to the reasonableness of its decision, or to suggest that these matters can be dealt with in writing.

91 As to the first point, surmising that UDC had addressed its evidence to the reasonableness of the decision, UDC's newly appointed expert team did, in the usual way when dealing with a decision overturning officer recommendation, turn their minds to the application papers and the decision in January 2020, giving their overall view as to its reasonableness. However, that is in no way a substitute for knowing the full basis of a costs application which is to be made, so that the specific matters within the process relied upon to show unreasonableness can be focussed upon and properly covered in written evidence and expanded upon in the oral evidence of those witnesses. Requiring parties to respond to allegations of unreasonableness in a Statement of Case or in proofs of evidence, which are not supported by a properly particularised costs application, results in an exercise of shadow boxing. Moreover, here, STAL gave the false impression that the allegations in the Statement of Case were not anticipated to be the subject of a costs application at the CMC in September 2020. See also Mr. Vergoulas' suggestion that the timing of Mr. Hinnells' request for clarification of carbon projections in the ESA was unreasonable, which does not form part of the costs application here (§36(1) above).

92 As to the second point, dealing with the costs application in writing has denied UDC the opportunity to cross-examine STAL's witnesses on points arising from their costs application, with a view to demonstrating the reasonableness of its position, an opportunity which STAL alone has been afforded (and has not properly undertaken).

93 It is no excuse for Mr. Hill QC to say that he had no instructions to make a costs application until all of the evidence has been completed and, even then, at the very last minute: Queen's Counsel cannot shield himself behind any inadequacies of a client. That is completely inadequate as a response to why the application here, and its basis, could not have been provided at an early stage and in any event before the inquiry commenced, allowing for it to be addressed properly in evidence, and for it to be supplemented where necessary. Allowing Mr. Hill QC's approach is a repudiation of what is required by the PPG. This is not an application arising from conduct at or during the inquiry, for which there might be some justification for late notification of a costs application. Allowing costs applications to await "final instructions" without any disclosure as to their basis or allowing a proper ventilation of the issues before that, would give carte blanche to any developer to ride roughshod over the PPG. In every such case, it would be tactically advantageous to them to wait until the last

minute to reveal their costs application and its basis. It makes a nonsense of the PPG and its rationale, and leads to clear unfairness, as has occurred here.

94 STAL has highlighted the very substantial costs of bringing its appeal (§8), resulting from its decision to call 11 witnesses over the course of 30 sitting days[13]. On any view, a full costs award for the costs of the whole of the appeal would be substantial. Procedural rigour in the application of the PPG on costs is all the more important in those circumstances. The scale of the likely costs award further supports the need for the Panel to ensure fairness to UDC in its response to the points made. It is respectfully submitted that that has not been achieved by the way in which STAL has been allowed to make its costs application, and the Panel's ruling that it should be dealt with in writing. The facts and circumstances surrounding this appeal provide a very good example of why costs applications should be made at an early stage.

95 UDC's response to the costs application which follows should be considered expressly subject to the points made above as to the unfair advantage which STAL has gained by the timing of its application, and the prejudice caused to UDC in responding to the application.

(4) Relevant legal background

(i) General legal principles applicable to costs applications

96 Section 250(5) of the Local Government Act 1972 provides a statutory discretion to the SoS to make orders as to costs. Guidance as to the way in which that discretion may be exercised is set out in the PPG (ID: 16-027 – 16-050).

97 Unlike in civil litigation, costs in planning appeals do not follow the event. In planning appeals, the parties '*normally meet their own expenses*' (ID 16-028). That is because planning decisions engage the public interest, affecting local residents and other stakeholders beyond the individual interests of the applicant for permission and the local planning authority as decision maker. The decision in this appeal fully reflects those concerns, given its scale, permanence, and effects, as demonstrated by the full engagement of SSE and other interested parties at both the application stage and on appeal. The fact that a public planning inquiry took place to

[13] Five witnesses were needed to respond to UDC's case at appeal, Mr. Cole (aircraft noise), Dr. Bull (air quality), Mr. Robinson and Mr Vergoulas (carbon emissions), and Mr. Andrew (planning).

hear from all interested parties and determine all of the issues raised does not, of itself, warrant any award of costs.

98 Against that background, the discretion to award costs is only engaged if two pre-conditions are both met (see ID: 16-030):

(1) UDC has behaved unreasonably in its decision to refuse permission as articulated in its RFRs; and
(2) That unreasonable behaviour has directly caused STAL to incur unnecessary or wasted expense in the appeal process.

99 As is clear from the PPG and s.250(5) of the 1972 Act, even if the two pre-conditions are met, there remains a discretion as to whether costs should be awarded (ID: 16-030 – 16-031).

100 As to the pre-conditions, the word '*unreasonable*' in the PPG is to be used in its ordinary meaning. Whether a party has acted unreasonably is to be judged having regard to the picture as a whole (*Manchester CC v SOSE* [1988] JPL 774, per Kennedy J at pp.775, 777).

101 The proper approach to the application of the guidance on costs, in the exercise of a discretion to make an order for the costs of a planning appeal, has been addressed by the courts (*R v SOSE, ex parte North Norfolk DC* [1994] 2 PLR 78, per Auld J at pp.83H, 84A, as relevant, emphasis added):

(1) '*Clearly, the evidence upon which the authority relies to support a ground for refusal of permission must have some substance in the sense of providing some respectable basis for their stance upon a particular issue. But it need not be of such substance as to persuade the inspector to find in the authority's favour on the issue. Otherwise every evidential failure to persuade an inspector on an issue would expose the loser to a finding of unreasonableness on an application for costs in relation to that issue.*'
(2) '*In addition, the test is one of unreasonableness, not just of whether an authority has produced evidence to substantiate their case on a particular issue.*'

102 It is clear from the *Manchester* and *North Norfolk* cases that when considering whether there is some substance to a RFR, the decision maker must look at the picture as a whole, considering all of the evidence given at the appeal.

103 Further or alternatively, where a decision has been taken to overturn an officer recommendation to grant permission, it is wholly unsurprising for RFRs not to be "substantiated" at the time of the decision, since there is no requirement or expectation for an Officer Report to set out and evidence the basis for a decision contrary to its recommendation. In those circumstances, such evidence must necessarily be considered on appeal as is acknowledged in the PPG[14]. Unreasonableness should therefore be considered in the round, having regard to all of the evidence submitted by UDC to defend its RFRs on appeal.

104 Against that background, the submission of expert evidence, which assesses the evidence before the local planning authority when the decision was taken, and gives the view that the decision was a reasonable one in the circumstances, is the clearest demonstration of there being some respectable basis for the local planning authority's stance on appeal. That is precisely what UDC has done through its expert witnesses in this appeal, each of whom has given their view that, on their area of expertise, UDC's decision was a reasonable one at the time it was taken. There has been no suggestion by STAL that these were not appropriately qualified and experienced witnesses in their area. Importantly, the expert views of each of UDC's witnesses on the reasonableness of the UDC's decision at the time it was taken has not been challenged, fairly and squarely, as it should have been.

105 As to causation, RFRs (1) – (3) each stand independently of one another (RFR4 is related to and dependent on the other RFRs). Each RFR was reasonable when considered against the evidence as a whole. However, even if only one RFR were considered to be reasonable, that would have been sufficient to cause an appeal. On appeal, it is plain that SSE (and indeed other 3rd parties without Rule 6 status) would have caused a number of other issues to be considered. STAL would have responded to those issues with expert evidence, as it has done on each of UDC's issues, plus each of those raised by SSE. As a result, if just one of the RFRs is considered to be reasonable, there had to be an appeal which would have addressed all of the issues which have in fact been covered. It follows that if only one of UDC's RFRs is considered to be reasonable, no costs award should made.

(ii) Discussions at Planning Committees, Minutes, and Reasons for Refusal

[14] '*[F]ailure to produce evidence to substantiate each reason for refusal <u>on appeal</u>*' is cited as an example of unreasonable behaviour (ID: 16-049, emphasis added).

106 STAL has spent time at this inquiry seeking to pick over what may or may not have been openly discussed or expressed to be reasons for the decision, by reference to recollections of the discussions, the Minutes of the January 2020 meeting, and Minutes of previous meetings. STAL has also spent inquiry time picking over what may or may not have been before UDC's Planning Committee when it made its decision in January 2020 by reference to the Officer Reports and supporting documentation.

107 Such matters are of very limited relevance to this costs application because: (1) the RFRs are those contained in the Decision Notice; and (2) the need for unreasonableness to be considered against all of the evidence heard at the appeal, including that of UDC's expert witnesses, for the reasons set out above.

108 Further or alternatively, the Courts have provided relevant guidance on how the discussions of Councillors at a Planning Committee meeting should be approached, albeit in the context of challenges to the grant of planning permission.

109 First, the Courts have made a clear distinction between, on the one hand, the decision notice containing the RFRs, and on the other hand, the resolution of the committee recorded in the Minutes. The decision notice constitutes the decision and the reasons on which the decision was made. It is the decision notice and its reasons which give rise to the appeal, not the Minutes. The drawing up of Minutes is directed to a different statutory obligation under the Local Government Act 1972 to provide a record of the proceedings after a committee meeting (s.100C and Sched. 12), not to give reasons for the committee's decision pursuant to the Town and Country Planning Act 1990 and Article 35 of the Town and Country Planning (Development Management Procedure) Order 2015 (*R (Hawksworth Securities Plc) v Peterborough CC et al.* [2016] EWHC 1970 (Admin) per Lang J at §§73-74).

110 Here, the reasons contained within the Decision Notice at [CD12.10] constitute UDC's RFRs, a point which seems to be lost on STAL, given its repeated focus on the Minutes of meetings. Fundamentally, through those RFRs, UDC articulated that STAL had failed to demonstrate that the aircraft noise and air quality effects would not be detrimental, and that UDC's view was that the carbon emissions were incompatible with climate change policy and targets.

111 Secondly, when considering discussions at a planning committee, it is necessary to bear in mind that the committee are taking a collective decision on a planning application. The general tenor of the discussion must be considered rather than individual views expressed by committee members, let alone the precise terminology used (*R v Exeter CC ex parte Thomas & Co. Ltd.* (1989) 58 P&CR 397, per Simon Brown J at p.408[15]). There are real difficulties in establishing the reasoning process of a corporate body which acts by resolution. What an individual says during the debate may or may not be how he acts when he casts his vote after the debate. Many of those present may make no verbal contribution (*R (Tesco Stores Ltd.) v Forest of Dean DC* [2014] EWHC 3348 (Admin), per Patterson J at §73, points which remain unaffected following the appeal [2015] EWCA Civ 800).

112 Here, the general tenor of the Minutes of the January 2020 meeting (and in fact those which went before), was that STAL had failed to convince members as to the extent of environmental impacts relating to aircraft noise, air quality, and carbon emissions arising from their proposals and whether they could be adequately addressed. UDC's experts have each confirmed that that stance was a reasonable one at the time the decision was taken.

113 The Courts' guidance, that extreme caution should be applied with regard to individual comments by members during the debate of a planning application, applies with particular force to Councillor Hargreaves' comment as to the availability of financial reserves to defend any decision, which STAL wrongly seeks to rely upon (§21). Such comments are wholly irrelevant to the merits of this costs application. STAL's focus on this comment is designed to divert attention from the proper planning concerns which lay behind the decision, which have been supported by expert evidence on appeal.

114 As to reasons generally, at para. 14 of its costs application, STAL refers to the leading case of *Dover DC v CPRE (Kent)* [2018] Env LR 17, without acknowledging its particular application here. The Court noted that it has long been the case that local planning authorities must give reasons for refusing permission, which appears to have been a corollary of the fact that in those cases there is a statutory right of appeal (per Lord Carnwath at §27, referencing the 2015 Order). The Court went on to comment that if a recommendation to grant is accepted

[15] Referring with approval to Pickford LJ's comment in *R v London County Council* [1915] 2 KB 466 at p.490, that '*there are probably few [Council] debates in which someone does not suggest a ground for decision something which is not a proper ground and to say that because somebody in debate has put forward an improper ground the decision ought to be set aside as being founded on that particular ground is wrong*'.

by members, no further reasons may be needed. '*Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference.*' (§42).

115 STAL has spent inquiry time seeking to make the case that UDC was required formally and expressly to revisit and undertake the planning balance in its consideration of the planning application in January 2020. However, that ignores the way in which the RFRs were framed, making clear that the Committee had not been convinced by the evidence put before them on the issues of aircraft noise, air quality, and carbon emissions. That is the context in which the planning balance was addressed. In any event, even if there was a requirement to address the planning balance, there is nothing requiring that to be formally expressed within the duty to give full reasons. There is nothing in statute, case law, or guidance which requires a local planning authority to set out in a decision notice how the planning balance has been undertaken.

116 What the Supreme Court recognised in the *Dover* case is that the requirement to give reasons for a refusal should be considered within the context of the statutory appeal which is available for any such refusal. That reflects the fact that the terms of a refusal, contained in a Decision Notice, will be expanded upon in the planning authority's Statement of Case and then in its evidence on the appeal, as has occurred here. In this case, that process has substantiated the RFRs articulated in UDC's decision notice.

(iii) Immateriality of advice on costs consequences to question of reasonableness

117 STAL devotes significant passages of its costs application to the fact that UDC's members were made aware of the financial implications of any decision to reverse the resolution of the Committee in November 2018 (§§18 – 24, 38 - 39). These matters are completely irrelevant to the merits of whether UDC's decision was a reasonable one. It is well known that, although local planning authorities can properly be made aware of the financial implications of their decisions, the costs consequences of any decision should not influence the exercise of planning judgment on an application, as they are not a material planning consideration (*R (East Bergholt PC) v Babergh DC* [2019] EWCA Civ 2200, per Lindblom LJ at §82).

118 It does not follow that because a Planning Committee is given proper advice as to the potential financial implications of a decision, the taking of that decision is unreasonable, whether at

that time or when considered on appeal. By focussing on the advice given – quite properly - to the Planning Committee on costs consequences, STAL seeks to colour the Panel's judgment on the reasonableness of UDC's decision and to draw attention away from the proper planning concerns which lay behind that decision. Having been made aware of the financial implications of their decision, the Planning Committee held firm in their planning judgment that their concerns as to the environmental effects had not been properly addressed, a point made good on appeal through UDC's expert witnesses.

(iv) Proper scope of legal advice on material considerations

119 The costs application suggests that any decision to reverse the November 2018 resolution was contrary to the consistent advice of Counsel and Leading Counsel that there was no lawful basis for so doing, referring to legal advice received by UDC (§§16, 18). The point is both wrong on the facts and misconceived as a matter of law.

120 Legal advice was received by UDC, which was properly referred to in the Report to the Planning Committee of January 2020 [CD13.4b, §§6-11]. As stated in that Report, that advice was shared with members on a legally privileged and confidential basis.

121 Quite separately, the January 2020 Report properly set out the approach for the Planning Committee, including whether there were any new material considerations that would justify a different decision to that resolved in November 2018 [CD13.4b, §§10, 52-53].

122 The approach set out for the Planning Committee properly reflected the scope of what were legal matters, and what were matters for the Planning Committee: whether or not a particular consideration is a material consideration is a matter of law on which legal views can be taken. However, subject to irrationality, it is a matter within the exclusive province of a decision maker to decide the weight which should be accorded to a material consideration (*Tesco Stores v SOSE* [1995] 1 WLR 759, per Lord Hoffmann at p.780F, see also Lord Keith at p.764G):

'*The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that*

the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.'

123 The Courts have also addressed what a material consideration is in the planning context (*R (Kides) v South Cambridgeshire DC* (2003) 1 P&CR 19, per Jonathan Parker LJ at §121, emphasis added):

'*In my judgment a consideration is "material", in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decisionmaker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.*'

124 To suggest, as STAL does, that any decision to reverse the November 2018 resolution was contrary to legal advice and had '*no lawful basis*' (§18), is both misleading, given the proper way in which the legal advice was referred to in the Officer Report, and misconceived as a matter of law. STAL's suggestion that the decision was contrary to legal advice is yet another attempt to colour the Panel's judgment on the reasonableness of UDC's decision.

(5) Response to Grounds 1, 2, and 3: Preventing or delaying development which should clearly be permitted; imprecise and vague RFRs / failing to substantiate RFRs; refusing planning permission capable of being dealt with by condition

125 Grounds 1 - 3 can be taken together. They are devoid of any merit when the proper context for UDC's decision is considered.

(i) UDC's detailed consideration of the application

126 The following relevant parts of the timeline up to the meeting in January 2020 can be noted.

127 On 19 February 2018, SSE made a request to the SoS that the application be called in for determination (See Appendices to [CD12.15b]). As a result of that request, on 7 November 2018, the SoS requested that UDC not issue any Decision Notice until the request for call in had been fully addressed **[29]**.

128 On 14 November 2018, UDC's Planning Committee resolved to follow the recommendation in its Officer Report and to give conditional approval to the application, subject to a s.106 Agreement being agreed and signed. The resolution was passed by casting vote, reflecting the hugely contentious nature of this major application and its importance to the constituents which the members represented.

129 Over 4 months later, on 20 March 2019, the SoS decided not to call in the application [CD12.15a].

130 On 12 April 2019, and 5 months after the November 2018 resolution, the s.106 Agreement was signed by STAL and sent to UDC for signature [CD25.1, p.9].

131 Local elections held in May 2019 resulted in the election of a completely new administration for the Council. Whilst certain members from the November 2018 committee remained, the elections resulted in a significant change to the make-up of the Planning Committee to reflect the new political balance. Both before and after those elections, motions were considered to instruct officers not to issue the Decision Notice. These motions were based on members wanting to review the adequacy of the s.106 Agreement which had been negotiated (25 April 2019), and subsequently also to consider whether there were any new material considerations and / or changes in circumstances since the November 2018 resolution to which weight might now be given in striking the planning balance.

132 An informal meeting was held on 30 April, and at an Extraordinary Council Meeting on 28 June 2019, officers were instructed not to issue the Decision Notice pending consideration of the adequacy of the s.106 Agreement and any new material considerations and / or changes in circumstances. Legal advice was obtained and considered both before and after those meetings, and workshop sessions arranged for members to consider the s.106 Agreement and issues that might be raised as material considerations [CD13.4b, §§4-12].

133 By reference to the above timeline, it cannot sensibly be claimed that UDC are in any way culpable for the 5 month period between the resolution of November 2018 and the signing of the s.106 Agreement by STAL on 12 April 2019. UDC were under a direction not to issue the

Decision Notice until the application had been considered by the SoS. After that, the s.106 Agreement was negotiated by officers.

134 As to the period after 12 April 2019:

(1) There is nothing unreasonable in a Planning Committee wanting to review the adequacy of a s.106 Agreement and to seek legal advice as to its legal adequacy to assist in that process.

(2) There is nothing unreasonable in a Planning Committee wanting to consider whether any new material considerations have arisen since its resolution which might affect the planning balance.

(3) Local elections and changes in the political make-up of local authorities are a fact of life. It was entirely sensible for new members to the Planning Committee to be brought up to speed on an application which was highly contentious and remained under consideration.

(4) Given the history of airport expansion at Stansted, together with the scale of this application, its importance to local residents - with a new residents-based administration - and with environmental effects lasting for generations, it was not unreasonable that members of UDC's Planning Committee would wish to subject the application to detailed scrutiny.

135 Significantly, the detailed scrutiny given by UDC's members to the application, and the reasonableness of that approach was something which STAL itself accepted and emphasised when addressing the Planning Committee in January 2020. In his address to the Committee on 24 January 2020, Ken O'Toole, CEO of STAL stated as follows ([CD13.4a], pp.49-50, as relevant, emphasis added):

'*I want to start by thanking the UDC members and officers for the time and effort they have devoted to carefully and professionally considering our application, particularly over the last few months.*

…

Our planning application was submitted in February 2018. We have been patient; recognised the challenges facing a new administration; and have tried to be accommodating and respectful of your wish to thoroughly examine the issues.'

136 Mr. Andrew accepted in cross-examination that there was nothing to suggest that the sentiments contained in Mr. O'Toole's speech were not genuine.

137 The statements above provide the complete answer to the claim by STAL that UDC's consideration of the application amounted to filibustering, or that UDC unreasonably delayed the determination of the application ([INQ1] §90, STAL's Closing §280, costs application §41).

138 In any event, the application was subject to a Planning Performance Agreement signed on 21 February 2018 **[33-36]** including an agreed timetable with a view to resolution of the application by 18 July 2018 **[35]**, a date which was clearly not achieved given STAL submitted 808 pages of consultation response and clarifications by letter dated 5 July 2018 [CD11.2]. The first page of the PPA expressly recorded that nothing in the agreement restricted or inhibited STAL from exercising its right of appeal under s.78 of the TCPA 1990 **[33]**. If at any stage after 18 July 2018, STAL had genuinely considered that UDC were unreasonably delaying consideration of the application, STAL could have refused to extend the period for consideration and appealed for non-determination. Instead, STAL agreed to extensions to the determination period up to 30 September 2019 **[37]**, and then from 20 December 2019 until 29 January 2020 **[40-43]** (the period between 1 October 2019 and 19 December 2020 provided a 10 week window when there was no extension sought by UDC, which STAL could have used to appeal for non-determination, if it so wished).

139 The reality is that, whilst STAL was in receipt of a favourable recommendation and resolution, they were content to support UDC in its detailed further consideration of the application following the May elections and change in administration. However, when that democratic process resulted in a unanimous resolution[16] and decision to refuse permission for the reasons set out in the Decision Notice, as part of this costs application, STAL now seeks to criticise the very process it was content to support. STAL's position is utterly disingenuous.

(ii) Reasonableness of the decision in January 2020

140 The RFRs contained within the Decision Notice provide the basis for UDC's decision and its scope. The reasons for the decision are not to be gleaned from Minutes or Officer Reports. The Courts have urged extreme caution in seeking to pick over details from Minutes to elicit reasons, given that planning committees take collective decisions on planning applications (*Hawksworth Securities*, *Thomas*, *Forest of Dean*).

[16] With 2 abstentions

141 The RFRs in the Decision Notice are summarised above and are at [CD12.10]. In essence, they articulated the Planning Committee's concern that STAL had failed to demonstrate that the aircraft noise and air quality effects would not be detrimental, and the Planning Committee's view that the carbon emissions were incompatible with climate change policy and targets. More broadly, they reflected the Planning Committee's concern as to the extent of the environmental impacts relating to aircraft noise, air quality, and carbon emissions arising from the proposal and whether they could be adequately addressed.

142 Insofar as reference can be made to the Officer Report, and the discussions reflected in the Minutes of the January 2020 meeting, bearing in mind the extreme caution which the Courts have urged in seeking to draw out reasons for a decision from Officer Reports and Minutes, it can be noted that a number of valid concerns were before the Planning Committee and / or discussed ([CD13.4g], §§1-4; [CD13.4a], pp.8-11), including:

(1) The extent to which the environmental impacts assessed were reliant on fleet mix assumptions which included new generation aircraft such as the Boeing 737MAX, an aircraft which had been grounded since March 2019. This had the potential to affect aircraft noise and carbon emissions in particular.
(2) The extent to which the WHO ENG 2018 had been considered and explained by STAL. This was relevant to the tightening of standards for aircraft noise, in circumstances where the additional passenger throughout above current capacity would not occur for some years (based on the 2018 ES).
(3) The extent to which the effects of fine particulate matter (PM2.5) had been considered and taken into account. As with aircraft noise, this was relevant to tightening policy on air quality referable to the life of the scheme as referred to in (2).
(4) The application of carbon policy, that airport applications for capacity growth must demonstrate that their emissions will not impact on the government's ability to meet carbon reduction targets, when considered against the advice of the Committee for Climate Change on emissions from aviation and shipping, and the recent amendment to the Climate Change Act to reflect net zero.

143 Each of the above concerns were material planning considerations in the sense of being factors which carried some weight in the decision-making process (*Kides*). There was no

suggestion to the contrary in the Officer Reports[17]. The weight to be given to those material considerations in considering the application was therefore a matter for the Planning Committee, subject to *Wednesbury* irrationality (*Tesco Stores*).

144 In addition, what has to be borne in mind when assessing the reasonableness of UDC's decision in January 2020 is that it was a decision taken by Councillors sitting on a Planning Committee. Whilst they had received assistance from officers and others in determining the application, they were ultimately exercising a planning judgment on the application. Considered against that proper context, it was entirely reasonable for the Planning Committee to consider that:

(1) Their concerns as to fleet mix would affect the extent of the environmental impacts assessed.
(2) The evidence before them did not demonstrate that the aircraft noise and air quality impacts had been adequately addressed, whether in light of the concerns as to fleet mix or when considering the tightening policy in these areas against the longer term impacts of the proposal.
(3) The carbon emissions arising from the proposal would be incompatible with climate targets and net zero.

145 The above considerations (and others discussed at the January 2020 meeting) amply provide '*some respectable basis*' for the RFRs (*North Norfolk*). The fact that STAL or even the Panel may not agree with the robustness of the points which lay behind the RFRs at that stage, does not make the RFRs themselves or the decision to refuse unreasonable.

146 Given their concerns about fleet mix assumptions based on new generation aircraft – one type of which, in January 2020, had been grounded for many months - it was reasonable for the Planning Committee to consider that the roll forward of the existing noise contour condition would not adequately limit the effects arising from the airport, the noise profile of flights in the short term, nor secure the forecast improvements expected from new generation aircraft in the longer term.

[17] See [CD13.4g] and particularly the Additional Supplementary Pack for the April 2019 meeting in which a correction was made to the April 2019 report, to confirm that the WHO ENG2018 did carry weight (albeit in officers' view negligible) ([CD13.2c], p.3).

147 It was also reasonable for the Planning Committee not to have to address the planning balance expressly in its deliberations or reasons. It is nonsensical to suggest that the planning balance was not something very much in the minds of the Planning Committee in considering the application, both through the detailed scrutiny which had been given to the application over many months, and at the January 2020 meeting, when:

(1) The Officer Report for the January 2020 meeting addressed new material considerations in the context of the overall conclusions of the November 2018 Report, and directed members to whether there were any new material considerations or other changes in circumstances to justify a different conclusion ([CD13.4b], §§32-33).
(2) At the start of the second day of the January 2020 meeting, the Chair read out the resolution of the June 2019 meeting, to the effect that consideration would be given to any new material considerations to which weight may now be given in striking the planning balance.
(3) The Members Discussion also commenced by considering whether there were relevant changes in circumstances which should be sufficient to tip the tilted balance ([CD13.4a], pp.6, 8).

148 There was no requirement mechanistically and expressly to revisit the planning balance in deliberations or the decision, when the proper context for the decision had been established in the Officer Report and was well understood by the Planning Committee through their comments. Nor is there anything in statute, case law, or guidance which requires a Planning Committee to set out in a decision notice how the planning balance has been undertaken. It is enough for the RFRs to be '*limited to the points of difference*' (*Dover*), which members can be taken to have considered against the planning balance, leading to refusal.

149 Here, as in other areas, STAL has not put its case properly or fairly to the relevant witness. Mr. Scanlon unsurprisingly accepted in cross examination that as a planning expert, it is essential to any planning assessment to undertake the planning balance (costs application, §33). But that does not amount to a concession as to what a Planning Committee must expressly do when arriving at its decision on this application, where it has made clear statements which show that the planning balance is the context in which that decision is taken.

(iii) Substantiation of UDC's decision at the time it was taken through expert evidence on appeal

150 Even if, contrary to the above, it was considered that the RFRs had no proper basis at the time of the decision:

(1) It is in the nature of an overturn decision that the RFRs may not be well evidenced at the time the decision is taken, given the decision will be contrary to the position set out in the Officer Report;
(2) Unreasonableness should be considered in the round, having regard to all of the evidence submitted by UDC to defend the RFRs on appeal (*Manchester*);
(3) Both (1) and (2) are reflected in the PPG, which references the failure to produce evidence to substantiate RFRs '*on appeal*' as an example of unreasonable behaviour (ID: 16-049).

151 By reference to the PPG, UDC plainly has produced evidence to substantiate its RFRs on appeal. Each of UDC's expert witnesses reviewed the application and supporting information and gave their professional view that at the time the decision was taken, the RFRs were both reasonable and understandable.

(1) On aircraft noise, Mr. Trow's expert view was that the decision was understandable, and further assessment work should have been undertaken to further articulate and communicate the effects of the ES [UDC/1/2, §8.8; see also §§5.13 and 6.2], and that a set of noise limits aligning with the demands of policy was necessary rather than a continuation of the historic form of restrictions. These shortcomings were clearly set out in Mr. Trow's rebuttal in response to the alleged comprehensiveness of the ES by Mr. Cole, and Mr. Cole's consideration of the WHO ENG2018 and noise effects on schools in his proof [UDC/1/4, responses to §§3.1, 6.8.2, and 8.1.1].
(2) On air quality, Dr. Broomfield's expert view was that the decision was reasonable [UDC/2/2, §113]. There were shortcomings in the air quality assessment in the ES and further information should have been required on certain matters (e.g. levels of nitrogen dioxide in the Bishop's Stortford AQMA) [UDC/2/2, §§57 and 61; UDC/2/4, p.9].
(3) On carbon emissions, Dr. Hinnells's expert view was that the evaluation of the carbon emissions was flawed at the point of decision because it failed to acknowledge, grapple with or address evolving carbon emissions policy, and the RFR was reasonable [UDC/3/1, §§99, 24-29].

152 The shortcomings identified by UDC's experts were all clearly made in the context of the EIA Regulations whether explicitly (e.g. Dr. Broomfield [UDC/2/2, §61]), or implicitly (e.g. Dr. Hinnells' references to '*flaws*' at the point of decision). Importantly, the shortcomings were also identified applying the core principles of extant aviation policy in the APF ([CD14.1], §3, emphasis added, referred to in UDC's Opening at [INQ2], §63):

'*The Aviation Policy Framework .. is underpinned by two core principles:*

- *Collaboration: By working together with industry, regulators, experts, local communities and others at all levels, we believe we will be better able to identify workable solutions to the challenges and share the benefits of aviation in a fairer way than in the past.*

- *Transparency: To facilitate improved collaboration, it is crucial to have clear and independent information and processes in place. Those involved in and affected by aviation need to have a clearer understanding of the facts and the confidence that proportionate action will be taken at the international, national or local level.*'

153 As to the principle of providing transparency for those involved in and affected by aviation, it is notable that STAL did not seek to update its ES after the consultation response and clarifications documentation dated 5 July 2018 [CD11.2]. STAL has sought to hide behind the lack of specific requests from UDC's officers for further environmental information but, quite separately under national aviation policy, the responsibility to provide a clearer understanding of the environmental effects for those affected by aviation falls equally on the airport seeking to expand, especially where policy is evolving. UDC's Statement of Case detailed relevant changes to policy, guidance, and legislation on aircraft noise, air quality, and carbon emissions, all published after the submission of the application in February 2018 [CD24.2, Table 2.2]. Most of these changes occurred in the period after July 2018 and before the determination in January 2020. For example:

(1) The publication of the WHO ENG 2018 in October 2018 and their application was a matter which UDC's Scoping Opinion specifically asked to be addressed [CD12.9, App. A, §27]. Mr. Trow's position was that, although the Guidelines are not without criticism, they should have been formally and properly addressed by STAL before determination of the application, to show that the full effects of the development had been clearly explained and considered [UDC/1/4, §6.8.2][18].

[18] As Mr. Trow openly acknowledged in this same part of his written evidence, the WHO ENG 2018 did not provide a more appropriate basis for conducting noise assessments, but made clear that they should have been used to inform the assessment of aircraft noise on health.

(2) The publication of the national Clean Air Strategy in January 2019 set out how the Government proposed to tackle all sources of air pollution moving forward, containing a clear commitment and direction of travel towards tightening the air quality objective for PM2.5. Dr. Broomfield's position was that a large scale and long term project such as the proposal should take that commitment at a national level into account [UDC/2/2, §32].

(3) The Committee for Climate Change's letter of February 2019 [CD17.44], its Net Zero Report of May 2019 [CD17.26], and its letter of September 2019 [CD17.46], together with the amendment in June 2019 to the Climate Change Act 2008 to reflect net zero, were material considerations which Dr. Hinnells considered should have been addressed by STAL [UDC 3/1, §29[19]].

154 The fact that the above matters were not properly addressed by STAL during the consideration of the application, supports the reasonableness of UDC's decision at the time it was taken. The direction of travel in policy in each of these areas has informed UDC's position even after the ESA was published in October 2020.

155 As to oral evidence at the inquiry on UDC's decision:

(1) None of UDC's witnesses were challenged in cross-examination on their opinions as to the reasonableness of UDC's decision, which had been stated in writing and confirmed orally. Rather, STAL spent a limited amount of time in cross-examination asking UDC's witnesses to confirm facts around the history of the application, without ever putting its case on unreasonableness, fairly and squarely, to any UDC witness. It was not sufficient to dance around the edges of these issues, if they were to become the subject of a costs application.

(2) In any event, with respect to air quality matters, Dr. Broomfield confirmed in Re-examination that, notwithstanding the limited ambit of the questions put to him in cross-examination, as to the way in which air quality was addressed by the Planning Committee, none of those points altered his view that UDC's decision was a reasonable one.

(3) On carbon emissions, the foundation of STAL's case was and is that carbon emissions are a matter for international and national governments, not for local planning authorities in local planning decisions. Yet STAL's carbon policy witness, Mr. Robinson, accepted in cross examination that carbon emissions can be a matter to be taken into account in local

[19] This was in a section of Dr. Hinnells' proof entitled '*Evolution of policy after the application was submitted but before final determination, which was not addressed by STAL.*'

planning decision making (UDC's Closing, §84)[20]. UDC's RFR on carbon emissions is readily substantiated (by reference to the January 2020 decision and since publication of the ESA) when this concession is taken together with the following pieces of evidence (UDC's Closing, §§106-108):

- Dr. Hinnells' judgment, that the carbon emissions arising from the proposal would be significant, and almost certainly adversely impact on the UK's ability to meet its 2050 net zero target to a degree which cannot be overlooked.
- The acceptance by Mr. Vergoulas, STAL's carbon technical witness, in cross examination that there was nothing technically or methodologically unsound in Dr. Hinnell's approach, and that the difference between himself and Dr. Hinnells was one of professional judgment.

(iv) UDC's position after publication of the ESA on 16 October 2020

156 It was STAL's decision to "update" its ES after UDC's decision in January 2020, and to publish the ESA on 16 October 2020.

157 The ESA effectively constituted a new ES in all but name. It was on any view a substantial document, comprising 18 Chapters of main text (over 400 pages), plus numerous Appendices and a Non-Technical Summary in a total of 4 volumes [CD7.1-7.18, 8.1-8.9, 9.1-9.4, 10.1]. More pertinently, there were significant changes to the content:

(1) The ESA was based on a wholly new set of aviation forecasts, with a baseline moved forward by 3 years (2016-2019). Those forecasts incorporated delays to the Boeing 737 Max program into fleet mix assumptions [STAL/2/2, §4.12], and sought to account for the unprecedented effects of the COVID-19 pandemic, which were still evolving at the time [STAL/2/2, §4.3].

(2) The result of those forecasts was to push back the forecasts in the 2018 ES by a further 4 years, with current capacity expected to be reached in 2027 (originally 2023), and the proposed 43mppa expected to be reached 12 years after publication of the ESA, in 2032 (originally 2028).

[20] The interpretation and application of MBU policy as allowing consideration of carbon emissions in local decisions places it within the third category of consideration material to a decision (*R (Friends of the Earth Ltd. et al.) v Heathrow Airport Ltd.* [2020] UKSC 52, at para. 116, per Lord Hodge and Lord Sales [CD14.74], as referred to by Dr. Hinnells in cross-examination.

158 At the same time, given its publication a month after UDC's Statement of Case, STAL took the opportunity within the ESA to respond to matters raised in UDC's Statement of Case [CD10.1, p.2, last para.].

159 The environmental effects estimated to result from the forecasts, and the assessments undertaken in the ESA, were considered in detail in UDC's written and oral evidence and shall not be repeated here. However, it can be noted that:

(1) the noise exposure forecasts in the ESA presented more favourable outcomes than in the ES on key metrics, principally at night whereby the effects of the development have changed from being adverse to beneficial [UDC/1/2, §§6.15, 6.25];
(2) the NOx emissions presented across the 2019-2032 period in the ESA were notably different from those across the 2016 – 2028 period in the ES, due to reductions from road traffic over the longer period in the ESA, and changes to fleet mix assumptions ([CD3.10], Fig. 10.6, §§10.116-7 vs [CD7.10], Fig. 10.2, §§10.7.5-10.7.8]). The NOx emissions for the DC year reduced from 88t/yr in the ES to 48t/yr in the ESA.
(3) the 4 year push back in the forecasts also resulted in a lower amount of carbon emissions estimated for the DC year in the ESA (2032) when compared to the ES (2028) ([CD3.12], Fig.12.6 vs [CD7.12], Fig. 12-3).

160 At the same time, each of UDC's expert witnesses have explained how, given the clear direction of both extant and emerging policy applicable to airport expansion, and the relatively long (6yr) period before the additional passenger numbers are expected to be needed, and the proposed capacity is to be reached (11yrs), there is a need for the environmental impacts of the proposal to be controlled and mitigated in both the short and longer term through a dynamic phased release condition.

161 Finally, having regard to extant and emerging air quality and carbon emissions policy, Dr. Broomfield and Dr. Hinnells have explained that the emissions of key pollutants and carbon emissions are indeed significant (UDC's Closing §§67, 75, 78, 106-109).

162 Against that background, it is a gross oversimplification by STAL to suggest that, because the headline outcomes presented in STAL's ESA are not significantly different from those in the

ES, UDC's decision and UDC's position on appeal is unreasonable (costs application §41). That belies the significant differences in content (including amendments to assessment methodology and scope)[21], the changed aviation forecast periods, and resulting changed environmental forecasts presented, all of which falls to be assessed against extant and emerging policy, policy which STAL has failed properly to address in material respects in arriving at its ESA conclusions.

163 In those circumstances, it is a complete mischaracterisation of UDC's case to suggest that it has '*abandoned*' any attempt to defend its RFRs on appeal, or that UDC's position represents a '*volte face*', as suggested in the costs application (§§3, 7). Having received the ESA, UDC's expert team has evaluated the changed picture it presents, and considered that against:

(1) the inherent uncertainties of aviation forecasting exacerbated at an airport specific level and compounded by the effects of the COVID-19 pandemic;
(2) the significantly longer periods now involved before the existing and proposed capacities are forecast to be reached; and
(3) the direction of travel in applicable extant and emerging policy on noise, air quality, and carbon emissions.

164 It is those factors which have led UDC to formulate a '*workable solution*' (APF, [CD14.1], §3) to the challenges faced by this appeal and the issues which UDC has addressed in its evidence, in the form of Condition 15. It is by that mechanism that UDC has sought to bridge the gap between STAL's and UDC's position, which it sought to do as early as 4 December 2020, having received the ESA just over 6 weeks previously, on 16 October 2020.

165 UDC has been perfectly clear in its evidence and submissions that, unless appropriate and necessary mitigation or limits cannot be secured, the appeal should be refused (UDC's Opening §64, UDC's Closing §159). Mr. Scanlon's planning evidence on behalf of UDC is that the grant of permission is dependent on securing the environmental mitigation through

[21] For example, on air quality, the ESA does include new material on issues which were not addressed in the ES, including an assessment of concentrations in zones around the M11 and A120 as required in UDC policy ENV13, a sensitivity test on aircraft departure thrust settings, and update to emissions data for LEAP engines, a sensitivity test on airport vehicle speeds, an assessment against WHO air quality guidelines for PM2.5, discussion of ammonia emissions from aircraft and road traffic, further information on Thorley Flood Plain and Little Hallingbury Marshes SSSIs, and further information on the potential impacts ay Elsenham Woods SSSI [UDC/2/3, §§ 123-139].

Condition 15 or equivalent conditions (UDC's Closing §§116-117). STAL persists in misreading his evidence in its costs application (§37), and falls into the trap of failing to read his evidence as a whole, supplemented (if it were necessary) by his oral evidence (UDC's Closing, §§116-117).

166 Nor is it remotely credible for STAL to suggest that UDC could have sought further information or imposed conditions to resolve their concerns in January 2020 (costs application, §29). That conflates the issues which lay behind the RFRs, and the position now, following publication of the ESA and assessment of its effects in the light of the factors set out above (§§157-164 above). At the time of the January 2020 decision, the ES had not been updated to reflect a series of material considerations. There were issues which had not been properly addressed (§151 above). Further, it was not unreasonable for the Planning Committee to conclude that, following the detailed scrutiny which the application had been given over several months, their matters of concern could not at that time be addressed by conditions, and therefore to conclude that the application should be refused. From February 2020, STAL was stating to UDC's officers that it was considering a range of responses to UDC's refusal of the application, including a resubmission of the application or an application for an NSIP **[3-4]**. From March 2020, STAL was referring to a revised ES if an appeal were to be made **[4]**, which it then did not publish until October 2020. It was reasonable for UDC to await publication of the ESA to consider its position, given the need for an updating of the environmental effects.

167 In any event, even if, contrary to the above, it was considered that UDC should have sought to formulate conditions to meet its concerns, STAL would not have accepted them. Following the scrutiny of an inquiry appeal process, it is perfectly plain that STAL is implacably opposed to any form of phased release condition, whether in the form of Condition 15[22] or otherwise. Moreover, UDC's alternative Conditions (7, 10A) are not accepted by STAL. The air quality condition (10B) which STAL did not offer until 2 March 2021[23], does not provide an effective means of limiting the air quality effects of the development, as explained in UDC's Position Statement [CD26.29]. Finally, STAL offers no condition at all to control its carbon emissions to this inquiry (UDC's Closing, §§156-158).

[22] On Condition 15, STAL asserts as much at §82 of its costs application.
[23] Just 3 days before the second and final Planning Conditions and Obligation session, and fully 3 months after UDC had provided its draft Condition 15 to STAL.

168 The fact that UDC had the power to impose the conditions it saw fit provides no answer on this point (costs application, §77). Given its stance on the conditions discussed at this inquiry, if UDC had imposed conditions adequate to achieve the mitigation required for this application back in January 2020, STAL would inevitably have appealed against those conditions, resulting in an appeal process such as that which has taken place (s.78(1)(a) TCPA 1990).

169 Taken as a whole, it cannot sensibly be contended that UDC has failed to produce evidence substantiating its RFRs on appeal. Evidence has been produced by appropriately qualified, experienced experts which has defended the RFRs and advocated a workable solution for this appeal following publication of the ESA.

(v) Residual points under Grounds 1 - 3

170 The submissions above respond to the substance of Grounds 1 - 3 and provide a complete response to those Grounds. However, for the sake of completeness, certain residual points can briefly be dealt with.

171 As to RFR1 on noise (costs application, §§48-57):

- It is a misreading of UDC's case to suggest that it no longer puts forward a case that permission should be refused on noise grounds. If appropriate and necessary mitigation and limits in the form of Condition 15 or alternatively Condition 7 (in the form sought by UDC) cannot be secured, permission should be refused on noise grounds[24].
- Mr. Trow's evidence was that the RFR on noise, based on the ES, was understandable and he neither departed from, nor was challenged on this expert view.
- It was a shortcoming of the ES that it did not properly explain and communicate the effects of the WHO ENG 2018, even if the ultimate acceptability of the proposal was not to be assessed against them. The fact that they were not properly explained, combined with the uncertainty around the fleet mix assumptions, supported the reasonableness of the decision. This matter was then addressed by STAL within the ESA and Mr. Cole's written evidence.

[24] The SCG on aircraft noise, agreed by Mr. Cole, confirms as much. The development is acceptable, '*subject to mitigation and appropriate conditions*' ([CD25.3], emphasis added).

- Quite separately from the WHO ENG 2018, Mr. Trow's evidence points to additional assessment work which in his professional view should have been undertaken as part of the ESA to fully articulate and communicate the effects of the development having regard to policy, particularly as part of the night-time and schools assessments, as carried out at other UK airports.
- The principle of the noise contour would have provided a safeguard, but as at January 2020 the daytime contour was not set at a policy compliant level, and no night-time contour was included. As such, at January 2020, the control on daytime noise was not set at a value aligned to the effects of aircraft noise in evidence or in policy.
- As recently as 5 January 2021 in his rebuttal, Mr. Cole remained wedded to the 57dB metric for the daytime contour (UDC's Closing §22). There is no evidence that STAL ever offered or stated it would be content with the 54dB contour (UDC's Closing §23). It is the scrutiny of the inquiry process which has resulted in that change in position.
- STAL maintains it opposition to a night time noise contour. It also objects to the inclusion of Thaxted Primary School in the enhanced insulation scheme. Both are necessary parts of the noise mitigation which UDC seeks.

172 As to RFR2 on air quality (costs application, §§58-67):

- As with RFR1, the acceptability of the proposal in air quality terms is only ensured by the imposition of Condition 15 or alternatively Condition 10A. If appropriate and necessary mitigation in the form of Condition 15 or alternatively Condition 10A cannot be secured, permission should be refused on air quality grounds.
- Dr. Broomfield's evidence was that the RFR on air quality was reasonable and he neither departed from, nor was challenged on this expert view.
- Reading the Minutes fairly, and with the caution required, the RFR was animated by concerns as to air quality impacts over the life of the scheme. The fact that the discussions covered health impacts is reasonable, unsurprising, and does not detract from the cause of the concern which has been addressed by expert evidence. The RFR is not limited to health impacts.
- Dr. Broomfield's evidence on appeal substantiates that RFR. When considering the responsibility on airports to improve air quality as expressed in national policy, and the tightening standards on PM2.5 in particular, the emissions of key pollutants caused by the proposal need to be controlled and mitigated.

- Dr. Broomfield's evidence on appeal is that there is a potentially significant impact from NOx emissions related to the Bishop's Stortford AQMA.
- Whilst it was agreed that there is no recognised way of assessing UFPs, that does not mean they should not be addressed, given the increasing focus on UFPs in advice to central government and emerging aviation policy (UDC's Closing §§71-75). Dr. Broomfield's evidence is that Condition 15 (or Condition 10A) allows for UFPs to be mitigated through control of PM2.5. In the absence of any consideration of UFPs in the ES and supporting documentation, it was both reasonable and necessary for this issue to form part of the refusal and appeal, so that appropriate controls could be considered and imposed to protect public health and the local environment.
- The alleged vagueness of RFRs is to be assessed in the round. There is nothing vague about this RFR as expanded upon the UDC's Statement of Case and addressed by Dr. Broomfield in his evidence.

173 As to RFR3 on carbon emissions (costs application §§68-70):

- The costs application seeks to summarise points from STAL's Closing. UDC's Closing on carbon emissions provides the complete response to those points (UDC's Closing §§79-113[25]). If appropriate and necessary mitigation in the form of Condition 15 or alternatively Condition 10A cannot be secured, permission should be refused on carbon grounds.
- The test for this costs application is whether UDC's position on carbon emissions is unreasonable. It plainly is not.
- Mr. Robinson's acceptance in cross-examination that carbon emissions are a matter which can be taken into account in local decision making is not only at odds with STAL's case, but fundamentally supports the reasonableness of UDC taking carbon emissions into account under RFR3. That also brought his evidence on this point into line with Dr. Hinnells' evidence in cross examination, that carbon emissions could be considered in local decision making[26].
- Dr. Hinnells has provided expert evidence on appeal that UDC's RFR was reasonable and that the carbon emissions arising from the proposal will be significant.

[25] In particular, noting the full reasoning behind Dr. Hinnells' view that the carbon emissions arising from the proposal would be significant §§106-107, which STAL continue to misinterpret in their costs application at §68(iii).

[26] They fall within the third category of material consideration referred to in the *Heathrow* case (*R (Friends of the Earth Ltd. et al. v Heathrow Airport Ltd.* [2020] UKSC 52, per Lord Hodge and Lord Sales, at §116, [CD14.74].

- Mr. Vergoulas' acceptance in cross examination that there was nothing technically or methodologically unsound in Dr. Hinnell's approach, and that the difference between himself and Dr. Hinnells was one of professional judgment, further underlines the reasonableness of UDC's position at appeal.
- The alleged vagueness / inaccuracy of parts of a RFR are to be assessed in the round. Dr. Hinnells' evidence was not cast in terms of generally accepted perceptions and understandings of climate change, nor did he argue that it would be inappropriate to approve the application at this time (both as referred to in the RFR). There was nothing vague or inaccurate about his evidence, which was foreshadowed in UDC's Statement of Case.
- The amendment to the Climate Change Act 2008 in June 2019 to reflect net zero, combined with recent statements of the Committee for Climate Change provided a proper basis for this RFR. It is disingenuous of STAL to claim that they have not understood its basis. There has been a clear focus to the evidence on carbon emissions given at this inquiry over the course of 1 week. Further or alternatively, NPPF paras. 7, 8, and 148 provided a proper and reasonable policy basis for the RFR, as referred to in Dr. Hinnells' proof on appeal [UDC/3/1, §101].

174 As to RFR4 on necessary infrastructure or mitigation (costs application §§71-74):

- It is not uncommon for a decision notice to include a RFR which articulates that there has been a failure to provide adequate and necessary mitigation arising from the issues raised in the other RFRs. There is nothing inherently unreasonable in a local planning authority taking that approach, particularly when considering a major application such as this.
- The RFR refers to a failure to provide necessary infrastructure and necessary mitigation, a point which STAL appears to miss.
- Arising from its evaluation of the ESA on appeal, UDC has sought necessary mitigation in the form of conditions. It has also sought further mitigation within the s.106 Agreement in relation to the enhanced sound insulation scheme.
- UDC has also scrutinised and highlighted the limitations of the air quality mitigation within the s.106 Agreement (UDC's Closing §§61-63). Ultimately, UDC's approach through Condition 15 is the means by which it seeks to address those limitations.
- The RFR was not vague or inaccurate in recognising that the concerns raised through RFR1-3 needed to be considered through mitigation.

175 As explained above (§105), whilst each RFR both was and is reasonable when considered against the evidence as a whole, even if only one RFR were considered to be reasonable, that would have been sufficient to cause an appeal, with the result that all of the other issues considered on this appeal would have had to be considered with expert evidence. It follows that if only one of UDC's RFRs is considered to be reasonable, no costs award should made.

176 The costs application makes a wholly unfounded assertion that only certain of UDC's witnesses supported Condition 15 '*with any real enthusiasm*' (costs application, §76). There is simply no basis for this assertion, and it certainly was not something put to those, or any of UDC's witnesses in cross-examination.

(6) Response to Ground 4: unreasonableness of Condition 15 as unlawful and / or contrary to the policy tests

177 The PPG provides the following as an example of unreasonable behaviour (ID: 16-049):

- '*imposing a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and obligations.*'

178 The example cited is clearly directed at the imposition of a condition by a local planning authority, not one proposed at an appeal. That is because the seeking of conditions on appeal can be fully considered through the appeal process in the normal way.

179 The reasonableness of UDC's approach on Condition 15 is borne out by UDC's disclosure of it to STAL on 4 December – over 5 weeks before the inquiry was due to commence - and its offer to explain and discuss further any points of concern **[27]**.

180 The unreasonableness of STAL's approach on Condition 15 is its complete failure to engage with UDC on its substance or detail, until after the evidence sessions to which it related had been completed. None of STAL's witnesses provided credible answers in cross-examination as to why they had not sought to discuss Condition 15 with UDC's experts[27]. Resistance to, or

[27] Dr. Bull specifically accepted in cross-examination that, with hindsight, it would have been better to have engaged with Dr. Broomfield on Condition 15.

lack of co-operation with another party in discussing an appeal is also cited as an example of unreasonable behaviour in the PPG (ID: 16-052).

181 The legality and policy compliance of Condition 15 has been well traversed in the evidence and written submissions provided by UDC, and will not be repeated here (UDC's Closing §§121-155). At its heart, it is a scheme based, phased release condition, which does not revisit the principle of permission. The concepts which lie behind the condition are not alien to planning.

182 The question for the costs application does not turn on whether the Panel agrees that Condition 15 should be imposed[28]. It turns on whether UDC's approach in proposing it is reasonable. When asked about it in cross-examination, none of STAL's witnesses could articulate clear reasons why Condition 15 was objectionable in principle. In reality, the key focus of Mr. Andrew's concerns were to do with the practicalities of compliance and legal points (which have been dealt with in legal submissions). None of this demonstrates that the Condition is an unreasonable one for UDC to seek as a means of providing a workable solution to the challenges in this appeal.

(7) Response to Ground 5: acting contrary to, or not following, well-established case law

183 As with the other Grounds, this one is devoid of any substance or merit. Both the legal principles applicable to conditions, and the terms of the alternate decision making procedure and their consistency with the statutory appeals mechanism within the TCPA 1990, have been comprehensively addressed in UDC's submissions under Condition 15 ([CD26.6]; [CD26.17a]). Condition 15 is consistent with the authorities and law on conditions.

[28] Yet again, STAL' propensity to mischaracterise what was said at the inquiry is revealed under this Ground (§81). On the opening day of the inquiry, Inspector Boniface mentioned Condition 15, stating that the Panel had '*some reservations*' about its approach, which he was flagging at the outset, so that UDC could set out and justify how it would meet the test for conditions, and also so that UDC could address the situation where that condition was not found to be appropriate. It is wrong to characterise those comments as noting '*serious reservations*' with the Condition.

184 The principle from *Bushell*, on which STAL seeks to rely, is that the merits of Government policy are not a matter which can be subject to investigation when determining individual planning applications.

185 Two points should be noted in relation to the *Bushell* case:

186 First, as a matter of law, the "principle" sought to be relied upon by STAL was actually a comment (obiter dicta) made by Lord Diplock on a point which was conceded by the respondent to that appeal (p.98B-C). The appeal actually concerned a challenge to the decision of the Inspector to disallow cross-examination of the relevant department's witnesses at the public inquiry into 2 draft schemes for the construction of motorways. The "principle" only has binding legal force to that more limited extent.

187 Secondly, the statement of the minister's reasons for proposing the draft scheme stated, in terms, that the government's policy to build the new motorways '*will not be open to debate at the forthcoming inquiries*' (p.98A). The policy and supporting statement on which the House commented in *Bushell* was not analogous to the policy in MBU and how it has been explained by the DfT here:

(1) MBU gives qualified support for all airports wishing to make best use of their runways, subject to environmental issues being addressed, a point which UDC has always accepted ([UCD/4/1], §9.47). But it is not an airport specific policy in the way that the policy to build specific motorways was in *Bushell*.
(2) On carbon emissions, Sarah Bishop's evidence to the High Court in relation to MBU states that there is '*no requirement*' for local authorities to assess proposals under MBU against wider national carbon emission ambitions ([CD17.65], §61). That is a qualified statement which does not say such matters are not open for debate, as was stated in terms in the department's statement considered in *Bushell*.

188 For the above reasons, it is questionable whether there is any principle from *Bushell* which falls to be applied here.

189 In any event, UDC's position, that the weight to be given to MBU in the planning balance is discounted because of the direction of travel in carbon policy (UDC's Closing §118(4)), and

that carbon emissions can be taken into account in local decision making, does not fall foul of any such principle. It is a function of the proper interpretation of the policy in MBU and its application to this proposal[29].

190 Moreover, the fact that Mr. Robinson conceded in cross examination that carbon emissions are a matter which a local planning authority can take into account under MBU (UDC's Closing §84) cannot be saved by STAL's attempts refer to *Bushell* here.

(8) Conclusion

191 For all of the above reasons, the Panel is respectfully invited to dismiss the application for costs (whether for a full or partial award). STAL's costs application is devoid of any substance or merit, and there is nothing to justify a departure from the normal rule for appeals, that each party bears their own costs.

PHILIP COPPEL QC + ASITHA RANATUNGA

9 April 2021

Cornerstone Barristers, 2-3 Gray's Inn Square, London

[29] See UDC's Closing at §§84-93, including reference to the *Drax Power* decision at Footnote 4. Also reference by Dr. Hinnells in cross-examination to carbon emissions coming within the third category of material consideration in decision making by reference to the Heathrow case (*R (Client Earth Ltd. et al. v Heathrow Airport Ltd.* [2020] UKSC 52, per Lord Hodge and Lord Sales, at §116 [CD14.74]).

APP/C1570/W/20/3256619 (UTT/18/0460/FUL)

AIRFIELD WORKS COMPRISING TWO NEW TAXIWAY LINKS TO THE EXISTING RUNWAY (A RAPID ACCESS TAXIWAY AND A RAPID EXIT TAXIWAY), SIX ADDITIONAL REMOTE AIRCRAFT STANDS (ADJACENT YANKEE TAXIWAY); AND THREE ADDITIONAL AIRCRAFT STANDS (EXTENSION OF THE ECHO APRON) TO ENABLE COMBINED AIRFIELD OPERATIONS OF 274 000 AIRCRAFT MOVEMENTS (OF WHICH NO MORE THAN 16 000 MOVEMENTS WOULD BE CARGO AIR TRANSPORT MOVEMENTS (CATM)) AND A THROUGHPUT OF 43 MILLION TERMINAL PASSENGERS, IN A 12 MONTH CALENDAR PERIOD AT STANSTED AIRPORT

BUNDLE OF DOCUMENTS IN SUPPORT OF UTTLESFORD DISTRICT COUNCIL'S RESPONSE TO THE APPELLANT'S COSTS APPLICATION.

APP/C1570/W/20/3256619 (UTT/18/0460/FUL)

AIRFIELD WORKS COMPRISING TWO NEW TAXIWAY LINKS TO THE EXISTING RUNWAY (A RAPID ACCESS TAXIWAY AND A RAPID EXIT TAXIWAY), SIX ADDITIONAL REMOTE AIRCRAFT STANDS (ADJACENT YANKEE TAXIWAY); AND THREE ADDITIONAL AIRCRAFT STANDS (EXTENSION OF THE ECHO APRON) TO ENABLE COMBINED AIRFIELD OPERATIONS OF 274 000 AIRCRAFT MOVEMENTS (OF WHICH NO MORE THAN 16 000 MOVEMENTS WOULD BE CARGO AIR TRANSPORT MOVEMENTS (CATM)) AND A THROUGHPUT OF 43 MILLION TERMINAL PASSENGERS, IN A 12 MONTH CALENDAR PERIOD AT STANSTED AIRPORT

WITNESS STATEMENT OF ADRIAN STEPHEN WEBB IN SUPPORT OF SUBMISSIONS ON BEHALF OF UTTLESFORD DISTRICT COUNCIL IN RESPONSE TO A COSTS APPLICATION MADE BY STANSTED AIRPORT LIMITED ON 12 MARCH 2021

ADRIAN STEPHEN WEBB of the Council Offices, London Road, Saffron Walden, Essex will say as follows:

1. I am employed by Uttlesford District Council (UDC or the Council) as Director of Finance and Corporate Services and S151 Officer and have held my current post for thirteen years. I make this statement upon the basis of matters within my own personal knowledge or upon the contents of records in the possession of the Council. When I do not have such knowledge then I state the source of my information and belief.
2. I have had the opportunity of reading the Appellant's Submission on Costs in this matter dated 12th March 2021 and have had my attention drawn in particular to the contents of paragraphs 18-22 thereof.
3. Paragraph 19 is a direct quote from a report prepared by Simon Pugh, the then Monitoring Officer to the EGM taking place on 28 June 2019. On point of fact, whilst the quotation given is attributed to me, it was actually that of Mr Pugh. Mr Pugh has since retired from the employment of the Council. It is not uncommon for a Planning Committee to be given costs warnings as to the potential costs risks of their decisions, especially where an overturn of officer recommendation is envisaged.
4. Paragraph 22 of the Appellant's submissions implies that Cllr Hargreaves' comments, as quoted in paragraph 21, amounted to a clear approach to ringfenced funds which was improper. I do not consider such an allegation to be fair or justified. Whilst it was inaccurate of Cllr Hargreaves to refer to the Transformation and Future Development Project Reserve

as being available to cover appeal costs, he correctly referred to the Strategic Initiative Fund (SIF) in that context. In fact, both the Planning Reserve and the SIF are potentially available to cover the costs of appeals, which would include any third party costs awards made against the Council. The SIF is not an earmarked reserve as implied by the Appellant in paragraph 22. It is subject to a clear set of rules that govern its use.

Despite the seriousness of the suggestion made by the Appellant in paragraph 22, I am not aware of any complaint made by the Appellant in relation to Cllr Hargreaves' comments at the time or since. I believe that the facts stated in this statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Dated 1st day of April 2021

SIGNED:

APP/C1570/W/20/3256619 (UTT/18/0460/FUL)

AIRFIELD WORKS COMPRISING TWO NEW TAXIWAY LINKS TO THE EXISTING RUNWAY (A RAPID ACCESS TAXIWAY AND A RAPID EXIT TAXIWAY), SIX ADDITIONAL REMOTE AIRCRAFT STANDS (ADJACENT YANKEE TAXIWAY); AND THREE ADDITIONAL AIRCRAFT STANDS (EXTENSION OF THE ECHO APRON) TO ENABLE COMBINED AIRFIELD OPERATIONS OF 274 000 AIRCRAFT MOVEMENTS (OF WHICH NO MORE THAN 16 000 MOVEMENTS WOULD BE CARGO AIR TRANSPORT MOVEMENTS (CATM)) AND A THROUGHPUT OF 43 MILLION TERMINAL PASSENGERS, IN A 12 MONTH CALENDAR PERIOD AT STANSTED AIRPORT

WITNESS STATEMENT OF GORDON GRAEME GLENDAY
IN SUPPORT OF SUBMISSIONS ON BEHALF OF
UTTLESFORD DISTRICT COUNCIL IN RESPONSE TO
A COSTS APPLICATION MADE BY STANSTED AIRPORT LIMITED

GORDON GRAEME GLENDAY of the Council Offices, London Road, Saffron Walden, Essex will say as follows:

1. I am employed by Uttlesford District Council (UDC or the Council) as Assistant Director: Planning and have held my current post for over 4 years. I make this statement upon the basis of matters within my own personal knowledge or upon the contents of records in the possession of the Council. When I do not have such knowledge then I state the source of my information and belief.
2. As part of my duties, I attend a monthly meeting with representatives of Stansted Airport Limited (STAL) at which a number of matters are regularly discussed. The usual attendees at these meetings are me and Roger Harborough, Director of Public Services on behalf of the Council and John Twigg and Alistair Andrew of STAL but others are periodically invited to attend when their input is required. The agenda of these meetings can cover a potentially wide range of matters of mutual interest to the parties, particularly operational matters from a community perspective. However, Planning matters form the staple of each agenda.
3. At the meeting following the decision of the Planning Committee on 24th January 2020 taking place on 4th February 2020 there was general discussion as John Twigg, the senior representative of STAL, was absent on annual leave. STAL stated that it was considering its options in relation to the refusal, including a judicial review challenge, ombudsman complaint, an appeal, re-submission of the application, or NSIP application for >10 mppa. At

clearly stated that it might take three to four months for STAL to make a decision as to its way forward.

Regardless of this it was agreed that the monthly meetings would continue and the next one was scheduled for 3rd March. On that date all four of the persons listed at paragraph 2 above were in attendance. It was stated that if an appeal were to be made, the Statement of Case would offer a revised ES to pick up on new information on updated modelling and other matters. No further information was provided at that time. I recall that at a later stage in the summer, and after the appeal was actually submitted, when we asked about what the revised ES would cover, we were told that the base date would be updated together with revised air traffic forecasts. No other information was provided.

I believe that the facts stated in this statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Dated 7th day of April 2021

SIGNED:

The Planning Inspectorate

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Your Ref: UTT/18/0460/FUL
Our Ref: APP/C1570/W/20/3256619

12 August 2020

Dear Planning Advice Team,

Town and Country Planning Act 1990
Appeal by MAG
Site Address: Stansted Airport, Essex, CM24 1QW

I have received appeal forms and documents for this site. I am the case officer. If you have any questions, please contact me. I have checked the papers and confirm that the appeal(s) is valid. If I later find out that this is not the case, I will write to you again.

The procedure and the starting date

The appellant(s) has requested the Inquiry procedure. In accordance with s319A of the Act we have applied the criteria and considered all representations received, including the appellant(s) preferred choice. We consider the Inquiry procedure to be suitable.

The Independent Review of Planning Appeal Inquiries has been published and the Planning Inspectorate is implementing some of the recommendations, where we can and in line with our Action Plan (hyperlinks below).

https://www.gov.uk/government/publications/independent-review-of-planning-appeal-inquiries-report

https://www.gov.uk/government/news/16-out-of-22-rosewell-recommendations-implemented-as-planning-inspectorate-publishes-updated-action-plan

Please note that due to the current situation with Covid-19, it is not currently possible to follow all the recommendations in the Rosewell Review and some of the timescales for the appeal may differ from those in the Review.

The date of this letter is the **starting date** for the appeal(s). The timetable for the appeal(s) begins from this date.

The Inspector and Inquiry date

The Inspector appointed to decide the appeal and the inquiry date will be confirmed as soon as possible. We intend to schedule 40 sitting days.

Once the inquiry date has been confirmed please can the LPA secure a suitable venue as soon as possible and provide details.

The Inspector will hold a case management conference with the main parties by telephone, on a date to be confirmed. More details will follow including an agenda and details of how to call in. Each party should have a single spokesperson nominated to speak; the intended advocates should participate if at all possible. Please can you provide the name and email address of your spokesperson 7 days before the case conference, along with the names of any other participants.

In advance of the case management conference, parties are requested to focus only on the matters that are in dispute and give detailed consideration as to exactly what topics could most efficiently be dealt with as a round table discussion at the inquiry (or even just by written submissions) in order to ensure that the inquiry is conducted in an efficient and effective manner, optimising inquiry time. This will be an item on the agenda for the conference. In light of the outcome of that discussion, the Inspector will direct how the evidence will be dealt with at the inquiry.

Sending documents to us and looking at the appeal(s)

A timetable for some elements of the case is set out below. No reminders will be sent, and any documents sent after the deadlines will normally be returned.

You can use the Internet to submit documents, to see information and to check the progress of cases through GOV.UK. The address of the search page is https://acp.planninginspectorate.gov.uk/

If emailing documents, please use the email address above. If posting documents (other than the Questionnaire) please send 2 copies of everything. Whichever method you use, please make sure that all documents/emails are clearly marked with the full reference number.

Guidance on communicating with us electronically can be found at https://www.gov.uk/government/publications/planning-appeals-procedural-guide

Keeping to the timetable

You must keep to the timetable set out below and make sure that you send us the relevant documents within these deadlines. This will mean that we can deal with the appeal(s) promptly and fairly. If you do not send us the relevant documents in time, the Inspector will not normally look at them and we will return them to you unless there are exceptional reasons for accepting them. Not meeting the prescribed timetables may be a reason for the Inspector to initiate an award of costs (see section on costs below).

Unless agreed otherwise by the Inspector at the case management conference the following documents must be sent within this timetable.

By 19 August 2020

Using the model notification letter at the following link https://www.gov.uk/government/publications/model-notification-letter-for-planning-appeals you must notify any person who was notified or consulted about the application in accordance with the Act or a development order and any other interested persons who made representations to you about the application, that the appeal(s) has been made. You should tell them:-

i) that any comments they made at application stage will be sent to me and the appellant(s) and will be considered by the Inspector (unless they withdraw them within the 5 week deadline). If they want to make any additional comments they must submit 3 copies within 5 weeks of the starting date, **by 16 September 2020**. If comments are submitted after the deadline, the Inspector will not normally look at them and they will be returned;

ii) when and where the appeal documents will be available for inspection;

iii) that the Planning Inspectorate will not acknowledge representations. We will, however, ensure that letters received by the deadline are passed on to the Inspector dealing with the appeal(s);

iv) that they can get a copy of our booklet 'Guide to taking part in planning appeals proceeding by Inquiry' either free of charge from you, or on GOV.UK https://www.gov.uk/government/collections/taking-part-in-a-planning-listed-building-or-enforcement-appeal;

v) that the decision will be published on GOV.UK.

You must send a copy of a completed appeal questionnaire and supporting documents, a copy of your notification letter and a list of those notified to the appellant(s) and me.

By 16 September 2020

Please send me 2 copies of your statement giving **full** details of the case you will put forward at the inquiry including any documents, maps or plans you intend to refer to or use in evidence. The appellant may require you to send any such document (or relevant part of such a document). Please also include a list of any conditions or limitations you would agree to, if the appeal were to be allowed. I will send a copy of your statement to the appellant(s) and you must send a copy of your statement to any statutory parties. I will also send you and the appellant(s) a copy of any comments received from other interested persons or organisations.

You must also submit a copy of the completed agreed statement of common ground, listing all matters that are not only agreed but also confirming areas where there is disagreement. Further guidance on producing statements of common ground (and a model form) is available from https://www.gov.uk/government/publications/statement-of-common-ground

You must allow anyone who wants to inspect the appeal documents a reasonable opportunity to do so. Your statement must say when and where this can be done.

By 4 weeks before the inquiry opening

You and the appellant(s) must send me 2 copies of your proof(s) of evidence (and a written summary if the proof is over 1500 words in length). You should also send a copy to any statutory party. A 'proof of evidence' is a written statement that you, the appellant(s) or a witness wishes the Inspector to take into account at the inquiry. Any summary should reflect the contents of the proof and should not include new evidence.

By 3 weeks before the inquiry opening

Please send a copy of the LPA inquiry notification letter.

Planning obligations - section 106 agreements

A planning obligation, often referred to as a 'section 106 agreement', is either a legal agreement made between the LPA and a person 'interested in the land' or a legally binding undertaking signed unilaterally by a person 'interested in the land'. If you intend to submit a planning obligation, you must read the guidance provided on GOV.UK - https://www.gov.uk/government/publications/planning-appeals-procedural-guide. A draft, or heads of terms, should be submitted before the case management conference. A final draft, agreed by all parties to it, must be submitted to me no later than 10 working days before the inquiry opens.

Statutory parties

'Statutory parties' are owners or tenants of the application/appeal site who made comments within the time limit on the application, or who do so on appeal. You must give details of any statutory parties at application stage on the questionnaire. I will tell you about any statutory parties who write to us at appeal stage, before your statement of case is due.

Withdrawing the appeal(s)

If you hear that the appeal(s) is to be withdrawn, please telephone me immediately. If I receive written confirmation of this from the appellant(s), I will write to you.

Costs

The appellant(s) has been directed to GOV.UK for further information regarding costs – http://planningguidance.communities.gov.uk/blog/guidance/appeals/. You should also be aware that costs may be awarded to either party.

Additionally, a Planning Inspector or the Secretary of State may on their own initiative make an award of costs, in full or in part, if they judge that a party has behaved unreasonably resulting in unnecessary appeal expense.

Further information

Further information about the appeals process can be accessed at GOV.UK - https://www.gov.uk/government/publications/planning-appeals-procedural-guide. I recommend that you read the relevant guidance.

Yours sincerely,

Elizabeth Humphrey
Elizabeth Humphrey

Where applicable, you can use the internet to submit documents, to see information and to check the progress of cases through GOV.UK. The address of the search page is - https://www.gov.uk/appeal-planning-inspectorate

UTTLESFORD DISTRICT COUNCIL

Council Offices, London Road, Saffron Walden, Essex CB11 4ER
Telephone (01799) 510510, Fax (01799) 510550
Textphone Users 18001
Email uconnect@uttlesford.gov.uk Website www.uttlesford.gov.uk

Chief Executive: Dawn French

Ms E Humphrey
3/J Kite Wing
Temple Quay House
2 The Square
Bristol
BS1 6PN

20th August 2020

Ref:APP/C1570/W/20/3256619

Our ref: ES/10849

Please ask for Elizabeth Smith on 01799 510417
email: esmith@uttlesford.gov.uk

Dear Ms Humphrey

S78 TOWN AND COUNTRY PLANNING ACT 1990
APP/C1570/W/20/3256619: APPEAL BY MANCHESTER AIRPORTS GROUP PLC, STANSTED AIRPORT, ESSEX CM24 1QW

Thank you for your start letter dated 12 August 2020 in relation to the above appeal.

Please note that I am the solicitor at the Council with conduct of this appeal. In order to assist with the efficient running of the Council's case, I would be grateful if you could copy me into any correspondence from PINS, in addition to the Planning Advice Team at the Council.

I write concerning the timetabling for the Council's Statement of Case and agreed Statement of Common Ground.

The timetabling in the start letter provides that the Council's Statement of Case and agreed Statement of Common Ground must be sent to PINS by 16 September 2020. The timetable set out in the start letter is stated to be '*Unless otherwise agreed by the Inspector at the case management conference…*'. The case management conference is due to be held on 24 September 2020.

The Appeal Form was received by PINS on 24 July 2020, and by the Council on 26 July. The appeal is against the Council's decision overturning the recommendation of its officers. As a result, the Council is in the process of instructing a team of external expert consultants for the appeal.

In its Appeal Form, the Appellant has indicated that it intends to call 11 witnesses to address the 4 Reasons for Refusal, and the Council may need to call several expert witnesses in response. The process of instructing experts is necessarily taking some time, given the number of topic areas to be covered.

009632 / 035294

It is also not assisted by the fact that we are in the summer holiday period and also a period when Covid-19 restrictions remain in place, both of which impinge on the availability of experts and the speed of the process.

For the above reasons, at this early stage, the Council respectfully seeks an extension to the Statement of Case and Statement of Common Ground deadlines to 14 October 2020.

This proposed extension has been raised with the Appellant and the Rule 6 party. The Rule 6 party has raised no objection. The Appellant agrees to an extension for the Statement of Common Ground but does not agree to an extension for the Statement of Case (see letter attached). In response to the points made by the Appellant, it should be noted that:

(1) The pre-notification of appeal certificate notified the Council only of the fact of a forthcoming appeal. As set out above, it is the Appeal Form dated 24 July 2020 (and received by UDC on 26 July) which set out the Appellant's intended approach and number of witnesses, and PINS' start letter of 12 August which confirmed that approach as acceptable. In any event, all of these initial steps have occurred during the summer period when Covid-19 restrictions have been in place, which the Appellant accepts will have complicated the process of instructing witnesses.

(2) The Statement of Case is intended to define the scope of the Council's case and should have regard to PINS' Procedural Guide, Annex J. The Appellant's Statement of Case raises the issue of whether there is any technical evidence or clear justification for the Reasons for Refusal on noise and air quality (paras. 4.12 and 4.20), and asserts that the Reasons for Refusal are unclear and imprecise (para. 4.3). Following the overturn of the recommendation, it is both necessary and reasonable for the Council to seek the input of expert witnesses to review its case for the appeal and to provide input into its Statement of Case, both to comply with the guidance in Annex J, and to provide a response to the Appellant's Statement of Case.

(3) Whilst it is true that the timetable in the start letter follows the standard process for inquiries under the Determination by Inspectors (Inquiries Procedure) Rules 2000, the rules apply subject to amendment by the Inspector, as the start letter confirms. The proposal here is for an inquiry sitting for 40 days involving 3 main parties. An amendment to that standard timetable is clearly justified given the proposed length and scope of the appeal.

(4) Most importantly, the Appellant does not raise any issue of prejudice in extending the timetable for the Statement of Case. The extension would not prejudice any party if the Inquiry starts on 12 January 2021.

Without the extension sought, the Council's Statement of Case will be unavoidably abbreviated, and less helpful to the other parties and to the Inspector than would otherwise be the case.

The Appellant's Statement of Case proposes to provide an Addendum Environmental Statement to refresh certain chapters of the Environmental Statement of 2018. For the sake of completeness, I would record that the Council has no objection to the principle of an Addendum ES which updates the base date, and it is noted that this is expected around the

end of September. The Council will of course need an appropriate period of time to respond to the Addendum, once it has been provided.

I would be grateful if you could pass on our request to the Inspector for his attention.

Yours sincerely,

Elizabeth Smith
Interim Legal Services Manager
Uttlesford District Council

009632 / 035294

MAG
London Stansted
Airport

20 August 2020

Elizabeth Smith
Legal Services Manager
Uttlesford District Council

By Email

Dear Elizabeth,

Re: Appeal APP/C1570/W/20/3256619 Against Refusal of Application UTT/18/0460/FUL, Stansted Airport.

Thank you for your letter in advance of your approach to the Planning Inspectorate (PINS).

I do recognise that a complicated process of council witness selection has been made necessary due to the overturning of the officer's recommendation to the Planning Committee and also that timing is impacted by circumstances surrounding COVID-19. Nevertheless, it cannot have come as a surprise to the Council, given the path the application followed during its determination, that an appeal was likely to occur and crucially, that external witness appointments would be required.

More specifically, the Council was formally aware that an appeal would be lodged following the *pre-notification of appeal certificate,* served on 10 July 2020. More than five weeks has elapsed since that point. The standard appeal process is surely well known to the Council, requiring the Council's Statement of Case and the joint Statement of Common Ground five weeks from the start letter.

With these facts in mind, I am not persuaded that there is reasonable justification for any delay to the initial phases of the appeal process, and in particular for the production of the Council's Statement of Case, which involves the production of "a succinct statement supporting the reasons for opposing the development"[1]. This should be concise and highlight the differences between the Appellant and the Council. This exercise does not depend upon inputs from consultants who have yet to be identified let alone instructed, but upon the matters which were in the minds of the elected Members of the Council when they decided to overturn the previous conclusions of the Committee in 2018 and resolve upon the form and words of the reasons for refusal which are set out in the Decision Notice.

The Statement of Common Ground, however, is something that could arguably benefit from more time being allowed, and STAL would agree to a limited extension to reach a conclusion with the Council on this document.

With regard to your view concerning the Environmental Statement Addendum, there is not a prescribed PINS procedure for such a document. EIA Regulations still apply of course. Following our consideration of the PINS correspondence last week, I believe that it is possible to achieve the dates set out set by PINS for the Inquiry. This would involve the submission of the Addendum to PINS around the end of September,

[1] See PINS Procedural Guide for Planning Appeals July 2020, Annexe J.3.

Enterprise House
Bassingbourn Road
Essex
CM24 1QW
United Kingdom

thus allowing some two and a half months before the proofs of evidence are due (mid-December). This would allow time for consultation pursuant to the EIA Regulations.

I too am keen to understand the practical details of how PINS intend to organise the Public Inquiry. It must be presumed that this is a matter which has already given some consideration by PINS in setting the date. I am sure that are steps that can be taken by them, in conjunction with yourselves and ourselves, to ensure that a safe public event could take place, if that option is to be followed in preference to the virtual platforms which PINS has been using for inquiries post-COVID-19.

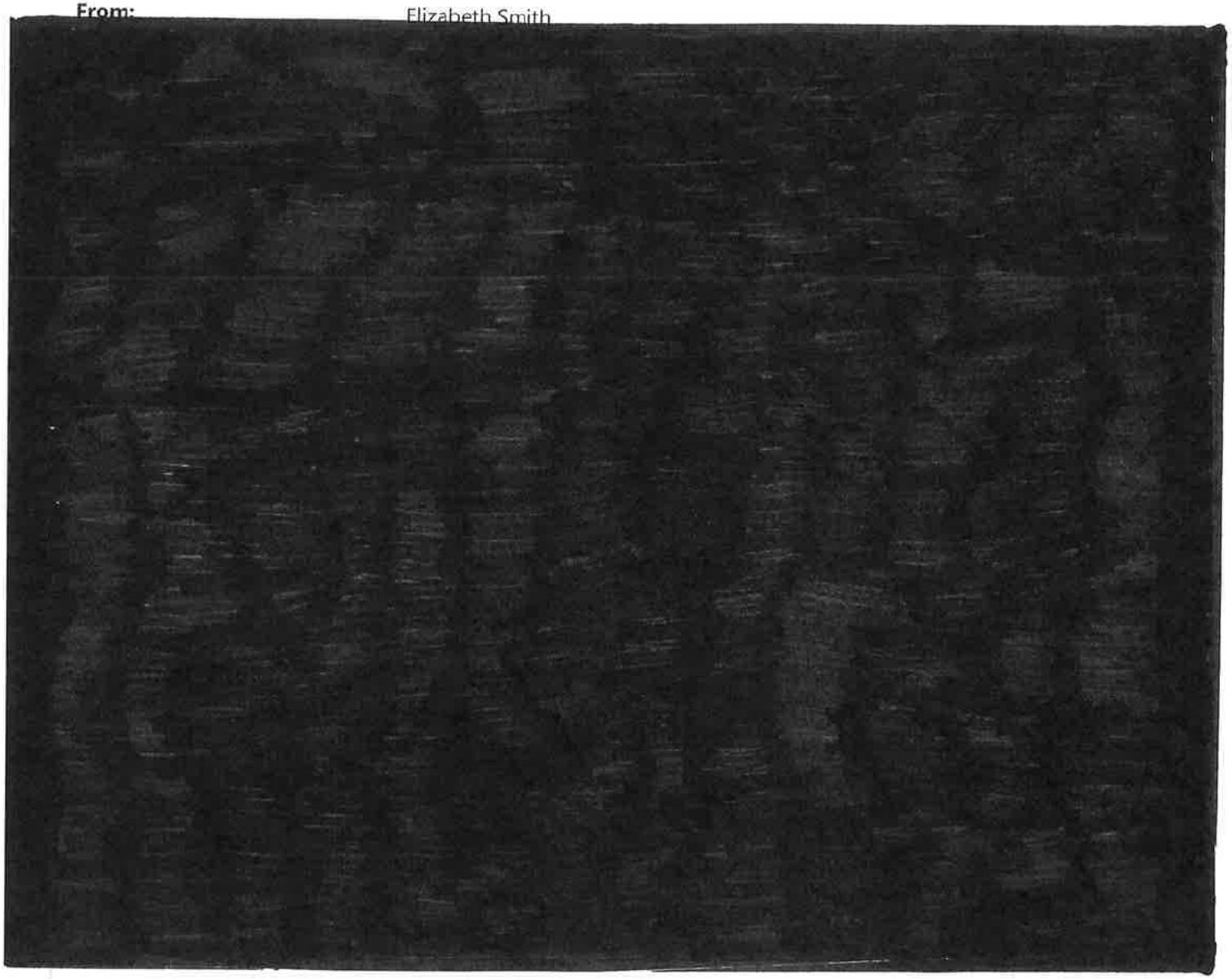
In order to assist in document sharing, I would be happy for this letter to be appended to any correspondence the Council sends to PINS on this matter.

Sincerely,

Al... ...
Planning Manager
London Stansted Airport

Elizabeth Smith

From: Elizabeth Smith



From: Humphrey, Elizabeth <ELIZABETH.HUMPHREY@planninginspectorate.gov.uk>
Sent: 25 August 2020 17:42
To: Elizabeth Smith <esmith@uttlesford.gov.uk>
Cc: Alistair Andrew <Alistair.Andrew@magairports.com>; brian.ross@lineone.net; Gordon Glenday <gglenday@uttlesford.gov.uk>
Subject: [External]..RE: APP/C1570/W/20/3256619:Stansted Airport, Essex CM24 1QW

Dear Elizabeth

Thank you for your email and letters. I have discussed the matter with the Inspector and he advises that the request for an extension of time for submission of the Council's statement of case is refused. It is important that all parties are aware of the issues involved as soon as possible if the inquiry is to proceed efficiently. The Council should be able to provide details of the reasons why it refused planning permission and the case that it will make without delay.

The Inspector agrees that additional time would be useful for agreeing detailed matters within a Statement of Common Ground and he allows the requested extension of time to 14 October 2020.

Kind regards

Liz

Liz Humphrey
Inquiries and Major Casework Team
The Planning Inspectorate
✉: elizabeth.humphrey@planninginspectorate.gov.uk
: https://www.gov.uk/government/organisations/planning-inspectorate

From: Elizabeth Smith <esmith@uttlesford.gov.uk>
Sent: 20 August 2020 12:24
To: Humphrey, Elizabeth <ELIZABETH.HUMPHREY@planninginspectorate.gov.uk>
Cc: Alistair Andrew <Alistair.Andrew@magairports.com>; brian.ross@lineone.net; Gordon Glenday <gglenday@uttlesford.gov.uk>
Subject: APP/C1570/W/20/3256619:Stansted Airport, Essex CM24 1QW
Importance: High

Dear Ms Humphrey

I am instructed to act by Uttlesford district Council the Respondent to the above matter.

I attach, from left to right a letter from myself to the Inspector and a copy of a letter from the Appellant setting out their view. They have no objection to this letter being disclosed to yourselves.

Please note that this email has been copied to them and to SSE, the Rule 6 party.

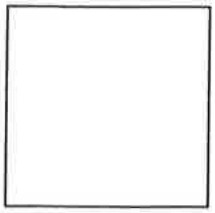
I would be grateful if this correspondence could be placed before the Inspector as soon as possible.

Yours sincerely

Elizabeth Smith

Elizabeth Smith
Interim Legal Services Manager
Uttlesford District Council
Council Offices
London Road
Saffron Walden
Essex
CB11 4ER

01799 510417



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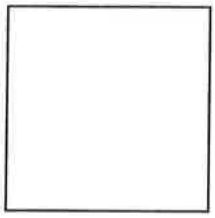

The Planning Inspectorate

APPEAL REF: APP/ C1570/W/20/3256619

SITE ADDRESS: LONDON STANSTED AIRPORT, STANSTED, ESSEX

CASE MANAGEMENT CONFERENCE SUMMARY NOTE

1. The Panel of Inspectors appointed to conduct the Inquiry comprises Michael Boniface MSc MRTPI, Gareth Jones BSc (Hons) DipTP DMS MRTPI and Nick Palmer BA (Hons) BPl MRTPI. The Inquiry will open at 10.00am on Tuesday 12 January 2021, sitting for up to 40 days. A detailed programme of sitting days will be devised in due course and an early indication of likely timings for various witnesses would be useful.

2. For the time being, the appeal remains transferred for determination by the Panel. The parties will be informed if the relevant Secretary of State subsequently recovers the appeal for his own determination.

3. The Panel has had regard to the request from SSE and the appellant to postpone the inquiry beyond the winter months given the potential impacts of the current Pandemic. The impacts and duration of the Pandemic cannot be anticipated and it cannot be assumed that the situation will have improved by Spring. PINS has a duty to progress appeals efficiently and expediently and has worked hard to establish effective virtual and blended event options that allow appeals to proceed while minimising health risks and complying with Government guidelines. No exceptional circumstances have been identified that would prevent the appeal from proceeding in accordance with the existing timetable.

4. The Council may wish to draw the attention of interested parties to this Note. At the very least, it is recommended that a copy be posted on the Council's website.

Programme Officers

5. The Council has appointed two Programme Officers, Yvonne Parker and Helen Wilson. They are independent from all parties and will be responsible to the Inspectors. They have been appointed to assist with the organisation and smooth running of the Inquiry and will be the first point of contact for people with queries about procedure, timetabling and general organisation at the event. All correspondence relating to the appeal should now be sent to the Programme Officers (info@programmeofficers.co.uk), copying the PINS Case Officer (elizabeth.humphrey@planninginspectorate.gov.uk).

Main Issues

6. Having had regard to the submissions to date and discussions during the Case Management Conference, the main issues are:

1) The effect of the development on aircraft noise;

2) The effect of the development on air quality;

3) whether the development would conflict with UK obligations to combat climate change;

4) whether the development would be supported by necessary infrastructure.

7. Evidence will also cover the topics of air traffic forecasts and projections; socio-economic impacts and health matters though it was considered that these are sub-issues within the main issues identified above.

8. Matters raised by interested parties will also need to be addressed. Whether or not these are dealt with as main issues in the eventual decision will depend on the evidence heard in due course. It may also be the case that some of these issues could be dealt with through written submissions.

Format of the Inquiry

9. During the pandemic, PINS is progressing most casework by virtual means (using Microsoft Teams), as opposed to conventional physical events. The Panel will have regard to the position statements of the parties submitted before the CMC and to the discussions during the CMC. There is no consensus between the parties as to the most appropriate format.

10. The Panel will consider the matters raised and advise which format will be adopted in a separate note.

Dealing with the evidence

11. The Panel is minded that all the main issues be dealt with in the conventional format for Inquiries, by evidence in chief from the relevant witness for each side, which will then be cross-examined. A topic-based approach will be adopted for the main issues so that the parties' respective evidence on particular issues can be heard consecutively.

12. Other matters raised by interested parties will be addressed by the appellant and Council in the proofs of their respective planning witnesses and at the Inquiry itself as necessary.

13. To maintain focus on those areas where there is not agreement, a Position Statement on the main issues will be required, setting out in a tabular format, the key facts in dispute. These should accompany topic specific statements of common ground relating to the main issues.

14. SSE (and any other Rule 6 parties) should be invited to be party to the agreements or separate SoCG's could be produced.

Conditions

15. An agreed schedule of suggested planning conditions and the reasons for them, including references to any policy support, should be submitted with the general Statement of Common Ground. Careful attention must be paid to the wording, and the conditions will need to be properly justified having regard to the tests for conditions, in particular the test of necessity. Any differences in views on the suggested conditions, including suggested wording, should be highlighted in the schedule with a brief explanation given.

16. Any pre-commencement conditions will need the written agreement of the appellant and this should be expressly given in the SoCG.

Planning Obligations

17. A final draft of the planning obligations should be submitted two weeks before the Inquiry opens, accompanied by the relevant office copy entries and a CIL Compliance Statement prepared by the Council. The statement must contain a fully detailed justification for each obligation sought with reference to the CIL Regulations. The methodology for calculating any financial contributions should be included, along with details for how the money would be spent.

18. A signed and completed version of the S106 agreement should be submitted before the close of the Inquiry.

Core Documents/Inquiry Documents

19. A list of core documents should be agreed in advance of preparing your proofs so they can be properly referenced. The agreed list must be submitted with the proofs of evidence. Core Documents can be provided in electronic form only. They should be submitted to the Programme Officers (copying the PINS Case Officer), who will coordinate their organisation and referencing on a website for easy access by all parties throughout the appeal.

20. Any documents submitted once the Inquiry has opened will be recorded as an Inquiry Document on a separate list, overseen by the Inspectors and administered by the Programme Officers.

21. Three hard copies of Proofs (and summary proofs where more the 1500 words) and the Environmental Statement are needed for the Inspectors. These should be sent to the Programme Officers. The parties should make arrangements to exchange Proofs with each other, in consultation with the Programme Officers.

Inquiry Running Order/Programme

18. The Inquiry will open at 10.00 on 12 January 2021 though may start slightly earlier on subsequent days. We will aim to finish each day no later than 17.00, take a lunch break around 13.00, with mid-morning and afternoon breaks at suitable points in the proceedings. During virtual elements of the Inquiry, we will aim to sit for around 90 minutes at a time and will seek the parties' assistance in facilitating this.

19. The Inquiry is likely to open using a virtual format. After the Panels opening comments, opening statements from the main parties will be invited. After that, it is likely that the Inquiry will adjourn to allow for an accompanied site visit. We will then hear from interested parties who wish to speak, although there is scope for some flexibility if someone has difficulties that prevent them from speaking in the first few days.

20. A topic-based approach to hearing the evidence will be adopted. This will start with the formal presentation of evidence on noise matters – Council first, followed by Rule 6 and then the Appellant. We will work our way through the main issues, subsequently dealing with air quality, climate

change implications and infrastructure matters. It is understood that other topics will inform these broad categories, including air traffic forecasts and projections, socio-economic impacts and health matters. The ultimate order of witnesses will be determined after a review of the evidence, in consultation with the parties.

21. After hearing from all other witnesses, we will hear from each party's planning witness, who should consider the benefits of the scheme, outstanding matters raised by third parties and the overall planning balance.

22. On conclusion of that, the Inspectors will lead round table sessions on conditions and planning obligations.

23. That will be followed by closing submissions which should last no longer than 2 hours for each party. They should set out each parties' respective cases as they stand at the end of the Inquiry, with an electronic copy having been provided in advance, appropriately cross-referenced where evidence is relied on, for the avoidance of doubt.

24. The Inspectors will carry out a further accompanied site visit, which is likely to take place shortly after the Inquiry has closed. Its purpose is simply for the Inspectors to see the site and its surroundings. They cannot listen to any representations/discussion/arguments during the visit, but parties can point out physical features. A suitable route and itinerary should be agreed between parties for the visit.

25. An Inquiry programme will be circulated following receipt of your time estimates for each witness in due course, which may alter the duration of the inquiry. However, all parties should maintain their availability for the expected 40 days of sitting, noting that Monday's will not generally be a sitting day. Other than in exceptional circumstances, you are expected to take no longer than the timings indicated, which will require the co-operation of both advocates and witnesses.

Timings

26. The appellant is currently updating the Environmental Statement (ES) given the passage of time and having regard to concerns raised by the Council. The ES addendum must be submitted by **16 October 2020**. It is expected that the Council will consult upon the Addendum promptly after receipt.

27. The general SoCG is due by **28 October 2020**.

28. Given the proximity of the Inquiry to the Christmas break, Proofs (electronic and hard copies) will need to be submitted 5 weeks before opening, by **8 December 2020**.

29. More detailed topic specific statements of common ground and position statements dealing with the main issues should inform your proofs and are to be submitted at the same time (**8 December 2020**).

30. Final timings for openings and closings, evidence in chief and cross examination must be provided by **22 December 2020**.

31. The final draft S106 agreement is to be submitted no later than **29 December 2020** to be accompanied by the CIL Compliance Statement prepared by the Council and the relevant office copy entries.

32. Copies of notification letters to interested parties of the Inquiry arrangements should be provided to the Inspectors by **29 December 2020**.

33. There is no reference in the Rules or the Procedural Guide to supplementary or rebuttal proofs and PINS does not encourage the provision of such. However, where they are necessary to save Inquiry time, copies should be provided no later than **5 January 2021**. It is important that any rebuttal proofs do not introduce new issues. Before considering the use of rebuttals, the parties will be expected to explore whether the matters in question can be addressed via an agreed addendum to the Statement(s) of Common Ground.

Timetable for the submission of documents:

16 October 2020	Deadline for submission of: • Updated Environmental Statement
28 October 2020	Deadline for submission of: • General SoCG, including draft conditions
8 December 2020	Deadline for submission of: • all proofs • core documents list (and hard copies) • topic specific statements of common ground/position statements
22 December 2020	Deadline for submission of: • final timings
29 December 2020	Deadline for submission of: • final draft planning obligation and relevant office copy entries • CIL Compliance Statement (Council) • Inquiry notification letters
5 January 2021	Deadline for submission of: • any necessary rebuttal proofs
12 January 2021	Inquiry opens 10.00am

Costs

34. No application for costs is currently anticipated by any party. If an application is to be made, the Planning Practice Guidance makes it clear that they should be made in writing to the Inspector before the Inquiry or as soon as reasonably possible. You are also reminded that in order to support an effective and timely planning system in which all parties are required to behave reasonably, the Inspector has the power to initiate an award of costs in line with the Planning Practice Guidance. Unreasonable behaviour may include not complying with the prescribed timetables.

Other Matters

35. During the CMC, it was asked that the appellant make arrangements for an accompanied pre-inquiry site visit to familiarise the Panel with the proposal and the site. Having subsequently had regard to caselaw (Anderson v SSCLG [2015] EWHC 3005 (Admin)), which establishes that accompanied pre-inquiry site visits do not fall within the scope of the Inquiry Procedure Rules, that visit will now take place shortly after the Inquiry opens.

36. The advocates for the Council and appellant are asked to provide a note to the Inspectors explaining the relationship between the appeal scheme (a full planning application) and the previous planning permission on site, with its attendant restrictions imposed through conditions and planning obligations e.g. restrictions on aircraft movements. This is to be provided by 8 October 2020.

Michael Boniface, Gareth Jones & Nick Palmer
INSPECTORS

2 October 2020

MAG
London Stansted
Airport

23 September 2020

Elizabeth Humphrey
Planning Inspectorate
3/J Kite Wing
Temple Quay House
2 The Square
Bristol
BS1 6PN

Dear Ms Humphrey,

Re: Appeal APP/C1570/W/20/3256619 by STAL, Stansted Airport, Essex CM24 1QW

This letter sets out STAL's position in respect of procedural issues arising in relation to its appeal, ahead of the first Case Management Conference (CMC) to be held on 24 September 2020.

In respect of the Inspector's pre-conference note and both the UDC and SSE's position statements received yesterday, the following points are addressed:

1) Preliminary Issues (Inquiry opening and length)
2) Main Issues
3) Format of the Inquiry
4) Dealing with the evidence.

I address each in turn.

1) Preliminary Matters

Firstly, STAL does not support any arguments for a delay to the opening of the Inquiry in order to allow SSE to renew its unsuccessful application for permission to appeal against the unsuccessful outcome of its judicial review claim in the High Court. We note the Inspector's comments yesterday in Mr Boulton's email to SSE and fully agree with the position taken by him.

Secondly, STAL initially suggested that the inquiry could sit for up to 40 days, but that is of course dependent on the length of evidence in chief and cross examination of each witness and the number of witnesses. STAL considers that this approximate length of time is still an appropriate working assumption, when taking into account the indicated number of witnesses and consideration of the number of interested parties that may attend. Moreover, the additional time which may be involved in conducting the inquiry virtually (in whole or in part) needs to be factored in. If some evidence is to be dealt with by written representations, then the number of sitting days would of course reduce.

We do not support the UDC's preference for the 40 days to be run entirely without a break. In our experience a pattern of 3-4 sitting weeks followed by a week-long break has usually been adopted by PINS for an inquiry

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Essex
CM24 1QW
United Kingdom

of this scale, often to try to align with school holidays. We do agree with the UDC's proposition that a break before closing submissions would be appropriate.

2) Main Issues

STAL agrees with the Inspector's initial views, and those of UDC, that the main issues are correctly identified in the pre-conference note. However, we note that these issues sit within a broader legal, policy and factual context which will need to be the subject of expert evidence at the inquiry, for example national planning and aviation policy.

3) Format of the Inquiry

STAL understands UDC's preference for a conventional inquiry format albeit incorporating measures to ensure socially distancing so far as possible. Nevertheless, we are concerned that an arrangement of the type proposed by UDC will be very vulnerable to one or more persons in the inquiry room falling ill and there being a need for everyone else to isolate, if we are to spend as long as 40 days together with a large number of personnel in the same room at the same time.

We are therefore of the view that the vast majority of the inquiry will need to take place virtually with some limited exceptions if participants are simply not able to participate virtually.

STAL notes SSE's concerns in respect of fairness. However, SSE do not provide reasons as to why virtual participation is not "transparent". Indeed, such a format could in fact lead to more people being able to view proceedings. Many inquiries have taken place virtually and the Inspector will be best placed to ensure fairness throughout the process.

In respect of any potential disadvantages surrounding access to necessary technology, STAL would be willing to assist in facilitating a Covid-19 safe facility at a location to be agreed, that would allow for any member of SSE, or any other interested party, to provide evidence to the Inquiry.

We are still reflecting carefully on the implications of the Prime Minister's statement yesterday. We do have some concerns about the inevitable requirement to bring numbers of people together for an extended period of time, even remotely, in order to accommodate a start date on 12 January 2021 and ten weeks of sittings during the winter period (in addition to the concentrated periods of preparation required during the preceding weeks in December and January). These issues should be aired during the CMC, including the possibility of a short postponement until the end of the winter period.

4) Dealing with the Evidence

STAL agrees that a conventional format is appropriate, and that a topic-based approach is the most efficient way to hear the evidence. The order of topics will need to be established once the proofs of evidence are available.

We agree with the order of appearance suggested by UDC and with a ½ day speaking limit for each party's closing submissions.

ES Addendum

In informal discussions with UDC and the PINS case officer, we had originally indicated a target date of end September for the publication of an ES Addendum, recognising the passage of time since the submission of the original ES. However, in its Statement of Case received last week, UDC has for the first time raised a

whole series of new questions relating to the content of the ES, notwithstanding that its officers, consultants and legal team agreed as recently as January this year that the ES was satisfactory. We are now required to review this new list of suggested deficiencies and to consider our response. It is likely that this exercise will take several weeks to complete, given the extent of the matters now raised and the need for us to engage with our consultant team.

It is therefore unlikely that the ES Addendum will now be available before 16 October 2020, which will still be 12 weeks before the intended start date of the inquiry.

Yours sincerely,

Alistair Andrew, MRTPI
Head of Planning Services
MAG

Elizabeth Smith

From: Philip Coppel <pcqc@2-3gis.co.uk>
Sent: 07 April 2021 09:35
To: Elizabeth Smith
Subject: [External] Fwd: Stansted Airport - Without prejudice
Attachments: Stansted - Condition 15 - 04 Dec 2020.pdf

-------- Forwarded Message --------
Subject: Stansted Airport - Without prejudice
Date: Fri, 4 Dec 2020 11:16:36 +0000
From: Philip Coppel <pcqc@2-3gis.co.uk>
To: Thomas Hill QC <thomas.hill@39essex.com>, Philippa.Jackson@39essex.com
CC: Asitha Ranatunga <ar@cornerstonebarristers.com>

Dear Tom and Philippa

Attached is a draft condition - called "Condition 15" - as foreshadowed in my conversation with you (Tom) yesterday. It is sent on a "without prejudice" and "confidential" basis.

If considered to be of Tolstoyan length, my response is that it is the peace, rather than the war, half. Thus it seeks to reach comprehensive agreement between UDC and STAL in relation to what occupies 800+ pages of an addendum environmental statement.

You will want to read the draft first and then I would like to explain it to you: a bit like an explanatory memorandum to legislation (one annual Finance Acts, you might say). That is my object for this afternoon's call. At the point of my call, I neither expect nor want your response to the draft condition. Rather, the telephone call is my way of explaining how the condition works, the thinking behind particular paragraphs, and to answer any questions of understanding that you may so far have. Armed with that, I hope that you will be in a better position to think about the draft, to discuss it with your clients, to take instructions and, after that, to return to me with your views.

My hope is that the draft (or something substantially the same) will serve to bridge the gap between UDC and STAL. But if does not, it should certainly narrow the gap sufficiently that whatever remains can be jumped over.

You will notice that some bits of the draft are highlighted in yellow and that some boxes in Schedule B are not yet filled in. These are detailed technical items which I fully expect our respective experts would be able to agree upon.

With best wishes + 'till this afternoon

Philip

--

Philip Coppel
Cornerstone Barristers
2-3 Gray's Inn Square
Gray's Inn
London WC1R 5JH

d 020 - 7421 1860
m 07966 - 138 860
e pcqc@2-3gis.co.uk
s 020 - 7242 4986
f 020 - 7405 1166
DX LDE 316 Chancery Lane

Ann Howells

Subject: RE: Stansted Airport application officer report - UTT/18/0460/FUL

From: "Maria Bowen" <Maria.Bowen@communities.gov.uk>
Date: 07/11/2018 at 10:22:36
To: "'Ann Howells'" <ahowells@uttlesford.gov.uk>
Cc: "'kdenmark@uttlesford.gov.uk'" <kdenmark@uttlesford.gov.uk>
Subject: RE: Stansted Airport application officer report - UTT/18/0460/FUL

Hi Anne,

Many thanks for the report and associated document. Apologies for not confirming receipt sooner as I have been out of the office.

I am writing to request that the council do not issue any decision notice, should the officer recommendation of support be agreed by the committee meeting next week, until the request/s for call in have been fully assessed. I am unable at this stage to give an exact time scale for this consideration process, however you will be updated on a regular basis. I would hope that this would fit in with the legal agreements/S106 which will inevitably be required in this case. Please can I ask you to confirm that your council agree to withhold issuing any decision by return e-mail.

If you have any queries please do not hesitate to contact me. I am currently out of the office so the best way to contact me will be via e-mail.

Kind regards,

Maria

Ministry of Housing, Communities & Local Government

Maria Bowen | Planning Officer | Planning Casework Unit

Ministry of Housing, Communities and Local Government

1st Floor, Coburg House, Mayflower Street, Plymouth. PL1 1DJ.

t: 0303 444 8041 | maria.bowen@communities.gov.uk

PCU General Enquiries: pcu@communities.gov.uk | t: 0303 444 8050

Visit us on GOV.UK:
https://www.gov.uk/government/organisations/ministry-of-housing-communities-and-local-government

Twitter - https://twitter.com/mhclg

From: Ann Howells [mailto:ahowells@uttlesford.gov.uk]
Sent: 22 October 2018 16:22
To: Maria Bowen
Subject: Stansted Airport application officer report - UTT/18/0460/FUL

Copy of report and agenda attached.

Regards

Ann

Ann Howells

Support and Business Manager

Uttlesford District Council

London Road

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The Department's computer systems may be monitored and communications carried on them recorded, to secure the effective operation of the system and for other lawful purposes.

Correspondents should note that all communications from the Ministry of Housing, Communities and Local Government may be automatically logged, monitored and/or recorded for lawful purposes.
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Planning Performance Agreement

This Planning Performance Agreement is an agreement between Uttlesford District Council, Essex County Council and the Applicant to provide a project management framework for handling this proposed major planning application from pre-application through to determination. This framework should improve and speed up the planning process by committing all parties to an agreed timetable containing "milestones" that make clear what level of resources and actions are required and ensure that all key planning issues are properly considered and resolved.

This agreement does not give a guarantee of planning permission. It relates to the process of considering development proposals and not the decision itself.

This agreement is made pursuant to Section 111 of the Local Government Act 1972 and Section 2 of the Local Government Act 2000.

Nothing in this agreement shall restrict or inhibit the Applicant(s) from exercising their right of appeal under Section 78 of the Town and Country Planning Act 1990.
Terms of reference please see PPA Charter unless specifically mentioned below.

Between:	**Stansted Airport Limited (STAL)**
and:	**Uttlesford District Council and Essex County Council**

Planning reference(s):	UTT/18/0460/FUL
Site location:	Stansted Airport
Description of development:	Airfield works comprising two new taxiway links to the existing runway (a Rapid Access Taxiway and a Rapid Exit Taxiway), six additional remote aircraft stands (adjacent Yankee taxiway); and three additional aircraft stands (extension of the Echo Apron) to enable combined airfield operations of 274,000 aircraft movements and a throughput of 43 million terminal passengers, in a 12-month calendar period.
Applicant team:	John Twigg, Planning Director john.twigg@magairports.com Alistair Andrew, Planning Manager (Principal Contact) – 07958 876723 alistair.andrew@magairports.com Keeley Briggs, Senior Planner keeley.briggs@magairports.com
Council team:	**Uttlesford**: stanstedairportplanningapplication@uttlesford.gov.uk Director – Roger Harborough 01799 510457 rharborough@uttlesford.gov.uk Assistant Director – Gordon Glenday 01799 510601

	gglenday@uttlesford.gov.uk Development Manager - Nigel Brown – 01799 510467 nbrown@uttlesford.gov.uk Lead Planning Officer - Karen Denmark – 01799 510495 kdenmark@uttlesford.gov.uk Specialist Support Planning Officer – Jeremy Pine 01799 510460 jpine@uttlesford.gov.uk Project Manager – Ann Howells 01799 510468 / 07855 014951 ahowells@uttlesford.gov.uk Environmental Health – Marcus Watts 01799 510595 mwatts@uttlesford.gov.uk Legal Services – Simon Pugh – 01799 510416 spugh@uttlesford.gov.uk **Essex County Council:** Transport – David Sprunt Head of Planning Service – Graham Thomas Public Health – Laura Taylor Green Skills – Richard Bambridge Principal Planner (ECC planning DM lead) – Anne Clitheroe

1 Main issues and stakeholder involvement

This PPA aims to secure collaborative working between the Applicant, the Local Planning Authority (LPA) and Essex County Council other parties on the proposals for the development of this site.

The objectives of this PPA are to:

- Provide clarity in respect of response timescales; and
- Ensure all technical matters are resolved as far as possible.

These milestones/dates may be amended due to changing circumstances when agreed by all three signatories.

Fortnightly meetings to be held between MAG; UDC and ECC to commence w/c 5 March 2018 at 14h00

Matters to include in the PPA are as follows, this list may alter as the project moves forward:

Highways; Noise; Air Quality; Public Health; Ecology.

2 Key milestones

Milestone	Proposed achievement date	Responsible Team Member(s)
Submit application on USB for pre validation check	15 02 2018	Alistair Andrew
Submit eight paper copies for pre validation checks	21 02 2018	Alistair Andrew
Application is valid	22 02 2018	Karen Denmark
Consultation letters/emails sent	22 02 2018	Project Manager
Public Engagement Session with Manchester Airports Group	13 March 2018	Project Manager
Meeting to discuss Surface Access issues with Statutory Consultees	13 March 2018	Project Manager
Officer Workshop to advise UDC Members to	14 March 2018	Karen Denmark

introduce application		
Meeting to discuss Noise issues with Statutory Consultees	26 March 2018	Project Manager
Meeting to discuss Air Quality/Public Health issues etc with Statutory Consultees	28 March 2018	Project Manager
Officer Workshop to advise UDC Members on statutory consultees responses etc	11 April 2018	Karen Denmark
Meeting to discuss s106/mitigation with UDC Officers etc	May 2018	Project Manager
Officer Workshop to advise UDC Members on progress of application	9 May 2018	Karen Denmark
Meeting to discuss s106/mitigation with UDC Officers etc	7 June 2018	Project Manager
Officer Workshop to advise UDC Members	6 June 2018	Karen Denmark
Planning Committee date – consideration and resolution of the application	18 July 2018	Karen Denmark

3 Services, fees and payment

The fees payable by the applicant team to Uttlesford District Council for providing Officer time for the advice and services within the terms of this PPA in respect of the proposed development (excluding the statutory planning application fee) shall be no greater than [redacted] *to UDC and* [redacted] *to ECC payable* plus VAT as set out in the table below (officers will be recording their time and this will be reflected in the final invoice) to be paid in not more than three stages (UDC and ECC to invoice individually):

1. Within one month of validation of application
2. At 12 week following validation
3. Within one month of resolution of application

Any further fees required shall be subject to further negotiation and agreement between parties.

Services provided/officers		**Description**	**Budget Hours**	**Budget Cost**
Pre- application discussions including admin services [redacted] p/h plus VAT	☑	40 hours between commencement of discussions to submission.	40	[redacted]
Planning Case Officer / specialist knowledge etc Including admin services [redacted] plus VAT	☑	Including a dedicated officer to be contact point between UDC and STAL. All enquiries will be dealt with commensurate with the level of importance/relevance.	777	[redacted]
Essex County Council TBA @ [redacted] plus VAT	☑	This may need to be reviewed following submission to take account of amount of hours/involvement required.	147.5	[redacted]
Consultants regarding Noise / Air Quality and Health Impacts	☑	Consultant re noise specialist budget of [redacted]		[redacted]
		TOTAL excluding VAT		[redacted]

4 Signatures
I hereby agree to the terms set out above: **For Uttlesford District Council as Local Planning Authority** Name: Gordon Glenday Position: Assistant Director Signature: Date: 21 Feb 2018
I hereby agree to the terms set out above: **For Essex County Council as County Council** Name: Position: Signature: L Date: 21 February 2018
I hereby agree to the terms set out above: **For the applicant team -** Name: Paul Willis Position: Programme Director Signature: Date: 2[illegible]

Freedom of Information
Your enquiry, together with any response made by the Council, will be made available for public inspection unless you confirm in writing to us that the information provided is commercially sensitive. If the Local Planning Authority receives a request, under the Freedom of Information Act (FOI) or Environmental Information Regulations (EIR), to disclose information relating to the planning performance agreement they are obliged to do so unless the information is deemed exempt under the Act. **Note.** We can only withhold information under FOI or EIR if the information falls under one of the exemptions (FOI) or exceptions (EIR) set out in legislation. For certain pre-application issues the applicant would be advised to complete the commercially sensitive checklist that should set out the reasons why, and for how long, they feel any information relating to the case needs to remain confidential. However, whilst we will take account of these views, the final decision on whether the information should be withheld rests with the Council. The Council maintains compliance to the Data Protection Act and we will not release any personal information to third parties.

If further services are required during the course of the agreement, a new agreement needs to be drafted and signed and sent to us with a completed notification form. This allows us to identify and process your documents urgently.

Ann Howells

Subject: RE: Extension of time request

From: "Alistair Andrew" <Alistair.Andrew@magairports.com>
Date: 04/07/2019 at 11:37:36
To: "Karen Denmark" <kdenmark@uttlesford.gov.uk>
Subject: RE: Extension of time request

Karen,

Thank you for the email.

I can confirm that STAL agrees to the 30th September for the extension of the application determination period. However, we would request that this date is not considered as a proxy for a late September Planning Committee to be scheduled, but rather that the Council deals with the matter as soon as possible; a point made by some of the Members at the EGM last week.

I look forward to hearing from you concerning proposals for Committee dates.

Regards

Alistair Andrew

Planning Manager

MAG

m: 07958 876723

e: alistair.andrew@magairports.com

www.magairports.com

MAG

From: Karen Denmark <kdenmark@uttlesford.gov.uk>
Sent: 04 July 2019 11:15
To: Alistair Andrew <Alistair.Andrew@magairports.com>
Subject: Extension of time request

Dear Alistair

As you are aware at a meeting of the Full Council on 28 June it was resolved to report the Stansted Airport application, reference UTT/18/0460/FUL, back to the Planning Committee to consider new material planning considerations and the content of the s106. Due to the additional work that this will require I therefore request an extension of time to 30 September 2019 to enable the Council to prepare the reports and to advise members of the new Planning Committee about the application.

Kind regards

Karen Denmark

Development Management Team Leader

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Ann Howells

Subject: RE: [External]..35+: Extension of Time

From: "Roger Harborough" <rharborough@uttlesford.gov.uk>
Date: 20/12/2019 at 14:40:34
To: "Alistair Andrew" <Alistair.Andrew@magairports.com>
Cc: "Karen Denmark" <kdenmark@uttlesford.gov.uk>,"Ann Howells" <ahowells@uttlesford.gov.uk>
Subject: RE: [External]..35+: Extension of Time

Alistair

Thank you for offering to further extend the time for determination of the application until 24 January 2020. This extension is agreed.

Regards

Roger Harborough

Director of Public Services

Uttlesford District Council
Council Offices
London Road
Saffron Walden
Essex CB11 4ER

T: 01799 510457
E: rharborough@uttlesford.gov.uk

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From: Alistair Andrew <Alistair.Andrew@magairports.com>
Sent: 20 December 2019 14:37
To: Roger Harborough <rharborough@uttlesford.gov.uk>
Subject: [External]..35+: Extension of Time

Roger,

I neglected to mention earlier when we spoke about any potential request from the Council to extend the time of the application determination period.

I would confirm that in light of the recent committee date announcement, that STAL would be willing to agree to extend the time to that same date, namely 24th Jan 2020.

If you would confirm agreement by return, I would be grateful.

Alistair Andrew

Planning Manager

MAG

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e: alistair.andrew@magairports.com

www.magairports.com

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Ann Howells

Subject: 35+

From: "Alistair Andrew" <Alistair.Andrew@magairports.com>
Date: 29/01/2020 at 08:57:10
To: "Karen Denmark" <kdenmark@uttlesford.gov.uk>
Subject: 35+

Karen,

I am happy for you to extend the application time to today, in order for the decision notice to be issued accordingly.

Thanks

Alistair Andrew
Planning Manager
MAG
07958 876723
Disclaimer

APP/C1570/W/20/3256619 (UTT/18/0460/FUL)

STANSTED AIRPORT APPEAL

INDEX OF AUTHORITIES

REFERRED TO IN UDC'S RESPONSE TO COSTS APPLICATION

Application for costs - Circular 73/65 - criteria for award of costs

Case Comment

Journal of Planning & Environment Law

J.P.L. 1988, Nov, 774-777

Subject
Planning

Keywords
Costs; Planning appeals

Cases cited
Manchester City Council v Secretary of State for the Environment [1988] J.P.L. 774; [1988] 1 WLUK 266 (QBD)

J.P.L. 774 Mercury Communications Ltd. wishing to provide microwave radio facilities applied for planning permission to replace a radio mast on the Sunley Building in Manchester. In October 1983 the application was considered by the City Council's Planning Committee. At the meeting a letter objection was received from the British Telecommunications Union referring to the potential hazards of microwaves. The City Planning Officer reported that the Health and Safety Executive had, on consultation, considered there was no public danger. The decision was deferred until the meeting of the Planning Committee in December 1983 at which the planning officers report again stated that safety requirements were coupled with. The Committee expressed unease into the lack of research into the effects of microwaves, and recommended refusal of the application. In January 1984 the full city council formally refused the application on health and safety grounds.

J.P.L. 775 Mercury applied to the Secretary of State. An inquiry was held at which numerous experts gave evidence on the safety issue. The Secretary of State allowed the appeal and costs were awarded against Manchester City Council. The Council appealed to the High Court for an order to quash the cost's order.

KENNEDY J. said that it was common ground that the Secretary of State had power to award costs, and in circular 73/65 the then Minister of Housing and Local Government set out the practice which he proposed to follow, and which in the present case the Secretary of State purported to follow, when dealing with the application for costs.

In deciding whether to order Manchester to pay costs the Secretary of State was not bound to apply the policy set out in circular 73/65, but, as was apparent from paragraph 4 of his decision letter in relation to the issue of costs, he purported to do so, and accordingly, as was said by Sir Douglas Franks, Q.C., in *Niarchos (London) Ltd.* v. *Secretary of State for the Environment and Another* (1977) 76 L.G.R. 480, the particular passage in question being at p.485:

"(If the Secretary of State) expresses himself to be deciding a case under a stated policy, it must follow that if he decides the case other than in accordance with that policy he misdirects himself."

Thus far there seemed to be no dispute between the parties as to the approach which should have been adopted by the Secretary of State once Mercury made its application for costs, but Mr. Henderson did submit that the Secretary of State should not have found the behaviour of Manchester to be unreasonable unless it was behaviour which no reasonable local authority would adopt. By way of analogy he pointed to the power in the Rules of the Supreme Court to strike out pleadings which disclosed no reasonable cause of action, and, adopting a phrase used by Sir John Donaldson in *J. H. Smith Ltd.* v. *Smith* (1974) *Industrial Court Reports* 156, in the National Industrial Relations Court, submitted that in accordance with the Ministerial policy before Manchester could be ordered to pay costs the Secretary of State had to be satisfied that the city council adopted a position which was "obviously wholly unarguable."

For the purposes of the present case it was necessary to say more about standards of reasonable behaviour than was said in paragraphs 26 and 27(ii) of the Report of the Council on Tribunals because the Secretary of State found Manchester to have

been unable to support its decision by any substantial evidence. If on the facts he was entitled to come to that conclusion then, he was entitled to find that Manchester had acted unreasonably within the meaning of paragraph 9 of the circular so as to justify an award of costs.

The first ground relied upon was that the Secretary of State failed to consider whether the reason given for refusing planning permission was one which no reasonable planning authority could have given. Here Mr. Henderson's submission, was that Manchester should be entitled to have some credit for choosing, when refusing planning permission, a form of words which could be appropriate as a ground for refusal if there was substantial evidence available to justify that conclusion. That could not be right. When it came to deciding whether or not to award costs what mattered was the evidence, if any, which led to the decision, and the Secretary of State was under no obligation to ask himself whether, standing alone and without regard to the evidence, the reason given for ***J.P.L. 776*** refusing planning permission was one which no reasonable planning authority could have given. In the context of the available evidence he had concluded, as he was entitled to, that the council had acted unreasonably in refusing planning permission for the reason it gave, and that it had failed to support its refusal with substantial evidence.

In ground 2(*a*) it was alleged that when considering whether Manchester had been unable to support its decision by any substantial evidence the Secretary of State had failed to consider the evidence adduced by the city council and whether it was substantial. It seemed to be clear from the Inspector's report and from the decision letter of the Secretary of State in relation to the issue of costs that he had considered the evidence produced by the city council and he found, as he was entitled to find, that it was insubstantial. As Mr. Barnes pointed out, it was always necessary to bear in mind that planning laws were fetters on the liberty of the individual, and the proper approach which ought to be adopted by any planning authority in relation to a proposed development was that which found an echo in paragraph 3.8 of the Inspector's report--namely that it was not for the developer to prove why he ought to be granted planning permission. He had a right to it unless there was shown to be a good reason why he should not have it. Here the reason for refusal given by the city council was that the proposed development would be a threat to the health and safety of the general public in the city and particularly to those people who would be in close and frequent proximity to the installation. Mr. Barnes submitted and he (Kennedy J.) accepted, that the Secretary of State was entitled to find that even at the inquiry there was a lack of substantial evidence to support that positive assertion, made with at least some knowledge of the weight of the evidence to the opposite effect.

Grounds 2(*b*) and (*c*) were allegations of the Secretary of State having had regard to what were alleged to have been irrelevant considerations, namely the use by British Telecommunications of a microwave system, and the council's failure to attempt to remove existing rights to use microwave equipment. Returning for a moment to paragraph 9 of circular 73/65 it would be remembered that the basic allegation being investigated by the Secretary of State when considering whether or not to award costs was that Manchester had acted unreasonably in that it had been unable to support its decision by any substantial evidence. It was its case that, both at the time when it had rejected the proposal, and at the time of the inquiry, it had available evidence to support its conclusion that the proposed development would be a threat to health and safety. In order to decide whether that evidence was substantial the Secretary of State was entitled to have regard to the known existence of a comparable system of microwave transmission, and in order to decide whether Manchester had acted unreasonably the Secretary of State was entitled to have regard to the failure of the city council to make any attempt to inhibit other transmitters of microwaves. Of course Mr. Henderson was entitled to say that there was a world of difference between refusing to authorise a new transmitter and taking from an existing transmitter the right to transmit. No doubt the Secretary of State had that well in mind. And nothing turned on the point that some of the statutory provisions to which the Secretary of State referred gave only limited powers of revocation. In paragraph 7 of the decision letter the references to those powers were all gathered together in one sentence.

Ground 2(*d*) was merely a repetition of the allegation that in making his decision as to the question of costs the Secretary of State should have looked only at the evidence ***J.P.L. 777*** called by the city council to support its decision, and not at the picture as a whole. As indicated, it seemed that in order to decide whether a party had acted unreasonably, and whether the evidence on which it had relied should be regarded as substantial it would nearly always be necessary to have regard to the picture as a whole.

Application dismissed.

Comment. The new policy on the award of costs (contained in circular 2/87) has already resulted in costs being awarded more readily. Correspondingly, there is likely to be more judicial challenges to such awards. The determination of an application for costs involves the exercise of an statutory discretion and such is subject to the normal administrative law principles. The decision in *R.* v. *Secretary of State for the Environment, ex p. Reinisch* (1971) 22 P. & C.R. 1022 established that the Minister is entitled to have a general policy on costs but was not bound to and should not apply that policy inflexibly. Since then the case

law on policy has further developed and Kennedy J. indicates in the present decision, the courts have arrogated to themselves the final say as to the meaning of policy. This is based on the argument that if the Minister purports to apply a policy, he must not misdirect himself. In this way policy documents take on a life and meaning of their own separate from the hand that actually drafted the document.

The general policy set out in Circular 73/65 (and which is still the basic policy in Circular 2/87) is that costs should be awarded for "unreasonable behaviour" where that behaviour has caused the other party to incur unnecessary expense. The vagueness and subjectivity of the term "unreasonable behaviour" means that the detailed examples which are given in the new Circular take on a crucial importance. In this case, the local planning authority argued that behaviour could only be considered "unreasonable" if the Secretary of State had adopted a position which was "obviously wholly unarguable." Kennedy J. declined to make an express finding as to what were the standards by which reasonable behaviour had to be judged. Nevertheless, he clearly rejected a *Wednesbury* standard of the behaviour which no reasonable local authority would have adopted and accepted that behaviour would be unreasonable if the refusal by planning permission could not be supported by substantial evidence. This would suggest that the courts will not interfere with the Secretary of State's views as to what amounts to unreasonable behaviour.

R *v* Secretary of State for the Environment, *ex parte* North Norfolk District Council

QUEEN'S BENCH DIVISION
Auld J
July 12 1994

Planning inquiry – Award of costs against local planning authority – Judicial review – Whether inspector's decision to award costs was rational – Whether proper test for award of costs was applied

On January 9 1992 Barratt East Midlands Ltd ("Barratts") applied to the applicants, North Norfolk District Council ("the council"), for full planning permission to construct 126 dwellings on a site at the southern edge of the residential area of North Walsham, Norfolk. The proposed density was 10 dwellings per acre compared with a density of 5.3 dwellings per acre on the surrounding residential estate. The council failed to determine the application within the prescribed period, but gave the following putative reasons for refusal: (i) detriment to the character and visual amenity of the area (by reason of density and type of development in comparison to the existing pattern of development in the area and lack of adequate landscaping); (ii) detriment to the amenity of occupiers in the area (by reason of increased traffic on existing road network).

Barratts appealed to the respondent, the Secretary of State for the Environment, whose inspector, following a public local inquiry, dismissed the appeal. He did so only on the ground of inadequate landscaping, finding that the other reasons for refusal had not been established. In response to Barratts' application pursuant to section 250(5) of the Local Government Act 1972 and para 6(4) of Schedule 6 to the Town and Country Planning Act 1990, the inspector awarded Barratts their costs of refuting the council's putative reasons for refusal of permission save for the ground on which the appeal was refused, namely inadequate landscaping.

The council applied to quash the decision to award costs by *certiorari* on the grounds that the decision was irrational or that the reasons given by the inspector for the decision were so unclear as to raise a substantial doubt as to its rationality.

Held The application was allowed.

The proper test for an award of costs was that set out in para 5 of Circular 2/87 – *Award of Costs incurred in Planning and Compulsory Purchase Order Proceedings*[1], namely had the unreasonable conduct of the authority caused the other party to incur unnecessary expense. Para 7 of the circular was intended to give guidance as to some of the different

[1]Editor's note: see now Circular 8/93 – *Award of Costs incurred in Planning and Other (including Compulsory Purchase Order) Proceedings* – issued on March 29 1993, which replaces the advice in Circular 2/87.

matters which might be relevant to deciding that issue. While, therefore, a failure to produce evidence to substantiate reasons for refusal might be a basis for a finding of unreasonableness against an authority, such a finding did not follow as a matter of course: see p84A-D.

The test of reasonableness to be applied by an inspector in this context was different from that for the court in ruling on the reasonableness of the inspector's decision on the point. For an inspector "unreasonable" means unreasonable in the ordinary sense of the word whereas for the court "unreasonable" means unreasonable in a *Wednesbury* sense: see p84F-G.

An inspector had to give clear and intelligible reasons for a decision on costs just as he had to on the issues in the appeal. The inspector's reasons, in the present case, were inadequate and the inadequacy was prejudicial to the council. Those reasons raised a substantial doubt whether his decision was within his powers or lawful in the sense of amounting to a proper exercise of his discretion having regard to the guidance set out in Circular 2/87: see p89C-E.

Cases referred to in the judgment

Blyth Valley Borough Council v *Secretary of State for the Environment* [1990] JPL 904

North Kesteven District Council v *Secretary of State for the Environment* unreported, December 18 1987

R v *Secretary of State for the Environment, ex parte Chichester District Council* [1993] 2 PLR 1

Save Britain's Heritage v *No 1 Poultry Ltd* [1991] 1 WLR 153; *sub nom Save Britain's Heritage* v *Secretary of State for the Environment* [1991] 2 All ER 10; (1991) 62 P&CR 105; [1991] 3 PLR 17, HL

Seddon Properties Ltd v *Secretary of State for the Environment* (1978) 42 P&CR 26; 248 EG 950; [1978] JPL 835

Application for judicial review

This was an application by North Norfolk District Council for the judicial review of a decision by the first respondent, the Secretary of State for the Environment, by his inspector to make an award of costs to Barratt East Midlands Ltd pursuant to section 250(5) of the Local Government Act 1972 and para 6(4) of Schedule 6 to the Town and Country Planning Act 1990.

Peter Village (instructed by Sharpe Pritchard) appeared for the applicants, North Norfolk District Council.

David Holgate (instructed by the Treasury Solicitor) appeared for the respondent, the Secretary of State for the Environment.

The following judgment was delivered.

AULD J: This is an application by North Norfolk District Council to quash by *certiorari* a decision of the Secretary of State for the Environment who, by his planning inspector, ordered that the council should pay the costs of an unsuccessful appeal by Barratt East Midlands Ltd brought by them under section 78 of the Town and Country Planning Act 1990. The council maintains that the decision was

A irrational, or that the reasons given by the inspector for it are so unclear as to raise a substantial doubt as to its rationality.

On January 9 1992 Barratts applied to the council for full planning permission for residential development and associated works on a 5.3ha site at the southern edge of the residential area of North Walsham, Norfolk. The proposed access to the development was off Thirlby Road, B which served the immediately adjacent residential area. The appeal site was in agricultural use, but was the subject of an existing planning permission for 56 dwellings.

Barratts' application was to build a mix of 126 houses and bungalows on the site, a proposed density of 10 dwellings per acre, compared with a density of 5.3 dwellings per acre on the surrounding residential estate.

C The council did not formally determine the application within the required period, but gave putative reasons for refusal, namely:

> (i) Detriment to the character and visual amenity of the area (by reason of density and type of development in comparison to the existing pattern of development in the area and lack of adequate landscaping).
> (ii) Detriment to the amenity of occupiers in the area (by reason of increased traffic on existing road network).

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Barratts appealed against the council's failure formally to determine its application and on September 16 and 17 1992 an inspector, appointed by the Secretary of State, held a public local inquiry into the appeal under section 78 of the 1990 Act. By a decision letter of November 25 1992 he dismissed the appeal. He did so only on one of the grounds E argued by the council, namely inadequate landscaping, finding that the other two main grounds of detriment to the amenity, namely from density and type of development in relation to the existing pattern of development and from increased traffic, had not been established. By a separate decision letter of November 25 1992 the inspector, determined, on Barratts' application and in the exercise of powers given to him by F section 250(5) of the Local Government Act 1972 and para 6(4) of Schedule 6 to the 1990 Act, to award Barratts its costs of refuting the council's putative reasons for refusal of permission, save for the ground on which the appeal was refused, inadequate landscaping.

On the issues of density and type of development, the council had argued, in reliance upon evidence given by their planning officer, that G the proposed density of dwellings was too high, being about double that of the surrounding residential area and of that permitted by the existing planning permission. They considered that the more spacious form of development in the locality of Thirlby Road should be continued in any proposed development of the site and then only by the construction of bungalows. The council's evidence to the inspector had been that, H although the site was allocated on the non-statutory interim North Walsham local plan for 56 dwellings, the council had no formal policy as to density of residential buildings in the area. He dealt with the issue in paras 14 and 15 of his main decision letter as follows:

> 14. I do not consider that the Council can reasonably seek to restrict the density of development to that permitted within the previous permission.

I understand the concern to maintain the more spacious form of development that characterises the Thirlby Road locality. However it remains the case that Planning Policy Guidance Note 3 advises that, where it is necessary to protect the character and amenity of existing development, appropriate policies may be included within local plans. Whilst it is clearly important to have regard to the character of existing housing there are no such policies relating to the existing development around Thirlby Road. It is also made clear that planning authorities should not attempt to prescribe rigid formulae and that regard should be paid to marketing considerations. In this connection I find no reason to dispute your clients' contention that present market demand is for a mix of smaller family dwellings.

15. It is anyway apparent that the Council in assessing housing land availability within the interim local plan, have assumed significantly higher densities of development within other sites in the town than now proposed. It is my conclusion that the present proposal falls to be considered on its own merits when considered against the relevant planning policies, both local and national.

Planning Policy Guidance Note 3, to which the inspector referred, is known as PPG 3 – *Housing*. It was issued by the Department of the Environment in March 1992, superseding a version of January 1988. The inspector did not identify the particular paragraphs of PPG 3 which he had in mind, though they are likely to have been paras 6, under the heading "Good design" and paras 21 and 23 under the heading "Development plan policies for housing" and the subheading "Development in existing residential areas". Those paragraphs read, so far as material:

6. . . . In considering the location of houses on plots and their relationship to each other, local planning authorities should not attempt to prescribe rigid formulae. They should regulate the mix of house types only when there are specific planning reasons for each control, and in doing so they should take account of marketing considerations.

. . .

21. Local plans may include policies on the densities of new housing in particular areas allocated for development. They should permit reasonable flexibility in individual cases in view of the different characteristics of particular sites and the need for a range of housing types at varying price levels.

. . .

23. In *older established residential areas*, . . . Where authorities consider that the pressure for development and redevelopment is such as to threaten seriously the character of an established residential area which ought to be protected, they may include density and other policies in their local plans for the areas concerned, while avoiding undue rigidity.

PPG 3 also provides some general guidance about design and density of development in rural areas, with particular reference to setting and existing development and without mention of inclusion of policies about them in local plans. Under the headings of "Good design" in para 5 and of "Development plan policies for housing" in paras 18 and 19, it provides as follows:

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> 5. Local planning authorities should consider development proposals in terms of their relationship to their setting, and by reference to the character and quality of the local environment, including any adjacent buildings. Relevant considerations are likely to include matters such as the overall scale and density of the development; the height and massing of its various elements; the layout of the scheme and its landscaping; and access and parking requirements.

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> . . .
>
> *Rural areas*
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> 18. Housing will, however, continue to be needed on new "green field" sites outside existing urban areas. It is important to ensure, through the planning process, that new development in rural areas is sensitively related to the existing pattern of settlement and has proper regard to Government policies for the protection of the countryside.

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> 19. Some villages may have reached the limit of their natural growth, while in others provision can be made for modest development without damage, either to the countryside or to the settlement itself.
>
> . . .
>
> Where new housing is acceptable, the character of the particular settlement should always be respected, in terms of densities as well as scale and environmental quality. Villages vary widely in their character, and what

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> might be appropriate in a village with a dense intricate pattern of development could be out of place in a sparser, more open settlement. The reverse may also be true. Expansion of villages and towns should avoid creating ribbon development or a fragmented pattern of development.

While North Walsham, which is a small town, could not be regarded as a "village" for the purpose of this policy, the guidance given in it has

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some relevance to the proper planning approach to residential development at the boundary of town and country.

As to the council's concern about the likely detriment to the amenity of those living in the area from increased traffic resulting from the development, the inspector found, in paras 22 to 24 of his main decision letter, that there would be no material detriment as a result of such

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increase as was likely.

That left the matter of the adequacy of the proposed landscaping, on which the inspector found in favour of the council. As to that he said in para 19 of the main decision letter that it fell well short of what was required to meet the aims of local planning policies and added:

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> Having regard to the higher density of development it is, in my opinion, particularly desirable to screen and soften the appearance of new building when viewed from the . . . south.

Barratts' application for costs was made under section 250(5) of the 1972 Act. It provides, so far as material:

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> (5) The Minister . . . may make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid . . .

Guidance as to the way in which he should exercise his discretion under that provision was contained in Circular 2/87 – *Award of Costs incurred in Planning and Compulsory Purchase Order Proceedings*, which has

now been replaced by Circular 8/93 – *Award of Costs incurred in Planning and Other (including Compulsory Purchase Order) Proceedings*. That guidance, so far as material, was as follows:

> 5. In planning proceedings the parties are normally expected to meet their own expenses and costs are awarded only on grounds of unreasonable behaviour. It should also be noted that awards of costs do not necessarily follow the decision on planning merits: an appellant is not awarded costs simply because the appeal has succeeded, and indeed there may exceptionally be circumstances in which an award is made against a successful party.
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> 6. Before an award of costs is made, the following conditions will normally need to be met:
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> (i) one of the parties has applied for an award . . .;
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> (ii) the party against whom the claim is made has acted unreasonably;
>
> (iii) this unreasonable conduct has caused the party making the application to incur expense unnecessarily, either because it should not have been necessary for the case to come before the Secretary of State for determination or because of the manner in which another party has conducted his part of the proceedings.

The circular goes on, in paras 7 to 12, to give guidance where there is an application for costs against a planning authority because of their unreasonable refusal of planning permission. Para 7 contains the following guidance:

> . . . In any appeal proceedings authorities will be expected to produce evidence to substantiate their reasons for refusal. If they cannot do so, costs may be awarded against them. Indeed, this is the ground on which costs are most commonly awarded against a planning authority. In a case of this nature, each of the reasons given for refusal will be examined to see whether there is evidence to show that the relevant advice given in Departmental circulars and relevant judicial authority were [*sic*] properly taken into account, and that the application was considered on its merits in the light of these and other material considerations. Where one reason for refusal cannot be supported in this way but evidence has been produced to substantiate other reasons for refusal, a partial award may be made in respect of the costs in opposing that reason.

Mr David Holgate, on behalf of the Secretary of State, has argued that the effect of that guidance, in particular, para 7, is to require a planning authority to put before an inspector "substantial evidence" in support of any ground of refusal upon which they rely. The paragraph does not say that. It says that on appeal authorities are "expected to produce evidence to substantiate their reasons for refusal". It may be a convenient paraphrase of that guidance to say that authorities are expected to produce "substantial evidence", but it depends what "substantial evidence" means in this context. Clearly, the evidence upon which an authority relies to support a ground for refusal of permission must have some substance in the sense of providing some respectable basis for their stance upon a particular issue. But it need not be of such substance as to persuade the inspector to find in the authority's favour on the issue. Otherwise every evidential failure to persuade an inspector on an issue

A would expose the loser to a finding of unreasonableness on an application for costs in relation to that issue.

In addition, the test is one of unreasonableness, not just whether an authority has produced evidence to substantiate their case on a particular issue. I respectfully adopt the view of Hutchison J in *R* v *Secretary of State for the Environment, ex parte Chichester District Council* [1993] 2 PLR 1 DC, that the proper test is that set out in para 5 of the circular, namely B has the unreasonable conduct of the authority caused the other party to incur unnecessary expense. This is how he put it at p8 of the report:

> . . . I cannot accept that the correct test is whether the authority had produced substantial evidence to support their case. Mr Mole relied heavily on para 7 of the policy statement, contending that it in effect requires that C the inspector should examine the evidence and the reasons, treating para 7 as a sort of check list; . . .
>
> In my judgment, . . . the test is that stated in para 5 – had the unreasonable conduct of the authority caused the other party to incur unnecessary expense; and that para 7 is intended to give guidance as to some of the different matters which may be relevant to deciding that issue. Thus, while the question of whether there was or was not substantial D evidence to support the authority's objections will usually be a relevant one, it does not embody the legal test for making an order for costs.

While a failure to produce evidence to substantiate reasons for refusal may be a basis for a finding of unreasonableness against a planning authority, such a finding does not follow as a matter of course. Such a failure is no more than a relevant consideration, albeit an important one, E on the question of unreasonableness. Much may depend upon the inspector's assessment of the substance or weight of the authority's evidence looked at on its own, as distinct from weighing it against other evidence put before him on the hearing of the appeal.

Para 11 of the circular sets out, as another example of possible unreasonable behaviour by a planning authority justifying an award of F costs against them, the circumstance "where it must have been obvious from official statements of policy or judicial authority that an appeal was virtually certain to succeed".

The test of reasonableness to be applied by an inspector in considering a party's stance on an application for costs under section 250(5) is different from that for the court in ruling on the reasonableness of his decision on the point. For an inspector G "unreasonable" means unreasonable in the ordinary sense of the word, whereas for the court "unreasonable" means unreasonable in a *Wednesbury* sense. Otton J put the difference neatly in the following passage in his judgment in *Blyth Valley Borough Council* v *Secretary of State for the Environment* December 2 1988, at p21:

> H It seems . . . that there is a wide discretion vested in an inspector in regard to costs, and the Circular advises how that discretion is normally to be applied. I accept that the inspector must look to see if the local planning authority has acted unreasonably; that is using the word "unreasonably" in its ordinary and non *Wednesbury* sense. I must then go on to look at whether the exercise of the inspector's discretion was unreasonable or irrational in the *Wednesbury* sense.

Barratts, in its application for costs, maintained, in reliance on para 7 of Circular 2/87, that the council had acted unreasonably in that they had failed to produce clear-cut and substantial evidence to support their putative grounds for refusal of the application. In particular, Barratts argued that the council had not produced any evidence to show that there would be any material harm to the wider amenity or to existing residents from the density or type of the proposed housing or from increased traffic. The council, in reply, referred to the evidence which had been given on these matters by their planning officer and their concern, in seeking a lower density of development than that proposed, to lessen the harm to the amenity and character of the existing development in the area.

The inspector's decision letter on the application for costs should be read together with his main decision letter, though, of course, it has an entirely different function. In para 8 of the costs decision letter he correctly identified the question for his decision. He wrote:

> The application for costs falls to be determined in accordance with the advice contained in Circular 2/67 and all the relevant circumstances of the appeal, irrespective of its outcome, and costs may only be awarded against a party who has behaved unreasonably.

He continued, in para 9, by referring to para 7 of the circular, in particular to its statement that an authority is expected to produce evidence to substantiate their reasons for refusal. In para 10, he found that they had not done so on the issues of "density and amenity". This is how he put it:

> I consider that the local authority were not able to adequately support their putative reasons for refusal other than in relation to the adequacy of measures for landscaping. I recognize that assessment of harm to amenity is to some extent subjective. Nevertheless I take the view that the Council failed to pay adequate regard to advice within published guidance from central government which should have made it clear that their stance on density and amenity was unlikely to be supported at appeal. Whilst the Council do not have to follow advice from the highway authority on traffic aspects they failed to provide any substantial evidence to support their views.

It should be noted that the inspector made no finding of unreasonableness in that paragraph nor, save in regard to traffic matters, any express finding that they had failed to produce evidence to substantiate their reasons for refusal in the sense in which that expression must be intended in para 7 of the circular. His opening words that he considered that the council were "not able to adequately support . . . [their] putative reasons for refusal" other than as to "landscaping" do not make clear, in the light of his succeeding references to the subjectivity of assessment of harm to amenity and the council's failure to follow Governmental guidance, whether he meant that the council had not produced evidence to substantiate their reasons for refusal within the meaning of that expression of para 7 of the circular or whether they had

A produced such evidence, but insufficient to succeed on those points in the appeal. His statement in the last sentence of the paragraph, apparently in relation to traffic matters, that the council had failed to provide any "substantial evidence" in support of their case suggests that he had the latter, incorrect, test in mind.

He approached his finding of unreasonableness by stating, in para 11 of the decision letter, that the council's

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> reasonable concerns about the adequacy of measures for landscaping and screening might well have been resolved by negotiation.

and reached it without other explanation, in para 12, in the following terms:

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> In all the circumstances, therefore, it is my conclusion that, whilst the Council behaved unreasonably, thereby meriting a costs award in favour of your clients, that award should exclude costs in relation to that part of the first putative reason for refusal referring to the adequacy of landscaping.

Accordingly, and in summary, I make two main criticisms of this D reasoning of the inspector.

First, it is not clear whether he had in mind the test in para 7 of the circular that they had failed to produce "evidence to substantiate . . . [their] reasons for refusal", or simply that such evidence as they had produced at the hearing, when compared with the evidence of Barratts, had not satisfied him of the rightness of their stance on those matters.

E Second, it is not clear upon what basis he found as unreasonable the council's failure adequately to support their reasons, other than as to landscaping, for refusal, or their stance in relation to unspecified Government guidance.

Taking first density as a potential harm to amenity, the inspector does not appear to be saying in para 10 of his costs decision letter that the F council did not produce evidence to substantiate their refusal on that ground. Indeed, for him to have suggested that would have been contrary to his references to the council's case and evidence referred to in paras 14, 15 and 19 of his main decision letter, which I have set out. In particular, the council's planning officer had given evidence, which was not in dispute, that the proposed development was twice as dense as that of the adjoining estate.

G The nearest that the inspector came to an identifiable reason for finding that the council had not been "able to adequately support [their] putative reasons for refusal" on the issue of density was that they had "failed to pay adequate regard to advice within published guidance from central Government". That can only be a reference to PPG 3, which, he asserted

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> made it clear that their stance on density and amenity was unlikely to be supported at appeal.

It is not apparent what advice in that document he can have had in mind. In para 14 of his main decision letter when dealing with density,

he referred only to what must have been paras 6, 21 and 23 of it, which I have set out, but those paragraphs simply indicate that local authorities "may", not "must", include in local plans policies on density and that if they do so they should not attempt to prescribe rigid formulae. The absence of such policies here and the council's approach to density in relation to this site certainly cannot be a basis for concluding that the council's "stance on density and amenity was unlikely to be supported on appeal". As Mr Peter Village observed, in his submissions on behalf of the council, there is nothing in PPG 3 to suggest that an authority may not exercise their planning judgment on the matter of density unless it is dealt with in a statutorily adopted local plan.

Mr Holgate, on behalf of the Secretary of State, suggested that the inspector must have been relying also on para 20 of PPG 3. The particular passage in that paragraph that he, Mr Holgate, had in mind was as follows:

> 20. . . . Where there is strong pressure for development which could give rise to town cramming if not carefully controlled, planning authorities should ensure that local plans include clear policies in relation to which applications will be considered.

All I can say about that suggestion, is that there is no hint of a reference to it in either decision letter. Even if there were I cannot see what possible relevance it could have to this planning proposal or anything in it to indicate that the council's stance on density was unlikely to be supported on appeal. More relevant passages in PPG 3 are those that I have already set out in whole or in part, namely paras 5, 6, 18, 19, 21 and 23. They support rather than conflict with the council's case on density and amenity before the inspector.

In my view, the inspector's reasons for concluding that the council had failed to pay adequate regard to Governmental advice making clear that their stance was unlikely to be supported on appeal are inexplicable. He did not identify the guidance to which he was referring and to the extent that the reader may deduce or guess what he had in mind, it simply does not support his assertion that it should have made clear to the council that they would fail on the issue of "density and amenity" on appeal.

As to traffic, the inspector's remark that "the Council do not have to follow the advice from the highway authority on traffic aspects" is inexplicable unless the reader is intended to infer from it that the council rejected advice from the highway authority. However, it is common ground that neither the council nor the highway authority objected to the proposal on highway grounds and that the highway authority expressed no view on the noise and disturbance likely to be caused by increased traffic. The council, in objecting to the proposal because of the likely increase in noise and disturbance from increased traffic, were not rejecting any advice of the highway authority.

Assessment of harm to the amenity is, as the inspector acknowledged in the second sentence of para 10 of the costs decision letter, "to some extent subjective". If one puts aside his apparent and mistaken impression that the council ignored the advice of the highway authority

A on this matter, he was left with the evidence of the council's planning officer on the one hand and that of Barratts' planning witness and highways expert on the other.

The council's planning officer's evidence on the point was, at para 27 of his witness statement:

> B . . . the traffic generated by the provided development will result in a significant loss of amenity at present enjoyed by the residents and occupiers of the existing development in the locality especially those on either side of the access road. This loss of amenity would be very considerably reduced if not completely, if the sole access to the site were to Yarmouth Road (access to Yarmouth Road was proposed in the original permission), and would be reduced if the number of dwellings proposed were reduced to about 50. It is reckoned that the number of trips generated by 126 C dwellings would be 472 (945 movements) whereas only 50 dwellings would generate 187 trips (375 movements).

Barratts' planning witness said, at para 6.45 of his witness statement:

> D Environmental impact stems from noise, pollution and lights caused by traffic using the road. These properties are set back some distance from the road and the increased levels of traffic are not in my view, sufficient to have an unacceptable impact on the amenity of the residents.

Barratts also called evidence from a highways expert. He said that the proposed development was likely to generate an additional 88 vehicles during the peak hour and 900 vehicle movements in the day, which was E likely roughly to double the existing traffic in Thirlby Road in the peak hour to about 170 vehicle movements. He concluded, by reference to Sir Colin Buchanan's report, *Traffic in Towns* and a joint publication of the Institution of Highways and Transportation and the Department of Transport in 1987, *Roads and Traffic in Urban Areas*, that the projected traffic flow would be below Sir Colin Buchanan's "lower limit of F environmental capacity" and that it would also be below the "desirable maximum" to be deduced from the *Design Bulletin 32*.

As I have already indicated, the inspector found against the council on this issue. This is how he put it, in para 22 of his main decision letter:

> G The remaining aspect of concern to both the Council and local residents relates to additional noise and disturbance arising from increased traffic levels on Thirlby Road. . . . whilst I can understand that any additional traffic is unwelcome, it remains the case that Thirlby Road is very lightly trafficked, even at peak hours, and was anyway constructed . . . in order to serve additional road development. Existing properties are set well back from the road and I do not consider that vehicular activity in connection with further development need be materially detrimental to the amenity of existing residents. Traffic levels would remain well within the H environmental capacity of the road and fall well short of the level 210 vehicles per hour identified as a desirable maximum in the latest edition of Design Bulletin 32.

While the inspector found against the council on this issue, it is difficult to know from his shortly stated reference to it in the last

sentence of para 10 of the costs decision letter why he implied that the council had failed to follow advice from the highway authority or in what sense the council's evidence in support of their views had not been "substantial". It is plain from the extracts of the parties' principal evidence on the point that it had some substance in planning terms. Was the inspector typifying it as insubstantial simply because he preferred the evidence of Barratts' witnesses? And upon what basis, did he conclude that, in consequence of whatever test of substantiality he applied, that the council's reliance upon the traffic argument had been unreasonable? Whatever test of substantiality of evidence he applied, would he have found the council to have been unreasonable if he had not made the mistake about the guidance in PPG 3 on density and amenity, leaving traffic as the only matter on which he had concluded that the council had not produced evidence to substantiate their reasons for refusal?

An inspector must give clear and intelligible reasons for a decision on costs, just as he must do on the issues in the appeal: see *Seddon Properties Ltd* v *Secretary of State for the Environment* (1978) 42 P&CR 26; and *Save Britain's Heritage* v *No 1 Poultry Ltd* [1991] 1 WLR 153, HL. I bear in mind the indication given by Simon Brown J, as he then was, in *North Kesteven District Council* v *Secretary of State for the Environment* unreported, December 18 1987 at pp21 and 22 of the transcript, that the court should not encourage challenges to an inspector's decision on costs. However, in my judgment, the inspector's reasons were inadequate for the reasons I have given and the inadequacy is prejudicial to the council for the first reason mentioned by Lord Bridge on p167 of the report in *Save*. They raise a substantial doubt whether his decision was within his powers or lawful in the sense of amounting to a proper exercise of his discretion having regard to the Secretary of State's own guidance in Circular 2/87.

Accordingly, I quash the order of costs made by the inspector and direct that the matter be remitted to the Secretary of State for it to be considered again.

Application allowed.

Neutral Citation Number: [2016] EWHC 1870 (Admin)

Case No: CO/5715/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 26 July 2016

Before :
MRS JUSTICE LANG DBE
Between :
THE QUEEN
on the application of

HAWKSWORTH SECURITIES PLC	**Claimant**
and	
PETERBOROUGH CITY COUNCIL	**Defendant**
(1) IREEF QUEENSGATE PETERBOROUGH PROPCO S.A.R.L **(2) INVESCO REAL ESTATE** **(3) LENDLEASE** **(4) ODEON CINEMAS LIMITED** **(5) JOHN LEWIS PARTNERSHIP** **(6) PETERBOROUGH CITY COUNCIL HIGHWAYS** **(7) PETERBOROUGH CITY COUNCIL COMMERCIAL AND PROCUREMENT UNIT**	**Interested Parties**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Hereward Phillpot QC (instructed by **Burges Salmon LLP**) for the **Claimant**
Reuben Taylor QC (instructed by **Peterborough City Council**) for the **Defendant**
Timothy Corner QC and Richard Moules (instructed by **Pinsent Masons LLP**) for the **First Interested Party**
The **Second, Third, Fourth, Fifth, Sixth and Seventh Interested Parties** did not attend and were not represented

Judgment
As Approved by the Court

Mrs Justice Lang:

1. The Claimant seeks judicial review of the decision of the Defendant's Planning and Environmental Protection Committee ("the Committee"), on 16 October 2015, to grant detailed planning permission for the redevelopment of part of the Queensgate Shopping Centre ("the Queensgate scheme") in Peterborough city centre.

2. The Claimant is the promoter of another scheme in Peterborough city centre for the redevelopment and regeneration of the land at North Westgate ("the Westgate scheme").

3. The Defendant, Peterborough City Council ("the Council"), is the local planning authority.

4. The First Interested Party is the applicant for planning permission for the Queensgate scheme. The Queensgate Shopping Centre is owned by Invesco Real Estate and managed by Lendlease. Only the First Interested Party has taken part in these proceedings and so I refer to it hereafter as "the IP".

5. Gilbart J. refused permission to apply for judicial review on 23 February 2016. On the Claimant's renewed application for permission, Ouseley J. decided, on 27 April 2016, to order a rolled-up hearing.

Facts

6. The Queensgate scheme comprises the part demolition, alteration and extension of the Queensgate Shopping Centre, including change of use and erection of a roof top extension to provide for uses within Class A1, A3-5 (shops, restaurants and cafes, drinking establishments and hot food take-away), D2 (assembly and leisure, specifically a cinema) and other associated works. The Queensgate Shopping Centre is immediately to the south-east of the site of the proposed Westgate scheme.

7. The Westgate scheme is a mixed use redevelopment involving the demolition of existing buildings and structures on the North Westgate site, the construction of new buildings and structures, the stopping up, diversion and alteration of public highways and the internal and external alteration and change of use of buildings and structures to be retained on site to provide: (i) retail uses (Classes A1, A2, A3, A4 and A5), 50,000ft^2 of office space (Class B1), hotel (Class C1), 150 residential units (Class C3), community uses (Class D1) and leisure uses including a cinema (Class D2) together with various elements of ancillary development including public realm comprising a new piazza. It is approximately 4.6 ha in size.

8. The Claimant and others objected to the Queensgate scheme on the basis of the prejudice that it would cause to the viability of the Westgate scheme. The Westgate scheme was designed and promoted as a leisure-led development, centred on the provision of a new multi-screen cinema. It was anticipated that the cinema would generate footfall and a ready market for food and drink outlets. The Queensgate scheme also included the development of a new cinema. The Claimant contended that there was only sufficient demand to support one city centre cinema, and so the grant of planning permission for the Queensgate scheme would render the Westgate scheme

unviable. The Claimant contended that it would therefore be unable to implement and deliver the Westgate scheme. This would be contrary to the Council's policy of regenerating and redeveloping the North Westgate Opportunity Area, as the proposed Westgate scheme would regenerate the North Westgate area and, if it had to be abandoned, the consequence would be planning harm.

9. The planning officer, in his report to the Committee on the Queensgate scheme, summarised the Claimant's objections and annexed its letter to the report. In addressing the issues arising from the objection, he advised that:

i) The Queensgate scheme accorded with the NPPF.

ii) "*The applicant for the North Westgate scheme has stated that if the Queensgate scheme obtains planning permission then the North Westgate scheme cannot be implemented. This is acknowledged as it is unlikely that two city centre cinemas would be financially viable. However, this is a matter of competition between the developers and not a matter of planning policy (not least because there is not a national or local planning policy that seeks to refuse policy compliant development within the city centre that has the potential to prevent the redevelopment of the North Westgate site).*"

iii) The Westgate scheme would make a "positive contribution" to the City Centre.

iv) The Queensgate scheme would be sustainable in that it would be accessible, and the provision of a cinema and restaurant quarter would contribute to the sustainability of the city centre in terms of job creation and input into the local economy.

v) The Queensgate scheme accorded with the policy objectives of Core Strategy CS4 and Policy CC3 of the City Centre Plan, encouraging trips into the city centre for leisure, social and cultural purposes to strengthen the city centre core area.

vi) The proposal for a cinema accorded with the vision for the City Centre. Policy CC3 talked about the need for a cinema within the city centre core; however it did not state that the cinema had to be on the North Westgate site.

vii) It would not be reasonable to refuse the application on the basis that the approval of the Queensgate scheme would prejudice the development of North Westgate. Policy CC3 of the City Centre Plan applied to prevent development coming forward within the North Westgate Opportunity Area from prejudicing the comprehensive development of the whole North Westgate Opportunity Area and was not to be interpreted as applying to proposed development outside the North Westgate Opportunity Area.

viii) There was no guarantee that the Westgate scheme would be delivered. It was allocated for redevelopment in the 1971 City Centre Plan and there was still a pending application dating back to 2007. On the other hand, Invesco had indicated that it expected to implement the Queensgate scheme early next year and the operator for the cinema was confirmed as Odeon.

10. The planning officer's report concluded:

> "Subject to the imposition of the attached conditions, the proposal is acceptable having been assessed in the light of all material considerations, including weighing against relevant policies of the development plan and specifically:
>
> - the principle of a city centre cinema and restaurant provision with additional retail provision for the city centre is acceptable. This is in accordance with the vision for the City Centre, Policy CC3 of the City Centre DPD and Policy CS4 of the Core Strategy,
>
> - the scale, proportions, design and use of materials would harmonise with the existing centre. This is in accordance with Policy CS16 of the Core Strategy and Policy PP2 of the Planning Policies DPD.
>
> - it is accepted that the resultant bulk and mass of the extension would have a negligible adverse effect on the setting of some listed buildings and the City Centre conservation area. However, this is outweighed by the benefits of the scheme to the vitality and viability of the city centre through the likely increase in visitor numbers through cinema and restaurant offer, improved night time economy, employment, and improved pedestrian connectivity. This is in accordance with the NPPF and Policy CS17 of the Core Strategy and Policy PP17 of the Planning Policies DPD.
>
> - the site is accessible by a choice of means of transport and the proposal is supported by a transport statement and travel plan and will not result in any adverse highway implications. This is in accordance with Policies CS14 of the Core Strategy and Policy PP12 of the Planning Policies DPD."

11. Further representations were then made by the Claimant which were attached to a "Briefing Update" provided to the Committee, indicating that an offer had been received from a cinema operator but the city could not support two cinemas; a cinema was the only viable "anchor" for the scheme; the scheme could be delivered by summer 2018.

12. The Committee considered both applications for planning permission at its meeting on 29 September 2015. The application for the Queensgate scheme was first on the agenda, as it had been received by the Council before the application for the Westgate scheme.

13. A transcript of the Committee's deliberations at the meeting has been obtained by the Claimant. The planning officer addressed the Committee saying:

> "…..[t]he starting point has to be development of the City Centre planning policies and had we wished to protect the

> North Westgate site from these developments which might compromise its deliverability then we would have formed a suite of policies specifically around protecting that site from harm … but we haven't done that, we have specifically not done that and therefore what you need to bear in mind is that … the consideration of planning policy is key to this and it is only outweighed if you feel, having looked at and considered yourselves that there are greater benefits associated with North Westgate scheme which outweigh your planning policies..."

14. Ms Lea, Senior Lawyer, gave the following advice:

> "The application is policy compliant. It has been summarised within your officer report and it is in accordance with the council's policy. It is within the City Centre policy area. You are aware that that includes a mix of retail and leisure uses and that is exactly what is in front of you today…. your officers have reported to you there is no reason not to approve on policy grounds. You heard about the significance of planning harm if …you were to go forward and approve this application. What you are required to do is weigh in the balance all the factors that are in front of you. It is very plain that policy is one. But also you've heard about the …impact of this application on the North Westgate area and the potential to regenerate the North Westgate area. That in and of itself is a material consideration and it is one that you must judge in terms of taking what weight you want to give to that…you need to take into consideration matters such as …when any of these schemes may be coming forward. We know that this is a full application and we know that it is deliverable and expected to come forward at quite a pace. …. Your officers have made an assessment of that for you…They have also shared with you all of the additional information that came forward from the objectors at late stage…So your officers have considered all of that … they are of the view that this application nevertheless can be recommended for approval. You now need to consider those factors yourself."

15. Ms Lea advised members to focus on the decision in respect of the Queensgate application. She said it was the view of the officers that that they had sufficient information to be able to make a judgment on whether the application was going to have such a detrimental impact on the North Westgate Opportunity Area so as to outweigh the planning policies.

16. The planning officers also referred to the fact that no decision had yet been made on the Westgate application. They confirmed that they were recommending approval of it, though they pointed out that they could not guarantee its implementation.

17. On behalf of the applicant for the Queensgate scheme, Mr Bingham of Invesco told the Committee that the project would complete in 2017. It included reorganisation of the Peterborough John Lewis store to reflect its current trading requirements. Invesco

also owned two sites within the North Westgate area. In response to the Claimant's objection, Mr Bingham said:

> "Our scheme will be brought forward quickly to stop the leakage of shoppers to other centres and facilities. That in turn, in our view, will make investments on other sites and premises in the city centre, including North Westgate more attractive, not less. We believe that what is being achieved in the city, including at Westgate will in fact stimulate the investment and the funding that is needed to develop those parts of North Westgate site that are not within Invesco's ownership."

> "Hawksworth have come forward with a scheme with a mix of uses. The application has been submitted in outline form, which only set parameters for the different uses at this stage. It is therefore flexible, so different options in different forms of development can come forward once operator interest is firmed up, as long as within those parameters."

18. The Committee decided to grant full planning permission for the Queensgate scheme, subject to conditions. Formal notice of the decision was issued on 16 October 2015.

19. The application for the Westgate scheme was considered afterwards, at the same meeting. There were no objections, and the Committee decided to grant outline planning permission, subject to conditions. Formal notice of the decision was issued on 2 October 2015.

Grounds for judicial review

20. The Claimant's grounds for judicial review were as follows.

21. **Ground 1**. In determining the two applications sequentially, rather than together, and by determining the Queensgate scheme first, the Council acted unfairly and/or unreasonably in the *Wednesbury* sense, in that it thereby prevented the Committee from undertaking a proper and effective comparison of the merits of the two schemes before deciding to grant permission for the Queensgate scheme.

22. **Ground 2.** In granting planning permission for the Queensgate scheme, the Planning Committee failed clearly to answer a question it needed to resolve in order to make its decision, namely: did it accept the Claimant's evidence that granting planning permission for the Queensgate scheme would render the Westgate scheme unviable and mean that it would not proceed.

23. **Ground 3**. The planning officer misdirected the Committee on the evidence as to the potential for prejudice to the Westgate scheme by saying that it had to be demonstrated "beyond doubt".

24. **Ground 4**. If (in the alternative to Ground 2) the Committee did not accept that prejudice to the redevelopment and regeneration of the Westgate site was likely to

occur as a result of the grant of planning permission for the Queensgate scheme, the decision was unreasonable in the *Wednesbury* sense.

25. **Ground 5**. If (in the alternative to Ground 4) the Committee did accept that such prejudice was likely to occur, it erred in law by:

    i) failing to take into account a material consideration, namely a comprehensive comparison of the relative merits and planning benefits associated with the two schemes; and/or

    ii) failing to ask itself the right question (namely what weight should be attached to the loss of the benefits associated with the Westgate scheme, and did that outweigh the policy and other factors said to weigh in favour of granting permission for the Queensgate scheme?) and to take reasonable steps to acquaint itself with the relevant information to enable it to answer that question correctly (namely, a comprehensive comparison of those factors).

26. **Ground 6**. In determining the application on the basis that prejudice to the redevelopment and regeneration of the allocated North Westgate Opportunity Area did not give rise to any conflict with development plan policy, the decision was made on the basis of an approach to the development plan that was unreasonable in the *Wednesbury* sense.

27. **Ground 7**. The reasons volunteered by the Committee for its decision to grant permission were inadequate because they did not identify what conclusions were reached on the principal controversial issue of prejudice to the Westgate scheme.

Conclusions

Alternative sites

28. The Claimant's grounds rested upon the premise that the Council was under a legal duty to compare the merits of the two schemes, which the Defendant and the IP disputed. Before considering the Claimant's grounds, it is necessary to decide whether or not that premise was correct.

29. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) Town and Country Planning Act 1990.

30. In *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13, Lord Reed held, at [17]:

> "It has long been established that a planning authority must proceed upon a proper understanding of the development plan…."

31. The development plan must be read as a whole, with a focus on its relevant objectives and the policies which give effect to those objectives: see *Crane v. Secretary of State*

for Communities and Local Government [2015] EWHC 425 (Admin), per Lindblom J. at [40].

32. Conflict with a single policy does not necessarily mean that an application is out of accord with the development plan as a whole: *Cummins v. LB Camden* [2001] EWHC Admin 1116, per Ouseley J. at [162] -[163].

33. In principle, any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances: *Stringer v. Minister of Housing and Local Government* [1971] 1 All ER 65, per Cooke J. at page 77.

34. A consideration is 'material' if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although it may not be determinative: *R (Kides) v. South Cambridgeshire DC* [2002] EWCA Civ 1370, per Jonathan Parker LJ at [121].

35. The weight (if any) to be attached to a material consideration in determining an application for planning permission is entirely a matter for the decision-maker: *Tesco Stores Ltd. v. SSE* [1995] 1 WLR 759, per Lord Hoffman at 780F-H.

36. The task of the local planning authority is to consider the planning merits of the particular application for planning permission. Generally, land may be developed in any way which is acceptable for planning purposes and so the planning legislation does not require the local planning authority to consider whether the proposed development would be more appropriately located at an alternative site. Where a potential alternative site is brought to the attention of the local planning authority, the circumstances may be such that (1) the authority must have regard to it; or (2) the authority may have regard to it in the exercise of its planning judgment; or (3) the authority ought not to have regard to it.

37. In *Trusthouse Forte Hotels Ltd v. Secretary of State for the Environment* (1987) 53 P. & C.R. 293 at 299 Simon Brown J. identified the following propositions from the authorities:

> "(1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.
>
> (2) Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse

effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

(3) Instances of this type of case are developments, whether of national or regional importance, such as airports (see the *Rhodes* case), coalmining, petro-chemical plants, nuclear power stations and gypsy encampments (see *Ynstawe, Ynysforgan and Glais Gypsy Site Action Group v. Secretary of State for Wales and West Glamorgan County Council*.) Oliver L.J.'s judgment in *Greater London Council v. Secretary of State for the Environment and London Docklands Development Corporation and Cablecross Projects Ltd.* suggests a helpful although expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material:

> "… comparability is appropriate generally to cases having the following characteristics: First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development, or at least only a very limited number of permissions."

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices (see the *GLC* case itself) and superstores (at least in the circumstances of *R. v. Carlisle City Council and the Secretary of State for the Environment, ex parte Cumbrian Co-operative Society Ltd.*).

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong: See *Sir Brandon Meredith Rhys Williams v. Secretary of State for Wales and others* and *Vale of Glamorgan Borough Council v. Secretary of State for Wales and Sir Brandon Rhys-Williams*, both of which concerned the siting of the same sewage treatment works.

…"

38. In *Mount Cook Land Ltd v. Westminster City Council* [2004] JPL 470, Auld LJ, at [30], accepted the following to be correct statements of the law:

> "(1) in the context of planning control, a person may do what he wants with his land provided use of it is acceptable in planning terms.
>
> (2) there may be a number of alternative uses which he could choose, each of which would be acceptable in planning terms;
>
> (3) whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any;
>
> (4) in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms;
>
> (5) where… an application proposal does not conflict with policy, otherwise involves no planning harm and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant;
>
> (6) even, in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those which are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight."

39. In *Derbyshire Dales DC v. Secretary of State* [2009] EWHC 1729 (Admin), [2010] 1 P. & C.R. 19, Carnwarth LJ summarised the law on alternative sites as potential material considerations in planning decisions at [14] to [37]. That summary was endorsed by Sales LJ in *R (Luton BC) v. Central Bedfordshire Council* [2015] EWCA Civ 537, who summarised the principles at [71]:

> "(i) There is an important distinction between (1) cases where a possible alternative site is *potentially* relevant so that a decision-maker does not err in law if he has regard to it and (2) cases where an alternative is *necessarily* relevant so that he errs in law by failing to have regard to it (paragraph 17).
>
> (ii) Following [*CREEDNZ v. Governor-General* [1981] 1 NZLR 172], [*Re Findlay* [1985] AC 319] and *R (National Association of Health Stores) v. Secretary of State for Health* [2005] EWCA Civ 154, in the second category of cases the issue depends upon *statutory construction* or whether it can be shown that the decision-maker acted *irrationally* by failing to take alternative sites into account. As to the first point, it is necessary to show that planning legislation either expressly requires alternative sites to be taken into account, or impliedly does so because that is "so obviously material" to a decision on a particular project that a failure to consider alternative sites

> directly would not accord with the intention of the legislation (paragraphs 25-28).
>
> (iii) Planning legislation does not expressly require alternative sites to be taken into account (paragraph 36), but a legal obligation to consider alternatives may arise from the requirements of national or local policy (paragraph 37);
>
> (iv) Otherwise the matter is one for the planning judgment of the decision-maker (paragraph 36). In assessing whether it was irrational for the decision-maker not to have had regard to alternative sites, a relevant factor is whether alternative sites have been identified before the decision-maker (paragraphs 21, 22 and 35 and see *Secretary of State v Edwards* [1995] 68 P. & C.R. 607 where that factor was treated as having "crucial" importance in the circumstances of that case)."

40. The Claimant relied in particular upon *R (Chelmsford Car and Commercial Limited) v. Chelmsford Borough Council* [2005] EWHC 1705 (Admin), [2006] 2 P. & C.R. 12 in which two competing applications for planning permission were made to construct 12 affordable dwellings. Exceptionally, the local plan provided for this development outside the existing settlement boundary to meet an identified local need. Since it was common ground that only one of the two applications could be granted, under the terms of the local plan, Sullivan J. held that "*[c]ommon sense would suggest that in these particular circumstances a comparison between the merits of the two sites would inevitably be a material consideration*" (at [14]). He concluded that the local planning authority had been inconsistent, unreasonable and unfair in only partially considering the planning factors and merits of the rival application when granting planning permission.

41. Applying these principles to this case, I accept the Council's submission that it was not under a legal duty to consider the merits of the alternative Westgate scheme site when deciding the Queensgate scheme application.

42. First, there was no statutory requirement, either express or implied, to do so.

43. Second, I accept the Council's submission that the Queensgate scheme was acceptable in planning terms and it did not conflict with the development plan.

44. The Core Strategy, adopted in February 2011, supported improvement in the quality of the commercial, retail, cultural, leisure and recreational facilities in the city centre, an area which included both schemes. It identified the North Westgate area as one of a number of areas where opportunities existed to improve the offer of the city centre, with potential for residential, employment, retail, leisure, open spaces and other forms of development (paragraph 5.9.6). Policy CS4 supported retail expansion in the city centre, especially in the North Westgate area. At paragraph 6.12.6, the Core Strategy stated:

> "The overall spatial strategy proposes the intensification and regeneration of the city centre with the provision of an additional 4,300 homes. This offers an ideal opportunity to help

> improve the range of facilities and attractions and the image of the city. This is already beginning to happen with the proposed mixed-use development of the opportunity areas, particularly the North Westgate development which will focus on new retail provision but will also include housing and leisure, with the possible development of a cinema. The CCAAP will provide more detail on the location and type of culture, leisure and tourism facilities proposed for the city centre."

45. Policy CS18 encouraged the development of new cultural, leisure and tourism facilities, giving priority to areas identified for regeneration, with a particular focus on the provision of new facilities in the city centre as part of the overall policy for its regeneration.

46. The City Centre Plan, adopted in December 2014, made more detailed proposals for the development of the city centre. It recognised a need for the city centre to improve its "cultural offer" including a "centrally located cinema" to improve the evening economy.

47. It identified the City Centre Core Policy Area as the heart of the city, which included both the Queensgate shopping centre and the North Westgate Opportunity Area, among other localities. Under the heading "*Description of the Area*", paragraph 5.2.7 proposed the North Westgate Opportunity Area for "*redevelopment for a mix of uses, including retail, leisure, community and residential*". Paragraph 5.2.8 described the area as "*an important transition between the central commercial core and the inner city residential area to the north, which is characterised by relatively high levels of deprivation and inequality*"; stressed that the new development should link the two communities; and said that the Council would "*use its compulsory purchase powers where necessary for land assembly to ensure the optimum redevelopment solution*".

48. Under the heading "*Vision for the Area*", paragraph 5.2.11 provided for "*new retail and leisure provision, particularly further improvements to the Queensgate shopping centre and the North Westgate Opportunity Area*". Paragraph 5.2.13 went on to say:

> "Elsewhere, there will be more incremental new development, including residential, retail, cafes, bars and restaurants, combined with high quality public spaces. The evening economy will be diversified, for example through provision of a new cinema, to help create a a more lively and attractive environment where people want to visit, work and live …."

49. Policy CC3 provided:

> "Within the North Westgate Opportunity Area … planning permission will be granted for comprehensive mixed-use redevelopment including retail, housing, office and leisure uses, which is well integrated with the existing retail area…Individual proposals which would prejudice the comprehensive redevelopment of this Opportunity Area will not be permitted."

50. Policy CC3 went on to make provision for the Northminster Opportunity Area and the market.

51. It then stated:

> "Elsewhere in the City Core Policy Area, the city council will expect and support, in principle, proposals that would help to deliver the following:
>
> - a net increase in dwellings …
> - improved connectivity for pedestrians and cyclists …
> - mixed-use development …
> - development which encourages trips into the city centre for shopping, leisure (including a cinema), social and cultural purposes;
> - additional high quality office space; and
> - the conservation and restoration of historic shop fronts."

52. In my view, on a proper interpretation of the policies, a city centre cinema was proposed, but not in any specific part of the City Core Policy Area. Thus, proposals for a cinema in the Queensgate shopping centre or the North Westgate Opportunity Area or another locality within the City Core Policy Area would all have been consistent with the local plan. Moreover, whilst "leisure uses" were proposed for the North Westgate Opportunity Area, these could cover a broad range of activities, not just a cinema.

53. Whilst the local plan did identify the North Westgate Opportunity Area as an underused area in need of regeneration in the public interest, it did not provide that, in consequence, development proposals in the North Westgate Opportunity Area should be prioritised ahead of development proposals for other parts of the City Core Policy Area, to ensure that they were not jeopardised by competition. The policy could have been drafted so as to achieve that aim but in fact it did not include any such provision. Finally, in my view, the policy statement that the Council was willing to use its compulsory purchase powers indicated its intention to overcome potential difficulties with land assembly across a large area in multiple ownership. Whilst it was a sign of its commitment to the North Westgate Opportunity Area, it did not prioritise it ahead of other development.

54. Thirdly, unlike the *Chelmsford* case, this was not a case where, under the terms of the development plan, only one of two rival applications could succeed. Here, planning policies did not mean that any application for a second cinema would be refused as being contrary to the development plan. Indeed, both applications for city centre cinemas were granted by the Council. The fact that two cinemas, each promoted by competing commercial developers, would be unlikely to be commercially viable was not sufficient to bring the Claimant within the exceptional category exemplified by the *Chelmsford* case.

55. Finally, I am unable to accept the Claimant's submission that the competition which the Queensgate scheme represented to the Westgate scheme, and thus the potential threat to the current plans for the regeneration of the North Westgate area, could be properly characterised as "planning harm" of the type which the court in *Trusthouse Forte* and *Mount Cook* envisaged would trigger a requirement to consider an alternative site. The Queensgate scheme was, of itself, in accordance with planning policy and had no planning disadvantages; and the North Westgate Opportunity Area had not been prioritised in the development plan. In my view, the Claimant's submission would be an unjustifiable extension of the current law.

56. Although the Council was not under a legal duty to have regard to the alternative site, I consider that it was entitled to do so, in the exercise of its planning judgment, because of the importance of the Westgate scheme for the regeneration of the North Westgate Opportunity Area, and the risk that the Westgate scheme would founder if the Queensgate scheme was approved. Applying the analysis in *Derbyshire Dales*, endorsed in *Luton BC*, this was a case in which a possible alternative site was potentially relevant, so the Council did not err in law by having regard to it. Although the planning officer in his report did not initially advise members to have regard to it, by the date of the meeting both he and Ms Lea, senior lawyer, advised members at the meeting to treat it as a material consideration, which could in principle allow them to refuse planning permission for the Queensgate scheme, despite its compliance with the development plan. The Committee accepted that advice and decided to treat it as a material consideration. I therefore turn to consider the Claimant's grounds on that basis.

Claimant's grounds 1, 2, 4, 5 and 6

57. The Claimant's grounds 1, 2, 4, 5 and 6 alleged that the manner in which the Council considered the Westgate scheme was flawed in law, and it is convenient to consider these grounds together, to avoid repetition.

58. Under ground 1, the Claimant submitted that it was unfair or *Wednesbury* unreasonable for the Council to determine the applications sequentially, and to take the Queensgate scheme application first, since it prevented the Council from undertaking a proper and effective comparison between the two sites. In my view, the members were correctly advised, in accordance with the law and standard practice, to determine each application in turn, and to do so in accordance with the development plan, unless material considerations indicated otherwise. As I have indicated above, this was not an exceptional case, such as *Chelmsford*, in which the Council was required to depart from normal practice by considering the two applications together. In my judgment, the Council adopted a fair and reasonable approach by determining the Queensgate scheme first since that application was made first. By placing both applications before the Committee at the same meeting, and providing members with detailed information about both schemes in the planning officer's reports, the Council ensured that members were in a position to make an informed planning judgment. Members had the added advantage of receiving written representations on behalf of the promoters of the Westgate scheme (annexed to the officer's report) and hearing oral representations from counsel for the Claimant, Mr Phillpot, as well as from Invesco. It is apparent from the transcript of the debate at the meeting that members, with their extensive local knowledge, were well-appraised of the controversial issues

surrounding the proposed development of the city centre, and indeed had been lobbied prior to the meeting by advocates of the Westgate scheme. In my view, they had sufficient information before them upon which to make a decision.

59. Under grounds 2, 4, 5 and 6, the Claimant alleged that the Council failed to ask itself the right questions and failed to take into account all relevant considerations. In my view, the Claimant failed to make good these allegations. The advice given by the officers was comprehensive. The Claimant could not properly rely upon conflicting comments made by individual members during the debate, since they could not be indicative of the basis upon which the Committee eventually made its collective decision: see *R (Tesco Stores) v. Forest of Dean* [2014] EWHC 3348 (Admin), at [23]. The minutes of the meeting did not lend support to the Claimant's criticisms. It seemed to me that the Claimant's starting point was that the decision to grant planning permission for the Queensgate scheme was inexplicable, and therefore the Claimant assumed that the Council must have erred in its decision-making process, without being able to point to any proof that such errors were in fact made. The Claimant criticised the Council for not providing sufficiently transparent reasoning to enable the Claimant to target its challenge more accurately, but as I have found under Ground 7, the Council was not required to do so.

60. I agree with the IP and the Defendant that the Council's decision was neither inexplicable nor irrational. Whilst both schemes had merit, and were in accordance with the development plan, there were a number of factors pointing in favour of the grant of planning permission for the Queensgate scheme:

    i) The redevelopment of the Queensgate shopping centre was considered important for the regeneration of the city centre.

    ii) The redevelopment could begin in the near future because Invesco had funding, the pre-lets had been identified, including Odeon as its cinema operator, and the John Lewis department store was supportive.

    iii) John Lewis' commercial requirements meant that there was a narrow window of opportunity within which the redevelopment could take place.

    iv) The Queensgate scheme could generate footfall within the city centre and thus improve the prospects of regeneration of the North Westgate Opportunity Area.

61. Moreover, there was uncertainty as to whether the Westgate scheme would in fact ever be delivered. The site had been allocated for redevelopment as long ago as 1971. This was an application for outline planning permission only. The Claimant did not have an interest in all of the land required to deliver the scheme. Officers advised in their 'Briefing Update' that the evidence submitted by the Claimant to justify a lack of affordable housing demonstrated that "*the minimum level of return for the proposed scheme would not be achieved based on the submitted details*".

62. In my judgment, the Claimant's challenges were, in reality, an impermissible attack on the merits of the planning judgments which the Council made, and the weight which it accorded to the Westgate scheme. These were matters which were entirely

within the province of the planning authority, and the court ought not to interfere with the assessments which the Council made on the material before it.

Ground 3: burden of proof

63. During the meeting, in response to a point made by Councillor Lane, Mr Harding, Head of Development and Construction, said:

> "It's not been proven beyond doubt that this Queensgate scheme will certainly stymie the North Westgate scheme and as I think has already been mentioned, even if planning permission were to be granted for the North Westgate scheme we cannot guarantee its implementation."

64. The Claimant submitted, on the basis of this statement, that the officer erroneously advised members to apply a test of "proven beyond doubt" when determining questions of fact which were relevant to the decision, relying upon *Halite Energy Group Ltd v. Secretary of State for Energy & Climate Change* [2014] EWHC 17 (Admin).

65. Mr Corner QC referred me to the observations of Sullivan J. in *Kings Cross Railway Lands Group v. London Borough of Camden* [2007] EWHC 1515 (Admin), at [65], where he said:

> "[i]n deciding whether any infelicity in this one piece of advice is sufficient to negate all of the other entirely correct advice, it is necessary to bear in mind not only the observations of Lord Justice Judge in Oxton Farms, which apply with even greater force to advice, whether legal or otherwise, which is given "off the cuff" during the course of a meeting but also the dicta of Lord Justice Pickford in *R v London County Council, ex parte London and Provincial Electric Theatres Limited* [1915] 2 KB 466, at 490(g) to 491(a)…"

66. In my judgment, the Claimant was reading too much into Mr Harding's somewhat careless off-the-cuff remark. I cannot accept that Mr Harding was advising the members to adopt a criminal standard of proof. This would be a surprising mistake for an experienced planning officer to make and there is nothing to support the Claimant's allegation in the officer's reports or in the other oral advice given at the meeting. On my reading of the transcript, Mr Harding was not purporting to advise the members as to the relevant legal test; rather he was providing his view of the likelihood of the Queensgate scheme jeopardising the Westgate scheme and the likelihood of the Westgate scheme proceeding, even in the absence of the Queensgate scheme.

Ground 7: Reasons

67. The Claimant submitted that the reasons given by the Council for the grant of planning permission for the Queensgate scheme were inadequate, because they did

not enable the Claimant to understand what conclusions were reached on the principal controversial issue, namely, the prejudice which would be caused to the Westgate scheme. In particular, the Claimant complained that the reasons for the decision did not disclose:

i) whether Hawksworth's evidence and the advice in the officer's report as to likely prejudice to the Westgate scheme were rejected or not;

ii) if that evidence and advice was rejected, the basis for rejecting it; and

iii) if that evidence and advice was not rejected, whether the Committee concluded that the loss of the Westgate scheme was outweighed by the merits and benefits associated with the Queensgate scheme, and if so, on what basis that conclusion had been reached.

68. The Defendant and IP submitted that there was no duty to give reasons in this case. In the alternative, the reasons in the minutes were adequate.

69. A local planning authority's duty to give reasons for its decisions on applications for planning permission is set out in article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) ("the 2015 Order"), which provides:

> "35. Written notice of decision or determination relating to a planning application
>
> (1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters—
>
> (a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—
>
> (i) for each condition imposed; and
>
> (ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition;
>
> (b) where planning permission is refused, the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision;
>
> (c) where—
>
> (i) the Secretary of State has given a direction restricting the grant of planning permission for the development for which application is made; or
>
> (ii) the Secretary of State or a government department has expressed the view that the permission should not be granted

(either wholly or in part) or should be granted subject to conditions,

the notice must give details of the direction or of the view expressed.

(2) Where paragraph (1)(a) or (b) applies, the notice must also include a statement explaining, whether, and if so how, in dealing with the application, the local planning authority have worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with a planning application.

(3) Where paragraph (1)(a), (b) or (c) applies, the notice must be accompanied by a notification in the terms (or substantially in the terms) set out in Schedule 5.

(4) Where—

(a) an applicant for planning permission has submitted an environmental statement; and

(b) the local planning authority have decided (having taken environmental information into consideration) to grant permission (whether unconditionally or subject to conditions),

the notice given to the applicant in accordance with article 34(1) must include a statement that environmental information has been taken into consideration by the authority.

(5) In paragraph (1)(a)(ii) *"pre-commencement condition"* means a condition imposed on the grant of a planning permission which must be complied with—

(a) before any building or other operation comprised in the development is begun; or

(b) where the development consists of a material change in the use of any buildings or other land, before the change of use is begun."

70. The formal 'Notice of Planning Permission' issued by the Council on 16 October 2015 in respect of the Queensgate application met the requirements in article 35(1)(a) to "*state clearly and precisely their full reasons for each condition imposed and in the case of each pre-commencement condition, for the condition being a pre-commencement condition*". Article 35 does not contain any statutory duty to give the reasons for granting planning permission, and accordingly the Council did not do so.

71. However, the Claimant submitted that since the Council volunteered reasons in the minutes of the Committee's meeting, their adequacy fell to be tested by the same criteria as if they had been obligatory, applying the well-established principle in *R v.*

Criminal Injuries Compensation Board, ex parte Moore [1999] 2 All ER 90, per Sedley J. at 95h.

72. I am not convinced that the principle in *ex parte Moore* applies to the circumstances of this case because, unlike the oral ruling given by the Criminal Injuries Compensation Board at the end of its hearing, the Committee's minutes were not volunteered as its formal reasons for the decision.

73. It is well-established that it is the written notice to the applicant which constitutes the grant of planning permission, from which time to appeal runs, not the decision of the committee or council recorded in the minutes. In this case, the Council's 'Notice of Planning Permission' did not volunteer reasons for the grant of planning permission.

74. The Committee was obliged to record minutes of proceedings at its meetings, pursuant to paragraph 41 of schedule 12 to the Local Government Act 1972, and present them for approval and signature at the next meeting of the committee. Typically, the recording of minutes would also be provided for in a Council's Standing Orders. Those minutes had to be made available for inspection by the public pursuant to section 100(C) Local Government Act 1972. In this case, the minutes of the meeting of 29 September 2015 were approved at the meeting of 11 November 2015, nearly a month after the decision notice, with its reasons, was issued. In my view, the Committee's purpose in drawing up the minutes was to discharge its statutory obligation under the Local Government Act 1972 to provide a record of the proceedings at its meeting, not to give its reasons for its decision pursuant to the Town and Country Planning Act 1990 and the 2015 Order.

75. If the Claimant's analysis was correct, the mere act of recording some reasons for a decision in the minutes of the meeting would trigger an obligation on local planning authorities to provide legally adequate reasons in every case where planning permission was granted, even though the Secretary of State has made an order, laid before Parliament, which does not require local planning authorities to give reasons for the grant of planning permission. This would be surprising. As recently as 2013, the Secretary of State, pursuant to his duties under the Town and Country Planning Act 1990, decided it was appropriate to remove the duty to give "summary reasons" for the grant of planning permission (Town and Country Planning (Development Management and Procedure)(England)(Amendment) Order 2013 (SI 2013/1238)).

76. However, even in cases where there is no statutory duty to give reasons, and a public body has not volunteered reasons, at common law a duty to give reasons will, in some circumstances, be implied in order to meet the requirements of fairness.

77. Prior to the introduction of a statutory duty to give reasons in 2003, the Court of Appeal held in *R v. Aylesbury Vale District Council* (1996) 76 P. & C.R. 207 that there was no general duty to give reasons for the grant of planning permission. Although in principle there could be a situation in which reasons would be required, in the instant case, it was obvious why the planning committee had reversed its earlier decision. After making a site visit and re-considering the advice of the planning officer in favour of the proposal, it must have reached a different judgment, which it was entitled to do. Pill LJ said:

> "I am not prepared, in the present statutory context, to find the existence of a general duty to give reasons for the grant of planning permission. Such an obligation is conspicuously absent from the statute. This contrasts with the obligation upon a Planning Inspector to make a statement of reasons for a decision he is empowered to make following a planning appeal (1990 Act, 6th Schedule, para 8). I would not extend that obligation by analogy to cover the situation where no duty is imposed in the statute. Moreover, just as the obligation to give reasons for a refusal is compatible with the right of appeal in that a decision whether to appeal may be based upon the perceived weight of reasons for refusal, so the absence of a right of appeal against a grant is compatible with the absence of an obligation to give reasons for the grant. A local planning authority need not under the statute give reasons for granting permission even when the grant is made against the advice of its planning advisers…On Mr Singh's terms, that would appear to be a worse situation than the one he now complains of, but Parliament must have been aware, when enacting the present scheme without imposing the obligation, of the possibility of such grants. Schiemann J. in *R v Poole Borough Council ex parte Beebee* [1991] 2 PLR 27, having considered the statutory scheme, stated obiter, at page 31G, that "all this may well point to a desire on Parliament's part not to have the implementation of policy decisions held up by legal challenge on the basis of defective reasoning". Be that as it may, to quote Schiemann J.'s comment upon his own statement, I can find no general obligation upon local planning authorities to give reasons for the grant of planning permission."

78. In *R v. Mendip DC ex parte Fabre* (2000) 80 P. & C.R. 500, a challenge was made to a grant of planning permission on the ground that it was not clear why the members had reversed their previous decision. Sullivan J. held at 510:

> "I accept that, whilst there is no general duty to give reasons for the grant of planning permission, there may be circumstances where such a duty will arise. An obvious example of such a circumstance is, in principle, where a local planning authority has changed its mind and decided to grant planning permission for a development which it has previously refused: see *ex parte Chaplin* and *ex parte Beckham*, to which I have referred above. I say "in principle" because it may be plain from all the surrounding circumstances why the council has changed its mind, as was the case in *ex parte Chaplin* (per Pill LJ at page 53). There may be cases where reasons should be set out in a minute. *Ex parte Beckham* was such a case on its facts. Equally, there may be cases where that would be unnecessary in the light of the factual background. I am satisfied that this case falls into the latter category….

> ….If there has been an earlier refusal, as recommended by a planning officer, followed by a grant of planning permission, contrary to the planning officer's consistent recommendation, some explanation will be required, since by definition it will not be possible to find it in the officer's report. So it will be necessary to search elsewhere for the reasons why the members decided to change their minds. In such circumstances, it might well be sensible at the very least to record the members' reasons in the form of a minute…"

79. In *R (Oakley) v. South Cambridgeshire District Council* [2016] EWHC 570 (Admin), Jay J. held that, despite the removal in 2013 of the statutory duty to give reasons for a grant of planning permission, it remained open to judges to intervene to imply a duty to give reasons, if fairness so required. In considering when the duty might arise, he cited the well-known principles in *Lloyd v. McMahon* [1987] AC 625, per Lord Bridge at 702-3; *ex parte Doody* [2004] AC 531, per Lord Mustill at 562C-D; and *R v. HEFC ex parte Institute of Dental Surgery* [1994] 1 WLR 242, per Sedley J., at 256H. In *Oakley*, the claimant relied on the feature identified in Sedley J.'s formulation that there was "*something peculiar to the decision*" "*some form of aberration*" which triggered a reasons duty, or as Jay J. put it, "*an explanation was called for because, without it, the decision was inexplicable*" (at [36]). Jay J. held that the duty to give reasons did not arise merely because the members did not accept the recommendation of the planning officer, nor because the application was complex with multiple issues.

80. I agree with Jay J. that the court retains a residual power to imply a duty to give reasons for a grant of planning permission. In my judgment, since the 2015 Order has removed the general duty to give summary reasons, the duty will only arise exceptionally, in order to meet the requirements of fairness. Generally, the requirements of fairness will be met by public access to the material available to the decision-maker, setting out the issues, and the arguments for and against the grant of planning permission. Typically, these will comprise the application for planning permission with supporting documents, and the planning officer's report, setting out the relevant planning policies, any environmental or other planning concerns, the outcome of consultations, objections from third parties, and the officer's assessments and recommendations. These will generally suffice to demonstrate the basis upon which the application for planning permission was granted, despite objections. As Jay J. observed in Oakley, at [38], the planning committee's disagreement with the planning officer's recommendation, is not of itself evidence of some form of aberration giving rise to a duty to give reasons, though, on the particular facts of the case, it may give rise to such a duty, as Sullivan J. observed in *ex parte Fabre*.

81. In my judgment, this was not a case where, exceptionally, fairness required that the Committee was required to give reasons for its decision. The decision of the Committee was in accordance with the recommendation of the officers. The applicant for planning permission (the IP) and the main objector (the Claimant) had provided detailed material and the planning officer had prepared detailed reports. In the light of the points made in favour of the Queensgate application, the decision to grant planning permission could not be characterised as inexplicable or aberrant.

82. If, contrary to my view, the minutes of the meeting of 29 September 2015 were to be treated as voluntary reasons which had to be tested by the same criteria as if reasons

for the decision were obligatory, the parties disagreed as to the standard of reasoning which was required. The Claimant submitted that Lord Brown's classic formulation in South *Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953, at [36], applied. The Council and the IP relied upon the principles established in the case law during the period when there was a statutory duty to give "summary reasons" for the grant of permission, arguing that the standard imposed by the common law ought not to be any higher.

83. From 2003, Article 22(1) of the Town and Country Planning (General Development Procedure) Order 1995 (as amended) provided:

> "When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters and –
>
> (a) planning permission is granted, the notice shall include a summary of their reasons for the grant and a summary of the policies and proposals in the development plan which are relevant to the decision;
>
> (b) planning permission is granted subject to conditions, the notice shall: -
>
> (i) include a summary of their reasons for the grant together with a summary of the policies and proposals in the development plan which are relevant to the decision to grant permission; and
>
> (ii) shall state clearly and precisely their full reasons for each condition imposed, specifying all policies and proposals in the development plan which are relevant to the decision;
>
> (c) planning permission is refused, the notice shall state clearly and precisely their full reasons for the refusal, specifying all policies and proposal in the development plan which are relevant to the decision."

84. In *R (Siraj) v. Kirkless MBC* [2010] EWCA Civ 1286 the Court of Appeal dismissed a challenge to the adequacy of the "summary" reasons given upon a grant of planning permission, rejecting a submission (similar to the submission made by the Claimant in this case) that the reasons had to meet the standard required of inspectors and ministers, encapsulated in the classic formulation by Lord Brown in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953, at [36] . In *Siraj*, Sullivan LJ, giving the judgment of the court, said:

> "13 In my judgment there is no force in these criticisms, and they are based, at least in part, on a misunderstanding of the role of the respondent's summary reasons for granting planning permission in the decision-making process. When considering the content and adequacy of summary reasons it is important to bear in mind the contrast between the requirement in

paragraphs (a) and (b) in Article 22(1) of the Town and Country Planning (General Development Procedure) Order 1995 ("the GPDO"), now repealed and re-enacted in Article 31 of the Town and Country Planning Development (Management Procedure) (England) Order 2010, which at the material time required a decision notice granting planning permission to include "a summary of [the reasons] for the grant of planning permission" and paragraph (c), which required that a decision notice refusing planning permission "shall state clearly and precisely all reasons for the refusal".

14 A local planning authority's obligation to give summary reasons when granting planning permission is not to be equated with the Secretary of State's obligation to give reasons in a decision letter when allowing or dismissing a planning appeal. I mention this because, although Mr Roe in his oral submissions before us recognised that there was indeed such a distinction between summary reasons and the reasons to be expected in a decision letter, the appellant's skeleton argument relied on the speech of Lord Brown in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953 at paragraph 36. It is important to remember that that case was concerned with the adequacy of reasons in a Secretary of State's decision letter. Although a decision letter should not be interpreted in a vacuum, without regard for example to the arguments that were advanced before the inspector, a decision letter is intended to be a "stand-alone" document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal. By their very nature a local planning authority's summary reasons for granting planning permission do not present a full account of the local planning authority's decision making process.

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.

16 Where on the other hand the members have followed their officers' recommendation, and there is no indication that they

have disagreed with the reasoning in the report which lead to that recommendation, then a relatively brief summary of reasons for the grant of planning permission may well be adequate. Mr Roe referred us to the observations of Collins J in paragraph 28 of his judgment in R (on the application of Midcounties Co-operative Ltd) v Forest of Dean DC [2007] EWHC 1714 (Admin). For my part, I would respectfully endorse the observations of Sir Michael Harrison in paragraphs 47 to 50 of R(Ling) (Bridlington) Limited v East Riding of Yorkshire County Council [2006] EWHC 1604 (Admin)."

85. In *R (on the application of Telford Trustee No. 1 Limited and Anor) v. Telford and Wrekin Council* [2011] EWCA Civ 896, Richards LJ, giving the judgment of the court, reviewed the authorities, endorsing the passages in the judgment of Sullivan LJ in *Siraj* set out above, and said:

> "22 The passage in the judgment of Sir Michael Harrison *in R (Ling)(Bridlington) Limited v East Riding of Yorkshire County Council* [2006] EWHC 1604 (Admin) which Sullivan LJ expressly endorsed at [16] is to a considerable extent repetitious of points included in Sullivan LJ's own judgment, but it is nonetheless helpful to set it out:
>
> > "47. In considering the adequacy of reasons for the grant of permission there are a number of factors which seem to me to be relevant. The first is the difference in the language of the statutory requirement relating to reasons for the grant of planning permission compared to that relating to the reasons for refusal of planning permission. In the case of a refusal, the notice has to state clearly and precisely the full reasons for the refusal, whereas in the case of a grant the notice only has to include a summary of the reasons for the grant. The difference is stark and significant. It is for that reason that I reject the claimants' contention that the standard of reasons for a grant of permission should be the same as the standard of reasons for the refusal of permission.
> >
> > 48. Secondly, the statutory language requires a summary of the reasons for the grant of permission. It does not require a summary of the reasons for rejecting objections to the grant of permission.
> >
> > 49. Thirdly, a summary of reasons does not require a summary of reasons for reasons. In other words, it can be shortly stated in appropriate cases.
> >
> > 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."

23 In *R (Tratt) v Horsham District Council [2007] EWHC 1485 (Admin)*, at [25]-[26], and in *R (Midcounties Co-operative Ltd) v Forest of Dean District Council* [2007] EWC 1714 (Admin), at [28], Collins J expressed some difficulty with the first two of those factors. In relation to the second factor, he said at [26] of Tratt that reasons in relation to planning decisions must normally deal with the main issues that have been raised; the officer's report in that case (which concerned a mobile phone mast) indicated that the main issues were need, siting and possible health concerns; and it seemed to Collins J that "the reasons ought at least to have stated, albeit only in a sentence in each case, why those issues have been decided in favour of the Applicants". In similar vein, at [28] of the Forest of Dean case, he said that he did not accept Sir Michael's second factor: "[i]f there have been objections which raise one of the main issues in considering the application, the reasons for rejecting them will equally be reasons for granting permission". Sullivan LJ's judgment in Siraj makes clear, however, that regard is to be had to the factors set out by Sir Michael rather than to the conflicting views expressed by Collins J.

24 That point is of potential importance for the present case, since Mr Katkowski contended, as explained in greater detail below, that the Trustees were entitled to be told in the summary reasons not just *that* the proposal had been assessed to be in accordance with PPS4, but *why* the proposal had been found to be in accordance with the relevant policies in PPS4. His submissions placed substantial weight on the passage in Tratt where Collins J said that the reasons ought to state *why* the main issues have been decided in favour of the applicant for planning permission. He also relied on a passage in the judgment of Ouseley J in *R (Midcounties Co-operative Ltd) v Wyre Forest District Council* [2009] EWHC 964 (Admin), at [190], where the judge said that the fundamental test was: "can an interested person see why planning permission is granted and what conclusion was reached *on the principal issues*?" (emphasis added). It seems to me, however, that those submissions place more weight on the passages in Tratt and the Wyre Forest case than they can properly bear in the light of the principles set out and approved in Siraj. One must not lose sight of the fact that the statutory requirement is to give a summary of the reasons for the grant of planning permission, not a summary of the reasons for rejecting an objector's representations (even on a principal issue) or a summary of reasons for reasons."

86. These judgments have to be read with caution as they were considering an express statutory requirement to give "summary reasons", which is not applicable here.

87. I agree with the submission made by the Defendant and the IP that Lord Brown's formulation in *South Bucks*, which applies where a minister or inspector is giving a decision on appeal, is not the standard to be applied to a local planning authority's decision to grant planning permission. Planning appeals are an adversarial procedure, akin to court or tribunal proceedings, in which opposing parties make competing submissions, and the decision-maker adjudicates upon them, giving reasons for his conclusions on the "*principal important controversial issues*", limited to "*the main issues in dispute*" not "*every material consideration*" (per Lord Brown in *South Bucks* at [36]). In contrast, a local planning authority is an administrative body, determining an individual application for planning permission. Its reasons ought to state why planning permission was granted, usually by reference to the relevant planning policies. But it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission.

88. Moreover, as Lady Hale said in *Morge v. Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268, at [36], "*[d]emocratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them*...". They are politicians from all walks of life, not trained judges or civil servants. As Sullivan LJ said in *Siraj*, at [14], whereas a minister's decision on appeal is intended to be a "stand-alone" document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal, a local planning authority's reasons for granting planning permission by their very nature do not present a full account of the local planning authority's decision making process, in which the planning officer's report is a crucial part. It is expected that the report will form the background to the reasons. I also consider it would be unduly onerous to impose a duty to give detailed reasons, as proposed by the Claimant, given the volume of applications which have to be processed.

89. For these reasons, I consider that where a local authority planning committee gives reasons for a grant of planning permission it need only summarise the main reasons for the decision and can do so briefly. The committee is not required to set out each step in its reasoning, nor indicate which factual matters were accepted or rejected. Indeed, as the committee will comprise a number of councillors who may well have reached their shared conclusion by different routes, it would be impractical and undesirable for the committee to set out its step-by-step reasoning. In *R (on the application of Tesco Stores Ltd) v. Forest of Dean DC* [2014] EWHC 3348 (Admin) Patterson J. held at [23]:

> "When a challenge is based on comments made by a decision maker in a planning committee meeting it is necessary to bear in mind the judgment in *R v London Borough of Camden Ex parte Kings Cross Railway Lands Group* [2007] EWHC 1515 at [63] and the fact that the committee was taking a collective decision so that it was the general tenor of the discussion that was important rather than the individual views expressed by

> committee members let alone the precise terminology used: *R v Exeter City Council ex p Thomas* [1990] 3 WLR 100. Further, in dealing with such a situation there are recognised difficulties in establishing the reasoning of a corporate body that acts by resolution. As Schiemann J said in *R v Poole Borough Council ex p Beebee and others* [1991] 2 PLR 27:
>
> > "All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may well have changed them because of what was said subsequently in debate.""

90. I do not consider that this causes any unfairness since those who have a particular interest in the outcome will already be well aware of the competing arguments and recommendations. An unsuccessful objector can safely assume that his objections were either not accepted or were not considered of sufficient weight to outweigh the case in favour of the application.

91. Applying these criteria, I consider that the minutes of the meeting on 29 September 2015 met the required standard and were adequate reasons for the Committee's decision to grant planning permission. They were lengthy: approximately 3 pages of A4. The minutes set out a full and fair summary of what was said at the meeting, by councillors, officers, the applicant and objectors, which I have been able to check against the transcript. The section headed "Reasons for the decision" summarised the conclusions on the various planning considerations, repeating the conclusions in the planning officer's report. It stated that "*the proposal was acceptable having been assessed in the light of all material considerations*". The material consideration of the impact of the proposal on the Westgate scheme had been identified earlier in the minutes, as part of the legal advice given orally at the meeting. The Senior Lawyer advised "*it was for the Committee [to] determine how much weight was placed on this*". The potential nature of the impact was plain from the summary of the representations made by the objectors, some councillors and the local Member of Parliament. The opposing arguments by the IP were also clearly summarised, namely, that the application would be beneficial as it would increase footfall and spending in the city centre, including North Westgate. In my judgment, it was clear that the majority of the Committee concluded that the Queensgate application was acceptable in planning terms, and it did not accept the Claimant's representations. In my judgment, the Committee was not required to specify how much weight, if any, it gave to the impact on the Westgate scheme and the North Westgate area. Nor was it required to set out its detailed findings, either collectively or by reference to individual councillors, on the evidence presented by the Claimant or on the advice given by the planning officer.

92. The Claimant submitted that it was substantially prejudiced because it was unable to understand why the Council granted permission for the Queensgate scheme in the light of its objections. It did not know on what basis to present its legal challenge. The Defendant had failed to respond adequately to the Claimant's requests for clarification in the pre-action correspondence. I disagree. The Claimant has obtained the transcript of the meeting which, together with the substantial amount of documentary material, and the minutes, provides a sufficient explanation for the

Claimant as to why the majority of the Committee followed the advice of its officers and granted permission for the scheme.

Conclusions

93. I grant the Claimant permission to apply for judicial review. However, for the reasons set out above, the Claimant has failed to establish that the Council's decision was unlawful, and so its claim for judicial review is dismissed.

R. v. EXETER CITY COUNCIL, EX p. J. L. THOMAS & CO. LTD. AND ANOTHER

QUEEN'S BENCH DIVISION (Simon Brown J.): April 28, 1989

Town and country planning—Planning permission—Judicial review—Development plan containing no specific redevelopment proposals for an area—Residential redevelopment in industrial area granted permission by local planning authority—Conflict between residential development permitted and existing predominant industrial use of land—Local planning authority wished area to become residential and hoped industrial users would relocate elsewhere—Whether local authority seeking to achieve legitimate purpose by grant of permission—Whether local authority bound to exercise statutory power to discontinue undesirable land use instead—Whether local authority avoiding indirectly payment of compensation by ulterior and improper grant of permission—Whether decision of local authority unreasonable—Whether proper to consider in detail all statements made at committee meeting to determine planning application—Delay and discretion in judicial review—Whether appropriate to seek judicial review of section 29 permission—Separate costs for respondents where prejudice suffered

The applicants for judicial review carried on industrial processes within the Haven Banks area of Exeter. This was the most heavily industrialised part of the city. Thomas & Co. Ltd. (the first applicants) produced tallow and animal feeding meal, having occupied the site since 1964. Blight & White Ltd. (the second applicants) had carried on the business of steel fabricators and structural engineers on their site since 1983, permission for heavy industrial use having been granted to a previous owner in 1953. Both operated 24 hours per day and generated heavy traffic movements. Thomas' processes created smells whilst Blight & White's produced noise. Both undertook work which provided a useful and important public service. The Exeter local plan contained no specific policy for the area and no proposals for any particular form of redevelopment. There was one residential site within the Haven Banks area which pre-dated the occupancy of both applicants. This was terraced housing in Cotfield Street abutting the application site. On March 16, 1988, an application for comprehensive redevelopment of the derelict site at Gabriel's Wharf, Water Lane, on the bank of the Exeter Canal was submitted by Tutorhomes Ltd. (the second respondents). The proposal was for 87 flats and maisonettes together with a shop. This site was within 100 yards of the sites occupied by Thomas & Co. Ltd. and Blight & White Ltd. Objections to Tutorhomes' application were submitted by several industrial users in the vicinity including the applicants. The director and assistant director of the Department of Housing and Environmental Health of Exeter City Council (the first respondents) wrote to the director of planning strongly recommending that the application for permission be refused. The highway authority, Devon County Council, also regarded the development as undesirable. A working party of the city council considered the application in the first instance. Negotiations then took place between the planning officers and the developers which led to modifications of the proposals. The working party met again and recommended approval of the revised scheme subject to conditions. This recommendation was embodied in a full report which went before the meeting of the council's planning and development committee on June 20, 1988, to decide the application. A solicitor for the applicants attended the meeting and took full notes. The application was gone into with great care. There was a vigorous debate with conflicting views expressed. The application was deferred by a majority vote for one particular modification to the proposals: otherwise the chief planning officer was authorised to approve it. Conditional planning permission was finally granted on July 13, 1988. On September 29, Tutorhomes entered into an

agreement with the vendors of the site and on October 7 Peninsular Housing Association Ltd. (the third respondents) exchanged contracts with Tutorhomes for the purchase of part of the site.The applicants applied for judicial review on October 10. On counsel's advice the city council took a fresh decision upon an application for planning permission for an identical development, specifically taking into account various material considerations which the applicants were contending had not been taken into account upon the first decision. This application was granted permission on March 29, 1989. By consent, both permissions were challenged by the applicants. Underlying the challenge was the city council's wish that the Water Lane area should become residential and that the industrial users should relocate elsewhere, and the planning committee's recognition that the grant of permission would inevitably create conflict between the residential and industrial users.

Held, dismissing the application, (1) a local planning authority was not deprived of its powers under section 29 of the 1971 Act to grant planning permission simply because it chose not to use its powers under section 51 and so possibly avoid the payment of compensation;

(2) it was perfectly proper for a planning authority to wish to encourage residential development in a particular area even if it contained industrial users and even though the planning authority's hope was that the existing users would relocate. It was also legitimate for the planning authority to recognise and accept that a grant of planning permission was likely to give rise to conflicts with existing users. Only if the authority's decision to grant permission was concerned to promote rather than minimise the conflict would its decision be unlawful. This was not the case here;

(3) the decisions to grant permission were not unreasonable since it did not follow that the existing user must prevail. Such an interest must be taken into account in order that the planning authority might decide between it and any proposed competing use solely in the light of the public interest;

(4) when considering discussions at a planning committee meeting one must consider their general tenor rather than the views and terminology of individual members;

(5) it was crucial in challenges in cases of this kind for applicants to proceed with the greatest possible urgency, giving to those affected the earliest warning of an intention to proceed since there was conspicuously absent from the legislation any right to appeal from a planning authority's grant of permission. Only rarely would it be appropriate to seek judicial review of a section 29 permission; rarer still would be the occasions when the court would grant relief unless the applicant had proceeded with the greatest possible celerity;

(6) since both the second and third respondents suffered prejudice caused by delay to the start of development it was proper that both their costs be paid as well as the respondent authority's.

Cases cited:

(1) *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

(2) *Colonial Sugar Refining Co. Ltd.* v. *Melbourne Harbour Trust Commissioners* [1927] A.C. 343, P.C.

(3) *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] 1 Q.B. 754; [1975] 2 W.L.R. 897; [1975] 2 All E.R. 931; 30 P. & C.R. 151, C.A. applied.

(4) *Minister of Housing and Local Government* v. *Hartnell* [1965] A.C. 1134; [1965] 2 W.L.R. 474; [1965] 1 All E.R. 490; 17 P. & C.R. 60, H.L. distinguished.

(5) *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731; 40 P. & C.R. 148, H.L. considered.

(6) *Pioneer Aggregates (U.K.) Ltd.* v. *Secretary of State for the Environment* [1985] A.C. 132; [1984] 3 W.L.R. 32; [1984] 2 All E.R. 358; 48 P. & C.R. 95, H.L.

(7) *R.* v. *London County Council, ex p. London and Provincial Electric Theatres Ltd.* [1915] 2 K.B. 466, C.A. applied.
(8) *Stringer* v. *Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65; 22 P. & C.R. 255 considered.
(9) *Westminster Bank Ltd.* v. *Minister of Housing and Local Government* [1971] A.C. 508; [1970] 2 W.L.R. 645; [1970] 1 All E.R. 734; 21 P. & C.R. 379 H.L. applied.

Legislation construed:
Town and Country Planning Act 1971 (c. 78) s.29(1), s.1(1). These provisions are set out at page 402 *post.*

Application for judicial review by J. L. Thomas & Co. Ltd., first applicants, and Blight & White Ltd., second applicants, for judicial review of the decisions of the first respondent, the Exeter City Council, to grant planning permission to Tutorhomes Ltd. By consent, the second permission which was granted after the application for judicial review was made was treated by the parties as being challenged upon the motion as well. Leave to move for judicial review was initially refused on the documents by Macpherson J. but later granted by Pill J. at an oral hearing on November 4, 1988.

The grounds of challenge were: (1) that where circumstances exist which would entitle a local planning authority to order the discontinuance of the use of any land under section 51 of the Town and Country Planning Act then they are bound to do so even if they are seeking to achieve a legitimate direct purpose under section 29 of the Act by granting planning permission; in relation to the first applicant, (2) that the city council granted permission for an ulterior and improper purpose, namely to procure the discontinuance of an existing lawful use without paying compensation which would be required under section 51; and (3) that the decision to grant permission was unreasonable in the *Wednesbury* sense since the introduction of the proposed residential use would inevitably give rise to nuisance claims and conflict which would drive an existing user uncompensated away from the site.

D. Gilliland, Q.C. and *G. Thomas* for the first and second applicants.
J. Sullivan, Q.C. and *B. Ash* for the first respondents.
S. Head and *N. Burton* for the second and third respondents.

SIMON BROWN J. This is a challenge to the grant of planning permission for a substantial residential development on a seven hectare site on the bank of the Exeter Canal known variously as Gabriel's Wharf and the Old Texaco Depot (the application site). It lies within the Haven Banks area, adjacent to Water Lane, perhaps the most heavily industrialised part of the city. Amongst the several industrial uses in the area are those carried on by the two applicants. J. L. Thomas & Co. Ltd. (Thomas) are tallow and animal feeding meal manufacturers, rendering down animal waste products collected in from abattoirs and slaughter-houses. Blight and White Ltd. (B & W) are steel fabricators and structural engineers, a "metal bashing" industry. Thomas employ about 150 people, their factory being serviced by some 31 lorries. B & W have about 20 employees and their business involves the frequent loading and unloading of heavy steel lengths. Both work a 24 hour day. Both generate heavy traffic movements. Thomas's processes are smelly; B & W's noisy. Thomas have occupied

their site since 1964. For that they required and obtained the respondent council's consent, theirs being an "offensive trade" within the meaning of section 107 of the Public Health Act 1936. They are one of only two such animal waste processors in the south-west of England and clearly fulfil a useful public service. B & W acquired their site in 1983, planning permission for its heavy industrial use having been given to a previous owner by the Exeter Corporation in 1953. B & W have a high reputation in the industry and they too undertake work of public importance.

The area generally is given over to industrial use. The development plan, however, (the Exeter local plan) contains no specific policy for the area, no proposals for any particular form of redevelopment. The planning permission under challenge is for 87 flats and maisonettes together with a shop. It would not, however, be the first residential site within the area: there already exists terraced housing in Cotfield Street, a development which pre-dates the occupancy of either applicant. The Cotfield Street housing abuts the application site. It is yet closer to B & W than is the application site although marginally further from Thomas. The application site is only a hundred yards from Thomas, nearer still to B & W.

Against that broad background let me now sketch in the history of this planning permission. The application—for comprehensive redevelopment of this derelict site for residential use—was made on March 16, 1988. The applicants were Tutorhome Ltd. (Tutorhome) who also became respondents to this motion. Objections to their proposal were submitted by several of the industrial users in the vicinity including Thomas and B & W. Thomas wrote that:

> to introduce dwellings in such close proximity would be most incompatible with the "offensive trade" which we conduct on a continuous 24 hour daily basis and with the associated necessary vehicle movements to serve the factory.

They further drew attention to paragraph 16 of Joint Ministerial Circular 43/76 which reads:

> If nuisance from smell from either animal waste processing or any other industry is to be minimised, good planning is important. If processing factories are isolated it is particularly important that incompatible development (*e.g.* houses, schools) is not permitted so close that it may be affected by smell. Where such development has been allowed to encroach upon previously isolated factories, and there had been an increase in the throughput of those factories, complaints have led local authorities to take action against the processor.

Others too were concerned about the proposal. In May 1988 the director and assistant director of the respondent's Housing and Environmental Health Department (respectively Mr. Bassett and Mr. Beeching) wrote to the director of planning, strongly recommending that the application be refused. They suggested that the juxtaposition of heavy industry and the proposed residential use "can only lead to a poor environment for persons living in the area and problems for the industry in the vicinity." Mr. Beeching referred to the city council having received 132 complaints of odour from Thomas's premises in 1987. The Highway Authority, Devon County Council, also regarded the development as "undesirable because of the conflict and danger to pedestrians from industrial heavy traffic in the area."

In accordance with the respondent's practise the application was considered first by a group of council members and officers, in this instance the western area working party. After their initial consideration of the application, negotiations took place between the planning officers and the developers which led to modifications of the proposals. The working party then met again to consider the revised scheme. They recommended its approval subject to conditions (precisely those ultimately imposed). This recommendation they embodied in a full report which was before the planning and development committee for the council meeting on June 20, 1988 to decide the application. It was rightly described by the chairman as important. The meeting was attended, amongst others, by Miss Bailey, a solicitor acting on behalf of another of the industrial users who was objecting to the proposal. She made detailed notes of the proceedings. Before the court is the full report which the following day Miss Bailey compiled from these notes and a yet fuller affidavit which she swore on April 6. There is no substantial dispute as to the accuracy of her account.

The application was clearly gone into with great care. The chief planning officer introduced it at length. He pointed out the various objections which had been advanced but in the end indicated his department's recommendation that it be approved. The matter was then thrown open for general discussion amongst the committee members, a discussion lasting some 20–30 minutes. At some stage Mr. Beeching reiterated his objections. He is recorded as saying:

> that there was no question that whatever was done in the way of double glazing and other suggested improvements the residents would be blighted by the smell, noise and traffic created by the existing commercial users.

It was a vigorous debate. Conflicting views were expressed. The application was certainly not rubber stamped. It was, however, finally approved by a vote of eight to one. I say approved; more precisely it was deferred but, subject to one particular modification, the chief planning officer was authorised to approve it. The committee further resolved:

> that the housing and environmental health committee be requested to ensure that effective steps were being taken to resolve the long standing problems in respect of J. L. Thomas's premises.

Conditional planning permission was finally granted on July 13, 1988. Having received it, Tutorhome on September 29, 1988 entered into a contract whereby the vendors of the site were entitled to require completion of the purchase on three months' notice. On October 7, 1988 Peninsular Housing Association Ltd. (Peninsular), another respondent to this motion, in turn exchanged contracts with Tutorhome for the purchase of part of the site.

It was not until three days later, October 10, 1988, that the applicants applied for judicial review. They had not previously given the slightest hint of such a challenge. Although it was lodged just within three months of the actual grant of planning permission, it can hardly be regarded as promptly made, not least bearing in mind that the effective resolution—that of the planning and development committee on June 20, 1988—pre-dated the formal decision by over three weeks. There is no affidavit nor other satisfactory explanation before me regarding this want of promptitude. The

prejudice to Tutorhome and Peninsular is plain. I shall have to return to this matter later.

Leave to move for judicial review was initially refused on the documents by Macpherson J. It was later granted by Pill J. at an oral hearing on November 4, 1988. Having regard to the width of challenge then advanced, the respondent authority, on counsel's advice, very sensibly took a fresh decision upon an application for planning permission for an identical development, specifically taking account of various material considerations which the applicants were contending had not been taken into account upon the first decision. This second application was granted on March 29, 1989. Although, by consent, that too has been challenged upon this motion, it is plainly impervious to attack save only upon the fundamental basis common to both decisions, as I shall shortly explain. Were this fundamental attack made good, it would (subject to delay and discretion) unseat both decisions; if, however, it fails, then it is plain that the second decision at least cannot be impugned.

What then is the basis of challenge? Mr. Gilliland, for the applicants, advances essentially three arguments, distinguishable although overlapping. Underlying all three is the indisputable fact that the respondent authority wished the Water Lane area to become residential and to that end hoped that the industrial users in general, and Thomas in particular, would relocate elsewhere. It is further plain from Miss Bailey's account of the June 20 meeting that the committee recognised that the grant of this residential planning permission would inevitably create conflict between these essentially incompatible uses, not least the possibility of nuisance claims against Thomas. All this might well eventually cause Thomas to leave. Certainly the introduction of further residential use into the area would improve the chance of that desired result.

Mr. Gilliland's first argument requires consideration of the inter-relation between sections 29 and 51 of the Town and Country Planning Act 1971. So far as material, they provide as follows; section 29(1):

> subject to . . . the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority . . . (a) . . . may grant planning permission . . .

Section 51(1):

> If it appears to a local planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity), regard being had to the development plan and to any other material consideration—(a) that any use of land should be discontinued . . . the local planning authority may by order require the discontinuance of that use . . .

If a section 51 order is made and confirmed by the Secretary of State, compensation may become payable under section 170 of the Act.

Mr. Gilliland's argument runs thus. Section 29 is expressly made subject to section 51 (one of "the following provisions of this Act"). Where, as here, circumstances exist which would entitle the local planning authority to make a section 51 order, then that is what they are bound to do. They are not entitled to seek or even hope to achieve the object of discontinuing a lawful use of land by exercising their section 29 power to grant planning permission in respect of other land. That is so, the submission necessarily

runs, even if the local planning authority are seeking to achieve a legitimate direct purpose by their grant of planning permission: as here, the residential development of the application site itself. The mere fact that the local planning authority harbour a wish that their grant of planning permission will or may result in another occupier ceasing a particular use that they consider it expedient to discontinue, disentitles them from granting the planning permission unless and until they invoke their section 51 power. And indeed, the submission goes, it is wholly immaterial whether the local planning authority's hope is that the grant of planning permission will tempt the user out—for instance by the grant enhancing the value of his land (the carrot)—or force the user out—because he finds the newly introduced use incompatible (the stick). Mr. Gilliland urges the point as one of construction of the Act, reminding me of Lord Scarman's dictum in *Pioneer Aggregates (U.K.) Ltd.* v. *Secretary of State for the Environment*[1]:

> Parliament has provided a comprehensive code of planning control. It is currently to be found in the Town and Country Planning Act 1971.

I reject this contention. Indeed it appears to me self-evidently absurd. The consequences would be remarkable. And in truth it is founded upon the wholly unsustainable premise that a local planning authority are deprived of their section 29 power save only if they regard their section 51 discretion as a duty. They cannot even grant a planning permission, await the outcome of the development, and then consider their section 51 powers at a later date.

Mr. Gilliland's second argument is that the respondent authority granted this planning permission for an ulterior and improper purpose, namely to procure Thomas's discontinuance of their existing lawful user without the compensation they could expect under section 51. It is clear on the facts that the respondents hoped to achieve Thomas's departure consequent upon this grant of planning permission. That being a substantial, a not insignificant, consideration which in part influenced their minds, the decision is, it is submitted, flawed.

Mr. Sullivan, for the respondents, meets the point squarely. His contention is that there is nothing in the least improper in a council hoping or even seeking to get rid of one user by the grant of planning permission to another. Provided only and always that the planning permission is granted out of a genuine desire to see the application site developed as permitted, and not as a device whose real purpose is to create trouble for existing users so as to force them out, then, submits Mr. Sullivan, it is unimpeachable. He of course further assumes that the planning permission is not granted out of malice towards an existing owner; that, however, is not asserted. And there is certainly no question here of this permission being granted specifically to cause trouble. On the contrary, the evidence clearly shows that the planning authority took all steps open to them to minimise the likely future friction, first by modifying the developer's proposals and then by imposing conditions upon the grant. Furthermore, the respondents contemplate that the offensiveness of Thomas's processes will in future be reduced by technological improvements and if necessary by legal proceedings against them. Such proceedings would be under sections 92–100 of the

[1] [1985] 1 A.C. 132 at p. 141; 48 P. & C.R. 95 at p. 101.

Public Health Act 1936; by no means necessarily would they have the effect of driving Thomas off site.

Mr. Sullivan contends that the position here is simply this: in granting this planning permission the local planning authority are accepting the clear risk of disturbance to new residents from adjoining industrial users. As a matter of planning judgment they are not prepared to allow that risk to prevent what they regard as the desirable residential development of the area as a whole, including the application site. They hope that the character of the area will change and that increasingly residential users will move in and industrial users move out, or adapt. They contemplate that many of the industrial users will be persuaded out by a combination of carrot and stick—the evidence before me suggesting that residential land values are now some four times higher than commercial land values in this area. This particular development—itself, of course, foreshadowed by the existing residential use of Cotfield Street—they see as the first stage in their proposals for the area.

Is it then unlawful to have the subsidiary aim or hope here in question, namely that through granting planning permission to one site owner another will move? Is that an improper purpose, an ulterior purpose? In contending that it is, Mr. Gilliland relies on two House of Lords authorities in particular. The first is *Newbury District Council and the Secretary of State for the Environment*. Mr. Gilliland relies particularly on the following passage in Lord Fraser's speech[2]:

> In order to be valid, a condition must satisfy three tests. First, it must have a planning purpose. It may have other purposes as well as its planning purpose. But if it is imposed solely for some other purpose or purposes, such as furtherance of the housing policy of the local authority, it will not be valid as a planning condition . . . Second, it must relate to the permitted development for which it is annexed . . . One reason, relevant to the instant case, why it would be wrong to secure removal of buildings by the use of a condition unrelated to the permitted development is that it would enable the planning authority to evade its liability to pay compensation for removal under section 51 of the Act of 1971. Thirdly, the condition must be "reasonable" (in the *Wednesbury* sense) . . .

It is of course the sentence referring to section 51 which counsel urges is significant. In my judgment, however, that dictum cannot avail him. Lord Fraser I take to be saying only that a planning authority cannot avoid section 51 by imposing an unrelated (and thus *ex hypothesi* unlawful) condition; not that the authority would need to pursue the section 51 route even if the same end could be achieved by imposing an otherwise valid condition. In truth, the passage begs rather than answers the question now at issue.

The second authority relied upon is *Minister of Housing and Local Government* v. *Hartnell*. This is at first blush more promising. The case concerned section 17 of the Caravan Sites and Control of Development Act 1960. Under that provision, if a planning authority did not take steps to end the use of an existing caravan site by enforcement or discontinuance proceedings as the case might be, they could not refuse permission to the

[2] [1981] A.C. 578 at p. 607; 40 P. & C.R. 148 at pp. 168–169.

existing site owner and could not impose conditions so onerous as in effect to amount to a refusal, even where either course would have been well justified on planning grounds. As to that there was no dispute. Among the passages relied upon by Mr. Gilliland is this from the speech of Lord Reid[3]:

> The question in this case is whether they (the planning authority) can under section 17 impose conditions which are not so onerous as in effect to amount to a refusal but are so onerous as materially to cut down the pre-existing right of the existing site owner. In effect the appellant's argument is that, while section 17 does not enable the planning authority to take away the whole value of the existing site owner's right—that must be done if at all by discontinuance and payment of compensation—it does enable the authority to take away without compensation anything short of the whole value by imposing conditions which stop short of being so onerous as in effect to be equivalent to a refusal of permission. That Parliament should have intended such a result seems to me so improbable that it is necessary to scrutinise with some care the provisions on which the appellant relies, and they must be scrutinised in light of "the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms" (*per* Lord Warrington,[4] giving the opinion of the board in *Colonial Sugar Refining Co. Ltd.* v. *Melbourne Harbour Trust Commissioners*). Moreover, in the present case there was alternative procedure under section 26 of the Act of 1947 by which the same result could have been achieved but with liability to pay compensation.

Mr. Gilliland submits that by parity of reasoning the same relationship should be held to exist between sections 29 and 51 of the 1971 Act, as that between sections 17 and 26 of the 1960 Act. Mr. Sullivan submits the contrary, placing *Hartnell*'s case in its particular legislative context and relying for the general principle upon two later authorities: *Westminster Bank Ltd.* v. *Minister of Housing and Local Government* and *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment.*

In the *Westminster Bank* case the same council was both the local planning authority and the highway authority. Because they were anxious to keep open their options on street widening they refused the bank's application for planning permission. They could instead, as highway authority, have prescribed an improvement line and paid compensation to the bank for injurious affection to their land. Lord Reid said this[5]:

> But, even if the sole reason for the authority proceeding in the way it did had been the desire to save public money, it does not follow that they were not entitled to do that. The appellants say that this was "unreasonable" . . . Here the authority did not act in excess of power in deciding to proceed by way of refusal of planning permission rather than by way of prescribing an improvement line. Did it then act in abuse of power? I do not think so. Parliament has chosen to set up two

[3] [1965] A.C. 1134 at p. 1156; 17 P. & C.R. 60 at p. 65.
[4] [1927] A.C. 343 at p. 359.
[5] [1971] A.C. 508 at p. 530; 21 P. & C.R. 379 at pp. 390–391.

> different ways of preventing development which would interfere with schemes for street widening. It must have been aware that one involved paying compensation but the other did not. Nevertheless it expressed no preference, and imposed no limit on the use of either. No doubt there might be special circumstances which make it unreasonable or an abuse of power to use one of these methods but here there were none. Even if the appellants' view of the facts is right, the authority had to choose whether to leave the appellants without compensation or to impose a burden on its ratepayers . . . I cannot in these circumstances find any abuse of power in the local authority deciding that the appellants and not its ratepayers should bear the burden.

In *Hoveringham Gravels* the landowners were refused planning permission for sand and gravel extraction from land which included an Iron Age campsite. They argued that it would be an abuse of power for the planning authority by means of a refusal of planning permission to deprive them of compensation which would otherwise be due to them in consequence of a preservation order made under the Ancient Monuments Acts. Lord Denning M.R. referred to the *Westminster Bank* decision as showing that[6]:

> when there are two alternative courses open to a public authority—one of which gives rise to compensation and the other does not—the authority is entitled to adopt the one which does not give rise to compensation.

Orr L.J. agreed that the claimants' argument was defeated by the *Westminster Bank* decision and added that *Hartnell*'s case as to existing rights, had no application[7]:

> since, unless the Ancient Monuments Acts oust the application of planning law, the respondents never had . . . any subsisting right to take sand and gravel, nor, in my judgment, any reasonable expectation of being permitted to do so.

There is, submits Mr. Sullivan, no subsisting right or legitimate expectation on the part of Thomas or the other industrial objectors in the present case, any more than there was on the part of *Westminster Bank* or *Hoveringham Gravels*, equivalent to the existing rights enjoyed by *Hartnell*. In short, *Hartnell*'s case was concerned with (and is properly to be understood as confined to) existing use rights. The instant case is quite different. Thomas and the other industrial users have no legitimate expectation that other conflicting uses will never be introduced into the vicinity; the planning permissions which they obtained and enjoy confer upon them no right to commit nuisances against their neighbours either now or in the future.

I have no doubt that Mr. Sullivan is right in his submissions. It is in my judgment perfectly proper for a planning authority to wish to encourage residential development in a particular area even if it contains existing industrial users. It is legitimate also for the planning authority to recognise and accept that planning permission for residential development in such an

[6] [1975] 1 Q.B. 754 at p. 763; 30 P. & C.R. 151 at p. 158.
[7] *Ibid.* at p. 765; p. 160.

area is likely to give rise to conflicts with those existing users. It is also perfectly proper for the authority to harbour the wider aspiration that the existing users will relocate, whether influenced by carrot or stick. The one thing that would flaw the authority's decision is if they were concerned to promote rather than minimise the conflict, which I am satisfied is not this case. I conclude therefore that the grant of residential planning permission in these circumstances would not be unlawful even if a substantial part of the authority's motivation was the hope that they might thereby avoid the subsequent payment of section 51 compensation.

It is perhaps worth pausing to consider the practical effect of the contrary argument. If Mr. Gilliland is right, his clients' uses impose an embargo upon residential development in the area save only if the authority first make a section 51 order against them. Planning control, they contend, must otherwise be exercised so as to enable them to continue to pursue their noisome and malodorous processes, whether or not those presently create statutory nuisances. On this approach, indeed, the smellier and noisier they are, the stronger their case. And if this be right then they are certainly much better off than, say, a residential user whose house is suddenly overshadowed by a new factory. Section 51 cannot avail him. And he cannot claim that in buying his house he bought the view. No more, in my judgment, should the applicants be able to say that by carrying on their businesses they can forever prevent the introduction of conflicting uses. This was, indeed, one of the points raised at the crucial meeting on June 20, 1988. As Miss Bailey recorded: "Most took the view that the committee should not allow the activities of J. R. Thomas to put a planning blight on half the city."

I turn then to Mr. Gilliland's third and last argument; that the decision was *Wednesbury* unreasonable, wholly absurd and perverse, given the inescapable conflicts which must result from the introduction of residential use to this application site. The argument would be at its strongest were the facts these. First, that Thomas's processes are not at present causing any nuisance in law so that they are vulnerable neither to statutory proceedings by the authority nor common law actions by neighbours (not least the occupiers of the Cotfield Street development). Secondly, that the introduction of the proposed new residential use will inevitably give rise to nuisance—it is, of course, clear law that, whilst "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey," it is nevertheless no defence to a nuisance claim that the claimant came to the nuisance, and in any event this authority are seeking to turn Bermondsey into Belgravia. Thirdly, that there is a high probability that the nuisance and conflict created by the introduction of this new residential use will drive Thomas uncompensated away from the site—they would of course realise its enhanced land value but might well be unable to find an alternative site and thus lose the very considerable value of their business.

Even had the authority arrived at these factual conclusions (which, I make plain, they were certainly not bound to do), I would still reject this *Wednesbury* challenge. True, as Mr. Gilliland submits, this grant of planning permission represents an apparently striking departure from the paragraph 16 recommendation in Circular 43/76. But this is a recommendation only and it was most certainly taken into account. True too, the effect a proposed development will have on an existing use of land is a material consideration within section 29—see *Stringer* v. *Minister of Housing and*

Local Government, the *Jodrell Bank* case. But it certainly does not follow that the interest of the existing user must prevail. On the contrary, provided only that such interest is properly considered, it is the duty of the planning authority to decide between it and any proposed competing use and to take this decision solely in light of the public interest. That, as Mr. Sullivan stresses, is the essential purpose of planning control. As currently stated in Planning Policy Guidance Note 1, paragraph 17:

> The purpose of the planning system is to regulate the development and use of land *in the public interest*. It is not to protect the private interests of one person against the activities of another. While considerations of public interest may in the particular case serve to protect private interests, the material question is not whether owners and occupiers of neighbouring properties would suffer financial or other loss from a particular development, but whether the proposal would affect the locality generally and unacceptably affect amenities that ought in the public interest to be protected.

If the local planning authority conceive it to be in the public interest that one use should be introduced or extended even though its inevitable consequence would be to drive out an adjoining use, then their duty is to grant the planning permission sought. It is the public interest which must always prevail. Had, for instance, the development proposal in the *Jodrell Bank* case come not from *Stringer* but, say, a company like Toyota anxious to build a factory employing 5,000, the local authority might well have come to a different decision. That decision would have been pre-eminently a matter of planning judgment for them. Mr. Gilliland accepts that that would be so in the *Jodrell Bank* type of case. But, he submits, that is because Jodrell Bank was harming no one so that no section 51 point arose. It seems to me an impossible argument. At the end of the day this section 51 point will be seen to underlie all of Mr. Gilliland's arguments. For the reasons I have given, however, I reject them.

Before finally dismissing this application, I must return briefly to two particular matters. First, Miss Bailey's very detailed account of the committee meeting on June 20. As Mr. Sullivan reminds me, it is necessary to bear in mind that the committee were taking a collective decision on this planning application. One must accordingly consider the general tenor of their discussion rather than the individual views expressed by committee members, let alone the precise terminology used. The point is well made in Pickford L.J.'s judgment in *R.* v. *London County Council*[8]:

> With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision of a body like the London County Council dealing with these matters could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably few debates in which someone does not suggest as a ground for decision something which is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being found on that particular ground is wrong.

[8] [1915] 2 K.B. 466 at p. 490.

In this judgment I have endeavoured to indicate the general tenor of the discussion. I have not however found it helpful or necessary to refer to the many detailed passages in Miss Bailey's report and affidavit upon which Mr. Gilliland sought to rely.

Secondly, the question of delay and discretion. As stated, this application was not made promptly; no justification has been advanced for the delay; and Tutorhome and Peninsular have both suffered prejudice. Generally speaking, these considerations would of themselves have been sufficient to bar relief. Certainly I would have found this so if the central object of the challenge were merely to procure a re-determination of the decision; if, for instance, the complaints were of procedural impropriety or failing to have regard to relevant considerations. But in fact this challenge has been advanced upon the more fundamental basis that, in light of section 51, the authority for one reason or another was simply not empowered to grant this planning application however they had approached the matter. In these circumstances, had I been persuaded of the correctness of this contention, I might possibly have exercised my discretion in the applicant's favour. That said, however, I cannot sufficiently stress the crucial need in cases of this kind for applicants to proceed with the greatest possible urgency, giving moreover to those affected the earliest warning of an intention to proceed. In this connection it should be remembered that there is conspicuously absent from the legislation any right to appeal in fact or law from a planning authority's grant of planning permission. And even when a right of challenge *is* given—the right of statutory application under section 245 to challenge a ministerial decision—it must be exercised within six weeks. Only rarely is it appropriate to seek judicial review of a section 29 permission; rarer still will be the occasions when the court grants relief unless the applicant has proceeded with the greatest possible celerity.

For reasons earlier given, this application fails and is dismissed.

Application dismissed with costs of all respondents to be paid by applicants.

Solicitors—Hatchett, Jones & Kidgell, London E.C.3, acting as agents for Goodall & Son, Mirfield; Hatchett, Jones & Kidgell, London E1, acting as agents for Bord, Pearce, Plymouth; the City Solicitor, Exeter; Trowers & Hamlins, London WC2, acting as agents for Dunn & Baker, Exeter.

Neutral Citation Number: [2014] EWHC 3348 (Admin)

Case No: CO/1830/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 14th October 2014

Before:

THE HONOURABLE MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF TESCO STORES LIMITED	**Claimant**
- and -	
FOREST OF DEAN DISTRICT COUNCIL	**Defendant**
- and -	
(1) JD NORMAL LYDNEY LIMITED **(2) ASDA STORES LIMITED** **(3) WINDMILL LIMITED** **(4) MMC LAND & REGENERATION LIMITED**	**Interested Parties**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Patrick Clarkson QC and Gwion Lewis (instructed by **Ashurst LLP**) for the **Claimant**
Paul Stinchcombe QC and Graeme Keen (instructed by **Thomas Eggar LLP**) for the **Second and Third Interested Parties**

Hearing date: 2 October 2014
Judgment
As Approved by the Court

Mrs Justice Patterson:

Introduction

1. This is a claim for judicial review in which the claimant challenges the decision of the Forest of Dean District Council ("the council") on the 11 March 2014 to grant planning permission on a site known as the Federal Mogul Camshaft & Casings Ltd, Land South of Cambourne Place, Lydney for:

> "Demolition of existing finishing shop and erection of new finishing shop, offices with car parking and associated works. Erection of retail store of 3827 sq.m. gross internal floor area (Class A1), petrol filling station, car parking, service areas and associated development. Erection of 4 No. B1 units and 4 No. B1/B8 units."

2. The original applicant for planning permission is now owned by J D Norman Lydney Ltd (JDN) which already operates a camshaft production business on the site with permission. The site has been in two ownerships, land owned by JDN, and land owned by the fourth interested party, MMC Land and Regeneration Limited (MMC). JDN occupies the MMC land under a lease with MMC Developments Limited dated 21 December 2009 which is due to expire on 28 December 2014. JDN wants to build a new finishing shop on the JDN land before its lease of the MMC land expires in December 2014. It has entered into an arrangement with the second and third interested parties, Asda stores limited (Asda) and Windmill Limited (Windmill) respectively. The planning application was presented on the basis that the retail store component of the scheme will be operated by Asda.

3. The claimant is the owner and operator of a Tesco supermarket located on the high street in the centre of Lydney.

4. The defendant is the local planning authority. The defendant did not appear and was not represented at the proceedings before me. By a letter dated the 7 May 2014, Mrs Hughes, the legal team manager and monitoring officer, said that the council had decided not to take an active role in defending the claim but to provide assistance, where needed, to the interested parties who would be putting forward a robust defence. That was not intended to suggest that the council accepts the claim or felt unable to offer a defence but was based purely on protecting local residents and public finance. That position was repeated in a letter dated 5 of August 2014 which said also that the Defendant had had sight of the Interested Parties Skeleton Argument and fully supported the arguments advanced therein.

5. The second and third interested parties appeared and were represented by leading and junior counsel.

6. The application was recommended for refusal by the council's planning officers initially for four reasons. They were

    i) the proposal would be contrary to the advice of the National Planning Policy Framework and policy CSP.12 of the core strategy in that there is insufficient

need for a store of the size proposed and due to its scale would have a significant impact on the vitality and viability of the town centre;

ii) the proposal would be contrary to the advice of the National Planning Policy Framework and Policy CSP.12 of the core strategy in the applicants have failed to satisfy the sequential test by failing to show sufficient flexibility and have discounted a sequentially preferable site which could be available in the town centre;

iii) the proposal would be contrary to Policy CSP.1 of the core strategy and the advice of the National Planning Policy Framework in that satisfactory information has not been submitted to demonstrate that the proposal would not result in an unacceptable adverse impact on European Protected Species;

iv) The proposal fails to make provision for the necessary contributions to mitigate the impact on the town centre via a section 106 legal agreements or undertaking. As such the proposal would be contrary to the National Planning Policy Framework and policy CSP.12 of the core strategy.

7. Further material was received by the defendant which then prepared a late information document for members. In that, the recommendation remained one of refusal but the reasons for refusal were abbreviated so that there were two only. They were numbers (i) and (iv) above. The other proposed reasons for refusal were withdrawn.

8. Following a meeting on 12 November 2013 members of the council's planning committee resolved to grant planning permission for the application, subject to conditions. The resolution read as follows:

> "that authority be given to the Group Manager, Planning and Housing, to grant planning permission subject to conditions including the requirement that the offices and finishing shop for JD Norman be completed and operational before work on the supermarket commences, and subject to satisfactory completion of a section 106 agreement to provide a shuttle bus for a period of not less than 5 years between the new store and the High Street via Cambourne Place…"

9. In the Statement of Common Ground it is agreed that the committee gave the following reasons for the grant of permission:

i) the proposal would safeguard existing jobs at JDNL;

ii) the proposal would create new jobs;

iii) the impact arising from the proposal would be mitigated through an agreement under section 106 of the Town and Country Planning Act 1990.

10. On the 11 March 2014 an agreement under section 106 of the Town and Country Planning Act was completed and planning permission was issued.

11. On the 22 April 2014 the claimant lodged an application with the court for permission to apply for judicial review.

12. The matter was considered by Lindblom J on the 20 June 2014 who ordered that the matter be heard at a rolled up hearing. That is how the matter comes before me.

13. As a result of the order of Lindblom J the parties have agreed a statement of common ground setting out an agreed narrative of relative facts, an agreed list of issues for the court and an agreed list of relevant propositions of law for each issue identifying for each proposition the relevant authority. That document has been extremely helpful and of great assistance in narrowing the issues.

Agreed list of issues

14. The agreed issues are:

    i) whether the council breached its statutory duty under section 38(6) of the Planning Compulsory Purchase Act 2004;

    ii) whether the council:

        a) was required to consider the operation of Landlord and Tenant Act 1954 and, if so, whether it erred in law by failing to consider the operation of the Landlord and Tenant Act;

        b) whether the council took an illogical/irrational approach to the threatened loss of jobs at JDNL, in particular, whether the council failed to ask the relevant questions and/or failed to take reasonable steps to obtain the relevant information in relation to the threatened loss of jobs at JDNL.

    iii) whether the council irrationally relied on condition four and/or whether condition 4 does or does not sufficiently safeguard the continued existence of JDNL;

    iv) whether the section 106 is CIL compliant and/or otherwise lawful and whether the council acted properly in giving weight to it.

Legal framework

15. Judicial review is not an opportunity to rerun arguments on planning merits: see *R (Newsmith Stainless Steel) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 at [6] – [8].

16. A local planning authority determining an application for planning permission must do so in accordance with the Development Plan unless material considerations indicate otherwise see: section 70(2) of the TCPA and section 38(6) of the Planning and Compulsory Purchase Act 2004 (the PCPA). In other words there is a presumption that any decision on an application for planning permission will be taken in accordance with the Development Plan but that presumption can be rebutted by other material considerations.

17. A judgment is to be made by the decision maker, first, as to whether a proposal is in accordance with the Development Plan as a whole; and a proposed development may be in accordance with the Development Plan as a whole even if it fails to comply with

one or more policies it contains: see *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1WLR 1447, Lord Hope at page 1450 E-G and Lord Clyde at page 1459 E- F. The role of the court, if its jurisdiction is invoked on this issue, is to merely view the rationality of the judgment made by the decision maker and not to determine the question for itself.

18. If the decision maker considers a proposal is not in accordance with the Development Plan as a whole the decision maker must make a judgment as to whether material considerations indicate that the decision should be made otherwise than in accordance with the Development Plan.

19. National Planning Policy, such as the National Planning Policy Framework (NPPF) is a material consideration. A decision maker must interpret policy properly. The true interpretation of policy is a question of law for the court: *Tesco Stores Limited v Dundee City Council* [2012] UK SC 13.

20. A decision maker must take into account all material considerations but the weight to be given to such considerations is a matter of planning judgment for the decision maker: see *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759. However, neither the weight given to a particular consideration or the ultimate decision must be irrational in the sense of being Wednesbury unreasonable.

21. The threshold of irrationality for the purposes of judicial review is a high one: see *R (on the application of Skinner and Alvarado) v London Borough of Haringey* [2013] at [8] and in the Court of Appeal [2013] EWCA Civ 1870 at [12].

22. Guidance on the discretion of the court to quash a planning permission in the event of a decision maker failing to take a relevant matter into account is set out in *Bolton MBC v Secretary of State for the Environment* [1990] 61 PNCR 343.

23. When a challenge is based on comments made by a decision maker in a planning committee meeting it is necessary to bear in mind the judgement in *R v London Borough of Camden Ex parte Kings Cross Railway Lands Group* [2007] EWHC 1515 at [63] and the fact that the committee was taking a collective decision so that it was the general tenor of the discussion that was important rather than the individual views expressed by committee members let alone the precise terminology used: *R v Exeter City Council ex p Thomas* [1990] 3 WLR 100. Further, in dealing with such a situation there are recognised difficulties in establishing the reasoning of a corporate body that acts by resolution. As Schiemann J said in *R v Poole Borough Council ex p Beebee and others* [1991] 2 PLR 27:

> "All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may well have changed them because of what was said subsequently in debate."

24. On Ground 2 the claimant relies upon the position in relation to a business lease under the Landlord and Tenant Act 1954 that the tenant is entitled at the contractual expiration of his lease to remain. The landlord is only able to bring his relationship with the tenant to an end by serving a notice under section 25 of the 1954 Act. When

serving a section 25 notice, or when responding to an application by the tenant for a new tenancy a landlord may object to a new tenancy on the ground that he intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and he could not reasonably do so without obtaining possession of the building.

25. On Ground 4 a local planning authority presented with a section 106 obligation needs enough information to be able to appraise the contributions on offer and, in particular, to asses the extent to which (if at all) those contributions would reduce the harm identified: *R (Mid Counties Co-Operative Limited) v Forest of Dean District Council* [2013] EWHC 1908 at [28] and *R (Mid Counties Co-Operative Limited) v Forest of Dean Council* [2014] EWHC 3059.

26. Further, regulation 122 (2) of the Community Infrastructure Levy Regulations 2010 states as follows:

> "(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development."

Planning policy

27. The Development Plan comprises the Council's Core Strategy 2012 (CS). The most relevant policy is CSP.12. Where relevant that reads:

> "In order to enhance the role of the town, the core strategy will support the proposed development of land east of Lydney for a new neighbourhood and will promote a new mixed development including amenity land along the access between the harbour and the town centre. The development of the town centre including improvements following the implementation of the highway strategy and the improvement of key retail sites will be supported. This will…improve the town centre and develop up to an additional 600 sq. m. convenience retailing and about 1,500 sq. m. for comparison goods principle within the south eastern part of the town centre."

28. The supporting text in the CS says:

> "7.27 the development of Lydney is critical to the district as a whole. To rely on incremental growth in the (often declining) sectors present in the town's economy or not to intervene in the

> town centre would result in a declining town and one that could not support the wider area in the manner envisaged…
>
> …
>
> 7.31 although there is possibly a case for the remodelling of the stores, indications are that there is unlikely to be major scope for additional convenience retailing in the town, though a modest increase will be planned."

29. Policy CSP.7 titled "Economy" has also been referred to. That reads, where relevant:

> "Economic development will be promoted throughout the district in accordance with a spatial strategy and its allocations. This will encourage new and more diverse types of employment and supporting infrastructure to be established by making land and premises available."

30. As part of the supporting text to that policy, paragraph 6.47, reads:

> "As part of its promotion of employment uses the policy encourages the retention of employment in locations presently used for employment, unless they are allocated for another purpose or can be shown to be unsuitable. Its scope is not confined to traditional areas or uses (B1, B2, B8 for example). The intention is to allow as broad a range as possible of alternative employment generating proposals to be considered on any given site. This range will be limited by the location and nature of the site concerned. Sites in established employment estates will not be suitable for the same uses as some in or close to town centres. Retailing may be considered as suitable where it doesn't conflict with the need to protect shopping in a town centre. By being flexible with the types of employment, a better range will be established through time. It will be a long term process but given the variety of sites (some of which are in exceptional locations), it will deliver welcome change over a wide area."

31. A material consideration in the determination of the application was the NPPF. It confirms that the status of development plans is unchanged and that proposed development which conflicts with an up to date local plan should be refused, unless material considerations indicate otherwise (paragraph 12).

32. The NPPF requires local planning authorities to recognise town centres as the heart of their communities and pursue policies to support their vitality and viability (paragraph 23). A sequential test should be applied for retail development which is not in an existing centre. When assessing applications for retail development outside the town centre which are not in accordance with an up to date local plan local planning authorities should require an impact assessment if the development is over a proportionate locally set floor space threshold. That should include an assessment of the impact of the proposal on the town centre vitality and viability (paragraph 26).

33. Where an application fails to satisfy the sequential test or is likely to have significant adverse impact on investment in a centre or vitality and viability it should be refused (paragraph 27).

The Officer Report

34. The officers produced a detailed report which highlighted the key issues in the determination of the application. One of those was the principle of development. Under that heading the report recorded that the eastern part of the site already had planning permission as part of a larger scheme for mixed employment and housing use. The land where the new finishing shop and offices were to be located was outside land which was allocated for development but, as it fell within the settlement boundary, it was considered that the principle of employment development in the location was acceptable. The report went on:

> "Policy CSP.12 of the Core Strategy focuses on Lydney and identifies that in order to support the role of the town centre the proposed development to the east of Lydney for a new neighbourhood will be supported. The land identified for the neighbourhood centre is outside of land subject of this application and is located further to the north. This, along with other measures, would enable employment generating uses to be developed. The proposal for a new supermarket will generate jobs, and although this is a different type of employment to that previously approved, it remains an employment generating use. However, although this is the case, the supporting text to policy CSP.12 identifies that uses which conflict with the broader claims of economic regeneration and could harm the town centre will not be permitted. This will be assessed in greater depth below. Policy CSP.12 also identifies that an additional 600 sq. m. con convenience goods retailing and about 1500 for comparison goods is to be provided principally within the south eastern part of the town centre. The proposal would be contrary to this due to its location and amount of convenience goods floor space, as 1462 sq. m. is proposed."

35. The report continued that the purpose of the neighbourhood centre was to provide a local centre for the new east of Lydney neighbourhood but was also to enhance the town centre. Due to the relative distance between the neighbourhood centre and the Asda store it was considered to be unlikely that there would be linked trips between the two. It was likely that the facilities offered by the store would be similar to those proposed within the neighbourhood centre and that would undermine its development.

36. On this part of the evaluation the report said:

> "In conclusion it is considered that, in the wider sense, the principle of a store in that it creates employment rather than the employment uses envisaged by the existing planning permission is accepted however the store provides greater convenience retailing envisaged within the core strategy and

> this, and the other issues of material consideration which must be assessed are considered below. The principle of the provision of B1, B1/B8, new finishing shop and offices is considered acceptable and this element of the scheme would accord with the policy CSP.7 of the core strategy."

37. Under retail need and impact the report noted that policy CSP.12 was not designed to consider out of centre proposals and so the proposal was contrary to the Core Strategy.

Impact on town centre vitality and viability and consumer choice

38. The report continued:

> "The information provided has been assessed by the council's retail consultant who has concluded that the trading effects of the proposed store will have a clear adverse impact on the financial turn over in Lydney town centre. When combining the convenience and comparison good sectors, the cumulative impact will be a loss of 31% of the retail annual turn over in 2017."

39. The officers were not impressed by the retail impact assessment submitted by the applicant. The report continued:

> "Due to the concerns identified above the council's retail consultant has undertaken their own analysis of financial impact in relation to the convenience good sector. This concludes that the impact of the Asda proposal will result in an overall cumulative loss of trade to Lydney town centre of 38% at 2017. The impact on existing stores in Lydney is different for each. The impact on trade for the existing Tesco store would be 37% with £11.5 million diverted to the proposal. For the Co-op the impact would be 26% with £2 million trade diversion. …As a result of this analysis it is considered that there would be a noticeable effect on the trading performance of the Tesco store. Although it is considered that this store would not close, the level of impact is likely to have knock-on consequences for the town centre. In relation to the Co-op store it is already trading at a level below the 2011 Lydney retail study benchmark figure and the development would worsen their situation. The store is considered to have a modest trading performance but is distinctly less well-used than the Tesco store. There is therefore already pressure on the Co-op store without the Asda store opening. …it is considered that the proposal would divert £15.9 million from the town centre retail sector which would have a marked effect on the future trade performance of the town centre. In addition, the loss of linked trips to Tesco and spin off benefits this may provide in the form of linked trips is key. …The proposal is in an out of town location, and at the present time isolated, although it is

> acknowledged that there are extant permissions for both residential and employment development. The store is located approximately one kilometre from the town centre and linked trips are far more unlikely. Whilst there is a footpath link that is to be provided there is no intervisibility with the town centre. A store of the nature proposed is more likely to offer a one-stop 'shopping experience' than a store within the town centre where there are opportunities for linked trips and the benefits that this bring which are both for convenience goods retailers and other services … Overall it is considered that the trading effects of the Asda store will have a clear adverse impact upon financial turnover in Lydney town centre. The retail sector in the town could be impacted upon by 31% with the impact on the convenience goods sector at 38% it is therefore considered that the proposal would be contrary to the aims and aspirations of policy CSP.12. …the NPPF asks LPAs to consider whether the impacts associated with the development can be classed as 'significant adverse impacts'. For the reasons identified within this section is it considered that the impact of the proposed Asda can be classed as significantly adverse."

40. This section of the report ended as follows:

> "In conclusion, it is considered that the proposal fails to demonstrate compliance with the sequential test and the NPPF identifies where this is the case though the application should be refused. The NPPF also identifies that if there is a 'significant adverse impact' then the application should be refused. In this case, it is considered that there are significant adverse impacts due to the scale and financial impacts on the town centre, possibility of store closure and the loss of town centre vitality. It is, therefore, considered that the proposal is contrary to the advice in the NPPF and policy CSP.12 of the Core Strategy."

Other material considerations

41. The report considered that there were material considerations which should be taken into account. The officer advised that JDN had purchased the finishing shop and offices that were formerly operated by FM. A replacement finishing shop and offices were absolutely vital to maintain JDN's viability and presence within Lydney. Without that the manufacture of camshafts would be relocated to other JDN facilities outside the UK. Such a loss of Lydney's largest employer and hundreds of high quality jobs would cause hardship to hundreds of families. JDN was said not to have the capital expenditure budget to fund such a scheme. However, Windmill had agreed to utilise receipts from Asda to provide investment to allow for construction of a finishing shop and offices. Without that, it was said there was no viable plan B.

42. The report continued:

"The information provided by the applicants is welcomed, but raises a number of questions. Firstly no evidence has been provided that the lease finishes at the end of 2014. If it were provided it would help support the applicants' position and it is acknowledged that to have the facilities on land within their ownership would provide greater security. There is no reason to doubt that the lease does not finish at the end of 2014, in which case the applicants have been asked to demonstrate what alternative provisions are in place to continue to deliver the planned orders which the supporting information highlights is in place until 2017 with major world wide manufacturers. …the applicants have been asked to provide further information to demonstrate how granting permission for the Asda store would enable the development of the new finishing store and offices in financial terms and have confirmed that £1.5 million of investment will be provided to allow the construction … the applicants are of the opinion that the proposal will secure the existing jobs at JDN and the opportunity of further jobs at the site. It would be possible to ensure that the new finishing shop and offices were built prior to the commencement of the development of the new store thereby giving the opportunity to secure the business. Whilst it is acknowledged that there is planned work to 2017 which indicates the likelihood of the business continuing to operate, should market forces dictate there would be no guarantee that the actual jobs would be retained. It is also important to recognise the other job opportunities which would arise from the other B1 and B1/B8 development, but this should be balanced with the concerns raised regarding the potential for store closures or downsizing within the town centre and associated potential for job losses. …it is therefore considered that the proposal does offer wider benefits to which a great degree of weight can be attached. Greater weight could have been attached if further supporting information had been provided. Notwithstanding this, the consequences of allowing the proposal would mean that it would run contrary to the need to recognise town centres as the heart of communities and to pursue policies to support their vitality and viability as identified within the NPPF."

<u>Impact mitigation and section 106 requirements</u>

43. Dealing with impact mitigation and section 106 requirements the report recorded that the applicants had put forward a package of financial contributions in order to help mitigate the adverse impacts associated with the development. The applicants had acknowledged that adverse impact could not be entirely overcome by the package but was able to mitigate the impact.

44. The contributions that were on offer were summarised as follows:

    i) £25,000 for town centre management advice which would be paid to an expert town centre management adviser to work with the town council and local

traders to suggest improvements with a view to attracting more shoppers and visitors;

ii) Town centre improvements - for which £210,000 would focus on physical improvements to the town centre;

iii) Market square – a feasibility study was to be undertaken and £20,000 was allocated towards the implementation of recommendations from that study;

iv) Additional CCTV camera coverage later confirmed to be £15,000;

v) Shop front improvement grants of £5,000 each for up to twenty shops linked to the town council's neighbourhood plan design guide;

vi) A shuttle bus to be provided from Asda to the High Street via Camborne Place for a period of five years or less if a commercial operator took over the service sooner;

vii) Transport/path link to town centre contributions to the town centre in the sum of £75,000.

45. The report continued that it would have expected that expert advice would have accompanied the planning application to inform and quantify the impacts that need to be mitigated against. The danger of having that advice as part of the section 106 package was that without the impacts being quantified nothing could be done to mitigate the harm that would result to the town centre. As for the Market Square proposal it may be that it would not be feasible. The result could be that none of the elements of the package could come forward so that the impacts of the proposal would not be mitigated in either whole or part.

46. On the public realm improvements the report said that it needed to be borne in mind that there were no detailed schemes in place as to what the money could be spent upon or detailed evaluations as to how that works would offset the significant reduction in the town centre trading which had been identified. The CCTV provision was more realistic as areas where there was a deficiency in the existing provision could be identified.

47. On the path and transport link a contribution had already been secured by the residential planning permission on land to the north and as such it was not reasonable to include it within that package. As to the bus service the information provided was insufficiently detailed to determine what the money would provide. As a result the officer recommendation was of refusal.

48. As set out a supplementary note was prepared for the meeting on 12 November 2013 dealing with late submissions.

49. The note recorded that the officers had been provided on a confidential basis with a copy of the lease between MMC and Federal Mogul (FM).

50. Further retail analysis had been carried out by the council's consultant which concluded that a cumulative impact on Lydney town centre of the proposed store was 34%. There would be a 43% loss of trade in relation to the convenience goods sector

and 11% on the comparison goods sector. It remained the case that that had to be considered as a significant adverse impact on the health of Lydney town centre.

51. The note continued:

> "It was suggested to the applicants on a number of occasions during the course of the application, that they may wish to provide evidence to support the material considerations which they had identified. For understandable reasons a copy of the lease between MMC and Federal Mogul has been provided on a confidential basis. The purpose of its provision is to demonstrate that the lease will expire at the end of December 2014 and there is no alternative. It is the case that the lease expires at the end of December 2014 and the tenant's right to occupy ceases at this point. However, this does not preclude the lease being extended by the landlord or a new lease being negotiated. In addition, the tenant could refuse to leave and therefore 'holding over' on the lease terms. Therefore, it cannot be agreed that there is no alternative to the granting of the planning permission to enable the offices and finishing shop to be constructed for JDN."

52. It was recorded that there had been further representations providing costings in relation to improvements to the environment and public realm. That provided additional details to support the figures identified in the earlier report. It concluded that the monies offered in relation to improvements to the environment and the town centre could mitigate in part the harm to the town centre that would result from the proposal.

53. The report went on:

> "In conclusion, therefore, whilst it is acknowledged that there are material considerations to be taken into account, they do not outweigh the development plan or the advice in the NPPF. The recommendation remains one of refusal but with the removal of the second and third suggested reasons."

<u>The Committee Meeting</u>

54. The committee met, as planned, on 12 November 2013. The minutes of the meeting confirm divided views between those councillors that spoke. The ward members were supportive of the application as it would provide jobs both in the factory and in the supermarket. The motion that was eventually put forward and seconded was that the application be approved because:

> "This development of a brown field site would safeguard existing and create new jobs and that the impacts arising from the development would be mitigated by the 106 obligations offered. This motion was subject to a condition requiring the offices and finishing shop being completed and operational

> before work on the supermarket commenced and that any further conditions be delegated to officers to draft."

55. It was also proposed that approval be subject to the satisfactory completion of a section 106 agreement to provide a shuttle bus service for a period of not less than five years between the new store and the High Street via Camborne Place and £380,000 to provide:

- Town centre management;
- Town centre improvements;
- Market square;
- Additional CCTV coverage;
- Shop front improvement grants.

56. The section 106 agreement was to be completed within six weeks of any confirmation by the Secretary of State that he did not wish to call in the development pursuant to Town and Country Planning (Consultation) England (Direction) 2009.

57. The Committee voted seven members for and seven against the resolution. The chairman used his casting vote in favour.

58. On 28 January 2014 the Secretary of State for Communities and Local Government advised that he would not be calling in the application for his own determination.

59. On 11 March 2014 the council issued a formal notice granting permission subject to a series of conditions including condition 4 which reads:

> "Prior to the works commencing on the retail store hereby permitted, the finishing shop and its associated offices hereby permitted shall be completed and operational."

60. A section 106 obligation dealing with all the matters subject to the council resolution was executed prior to the grant of permission.

61. Section 8 of the obligation further provided for the implementation of a shuttle bus service if not already in place for a period of five years from when the retail store opened.

<u>Ground 1: Breach of the Council's statutory duty under section 38(6) of the Planning and Compulsory Purchase Act 2004</u>

62. The claimant relies upon the case of *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin) where Kenneth Parker J restated the approach to be followed as between the Development Plan and material considerations. He said:

> "23. I reject that argument on two grounds. First, the NPPF in referring to "relevant policies" is plainly directing the mind of

> the decision maker to the express terms of the relevant policies and requiring the decision maker to compare, for consistency, the express terms with the "cost/benefit" approach of the NPPF. Secondly, and perhaps more importantly, it is a fundamental and long established principle of planning law that something identified as a "material consideration" (such as the putative economic and environmental benefit in the present context) is conceptually distinct from considerations identified in the development plan and does not *ceteris paribus* carry the same weight as an aim or consideration identified in the development plan itself. It is, therefore, essential, both analytically and in policy terms, to separate objectives or considerations specifically set out in the development plan from something else that can count only as another "material consideration". Mr Cocks' argument confounds elements that fall within different relevant categories, and which have a different character for planning purposes, and it cannot rescue the inconsistency that is obvious on its face between the relevant policies and the NPPF."

63. The claimant accepts that the defendant's officers were clearly alive to this statutory duty when they gave their advice as is evident from their separating out issues of compliance with the Development Plan from their analysis of other material considerations. However, it contends that when the committee itself came to vote on the application the chairman presented the issue as one of simply balancing the harmful impacts that were identified against the benefits that accrued from the development. That approach failed to acknowledge that section 38(6) of the 2004 Act provides a statutory presumption in favour of the Development Plan and that the failure of the proposal to comply with policy CSP.12 had to be approached as a conceptually distinct element in the planning balance which the committee had not done.

64. The interested parties contend that the case of *Colman* does not affect the previous approach of the courts. Further, the claimant acknowledges that the advice given by the officers was impeccable. One should be cautious in relying on a debate and contributions made to that debate by the members and drawing the conclusion that members failed to follow the proper approach.

65. Members were aware of the importance of JDN as one of the oldest and largest single employers in Lydney with a finishing shop on the MMC land and a foundry on their own land. Both facilities needed to be within immediate proximity of each other to achieve efficiency. In addition to direct employment the letter from Mr Roderick, the Plant Manager, emphasised that the company generated further jobs via the local supplier network where JDN spent over £1 million each year. Mr Roderick also addressed the committee at the beginning of its meeting.

66. It is clear from the officer's report that it was recognised that there were other material considerations here to which great weight could attach. That remained the case after the provision of late information. The issue of what weight should be attached was exclusively for the members.

Discussions and conclusions

67. No criticism can be made, nor is any made, of the officer report in its analysis of the Development Plan and other material considerations. It sets out quite clearly the Development Plan position and the conflict of the proposed development with it.

68. As a separate and conceptually distinct exercise the report then goes on to set out other material considerations and analyses their strength. Within the report it accepts that other material considerations in the case are of some weight.

69. The minutes of the meeting make it clear that the members were particularly impressed and influenced by the retention of existing jobs although it is evident from the advice that they received from the Group Manager, Planning and Housing, and from some of their comments in the debate that they were perfectly aware that there was no guarantee that the existing jobs would be maintained. Further, there was the prospect of provision of new additional jobs in the supermarket itself.

70. The transcript of the committee meeting makes it clear that certain members who spoke were reluctant to go against the recommendation of the officers. However, the employment consideration trumped that recommendation as there was a great need for jobs. Employment was considered to be a material consideration of the greatest weight by certain of the members who spoke. The tenor of the transcript mirrors the official minutes in this regard.

71. The members were quite entitled to disagree with the recommendation of the officers provided they had a reasonable basis for doing so. Their basis here was to give greater weight to the employment considerations than the officers. They were entitled to do so. The weight to be given to a material consideration is entirely for the decision maker.

72. There is nothing to show that the members approach was anything other than legitimate. They were clearly cognisant of the officer analysis and recommendation but declined to follow it because of the weight that they attached to what they regarded as the most significant material consideration. In their judgment that overrode conflict with the Development Plan. In my judgment they were quite entitled to come to that view: the weight that they attached to the material consideration was entirely a matter for them.

73. As is made clear in the case of *Beebee* there are real difficulties in establishing the reasoning process of a corporate body which acts by resolution. What an individual says during the debate may or may not be how he acts when he casts his vote after that debate. Many of those present at the meeting in this case made no verbal contribution. In those circumstances a court has to be extremely cautious in attaching any undue significance to a transcript of proceedings during the debate part of the decision making process. I have applied that cautious approach.

74. It follows that Ground 1 fails.

Ground 2

(a) Whether the council was required to consider the operation of Landlord and Tenant Act 1954, and if so, whether it erred in law by failing to consider that the operation of Landlord and Tenant Act 1954; and

(b) Whether the council took an illogical/irrational approach to the threat and loss of jobs at JDNL, in particular, whether the council failed to answer the relevant questions and/or failed to take reasonable steps to obtain the relevant information in relation to the threat and loss of jobs at JDNL

75. Ground 2 was not pursued with Mr Clarkson's customary vigour. The reason for that was that the applicants had submitted the relevant lease which, by clause 32, excluded sections 24-28 of the Landlord and Tenant Act 1954. That means that the security of tenure which is provided to a business tenant when he serves a notice under section 25 was inapplicable in the current circumstances. Mr Clarkson maintained, however, that there was no material before the Committee to enable it to conclude as it did on this ground and so its approach was irrational.

76. Mr Stinchcombe QC submits that the claimant has acted under a misunderstanding of the Landlord and Tenant Act. Clause 32 of the lease expressly excludes section 25 of the Landlord and Tenant Act. There is no mechanism by which the tenant can extend the lease. A landlord can do so but he has chosen not to do so. It follows that all matters were before the members and there is no basis for a contention that the council acted irrationally or unreasonably.

Discussions and conclusion

77. The documentary evidence submitted to the court makes it clear that:

    i) In the lease held by JDN sections 24-28 of the 1954 Act are excluded;

    ii) The lease under which JDN held the premises expires on 28 December 2014;

    iii) By paragraph 8 of schedule 4 to the lease the landlord may serve a notice on the tenant at any time after 1 January 2014 extending the term on the lease to 28 December 2015 but no notice has been served by the landlord.

78. The documentation submitted to the court evidences a statutory declaration prior to an agreement excluding the security of tenure so that it is, as the interested party submits, incorrect to allege that the committee relied on no more than the bare assertion by Mr Roderick as to the lease.

79. It follows that there is no proper basis to allege that the council's decision was irrational as alleged in Ground 2(a) or 2(b). Without being able to occupy the land and the premises the jobs at JDN were clearly at risk. The officers had asked the relevant questions and taken reasonable steps to obtain the relevant information as to the duration and nature of the lease. They reported that to committee. Nothing else was required to enable the members to come to a decision. This ground fails.

Ground 3: whether the council irrationally relied on condition 4 and/or whether or not condition 4 does or does not sufficiently safeguard the continuing existence of JDN

80. Condition 4 is set out at paragraph 59 above. The reason for its imposition is:

> "To ensure that the benefits which were considered to outweigh the advice in the NPPF and the development plan were delivered."

81. Mr Clarkson does not submit that the condition is invalid but, rather, that it cannot do the job which it is supposed to do. He refers back to the discussion on the planning application where the chairman recited the motion which was to: "approve the application on the basis that it safeguards the jobs at JD Norman and there are other benefits coming from the development in terms of additional jobs with Asda." It is contended that it was irrational for the committee to grant permission on the basis of safeguarding jobs when the advice of Mr Williams, the council officer, was that it could not guarantee that and that the only mechanism proposed in an attempt to achieve the outcome was condition 4 that could not achieve it.

82. The interested party submits that members considered employment at JDN and at the application site as an important material consideration. They were aware that there was no guarantee that jobs would be retained as that was clearly set out in the officer report. Condition 4 was an attempt to promote employment. Such an approach is entirely consistent with the emphasis on economic growth contained in NPPF at paragraph 19. The claimant's contention is no more than a disagreement on the planning merits with the defendant.

Discussion and conclusion

83. The members received very clear advice both in the reports and at the meeting that there could be no guarantees in terms of safeguarding jobs.

84. When asked, at the meeting, whether it was possible to guarantee jobs Mr Williams said:

> "All you can do if you think that there is merit in the application and the points that are raised as other material considerations in terms of trying to safeguard the jobs at JD Norman is provide the facilities to allow that to happen so that you can require the finishing shop and the offices to be built in advance so that they are available for use prior to commencement of the store. You are not able to guarantee that the business will continue operating from the site. You have to make a judgment as to whether or not that is likely in light of the investment that is made and any other circumstances but we cannot guarantee that."

85. Later, Mr Williams said:

> "In the supporting information that has come with the application it is quite clear that they intend to invest to do that;

> there is talk of £1.5 million loan to allow that to happen. That is significant investment. So members need to make a judgment as to whether or not that level of investment is a good indicator as to whether or not they realistically want to be there. It is not a guarantee but you can't have guarantees in terms of safeguarding jobs but is that genuine intention to deliver what they say they want to deliver which is new facilities to replace the old and then allow the redevelopment of the existing site with the supermarket and the four business units."

86. It is quite clear from that that members were very aware that their approach had to be to optimise the prospect of safeguarding jobs and come to a judgment as to how that was best to happen. The factors that contributed to that judgment were condition 4 and the investment of £1.5 million from the construction of the Asda store.

87. Condition 4 has to be seen in that context. It was imposed for a planning purpose, namely, to encourage economic growth. That is supported by paragraph 19 in the NPPF. In those circumstances it cannot be said that the members were irrational in relying upon that condition. It could not provide an absolute safeguard in relation to the continued existence of JDN, but the planning judgment which the members formed, and for which there was a rational basis, was to the effect that, although the condition could not deliver absolute certainty of employment, it was a positive step. That meant that the defendant was not irrational in its reliance upon it. Its phasing of the development optimised the situation for JDN which the members of the defendant council regarded as of significant weight.

88. There is no substance in this ground of challenge.

Ground 4: Whether the section 106 is CIL compliant and/or otherwise lawful and whether the council acted properly in giving weight to it ?

89. The claimant submits that a defendant presented with a section 106 obligation needs enough information to be able to appraise the contributions on offer and, in particular, to assess the extent to which (if at all) those contributions would reduce the serious harm to the town centre that had been identified. The officers had advised the members that it was not possible to make an informed judgment as to how far the package would mitigate the impacts of the proposal, either in whole or in part. The chairman during the debate is recorded as saying, "the mitigation that is in the 106 has been considered and it is considered that in balancing the impact and the harmful impacts that we have identified against the benefits that accrue the balance is that the residual harm is acceptable."

90. The claimant contends that the absence of any analysis in the approach meant that the committee failed to deal with several relevant questions that arose for consideration in light of the advice of the officers and failed to take reasonable steps to obtain relevant information in relation to the contributions offered. As a result the committee lacked relevant information that it needed to assess the extent to which the contribution offered would mitigate the serious harm identified. In particular, it:

    i) had no information as to the "town centre improvements" that would be made. Instead, improvements were to be after the grant of permission;

ii) had insufficient information about whether a new market square would be feasible;

iii) had no information as to whether the contribution towards shop front improvements depended on matched funding by shop owners and, if so, the likelihood of this being forthcoming; and

iv) had no information about the frequency of the shuttle bus service.

91. Alternatively, the defendant acted in breach of regulation 122(2) of the CIL Regulations 2010. The obligation breached the test in the regulation as follows:

i) a contribution for town centre management advice was desirable but was not necessary to make the development acceptable in planning terms;

ii) a contribution of £25,000 for town centre management advice was not reasonably related in scale and kind to the development when the objective was to produce a town centre improvement plan;

iii) it was impossible to conclude that the contribution of £210,000 towards the town centre improvements was necessary to make the development acceptable in planning terms, directly related to the development, and reasonably related in scale and kind to the development when the committee did not know what improvements would be suggested in due course, what they would cost, whether and if so to what extent any such improvements could mitigate the harm identified;

iv) a contribution of £30,000 towards the market square was not necessary to make the development acceptable in planning terms in the absence of any detailed information which also made it impossible to conclude that it was reasonably related in scale and kind to the development;

v) it was impossible to conclude that a contribution of £100,000 towards a shop front grant scheme was necessary to make the development acceptable in planning terms when the basis for calculating that figure and a proper explanation of how the scheme would involve third party shop owners was absent; and

vi) it was impossible to conclude that the proposed shuttle bus was reasonably related in scale and kind to the development when the committee had no information about the proposed frequency of service.

92. Those points were given added force by the recent judgment of Mr Justice Hickinbottom in *R v Mid Counties Co-operative Against Forest of Dean District Council* [2014] EWHC 3059 (Admin).

93. The interested parties submit that the two *Mid Counties* cases were decided very much on their own facts and against their own planning history. They are entirely distinguishable from the circumstances here.

94. The statutory test that the members had to be satisfied of was whether what was proposed was related to the development, whether it was fairly related to the scale and

kind of the development and whether it was necessary to make the development acceptable in planning terms.

95. The development was supported by the council because it secured all the important advantages which had been subject to additional costing which had been supplied to the members and which was to a level that was sufficient to make it acceptable. All the detail was not known but the eventual decision would be informed by a feasibility study.

96. It is clear from the committee discussion that the members were aware of the harm that would be caused by the development. They knew what the benefits were and were satisfied that the contents of the obligation were sufficient to outweigh the harm. They did not have to do more on the facts of this case where they were not constrained by the prior findings such as in the MCL cases.

Discussions and conclusions

97. In *R (Mid Counties Co-operative Limited) v Forest of Dean District Council* [2013] EWHC 1908 (Admin) ("MCL1") Mr Justice Stewart quashed the defendant's grant of planning permission. It is important to examine that case, and the later case ("MCL 2"), in more detail to see how much of the MCL 1 decision and the later MCL 2 decision were fact or site specific.

98. In MCL1 the defendant had granted planning permission for a class A1 retail store of up to 4,645 sq. m. at Steam Mills Road, Cinderford. MCL owned and operated a Co-operative supermarket in the town centre of Cinderford. The planning history was highly material. On 28 June 1999 the Secretary of State, accepting the recommendation from an inspector, had refused an application for outline planning permission on the site at Steam Mills Road for a large retail store, namely the construction of a Tesco food store with associated parking and petrol filling station. That application had been supported by the defendant but called in by the Secretary of State for his own determination. The inspector reported after a ten day public inquiry.

99. The 1999 decision of the Secretary of State had found that Cinderford town centre was weak and vulnerable. Food shopping was the main reason for visiting the centre in which there was relatively little comparison shopping. There was a high proportion (22%) of vacant shops scattered throughout the centre. It was common ground that the proposed Tesco store would have a significant impact on town centre turnover. The direct impact of the Tesco store on Cinderford town centre was to be in the range of 25-37% but the actual impact was adjudged to be nearer to the higher figure. An impact of 37% was likely to be crippling on a centre as vulnerable as Cinderford. The greatest impact was to be on the Co-op which would suffer around a 50% reduction of turnover. A survey of Cinderford shoppers revealed that of those that did not go into the town centre 91% said it was unlikely they would start to use it as well as the new Tesco. Of those going into the town centre 22% said that they would no longer use it if the new Tesco was built. That suggested a decline in usage rather than increased spin off. The centre was found to lack a sufficient range of non-food shops or other attractions to give any hope of significant spin off occurring.

100. In considering the suitability of the site for the development proposed and whether there were any considerations which would outweigh any possible harm to the vitality

and viability of the town centre the inspector in 1999 concluded that benefits would accrue to the town centre in the form of increased parking at Haywood Road … paying for public toilets and other cosmetic enhancements to shop fronts etc. but would not be directly related to the impacts for development, would not meet the tests of the circular nor significantly enhance the centre as a draw for Tesco shoppers. As a result, whilst there would be tangible benefits associated with the proposal, they would not outweigh the very serious harm to Cinderford town centre if the proposal went ahead.

101. In the officer report in 2011, on the application which the defendant had to determine, analysis undertaken on behalf of the council estimated that between 25-30% of the current level of expenditure flowing to Cinderford town centre would be diverted to the proposed store. The report went on to say that the mitigation offered by way of financial contributions and support to Cinderford town centre regeneration scheme were a significant material consideration and satisfactory to offset the harm to the vitality and viability of the town centre and consequently the proposal was acceptable.

102. There was limited reference to the 1999 decision in the officer report where the fact of the application was set out together with a note that the Secretary of State had called it in and the appeal had been dismissed in June 1999. The reason for the dismissal was recorded as: "adverse impact on the vitality and viability of the town centre. In addition that the proposal failed to satisfy a sequential test as required in PPG6."

103. Mr Justice Stewart found, in [22.6], that the advice from the officers that the mitigation offered was satisfactory to offset the harm to the vitality and viability of the town centre and that the financial contributions were a significant material for consideration was inaccurate. In addition, there was no analysis, merely assertions of the mitigation of harm. He found it instructive that the Secretary of State had rejected, in relation to the particular site, the spin off "arguments" in terms of linked trips which were asserted in the officers' report in the statement, "these improvements to the public realm will enhance the town centre as a destination and encourage linkage trips."

104. Although the council had relied on surveys that they had commissioned the studies did not consider the application site or the impact of an out of centre supermarket on town centre vitality and viability or the improved linkages that would be required. Stewart J found it highly material that the studies did not address the position of the town centre given the very substantial impact. That was exactly the point which had in fact been addressed in the relevant paragraphs in the 1999 decision. He found, further, that there was no proper analysis of the 1999 decision in the officer report and that there was insufficient to support the submission that members were familiar with the planning history on major retail projects in Cinderford.

105. On the section 106 obligation Stewart J accepted a submission that the officers did not ask themselves how contributions would improve linkages between the site and town centre sufficiently so as to offset diversion of expenditure from the town centre to the site. Although the officers had referred to the 2007 Town Centre Enhancement Study that did not provide appropriate analysis of the benefits needed to reduce the harm to the town centre consequential upon granting permission. No adequate reasons were given to justify the opinion that the mitigation offered was satisfactory to offset the harm. He accepted that an architectural lighting scheme, landscaping and bulb

planting scheme and the provision of high quality materials in the high street could properly be said to be directly related to the development in that they were capable of encouraging some customers to shop in the main shopping centre of Cinderford it could not be said that the section 106 obligations were necessary to make the development acceptable in planning terms so as to constitute a reason for granting planning permission. There was, therefore, a breach of Regulation 122(2A).

106. In MCL 2, in which judgment was handed down on 30 September 2014, Mr Justice Hickinbottom considered a further challenge by MCL in relation to the same Steam Mills Road site following the redetermination of the application which had been quashed by the decision of Mr Justice Stewart on 4 July 2013. The basis of that claim was that the committee had fallen into the same errors that had led to the quashing of the first determination. Mr Justice Hickinbottom allowed the application and quashed the decision.

107. Mr Justice Hickinbottom referred to a report of November 2013 which had been commissioned by the defendant from GVA. It did not differ substantially from the earlier report which had considered that the Co-op store would lose half its turnover and would be at risk of closure with consequential adverse effects for other shops as a result of an anchor store closing or at least losing a considerable number of customers. The overall impact on the town centre was put at 30% and at 41% of the convenience goods sector alone. Nothing in the report suggested that the position with regard to linked trips had changed since the report on the first application.

108. The claimant's submission that the officers' report continued to provide no analysis of how the section 106 contributions would or might reduce the adverse effects caused to the town centre by the proposed superstore was accepted. Mr Justice Hickinbottom said at [57-61]:

> "57. One of the problems for the Council in defending the first determination before Stewart J was the fact that there was no evidence upon which to base an analysis of how the harm created to the town centre by the development would or might be mitigated by the section 106 contributions. The reports of GVA set out, to an extent, the nature of the harm, e.g. substantial reduction in customers for and possible closure of the Co-op anchor store, with a correlative reduction in in-town linked trips. GVA expressly disagreed with Trilogy's contention that the picture surrounding linked trips was different from the position in 1999. However, they did not address the question of whether, how and to what extent the section 106 measures would or might address that harm. Nor did they do so in the 2013 report. It seems that they were not asked to address that issue which, in the light of Stewart J's judgment, is somewhat curious.
>
> 58. I am unable to accept the submission that OR2 remedied the errors of law with regard to the section 106 contributions identified by Stewart J, by its references to the purported changes in local policy and strategy. Indeed, the matters referred to above, as purportedly remedying the errors, were all

> before Stewart J. OR1 set out all of these matters in substantively the same terms as OR2 (see paragraph 29(vi) above); and Stewart J also expressly referred to them, in this context (see paragraph 26 of his judgment). He referred to the regeneration programme, the Cinderford Northern Quarter Area Action Plan, and the Cinderford Town Centre Regeneration Scheme. In concluding that the officers had failed to analyse how the section 106 contributions would mitigate the harm, the judge therefore had in mind these matters. There is simply nothing new, of substance, in OR2. Consequently, even if I were minded to consider that Stewart J might have been wrong to have made the findings that he did, it would be difficult for me now to come to a different conclusion. His judgment was not the subject of any appeal.
>
> 59. However, I consider Stewart J was clearly right.
>
> 60. In this case, the Council contend that the section 106 contributions are necessary to make the development acceptable in planning terms. Those contributions are intended to mitigate the harm caused by the development to the town centre – that is their only purpose. It is common ground that that harm will be substantial.
>
> 61. The Council was clearly required to be satisfied that the contributions would mitigate that harm. That required some consideration of how, whether and (if at all) the extent to which it would do so. That was not an onerous task, nor did it require any form of mathematical exactitude. But it was a material consideration with which the Planning Committee was required to grapple: and OR2 (and, in its turn, the Committee) failed to do so."

109. Hickinbottom J accepted that the relevant report failed to perform the analysis required of assessing how improvements to the town centre lighting scheme, planting scheme, building materials and footways and the improvements of bus stops and service information, helped to overcome the diminution or loss of the anchor Co-op store (and loss of linked trips) and any other harm given the lack of retail or other attractions in the town centre which would be compounded by the development proposed.

110. He went on to find that there had been no material change since the decision in 1999 in a way that was favourable to the grant of planning permission. The conclusion then that significant spin off in the form of linked trips was "most unlikely" and that the town centre was so lacking in retail and other attractions to give any hope of significant spin off occurring remained the position.

111. I do not regard either MCL judgment as setting forward any new principle to be applied when a planning authority has to consider whether a section 106 obligation offered overcomes the harm caused by a proposed development. It is axiomatic that a local planning authority must apply the law now set out in the CIL Regulations, to its

decision making process. That means, that in relation to a section 106 obligation which has been offered by a developer, a decision maker must approach its assessment of the statutory tests with appropriate rigour. What is appropriate will clearly vary in the circumstances of each case. That was particularly pertinent in the Cinderford cases due to the vulnerable nature of the town centre and the lack of any material change since the detailed decision of the Secretary of State in 1999.

112. I turn now to consider the situation of Lydney and the current challenge to this application. The officers' view was that the proposal caused a significant adverse impact on the health of Lydney town centre (34%). The officers went on to consider a further cumulative impact should a resolution to grant planning permission for a Sainsbury's store also be implemented. The two stores would compete against each other but the possibility of cumulative impact on the town centre increasing could not be ruled out. It follows that the starting point for the members was, applying the advice in NPPF paragraph 27, a presumption of refusal.

113. The officer report analysed the effect of the retail impact on what were regarded as the three key stores in Lydney, namely, Tesco, the Co-op and Tuffins. On Tesco, it was considered that there would be a noticeable effect on the trading performance which was likely to have knock-on consequences for the town centre but the store would not close. In relation to the Co-op, that was already trading at a level below the 2011 Lydney retail study benchmark figure and the development would worsen that situation. As a result of being already under pressure closure of the Co-op could not be ruled out and there was a possibility that there would be a reduction in the range and depth of products on offer (including non-food goods) and ongoing investment in the store could be affected. On Tuffins, that was poorly performing but because of the potential sale to another operator the future was inconclusive.

114. Because of the limited expenditure in the Lydney area and significant overall reduction in expenditure within the town centre there were concerns about the convenience sector. All three stores of major concern were within the town centre and shoppers had the opportunity to visit them together with other shops and services in the same visit. With the proposed store 1km from the town centre linked trips were far more unlikely. Although a footpath link was to be provided there was no intervisibility between the proposed store and the town centre so that the proposal was more likely to offer a one stop shopping experience.

115. The council's retail consultant advised that post-impact trading performance indicated loss of turnover and poor trading performance with the consequence that some town centre retailers may stop investment due to the poor returns that it may provide. If that happened then the town centre would be a poorer quality destination than at present.

116. In the section of the officer report on impact mitigation headed section 106 requirements it was recorded that the applicants acknowledged that the adverse impact of their proposal could not be entirely overcome by the package. The applicants put forward developer contributions to support the town centre and promote its physical enhancement to mitigate the potential identified harm. Those contributions were costed and analysed by consultants acting for the applicants.

117. Having summarised what was offered the officer report went on the review the issue of impact mitigation. It said:

> "The issue of impact mitigation is a key consideration as was recently demonstrated in relation to the High Court challenge in relation to the supermarket in Cinderford. It should be noted that the offer put forward is similar to that of the Robert Hitchins Ltd. and Sainsbury's proposal. The offer has been put forward on the basis of mitigating the impacts of a single store. Whilst the applicants' offer is welcomed, there are a number of issues that are raised as a result. Firstly, regarding the expert advice which would ultimately lead to the production of a town centre improvement plan. It would normally be expected that this work would accompany the planning application in order to inform and quantify the impacts that would need to be mitigated against. The danger of having it as part of the s106 package is that without the impacts being quantified, that nothing could be done in order to mitigate the harm that would result to the town centre. Regarding the feasibility study and implementation, it may be the case that it is not feasible to have a market or market square. The result could be that none of this element of the package would come forward and the impacts of the proposal would not be mitigated in either whole or part. Regarding the public realm improvements, a number of the options could make the town centre more attractive, but it should be borne in mind that there are no detailed schemes in place that this money could be spent upon or detailed evaluation as to how such works would offset the significant reduction in town centre trading which has been identified. Whilst it is acknowledged that the Neighbourhood Development Plan is in preparation, it has not been subject to the required referendum and as such, can be given no weight. Specifically relating to shop fronts grants, this could potentially be delivered, but if buildings are owned by third parties and the money is to be match funded with each party providing half the funds, there is a danger that this may not become reality.
>
> Regarding the monies for CCTV provision, this is a contribution that could potentially be secured as it would be possible to identify those areas of the town centre currently not covered by the existing provision. In relation to the provision of the path/transport link, this is a contribution which has already been secured by the residential planning permission on land to the north and as such it is considered that it would not be reasonable to include within this package. The implementation of the link is addressed within the relevant highways section of this report. It is a contribution which at the present time has not been paid but it is understood that separate discussions are on-going regarding this matter.

> Finally the bus service, the information provided is not sufficiently detailed to determine as to what this money would provide. The applicants have identified that it would run for a five year period, or less if a commercial operator took the service over sooner. However, there is no information regarding the frequency of the service over this five year period. Once the bus service stops, this mitigation, and the opportunities for linked trips that the applicant identifies, would cease. Overall, due to the lack of detail within the offer, it is not possible to make an informed judgement as to how far the package would mitigate the impacts of the proposal either in whole or part."

118. According to the minutes of the meeting the motion put forward by the ward member, and seconded, was:

> "That the application be approved, as this development of a brown field site would safeguard existing and new jobs and that impacts arising from the development would be mitigated by the 106 obligations offered."

119. In the transcript the chairman is recorded as saying:

> "The motion is to approve the application on the basis that it safeguards the jobs at JD Norman and there are other benefits coming from the development in terms of additional jobs with Asda. The mitigation that is in the 106 has been considered and it is considered that in balancing the impact and the harmful impacts that we have identified against the benefits that accrue the balance is that the residual harm is acceptable. You are proposing that there is a condition specifically to deliver the finishing shop and offices before commencement of the retail store."

120. In those circumstances the members decided to reject the advice of their officers that there was insufficient detail to enable an informed judgment to be made on whether the section 106 obligation would mitigate the impacts of the proposal.

121. So far as the members were concerned, in my judgment, they had first to consider whether there was sufficient information available to them to take the section 106 agreement into account and then to be aware of, and apply, the statutory tests, but that was not something which, in the circumstances of this case, had to be applied with mathematical exactitude. Members had been advised by the officers that the applicants regarded the offer as part-mitigation only for the harm caused by the development. Further, members were reminded in the Officer Report that, in demonstrating compliance with the Regulations, the applicants noted that the purpose of the developer contributions was to support the town centre, and that its physical enhancement to redress the potential identified harm was necessary, directly related to the development and subject to a reasonable mechanism to review, reasonable in scale and kind. The members were, therefore, expressly reminded by the officers of the relevant tests.

122. The starting point for members was, therefore, an acceptance of harm to the town centre. It was against their acceptance of that principle that it can be inferred that members were satisfied that they had sufficient information to be able to take the section 106 into account. They were looking for partial amelioration of harm. That was a matter for their judgement.

123. Members were experienced members of the Planning Committee and had undergone mandatory training. As such it is a reasonable inference, in particular, as they were reminded of the tests in the officer report, that the members were familiar with the tests to be applied to consider and to take into account a section 106 obligation. They were under no obligation to spell out the CIL Regulations by name in their debate to demonstrate that they had applied them and there is nothing to indicate that the Regulations were not applied.

124. There were loose ends as a result of the applicant's obligation, such as the outcome from the feasibility study, that related to how the covenant to spend £380,000 in the town centre was to be deployed. What members were satisfied on was that the sum was necessary to bolster the town centre and increase its attractiveness. They can be regarded as accepting the applicant's arguments and being satisfied that what was on offer was sufficient to make the development acceptable in planning terms. The same applies to their judgement on the offer of a bus service for a period of five years even though warned by the officers that there was no information on frequency and that the opportunity for linked trips would cease with the cessation of the service.

125. The presumption in favour of refusal applying the NPPF was capable of being overcome by the weight that members attached to the material consideration of employment and taking into account what was offered in the section 106 agreement. That does not mean that the members misapplied the statutory tests in their consideration of a section 106 obligation. Their decision accords with their view that the benefits were sufficient to mitigate the residual harm caused by the development, at least in part and they were content, as I have said, as a matter of their judgement to accept harm to the retail centre of Lydney town centre.

126. The circumstances of this case are, in my judgment, distinguishable from the two MCL cases. There was no detailed prior finding here as there had been in the 1999 Secretary of State's decision letter which set the benchmark, absent any material change in circumstance, against which subsequent decisions on the same site had to be taken. The 1999 decision influenced the decision of Mr Justice Stewart which in turn was highly material to the judgment of Mr Justice Hickinbottom. In Lydney, as Mr Stinchcombe submits, the members were not constrained by such material considerations.

127. In conclusion, the council concluded that the development secured important advantages to the town of Lydney. The section 106 obligation had been costed by DPP, independent consultants for the applicant, and, whilst regarded by the officers as lacking, was found adequate by the members. On a fair reading of the proceedings, members were entitled to conclude that they had sufficient information to enable it to be taken into account and to meet the statutory tests given that acceptance of some harm to Lydney town centre was the members starting point. That was a matter of planning judgement entirely for them.

128. It follows that in the circumstances Ground 4 fails also.

129. In the circumstances of this case I would have granted permission to proceed but refused relief on the substantive application for the grounds set out above. I invite submissions on costs and the final Order.

DOVER DC v CAMPAIGN TO PROTECT RURAL ENGLAND (KENT)

SUPREME COURT

Lady Hale (President), Lord Wilson, Lord Carnwath, Lady Black, Lord Lloyd-Jones: 6 December 2017

[2017] UKSC 79; [2018] Env. L.R. 17

LT Environmental impact assessments; Mixed use development; Planning authorities' powers and duties; Planning permission; Quashing orders; Reasons

H1 *Environmental Impact Assessment—duty to give reasons—standard of reasons—remedies—common law duty to give reasons—whether special duties to give reasons arise in development subject to environmental impact assessment—whether quashing of planning permission was an appropriate remedy when there had been a failure to give reasons*

H2 The first appellant (DDC) was a local planning authority responsible for granting planning permission for a mixed use development involving 521 residential units; a retirement village; a hotel and conference centre and the conversion of a series of Napoleonic fortifications into a visitor centre and museum. The second appellant (CGI) was the applicant and the respondent (CPRE) objected to the original proposal. The development was categorised as "EIA development" for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the 2011 Regulations) and was accordingly accompanied by an environmental statement. DDC resolved to approve the application. Over 18 months' later, the application returned to DDC's Planning Committee with an updated report and the Committee resolved to grant planning permission subject to the completion of an appropriate s.106 agreement. The s.106 agreement was executed some six months' later and planning permission was granted on the same day. The notification of grant of planning permission was a long document but contained no reference to any obligations to give reasons under the 2011 Regulations. CPRE sought to challenge the grant of planning permission on the basis that no reasons for the decision were given. Following the dismissal of the judicial review in the High Court ([2015] EWHC 3808 (Admin)), the Court of Appeal allowed the appeal and quashed the permission on the basis that three particular factors called for clear reasons for the decision to grant planning permission, namely the pressing nature of relevant policies in the National Planning Policy Framework; the departure from the planning officer's recommendations; and the specific duty to give reasons imposed by the 2011 Regulations ([2016] EWCA Civ 936). DDC sought permission to appeal to the Supreme Court and in granting such permission, the Court indicated

that it would wish to consider generally the sources, nature and extent of a local planning authority's duty to give reasons for the grant of planning permission.

H3 **Held**, in dismissing the appeal:

H4 (1) Following a public inquiry or hearing, the Secretary of State or a planning inspector had an obligation to notify any decision and reasons for that decision in writing to all persons entitled to appear who had appeared and any other attendee who had asked to be notified. There was no corresponding statutory rule applying to decisions following a written representations appeal. However, it was the practice for a fully reasoned decision to be given and it was accepted that there was an enforceable duty that arose either from the principles of procedural fairness or from the legitimate expectation generated by the Secretary of State's long-established practices. It had long been the case that Local planning authorities had to give reasons for refusing permission or imposing conditions. Until 2003 there was no statutory duty on local planning authorities to give reasons for the grant of planning permissions as such. From 2003 until 2013, when planning permission was granted, local authorities had been required to include in the notice of the decision a summary of their reasons. That duty had been repealed by the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 art.7. Accordingly, since 2014, local authority officers making any decision involving the grant of a permission or licence had been required to produce a written record of the decision and reasons for it, under the Openness of Local Government Bodies Regulations 2014 reg.7. Special duties arose where an application involved EIA development. Under reg.3(4) of the 2011 Regulations, decision-makers were to state in their decision that they had taken reasonable environmental information into consideration. Under reg.24(1)(c), where a local authority determined an EIA application, it had to inform the public of the decision and make available a statement containing the main reasons on which the decision was based.

H5 (2) Where there was a legal requirement to give reasons, an adequate explanation was needed. If a local authority accepted the officers' report, no reasons further than those in the report might be needed. Even if it was not accepted, it might normally be enough for the committee's statement of reasons to be limited to the points of difference. The essence of the duty was the same: whether the information provided left room for doubt about what had been decided and why.

H6 (3) Public authorities were under no general common law duty to give reasons, but it was well-established that fairness could, in some circumstances, require it, even in a statutory context in which no express duty was imposed. The existence of a common law duty to give reasons, supplementing the statutory rules, was consistent with the government's decision in 2013 to abrogate the statutory duty to give reasons for the grant of permission. Although planning law was a creature of statute it was underpinned by general principles properly referred to as derived from the common law.

H7 (4) It was not in dispute that DDC was in breach of a specific requirement in the 2011 Regulations to make available a statement of "the main reasons and considerations" on which the decision was based. The only issue was the nature of the remedy. A declaration that the local authority had not complied with the EIA duty, with reasons to be supplied retrospectively, would not be sufficient. No attempt had been made to formulate reasons since permission was given. The defect in reasons went to the heart of the justification for permission. The only appropriate remedy was quashing the permission.

H8 **Cases referred to:**

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2001] Env. L.R. 16; HL

Clarke Homes Ltd v Secretary of State for the Environment [2017] P.T.S.R. 1081; (1993) 66 P. & C.R. 263; [1993] E.G. 29 (C.S.); CA (Civ Div)

Hijazi v Kensington and Chelsea RLBC [2003] EWCA Civ 692; [2003] H.L.R. 72

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] P.T.S.R. 623

Kennedy v Information Commissioner [2014] UKSC 20; [2015] A.C. 455; [2014] 2 W.L.R. 808

Martin v Secretary of State for Communities and Local Government [2015] EWHC 3435 (Admin)

Oakley v South Cambridgeshire DC [2017] EWCA Civ 71; [2017] 1 W.L.R. 3765; [2017] 2 P. & C.R. 4

R. (on the application of Campaign to Protect Rural England) v Dover DC [2015] EWHC 3808 (Admin)

R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710; [2016] Env. L.R. 5

R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567; [2014] 2 E.G.L.R. 98; [2014] P.T.S.R. D14

R. (on the application of Hawksworth Securities Plc) v Peterborough City Council [2016] EWHC 1870 (Admin)

R. (on the application of Macrae) v Herefordshire DC [2012] EWCA Civ 457; [2012] L.L.R. 720; [2012] J.P.L. 1356

R. (on the application of Richardson) v North Yorkshire CC [2003] EWCA Civ 1860; [2004] 1 W.L.R. 1920; [2004] Env. L.R. 34

R. (on the application of Siraj) v Kirklees MC [2010] EWCA Civ 1286; [2011] J.P.L. 571

R. (on the application of Wall) v Brighton and Hove City Council [2004] EWHC 2582 (Admin) ; [2005] 1 P. & C.R. 33; [2004] 4 P.L.R. 115

R. v Aylesbury Vale DC Ex p. Chaplin (1998) 76 P. & C.R. 207; [1998] J.P.L. 49; CA (Civ Div)

R. v Higher Education Funding Council Ex p. Institute of Dental Surgery [1994] 1 W.L.R. 242; [1994] E.L.R. 506; [1994] C.O.D. 147; DC

R. v Mendip DC Ex p. Fabre [2017] P.T.S.R. 1112; (2000) 80 P. & C.R. 500; [2000] J.P.L. 810; QBD

R. v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; (1995) 7 Admin. L.R. 1; HL

Poyser and Mills Arbitration, Re [1964] 2 Q.B. 467; [1963] 2 W.L.R. 1309; (1963) 107 S.J. 115; QBD

Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 W.L.R. 153; 89 L.G.R. 809; (1991) 3 Admin. L.R. 437; HL

Secretary of State for Communities and Local Government v Hopkins Homes Ltd [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] P.T.S.R. 623

Secretary of State for Education and Science v Tameside MBC [1977] A.C. 1014; [1976] 3 W.L.R. 641; (1976) 120 S.J. 735; HL

South Buckinghamshire DC v Porter (No.2) [2004] UKHL 33; [2004] 1 W.L.R. 1953; [2005] 1 P. & C.R. 6

Walton v Scottish Ministers [2012] UKSC 44; [2013] P.T.S.R. 51; [2013] Env. L.R. 16
West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC [2013] EWHC 2834 (Admin)
Westminster City Council v Great Portland Estates Plc [1985] A.C. 661; [1984] 3 W.L.R. 1035; (1985) 50 P. & C.R. 34; HL

H9 **Legislation referred to:**
Criminal Justice Act 1967 s.61(1)
Town and Country Planning Act 1990 s.70(2), 79(2), 106, 288(5)(b)
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) reg. 2(1), 21(1), Sch. 1
Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) r.11,
Freedom of Information Act 2000
Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) art. 6
Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 (SI 2003/2047) art. 5
Planning and Compulsory Purchase Act 2004 s.38(6)
Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) art.31
Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) reg. 2(1), 3(4), 21, 24(1)(c), Sch. 1
Directive 2011/92 on the effects of public and private projects on the environment (Environmental Impact Assessment) art.9, 11(a)
Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 (SI 2013/1238) art.7
Openness of Local Government Bodies Regulations 2014 (SI 2014/2095) reg.7(2)
Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) art. 35(1)

H10 *Mr N. Cameron QC* and *Mr Z. Simons*, instructed by Dover DC, appeared on behalf of the first appellant.
Mr M. Reed QC and *Mr M. Fraser*, instructed by Pinsent Masons LLP, appeared on behalf of the second appellant.
Mr J. Howell QC and *Mr N. Westaway*, instructed by Richard Buxton Environmental and Public Law, appeared on behalf of the respondent.

JUDGMENT

LORD CARNWATH:

(with whom Lady Hale, Lord Wilson, Lady Black and Lord Lloyd-Jones agree)

1 When a local planning authority against the advice of its own professional advisers grants permission for a controversial development, what legal duty, if any, does it have to state the reasons for its decision, and in how much detail? Is such a duty to be found in statutory sources, European or domestic, or in the common law? And what are the legal consequences of a breach of the duty?

2 Those issues are presented by this appeal in a particularly striking form. The context is a proposal for major development to the west of Dover, on two sites referred to as Western Heights and Farthingloe. The latter is within the Kent Downs Area of Outstanding Natural Beauty. Western Heights is a prominent hilltop overlooking Dover, dominated by a series of fortifications dating from the Napoleonic wars, including the so-called "Drop Redoubt". The site is a scheduled monument. Farthingloe is in a long valley between the A20 and the B2001 to the west of Western Heights, and comprises 155 hectares of agricultural and scrubland.

The application

3 The application for planning permission was submitted by the second appellant ("CGI") to the local planning authority, the Dover District Council ("the Council"), on 13 May 2012. The principal elements were: 521 residential units and a 90 apartment retirement "village" at Farthingloe; 31 residential units and a hotel and conference centre at Western Heights; and conversion of the Drop Redoubt into a visitor centre and museum. A payment of £5m for the improvements to heritage assets, to be funded from the profits of the residential development, was to be secured by a planning agreement. The development was categorised as "EIA development" for the purpose of the relevant regulations (Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) reg.2(1)), and was accordingly accompanied by an environmental statement.

4 The proposal attracted strong support and strong opposition. Some saw it as offering a much-needed boost to the local economy. Thus, for example, the South East Local Enterprise Partnership commented:

> "The proposals represent a major opportunity for both Dover and the wider tourism and visitor economy of East Kent at a time of major challenges facing the local economy. In the absence of likely public-sector funding to act as a catalyst for change it is essential that the private sector is encouraged to move forward with confidence and business can aid recovery. Approval of the application would be timely in demonstrating that Dover is open for business and investment. Refusal would send out all the wrong messages to investors."

Others (including the present respondents, CPRE Kent) saw it as a serious and unjustified breach of national policy. Thus the AONB Executive said:

> "The Farthingloe valley in the Kent Downs Area of Outstanding Natural Beauty is an enormous asset to Dover. This dry chalk valley provides a memorable approach to the town, with glimpses of Dover castle, as well as a green setting for both the town and the Western Heights available for all to enjoy. The proposed development of over 500 houses in a particularly prominent area of the valley would irreparably damage this nationally protected landscape. It would cause significant harm to the special character and the natural beauty of the AONB. No meaningful mitigation would be possible. The scheme is wholly contrary to national and local policy and is a major challenge to the Government's purposes for AONB designation. We have found no other housing development nationally on a similar scale which has been approved in an AONB …"

The planning officers' report

5 These views along with many others on both sides were faithfully summarised in the officers' report to the Planning Committee, circulated on 7 June 2013. The report, under the name of the Head of Regeneration and Development, is a remarkable document. It runs to some 135 pages with appendices. It contains a comprehensive exposition of the various elements of the proposed development, the responses to consultation public and private, and the applicable national and local policies, followed by a detailed appraisal of the relevant issues, and concluding with a recommendation for the grant of permission but in amended form.

6 The principal change recommended by the officers was the exclusion from the development at Farthingloe of a "safeguarded area" of some 2ha in the south-west (in the more prominent sector known as FL-B), where "officers consider the landscape harm … most acute"; and the consequent reduction of the number of houses at Farthingloe from 521 to 365. The Council's economic advisers, Smiths Gore, had advised that the reduction would not jeopardise the viability of the scheme or the intended financial contributions (officers' report paras 2.216, 2.443, 2.445). One aspect of Smiths Gore's advice was to suggest a reduction in the Code for Sustainable Homes (CSH) rating from Code 4 to Code 3, which would not only deliver a viable development but would also achieve "a more marketable and higher quality housing scheme … this being important to help diversify and improve the Dover housing offer" (paras 2.217, 2.443). Among other recommended conditions, it was proposed that the provision of the hotel should be secured by requiring it to be commenced before one of the development phases (para.2.131(iii)).

7 In a section of the report headed "NPPF (para.116) review", reference was made to that paragraph of the National Planning Policy Framework (NPPF), which indicates that major development in an AONB should be permitted "only in exceptional circumstances and where a public interest can be demonstrated". The officers regarded the level of harm to the AONB as "significant", particularly to the south-west of sector FL-B where "built development on the elevated and exposed terrain would seriously compromise the landscape character". They concluded:

> "2.447 Nevertheless it is your officers' opinion that offsetting the landscape harm by the modifications outlined in this report would shift the planning balance in favour of the economic and other national benefits of the application. The local economic issues and specific circumstances of this case … are considered to provide a finely balanced exceptional justification for this major AONB development, the benefits of which would be in the public interest. Essential to this conclusion would be seeking all the recommended conditions (changes) and ensuring (by condition / s.106 agreement) the deliverability of all the relevant application 'benefits' . The rationale for the application is as a composite package, and any permission should therefore be framed to ensure the emergence of the proposals in a structured and comprehensive fashion."

8 It was noted that the applicant had not yet been given an opportunity to comment on these proposed changes. If they were supported in principle by the Committee, it was suggested that they might delegate to officers to discuss with the applicant "any minor variation of the proposed residential quantum", and the precise

boundaries of the safeguarded area, although it was "not envisaged that this should lead to any notable change in the recommended approach" (para.2.448). On balance their conclusion in this case was that the application would, as "a single comprehensive scheme", support rather than work against the overall objectives of sustainable development as defined by the NPPF (para.2.454).

9 In a section headed "Conclusion" it was stated:

> "… the officer position is that the conditions / changes as set out in this report (informed by independent legal and financial viability advice) are well founded and that all are necessary to deliver the right composite package, including the economic benefits, so that an on balance recommendation of approval can reasonably be made." (para.2.457)

The report ended with a recommendation for the grant of conditional planning permission (part outline, part full) for the various elements of the proposal, but with a limit of 365 residential units at Farthingloe, and subject to the completion of a planning agreement (under s.106 of the Town and Country Planning Act 1990) to secure the proposed benefits including the hotel and conference centre.

10 The report was shown to the applicants. Their consultants, BNP Paribas, wrote on 11 September, expressing "fundamental" disagreement with Smiths Gore's appraisal of viability. They commented on the proposed reduction to 365 houses:

> "We have re-run our appraisals to test the impact of the removal of 156 units, as suggested by Smiths Gore. The result is to turn a positive land value of £5.85m to a negative land value of -£3.03m. On the basis of this result, the scheme would not secure funding and could not proceed.
>
> For the avoidance of doubt, we do not agree with the planning officer's assessment that the benefits provided by the Application scheme could also be provided by the sensitivity analysis mooted by Smiths Gore. Indeed, our view is that such a scheme would not be capable of providing the benefits offered and could not proceed as it would be incapable of providing a competitive return to the landowner and developers, as required by the National Planning Policy Framework."

They also disagreed with the suggestion that the proposed changes would make the scheme more marketable. Although the letter was not seen by the members of the committee (other than the chairman), its effect and Smiths Gore's response were summarised at the meeting (see below).

The Committee meeting

11 The application was considered by the Planning Committee on 13 June 2013. The very full minutes record that the meeting started at 6.00 pm and ended at 9.38 pm, with a short break at 9.00 pm following the main vote for the officers to make amendments to their recommendation. (Also on the agenda was one other minor planning application which was dealt with first.) On the Farthingloe application there were contributions by four members of the public (two for and two against). There was a detailed presentation by the officers of the proposals and the issues, during which reference was made to the issue of viability and the BNP Paribas letter, the effect of which was summarised. The minute continued:

> "The Principal Planner advised the Committee that, having considered the further views of BNP Paribas, Smiths Gore stood by their analysis that a lower density scheme would be viable and would deliver the same monetary benefits as currently on offer. Officers therefore recommended that a lower density scheme should be approved as it was viable, not excessive for the site and would be compliant with the Core Strategy."

12 After the officers' presentation, five members were recorded as speaking in favour of the proposal, and one against. Another expressed concern about the security of the proposed payment of £5m. The views of three named supporters were expressed collectively; they saw it as "a rare opportunity for regeneration and investment", and a "courageous step … necessary to give Dover's young people a future"; of the proposed amendments they said:

> "…, it was felt that the application should not be restricted in the way proposed in the recommendation as this could jeopardise the viability of the scheme, deter other developers and be less effective in delivering the economic benefits. The Committee had to assess whether the advantages outweighed the harm that would be caused to the AONB. When seen from the ground and with effective screening, it was believed that this could be minimised. In these exceptional circumstances it was considered that the advantages did outweigh the harmful impact on the AONB."

13 At the end of the discussion a motion was proposed that the officers' recommendation be approved but subject to amendment of the number of houses from 365 to 521 as proposed in the application. The motion was carried (the voting is not recorded). The meeting was adjourned for 25 minutes to enable the officers to re-word their recommendation with consequential amendments. A vote was then taken on the amended recommendation, which was approved.

14 On 11 July 2013, in response to requests by (among others) CPRE Kent, the Secretary of State declined to call in the application for his own determination.

The section 106 agreement and the grant of permission

15 On 18 December 2014 the application returned to the planning committee with an updated officers' report. The introduction to the report made clear that its purpose was, not to revisit the decision to grant permission in the previous year, but to update the committee on the s.106 agreement, and to provide "an assessment of planning considerations which have emerged since the resolution to grant planning permission" (para.3). The report on the s.106 agreement confirmed that, contrary to the officers' recommendation in June 2013, there was no obligation linking the provision of the hotel to the phasing of the residential development:

> "The s.106 is drafted in accordance with the Committee resolution which places no obligation on the applicant to provide the hotel at any point in time and there is no obligation to provide the hotel at any stage during the build-out of other development proposed in the application. Rather, the objective of the s.106 is to provide the opportunity for a quality hotel to come forward." (para.35)

16 Although Mr Cameron drew our attention to some aspects of this report, it does not seem to have been relied on in the courts below. Mitting J (para.6) merely noted

that the revisions were not material to the issues which arose in the case. The December meeting was not mentioned by the Court of Appeal. I can find nothing in the report or minutes to suggest an intention to revisit the substance of the decision of principle made in June 2013, nor which throws further light on the reasons for that decision. The committee resolved to grant permission subject to the completion of the s.106 agreement.

17 The agreement was executed on 1 April 2015, and planning permission was granted on the same day. The notification of grant is a substantial document, running to more than 50 pages, including a long list of approved documents supporting the application, and detailing 183 conditions. It concludes with a note ("for the avoidance of doubt") that the Environmental Statement accompanying the application has been taken into account. But it contains no reference to any obligation to give reasons under the EIA regulations (see below), nor any formal statement of the reasons for the grant.

The proceedings

18 The present proceedings for judicial review, on a number of grounds including lack of reasons, were heard by Mitting J at a rolled-up hearing in December 2015, and were dismissed by him on 16 December: [2015] EWHC 3808 (Admin). Permission to appeal was granted solely on the issue of reasons. On 16 September 2016 the Court of Appeal (Laws and Simon LJJ) allowed the appeal and quashed the permission: [2016] EWCA Civ 936.

19 Laws LJ noted the controversy at the Bar as to the standard of reasons required (para.18). He pointed to three particular factors as calling for clear reasons in this case: the "pressing nature" of the AONB policy as expressed in the NPPF para.115–6 ("the highest status of protection"); the departure from the officers' recommendation; and the specific duty imposed by the EIA regulations (paras 21–23). Although he noted the relative "thinness" of the material available to the committee on the viability issue, he relied principally on the failure of the committee to assess and explain the degree of harm to the AONB, having regard to the strictness of the policy and the strong view of harm taken by the officers (paras 29–30). The only reference to this issue in the minutes spoke of the need to assess whether the advantages "outweighed" the harm to the AONB, wrongly implying that it was simply a question of "striking a balance". Further the reference to "minimising the harm" by "effective screening" took no account of the officers' view that the change of levels to the east would mean that "over time, screening would be largely ineffective."

20 In granting permission to appeal (on 2 March 2017), this court indicated that it would wish to consider generally the sources, nature and extent of a local planning authority's duty to give reasons for the grant of planning permission.

Duties to give reasons—statutory sources

21 The Town and Country Planning Act 1990 itself says nothing about the giving of reasons for planning decisions. The 1990 Act requires the decision (inter alia) to be made having regard to the development plan and other material considerations (s.70(2)). The Planning and Compulsory Purchase Act 2004 is more specific in requiring the decision to be made in accordance with the development plan "unless material considerations indicate otherwise" (s.38(6); see *Hopkins Homes Ltd v*

Secretary of State for Communities and Local Government [2017] 1 W.L.R. 1865, [7]). But it does not in terms require the decision-maker to spell out the material circumstances which justify such a departure.

22 The non-statutory National Planning Policy Framework ("NPPF") (itself treated as a "material consideration" for these purposes: *ibid* paras 10–21) provides comprehensive guidance to local planning authorities on the handling of individual planning applications. Paragraph 14 with footnote 9 notes, as an exception to the general presumption in favour of permission, "specific policies" by which "development is restricted"; including those relating to protected sites under the Birds and Habitats Directives, Green Belts, Areas of Outstanding Natural Beauty, and National Parks. In practice such policy designations are likely to be reflected also in the statutory development plan, so that s.38(6) will come into play.

23 The statutory rules relating to the giving of reasons are all to be found in subordinate legislation. It is hard to detect a coherent approach in their development. The main categories are:

i) Secretary of State decisions (including those delegated to inspectors) -

   a) following an inquiry or hearing;
   b) on written representations.

ii) Decisions by local planning authorities -

   a) Refusing planning permission or imposing conditions;
   b) Granting permission;
   c) Officer decisions under delegated powers.

iii) Decisions (at any level) on applications for EIA development.

Secretary of State and inspector decisions

24 Local objectors have no right to call for a public inquiry into a planning appeal. Section 79(2) provides that before determining an appeal the Secretary of State shall "if either the appellant or the local planning authority so wish" give them an opportunity of appearing before a person appointed by the Secretary of State. If an inquiry is held the right of other parties to appear is determined by the inquiries procedure rules (see, in respect of Secretary of State decisions, the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624)r.11). Following an inquiry, the Secretary of State must "notify his decision on an application or an appeal and his reasons for it in writing" to "all persons entitled to appear at the inquiry who did appear, …and any other person who, having appeared at the inquiry, has asked to be notified of the decision" (ibid r.18(1)). Equivalent duties are applied under the separate rules dealing with decisions by inspectors and decisions following hearings.

25 In *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 W.L.R. 153, Lord Bridge said of the duty imposed by statute on the Secretary of State:

> "That they should be required to state their reasons is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been

> observed. It is the analogue in administrative law of the common law's requirement that justice should not only be done, but also be seen to be done." (p .170)

26 There is no corresponding statutory rule applying to decisions following a written representations appeal. However, it is the practice for a fully reasoned decision to be given. It has been accepted (on behalf of the Secretary of State, and by the Administrative Court) that there is an enforceable duty, said to arise "… either from the principles of procedural fairness … or from the legitimate expectation generated by the Secretary of State's long-established practice …" (*Martin v Secretary of State for Communities and Local Government* [2015] EWHC 3435 (Admin) at [51] per Lindblom LJ).

Local authority decisions

27 *Refusals and conditions* It has long been the case that local planning authorities must give reasons for refusing permission or imposing conditions. Historically this appears to have been the corollary of the fact that in those cases there is a statutory right of appeal against the refusal or the conditions. The current order (Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) art.35(1)) provides that the authority in their decision notice must state "clearly and precisely their full reasons."

28 *Grant of permission* Until 2003 there was no statutory duty on local planning authorities to give reasons for the grant of permission as such. There was then a change of thinking, as Sullivan J explained (*R. (Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin), at [52]):

> "Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority's reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system …"

Accordingly, between 2003 and 2013, local planning authorities were required to include in the notice of the decision "a summary of their reasons for the grant of permission" and "a summary of the policies and proposals in the development plan which are relevant to the decision" (see Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 (SI 2003/2047) art.5; Town and Country Planning (Development Management Procedure) (England) Order 2010a (SI 2010/2184) art.31).

29 This duty was repealed as from 25 June 2013 (Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 (SI 2013/1238) art.7). The Explanatory Memorandum (paras 7.17–20) indicated that this was a response to suggestions that the duty had become "burdensome and unnecessary", and having regard to the fact that officer reports "typically provide far more detail on the logic and reasoning behind a particular decision than a decision notice", so that the requirement to provide a summary "adds little to the transparency or the quality of the decision-taking process"; and also having regard to the "greater level of transparency in the decision-taking process", resulting from

increased ease of access to information, both on-line and through the Freedom of Information Act 2000.

30 *Officer decisions* Since 2014 there has been a duty on a local authority officer making any decision involving the "grant [of] a permission or licence" to produce a written record of the decision "along with the reasons for the decision", and "details of alternative options, if any, considered and rejected" (Openness of Local Government Bodies Regulations 2014 (SI 2014/2095) reg.7(2)–(3)). This covers, although it is not limited to, the grant of planning permission.

EIA development

31 Special duties arise where an application (as in this case) involves EIA development, at whatever level the decision is taken. EIA development is defined as development listed in Sch.1 or 2 to the Regulations, in the latter case if the development is "likely to have significant effects on the environment by virtue of factors such as its nature, size or location." Decision-makers must not grant planning permission "unless they have first taken the environmental information into consideration", and "they shall state in their decision that they have done so" (EIA regulations reg.3(4)). "Environmental information" is defined as:

> "the environmental statement, including any further information and any other information, any representations made by anybody required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development." (reg.2(1))

32 Where an EIA application is determined by a local planning authority, the authority must inform the public of the decision and make available for public inspection a statement, containing

> "(i) the content of the decision and any conditions attached to it;
> (ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public;
> (iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development; and
> (iv) information regarding the right to challenge the validity of the decision and the procedures for doing so." (regulation 24(1)(c))"

This regulation is derived from art.9 of the EU Directive on environmental assessment (2011/92/EU) ("the EA Directive"), which expresses the duty in similar terms.

33 Also relevant by way of background is the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) to which this country is a party. The preamble to the Convention recognises the right of all people to live in a healthy environment and their duty "both individually and in association with others" to protect it for the benefit of present and future generations; and the consequent need for effective public participation, access to information, transparency in decision-making and access to justice in environmental matters.

34 Article 6, which is mentioned in the preamble to the EA Directive, is headed "Public Participation in Decisions on Specific Activities". In addition to certain

listed activities and others which "may have a significant effect on the environment", it extends to any activities where public participation is provided for under national procedures for environmental impact assessment (art.6(1), annex I para.20). Article 6.9 provides:

> "Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based."

Standard of reasons

35 A "broad summary" of the relevant authorities governing reasons challenges was given by Lord Brown in *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 W.L.R. 1953, 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."

36 In the course of his review of the authorities he had referred with approval to the "felicitous" observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P. & C.R. 263, 271–272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

37 There has been some debate about whether Lord Brown's words are applicable to a decision by a local planning authority, rather than the Secretary of State or an

inspector. It is true that the case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal. However, the authorities reviewed by Lord Brown were not confined to such cases. They included, for example, the decision of the House of Lords upholding the short reasons given by Westminster City Council explaining the office policies in its development plan (*Westminster City Council v Great Portland Estates Plc* [1985] A.C. 661, 671–673). Lord Scarman adopted the guidance of earlier cases at first instance, not limited to planning cases (eg *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478), that the reasons must be "proper, adequate and intelligible" and can be "briefly stated" (p 673E-G). Similarly local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate.

38 In the context of the EIA regulations, Mr Reed QC (for CGI) relied on the fact that under Regulation 24(1)(c)(ii) the duty is limited to the "main" reasons. He drew an analogy with the former duty of local planning authorities to provide "summary" reasons for the grant of permission, which was treated as imposing a less onerous standard than that considered in *Porter*. Thus in *R. (Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286, Sullivan LJ said "summary reasons" in that context could not be equated with reasons in a Secretary of State's decision-letter:

> "… a decision letter is intended to be a 'stand-alone' document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal. By their very nature a local planning authority's summary reasons for granting planning permission do not present a full account of the local planning authority's decision making process." (at [14])

39 Mr Reed sought to apply this thinking to the duty to give the "main reasons" under the EIA regulations. He referred to *R (Cherkley Campaign Ltd) v Mole Valley District Council* [2014] EWCA Civ 567, at [70], where counsel was recorded as conceding (apparently without demur from the court) that the duty under the EIA was no higher than the duty to give "summary" reasons under domestic planning legislation. I am unable to accept the analogy. I do not read the reference in the EIA regulations to the "main" reasons as materially limiting the ordinary duty in such cases. It is no different in substance from Lord Brown's reference in *Porter* to the need to refer only to "the main issues in the dispute". To my mind the guidance in *Porter* is equally relevant in the EIA context.

40 Lang J in *R. (Hawksworth Securities plc v Peterborough City Council* [2016] EWHC 1870 (Admin) made a more general point about what she saw as the difference between a planning inspector conducting an "adversarial procedure, akin to court or tribunal proceedings", contrasted with a local planning authority as an administrative body, determining an individual application:

> "Its reasons ought to state why planning permission was granted, usually by reference to the relevant planning policies. But it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission." (at [87])

41 I am not persuaded that the difference between the two processes bears such significance. In both the decision-maker may have to take into account and deal fairly with a wide range of differing views and interests, and reach a reasoned conclusion on them. Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision. The content of that duty should not in principle turn on differences in the procedures by which it is arrived at. Local planning authorities are under an unqualified statutory duty to give reasons for refusing permission. There is no reason in principle why the duty to give reasons for grant of permission should become any more onerous.

42 There is of course the important difference that, as Sullivan J pointed out in *Siraj*, the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why."

Legal remedies

43 In the case of a decision by the Secretary of State or a planning inspector, the 1990 Act provides for a statutory challenge under s.288, on the grounds that the decision was not within the powers of the Act, or that a "relevant requirement" (which includes a requirement under the inquiries procedure rules to give notice of the decision and the reasons for it) had not been complied with. In the latter case the court must be satisfied also that "the interests of the applicant have been substantially prejudiced" by the failure (s.288(5)(b)).

44 I note that in the *Save* case, Lord Bridge identified a single question:

> "There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given." (p.167D–E)

I am not convinced with respect that it is helpful so to conflate the two parts of the statutory formula. Until one has decided on the nature of the breach of the statutory requirements, it is difficult to determine the nature and extent of any prejudice. However, that passage needs to be read in the context of what follows (p 168), which makes clear that Lord Bridge's principal concern was to emphasise, contrary to the apparent implication of the judgment of Woolf LJ in the Court of Appeal, that the burden lay on the applicant to establish both parts of the statutory test.

45 In *Save* itself, the decision of the House ultimately turned on the adequacy of the reasons for departing from the policy, rather than lack of prejudice. Lord Bridge accepted that

> "… an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications." (p.167H)

The same point is picked up in Lord Brown's summary. Lord Bridge did not, as I understand him, dissent from the view of the Court of Appeal that, had Save been able to establish a material defect of reasoning, the appropriate remedy was to quash the permission.

46 Mr Cameron QC (for the Council) argued that a different approach should apply to a breach of the EIA duty taken on its own. Relying on the decision of the Court of Appeal in *R. (Richardson) v North Yorkshire County Council* [2004] 1 W.L.R. 1920, he argued that in that context a mere declaration of the breach was sufficient. Indeed before Mitting J (at [22]) this point was conceded by Mr Westaway for CPRE Kent. Although the point was raised in argument in the Court of Appeal, Laws LJ apparently found it unnecessary to address the issue, perhaps because he saw the EIA duty, not as a free-standing duty, but as no more than one of the factors relevant to the obligation to give reasons in this case.

47 In *Richardson*, notwithstanding a clear failure to provide a statement of reasons as required by reg.21 of the EIA regulations then in force (Town and Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999), the Court of Appeal held that the appropriate remedy was, not to quash the decision itself, but to make a mandatory order for the required statement to be provided. In the leading judgment, Simon Brown LJ (para.33) adopted the reasoning of Richards J (at first instance), who had said:

> "49. … the first and most important point in the present case is that regulation 21(1) looks to the position *after* the grant of planning permission. It is concerned with making information available to the public as to what has been decided and why it has been decided, rather than laying down requirements for the decision-making process itself. It implements the obligation in article 9(1) of the directive to make information available to the public 'when a decision to grant … development consent *has been taken*' (emphasis added). That is to be contrasted with article 2(1) of the Directive, which lays down requirements as to what must be done *before* the grant of planning permission (which may be granted only after a prior assessment of significant environmental effects).
>
> 50. The fact that the requirement focuses on the availability of information for public inspection after the decision has been made, rather than on the decision-making process, leads me to the view that a breach of regulation 21(1) ought not to lead necessarily to the quashing of the decision itself. A breach should be capable in principle of being remedied, and the legislative purpose achieved, by a mandatory order requiring the authority to make available a statement at the place, and containing the information, specified in the regulation."

48 With respect to the judges concerned, I would decline to follow that reasoning. I find the distinction drawn between notification of the decision, and of the reasons

on which it is based, artificial and unconvincing. In the regulations (as in the Aarhus Convention, which is now expressly referred to in the Directive) the provision of reasons is an intrinsic part of the procedure, essential to ensure effective public participation. I would not necessarily disagree with the court's disposal of the appeal in *Richardson*. Although the committee had not given its own reasons, it had granted permission in accordance with the recommendation in the officer's report, and could be taken to have adopted its reasoning. Simon Brown LJ (para.35) referred with approval to the comment of Sullivan J (*R. v Mendip District Council, Ex p. Fabre* (2000) 80 P. & C.R. 500, 511) that in such a case

> "… the reasonable inference is that the members did so for the reasons advanced by the officer, unless of course there is some indication to the contrary."

49 It is perhaps also relevant that the court was faced with a somewhat extreme submission (based on observations of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603, 616–617), that in respect of a breach of an EU directive the court had no choice in the matter; it was

> "… simply not permitted to regard a breach of the implementing regulations as curable other than by the outright quashing of the development permission granted." (at [38])

Not surprisingly the court found that an unattractive proposition. However, it is now clear, following recent judgments of this court, that even in respect of a breach of an EU directive the powers of the court are not so restricted:

> "… the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice (per Lord Carnwath, (*R (Champion) v North Norfolk District Council & Anor* [2015] UKSC 52; [2015] 1 WLR 3710, para.54, following *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 139, 155)."

In *Champion* itself it was held that this test was met: given that the environmental issues were of no particular complexity or novelty; there was only one issue of substance on which each of the statutory agencies had satisfied itself of the effectiveness of the proposed measures; the public had been fully involved; and Mr Champion himself having been given the opportunity to raise any specific points of concern but having been unable to do so (at [60]).

Duty to give reasons–Common law

50 Given the existence of a specific duty under the EIA regulations, and the views I have expressed on its effect, it is strictly unnecessary in the present appeal to decide what common law duty there may be on a local planning authority to give reasons for grant of a planning permission. However, since it has been a matter of some controversy in planning circles, and since we have heard full argument, it is right that we should consider it.

51 Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see *R.*

v Secretary of State for the Home Department, Ex p. Doody [1994] 1 A.C. 531; *R. v Higher Education Funding Council, Ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242, 263A–D; *De Smith's Judicial Review* 7th edn, para.7-099). *Doody* concerned the power of the Home Secretary (under the Criminal Justice Act 1967 s.61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:

> "To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view …" (p.565G-H per Lord Mustill)

It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.

52 Similarly, in the planning context, the Court of Appeal has held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (*R. v Aylesbury Vale District Council, Ex p. Chaplin* (1998) 76 P. & C.R. 207, 211–212 per Pill LJ). Although this general principle was reaffirmed recently in *Oakley v South Cambridgeshire District Council* [2017] 2 P. & C.R. 4, the court held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Of the last point, Elias LJ (giving the leading judgment, with which Patten LJ agreed) said:

> "The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required … the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty." (at [61])

His conclusion was reinforced by reference to the United Kingdom's obligations under the Aarhus Convention (para.62; see to similar effect my own comments on the relevance of the Convention, in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] P.T.S.R. 51, at [100]). Sales LJ agreed with the result, but expressed concern that the imposition of such duties "might deter otherwise public-spirited volunteers"

from council duties, and might also introduce "an unwelcome element of delay into the planning system" (at [76]).

53 Mr Cameron QC (for the Council) submitted that this decision should be "treated with care", against the background of the government's decision in 2013 to abrogate the statutory duty to give reasons for grant of permission, planning law being a creature of statute (see *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865, at [20]). The factors identified by Elias LJ could arise in many cases, and lead to the common law duty becoming a general rule. He asked us to prefer the view of Lang J (*R. (Hawksworth Securities Plc) v Peterborough City Council* [2016] EWHC 1870 (Admin), at [81]) that a common law duty to give reasons would arise only "exceptionally" and that "generally, the requirements of fairness will be met by public access to the material available to the decision-maker". The present case, he submitted, was not exceptional in that sense, either in principle or on its own facts.

54 In my view *Oakley* was rightly decided, and consistent with the general law as established by the House of Lords in *Doody*. Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involved such an application of the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.

55 *Doody* concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the legality of which may be of legitimate interest to a much wider range of parties, private and public (see *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, at [152]–[153] per Lord Hope). Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done" (see [25] above). That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts (see *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] A.C. 455, at [47] per Lord Mance, at [127] per Lord Toulson). As applied to the environment it also underpins the Aarhus Convention, and the relevant parts of the EA Directive. In this respect the common law, and European law and practice, march together (compare *Kennedy* at [46] per Lord Mance). In the application of the principle to planning decisions, I see no reason to distinguish between a Ministerial inquiry, and the less formal, but equally public, decision-making process of a local planning authority such as in this case.

56 The existence of a common law duty to disclose the reasons for a decision, supplementing the statutory rules, is not inconsistent with the abrogation in 2013 of the specific duty imposed by the former rules to give reasons for the grant of permission. As the explanatory memorandum made clear, that was not intended to detract from the general principle of transparency (which was affirmed), but was a practical acknowledgement of the different ways in which that objective could normally be attained without adding unnecessarily to the administrative burden. In circumstances where the objective is not achieved by other means, there should be no objection to the common law filling the gap.

57 Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.

58 This endorsement of the Court of Appeal's approach may be open to the criticism that it leaves some uncertainty about what particular factors are sufficient to trigger the common law duty, and indeed as to the justification for limiting the duty at all (see the perceptive analysis by Dr Joanna Bell: *Kent and Oakley: A Re-examination of the Common Law Duty to Give Reasons for Grants of Planning Permission and Beyond* (2017) 22 Judicial Review 105–113). The answer to the latter must lie in the relationship of the common law and the statutory framework. The court should respect the exercise of Ministerial discretion, in designating certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.

59 As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para.22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para.45 above), they are likely to have lasting relevance for the application of policy in future cases.

60 Finally, with regard to Sales LJ's concerns about the burden on members, it is important to recognise that the debate is not about the necessity for a planning authority to make its decision on rational grounds, but about when it is required to disclose the reasons for those decisions, going beyond the documentation that already exists as part of the decision-making process. Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny. There is nothing novel or unduly burdensome about this. The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) gives the following useful advice, under the heading "Decision-making":

> "Do make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion /

> decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge." (their emphasis)

The decision in this case

61 The members of the Dover planning committee on 13 June 2013 had an unenviable task. The meeting started at six in the evening, probably for most of them at the end of a hard-working day. They were faced with probably the most significant planning application for their area for many years. It was no doubt seen as the culmination of an extended process of formal and informal consultation, triggered by the submission of the application over a year before, and they may have felt under some pressure to reach a conclusion. The officers' report, admirable though it was, had arrived on their desks only a few days before the meeting. Not only was it long and detailed in itself, but it introduced into the debate a new element of potentially critical significance (the proposed reduction in the number of houses), on which there was a sharp difference of view between the expert advisers.

62 The Model Council Planning Code and Protocol, already referred to (para.60 above) contains under the same heading the following advice:

> "Do come to your decision only after due consideration of all of the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse."

This passage not only offers sound practical advice. It also reflects the important legal principle that a decision-maker must not only ask himself the right question, but "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly" (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1065B). That obligation, which applies to a planning committee as much as to the Secretary of State, includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account.

63 Even if there was pressure for a decision on the principle of the development, it seems unfortunate that the members did not apparently consider deferring detailed discussion of the officer's proposed modifications, including the contentious issue of viability. It is difficult to see how the members could have expected to reach a properly considered decision on the material then before them. With hindsight at least, given that the application did not come back to the committee for more than a year, nothing would have been lost.

64 The issue of timing is not directly relevant to the reasons challenge before us, but it is an important part of the background. It is not in dispute that the Council was in breach of a specific requirement under the EIA regulations to make available a statement of "the main reasons and considerations" on which the decision was based. The only issue is the nature of the remedy. Mr Cameron submits that a declaration is sufficient and that the reasons can be supplied retrospectively. In so far as this submission is specific to the EIA duty, following the decision of the Court of Appeal in *Richardson*, I cannot accept it for the reasons already given.

The report of *Oakley* does not indicate what order resulted in that case. In the present case, however, I am satisfied that that is not an appropriate or sufficient remedy. Indeed it is notable that in the three years since the permission was issued, no attempt has been made to formulate the reasons so as to make good the admitted breach. This perhaps underlines the difficulty of reconstructing the operative reasons of the committee on the basis simply of what is in the minutes.

65 Mr Cameron relies on the views attributed to the three members who were recorded as supporting the proposal. That was against the background that the officers had recommended approval for a departure from the AONB policies, for reasons they had explained, and which the committee can be taken to have accepted. The only substantial difference was as to whether a reduced dwelling limit should be imposed. That was seen by the committee as turning on whether the risk to the viability of the scheme outweighed the harm to the AONB. That issue, he submits, was fully debated and the majority's conclusion and reasoning were clearly reflected in the minutes. The restrictions proposed by the officers were not accepted because (in the words there recorded) -

> "… this could jeopardise the viability of the scheme, deter other developments and be less effective in delivering the economic benefits."

66 This submission rests on the uncertain assumption that the views of the three members quoted were shared by the majority. The required statement under the regulations is of the reasoning of the committee as a whole. Even making that assumption, there are serious gaps. There is no indication of how or why the members felt able, without further investigation, to reject the view of their own advisers that the viability of the scheme need not be threatened, and indeed could be enhanced. It was not enough to rely on the possibility of the scheme being jeopardised, simply on the say-so of the applicant's advisers without any reference to the expert view to the contrary. Another important issue was the officers' insistence on the need for implementation as "a single comprehensive scheme" to secure the economic benefits, including in particular the hotel and conference centre, and for conditions or planning obligations to achieve that. Given that the members apparently shared their officers' view of the importance of those benefits, their omission of any legal mechanism to secure it needed explanation.

67 Furthermore, as Laws LJ pointed out, the economic argument was only one side of the picture. The other was the members' view of the harm to the AONB. Assuming that they accepted their officers' view as to the seriousness of the potential damage to the AONB, it became critical to understand the basis of their belief that it could be "minimised" by "effective screening". This was of particular significance in the context of the EIA regulations which require the statement to include a description of "the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development". If the committee had reason to think that landscaping measures could reduce or offset the harm, they needed to be described. At the very least there needed to be an explanation of how the members reconciled this assertion with the view of their officers that landscaping would be "largely ineffective". This point was left without any explanation.

68 These points were not merely incidental, but were fundamental to the officers' support for the amended scheme. The committee's failure to address such points raises a "substantial doubt" (in Lord Brown's words) as to whether they had properly understood the key issues or reached "a rational conclusion on them on relevant

grounds". This is a case where the defect in reasons goes to the heart of the justification for the permission, and undermines its validity. The only appropriate remedy is to quash the permission.

Conclusion

69 For the reasons indicated above, I would dismiss the appeal and affirm the order of the Court of Appeal.

Neutral Citation Number: [2019] EWCA Civ 2200

Case No: C1/2019/0140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
SIR ROSS CRANSTON (sitting as a judge of the High Court)
[2018] EWHC 3400 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2019

Before:

Lord Justice Underhill
Lord Justice Lindblom
and
Lord Justice Irwin

- -

Between:

R. (on the application of East Bergholt Parish Council)	**Appellant**
- and -	
Babergh District Council	**Respondent**
- and -	
(1) Mr and Mrs P. Aggett **(2) Countryside Properties Plc** **(3) Mr Michael Harris and Mr James Harris** **(4) Hills Residential Construction Ltd.**	**Interested Parties**

- -

Ms Sasha Blackmore (instructed by **Teacher Stern LLP**) for the **Appellant**
Mr Michael Bedford Q.C. (instructed by **Babergh District Council Legal Services**) for the **Respondent**
The Interested Parties did not appear and were not represented.

Hearing date: 18 July 2019

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Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. The main question in this appeal is whether a local planning authority, when assessing the five-year supply of housing land, misdirected itself on the relevant policies in the National Planning Policy Framework ("the NPPF") published by the Government in March 2012. It is not the first case of its kind. And no new issue of law is involved.

2. The appellant, East Bergholt Parish Council, appeals against the order dated 7 December 2018 of Sir Ross Cranston, sitting as a judge of the High Court, by which he dismissed its claim for judicial review of three grants of planning permission by the respondent, Babergh District Council, for housing development on sites in East Bergholt. In total, the three developments would provide up to 229 new dwellings: 10 for residents over the age of 55 on a site at Hadleigh Road, for which planning permission was granted on 10 November 2017; 144 on a site at Moores Lane, for which permission was granted on 23 November 2017; and up to 75 on a site at Heath Road, for which permission was granted on 9 February 2018. The district council's Planning Committee resolved to approve all three proposals on 2 August 2017. In each case the proposal did not accord with the development plan, which included the Babergh Core Strategy, adopted by the district council in February 2014, and the East Bergholt Neighbourhood Plan, made in September 2016. But the district council concluded that the five-year housing land supply required under government policy in paragraph 47 of the NPPF did not exist, so that, under the policy in paragraph 49, the policy for the "presumption in favour of sustainable development" in paragraph 14 was engaged and a decision to grant planning permission was justified.

3. The thrust of the parish council's challenge is that the district council's approach to the assessment of housing land supply when it decided to grant planning permission for these three developments, was flawed by its misunderstanding of the concept of "deliverability" in the NPPF, wrongly equating it to "certainty" or even "absolute certainty" of delivery. A further complaint is that in approving these developments the district council was influenced by the potential cost of opposing subsequent appeals if it refused permission. These grounds were rejected by the judge. Permission to appeal was granted by Singh L.J. on 18 February 2019, on two of the four grounds in the appellant's notice – grounds 1 and 2.

The issues in the appeal

4. Two main issues arise. First, did the district council err in law in its assessment of housing land supply, misinterpreting and misapplying NPPF policy, and including only sites on which it was certain, or absolutely certain, that housing would be delivered within five years – an approach said to be contrary to the decision of this court in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2018] P.T.S.R. 746 (ground 1 and ground 2 in part, and the district council's respondent's notice)? And second, did it improperly take into account the possible financial consequences for itself of fighting appeals against the refusal of planning permission (ground 2 in part).

The policy in paragraph 47 of the NPPF

5. We are concerned only with the policies of the NPPF as they were at the time of the decisions under challenge, in August 2017. The NPPF has, however, twice been revised since then, in July 2018 and again in February 2019.

6. Paragraph 47 of the NPPF stated:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> …
>
> - identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
> - identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;
>
> …".

Footnote 11 explained the meaning of the word "deliverable":

> "To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

Footnote 12 said that "[to] be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged".

7. The policy in paragraph 49 stated that "[housing] applications should be considered in the context of the presumption in favour of sustainable development", and that "[relevant] policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites". The policy in paragraph 14 envisaged the "presumption in favour of sustainable development" operating "where the development plan is … out-of-date", subject to two exceptions, one of which was that "any adverse impacts of [approving the proposal] would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole".

8. The relevant policy in paragraph 47 has remained substantially unchanged in the subsequent revisions of the NPPF. The definition of a "deliverable" site was changed in both revisions. The definition given in the glossary in Annex 2 to the 2019 version states:

> "To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:
>
> a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).
>
> b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years."

The guidance in the Planning Practice Guidance ("the PPG")

9. The policy in paragraph 47 of the NPPF was amplified in the PPG, first published by the Government in March 2014 and later updated. I shall consider the guidance as it was at the time of the district council's decisions.

10. Paragraph 3-019-20140306 of the PPG explained the factors to be considered when assessing the "suitability" of sites for development. It said that "[sites] in existing development plans or with planning permission will generally be considered suitable for development although it may be necessary to assess whether circumstances have changed which would alter their suitability".

11. Paragraph 3-030-20140306 advised that the starting point for calculating the five-year housing land supply should be "the Housing requirement figures in up-to-date adopted Local Plans", but went on to say that "[where] evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying significant weight, information provided in the latest full assessment of housing needs should be considered". Paragraph 3-031-20140306, under the heading "What constitutes a 'deliverable site' in the context of housing policy?", said:

> "Deliverable sites for housing could include those that are allocated for housing in the development plan and sites with planning permission (outline or full that have not been implemented) unless there is clear evidence that schemes will not be implemented within five years.
>
> However, planning permission or allocation in a development plan is not a prerequisite for a site being deliverable in terms of the 5-year supply. Local planning authorities will need to provide robust, up to date evidence to support the deliverability of sites, ensuring that their judgements on deliverability are clearly and transparently set out. If there are no significant constraints … to overcome such as infrastructure sites not allocated within a development plan or without planning

> permission can be considered capable of being delivered within a 5-year timeframe."

Paragraph 3-033-20150327 provided guidance on "Updating evidence on the supply of specific deliverable sites sufficient to provide 5 years worth of housing against housing requirements", stating that "… local planning authorities should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the 5 year supply". It went on to say:

> "Local planning authorities should ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record. Such assessment, including the evidence used, should be realistic and made publicly available in an accessible format.
> …."

The district council's consideration of housing land supply between 2013 and 2017

12. In the annual monitoring report for 2013-2014 there was said to be a housing land supply of 7.1 years, using a 5% buffer. In the annual monitoring report for 2014-2015 it was said to be 6.3 years, again using a 5% buffer. And in the annual monitoring report for 2015-2016 it was said to be 5.7 years, using a 20% buffer for past under-delivery; 6.6 years using a 5% buffer. In April 2017, having received a report prepared by Bidwells for Countryside Properties Plc, the intending developer of the Moores Lane site, the district council published an interim statement acknowledging that the housing land supply, with a 20% buffer, was only three years; with a 5% buffer, 3.4 years. The interim statement was based on evidence in a draft strategic housing market assessment ("SHMA"), which had been produced in February 2017.

The meeting on 22 May 2017

13. Some residents of East Bergholt were concerned by the change in the district council's position. The parish council sought a meeting with the district council to discuss the matter. The meeting took place on 22 May 2017. It was attended by parish councillors, including Councillor Miller, the district council's Corporate Manager for Strategic Planning, Mr Newman, and a Senior Policy Strategy Planner, Mr Deakin. Councillor Miller made a note of what was said, which the judge described as being "near contemporaneous", with "the ring of authenticity", and "[in] all material respects … an accurate record of what was said" (paragraph 22 of the judgment). The note "records a statement that the interim AMR was prepared because of a challenge by developers" (paragraph 23). It also "records that when asked why with the interim 5YHLS a number of planning applications had been held back and not included in the figures, Mr [Newman] explained that this was because of a conflict with the JR decision" (paragraph 24). It goes on to say:

> "[These] have been omitted from [the district council's figures] because there was no certainty they would be built. [Mr Newman] had decided that what was in the list was absolute certainties rather than ones affected by JR."

14. In his witness statement dated 23 May 2018 Mr Deakin explains (at paragraph 32) the reference to sites "affected by JR". These were sites on which the district council had granted planning permission or resolved to grant planning permission for housing development, relying on an incorrect understanding of development plan policy. The court had quashed the permission for the development on a site called "Gatton House" in East Bergholt in December 2016, but the proposals – for that site and for the site at Moores Lane – had yet to be taken back to the Planning Committee for redetermination at "the base date [for the annual monitoring report for 2016-2017] of 31 March 2017" (see *R. (on the application of East Bergholt Parish Council) v Babergh District Council* [2016] EWHC 3400 (Admin)).

15. Councillor Miller's note also records that the parish councillors were told the methodology used by the district council was the one advocated in the NPPF, and the figures to be published in June 2017 would "nail the AMR number".

16. On 22 May 2017, in response to a request made by a local resident, Mr Cave, under the Freedom of Information Act 2000, the district council sought to explain why 14 applications for planning permission for a total of 674 dwellings had not been included in the calculation of housing land supply. It said:

> "The sites listed have not been granted planning permission, nor are they sites allocated in the Local Plan. They would therefore fail to meet the tests of footnote 11 of [the NPPF] and have not been included within the Babergh Interim 5 year housing land supply assessment."

In a subsequent email sent on 12 July 2017, responding to Mr Cave's request for a re-calculated housing land supply taking into account the 14 applications, the district council's Chief Executive contended that such a calculation "would not be consistent with how we are required to establish 5 year land supply".

The annual monitoring report for 2016-2017

17. The "Babergh and Mid Suffolk Joint Annual Monitoring Report 2016-2017" was published by the district council and Mid Suffolk District Council on 13 June 2017. It stated (in paragraph 1.1) that "[all] of the information reported is the most up-to-date available at the time of publication". It referred (in paragraph 1.2) to the duty of local planning authorities to co-operate, under section 33A of the Planning and Compulsory Purchase Act 2004. And it confirmed (in paragraph 3.1) that the two authorities had "taken the key decision to produce a Joint Local Plan for Babergh and Mid Suffolk districts", and that "[a] new joint [local development scheme] was agreed in March 2017".

18. Under the heading "Housing Trajectory & Five-Year Land Supply", the annual monitoring report referred (in paragraph 4.9) to the policy in paragraph 47 of the NPPF "[requiring] Councils to identify and update on an annual basis a supply of specific deliverable sites sufficient to provide for five years' worth of housing against their identified requirements". It acknowledged that, under the policy in paragraph 47 of the NPPF, "[for] sites to be considered deliverable they have to be available, suitable, achievable and viable". It said (in paragraph 4.11) that the district council "has identified a housing land supply of 4.1 years

based on the Core Strategy housing target", and "a land supply of 3.1 years based on the SHMA housing target".

19. The "Babergh District Council 5 year housing land supply assessment", dated June 2017, was appended as Appendix 1. The "Introduction" to Appendix 1 referred again to the policy in paragraph 47 of the NPPF, and the guidance in paragraph 3-030-20140306 of the PPG. Like the text in paragraph 4.9, it explicitly acknowledged that "[for] sites to be considered deliverable they have to be available, suitable, achievable and viable". It said that the district council had "published the Ipswich and Waveney Housing Market Areas [SHMA] in May 2017 which is important new evidence for the emerging [joint local plan]". The five-year housing land supply had therefore been calculated for "both the adopted Core Strategy based figures and the new SHMA based figures". The "Core Strategy based supply for 2017 to 2022 [was] 4.1 years", and the "SHMA based supply for 2017 to 2022 [was] 3.1 years". In the tables for the "Babergh Land supply targets and buffers 2017/18-2021/22", the adjusted targets assuming a 20% buffer were, respectively, 2,071 and 2,742 dwellings. In the tables showing the "Babergh Land supply 2017/2018-2021/22" the "[total] supply" for both assessments was 1,699 dwellings, comprising 110 dwellings in the line "No permission/Allocated sites", 120 in the line "S106 to Sign" and none in the line "Application", plus 480 in the line "Windfall and small sites", plus a total of 989 for "Permission outline", "Permission full" and "In construction" with a "lapse rate" of 10%.

20. A table headed "Babergh Housing Land Supply Trajectory Table" identified the "Site Status" of each site, and for each site the total number of dwellings to be developed and the number in each of three periods, or "phases": 2017-2022, 2022-2027, and after 2027. It included two sites, known as "Hadleigh East" and "Chilton Woods", each of them a "Strategic Allocation" whose "Site Status" was said to be "No permission, Strategic Core Strategy Allocation". These two sites were assumed to provide a total of 110 dwellings in the period 2017-2022 – 80 at Hadleigh East, with 170 to follow in the period 2022-2027; 30 at Chilton Woods, with 230 to follow in the period 2022-2027, and 790 after 2027. A site known as "Wolsey Grange", another "Strategic Allocation", but with the "Site Status" of "S106 to Sign …", was assumed to provide 120 dwellings in the period 2017-2022, 200 in the period 2022-2027, and 155 in the period after 2027.

21. The officer responsible for the preparation of the annual monitoring report was Mr Deakin. In his witness statement he explains how he approached the assessment of housing land supply. The new SHMA had been prepared by consultants, instructed in September 2016 (paragraph 12). New household projections had been published by the Government in July 2016. The draft SHMA, which emerged in February 2017, identified a higher level of housing need (355 dwellings per annum) than the core strategy requirement (220 dwellings per annum for the period 2011-2016, and then 325 dwellings per annum until 2031). This higher level of need was assumed when the housing land supply was calculated (paragraph 13). But because the SHMA was still emerging, an assessment using the core strategy was also presented (paragraph 14).

22. On the effect of NPPF policy, Mr Deakin says this (in paragraph 20):

> "… [A] 5YHLS assessment tends to come under close scrutiny in the development management process for the determination of planning applications. Because decisions to refuse planning permission can be appealed … and appeals are

> resource-intensive both financially and with regard to officer time, and there is a risk of a costs award if [the district council] is found to have acted unreasonably, [the district council], like many other planning authorities, seeks to ensure that its 5YHLS assessment is robust and able to withstand scrutiny. This helps to ensure sound decision-making, deter unjustified appeals, and minimise the risks of [the district council] losing appeals."

23. Mr Deakin stresses the importance of using a "consistent base date for monitoring", which in the annual monitoring report for 2016-2017 was 31 March 2017 (paragraph 21). In preparing the five-year housing land supply assessment, as in previous years, he first considered whether a site was "suitable" for housing development before going on to consider whether it was "available" and "achievable". Bearing in mind that the question of whether a site was "suitable" involved questions of judgment on which opinions might differ, and that he was seeking to achieve a "robust and defendable assessment", he took the view that "there should be some confirmation of the suitability of development from some prior decision of [the district council] or from an appeal Inspector". Sites with planning permission that remained capable of implementation he regarded as suitable for housing development; and so too sites without planning permission but the subject of a policy in the development plan or in a "made" neighbourhood plan. Where a site did not have planning permission and was not an allocated site, but had a Planning Committee resolution to grant permission subject to the entering into of a planning obligation, "this meant that the … Planning Committee had accepted that the site could be developed for housing", and he "therefore regarded such a site as also suitable for housing development" (paragraph 26). But where an application for planning permission had been made and there was "no resolution or decision of the Planning Committee on the acceptability of the proposal", he "considered that the suitability of the site was not established or confirmed, and … made the judgment that such a site should not be regarded as suitable for housing development at that point of time" (paragraph 27).

24. He then went on to consider whether the sites that were suitable for housing development were "available", and "how many dwellings, if any, should be included in the 5YHLS assessment". For developments of 10 dwellings or more, he took into account what he had been able to discover from landowners, agents or developers in response to a letter he sent to each of them in April 2017. He then made his own assessment, which he discussed with colleagues (paragraph 28). The results of this work were in Appendix 1 to the annual monitoring report for 2016-2017 (paragraph 29).

The Planning Committee meeting on 5 July 2017

25. After the annual monitoring report for 2016-2017 had been published, the district council's Planning Committee relied on the assessment of housing land supply in it when determining applications for planning permission – for example, at its meeting on 5 July 2017 when it considered proposals for housing development in Capel St Mary and Long Melford. At that meeting, when called upon by a member of the public, Mr Watts, to account for the change in the district council's position on housing land supply since 2016, the Chairman of the committee, Councillor Ridley, mentioned two things: first, the change in the relevant housing target in the SHMA; and second, the district council's review, site by site, of the expected dates of delivery – the annual target not having been met in any of the previous three years. In his witness statement Mr Deakin acknowledges that Councillor

> Ridley, when referring to the review, had mentioned only sites with planning permission. But he confirms that, as the list of sites set out in Appendix 1 to the annual monitoring report for 2016-2017 shows, "the 5YHLS also included sites without planning permission which were development plan allocations and sites which had received a resolution to approve". When he was considering how many of the dwellings on the sites identified as suitable would be "achievable" in the relevant five-year period, he was "not looking for certainty about what would definitely happen but what [he] realistically expected to happen, based on the information known to [him] and [his] general experience of housing developments in the district" (paragraph 34).

The Full Council meeting on 18 July 2017

26. The district council held a Full Council meeting on 18 July 2017, which was attended by all but two of the members of the Planning Committee who would be present at its meeting on 2 August 2017. At the Full Council meeting, Mr Cave asked why, in the light of footnote 11 to paragraph 47 of the NPPF, the district council had excluded the 14 applications for planning permission to which he had referred in his Freedom of Information Act request. The response came from the district council's Cabinet Member for Planning, Councillor Parker:

> "…
>
> The key difference in the sites identified in the assessments is principally a result of the delivery status of each site[, i.e.] whether a site has now been fully built out, is under construction, or has recently gained planning permission.
>
> For sites with the benefit of planning permissions and/or allocations, whilst these sites have the greater certainty of delivery, they are only included in the 5 year land supply if it is considered that there is a realistic prospect that housing will be delivered within 5 years.
>
> Sites without planning permission or allocation are less certain in their suitability, availability and achievability. Their suitability and achievability is appropriately considered through the planning application process including the full extent of infrastructure provision required to make them acceptable. For this reason, [the district council] considers it robust to consider sites without planning permission in the 5 year land supply assessment only where the Planning Committee has given a resolution to grant planning permission, subject to a Section 106 legal agreement for planning obligations."

The Planning Committee's decisions at its meeting on 2 August 2017

27. With the benefit of advice from its planning consultants, Planning Direct, the parish council objected to all three of the applications for planning permission. "On its face", said the judge, the parish council's objection "seemed to accept the AMR figures" (paragraph 38). The East Bergholt Society also objected, maintaining there was no real shortfall in the supply of housing land in the district council's area if one included the 14 sites to which Mr Cave had referred. A local resident, Mr Brigden, objected on similar grounds.

28. The committee had an officer's report for each of the three proposals. It is common ground that the assessment in his report on the development proposed on the site in Moores Lane corresponds to the essential parts of the assessment in the other two.

29. In the "Summary" at the beginning of the report, having referred to section 38(6) of the 2004 Act, and having acknowledged that the proposal was contrary to several policies of the development plan, the officer recommended that planning permission be granted. He said:

> "… Whilst the proposal is found to be contrary to development plan policies CS2, CS11 and CS15, the authority cannot currently demonstrate a five year housing land supply and the adverse impacts of the development, including those areas of non-conformity with the development plan policies referred to, are not considered to significantly and demonstrably outweigh the benefits of the development."

The officer recognized that there would be harm to "heritage assets", but this, in his view, was "less than substantial" and was outweighed by the "public benefits" of the proposed development. The proposal was for "sustainable development". Under the NPPF, there was a "presumption in [its] favour".

30. The points made in response to consultation and in objections were set out (paragraph 8 of the report). In Appendix 1 to the report a large number of objections were summarized. They included an objection complaining that the district council had manipulated the housing land supply figures in the interim statement to distort the supply from 5.7 years to three years. The objections of the East Bergholt Society and Mr Brigden were before the committee when it met.

31. The officer explained the relevant policies in the NPPF and guidance in the PPG (paragraphs 35 to 38). He said the new SHMA was "important new evidence for the emerging Babergh and Mid Suffolk Joint Local Plan", and confirmed that "the 5 year land supply has been calculated for both the adopted Core Strategy based figures and the new SHMA based figures". He reminded the committee that "it will be for the decision taker to consider appropriate weight to be given to these assessments and the relevant policies of the development plan" (paragraph 39). His advice was that the housing land supply was either 4.1 years (based on the core strategy) or 3.1 years (based on the SHMA) (paragraph 40). He went on to say (in paragraph 41):

> "… Since there is not, on any measure, a 5 year land supply, paragraph 49 of the NPPF deems the relevant housing policies of the Core Strategy to be out-of-date, so triggering both the 'tilted balance' in paragraph 14 of the NPPF, and the operation of Policy CS1."

32. Weighing the "Planning Balance" at the end of his report, the officer concluded that "[in] consideration of the contribution towards the Council's housing targets (that has now become more acute due to the accepted lack of five year housing land supply), the provision of affordable housing and economic and infrastructure benefits which arise from the development, … these material considerations would outweigh the less than significant harm to the heritage [assets]" (paragraph 274).

33. At the committee meeting representatives of the parish council and the East Bergholt Society spoke, as did Mr Brigden and other objectors. As the minutes record, the speakers were "listened to, and questioned, … at length". When the members came to consider the proposal for the Hadleigh Road site, the officer dealing with that proposal referred to the "lack of a five year housing land supply". In the discussion on the proposal for the Heath Road site, Mr Newman told them that "significant and demonstrable adverse effects" would have to be identified if planning permission were to be refused "in the current absence of [the district council's] 5 year supply for which no firm indication was available or when it would be met".

Subsequent events

34. On 19 March 2018 – after the three planning permissions had been granted – the district council's Overview and Scrutiny Committee received a report from Mr Newman. Under the heading "Financial Implications" (in paragraph 3.1), he said it was necessary to produce a "robust assessment" of housing land supply, which could be used in determining applications for planning permission. He added that "[producing] a five-year housing land supply that has not considered all the available information robustly could result in costs against [the district council] at a Planning Appeal". The Overview and Scrutiny Committee resolved that the housing land supply should be reviewed every six months and monitored regularly. In its annual report, presented to the Full Council at its meeting on 22 May 2018, the committee asked to be given an opportunity to scrutinize the assessment of housing land supply. The scoping document for this exercise referred to a "mixed understanding among Councillors and communities regarding the 5 year housing land supply – both how it's calculated and the implications of not having one".

35. The annual monitoring report for 2017-2018 was published in July 2018. It noted that 331 new dwellings had been built in the district in the past year, which was 102% of the target figure. Based on the core strategy, the housing land supply stood at 6.7 years; based on the SHMA, five years.

The judge's reasoning

36. The parish council contended in the court below that at its meeting on 2 August 2017 the Planning Committee did not properly apply the relevant policies in the NPPF and guidance in the PPG on the deliverability of sites. Errors had been made in the calculation of the supply of housing land, both in the interim statement and in the annual monitoring report published in June 2017. Too high a test had been applied, contrary to the reasoning of this court in *St Modwen Developments Ltd.*, and unlike the approach taken by other local planning authorities. According to Councillor Ireland, the Chair of the parish council, in his witness statement dated 21 December 2017, several sites on which housing could be delivered within five years had been wrongly omitted from the supply.

37. The judge rejected that argument. In reality, as he saw it, the parish council's challenge went not to the decisions made by the district council's Planning Committee on 2 August 2017, but to the assessment of housing land supply in the 2017 annual monitoring report, foreshadowed in the interim statement (paragraph 62 of the judgment). At its meeting on 2 August 2017, as on 5 July 2017, the committee had applied the housing land supply

"already decided in light of planning judgment". It was unsurprising that other authorities should carry out their assessments in different ways, "given the broadly worded requirement in paragraph 47 of the NPPF and the absence of any prescribed method of assessment" (paragraph 63). But in any event the planning judgments involved in the assessments undertaken by the district council were not flawed. In *St Modwen Developments Ltd.* the Court of Appeal did not hold that a site must be included in the five-year housing land supply if there was "any realistic prospect" of delivery; this was "not the only element of the test". And it was not to be assumed that sites excluded from the assessment of supply in the annual monitoring report had been left out of account "because [the district council] misapplied the realistic prospect criterion, rather than that other planning judgments were exercised that the site was not suitable, available or viable" (paragraph 64).

38. In the judge's view the officer's reports for the 2 August 2017 committee meeting were not misleading (paragraph 65). They had to be read in the context of what had happened at the Planning Committee meeting on 5 July 2017, in particular what had been said by Councillor Ridley (paragraph 66), and at the Full Council meeting on 18 July 2017, when Councillor Parker had "echoed the language of footnote 11 in explaining that [the district council's] approach was to include in the 5YHLS only sites with planning permission, with an allocation, or with a resolution to approve subject to a legal agreement" (paragraph 67). The members of the Planning Committee "should have known by the time of the 2 August meeting that [the district council's] position was that it did not have a 5YHLS, and should have been aware of the reasons for the officers including some sites but not others in the calculation". If not, they would have enquired – because for some time the district council's approach to housing land supply had been generating discussion in the community. The judge accepted that it was "not necessary for the officer's reports … to set out the detailed reasoning which had led [the district council] to conclude that it could not demonstrate a 5YHLS". That reasoning was "generally available to those who attended and in the minutes of the 5 July [Planning Committee] meeting and the 18 July Full Council meeting", and it met "the requisite standard" (paragraph 68). At the meeting on 2 August, objectors who questioned the calculation of housing land supply addressed the committee; their written representations were before the members; the officer dealt with housing land supply in an oral presentation; there was a member's question about it; and the speakers were questioned at length (paragraph 69).

39. Adding two "footnotes" to his conclusions, the judge said the meeting on 22 May 2017 had taken place before the annual monitoring report was finalized in June 2017. But if the district council had really been "working on certainties" in calculating the housing land supply, this "would not be impermissible as a matter of planning judgment and would not conflict with the legal principles in [*St Modwen Developments Ltd.*]". And the consideration of housing land supply by the Oversight and Scrutiny Committee on 15 March 2018 "says nothing about the understanding of [the Planning Committee] on 2 August 2017" (paragraph 70).

40. The judge did not accept that the district council had "misdirected itself on the applicable test", or "failed to give adequate reasons for its approach" (paragraph 71). In *St Modwen Developments Ltd.* the Court of Appeal had not "[altered] the meaning of "deliverable" in footnote 11 of the NPPF or … [established] a lower bar" (paragraph 72).

Did the district council err in law in its approach to the assessment of housing land supply?

41. Ms Sasha Blackmore, for the parish council, argued that the judge's reasoning and conclusions were wrong. The district council had misinterpreted and misapplied the policy in paragraph 47 of the NPPF and the corresponding guidance in the PPG. It had conflated the concept of "deliverability" with "certainty", or even "absolute certainty", of "delivery". Government policy and guidance did not require "certainty", or anything like it. Although the question of whether there was a "realistic prospect" of housing being delivered on a site within five years was a matter of planning judgment, the decision-maker must understand and apply the policy test. In this case the district council failed to do that. This, Ms Blackmore submitted, was an error of law. The district council had adopted a "blanket approach", which was impossible to reconcile with the Court of Appeal's decision in *St Modwen Developments Ltd.*. That decision had made it clear that to require "certainties" when applying the policy in paragraph 47 was impermissible. Whether or not the court had laid down any principle of law, its reasoning had provided clear guidance to local planning authorities, giving them confidence to create housing trajectories based on a "realistic prospect" of delivery. They could reach robust judgments without having to surmount "golden hurdles". The practical effect of the court's guidance was to be seen, for example, in the annual monitoring report for 2017-2018, published in July 2018, which identified a housing land supply of 6.7 years. Even if it had been lawful to adopt the approach the Planning Committee did, and bearing in mind that the largest of these three proposals would have removed the shortfall calculated on the basis of the core strategy, the members ought to have been reassured that they had a discretion under NPPF policy not to apply so stringent a test as "certainty". But they were not; they were told there was "not, on any measure, a 5 year land supply".

42. Ms Blackmore submitted that the contemporaneous evidence – in particular, the district council's response to Mr Cave's Freedom of Information Act request in May 2017, that sites without planning permission or a local plan allocation would fail the test of deliverability in footnote 11 to paragraph 47 of the NPPF, and its subsequent email in July 2017 rejecting his request for a re-calculated housing land supply taking into account sites on which planning permission had been applied for but not granted – manifested an approach of seeking "certainty" that a site would deliver housing within five years before it could be included in the supply. It clearly believed that such an approach was required by NPPF policy. This conclusion, Ms Blackmore submitted, is not displaced by the "ex post facto" evidence on which the district council now seeks to rely.

43. If, as Ms Blackmore maintained, the district council had misapplied the test of deliverability by seeking "certainty" of delivery, its error could not, she said, be treated as insignificant simply because it had also discounted sites it regarded as not "suitable". This was contrary to the approach approved in *St Modwen Developments Ltd.*. As Councillor Ireland's evidence showed, sites that were "suitable" – for which there was a resolution to grant and a section 106 obligation outstanding – had been excluded sites from the five-year housing land supply.

44. I do not accept that argument. In my view, as Mr Michael Bedford Q.C. submitted on behalf of the district council, the decisive parts of the judge's reasoning on this issue were correct.

45. Judgment on the appeal in *St Modwen Developments Ltd.* was handed down on 20 October 2017 – after the Planning Committee had resolved to approve these three proposals. In that case the inspector had accepted that sites could properly be included in the five-year supply of housing land even though they were not certain of delivery, and the Secretary of State had agreed. At first instance Ouseley J. had found no error of law in the inspector's approach. Upholding Ouseley J.'s conclusion, this court emphasized the distinction between the concept of "deliverability" under the policy in paragraph 47 of the NPPF and the concept of an "expected rate of delivery" (paragraphs 34 to 37 of my judgment). The fact that a site is "capable of being delivered" within five years "does not mean … it necessarily will be" (paragraph 35). Each of the considerations referred to in footnote 11 to paragraph 47 went to "a site's capability of being delivered within five years: not to the certainty, or … the probability, that it actually will be". To be included in the five-year supply, a site did "not necessarily have to have planning permission already granted for housing development on it". Sites "may be included … if the likelihood of housing being delivered on them within the five-year period is no greater than a "realistic prospect"". This "[did] not mean that for a site properly to be regarded as "deliverable" it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years" (paragraph 38). The judge had acknowledged that the evaluation of housing land supply involved the exercise of "planning judgment" (paragraph 43). And it was "not open to [the appellant] now to go behind the inspector's conclusions on the credibility and reliability of the parties' respective cases on housing land supply". Such conclusions, the court stressed, were "well within the exclusive province of planning judgment" (paragraph 51).

46. This court's decision in *St Modwen Developments Ltd.* did not create new law. The court applied basic legal principles often put to the test in challenges to planning decisions involving the application of national planning policy and guidance – and on several occasions in cases where NPPF policy for housing development has been in issue (see, for example, the decisions of this court in *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] J.P.L. 63, and *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040; [2017] J.P.L. 358; and the first instance judgments of Dove J. in *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin), and Stuart-Smith J. in *Wainhomes (South West) Holdings Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin); [2013] J.P.L. 1145).

47. The principles themselves are well established. The court will not intrude into the territory of planning judgment, which is the exclusive domain of the decision-maker, nor will it subject the decision-maker's own exercise of planning judgment to review beyond the range of public law (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). Formulating national planning policy and guidance is the Government's responsibility, not the court's. Where the meaning of statements of policy is in dispute, the court has a proper role in construing the policy (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983, at paragraphs 17 to 22). A decision-maker's failure to understand relevant policy is an error of law, and the court may then intervene (see the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] P.T.S.R. 623, at paragraphs 22 to 26; and the judgment of Stephen Richards L.J. in *R. (on the application of Timmins) v Gedling*

Borough Council [2015] EWCA Civ 10; [2015] P.T.S.R. 837, at paragraph 24). However, the court's interpretation of planning policy does not generate new legal principles or tests to replace or reinforce the policy principles or tests it has construed.

48. That is not what the court was doing in *St Modwen Developments Ltd.*. Rather, it was considering whether, on a true understanding of the policy in paragraph 47 and, in particular, the concept of a "realistic prospect" of delivery, the Secretary of State was entitled to include in the five-year housing land supply sites that were not "certain" to be developed for housing within five years. The court held that he was. But if in that case the Secretary of State, in the exercise of his planning judgment, had adopted a somewhat more cautious view when assessing a "realistic prospect", this would not necessarily have been precluded by the policy in paragraph 47, or unreasonable. That is not what the court said, and not a logical consequence of its reasoning.

49. There is, in my view, no need to enlarge the court's reasoning in *St Modwen Developments Ltd.*. What it demonstrates is that the whole exercise of assessing the "deliverability" of sites under the policy in paragraph 47 is replete with planning judgment and must always be sensitive to the facts (see paragraphs 27 to 30, 34, 41 to 43 and 51 of my judgment). And this may be said, in particular, of the question of "achievability" – whether there is a "realistic prospect" of housing being delivered on a site within five years. A "realistic prospect" is not a legal concept. It is a broad concept of policy, which gives ample scope for a decision-maker's reasonable planning judgment on the likelihood of development proceeding on a site within five years – a predictive judgment on future events that are inevitably not certain. The court recognized the range of legitimate planning judgment available to the decision-maker when considering whether sites have a "realistic prospect" of development in the five-year period. The relevant passages in the judgment refer to a site not "necessarily" having to have planning permission to be regarded as deliverable under the policy, and to it not "necessarily" having to be certain that housing would be delivered on the site within five years (paragraph 38 of my judgment).

50. The policy is not prescriptive. It does not lay down any fixed method for applying the test of "deliverability", to be used in every case. A "realistic prospect" is not equated to any specific level of likelihood. Nor are there any criteria for deciding this question beyond what is said about the treatment of "[sites] with planning permission" in footnote 11. Subject to that, and to the further relevant guidance in the PPG, the policy leaves the assessment of a "realistic prospect" to the decision-maker's own planning judgment, which the court will only undo on conventional public law grounds. It is not for the court to stipulate how firm a "prospect" must be if it is to be "realistic".

51. The policy does not prevent a decision-maker reasonably taking the view, as a matter of planning judgment, that a particular site or sites on which it was not certain or confident that development would occur within five years should be excluded from the five-year supply of housing land. It does not state, for example, that sites without planning permission, but with a resolution to grant subject to a section 106 planning obligation being entered into, should always, or usually, be included in the supply, or that such sites should be included if they have been allocated for housing in the development plan. The same may also be said of the subsequent revisions of the policy in 2018 and in 2019 – in which the definition of a "deliverable" site has been somewhat expanded. Put simply, the degree of confidence required in the "deliverability" of sites is for the decision-maker to decide, within the bounds of reasonable planning judgment.

52. The latitude in the policy itself is also reflected in the relevant guidance in the PPG. Paragraph 3-031-20140306 says that deliverable sites "could" – not "must" – include those allocated for housing in the development plan, and also that a planning permission or allocation is "not a prerequisite" for a site's inclusion in the five-year supply. But it does not say that any site merely with a resolution to grant, subject to a planning obligation, must be included. It calls for "robust" evidence to support an authority's assessment of deliverability. Paragraph 3-033-20150327 uses the same adjective in its advice on annual assessments. The guidance does not, in principle, disqualify as insufficiently "robust" an assessment that excludes from the five-year housing land supply a site or sites yet to receive a grant of planning permission.

53. It is clear then that the policy in paragraph 47, and the PPG guidance upon it, accommodate different views on a "realistic prospect" of delivery. A local planning authority can take a more cautious view on this question, or a more optimistic view, than other authorities might. If it does, it is not for that reason acting contrary to the policy, or unreasonably. Had the Government meant to impose a rigid approach, or greater consistency than the policy and guidance require, it would surely have done so. If it had wanted to define exactly what it meant by a "realistic prospect" it could and would have done that. But it has not – either in the policy it originally issued or in the two revisions, or in the PPG.

54. As the judge recognized, "achievability" was only one of four elements that together went to the question of "deliverability", the other three being "availability", "suitability" and "viability" (see paragraph 38 of my judgment in *St Modwen Developments Ltd.*). All four elements must be present if a site is to be regarded as "deliverable". And all of them entail the exercise of planning judgment. Thus, for example, a site judged by the local planning authority not to be "a suitable location" for housing development "now" could properly be excluded from the calculation of the five-year housing land supply even if it was clearly "available now", and also "achievable with a realistic prospect that housing will be delivered on the site within five years", and development "viable". In those circumstances, and despite the existence of a "realistic prospect" of the site's development, however strong that prospect might be, the site could properly be judged by the authority not to qualify as "deliverable" under the policy.

55. With those points in mind, I do not think the assessment of the five-year housing land supply underlying the officer's advice to the Planning Committee at its meeting on 2 August 2017 was at odds with the approach endorsed by this court in *St Modwen Developments Ltd.*. It does not, in my view, betray any misdirection on the meaning and effect of the policy in paragraph 47 of the NPPF, or the relevant guidance in the PPG, or a misapplication of that policy and guidance. None of the planning judgments embodied in it were unlawful.

56. The real challenge in this claim, as the judge said (in paragraph 62 of his judgment), is to the assessment of the five-year housing land supply in the recently published annual monitoring report for 2016-2017, which was relied upon by the officers in their reports to committee on the applications for planning permission. The assessment set out in Appendix 1 to the annual monitoring report was an up to date assessment, published in June 2017 – only two months before the Planning Committee met on 2 August 2017. It was informed by an up to date SHMA, published in May 2017. It expressly referred to the relevant policy, in paragraph 47 of the NPPF, including the essential content of footnote 11, and it did so

accurately. The text in paragraph 4.9 of the annual report did the same. It expressly acknowledged the four elements of "deliverability" under the policy. It did not confuse "deliverability" with actual "delivery". And there is no reference to a test of "certainty" or "absolute certainty" as a proxy for the concept of a "realistic prospect" in footnote 11.

57. No such suggestion is to be seen in the five-year housing land supply assessment itself. The calculation of the supply was consistently presented for either basis of assessment – the housing requirement figures in the core strategy and the latest assessment of housing need in the SHMA – and it produced the same total supply figure for both, namely 1,699 dwellings for the five-year period from 2017 to 2022. It was founded on a site by site appraisal in which the status of each site was identified. The supply included not only sites with planning permission and where construction was already under way, but also sites allocated for housing in the development plan but as yet with no planning permission – Hadleigh East and Chilton Woods – and another site with a resolution to grant permission and a section 106 obligation still to be signed – "Strategic Allocation – Wolsey Grange", which was allocated under Policy CS7 for the "Ipswich Fringe" in the core strategy. Hadleigh East and Chilton Woods were expected to deliver a total of 110 dwellings in the relevant five-year period; Wolsey Grange, 120.

58. Ms Blackmore pointed out that those three sites, all of them allocations in the development plan, must already have been assessed for availability, suitability, achievability and viability in the plan period. There were no other sites in the trajectory table indicated as delivering housing within five years that simply had a resolution to grant planning permission and a section 106 obligation outstanding. The site known as "Land East of Artiss Close & Rotherham Road" in Bildeston, which had a resolution to grant subject to a section 106 obligation, was expected to deliver 48 dwellings, but – surprisingly – not within five years (see paragraph 21 of Councillor Ireland's witness statement). The section 106 agreement was signed on 20 October 2017 and planning permission granted (see paragraph 30 of the witness statement of Councillor Moss, dated 2 August 2018). The site known as "Former Brett Works and 109 High Street, Hadleigh", which also had a resolution to grant subject to a section 106 obligation, was expected to deliver 65 dwellings in Phase 2 of the development, but none in Phase 1 – again surprisingly, because in December 2017 dwellings on the site were already on the market (see paragraph 23 of Councillor Ireland's witness statement). This evidence had not been rebutted by Mr Deakin in his witness statement. It proved, Ms Blackmore submitted, that the district council had applied a test of "certainty" in assessing the deliverability of sites.

59. I disagree. In fact, as Mr Bedford submitted, the assessment of the five-year housing land supply in the annual monitoring report demonstrates an approach considerably less ambitious than a quest for "certainty" of delivery within that time. The inclusion of allocated sites still without a planning permission, or with a resolution to grant and a section 106 obligation outstanding, goes against the argument that the district council had set itself so rigorous a test – nothing less than a total absence of doubt. Neither of those categories of site could realistically be said to represent a "certainty" of any particular number of dwellings being developed on them within five years. The same might also be said of the sites included in the supply for which outline or full planning permission had already been granted – with a 10% adjustment for "lapse" – in accordance with the approach to sites with planning permission indicated in footnote 11. But in any event it is clear that a substantial portion of the housing land supply assessed in the annual monitoring report – 230 dwellings – comprised sites for which planning permission had not yet been

granted, to which a degree of uncertainty in both the amount and timing of development must attach. How much uncertainty may be moot.

60. Ultimately, as I have said, this was a matter for the district council's planning judgment. It may or may not be fair to describe its exercise of planning judgment as more circumspect than other local planning authorities' in similar circumstances would have been – or indeed the Secretary of State or his inspector on appeal. And it may or may not be right to suggest, as the parish council does, that there was a strong case for including developments on smaller sites, such as Artiss Close and the former Brett Works, in the five-year supply. Such arguments, however, tend dangerously close to the merits of including individual sites in the five-year supply, which it is not the court's role to consider. They do not, in my view, demonstrate a failure by the district council to understand government policy in paragraph 47 of the NPPF or guidance in the PPG, or a misapplication of that policy and guidance, or an exercise of planning judgment outside the generous scope that public law permits.

61. This analysis does not yield to Ms Blackmore's submissions on events before and after the publication of the annual monitoring report, and after the Planning Committee's meeting on 2 August 2017. The meeting with parish councillors on 22 May 2017 took place before the publication of the annual monitoring report for 2016-2017. The parish councillors were told, in effect, that the new annual monitoring report would settle the question of the five-year housing land supply in the light of government policy in the NPPF. Mr Newman's reference to there being "no certainty" that some of the sites discussed would deliver housing within five years, and his comment that the list of sites included "absolute certainties rather than ones affected by JR" – whether or not this was, as Mr Bedford submitted, merely a "hyperbolic contrast" with the sites and proposals yet to be reconsidered by the Planning Committee – does not negate the assessment of the five-year supply later to emerge in the annual monitoring report. That assessment was plainly not confined to "certainty" of delivery or "absolute certainties". And at the time of the meeting, the district council could not be sure that the sites "affected by JR" were "suitable for development now".

62. The district council's response on 22 May 2017 to Mr Cave's Freedom of Information Act request also preceded the publication of the new annual monitoring report. As Mr Deakin explains in his witness statement (at paragraph 31), the sites in question "did not benefit from a Planning Committee resolution to approve or a development plan allocation", and "were not regarded … as having sufficient confirmation that they were suitable for housing development so as to be included in the 5YHLS".

63. After the new annual monitoring report was published and before the Planning Committee met on 2 August 2017, the district council did not change its stance on the five-year housing land supply. It relied on the assessment in the annual monitoring report. As the judge said (in paragraph 68 of his judgment), the explanation for it is to be found in the minutes of the Planning Committee's meeting on 5 July 2017 – including the reasons given by Councillor Ridley for the changed situation since 2016 – and the meeting of the Full Council on 18 July 2017 – including Councillor Parker's answer to Mr Cave's question, in which he distinguished between the concepts of "suitability", "availability" and "achievability".

64. It is clear from what Councillor Parker said that, in assessing "deliverability", the district council had regard to each of these considerations, not just "achievability". It is also clear

that, in principle, a site without either planning permission or a development plan allocation would not automatically be discounted. Such a site might still be regarded as "suitable" if it had a resolution to grant permission, subject to a section 106 planning obligation – though, of course, this was not to say that it would automatically be included in the five-year supply. It would not be included if it failed the test of "availability" or the test of "achievability". Councillor Parker's reference to sites with planning permission or a development plan allocation, or both, having "the greater certainty" of delivery, and, by contrast, sites without permission or an allocation being "less certain" in their suitability, availability and achievability, belies the submission that the district council was intent on including only sites "certain" to deliver housing in the five-year supply. He was plainly using the words "certainty" and "certain" in a relative sense – not absolute.

65. I accept Mr Bedford's submission here. The approach taken in the annual monitoring report for 2016-2017, described by councillors at the Planning Committee meeting on 5 July 2017 and the Full Council meeting on 18 July 2017, and effectively adopted by the Planning Committee at its meeting on 2 August 2017, cannot be regarded as irrational. As a means of determining the "deliverability" of sites, in every necessary respect, and thus their inclusion in a "robust" assessment of the five-year housing land supply, it was legally unimpeachable.

66. Turning finally to events after the challenged decisions were made, again I think the judge's conclusion (in paragraph 70 of his judgment) was correct. The deliberations of the Overview and Scrutiny Committee at its meeting on 19 March 2018, and its annual report presented to the Full Council on 22 May 2018, had no bearing on the process culminating in the planning permissions granted for these three proposals – in November 2017 for the developments on the sites at Hadleigh Road and Moores Lane, and in February 2018 for the development on the site at Heath Road. And the annual monitoring report for 2017-2018, published in July 2018, which demonstrated a five-year supply of housing land, does not cast doubt on the lawfulness of those decisions.

67. Our conclusion, in my view, must be that Ms Blackmore's argument here cannot succeed. It does not show that the assessment of the five-year housing land supply on which the district council's Planning Committee relied in approving these three proposals displayed a misinterpretation of the policy in paragraph 47 of the NPPF, or an unlawful application of that policy, or irrationality, or any other public law error.

Did the district council improperly take into account the possible financial consequences of fighting appeals?

68. Ms Blackmore submitted to the judge that when the district council assessed housing land supply it had taken into account "developer pressure, as evidenced by the Bidwells report and the meeting following it, and the further irrelevant consideration that the developers might mount legal challenges" (paragraph 71 of the judgment). The judge rejected that argument. He accepted Mr Bedford's submission that it was "not unlawful for a local planning authority to want to have confidence that it will be able to robustly defend the judgments it forms on the deliverability of housing sites". He therefore concluded that "the concern about challenges from developers was lawfully taken into account as a factor in decision-making" (paragraph 72).

69. Before us, Ms Blackmore argued that the judge's conclusion was wrong. The financial burden for the district council in defending its position on housing land supply on appeal, and the financial risk of an award of costs being made against it if its position were found to be indefensible, were not considerations "[relating] to the use and development of land" (see the judgment of Cooke J. in *Stringer v Minister of Housing and Local Government* [1971] 1 W.L.R. 1281, at p.1295), or as Jonathan Parker L.J. put it in *R. (on the application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370; [2003] 1 P. & C.R. 19 (at paragraph 121), "rationally related to land use issues". They had nothing to do with the approach to assessing the deliverability of sites under government policy in paragraph 47 of the NPPF endorsed in *St Modwen Developments Ltd.*, or the guidance in paragraph 3-033-20150327 of the PPG calling for "robust" assessment. Having regard to them was impermissible as a matter of law. There was no warrant for doing so in section 70(2)(b) of the Town and Country Planning Act 1990, which requires a local planning authority to have regard to "any local finance considerations, so far as material to the application [for planning permission]". They were not financial considerations "material to the application". This was not a case where the financial viability of a development was at stake or where two or more developments were financially dependent on each other (see the speech of Lord Collins of Mapesbury in *R. (on the application of Sainsbury's Supermarkets Ltd.) v Wolverhampton City Council* [2010] UKSC 20; [2010] 2 W.L.R. 1173, at paragraph 70; and the speech of Lord Walker of Gestingthorpe, at paragraphs 86 and 87). The prospect of savings to the public purse if the cost of fighting appeals were avoided was an immaterial consideration. It was a free-standing "financial [consideration] unrelated to the use and development of land" (see, for example, the judgment of Kenneth Parker J. in *Samuel Smith Old Brewery Tadcaster v Selby District Council* [2013] EWHC 1159 (Admin), at paragraphs 39 and 40).

70. In my view this argument is not cogent. The reality here is that the district council made its decisions to grant planning permission lawfully, with a true understanding of relevant policy and on the strength of land use considerations that were material; it did not resort to considerations that were immaterial.

71. Neither in the officers' reports to the Planning Committee for its meeting on 2 August 2017 nor in the minutes of that meeting, nor in the annual monitoring report for 2016-2017, nor in the minutes of the committee meeting on 5 July 2017 or the Full Council meeting on 18 July 2017 does one find any support for the suggestion that the district council's assessment of the five-year housing land supply was undertaken contrary to the relevant policy in the NPPF and guidance in the PPG, or on the basis of any immaterial consideration. There is no evidence of an approach whose aim was to avoid for the district council the financial burden and risk of appeals, rather than one that would produce a "robust" assessment in accordance with national policy and guidance. And there is nothing there to suggest – nor does Mr Deakin say in his witness statement – that, in its assessment of the five-year housing land supply, the district council adopted a more cautious view when establishing which sites had a "realistic prospect" of housing being delivered on them within five years than it would otherwise have done because it was concerned about the possible need to expend public money in resisting appeals, or because it feared the prospect of being ordered to pay the appellants' costs if such appeals were pursued. Such considerations did not play any part in the officers' assessment of the proposals on their planning merits in the committee reports, nor are they to be seen in the members' deliberations as recorded in the minutes.

72. The observation made in Mr Newman's report to the Overview and Scrutiny Committee for its meeting on 19 March 2018 to the effect that a failure to produce a "robust" assessment of housing land supply might expose the district council to an award of costs on appeal, which is no doubt true as a matter of fact, came more than nine months after the Planning Committee meeting on 2 August 2017 and some three months after the last of the three planning permissions was granted.

73. Mr Bedford submitted that there is no general rule that a public authority may not have regard to the financial consequences of an administrative decision when making that decision. And he went further, submitting that unless there is some statutory prohibition, it might be contrary to common sense for an authority to have no regard to the implications for the public purse. He did not refer, though he properly could have done, to the decision of the Supreme Court in *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34; [2012] 1 W.L.R. 2264 – a case concerning the provisions for revocation in section 97 of the 1990 Act – where Lord Carnwath observed (at paragraph 48) that "general principles would normally dictate that a public authority should take into account the financial consequences for the public purse of its decisions". Lord Carnwath went on to say (at paragraph 50) that "[under] section 70 the planning authority … must either grant or refuse permission", that its decision "must be governed by considerations material to that limited choice", and that "the decision normally has no direct cost consequences for [it] (unless exceptionally it has a direct financial interest in the development, when other constraints come into play)".

74. In this case, however, we are concerned with a different question: whether the district council's exercise of legitimate planning judgment was distorted by considerations relating not to the land use planning merits of the proposals before it, but to extraneous implications for its own resources.

75. I see no basis for Ms Blackmore's contention that the district council erred in law in that way. Mr Bedford acknowledged Mr Deakin's comments (in paragraph 20 of his witness statement) on "resource-intensive" appeals, which impose burdens on local planning authorities both financially and in the expense of officers' time, and the "risk of a costs award" if, on appeal, the authority is found to have acted unreasonably in relying on an unrealistic assessment of housing need. But as he submitted, not only is this a reality with which authorities have to contend; it is also in no way inconsistent with the requirements of national planning policy and guidance on the five-year housing land supply. It is a consequence of the basic requirement for authorities to maintain five years' supply under the policy in paragraph 47 of the NPPF and to be able to "demonstrate" such a supply under the policy in paragraph 49, and the guidance enjoining them to be able "to provide robust, up to date evidence to support the deliverability of sites …" in paragraph 3-031-20140306 of the PPG and to "ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence …" in paragraph 3-033-20150327. Policy and guidance impose these responsibilities squarely on local planning authorities. It is up to them to demonstrate the existence of a five-year housing land supply in their decision-making, and if need be to defend their position before an appeal inspector.

76. Appeals can of course be made, and often are, against decisions of local planning authorities that prove to have been correct when the proposal is considered again on its merits by an inspector. And it is a truism that if a sound decision is appealed, the expense incurred by the authority in resisting an appeal will often be no less than in defending a

decision that is in the end overturned. As the Government's relevant guidance explains, adverse awards of costs are only made for conduct that is unreasonable, such as "preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations" (paragraph 16-049-20140306 of the PPG), and where an authority "has refused a planning application for a proposal that is not in accordance with the development plan policy, and no material considerations including national policy indicate that planning permission should have been granted, there should generally be no grounds for an award of costs against the … authority for unreasonable refusal of an application" (paragraph 16-050-20140306). "National policy" would clearly include the policy for the five-year housing land supply in the NPPF.

77. A "robust" assessment of the five-year housing land supply, which national policy and guidance expect, is synonymous with a defensible assessment. And a defensible assessment is inherently more likely to avoid the expenditure and delay for all parties – not only the local planning authority, but also applicants and objectors – of appeals against the refusal of planning permission that could have been avoided. It may deter such appeals. If there is an appeal and the five-year supply is in issue, a "robust" assessment is more likely to be capable of withstanding attack in evidence and cross-examination, more likely to be supported by the inspector, and also more likely to be proof against an award of costs being made against the local planning authority. Such an assessment will be faithful to national policy in the NPPF and national guidance in the PPG, and will also therefore be an assessment that saves unnecessary burdens on the public purse.

78. The simple point here therefore is this. National policy and guidance on the five-year housing land supply was necessarily a material consideration in the district council's decisions on these three proposals – being, as it obviously was, a consideration related to the use and development of land (see the judgment of Lord Carnwath in *Hopkins Homes Ltd.*, at paragraph 21). Essential to that national policy and guidance was the imperative of a "robust" assessment. A "robust" assessment was, by its nature, an assessment likely to reduce the district council's financial burden and risk. And the requirement in national policy for such an assessment was effectively reinforced by the guidance on awards of costs in the PPG.

79. This conclusion does not depend on the provision in section 70(2)(b) requiring "local finance considerations" to be taken into account, if "material to the application". That provision is not relevant in this case. The definition of a "local finance consideration" in section 70(4) is "(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown" or "(b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy".

80. Nor is there any offence to the principles in the case law governing the materiality of considerations that go to the viability of a development or to the economic interdependence of developments on different sites. Those principles are not involved here.

81. Our attention was drawn to the first instance decision in *R. v Royal Borough of Kensington and Chelsea Council, ex p. Stoop* [1992] 1 P.L.R. 58. In that case the local planning authority's committee was given advice, in closed session, on its prospects of successfully defending on appeal a refusal of planning permission for a mixed-use development,

including officers' advice on the possibility of an award of costs against the authority. Having referred to the Government's advice on awards of costs – which was then in paragraph 7 of Circular 2/87, under the heading "Unreasonable Refusal of Planning Permission" – Otton J., as he then was, said the officers were "doing no more than giving "sound and clear cut reasons for refusal" and that to refuse would put [the authority] in a position whereby they were vulnerable as to costs". In his view, "there was nothing wrong with this procedure or in the advice that was given or the consequences that flowed from the acceptance of that advice". Though the facts and circumstances in that case were obviously different, I see nothing in Otton J.'s reasoning to cast doubt on my conclusion here.

82. It need hardly be said that local planning authorities are not free to misread or misapply government policy because they fear the financial consequences for themselves if later faced with an appeal against a decision to refuse planning permission, or indeed, as in this case, proceedings for judicial review challenging a decision to grant. They must adhere, always, to a correct interpretation of relevant policy, apply such policy lawfully when assessing the proposals before them solely on the planning merits, and not allow the potential consequences of the decision for their own resources to influence their exercise of planning judgment. If authorities abide by that basic principle, they may still not avoid the expense of having to defend their decisions on appeal or resist claims for judicial review. That is beyond their control. But they will, at least, be acting in accordance with the law. And in this case, in my view, the district council did that.

83. I conclude, therefore, that the appeal should also fail on this issue.

Conclusion

84. For the reasons I have given, I would dismiss this appeal.

Lord Justice Irwin

85. I agree with both judgments.

Lord Justice Underhill

86. I agree that this appeal should be dismissed. As regards the issue of whether the Council made an error of law in its assessment of housing land supply, I have nothing to add to what Lindblom LJ says at paras. 41-67 of his judgment.

87. As regards the other issue, I agree with him (see paras. 71-72) that the evidence does not justify the conclusion that the impugned decision was made otherwise than on the basis of proper planning considerations. But I am bound to say that the passage from Mr Deakin's witness statement quoted at para. 22 of his judgment caused me some unease. It is true that in the real world councillors and officers are bound to be aware that a refusal of planning permission for a big development is likely to be appealed, and that, win or lose, the process will be expensive in terms both of officer resources and of legal costs incurred – let alone the further, though no doubt typically remote, risk of liability for the developer's costs if the appeal is successful and the council is held to have acted unreasonably. No doubt the risk of

those costs will encourage them to think carefully about any refusal decision, and that is fair enough – though of course in principle they should be doing so anyway. But that is not the same as allowing the risk of the costs associated with defending an adverse decision on appeal to influence them in the exercise of their planning judgement. That is not legitimate (Lord Carnwath's observations in the *HSE* case to which Lindblom LJ refers are directed to a different question). It is important that that distinction is not blurred; and there is a risk of that occurring if officers in their advice make express reference to the likely costs consequent on a refusal. Councillors' job is to exercise their planning judgement, and if that leads to an expensive appeal that cannot be helped. The same of course goes for planning decisions which cannot be appealed as such but which an adversely affected party may choose to challenge by way of judicial review. I therefore particularly endorse what Lindblom LJ says at para. 82.

A [HOUSE OF LORDS]

*TESCO STORES LTD. . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE ENVIRONMENT AND OTHERS . . . . . RESPONDENTS

B

1995 March 6, 7, 8, 9; May 11

Lord Keith of Kinkel, Lord Ackner, Lord Browne-Wilkinson, Lord Lloyd of Berwick and Lord Hoffmann

Town Planning—Development—"Material considerations"—Planning obligation—Planning application to build food superstore outside town—Development likely to increase traffic slightly—Link road not essential for development—Developer's offer of full funding for road—Whether material consideration—Town and Country Planning Act 1990 (c. 8), ss. 70(2), 106 (as substituted by Planning and Compensation Act 1991 (c. 34), s. 12)

C

At an inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, various developers, including T. Ltd. and P. Ltd. proposed superstores on sites outside the town centre. The inspector approved the proposal for a link road and rejected that for a town centre superstore. He held that development on one of the sites away from the town centre would be beneficial but made no formal recommendation, although he expressed a preference for T. Ltd.'s proposal. He also recommended that the council should negotiate the funding of the link road with developers. T. Ltd. and P. Ltd. both applied for planning permission. P. Ltd.'s application was not determined by the local planning authority within the statutory period. P. Ltd. appealed to the Secretary of State for the Environment, who called in T. Ltd.'s application as well. At a subsequent public inquiry T. Ltd. offered to provide full funding of £6·6m. for the link road, and entered into an agreement with the county council containing a planning obligation to that effect under section 106 of the Town and Country Planning Act 1990, as substituted.[1] The inspector recommended that T. Ltd.'s application should be granted and P. Ltd.'s appeal dismissed, observing that planning obligations under section 106 could relate to land and roads other than those covered by the planning permission where there was a direct relationship between the two, but that full funding of a major road was not reasonably related in scale to the proposed because it would only marginally increase the traffic. The Secretary of State in his decision letter rejected the inspector's recommendations, allowed P. Ltd.'s appeal and dismissed T. Ltd.'s application, stating that the relationship between the funding of the link road and the proposed foodstore was tenuous and could not be treated as a reason for granting T. Ltd. planning permission. On T. Ltd.'s application to the High Court the deputy judge quashed the letter, holding that the Secretary of State had wrongly failed to treat T. Ltd.'s offer of funding as a material consideration within section 70(2) of the Act of 1990. The Court of Appeal allowed P. Ltd.'s appeal.

D E F G H

On appeal by T. Ltd.:—

Held, dismissing the appeal, that a planning obligation offered under section 106 of the Act of 1990 by a developer was a

[1] Town and Country Planning Act 1990, s. 70(2): see post, p. 764E–F.
S. 106, as substituted: see post, p. 765A–D.

material consideration to which regard should be had under section 70(2) of the Act if it was relevant to the development; that the weight to be given to such an obligation was a matter entirely within the discretion of the decision maker; and that, accordingly, T. Ltd.'s offer for funding the link road was sufficiently related to the proposed development to constitute a material consideration under section 70(2), and since the Secretary of State had given it full and proper consideration his decision could not be challenged (post, pp. 764F–H, 770A–B, F–771D, 779G–H, 780F–H, 783C–G, 784B–C).

Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council [1964] 1 W.L.R. 240, C.A.; *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, H.L.(E.) and *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78, C.A. considered.

Decision of the Court of Appeal affirmed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Bradford City Metropolitan Council v. Secretary of State for the Environment (1986) 53 P. & C.R. 55, C.A.

Good v. Epping Forest District Council [1994] 1 W.L.R. 376; [1994] 2 All E.R. 156, C.A.

Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1, C.A.

Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)

Nollan v. California Coastal Commission (1987) 483 U.S. 825

Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.

Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd. [1993] J.P.L. 538; 67 P. & C.R. 78, C.A.

Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc. (unreported), 13 October 1994; Court of Appeal (Civil Division) Transcript No. 1204 of 1994, C.A.

Safeway Properties Ltd. v. Secretary of State for the Environment [1991] J.P.L. 966, C.A.

The following additional cases were cited in argument:

Barber v. Secretary of State for the Environment [1991] 2 P.L.R. 20

Reg. v. Secretary of State for the Home Department, Ex parte Brind [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)

Reg. v. Westminster City Council, Ex parte Monahan [1990] 1 Q.B. 87; [1989] 3 W.L.R. 408; [1989] 2 All E.R. 74, C.A.

Simplex G.E. (Holdings) Ltd. v. Secretary of State for the Environment [1988] 3 P.L.R. 25, C.A.

Wansdyke District Council v. Secretary of State for the Environment [1992] J.P.L. 1168

APPEAL from the Court of Appeal.

This was an appeal by Tesco Stores Ltd. ("Tesco") by leave of the Appeal Committee of the House of Lords (Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Slynn of Hadley) granted on 4 October 1994 from a decision dated 25 May 1994 of the Court of Appeal (Sir Thomas Bingham M.R., Beldam and Steyn L.JJ.) allowing appeals from a decision dated 7 July 1993 of Mr. Nigel Macleod Q.C., sitting as a deputy High Court judge in the Queen's Bench Division, by the first respondent, the

Secretary of State for the Environment and the third respondent, Tarmac Provincial Properties Ltd. ("Tarmac").

On 20 May 1993 Tesco gave a notice of motion under section 288 of the Town and Country Planning Act 1990 and amended on 24 June 1993, seeking an order that the decisions of the Secretary of State given by letter dated 16 April 1993 be quashed. By the letter the Secretary of State dismissed Tesco's appeal under section 78 of the Act of 1990 and refused to grant planning permission for a food superstore on part of the Henry Box Playing Fields, Station Lane, Witney and allowed Tarmac's appeal and granted outline planning permission for a food retail store at Mount Mills, Wilton Way, Witney. Tesco maintained that in paragaphs 7 and 8 of the letter the Secretary of State discounted Tesco's offer of funding for the West End Link road and in doing so he failed to take into account a relevant consideration. The deputy judge made the order sought. The Secretary of State and Tarmac appealed against that judgment.

The second respondent, West Oxfordshire District Council, took no part in the proceedings.

The facts are stated in the opinion of Lord Keith of Kinkel.

Roy Vandermeer Q.C. and *Christopher Katkowski* for Tesco.
Duncan Ouseley Q.C. and *John Hobson* for the Secretary of State.
Christopher Lockhart-Mummery Q.C. and *Richard Drabble* for Tarmac.

Their Lordships took time for consideration.

11 May. LORD KEITH OF KINKEL. My Lords, at the end of the judgments of the Court of Appeal in this case Sir Thomas Bingham M.R., said that it involved:

> "a question of unusual public importance bearing on the conditions which can be imposed, and the obligations which can be accepted, on the grant of planning permission and the point at which the imposition of conditions, and the acceptance of obligations, overlaps into the buying and selling of planning permission, which are always agreed to be unacceptable."

Three companies applied to the local planning authority for planning permission to build a retail food superstore in the town of Witney in Oxfordshire, each on a different site. Tesco's site was described as the Henry Box site, and that of Tarmac (which was associated with Sainsburys) as the Mount Mills Site. The third company's site does not figure in these proceedings and can be ignored. There had previously been a Local Plan inquiry into certain proposed alterations to the development plan. One of these related to a proposed new road to the west of the town of Witney. The town straddles the River Windrush. There is only one bridge over this river, and as a result there is severe traffic congestion in the centre of the town, which is a conservation area. The proposed new road known as the West End Link ("W.E.L." for short) included a new river crossing, and the purpose of it was to relieve the traffic congestion. Another proposed alteration to the plan was to provide for a major retail food superstore in the town centre. The inspector who conducted the inquiry issued a report approving the W.E.L. and rejecting the proposal for a retail food superstore in the town centre. Tesco, Tarmac and other developers had taken part in the inquiry, opposing the town centre superstore and promoting the merits of their own sites for such a store,

these sites being a considerable distance from the town centre. The inspector did not make any formal recommendations about these sites, but he held that development of a retail food superstore on one only of these sites would be beneficial, and he expressed a preference for Tesco's Henry Box site. Further, he expressed the view that funding for the W.E.L. was unlikely to come from the highway authority and he recommended a policy statement including reference to the district council's intention to negotiate with developers funding for the W.E.L. or a major contribution to it, before a superstore went ahead.

Tarmac's application for planning permission was not determined by the local planning authority within the statutory period, and so became the subject of an appeal to the Secretary of State, who then called in Tesco's application for the Henry Box site.

In July 1992 an inquiry into Tarmac's appeal and Tesco's application and another appeal not now relevant was held by Mrs. S. E. Hesketh. At the inquiry Oxfordshire County Council contended that without the construction of the W.E.L. there was a fundamental constraint to the development of a superstore on any site because of the traffic congestion situation, and that full private funding at a cost of £6·6m. must be provided. West Oxfordshire District Council supported this contention, as did Tesco, which offered to provide the full funding for the W.E.L. itself.

The inspector recommended that Tesco's application should be granted and Tarmac's appeal dismissed. She first addressed the question whether there was a fundamental constraint to the development of a food superstore in the absence of funding for the W.E.L. and rejected that proposition. Having referred to the traffic problem in Witney, she said:

> "7.2 . . . It is clear that a new foodstore would result in additional traffic on the local road network, and Bridge Street in particular. However, whilst a store would generate more traffic at peak times, particularly the Friday evening and Saturday morning peaks, even the worst estimates indicate the increase in traffic at Bridge Street would be well below 10 per cent. over and above that which would be generated by B1 office development, for which planning permission exists. . . ."

The inspector went on to refer to the Department of the Environment Circular 16/91, dealing with planning obligations under section 106 of the Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991), and observed that such obligations could relate to land, roads etc. other than those covered by the planning permission provided there was a direct relationship between the two. She went on to say:

> "7.4 . . . In this case there is some relationship between the funding of the W.E.L. and a proposed store in that a store would slightly worsen traffic conditions in the town over and above the existing planning permission. The relationship is however tenuous. Any superstore site would be a considerable distance from the W.E.L. and Bridge Street and the development proposed would not generate a great deal more traffic than the other permitted uses of the sites. . . ."

Having further observed that the Circular stated that the extent of what is required should be fairly and reasonably related in scale to the proposed development, she said:

> "7.5 . . . In the case of Witney, the W.E.L. is necessary to ameliorate existing traffic conditions and to assist in bringing forward

A the development of Policy Areas 1–3. I take the view therefore that the full funding of the road is not fairly and reasonably related in scale to this proposed development. . . ."

The inspector took the view that it would be unreasonable to require a developer of a previously approved development site to fully fund a major road proposal because his development would marginally increase traffic B over and above that already permitted but concluded:

"7.6 However, no such requirement is being made by the council. The Proposed Modifications of the Local Plan Alterations provide an upper case policy relating to the provision of the W.E.L. and a lower case statement to the effect that it will be the council's intention to negotiate funding or a major contribution to funding the W.E.L. The C Local Plan inspector also stated that the superstore may contribute 'all or most' of this funding. If the council negotiations result in the offer of a full contribution to the cost of the W.E.L. from the developer of a site preferred by the council following a lengthy Local Plan inquiry, then it would be perverse to turn away the offer. The council therefore finds itself in the somewhat surprising but felicitous position of the first major developer since the Local Plan inquiry D responding to the council's offer to negotiate on W.E.L. funding by a full funding proposal. This seems to me to be a perfectly proper outcome of negotiations provided that the agreement entered into is sufficiently robust to achieve the benefits promised."

The inspector went on to consider the merits from the planning points of view of the competing sites, upon the basis, which she found proper, E that only one site should be approved. She found those merits to be finely balanced, but having regard to the informal preference for Tesco's Henry Box site expressed by the Local Plan inspector she came down in favour of that one.

Though the matter is not directly alluded to in the inspector's report, it is relevant to notice that on 28 July 1992, the third last day of the F inquiry, Tesco entered into an agreement with Oxfordshire County Council containing a planning obligation under section 106 of the Act of 1990. The obligation was to pay the council the sum of £6·6m. if planning permission for the development of the Henry Box site was granted.

On 16 April 1993 the Secretary of State issued a decision letter in which he rejected the inspector's recommendation. He allowed Tarmac's appeal regarding the Mount Mills site, and dismissed Tesco's application G for the Henry Box site. I will have occasion to consider the decision letter in some detail later, but his reasons in brief were (1) that he held Tesco's offer of funding not to be a good ground either for granting planning permission to Tesco or for dismissing Tarmac's appeal, (2) that the Local Plan inspector's informal preference for the Henry Box site should receive only limited weight, and (3) that on planning grounds the Mount Mills H site was to be preferred.

Tesco took proceedings against the Secretary of State, under section 288 of the Act of 1990, to quash the decision letter. The grounds of the application were (1) that the Secretary of State had wrongly discounted the preference of the Local Plan inspector for the Henry Box site and the local planning authority's acceptance of that, and (2) that the Secretary of State by discounting Tesco's offer of funding for the W.E.L. had failed to take account of a material consideration. Tarmac and West Oxfordshire

District Council, in addition to the Secretary of State, were called as respondents to the application, but the council took no part in the proceedings. The matter came before Mr. Nigel Macleod Q.C., sitting as a deputy High Court judge in the Queen's Bench Division, who on 7 July 1993 gave judgment in favour of Tesco quashing the decision letter. He rejected the first ground of application but accepted the second, holding that the Secretary of State had wrongly failed to treat Tesco's offer of funding as a material consideration. Tarmac appealed, and on 25 May 1994 the Court of Appeal (Sir Thomas Bingham M.R., Beldam and Steyn L.JJ.) allowed the appeal and reinstated the decision of the Secretary of State: see Court of Appeal (Civil Division) Transcript No. 736 of 1994. Sir Thomas Bingham M.R. and Beldam L.J. held that the Secretary of State had not failed to have regard to Tesco's offer of funding nor treated it as immaterial, but had simply declined to give it any or any significant weight, as he was entitled to do. Steyn L.J. went somewhat further. He held that the Secretary of State, in announcing and applying a policy to the effect that planning obligations should only be sought where they were necessary to the grant of planning permission, had acted lawfully, and was entitled to take the view that in the light of that policy Tesco's offer of funding was immaterial. All three Lords Justices rejected a respondent's notice by Tesco directed to Mr. Macleod's refusal of the first ground of application to him. Tesco now appeals to your Lordships' House. The only matter now at issue is concerned with Tesco's offer of funding for the W.E.L.

The thrust of Tesco's argument is that the offer of funding was a material consideration and that the Secretary of State failed to have regard to it. The argument relies on section 70 of the Act of 1990 which, so far as material, provides:

> "(1) Where an application is made to a local planning authority for planning permission—(*a*) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit, or (*b*) they may refuse planning permission. (2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

By virtue of sections 77(4) and 79(4), section 70 applies to the Secretary of State when he is determining an application or an appeal.

Sir Thomas Bingham M.R. in the course of his judgment in this case said that "material" in subsection (2) meant "relevant," and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). In assessing whether or not the Secretary of State in the instant case wrongly treated Tesco's offer of funding for the W.E.L. as not being a material consideration in determining the competing applications for planning permission it is necessary to examine both the published policy of the Secretary of State in regard to planning obligations and the terms of his decision letter.

The substituted section 106 of the Act of 1990 made provisions with regard to planning obligations. The first three subsections of it are in these terms:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3)—(*a*) restricting the development or use of the land in any specified way; (*b*) requiring specified operations or activities to be carried out in, on, under or over the land; (*c*) requiring the land to be used in any specified way; or (*d*) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically. (2) A planning obligation may—(*a*) be unconditional or subject to conditions; (*b*) impose any restriction or requirement mentioned in subsection (1)(*a*) to (*c*) either indefinitely or for such period or periods as may be specified; and (*c*) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period. (3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(*d*)—(*a*) against the person entering into the obligation; and (*b*) against any person deriving title from that person."

Just before the section came into force on 25 October 1991 the Secretary of State issued a Circular, 16/91, giving guidance on the proper use of planning obligations under it. Annex B to the Circular commenced by observing that, rightly used, planning obligation might facilitate and enhance development proposals, but that they should not be used to extract from developers payments in cash or in kind for purposes that were not directly related to the development proposed but were sought as "the price of planning permission." That no doubt reflected the dictum of Lloyd L.J. in *Bradford City Metropolitan Council v. Secretary of State for the Environment* (1986) 53 P. & C.R. 55, 64, to the effect that it has usually been regarded as axiomatic that planning consent cannot be bought or sold.

The Circular continued, under the heading "General Policy:"

> "B5. The following paragraphs set out the circumstances in which certain types of benefit can reasonably be sought in connection with a grant of planning permission. They are the circumstances to which the Secretary of State and his inspectors will have regard in determining applications or appeals. They may be briefly stated as those circumstances where the benefit sought is related to the development and necessary to the grant of permission. Local planning authorities should ensure that the presence or absence of extraneous inducements or benefits does not influence their decision on the planning application. Authorities should bear in mind that their decision may be challenged in the courts if it is suspected of having been improperly influenced.
>
> "B6. Planning applications should be considered on their merits and determined in accordance with the provisions of the development plan unless material considerations indicate otherwise. It may be reasonable, depending on the circumstances, either to impose

conditions on the grant of planning permission, or (where the planning objection to a development proposal cannot be overcome by means of a condition) to seek to enter into a planning obligation by agreement with the applicant which would be associated with any permission granted. If there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable because it enables a developer to appeal to the Secretary of State. The terms of conditions imposed on a planning permission should not be restated in a planning obligation, because that would entail nugatory duplication and frustrate a developer's right of appeal.

"B7. As with conditions (see DoE Circular 1/85, Welsh Office Circular 1/85), planning obligations should only be sought where they are necessary to the granting of permission, relevant to planning, and relevant to the development to be permitted. Unacceptable development should never be permitted because of unrelated benefits offered by the applicant, nor should an acceptable development be refused permission simply because the applicant is unable or unwilling to offer such unrelated benefits.

"B8. The test of the reasonableness of seeking a planning obligation from an applicant for planning permission depends on whether what is required: (1) is needed to enable the development to go ahead, for example the provision of adequate access or car parking; or (2) in the case of financial payment, will contribute to meeting the cost of providing such facilities in the near future; or (3) is otherwise so directly related to the proposed development and to the use of the land after its completion, that the development ought not to be permitted without it, e.g. the provision, whether by the applicant or by the authority at the applicant's expense, of car parking in or near the development, of reasonable amounts of open space related to the development, or of social, educational, recreational, sporting or other community provision the need for which arises from the development; or (4) is designed in the case of mixed development to secure an acceptable balance of uses; or to secure the implementation of local plan policies for a particular area, or type of development (e.g. the inclusion of an element of affordable housing in a larger residential development) or (5) is intended to offset the loss of or impact on any amenity or resource present on the site prior to development, for example in the interests of nature conservation. The Department welcomes the initiatives taken by some developers in creating nature reserves, planting trees, establishing wildlife ponds and providing other nature conservation benefits. This echoes the Government's view in 'This Common Inheritance' (Cmnd. 1200) that local authorities and developers should work together in the interest of preserving the natural environment. Planning obligations can therefore relate to land, roads or buildings other than those covered by the planning permission, provided that there is a direct relationship between the two. But they should not be sought where this connection does not exist or is too remote to be considered reasonable.

"B9. If what is required passes one of the tests set out in the preceding paragraph, a further test has to be applied. This is whether the extent of what is required is fairly and reasonably related in scale and kind to the proposed development. Thus a developer may reasonably be expected to pay for or contribute to the cost of

infrastructure which would not have been necessary but for his development, but his payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided. So, for example, a developer may reach agreement with an infrastructure undertaker to bring forward in time a project which is already programmed but is some years from implementation."

Paragraph B12, under the heading "Unilateral Obligations" stated:

"The use of unilateral undertakings is expected to be principally at appeal, where there are planning objections which only a planning obligation can resolve, but the parties cannot reach agreement. Where a developer offers an undertaking at appeal, it will be referred to the local planning authority to seek their views. Such an undertaking should be in accordance with the general policy in this guidance. It should be relevant to planning and should resolve the planning objections to the development proposal concerned. Otherwise, it would not be a material consideration and will not be taken into account. If the undertaking would resolve an identified planning objection to a development proposal but also contains unrelated benefits, it should only be taken into account to the extent that it resolves the objection. Developers should not promise to do what they cannot perform. Attention is drawn to the statutory requirement that a developer must have an interest in the land before he can enter into a planning obligation. At appeal the inspector may seek evidence of title if it has not been demonstrated that the developer has the requisite interest. Where a trunk road is involved the developer will also need the agreement of the relevant highway authorities and any necessary highway orders."

The Secretary of State's decision letter, in dealing with the matter of Tesco's offer to fund the W.E.L., had regard to the policy guidance in Circular 16/91. The relevant paragraphs are these:

"7. Turning, therefore to the first main issue, the W.E.L., the Secretary to State accepts that a new foodstore on any of the three sites would result in additional traffic on the local road network, but he observes that such an increase would be less than 10 per cent. in excess of that which would have been generated by the permitted B1 development on the Mount Mills and Henry Box sites. He agrees with the inspector that this slight worsening of traffic conditions produces some relationship between the funding of W.E.L. and a proposed store, but shares her view that the relationship is tenuous, given the distance of these sites from W.E.L. and the amount of traffic likely to be generated compared to the potential from uses already permitted. Looking at the offer of funding made by Tesco in relation to the tests of reasonableness set out in paragraph B8 of Annex B to Circular 16/91, the Secretary of State does not consider that W.E.L. is needed to enable any of the superstore proposals to go ahead, or is otherwise so directly related to any of the proposed developments and to the use of the land after completion that any of the developments ought not to be permitted without it. He appreciates that provision for the road is made in the Local Plan which is nearing adoption, and that it is the county council's intention to seek funding or a major contribution. However, having regard to paragraph B9 of

the Annex to the Circular, and bearing in mind also that no contributions towards highway improvements were sought when planning permission was granted in 1991 for B1 development on two of the sites, he agrees with the inspector that the full funding of W.E.L. is not fairly and reasonably related in scale to any of the proposed developments. As to whether it would be appropriate to seek a major contribution from developers before allowing any superstore proposal, he takes the view, given the anticipated traffic levels and the distance between the sites and the route of W.E.L., that it would be unreasonable to seek even a partial contribution from developers towards the cost of the work in connection with the proposals currently before him. He notes the inspector's conclusion that it would be 'perverse' to turn away an offer from a developer of a site preferred by the council after a lengthy Local Plan inquiry but, for the reasons given in paragraphs 5 and 6 above, he thinks that the expressed preference can carry only limited weight. Accordingly, in his view, since the offer of funding fails the tests of Annex B of Circular 16/91, it cannot be treated either as a reason for granting planning permission to Tesco or for dismissing either of the two section 78 appeals.

"8. If the Secretary of State is wrong in his conclusion that it would be unreasonable to seek even a partial contribution towards the funding of W.E.L., then it would be the case that he would be required to take into account Tesco's offer of funding, albeit not fully but only to the extent of such partial contribution as he considered was reasonable. For the same reasons that led him to his conclusion that not even the seeking of a partial contribution would be reasonable, he considers that the extent to which the funding should be taken into account (assuming, for the purposes of argument, that it has to be taken into account at all) will be of such a limited nature that, even upon taking the benefit into account, the balance of the arguments would not be tipped so as to change his decision."

The argument for Tesco draws attention to the reference in paragraphs B5 and B7 of the Circular 16/91 to the benefits of planning obligations being properly sought only where they are necessary to the grant of planning permission, and in paragraph B8 to the reasonableness of seeking a planning obligation being dependent on whether it is needed to enable the development to go ahead. Paragraph 7 of the decision letter states that the W.E.L. is not needed to enable any of the superstore proposals to go ahead. This demonstrates, so it is maintained, that the Secretary of State has applied a test of necessity which has wrongly resulted in his treating Tesco's offer of funding as immaterial. Reliance is placed on *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578. That case was concerned with the question as to the type of conditions which might lawfully be annexed to a grant of planning permission. Viscount Dilhorne said, at p. 599:

"It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them."

The other members of the House spoke to similar effect.

A The same test, so it is claimed, falls to be applied to a planning obligation for the purpose of deciding whether it amounts to a material consideration in connection with an application for planning permission. The parallel, however, cannot be exact. No doubt if a condition is completely unrelated to the development for which planning permission is sought it will not be lawful. But this case is not concerned with the lawfulness of Tesco's planning obligation, and there may be planning B obligations which have no connection with any particular proposed development. Further, in *Good v. Epping Forest District Council* [1994] 1 W.L.R. 376 the Court of Appeal held that an agreement under section 52 of the Town and Country Planning Act 1971, the predecessor of section 106 of the Act of 1990, might be valid notwithstanding that it did not satisfy the second of the *Newbury* tests. So I do not think that C reference to the *Newbury* case is particularly helpful for the purpose of deciding whether a particular planning obligation is a consideration material to the determination of a planning application with which the obligation is associated.

Tesco's argument founded on *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78 as being a decision of the Court of Appeal to the effect that offers of D section 106 agreements by applicants for planning permission which promised various benefits on and off site, involving the payment of considerable sums of money, did not vitiate planning consents granted by the local planning authority, notwithstanding that the offers were not necessary in the sense that they overcame what would otherwise be planning objections to the proposed development. A supermarket operator E was seeking to overturn planning consents granted to two rivals, and argued that the section 106 agreements were not material considerations unless they passed the necessity test. The Court of Appeal held that it was sufficient, on the basis of the *Newbury* case [1981] A.C. 578, that the obligations offered concerned planning matters and fairly and reasonably related to the proposed development. The only member of the court who referred to the Circular 16/91 was Hoffmann L.J. Having quoted, at p. 90, F from paragraph B7 the statement that planning obligations should only be sought where they were necessary to the granting of permission, he observed that this statement of policy embodied a general principle that planning control should restrict the rights of landowners only so far as might be necessary to prevent harm to community interests. He did not make any criticism of the policy but said:

G > "The fact that the principle of necessity is applied as policy by the Secretary of State does not make it an independent ground for judicial review of a planning decision. . . . to say that a condition or the requirement of a section 106 agreement would have been discharged on appeal by the Secretary of State, because its imposition did not accord with the policies I have quoted, is not at all the same thing as saying that the planning authority would have been acting beyond its H statutory powers."

The meaning, as I understand it, is that a local planning authority is not bound to apply a policy favoured by the Secretary of State in the sense that failure to do so will vitiate its decision. The effect of the decision, therefore, is simply that the local planning authority is not acting unlawfully if it fails to apply a necessity test in considering whether a planning obligation should be required or accepted. It does not decide the

converse, namely that the local planning authority would be acting unlawfully if it did, as a matter of policy apply a necessity test.

An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy. The policy set out in the Circular 16/91 is intended to bring about certainty and uniformity of approach, and is directed among other things to securing that planning permissions are not bought and sold. It is not suggested that there is anything unlawful about Circular 16/91 as such. It might be thought the Secretary of State has made a slip in paragraph B12 where it is stated of unilateral undertakings:

> "It should be relevant for planning and should resolve the planning objections to the development proposal concerned. Otherwise, it would not be a material consideration and will not be taken into account. . . ."

But the context is that of an appeal against refusal of planning permission, which involves that the local planning authority should have taken the view that there were planning objections to the proposed development. If these objections were bad there would be no need for any unilateral obligation. If they were good then something would require to be done to overcome them and a unilateral obligation which would not do so would indeed be irrelevant. As regards the references in paragraphs B5 and B7 to planning obligations being necessary to the grant of permission and in paragraph B8 to their being needed to enable the development to go ahead, I think they mean no more than that a planning obligation should not be given weight unless the exercise of planning judgment indicates that permission ought not to be granted without it, not that it is to be completely disregarded as immaterial.

When it comes to the Secretary of State's decision letter, I am clearly of opinion that on a fair reading of it he has not disregarded Tesco's offer of funding as being immaterial. On the contrary, he has given it careful consideration. Paragraph 7 examines the effect of a new foodstore on the traffic situation in Witney, concludes that there would be a slight worsening, and agrees with the inspector that this produces some relationship between the funding of the W.E.L. and the proposed foodstore but that the relationship is tenuous. He expresses the view that the W.E.L. is not so closely related to any of the proposed superstores that any of them ought not to be permitted without it. He goes on to say that full funding of the W.E.L. is not fairly and reasonably related in scale to any of the proposed developments, and further that having regard to the expected traffic and the distance between the sites and the route of the W.E.L. it would be unreasonable to seek even a partial contribution from developers towards the cost of it. All of this seems to me, far from being a dismissal of the offer of funding as immaterial, to be a careful weighing up of its significance for the purpose of arriving at a planning decision. In paragraph 8 the Secretary of State considers whether in the event of its being reasonable to seek a partial contribution to the funding of W.E.L. the amount of the benefit would be such as to tip the balance of the

A argument in favour of Tesco, and concludes that it would not. That is clearly a weighing exercise.

Upon the whole matter I am of opinion that the Secretary of State has not treated Tesco's offer of funding as immaterial, but has given it full and proper consideration, and that his decision is not open to challenge. I would, accordingly, dismiss the appeal.

B LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I, too, would dismiss the appeal.

LORD BROWNE-WILKINSON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith C of Kinkel. For the reasons which he gives I, too, would dismiss the appeal.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I, too, would dismiss the appeal.

D LORD HOFFMANN. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that for the reasons which he gives, this appeal must be dismissed. But in view of what Sir Thomas Bingham M.R., in the passage quoted at the beginning of my noble and learned friend's speech, described as the unusual public importance of the questions involved in this appeal, E I add some observations of my own.

1. *External costs*

A development will often give rise to what are commonly called external costs, that is to say, consequences involving loss or expenditure by other persons or the community at large. Obvious examples are the F factory causing pollution, the office building causing parking problems, the fast food restaurant causing litter in the streets. Under the laissez-faire system which existed before the introduction of modern planning control by the Town and Country Planning Act 1947, the public had for the most part to bear such external costs as best it could. The law of torts (particularly nuisance and public nuisance) and the Public Health Acts could provide a remedy for only the most flagrant cases of unneighbourly G behaviour.

2. *Imposing conditions*

Section 14(1) of the Town and Country Planning Act 1947 gave planning authorities the power, when granting planning permission, to impose "such conditions as they think fit." This power has been repeated H in subsequent planning Acts and is now contained in section 70(1) of the Town and Country Planning Act 1990. This might have been thought to be a suitable instrument by which planning authorities could require that developers bear, or at any rate contribute to, their own external costs. But the courts, in the early days of planning control, construed the power to impose conditions very narrowly. It was not so much the general principles which the courts laid down as the way in which in practice the principles were applied. The classic statement of the general principle was by Lord

Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As a general statement, this formulation has never been challenged. In *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578 it was paraphrased by Viscount Dilhorne as stating three conditions for the validity of a condition. It must (1) be for a planning purpose and not for any ulterior one; (2) fairly and reasonably relate to the permitted development; and (3) not be *Wednesbury* unreasonable: [1948] 1 K.B. 223.

3. *The Shoreham case*

The inability of planners to use conditions to require developers to bear external costs arose from the way in which these principles were applied to the facts of particular cases.

The landmark case was *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240. The plaintiffs wanted to build a ready mixed concrete plant and other facilities on land between the sea near Shoreham and the heavily congested main road to Brighton. The local planning authority granted permission subject to a condition that the plaintiffs construct an ancillary road on their own land parallel to the main road and allow access over that road to traffic from neighbouring land which was scheduled for development and over which it was proposed that a continuation of the ancillary road would be built. Willmer L.J. said that this was an admirable way to avoid further congestion and minimise the risk of accident. Nevertheless he and the other members of the Court of Appeal held the condition to be *Wednesbury* unreasonable. He said, at pp. 250–251:

> "if what the defendants desire to achieve is the construction of an ancillary road serving all the properties to be developed along the strip of land that is scheduled for development, for the use of all persons proceeding to or from such properties, they could and should have proceeded in a different way. What is suggested is that, in addition to the strip of land already earmarked for the proposed road widening, they could have designated a further strip 26 feet wide immediately to the southward, and could have imposed a condition that no building was to be erected on this additional strip which would in any way interfere with its use hereafter for the building of the proposed ancillary road. . . . Under the conditions now sought to be imposed, on the other hand, the plaintiff must construct the ancillary road as and when they may be required to do so over the whole of their frontage entirely at their own expense. . . . The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs' expense, on the plaintiffs' land, and without the necessity for paying any compensation in respect thereof. Bearing in mind that another and more regular course is open to the defendants, it seems to me that this result would be

A utterly unreasonable and such as Parliament cannot possibly have intended."

This judgment shows no recognition of the possibility that the need to widen the Brighton Road could in part be regarded as an external cost of the applicant's ready mixed concrete business, to which they could in fairness be required to contribute as a condition of the planning B permission. It is assumed that the "regular course," the natural order of things, is that such costs should be borne by taxation upon the public at large. The fact that the local authority has power, on payment of compensation, to take land for highway purposes from any person, whether or not he imposes external costs upon the community, is treated as a reason for denying that it can use planning powers to exact a contribution from those who do.

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4. *Planning agreements*

I have dwelt upon *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* because it exercised a decisive influence upon the development of British planning law and practice. The Ministry of Housing and Local Government issued a circular for the guidance of local planning authorities D (5/68) which was intended to reflect its ratio decidendi. It has since been replaced in similar terms by paragraph 63 of Circular 1/85:

> "No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or E for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. Similarly, permission cannot be granted subject to a condition that the applicant enters into an agreement under section 52 of the Act [now section 106 of the Act of 1990] or other powers. However, conditions may in some cases reasonably be imposed to oblige developers to carry out F works, e.g. provision of an access road, which are directly designed to facilitate the development."

Faced with this restriction on their power to require contribution to external costs by the imposition of conditions, local planning authorities resorted to a different route by which they could achieve the same purpose. This was the agreement under section 52 of the Town and G Country Planning Act 1971, now replaced by section 106 of the Town and Country Planning Act 1990. In its original form it provided as follows:

> "(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the H agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement."

5. *Planning gain*

During the property boom of the early seventies, local planning authorities increasingly used the power to enter into section 52 agreements

(or agreements under their general powers) to exact payments or cessions of land which could not be imposed by conditions. Under Circular 5/68 it could not be made a condition of the planning permission that the developer enter into such an agreement, but that presented no difficulty. The local planning authority simply refused to grant a planning permission until the developer had entered into the agreement. Then it granted permission unconditionally. Of course the developer could always appeal against a refusal to the Secretary of State, but the delay and expense which would be involved was a powerful incentive to negotiate an agreement which would meet the local planning authority's demands.

There developed a practice by which the grant of planning permissions was regularly accompanied by negotiations for what was called a "planning gain" to be provided by the developer to the local planning authority. The practice caused a good deal of public concern. Developers complained that they were being held to ransom. They said that some local authorities insisted that in return for planning permission, an applicant should make a payment for purposes which could in no way be described as external costs of the particular development. In the boom atmosphere of the time, in which a grant of planning permission could add substantially to the value of land, some authorities appeared to regard themselves as entitled to share in the profits of development, thereby imposing an informal land development tax without the authority of Parliament. Citizens, on the other hand, complained that permissions were being granted for inappropriate developments simply because the developers were willing to contribute to some pet scheme of the local planning authority. There was also a more general concern about distortion of the machinery of planning. The process envisaged by the planning acts was that decisions would be made openly in council or committee by adjudicating on the merits of the application and then either refusing permission or granting it with or without unilaterally imposed conditions. If the developer did not like the condition, he could appeal to the Secretary of State, who would also adjudicate upon the matter openly after public inquiry. But the shift from conditions to agreements meant that a crucial part of the planning process took place in secret, by negotiation between the developer and the council's planning officers. It began to look more like bargain and sale than democratic decision-making. Furthermore, the process excluded the appeal to the Secretary of State. The developer who had entered into a section 52 agreement could not appeal. Nor did anyone else have a right of appeal. The only possibility of challenge was if some sufficiently interested party applied for judicial review on the ground that the planning authority had taken improper matters into consideration when granting the permission. In this respect the decision in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 had been self-defeating. By preventing local planning authorities from requiring financial contributions or cessions of land by appealable conditions, it had driven them to doing so by unappealable section 52 agreements.

6. *Circular 16/91*

It was in response to these concerns that the Department of the Environment issued its circular *Planning Gain* (22/83), now replaced by Circular 16/91, *Planning Obligations*. The purpose of these circulars was to give guidance to local planning authorities and state the policy which the Secretary of State would apply in dealing with appeals. The essence of

the advice is contained in paragraph B5 of Circular 16/91. It says that any benefit sought in return for a grant of planning permission must be "related to the development and necessary to the grant of permission." The test thus has two limbs: relationship to the development and necessity for the grant of permission. The need for a relationship to the development flows from the requirements of what is now section 70(2) of the Town and Country Planning Act 1990, which says that in deciding whether to grant or refuse planning permission (or to impose conditions)

> "the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

A benefit unrelated to the development would not be a "material consideration" and a refusal based upon the developer's unwillingness to provide such a benefit would therefore be unlawful. Thus far, the Circular does no more than reflect the requirements of the statute. But the second limb, "necessary to the grant of permission," is a different matter. The foundation for this test is the policy which has been applied by successive governments since the inception of the modern planning system, namely that

> "applications for development should be allowed, having regard to the development plan and all material considerations, unless the proposed development would cause demonstrable harm to interests of acknowledged importance." (*Planning Policy Guidance 1*: (PPGl, March 1992), *General Policy and Principles*, paragraph 5).

As a corollary of this principle of policy, the department had for many years advised that conditions should not be imposed unless without them the development would be unacceptable in the sense that it would have to be refused as likely to cause "demonstrable harm to interests of acknowledged importance:" see Circular 1/85, paragraph 12. Circular 16/91 declares a similar policy in respect of benefits required to be provided by agreements under section 106 of the Town and Country Planning Act 1990. It says that an obligation to provide such a benefit may be imposed if it is needed to enable the development to go ahead, or designed to secure an acceptable balance of uses or "so directly related to the proposed development that [it] ought not [be allowed to go ahead] without it:" paragraph B8. If there is the necessary relationship between the development and the benefit, i.e. if the benefit can be regarded as meeting or contributing to an external cost of the development, then

> "the extent of what is required [must be] fairly and reasonably related in scale and kind to the proposed development." A developer may "reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for his development, but his payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided:" paragraph B9.

In each case the language emphasises that an obligation should not be required if, even without it, or with a less onerous obligation, a refusal of planning permission would be contrary to the presumption in favour of development.

7. *Modern policy on external costs*

I shall defer for the moment an examination of the relationship between this second limb of the test in Circular 16/91 and the legal limits

of the powers of planning authorities. For the moment I would only draw attention to two aspects of the policy which it lays down. First, it comes down firmly against the practice of using demands for "planning gain" as a means of enabling local planning authorities to share in the profits of development. The more flagrant examples of demands for purposes unrelated to the development were in any event illegal as *Wednesbury* unreasonable or founded upon immaterial considerations. But the Circular also makes it clear that appeals will be allowed if local planning authorities make demands which are excessive in the sense of being in planning terms unnecessary or disproportionate. This policy is reinforced by a warning that applications for costs against local planning authorities making such excessive demands will be sympathetically considered. But secondly, the Circular sanctions the use of planning obligations to require developers to cede land, make payments or undertake other obligations which are bona fide for the purpose of meeting or contributing to the external costs of the development. In other words, it authorises the use of planning obligations in a way which the court in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 would have regarded as *Wednesbury* unreasonable in a condition. A good example of its application is the recent case of *Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc.* (unreported), 13 October 1994; Court of Appeal (Civil Division) Transcript No. 1204 of 1994. The district council, faced with an alteration to the structure plan which contemplated residential development which would double the population of the small town of Towcester, decided that applicants for planning permission to build the new houses would be required to enter into agreements to contribute to the necessary infrastructure, such as schools, community centres, a bypass road and so forth. The council calculated how much these works would cost and decided to allocate the burden among prospective developers in accordance with a formula based on the percentage of value added to the land by the grant of planning permission. The Court of Appeal held that this policy was both lawful and in accordance with Circular 16/91. Henry L.J. said:

> "Where residential development makes additional infrastructure necessary or desirable, there is nothing wrong in having a policy that requires major developers to contribute to the costs of infrastructure related to their development."

He went on to say that the formula was, in the circumstances of that case, a practical and legitimate way of relating the infrastructure costs to the various developments.

8. *Legislation in support of the new policy*

The government policy of encouraging such agreements has been buttressed by amendments to the planning and highways legislation to confer upon local planning authorities and highway authorities very wide powers to enter into agreements with developers. The new section 106 of the Town and Country Planning Act 1990 says in express terms that agreements under that section may require a developer to pay sums of money. The new section 278 of the Highways Act 1980, substituted by section 23 of the New Roads and Street Works Act 1991, confers a broad power upon a highway authority to enter into agreements by which some other person will pay for the construction or improvement of roads or streets. Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and

A other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While rejecting the politics of using planning control to extract benefits for the community at large, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs.

B

9. *Law and policy in the United Kingdom*

This brings me to the relationship between the policy and the law. I have already said that the first limb of the test in paragraph B5 of Circular 16/91 marches together with the requirements of the statute. But the second—the test of necessity (and proportionality)— does not. It is C well within the broad discretion entrusted to planning authorities by section 70 of the Town and Country Planning Act 1990. But it is not the only policy which the Secretary of State might have adopted. There is nothing in the Act of 1990 which requires him to adopt the tests of necessity and proportionality. It is of course entirely consistent with the basic policy of permitting development unless it would cause demonstrable D harm to interests of acknowledged importance. But even that policy is not mandated by Parliament. There may come a Secretary of State who will say with Larkin:

> "Despite all the land left free
> For the first time I feel somehow
> That it isn't going to last
> That before I snuff it, the whole
> Boiling will be bricked in . . .
> And that will be England gone
> The shadows, the meadows, the lanes
> The guildhalls, the carved choirs"

E

and promulgate a policy that planning permissions should be granted only F for good reason. There is nothing against this in the statute. And among the good reasons could be the willingness of the developer to provide related external benefits.

The potentiality for conflict between the policy of Circular 16/91 and other equally defensible policies has arisen most acutely in cases in which developers are in competition for a planning permission, that is to say, in which it is accepted that the grant of permission to one developer is a G valid planning reason for refusing it to another. In such cases the presumption in favour of development does not yield an easy answer. If there was no competition, it might be that the proposal of developer A could not be said to cause demonstrable harm to interests of acknowledged importance. But what happens when one has to throw into the scale having to forego the benefits of the far more attractive proposal of H developer B? Is that not harm to an interest of acknowledged importance? I do not think anyone would doubt that in such a case of competition, it would be legitimate to take into account that one developer was willing, for example, to employ the finest architect, use the best materials, lay out beautiful gardens and so forth, whereas the proposal of the other developer, though not unacceptable if it had stood alone, was far inferior. The problem arises when a developer tries to win the competition by offering more off-site benefits.

10. *The Plymouth case*

If it is proper in a case of competition to take into account the architecture and landscaping within the respective development sites, it is difficult logically to distinguish the provision of benefits related to the development but off the site. It is true that the former may be more likely to enhance the value of the developer's land than the latter. But the difference is one of degree and, one might think, a matter for the developer's choice. This was the view of the local planning authority in *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78. It was advised by its planning officers that only one permission should be granted for a superstore on the eastern approach to Plymouth. It thereupon organised a competition. It invited prospective developers to select from a menu of "community benefits," all of which satisfied the test of being fairly related to the proposed development, and indicated that it would take into account the extent to which a developer was willing to pay for items on the menu. Having received two attractive bids which included a number of external benefits, it changed its policy and decided to grant both permissions. This was challenged by the Co-operative Society, which had a competing supermarket nearby, on the ground that the local planning authority had taken into account an offer of benefits which were not necessary, in the sense that they overcame what would otherwise have been planning objections to the development. Because a local planning authority gives no reasons for a decision to grant planning permission, it is not easy to tell what view it has formed about whether a proposed benefit did or did not overcome an objection to the development. It is probably true to say that, as it was agreed that there could be a superstore in the area, the menu of benefits offered by each developer was not necessary to make his development acceptable if his had been the only application. The matter becomes more complicated when, as the council originally intended, acceptance of one application involves rejection of the other, or when, as afterwards happened, it was decided to grant both applications—a change of policy in which the benefits offered no doubt played a substantial part. But the Court of Appeal was content to deal with the matter on the basis that the council had indeed taken into account promises of benefits which, though relating to the proposed development, were not necessary for the grant of permission within the terms of Circular 16/91. It dismissed the appeal on the ground that the test of necessity, whether as explained in the Circular or in any other form, was not a legal requirement. It said that the tests for the vires of a grant of planning permission which took into account benefits offered under a planning obligation were the same as the tests for the validity of a condition laid down by this House in the *Newbury* case [1981] A.C. 578: the planning obligation must be for a planning purpose; it must fairly relate to the proposed development and having regard to it must not be *Wednesbury* unreasonable. There is no additional test of necessity.

11. *Planning obligations and the Newbury tests*

Although I was party to the *Plymouth* decision, 67 P. & C.R. 78 and accepted the transposition of the three *Newbury* tests to the validity of a planning permission granted on the basis of the developer undertaking a planning obligation, I am bound to agree with my noble and learned friend, Lord Keith of Kinkel, that the parallel is by no means exact. The

A analogy was been invoked because, as Lord Scarman pointed out in *Newbury* [1981] A.C. 578, 619A, the first two tests are a judicial paraphrase of the planning authority's statutory duty in section 70(2) of the Act of 1990 to have regard to the provisions of the development plan and "any other material considerations." This duty applies as much to the decision to grant a planning permission (which is what was under attack in the *Plymouth* case) as to the decision to impose conditions (which was under B attack in the *Newbury* case). The third *Newbury* test, *Wednesbury* unreasonableness, is a general principle of our administrative law. But the use of the *Newbury* tests in relation to planning obligations can cause confusion unless certain points are borne clearly in mind.

First, the *Newbury* case was concerned with the validity of a condition and there is a temptation to regard a planning obligation as analogous to C a condition. But section 70(2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v. Epping Forest District Council* [1994] 1 W.L.R. 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* D unreasonable. Of course it is normal for a planning obligation to be undertaken or offered in connection with an application for planning permission and to be expressed as conditional upon the grant of that permission. But once the condition has been satisfied, the planning obligation becomes binding and cannot be challenged by the developer or his successor in title on the ground that it lacked a sufficient nexus with E the proposed development. The reason why the adoption of the *Newbury* tests had any plausibility in the *Plymouth* case was because the case was not concerned with the validity of planning obligations. It turned upon whether the planning obligations undertaken in that case were material considerations which could legitimately be taken into account in granting planning permission. The same is true of this case.

Secondly, it does not follow that because a condition imposing a F certain obligation (such as to cede land or pay money) would be regarded as *Wednesbury* unreasonable, the same would be true of a refusal of planning permission on the ground that the developer was unwilling to undertake a similar obligation under section 106. I say this because the test of *Wednesbury* unreasonableness applied in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* to conditions is quite inconsistent G with the modern practice in relation to planning obligations which has been encouraged by the Secretary of State in Circular 16/91 and by Parliament in the new section 106 of the Town and Country Planning Act 1990 and the new section 278 of the Highways Act 1980 and approved by the Court of Appeal in *Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc.*, 13 October 1994.

Thirdly, while *Newbury* is a convenient judicial paraphrase of the effect H of section 70(2), it cannot be substituted for the words of the statute. The principal questions in a case like this must always be whether the planning obligation was a "material consideration" and whether the planning authority had regard to it.

12. *The necessity test*

This brings me to the submissions in this appeal, the facts of which have been fully stated by my noble and learned friend, Lord Keith of

Kinkel. Mr. Vandermeer for Tesco submitted that Tesco's offer to pay for the West End Link was a material consideration and that the Secretary of State failed to have regard to it. Mr Ouseley for the Secretary of State agreed that it was a material consideration but said that upon a fair construction of the Secretary of State's decision letter, he did have regard to it. Mr. Lockhart-Mummery, for Tarmac, said that the offer was not a material consideration at all. Logically I should start with Mr. Lockhart-Mummery's submission, because if he is right, it does not matter whether or not the Secretary of State had regard to the offer.

Mr. Lockhart-Mummery's submission was that Tesco's offer was not material because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable. The development would have been perfectly acceptable without it, or at any rate, with an offer of a good deal less. He formulated the test of materiality as follows: "A planning authority may lawfully take into account a developer's offer to provide off-site infrastructure or other benefits whose objective and effect are to render his development *acceptable* so that it may be granted planning permission under section 70 of the Town and Country Planning Act 1990." (My emphasis.)

Mr. Lockhart-Mummery disclaimed any intention of challenging the correctness of the *Plymouth* decision, despite some encouragement from Steyn L.J. in the Court of Appeal. But in my judgment his formulation is in substance a rerun of the unsuccessful submission of Mr. Gilbart in the *Plymouth* case. The key word is that which I have emphasised: acceptable. The planning obligation, he says, must have the effect of making acceptable what would otherwise have been unacceptable. This, it seems to me, is indistinguishable from the test of necessity for the purpose of granting a planning permission which was rejected in the *Plymouth* case.

13. *Materiality and planning merits*

It would be inappropriate for me to rehearse the reasoning in the *Plymouth* case. But I shall, if I may, look at the question from a slightly different perspective. The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.

The test of acceptability or necessity put forward by Mr. Lockhart-Mummery suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning

decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is I suppose theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts.

14. *Law and policy in the United States*

It is instructive to compare this basic principle of English planning law with the position in the United States. There the question of what conditions can be imposed on the equivalent of a grant of planning permission has a constitutional dimension because the Fifth Amendment prohibits the taking of property by the state except for a public purpose and upon payment of just compensation. Nevertheless, the debate over when the imposition of a condition amounts to an unconstitutional taking of property or (in terms of state law) an unreasonable exercise of the planning (or "police") power, has given rise to a debate remarkably similar to that over "planning gain" in the United Kingdom. The courts, following the decision of the Supreme Court in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, apply what has been called the "rational nexus" test. This requires the planning authority which exacts a contribution to infrastructure as a condition of its consent to demonstrate that "the development will cause a need for new public facilities and that the contribution required is proportionate to that need and will actually be used to provide those facilities." ("Planning Gain and the Grant of Planning Permission: Is the United States' Test of the 'Rational Nexus' the Appropriate Solution?" by Purdue, Healey and Ennis [1992] J.P.L. 1012, 1014.) This, as the authors of the article from which I have quoted point out, is very similar to the tests of necessity and proportionality in Circular 16/91. In another article, "Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements" Callies and Grant ((1991) 23 The Urban Lawyer 221, 248) say:

> "The necessity to avoid falling foul of the 'taking' doctrine has meant that United States local governments have always had to be in a position to justify their rules in case of constitutional challenge, and hence to pursue openness and economic transparency . . ."

Purdue, Healey and Ennis add that the rational nexus test "has led some state courts to require sophisticated analysis which goes into questions of past expenditure and double taxation."

My Lords, no English court would countenance having the merits of a planning decision judicially examined in this way. The result may be some

lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference.

15. *Buying and selling planning permissions*

This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.*, 67 P. & C.R. 78, was such a case, leading to concern among academic writers and Steyn L.J. in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term "auction" rather than "competition" to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits. Or take the present case, which is in some respects the converse of the *Plymouth* case. Tarmac say that Tesco's offer to pay £6·6m. to build the West End Link was a blatant attempt to buy the planning permission. Although it is true that Witney Bridge is a notorious bottleneck and the town very congested, the construction of a superstore would make the congestion only marginally worse than if the site had been developed under its existing permission for offices. Therefore an offer to pay for the whole road was wholly disproportionate and it would be quite unfair if Tarmac was disadvantaged because it was unwilling to match this offer. The Secretary of State in substance accepted this argument. His policy, even in cases of competition for a site, is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers.

Tesco, on the other hand, say that nothing was further from their minds than to try to buy the planning permission. They made the offer because the local planning authority had said that in its view, no superstore should be allowed unless the West End Link was built. Tesco say that this seemed a sensible attitude because although it was true that the development would add only marginally to the congestion which would have existed if offices had been built, this was an unrealistic comparison. In practice it was most unlikely that anyone would build offices in that part of Witney in the foreseeable future. The fact was that

the development would make the existing traffic problems a good deal worse. In an ideal world it would have been fairer if the highway authority had paid for most of the road and Tesco only for a proportion which reflected the benefit to its development. But the highway authority had made it clear that it had no money for the West End Link. So there was no point in Tesco offering anything less than the whole cost. Why should this be regarded as an improper attempt to buy the planning permission? The result of the Secretary of State's decision is that Witney will still get a superstore but no relief road. Why should that be in the public interest?

I think that Tesco's argument is also a perfectly respectable one. But the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts.

I would therefore reject Mr. Lockhart-Mummery's submission that Tesco's offer was not a material consideration. I think that it was open to the Secretary of State to have taken the same view as the Plymouth City Council did in the *Plymouth* case, 67 P. & C.R. 78, and given the planning permission to Tesco on the grounds that its proposals offered the greater public benefit. But the Secretary of State did not do so. Instead, he applied the policy of Circular 16/91 and decided to attribute little or no weight to the offer. And so, on the ground that its site was marginally more suitable, Tarmac got the permission.

16. *The appeal*

This brings me to Mr. Vandermeer's submissions in support of the appeal. He says that although the Secretary of State through Mr. Ouseley now asserts that the offer was a material consideration, that was not the view he took in his decision letter. There he treated Circular 16/91 as being not merely a statement of policy as to the weight to be given to planning obligations but as a direction that planning obligations which did not satisfy its criteria were not to be treated as material considerations at all.

For the reasons given by my noble and learned friend, Lord Keith of Kinkel, I do not think that the Secretary of State fell into this error. Paragraph 21 of *Planning Policy Guidance 1* (PPG1, March 1992), *General Policy and Principles*, describes the status of the department's circulars in unambiguous terms:

> "The Department's policy statements cannot make irrelevant any matter which is a material consideration in a particular case. But where such statements indicate the weight that should be given to relevant considerations, decision-makers must have proper regard to them."

The Secretary of State can hardly have forgotten this statement when he came to apply Circular 16/91 in his decision letter. So, for example, when he said in paragraph 7:

> "Accordingly, in his view, since the offer of funding fails the tests of Annex B of Circular 16/91, it cannot be treated either as a reason for granting planning permission to Tesco or for dismissing [the appeal by Tarmac]"

he could not have used the word "cannot" to mean that he was legally precluded from doing so. He clearly meant that he could not do so consistently with his stated policy in Circular 16/91.

17. *Little weight or no weight?*

Finally I should notice a subsidiary argument of Mr. Vandermeer. He submitted that a material consideration must be given some weight, even if it was very little. It was therefore wrong for the Secretary of State, if he did accept that the offer was a material consideration, to say that he would give it no weight at all. I think that a distinction between very little weight and no weight at all is a piece of scolasticism which would do the law no credit. If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in *Safeway Properties Ltd. v. Secretary of State for the Environment* [1991] J.P.L. 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it.

Appeal dismissed.
Question of costs adjourned sine die.

Solicitors: Berwin Leighton; Treasury Solicitor; McKenna & Co.

A. R.

R. (ON THE APPLICATION OF KIDES) v SOUTH CAMBRIDGESHIRE DC

COURT OF APPEAL (Aldous, Laws and Jonathan Parker L.JJ.): October 9, 2002[1]

[2002] EWCA Civ 1370; [2003] 1 P. & C.R. 19

H1 *Town and country planning—Determination of planning applications pursuant to s.70(2) of the Town and Country Planning Act 1990—New material considerations—Meaning of ''dealing with'' an application—Meaning of ''having regard to'' all ''material considerations''—When necessary to bring application before committee if new material considerations arise—Whether claimant has standing where no personal interest in ground of challenge*

H2 In May 1995, an outline planning application was submitted to the respondent council for the comprehensive development of a 30 hectare greenfield site at Longstanton for housing. At a Council meeting in December 1995, the respondent resolved in principle to approve the application subject to appropriate conditions and the completion of a satisfactory s.106 agreement. However, it was not until almost five years later in October 2000, after the s.106 agreement had been signed, that the delegated officer issued the decision notice, granting planning permission for the scheme. The appellant was a local resident and member of the Parish Council. She sought a judicial review of the respondent's decision to grant the planning permission on the basis that a number of material changes in circumstances had taken place in the intervening years such as the introduction of PPG3 on housing, new government circulars on affordable housing, progress on the review of the Local Plan and the closure of a large barracks site nearby. She argued that in order to discharge its duty under s.70(2) properly it was incumbent on the respondent to formally reconsider its resolution to grant planning permission in the light of these new circumstances. The High Court refused her permission to bring judicial review proceedings, holding that the respondent was well aware of those matters and did not need to have the application brought formally back before it. It also held that she would have had no standing to bring the proceedings if she had merely been relying on the issue of affordable housing in which she had no personal interest. She appealed to the Court of Appeal.

H3 **Held,** dismissing the appeal, that in the context of s.70(2) of the Town and Country Planning Act 1990 in which a planning authority, in dealing with a planning application shall have regard to any material considerations, the expression ''dealing with'' includes anything done by or on behalf of the planning authority which bears in any way, directly or indirectly, on the application in question. A ''material consideration'' is one which is relevant to whether the application should be granted or refused and the test must be an objective one in the sense that the choice of material considerations must be a rational one and the considerations chosen must be rationally related to land use issues. The duty to ''have regard to'' material considerations is discharged if, at the date at which the decision notice is issued, the authority has considered all material considerations and has done so with the application in mind albeit that the application was not specifically placed before it for reconsideration. Where a delegated officer is about to issue a decision and becomes aware (or ought reasonably to have become aware) of a new material consideration, he can only safely proceed if he is satisfied that (a) the authority is

[1] Paragraph numbers as assigned by the court.

aware of the new factor (b) that it has considered it with the application in mind and (c) that on a reconsideration the authority would reach (not might reach) the same decision. A claimant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds notwithstanding that he has no personal interest in any of the grounds on which he is relying.

Cases referred to:

H4 (1) *R. (on the application of Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23; [2002] 1 W.L.R. 1593; [2003] 1 P. & C.R. 3.

(2) *R. v Monopolies and Mergers Commission Ex p. Argyll Group plc* [1986] 1 W.L.R. 763.

(3) *R. v Somerset County Council Ex p. Dixon* [1997] J.P.L. 1030.

(4) *R. v West Oxfordshire DC Ex p. Pearce Homes Ltd* [1986] J.P.L. 523.

Legislation referred to:

H5 Town and Country Planning Act 1990, s.70(2).

H6 **Appeal to the Court of Appeal** by Mrs Erine Kides against a decision of Ouseley J. dated October 26, 2001, whereby he refused her permission to apply for judicial review of a planning permission issued by South Cambridgeshire District Council for major housing development on 30 hectares of land at Home Farm, Longstanton, Cambridgeshire. The developer of the site, Beazer Homes Central Ltd, and the major landowner, Mr Peter Stroude were joined as interested parties. Sedley L.J. granted permission to appeal against the decision of Ouseley J. and directed that the substantive judicial review hearing remain in the Court of Appeal pursuant to CPR 52.15(4). The facts are set out in detail in the judgment of Jonathan Parker L.J. below.

H7 *Wyn Williams,* Q.C. and *Martin Edwards* for the appellant.
Alice Robinson for the respondent.
Richard Drabble, Q.C. for the interested parties.

1 **JONATHAN PARKER L.J.:**

Introduction

The issue on this appeal is whether South Cambridgeshire District Council (''the Council''), as local planning authority, discharged its statutory duty under s.70(2) of the Town and Country Planning Act 1990 (''the 1990 Act'') to have regard to all material considerations in dealing with an application for planning permission. That in turn raises an issue as to the nature and extent of the statutory duty.

2 In the proceedings Mrs Erine Kides (''the appellant'') applies for judicial review of a planning permission issued by the Council on October 16, 2000 for the comprehensive development of some 30 hectares of land at Home Farm, Longstanton, in Cambridgeshire. The planning permission was granted to Mr Peter Stroude and Beazer Homes Central Ltd (''Beazer''), respectively the major landowner and the developer of the site. They are joined in the proceedings as interested parties, and I will refer to them as such.

3 Permission to apply for judicial review was refused by Collins J. on the papers. At a renewed oral hearing Sullivan J. directed that the application for permission and the substantive application be heard together. The hearing took place before Ouseley J. By his order dated October 26, 2001 Ouseley J. refused the appellant permission to apply for judicial review.

However, in refusing permission the judge delivered a reserved judgment in which he set out the factual background and gave detailed consideration to the merits of the substantive application.

4 By an order dated June 20, 2002 Sedley L.J. granted permission to appeal against Ouseley J.'s order, and directed that the substantive judicial review hearing remain in the Court of Appeal pursuant to CPR 52.15(4).

5 The instant case is unusual in that a period of almost five years elapsed between the Council's decision, in principle, to grant the planning permission and the issue of the decision notice granting permission. It is the appellant's case that a number of material changes in circumstances took place during that period, in the light of which it was incumbent on the Council, in discharging its statutory duty under s.70(2), to reconsider whether or not to grant planning permission; and that the Council failed to do that. She relies on the following matters in particular:

> 1. Planning Policy Guidance Note 3 (''PPG3''), published by the Government in March 2000.
> 2. Government Circulars 13/96 (published in August 1996) and 6/98 (published in April 1998) relating to affordable housing.
> 3. The progress of the Council's Local Plan Review, with particular reference to housing allocations and density. And
> 4. The fact that in May 1999 the airfield at nearby Oakington Barracks was declared redundant by the Ministry of Defence.

6 The Council and the interested parties contend that the Council discharged its duty under s.70(2), in that the members of the relevant Committee were at all material times fully aware of the above matters, and that in dealing with the 1995 application the Council had regard to them.

7 Before the judge, the Council and the interested parties contended in addition that permission should be refused on the ground that the claim form was not filed within three months after the grounds to make the claim first arose, pursuant to r.54.5(1) of the Civil Procedure Rules, submitting that the appropriate date for this purpose was a date prior to the issue of the planning permission. In the light of the subsequent decision of the House of Lords in *R. (on the application of Burkett) v London Borough of Hammersmith & Fulham* [2002] 1 W.L.R. 1593 (reversing the decision of this Court) that contention is no longer open to them, but they nevertheless maintain the contention (which they advanced in the alternative before the judge) that permission to apply for judicial review should be refused as a matter of discretion on grounds of delay.

8 The interested parties also challenged the appellant's standing to bring the proceedings.

Section 70 of the 1990 Act

9 Section 70 of the 1990 Act is in the following terms (so far as material):

> ''70
> (1) Where an application is made to a local planning authority for planning permission—
> (a) subject to ss.91 and 92, they may grant planning permission, either unconditionally of subject to such conditions as they think fit, or
> (b) they may refuse planning permission.
> (2) In dealing with such an application the authority shall have regard

to the provisions of the development plan, so far as material to the application, and to any other material considerations.
(3) . . .''

The Planning History

10 In order to set the appellant's challenge to the planning permission in its proper context, it is necessary to set out the planning history in some detail.

11 The village of Longstanton lies some six miles to the north-west of Cambridge.

12 In 1989 the Cambridgeshire Structure Plan identified Longstanton as a Rural Growth Settlement.

13 In July 1991, following a public inquiry, the Secretary of State for the Environment dismissed Mr Stroude's appeal against the Council's deemed refusal to grant planning permission for the comprehensive development of a 17-hectare site at Home Farm, Longstanton. The Secretary of State noted the Inspector's finding that the broad location of the development [was] a suitable and a natural extension to the settlement''. He also agreed with the Inspector that a bypass for Longstanton was required on environmental grounds, noting also the view of the highway authority (Essex County Council) that ''the acceptability and extent of the development of the [site] at Home Farm is totally dependent on the provision of the bypass''. He agreed with the Inspector that the proposals ''could prejudice the resolution of a line for the bypass and that . . . they represent an unacceptable extension of development into the open countryside''. He accordingly concluded that planning permission should be refused.

14 Between October 1990 and July 1991 a public inquiry took place at which representations were received concerning the draft South Cambridgeshire Local Plan. In April 1992 the Inspector reported on those representations. In para.5.50 of his report, the Inspector said this:

> ''I regard the land at Home Farm as being in every way the best site for the bulk of the residential land allocated in Longstanton. It is therefore essential that its western limits should be defined so that it can be formally allocated in the Local Plan. This can only be done by preparation of a line for the By-pass, which is something that the County council would not otherwise do in the near future. It is, however, agreed by them that the definition of the general route would not be unduly onerous, and I consider that this should be done as soon as possible so that the land with development potential could be defined. It would also have the advantage that the land to be safeguarded for the By-pass could be defined on the Inset Map and an appropriate safeguarding policy included in the Local Plan. This would, however, only be acceptable if there is a good chance of the By-pass being constructed during the Plan period.''

15 The Inspector accordingly recommended:

> ''. . . that the County Council be asked to define a safeguarding line for the proposed Longstanton By-pass as soon as possible.''

16 In 1993 the Local Plan was adopted. It allocated two sites in Longstanton for residential development, one of which was at Home Farm. The site at Home Farm was intended to provide for up to 250 dwellings up to 2001.

Other land was allocated for employment development. However, the Local Plan stated that substantial development at Longstanton was dependent on the prior completion of a bypass. It was contemplated that this might be secured under a s.106 agreement with the developer, but it was not at that stage contemplated that the developer would undertake to fund the entire cost of the bypass.

17 In May 1995 the interested parties submitted an outline planning application (''the 1995 application'') for the comprehensive development of the 30-hectare site at Home Farm, Longstanton and for the construction of a complete bypass, the entire cost of which was to be borne by the developer.

18 On December 6, 1995 the Council's planning officer reported to the Council on the 1995 application. The report recommended that the 1995 application be refused, on the ground (among other things) that a commitment to the provision of some 250 dwellings beyond the year 2001:

> ''... would prejudice and pre-empt the proper consideration and evaluation of all alternatives for future growth in the District during the statutory Local Plan review process.''

19 The report also noted, with some surprise, that Longstanton Parish Council (of which the appellant was a member) endorsed the 1995 application unreservedly.

20 At its meeting on December 6, 1995 the Council rejected the planning officer's recommendation and resolved in principle:

> ''... to approve [the 1995 application], subject a report covering draft conditions and draft s.106 Agreement being submitted for approval by Committee at a future meeting.''

21 I will refer to this resolution as ''the 1995 resolution''.

22 A report to the Council's Planning Committee dated March 6, 1996 noted that a first discussion draft of a s.106 Agreement had been prepared and circulated, but stated that it was too early to advise members of the progress of negotiations. The report recommended that the 1995 application be referred to the Secretary of State:

> ''... along with all representations and a copy of this agenda report which summarises progress to achieve [the 1995 resolution]''.

23 At its meeting on March 6, 1996, the Planning Committee resolved to refer the 1995 application to the Secretary of State as recommended, on the footing that it involved a departure from the Local Plan.

24 On March 29, 1996 the Government Office for Eastern Region (''the GOE'') notified the Council of the issue of an Art.14 direction to the effect that the Council was not to determine the 1995 application while the Secretary of State considered whether to call it in. In a covering letter, the GOE said this:

> ''The Art.14 direction has been issued, as it is considered that the significance of the development upon the village is such, that the determination of the planning application should be achieved in the context of the local plan review, which your Council is about to commence. The scale of the proposal indicates that it goes to the heart of the local plan's roll-forward of housing land provision to 2006 and its

determination at this time could be considered to be premature and prejudicial to the local plan process.''

25 By a Report dated May 1, 1996 officers reported the issue of the Art.14 direction to the Planning Committee.

26 On August 1, 1996 the GOE notified the Council that after further consideration the Secretary of State did not, after all, wish to intervene and that the Council was free to determine the 1995 application as it deemed fit.

27 Later in August 1996, the first of the two Government Circulars relating to affordable housing (13/96) was published.

28 On September 4, 1996 the Secretary of State's decision not to intervene in relation to the 1995 application was reported to the Planning Committee. The Planning Committee was also reminded that outline planning permission could not be issued pursuant to the 1995 resolution:

> ''. . . until negotiations upon the s.106 Agreement have been successfully concluded.''

29 In December 1997, the Council published the consultation draft of the South Cambridgeshire Local Plan Review 1997. The Review included ''POLICY LONGSTANTON 1'' in the following terms (so far as material):

> ''Two areas totalling 21 ha are allocated for some 500 dwellings north of Over Road. Development of this site will be dependent upon the provision of a development related bypass secured through a local agreement. The agreement shall ensure that no more than 250 dwellings will be occupied before the bypass—including all necessary junctions and road links to the existing highway network is complete. . . .''

30 On April 8, 1998 the second of the two Government Circulars relating to affordable housing (6/98) was published. The Circular advised planning authorities and developers of the need to ensure that new development provided an appropriate mix of housing and other uses, and of different types of households. In its introduction it advised that where there was evidence of a need for affordable housing, Local Plans should include a policy for seeking an element of such housing on suitable sites. Paragraph 10 of the circular set out a number of criteria to be applied by planning authorities in formulating policies for affordable housing to be included in Local Plans, and in assessing the suitability of sites to be identified in the Plan and of any additional sites in respect of which allocations had not as yet been made.

31 In May 1998 a Development Brief for the site was published and sent to a wide range of consultees. In December 1998 the Development Brief was adopted by the Council as constituting Supplementary Planning Guidance.

32 In February 1999 the Local Plan was placed on deposit, in the form of the consultation draft, in order to give members of the public and other interested parties the opportunity to submit representations. In addition to POLICY LONGSTANTON 1, the draft Local Plan contained the following:

> ''4.20 The [site at Home Farm] is not included within the requirements of affordable housing because it is the subject of a planning application where the Council has already resolved to grant planning permission under the provisions of the 1993 Local Plan without any requirements for affordable housing. At the time of the resolution, the Local Plan

did not include a policy requiring affordable housing on allocated land and there was no affordable housing needs survey as required by government guidance. Any new planning application would not be subject to that resolution, and in the light of the high level of housing need identified by the District Wide Housing Needs Survey, it would be appropriate to consider whether affordable housing should be sought from this site. However, whether the site could stand the full 30 per cent recommended by the survey, in addition to a bypass and other infrastructure, would need to be the subject of negotiations with the applicant.

. . .

67.18 The District Council considers that the provision of the bypass is crucial for the village and therefore allocated a larger area for a housing estate than would otherwise be appropriate. In this instance there is no requirement for affordable housing as set out in Policy HG9 because of the need to ensure the bypass and other community facilities such as a village green, shop and surgery.

. . .

67.20 The site of Home Farm, surrounded on three sides by existing housing, is considered appropriate for residential development. This would also enable the creation of a village green at the junction of Over Road and High Street. This, together with local shopping or community facilities which will be required because of the increased population, will allow the creation of a clearly identified centre to the village. However, the major area for housing development, as it will abut the bypass will require a high degree of screening and landscaping to reduce the visible impact and to create a satisfactory residential environment. . . .''

33 Thereafter, a large number of representations concerning the draft Local Plan were received from members of the public and other interested parties.

34 Throughout this period, negotiations as to the terms of a s.106 Agreement in relation to the 1995 application were still on foot. It appears that one of the causes of the delay in concluding a s.106 Agreement was the fact that part of the site the subject of the 1995 application was owned by Cambridgeshire County Council, which was reluctant to enter into obligations involving a contribution to the cost of a bypass and associated road improvements, and which was looking to realise the maximum possible price for its land. For its part, the Council was not prepared to allow planning permission to be issued pursuant to the 1995 resolution in the absence of a s.106 Agreement in respect of all the land comprised in the Longstanton site. An attempt by Beazer to acquire the County Council's land proved unsuccessful. The delays accordingly continued.

35 At the same time, negotiations were also on foot between the Council, the Parish Council, and the interested parties in relation to various ancillary matters, including the provision and maintenance of an area of public open space within the site.

36 In March 1999 the interested parties, frustrated by the continuing delay in the issuing of planning permission pursuant to the 1995 resolution (a delay caused, as they saw it, by the attitude adopted by the County Council), submitted a second planning application (''the 1999 application'') which

excluded the Council's land. The 1999 application sought permission for housing development over an area of 9.5 hectares at an average density of not less than 25 dwellings per hectare. It also provided for the construction of Stage 1 only of the proposed bypass, as a temporary measure (this being in contrast to the 1995 application, which, as noted earlier, provided for the complete bypass to be constructed at the cost of the developer).

37 The Council did not determine the 1999 application, and the interested parties accordingly appealed to the Secretary of State.

38 At the beginning of October 1999 the Local Plan was published, with an amendment relating to affordable housing which reflected the guidance contained in the two Government Circulars. ''POLICY LONGSTANTON 1'' was also amended by the addition of a paragraph in the following terms (so far as material):

> ''Development of this site will be subject to Policies HG9 . . . and HG10 for the provision of affordable housing. Where affordable housing is required, planning permission or renewal of planning permission will not be granted until a legal agreement has been signed ensuring such provision.''

39 On October 6, 1999 the planning director reported to the Planning Committee on the 1999 application. The report set out the background history, including the 1995 resolution, and referred to the Council's policies in relation to affordable housing on allocated sites. After setting out the amended ''POLICY LONGSTANTON 1'', the report went on to list a number of representations made by residents of Longstanton. Representation numbered 2 in the report was in the following terms:

> ''Empty houses will soon become available at Oakington Barracks. A greenfield site should not be developed in advance of that event or any other decision upon the future of the barracks. Brownfield development should take precedence. The large scale of potential development would suggest that it would provide for a significant amount of off-site infrastructure, which might include a Longstanton bypass.''

40 Representation numbered 10 was in the following terms:

> ''There have been material changes in circumstances since the resolution of the Council to approve the last application [a reference to the 1995 application]. These include:
> • the emergence of the former airfield and barracks at Oakington/Longstanton as a likely area for large scale and comprehensive development within the reasonably near future;
> • the publication of new Government guidance, such as Circulars 1/97 and 6/98, which require different benefits from large schemes, such as affordable housing provision;
> • a third major change is the proposals themselves, which do not propose a bypass for Longstanton.''

41 Representations numbered 12, 13 and 14 were in the following terms:

> ''12. The determination of the application would be premature in advance of the Public Inquiry into the Local Plan review, which would offer the appropriate forum to debate such a major issue.
> 13. The proposed development at Longstanton is a major departure

from the adopted Local Plan and no justification has been given for this departure in advance of the Local Plan Inquiry.

14. Any approval of the application would pre-empt the proper consideration which must be given to the Local Plan review on a district-wide basis.''

42 Under the heading ''PLANNING COMMENTS'', the report said this:

''The application is now before the Secretary of State as an appeal for his decision. He has directed that the proposal does not require the submission of an Environmental Impact Assessment.

The Council cannot issue a decision notice (*i.e.* in relation to the 1999 application]. But it should consider its position on the principal merits of the scheme in order to put its case at any future inquiry.

The starting point is the Council's resolution of 6th December 1995 that it was minded to approve a mixed development of 21 hectares housing (some 500 dwellings), 6.3 hectares business park, a B1050 bypass for Longstanton and related road works, extension to recreation ground (2.3 hectares), village green including land for local shop and surgery, open space, landscaping and related infrastructure. The Council considered that the provision of a bypass, financed by the development, outweighed the policy designations which would have limited the number of houses to be completed in the village to 250 allocated in the approved Local Plan 1993 and 400 houses normally permitted in a Rural Growth Settlement.

The Secretary of State's decision of 1st August 1996 to allow the Council to determine the application as it deemed fit is of relevance.

The outline application would have been approved by now had the interested parties and landowners reached a financial settlement which would have enabled the s.106 Agreement to be signed.

The Council needs to assess the new application against any material change in circumstances since those decisions on the earlier applications.

The principal changes are:

1. the publication of the [Local Plan] and the representations made to that Plan;

2. the publication of Government guidance in Circular 6/98 encouraging authorities to include policies in local plans for seeking an element of affordable housing on suitable sites; and

3. the application itself, which does not propose a complete bypass for Longstanton and which proposes housing ... on land not shown for such development on either the 1995 application or as part of a residential allocation in the Local Plan Deposit 1999.''

43 Then, after referring to the local plan, the report continued:

''Significantly, if the Regional Planning Guidance accepts the Panel's Report suggestion that a new settlement should be accommodated to the north, but close to Cambridge, the proposals will need to be examined through the Structure Plan process and ultimately into the Local Plan. So it would be premature to advance Oakington Barracks in isolation or in the context of a new settlement in this Local Plan Review ...''

44 Under the heading ''Affordable Housing'', the report quoted para.4.20 of the Local Plan (see para.32 above) and summarised the interested parties' representations on the issue of affordable housing as follows:

> ''1. It is not necessary to provide additional affordable housing in Longstanton for needs of Longstanton;
>
> 2. The community benefits from the provision of the Longstanton bypass and its capital costs are to be financed from the development allocated for Longstanton outweigh the need to provide affordable housing . . .''

45 The report continued:

> ''In the consideration of the representations of the Deposit Local Plan it was suggested that any new planning application would not be subject to the earlier resolution (not to require affordable housing), and in the light of the high level of housing need identified in the District Wide Housing Needs survey, it would be appropriate to consider whether affordable housing should be sought from this site, though not necessarily the full 30 per cent recommended by the survey.''

46 Turning to the merits of the 1999 application, the report commented that the fact that the application did not include the complete bypass represented a serious deficiency in the scheme, observing that the 1995 resolution was passed:

> ''. . . because it would ensure the provision of the complete bypass at entirely the developer's expense''.

47 In conclusion, the report recommended:

> A. that the Council reject the 1999 application on the grounds (1) that it did not provide for a complete bypass and (2) that it proposed housing development in a location which had not been allocated in the Local Plan and which was poorly related to the remainder of the village and services within it; and
>
> B. that the Council seek to secure a proportion of affordable housing based upon housing needs, as part of a s.106 Agreement.

48 At the meeting of the Planning Committee held that day (October 6, 1999) the recommendations in the report were adopted.

49 On October 8, 1999 a special meeting of the Council was held to assess the representations received concerning the draft Local Plan. In evidence is a tabulated document in which the various representations are recorded, together with, against each representation, the Council's assessment of the representation and any recommendation for a change in the Plan in the light of the representation.

50 One such representation was to the effect that the Plan should include provision for affordable housing for local people on the Longstanton site. Complaint was made that the Plan made provision for affordable housing in relation to other, smaller, sites, and that it was inequitable that the Longstanton site should be treated differently. The document records the Council's assessment of this representation in the following terms (so far as material):

> "The scale of development proposed is dependent upon the provision of a development related bypass. The District Council has resolved to grant planning permission in respect of a 1995 application [a reference to the 1995 resolution] without the need for affordable housing. However, it would be appropriate to consider whether this provision should be sought from this site if any subsequent planning application were to be submitted ... Such a provision would be subject to negotiation with the applicant ..."

51 In the light of this representation, the Council resolved to change the Plan by deleting the last sentence of para67.18 (quoted earlier) and substituting a passage making it clear that any new planning application would not be subject to the 1995 resolution.

52 Representations were also made as to the availability of land following the expected closure of the airfield at nearby Oakington Barracks, which the Ministry of Defence had, in May 1999, declared to be redundant. The Council's assessment of these representations, as recorded in the document which is in evidence, includes the following:

> "The site at Oakington Barracks is of strategic importance, which the panel report identifies would require a long lead in time, clearly beyond the time scale of this local plan. It would be premature to identify this site [*i.e.* Oakington Barracks] in advance of the agreement of a Cambridge Sub Region Strategy beyond the period to 2006."

53 The Council recommended no change to the Plan to reflect the representations relating to Oakington Barracks.

54 In November 1999 the proposed changes to the Local Plan were published, and were the subject of further consultation.

55 In March 2000 the Government issued PPG3. For present purposes it is necessary to refer only to paras 31, 32 and 38 of PPG3, which were in the following terms (so far as material):

> "31. In deciding which sites to allocate for housing in local plans and UDPs [unitary development plans] local planning authorities should assess their potential and suitability for development against each of the following criteria:
> • the availability of previously-developed sites and empty or under-used buildings and their suitability for housing use;
> • the location and accessibility of potential development sites to jobs, shops and services by modes other than the car, and the potential for improving such accessibility;
> • the capacity of existing and potential infrastructure ...
> • the ability to build communities ...
> • the physical and environmental constraints on development of land ...
>
> **Allocating and Releasing Land for Development**
>
> 32. In determining the order in which sites identified in accordance with the criteria set out in paras 30 and 31 should be developed, the presumption will be that previously-developed sites (or buildings for re-use or conversion) should be developed before greenfield sites. The exception to this principle will be where previously-developed sites

perform so poorly in relation to the criteria listed in para.31 as to preclude their use for housing (within the relevant plan period or phase) before a particular greenfield site.

. . .

Determining Planning Applications

. . .

38. In considering planning applications for housing development in the interim, before development plans can be reviewed, local authorities should have regard to the policy contained in this PPG as material considerations which may supersede the policies in their plan . . . Where the planning application relates to development of a greenfield site allocated for housing in an adopted plan or UDP it should be assessed, and a decision made on the application, in the light of the policies set out in this guidance. Comparison with available previously-developed sites against the criteria in para.31, and in the light of the presumption in para.32 and the policies on design, layout and efficient use of land, including car parking, will be particularly relevant. Where a proposed housing development involves the use of a previously-developed site or the conversion of existing buildings, the proposal may need to be amended in accordance with this guidance, for example, in relation to design, layout, density and parking.''

56 At a meeting on April 12, 2000 the Planning Committee noted that in the light of PPG3 a review of housing allocations in the Local Plan would have to be undertaken as further preparation for the Local Plan Inquiry.

57 On May 3, 2000 the Council's Head of Legal Services reported to the Planning Committee on the progress which had been made in negotiating a s.106 Agreement relating to the 1995 application. The particular issue which had arisen at that stage was whether the Council was willing to assume the obligation of maintaining an area of public open space within the proposed development, should the Parish Council decide not to do so. In the introduction to the report, the Head of Legal Services reviewed the history of the matter, as follows:

> ''Negotiations hitherto have proved very difficult indeed and although the Parish Council has instructed solicitors to assist it in its broad deliberations, it is not clear that negotiations in the normal form will be completed and a planning permission issued in the foreseeable future. The development is important for Longstanton, not least because it will afford the provision of a bypass which is much needed but also because it will advance the housing provision in our district. This matter has gone on since 1995 and has been held up by what have been unsuccessful negotiations with the County Council as part landowner. Those negotiations have now at last been concluded and the County Council has decided to sell its interest in the relevant land to developers (subject to planning permission) thereby allowing the whole project to go forward. . . .''

58 The report recommended that the Council should agree to adopt the public open space should the Parish Council be unwilling to do so. The recommendation was duly adopted by the Planning Committee.

59 At its meeting on June 7, 2000 the Planning Committee received a verbal

report from the Head of Legal Services on the progress of negotiations with the Parish Council concerning maintenance of the area of public open space. The report was to the effect that negotiations were continuing but that a decision was expected shortly. The minutes record members' concern at the prospect of any further delay. The relevant passage in the minutes reads as follows:

> ''Members welcomed the negotiations but expressed concern that extended discussions might significantly delay the process. The Head of Legal Services reiterated that a decision was expected quickly and that the issue would be returned to Committee in July if negotiations proved unsuccessful.''

60 At the July meeting of the Planning Committee (which took place on July 12, 2000), the Committee had before it a document entitled ''A Study of [PPG3] on The Local Plan Review within the Context of the Approved Cambridgeshire Structure Plan Review 1995''. I will refer to this document as ''the Study''. Also before the Committee was a report on the Study by the planning director. It is to be noted that although the Committee is referred to in this context as the ''Planning Policy Committee'', the evidence is that the Planning Policy Committee was in fact the same committee as the Planning Committee, albeit under another name.

61 The Study contained a district-wide review and appraisal of housing allocations. Paragraph 23 of the Study, under the heading ''Site Assessment Criteria (Physical and Environmental Constraints)'' was in the following terms (so far as material):

> ''Paragraph 32 of [PPG3] makes it clear that whilst brownfield sites should be developed before greenfield sites, this should not be so where brownfield sites perform so poorly in relation to the criteria in paragraph 31. In the context of this study it is considered that sites in unsustainable villages [which included Longstanton: see below] fall into this category of poor performance. . . .''

62 Paragraph 30 of the Study, under the heading ''Conclusions from the Analysis—Selection of Sustainable Locations'', was in the following terms (so far as material):

> ''. . . There are a small number of villages where the Local Plan makes allocations in villages which do not meet the 'sustainable' criteria. In each case there are specific reasons justifying the proposed development and these accord with criterion (4) of paragraph 31 of [PPG3], . . . Thus:
>
> . . .
>
> Longstanton, a Rural Growth Settlement designated in order to provide a much needed bypass, together with an extension to the recreation ground, a village green and a shop . . .''

63 Paragraphs 37 to 40 of the Study dealt with the question of density. In para.39 it was proposed that for those sites where there were no identified constraints, the notional average capacity for housing allocations be raised from 25 dwellings per hectare to 30 dwellings per hectare. Paragraph 40 of the Study was in the following terms (so far as material):

> ''This should not preclude the use of a lower (or higher) density if local

circumstances dictated that there are material considerations to do so. These are:

. . .

Longstanton where the Local Plan specifies a maximum of 500 dwellings within the agreed line of the proposed bypass and where planning permission has been agreed in principle [a reference to the 1995 resolution] and negotiations on the required s.106 Agreement are close to completion. . . .''

64 Under the heading ''Conclusions'', paras 57 and 58 of the Study were in the following terms:

''57. PPG3 requires local planning authorities to consider increasing the density of new housing developments. Whilst densities of the order of 30–50 dwellings per hectare may be appropriate in urban situations, an average density of 30 dwellings per hectare is appropriate in most rural situations. The conclusion is therefore drawn that average notional density in South Cambridgeshire should be increased from 25 to 30 dwellings per hectare.

58. The suggested approach of increasing housing density and a revised assessment of windfalls leads to the conclusion that there should be a reduction in the overall level of housing allocations, and a number of sites are identified which could be deleted to bring the overall level to that which is necessary to meet the Structure Plan requirement.''

65 In his report on the Study, the planning director informed the Planning Committee that the Inspector conducting the Local Plan Inquiry had arranged a number of ''round table'' sessions at which objectors could discuss relevant issues informally with the Inspector and representatives of the Council. He further informed the Committee that the Inspector had identified a number of specific issues to be debated, including: ''Should existing allocations be reviewed?''

66 The report went on to recommend that the Inspector be advised (among other things) that the view of the Council as to density was that, unless local circumstances should dictate otherwise, the notional average housing density for sites allocated in the Local Plan be increased from 25 to 30 dwellings per hectare in accordance with PPG3; and that in view of the increased density permitted by PPG3 a number of sites which were allocated for housing development in the Local Plan be deleted. Seven sites were then listed. The list did not include the site at Home Farm which was the subject of the 1995 application.

67 These recommendations were duly adopted by the Planning Committee at its meeting on July 12, 2000.

68 The recommendations of the Planning Committee came before the full Council at its meeting on the following day, July 13, 2000. The Council adopted the recommendations of the Planning Committee, save that it reduced the list of allocated sites to be deleted from the Local Plan from seven to four.

69 At a meeting of the Planning Committee on August 2, 2000 the planning director reported, in relation to the 1995 application, that it was likely that agreement would shortly be reached with the Parish Council concerning the public open space, and that negotiations in relation to the long-outstanding s.106 Agreement were at an advanced stage. It was accordingly anticipated

that planning permission would be issued within the next few days pursuant to the 1995 resolution. The minutes record that ''members approved this approach''.

70 On October 16, 2000 the decision notice on the 1995 application was issued, granting outline planning permission pursuant to the 1995 resolution.

71 Finally, so far as the planning history is concerned, I should record that throughout the period from the passing of the 1995 resolution on December 6, 1995 until the issue of the planning permission on October 16, 2000 it was the practice of the planning director to place before the Planning Committee, at quarterly intervals, a list of all outstanding planning applications. These lists would have included the 1995 application.

The arguments before the judge

72 In summarising the argument before the judge, I omit reference to the issue whether the claim form was filed within three months after the grounds to make the claim first arose (see r.54.5(1) of the Civil Procedure Rules) since, as explained earlier, that issue was put to rest by the decision of the House of Lords in *Burkett*.

The appellant's contentions

73 As a matter of law, it was contended on behalf of the appellant, relying on *R. v West Oxfordshire District Council Ex p. Pearce Homes Ltd* [1986] J.P.L. 523 at 527 *per* Lord Woolf, that in discharging its duty under s.70(2) a local planning authority is required to reconsider a resolution to grant planning permission if there is a change in material considerations occurring after the passing of the relevant resolution.

74 As to the facts, it was contended on behalf of the appellant that PPG3 marked a radical change in Government policy with regard to the location and design of housing sites, with an emphasis away from greenfield development. Reliance was also placed in this regard on the two Government circulars relating to affordable housing. In the light of these changes in Government policy, a housing scheme considered in 2000 would, it was submitted, be subject to very much more stringent requirements in relation to density and provision for affordable housing than those which obtained in 1995. It was also contended that it was a material consideration that during the period following the 1995 resolution the Oakington Barracks site, a brownfield site, had become available for early housing development. An additional material consideration, it was submitted, was whether a grant of planning permission pursuant to the 1995 resolution would be premature in that it would prejudice the outcome of the Local Plan Review.

75 These changes, it was submitted, were sufficient to trigger the Council's duty to reconsider the 1995 resolution, yet the Planning Committee was never asked to, nor did it, undertake such a reconsideration.

76 On the question of promptness, it was submitted that although the proceedings were not issued until some six weeks after the issue of the planning permission, the appellant lost no time in instructing a specialist solicitor, Mr Richard Buxton, who in turn communicated promptly with the

Council in order to establish whether there was a proper basis for judicial review proceedings. Reliance was also placed in this connection on the enormous volume of documentation involved. In the circumstances, it was submitted, the appellant could not have been expected to have acted more expeditiously than she did.

The interested parties' contentions

77 The interested parties submitted, as a preliminary point, that the appellant had no standing to bring the proceedings since she relies, among other things, on the absence of any provision in the 1995 application for affordable housing, which was not a matter of any real concern to her.

78 As to the merits, the interested parties accepted, as they were bound to do, that in dealing with the 1995 application the Council was under a duty to have regard to all material considerations; but it was submitted that this did not mean that an officer to whom had been delegated the authority to issue the consent was obliged to refer the matter back to committee whenever a change of circumstances, however small, occurred, and regardless of the views expressed by the planning authority in other contexts. It was submitted that the officer to whom such a power has been delegated is entitled to act on the resolution provided that there has not been a change of circumstances of a kind which means that the relevant committee should be invited to form a fresh judgment. In the instant case, it was submitted, it was plain that the planning officer's mandate remained good, and that no question of referral arose.

79 As to affordable housing, the interested parties pointed out that the Council specifically addressed this consideration in the context of the 1999 application. As to density, this too was a matter specifically considered by the Council in 2000, in the context of the Local Plan Review. In the result, the Council had decided not to alter the density of the Home Farm site or to delete it from the Local Plan. On the question of prematurity, it was submitted that the Council was fully aware of the scale of the proposed development and its relationship with the emerging Local Plan, through the involvement of members of the Planning Committee with matters of policy (the ''Planning Policy Committee'' being the Planning Committee under another name). As to Oakington Barracks, it was submitted that any development of the airfield was some way off. Reference was made in this connection to the fact that the Ministry of Defence had made it clear that the development of the site required ''positive outputs from a number of relevant studies to be progressed''.

80 As to promptness, it was submitted on behalf of the interested parties that there had been substantial delay and inaction on the part of the appellant for which she was entirely to blame, and that in consequence the interested parties had suffered prejudice. It was accordingly submitted that relief should in any event be refused as a matter of discretion.

The Council's contentions

81 The Council's contentions were substantially the same as those advanced on behalf of the interested parties, save that the Council did not take any point as to the appellant's standing to bring judicial review proceedings.

The judgment of Ouseley J.

82 After setting out the planning history, the judge turned (at para.65 of his judgment) to the issue as to the nature of the Council's duty in determining the 1995 application. He concluded that the duty continued up to the moment when the decision notice was issued, and that the discharge of that duty might, depending on the facts of the particular case, require that an earlier decision be reconsidered. However, in para.66 of his judgment he rejected the submission made on behalf of the appellant that only a formal reconsideration can ever suffice for compliance with s.70(2) in the event of new material considerations arising between a resolution to grant planning permission and its actual grant.

83 In para.69 of his judgment the judge said this:

> ''In my judgment it is a question of fact whether in the circumstances in any particular case the duty has been fulfilled. What actual steps have to be taken in order to fulfil it, as a matter of fact, depends on the circumstances of the case. Very often the circumstances will indeed require a formal Committee meeting to reconsider an earlier resolution in the light of new circumstances. However, I do not accept that that is required in law if, on the facts of a particular case, it is possible to demonstrate that regard was had to material considerations in some other way.''

84 In para.71 of his judgment, the judge rejected the contention, advanced primarily by the interested parties, that the relevant consideration was whether there was any good reason for the officer with delegated authority to issue the planning permission to refer the matter back to the Planning Committee. In relation to that contention, the judge said this:

> ''The delegation of the consideration of new material considerations is not answer to the Appellant's claim: first, no resolution generally or particularly delegating the necessary powers of determination was produced to me; and, secondly, a power to determine whether an application should be brought back to Committee and to deal with mechanical or trivial issues which might reasonably not require Committee consideration, is very different from a power to determine an application in these circumstances, where new factors of obvious significance had arisen.''

85 In para.72 of his judgment the judge observed that there was no basis for supposing that members of the Council were unaware that the 1995 resolution was not binding on the Council or that it disentitled the Council from revisiting the question whether planning permission should be granted.

86 As to whether, on the facts, the Council had discharged its statutory duty in relation to the 1995 application, the judge concluded that there could be no doubt that the members of the Planning Committee were well aware of the contents and significance of PPG3, with its emphasis on priority being given to brownfield sites and on higher density for housing development. Moreover, he commented that at no time did members express a desire to change their minds about granting the 1995 application, as they could easily have done.

87 As to the debate concerning the Local Plan, the judge (in para.74)

accepted that this took place in a different context from that of the 1995 application, but he went on to observe that the objections to the Local Plan, which were considered by the Council, were:

> "... inevitably objections to the development itself; consideration of them as policy objections necessarily involved consideration of the principle of the development".

88 In para.77 of his judgment the judge concluded that the 1995 application was "inextricably intertwined" with policy issues relating to the Local Plan and to the allocation of sites for housing development. He further concluded that the objections were:

> "... considered and weighed on their merits and not dealt with as if, however sound they might be, the [1995] resolution had sold the pass".

89 The judge then considered in turn the specific changes relied on by the appellant.

90 As to PPG3, the judge concluded that the Council's consideration of PPG3 went beyond a general awareness of its existence, and that in its analysis of the planning director's report on PPG3 the Council clearly took account of the competing considerations relating to development at Longstanton.

91 As to density, the judge said this (in para.80):

> "Density was specifically considered in relation to Longstanton and an exception to the general approach was indicated, not because of the 1995 resolution, but because of the purpose of the housing development and its relationship to services and the bypass."

92 The judge went on to point out that density was in any event a reserved matter, which was not covered by the grant of outline planning permission. He continued (in para.80)

> "The consideration of [PPG3] in the context of this study inevitably involved a consideration of the 1995 application—the maintenance of the allocation was not the consequence of the 1995 resolution but was the consequence of the consideration by the Council and its desire to see the development go ahead with the advantages which it would bring, some of which were relevant to PPG3 particularly in the context of a rural district with few brownfield sites available."

93 As to Oakington Barracks, the judge concluded (in para.81) that:

> "Oakington Barracks was not rejected as an objection because the [1995 resolution] precluded consideration being given to it; it was rejected because it did not have sufficient merit to warrant the allocation being deleted and hence to warrant planning permission being refused."

94 As to affordable housing, the judge concluded (in para.82) that the policies set out in PPG3 and in the two Government Circulars were considered by the Council in relation to the 1995 application, and that a view was reached that "the current package would not be disturbed". He continued (in para.83):

> "... the substance of the consideration involved both the current and

any potential fresh application and the substance of the conclusion was that the current application now enjoyed an agreed package in which the question whether or not to have affordable housing had been considered and rejected because of other and high development costs.''

95 As to prematurity, the judge observed that the Planning Committee was obviously very well aware throughout 2000 that the Local Plan Inquiry was under way, that there were objections to the Local Plan and that the allocation at Longstanton was very important to the Plan and to Longstanton itself. He continued (in para.85):

> ''It is clear that the Planning Committee wanted the development rapidly to proceed. It obviously rejected the very notion that the grant of permission in 2000 following a resolution in 1995 was premature in relation to a Local Plan which was more advanced than it had been in 1995.''

96 The judge went on to note that in considering the 1999 application the Planning Committee was specifically alerted to the question of prematurity, to the possible future availability of Oakington Barracks, and to the question of affordable housing.

97 In para.87 and 88 of his judgment, the judge said this:

> ''87. I accept that there was not one single meeting at which the new material considerations were formally considered as a group together with other relevant factors explicitly in relation to the 1995 application. This might matter if the Planning Committee had accepted the strength of individual objections on separate occasions which individually did not justify a change in decision, but which cumulatively might have done had they been so considered. However, here the Council did not accept that any of the new factors were justified or significant objections at all, let alone ones which taken together could lead to a different result.
>
> 88. I consider that the Council did fulfil its s.70 duty when granting planning permission in relation to all those material considerations. It considered them principally but not exclusively through the local plan process but it clearly maintained its view having considered each of them.''

98 The judge accordingly rejected the application on its merits.

99 The judge then turned (in paras 90 to 100 of his judgment) to the question of delay. In this part of his judgment the judge addressed the issue as to when time started to run pursuant to r.54.5(1) of the Civil Procedure Rules. As explained earlier, that is not longer a live issue in the light of the House of Lords' decision in *Burkett*. In the result, the judge concluded that the proceedings were issued out of time. Accordingly it was unnecessary for him to address the alternative argument based on delay, *viz*. that relief should be refused as a matter of discretion.

100 The judge then turned (in paras 101 to 110 of his judgment) to the question of the appellant's standing to bring the proceedings. He rejected the interested parties' submission that the appellant had no standing at all, but he accepted a narrower submission that in relation to the issue as to affordable housing she was ''a mere meddler'' and had no standing. He concluded (in para.109) that the appellant had no interest at all in securing

provision for affordable housing, and that she had seized adventitiously on a point of no interest to her. He accordingly concluded that it would be an abuse of process for the argument based on affordable housing to proceed, and that permission to proceed with that particular argument should be refused.

101 Finally, under the heading "Discretion", the judge said this (in para.111):

> "If I had granted permission, and if the affordable housing ground had been the basis of success for the appellant as a matter of law, I would have refused her relief in the exercise of my discretion for the reasons which I have given in relation to standing."

The Arguments on this Appeal

102 For the appellant, Mr Wyn-Williams Q.C. submits that, on the true construction of s.70(2), the Council was required to give focussed consideration of the 1995 application in the light of all material considerations, as opposed to what he described as tangential consideration, where material considerations were considered in different contexts. He does not go so far as to submit that there must in every case be a separate meeting, at which the application in question is considered: rather, he submits that there has to be a process in which the court and the parties affected can be confident that all material considerations have been considered, both individually and collectively, and that a balancing process had been undertaken. Anything short of that will, he submits, fall short of what the statute requires. In practical terms, he submits, the sensible course is to hold a meeting at which all considerations material to a particular application can be considered in the specific context of that application. He submits that the statutory duty continues up to the point when the decision notice is issued. He points out the only meeting at which the 1995 application was considered in the light of all material considerations was the meeting on December 6, 1995 at which the 1995 resolution was passed and that no further such meeting took place prior to the issue of planning permission on October 16, 2000.

103 He submits that there are good policy reasons for adopting such an approach to the construction of s.70(2), in that the construction for which he contends would be conducive to good and consistent decision-making and would serve to promote transparency in the decision-making process. He submits that it is highly unsatisfactory that it was necessary for the judge in the instant case to, in effect, carry out a paper-chase in order to determine whether the Council had discharged its statutory duty. Members of the public ought to be able to see for themselves what the decision-making process was.

104 Turning to the words of s.70(2), Mr Wyn-Williams submits that the expression "[i]n dealing with ..." must relate back to the planning authority's functions under subs.(1). Thus, since the act of the Council in considering objections to the Local Plan is not an activity within subs.(1), it cannot constitute "dealing with" a planning application.

105 He submits that s.70(2) requires that there should be a thought process which is focussed specifically on the application which is being dealt with.

106 Turning to the facts of the instant case, Mr Wyn-Williams submits that at no stage did the Council engage in the requisite thought process. When new

material considerations emerged (for example, in PPG3 or in the Circulars relating to affordable housing) they were considered piecemeal and sequentially, and not specifically in the context of the 1995 application. On the question of prematurity, Mr Wyn-Williams submits that that question too fell to be considered as part of the ongoing planning process and the continuing evolution of the Local Plan. He submits that the various threads were never drawn together, with the consequence that the point was never reached in the decision-making process where the decision-maker was in a position to have regard to all material considerations, to weigh them up and to take a decision based upon them.

107 Miss Alice Robinson, for the Council, submits that the expression ''[i]n dealing with'', in s.70(2), should not be restricted to consideration of the application in question by the relevant committee. Rather, she submits, it embraces the totality of what the planning authority says and does, in so far as it is relevant to the application in question in the sense that it has a direct bearing upon it.

108 On the facts, Miss Robinson supports the judge's conclusion that the Council had regard to all material considerations in relation to the 1995 application, despite the fact that there was no specific reconsideration of the 1995 resolution. She points out that for over ten years prior to the grant of planning permission the Home Farm site had been considered suitable for the provision of a substantial quantity of housing, and that the fact that the 1995 application provided for the construction of a complete bypass at the developer's cost was plainly considered by the Council to be a considerable attraction. She also points out that the merits of the proposed development at Longstanton continued to be debated by the Council in the context of the Local Plan Review. She further points out that the Council was informed on a quarterly basis that the 1995 application remained outstanding, and that in 2000 the 1995 application was twice considered specifically by the Council in the context of the negotiations concerning the maintenance of the public open space.

109 As to affordable housing, Miss Robinson reminds us that in the course of the Local Plan process the Council considered and assessed objections that the Plan made inadequate provision for affordable housing, and concluded that in relation to any new planning application it would be appropriate to consider whether provision for affordable housing should be made; and that the Plan was amended accordingly.

110 As to housing allocation policy, Miss Robinson relies on the Study (to which I referred earlier), which specifically considered the Longstanton allocation (which, in turn, reflected the 1995 resolution), and concluded that it should not be changed. The Study was considered by the Council in the context of formulating the Council's position in the forthcoming Local Plan Inquiry, and the Council accepted its recommendations.

111 As to density, Miss Robinson points out that (as with the policy on housing allocations) the guidance on density provided by PPG3 was considered in the Study, and that, once again, the Council accepted its officer's recommendations based on the Study, to the effect that unless local circumstances dictate otherwise the notional average housing density for allocated sites be increased from 25 to 30 dwellings per hectare. Local circumstances, for this purpose, included the fact that at Longstanton a maximum number of dwellings had been specified within the agreed line of the proposed bypass, that outline planning permission had been agreed in

principle, and that the lengthy negotiations on the terms of a s.106 agreement were close to finality. Miss Robinson also points out that in any event matters of density were reserved by the 1995 resolution.

112 As to Oakington Barracks, Miss Robinson points out that objections based on the prospective availability of the Oakington Barracks site where considered by the Council in the context of the Longstanton allocation, but that the Council considered that the allocation should remain unchanged.

113 As to delay, Miss Robinson submits that relief should in any event be refused on grounds of discretion on the ground that the appellant delayed unduly before bringing the proceedings. She submits that it should have been clear to the appellant well before October 16, 2000 that the Council was proposing to issue a decision notice granting planning permission pursuant to the 1995 resolution without a specific reference back to the Council to reconsider the 1995 application in the light of the five matters on which the appellant relies. She submits that had the appellant sought legal advice and drawn the Council's attention at the proper time to the material considerations to which the Council allegedly failed to have regard, the Council would have had the opportunity to correct the alleged defect by specifically reconsidering the 1995 application in the light of those considerations. In the event, her failure to do so has, she submits, caused the Council unnecessary expense and delay. She further submits that if the planning permission is quashed there will be further delay in the provision of much needed housing and of the Longstanton bypass.

114 For the interested parties, Mr Richard Drabble Q.C. essentially adopts Miss Robinson's submissions on the facts. In summary, he submits as follows:

1. In relation to PPG3, he submits that the fact that the Home Farm site was not included in the list of sites where changes to the Local Plan were proposed is plainly indicative of the fact that the Council had considered the Home Farm site in the context of PPG3 and was of the view that there should be no changes in relation to that site.

2. As to Oakington Barracks, he submits that the position is substantially the same. The site at Oakington Barracks was not yet available for housing, and the prospect of its becoming available at some time in the future was not considered to be a factor of sufficient weight to justify any change in the Council's thinking so far as the Home Farm site was concerned.

3. As to density, he reminds us that this was in any event a reserved matter.

4. As to affordable housing, he submits that the evidence establishes that the Council had regard to the two Government Circulars when considering the Local Plan, and that in so doing the Council addressed the question whether to require a provision for affordable housing as a condition of allowing the 1995 application but decided not to do so.

5. As to prematurity, he submits that had the Oakington Barracks site been available in the near future as a viable alternative site a prematurity objection might have some force, but on the evidence the Oakington Barracks site was not expected to become available for some time. Hence it was, as he put it, kicked into touch. He further points out that prematurity is relied on by the appellant as a reason for refusing planning permission; it is not contended that the Council

should have merely adjourned further consideration of the 1995 application to enable it so wait and see how matters turned out.

115 As to s.70(2), Mr Drabble submits (as he submitted unsuccessfully to the judge: see para.71 of the judgment, quoted earlier) that where there has been a material change of circumstances between the resolution and the issue of the decision notice consequent upon the resolution the relevant question is whether the officer with authority to issue the decision notice remains entitled to act on the resolution, and that he will remain entitled so to act provided that there has not been a change of circumstances ''of a kind that means the committee should be invited to form a fresh judgment'' (I quote from paragraph 12 of Mr Drabble's skeleton argument, on which he based his oral submissions). Paragraph 12 of the skeleton argument continues:

> ''He is not obliged to go back to committee if his mandate remains good, as it will if the changes are small or if the original resolution remains consistent with the policy views of the council, albeit expressed in a different context. If it is clear that the council as a whole (including the officers holding delegated powers) are alive to the various changes of circumstances, the council will have regard to all material considerations at the date of issue; express reconsideration by the original committee is not necessary.''

116 As to discretion, Mr Drabble adopts the submissions of Miss Robinson as to delay. He submits that the delay has caused prejudice to the interested parties in that Mr Stroude has refrained from investment in Home Farm and its buildings in the expectation that permission would in due course be granted pursuant to the 1995 resolution; that Beazer has required a full archaeological survey to be carried out on the site, which interfered with drainage and soil quality; that stocks of grain have had to be disposed of, thereby seriously constraining his agricultural operations; and that Beazer has incurred substantial expense amounting to approximately £500,000 in commissioning studies and appointing a number of consultants and advisers.

117 Mr Drabble also makes the further submission (accepted by the judge, in the context of affordable housing: see para.109 of the judgment, quoted earlier) that the appellant lacks standing in relation to the proceedings, since she has taken objections to the planning permission on grounds which are in themselves of no real concern to her. Mr Drabble submits that the appellant is a ''mere meddler'' (see *R. v Somerset County Council Ex p. Dixon* [1997] J.P.L. 1030 at 1037).

Conclusions

118 I begin by considering the nature and extent of a planning authority's duty under s.70(2) of the 1990 Act.

119 Section 70(2) requires a planning authority, in ''dealing with'' an application, to ''have regard'' (among other things) to all ''material considerations''.

''dealing with''

120 In the context of the activities of a planning authority in relation to a

planning application, I find it hard to think of an expression which has a wider or more general meaning than the expression ''[i]n dealing with''. In my judgment, ''dealing with'' in the context of s.70(2) includes anything done by or on behalf of the planning authority which bears in any way, and whether directly or indirectly, on the application in question. Thus it extends beyond ''considering", so as to include administrative acts done by the authority's delegated officers. Nor, in my judgment, is the expression ''dealing with'' to be limited to the particular acts of the authority in granting or refusing permission under s.70(1). I would regard such a construction as an unjustifiable limitation on the natural meaning of the words. In temporal terms, the first act of a planning authority in ''dealing with'' an application will be its receipt of the application; and its final act will normally be the issue of the decision notice (certainly that is the position in the instant case).

''material considerations''

121 In my judgment a consideration is ''material", in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.

''have regard to''

122 In my judgment, an authority's duty to ''have regard to'' material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind—albeit that the application was not specifically placed before it for reconsideration.

123 The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.

124 At one extreme, it cannot be a sensible interpretation of s.70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated*, prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.

125 On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, s.70(2) requires that the authority

have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

126 In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a ''material consideration'' for the purposes of s.70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision.

127 In substance, therefore, I accept the submission made by Mr Drabble in paragraph 12 of his skeleton argument (quoted in para.115 above), but with the proviso (which may in any event be implicit in his formulation of the statutory duty) that the test of a ''material consideration'' is an objective one in the sense explained in para.121 above. It is not for the delegated officer to decide what is a material consideration within the meaning of s.70(2). Hence it is no defence to a claim that an authority has breached its s.70(2) duty for the authority to assert that in issuing the decision notice the delegated officer did not consider the consideration to be ''material''. Accordingly, I respectfully agree with the judge's observation (in para.71 of the judgment) that ''[t]he delegation of the consideration of new material considerations is no answer to the ... claim''.

128 Having identified the nature and extent of the Council's duty under s.70(2), I now turn to the facts of the instant case in order to determine whether, on those facts, the duty was discharged.

129 In my judgment the lengthy recital of the planning history which I set out earlier in this judgment admits of only one answer to that question. It seems to me plain on the facts that not only was the Council was fully aware of the five new factors on which the appellant relies, but it considered them (had regard to them) with the 1995 application specifically in mind, in that the 1995 application was one (and a prominent one) of a number of matters which together set the context in which the new factors were considered and assessed. In the light of the decisions which the Council took, and the policies it adopted, it is entirely clear, in my judgment, that had the planning officer taken it upon himself to refer the 1995 application back to committee for reconsideration immediately before issuing the planning permission, the Council's decision would have been the same. Indeed, it goes further than that, in my judgment. Given the very considerable period which had elapsed since the passing of the 1995 resolution, and the understandable concern of members at the continuing delay in negotiating the terms of a s.106 agreement, the inference which I draw is that it would have come as a considerable and unwelcome surprise to members had they been told at the beginning of October 2000 that although the s.106 agreement was finally in place it was nevertheless necessary for them specifically to reconsider the 1995 application before a decision notice could be issued pursuant to the 1995 resolution.

130 Accordingly I consider that the judge was right to conclude (in para. 88 of his judgment) that in granting planning permission pursuant to the 1995 resolution the Council discharged its duty under s.70(2).

131 In the light of that conclusion, the issue of discretion does not strictly arise. As to that, I would only say that had I concluded that relief ought otherwise to be granted to the appellant, I would have concluded that there were no good grounds for refusing relief as a matter of discretion. In particular, the suggestion that the appellant should have warned the Council before it issued the decision notice that it was acting unlawfully seems to me to be fanciful.

132 That leaves the issue of standing. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest.

133 I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on grounds (which may be good grounds) in which he has no personal interest.

134 It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds. Nor do I read the judgment of Sedley J. (as he then was) in *Ex p. Dixon* as casting doubt on that proposition. Similarly, Lord Donaldson MR's reference in *R. v Monopolies and Mergers Commission Ex p. Argyll Group plc* [1986] 1 W.L.R. 763 at 773 to ''the applicant's interest'' is, as I read it, a reference to the applicant's interest in obtaining the relief sought: in this case, the quashing of the planning permission.

135 Accordingly, I would respectfully disagree with the judge's conclusion (in para.109 of the judgment) that the appellant be debarred from relying on the argument based on affordable housing.

136 In so far as Mr Drabble submitted that the appellant has no standing to bring the proceedings at all, I have no hesitation in rejecting that submission. The appellant has lived in Longstanton for upwards of 30 years. She plainly has a real and genuine interest in seeking to prevent the substantial development permitted by the planning permission.

137 However, for the reasons I have given I would dismiss this appeal.

138 **LAWS L.J.:** I agree.

139 **ALDOUS L.J.:** I also agree

Appeal dismissed.

H8 *Solicitors*—Richard Buxton, Cambridge; Solicitor to South Cambridgeshire District Council; Marrons.

H9 *Reporter*—Megan Thomas.