Comment ID 804

Thanet District Local Plan Examination

April to May 2019

Further Statement by Lee Evans Planning

On behalf of Friend Growers

Matter 4: Spatial Strategy

(Policies SP12, SP21, HO1, HO10, HO11 and HO18)

Main Issue 5 *Development in the Countryside – Policy SP21*

Issue 5 – Development in the Countryside – Policy SP21

The wording of the Pre-Submission Publication Draft Thanet Local Plan - 2031 (the Local Plan) refers to the NPPF 2012. Paragraph 214 of the NPPF 2019 notes that "*The policies in the previous Framework published in March 2012 will apply for the purpose of examining plans, where those plans were submitted on or before 24 January 2019.*" However, as wording of Local Plan policies may need to reflect current Government guidance we have referred to both Frameworks in our submission.

Question 1

How would a decision-maker determine if the need for a development overrides the need to protect the countryside for the purposes of Policy SP21? Is the policy effective?

We would submit that there are no clear criteria within the policy which a decision maker could use to determine if the need for a development overrides the need to protect the countryside. The criteria set out in the supporting text (Paragraph 4.4) are lifted from the NPPF 2012 paragraph 55 (NPPF 2019 paragraph 79), however, within the NPPF's this relates only to isolated dwellings in the countryside not to all types of development as it has been applied in draft Policy SP21. The policy is worded negatively *(will not be permitted)* and the policy does not outline the circumstances in which the need for a development would override the need to protect the countryside appearing to rely on the supporting text (paragraph 4.4). As outlined in our original submission we would submit that the policy should be amended to provide for economic development in the countryside and should only restrict isolated dwellings in the countryside as laid out in the Framework.

Paragraph 28 of NPPF 2012 (now paragraphs 83 and 84 of NPPF 2019) makes very clear that planning policies should support economic growth in rural areas including all types of businesses and enterprises, development and diversification of agricultural and other land based businesses, rural tourism, leisure and local and community facilities. This is applied in the Local Plans development management policies relating to the rural economy in draft Chapter 10 of the Local Plan and Chapter 9 relating to Tourism (Policies E15, E17, E19, EO7 and EO8) these policies and their provision for farm diversification, tourism and economic development in rural area. Strategic Policy SP21 is not

consistent with National Policy and does not accord with other policies in the Local Plan including Policies E15, E17, E19, EO7 and EO8.

Case law from the High Court supports the principles laid out in paragraph 28 of the NPPF 2012 (paragraph 83 of the NPPF2019), of supporting sustainable economic development in the rural area and highlights that there is no requirement for the need for the development to override the need to protect the countryside:

Sienkiewicz v South Somerset District Council [2013] EWHC 4090 (Admin), Lewis J (Appendix 2)

> *"The Framework would support the grant of planning permission for even a large scale expansion of a business in a rural area assuming, of course, that any adverse effects of the proposed development were considered acceptable and the proposed development was otherwise acceptable in planning terms. That approach appears, for example, from paragraph 28 of the Framework which says planning policies should support economic growth in rural areas in order to create jobs and prosperity."* [28]

Dignity Funerals Limited v Breckland District Council [2017] EWHC 1492 (Admin), Holgate J (Appendix 2).

> *"Paragraph 28 of the NPPF distinctly encourages "a positive approach to sustainable new development" in "rural areas" (and does not require need to be shown)" [61]*

We would, therefore, submit that the policy as written is neither effective nor consistent with national policy and conflicts with other policies of the Local Plan (Policies E15, E17 and E19).

Question 2

Is policy SP21 consistent with paragraph 55 of the Framework which allows for certain forms of development in the countryside, such as the need for rural workers to live at or near their place of work?

We would submit that the wording of Policy SP21 is not consistent with paragraph 55 nor paragraph 28 of the NPPF 2012 (nor the relevant paragraphs of the NPPF 2019). The wording of Policy SP21 restricts all development "*unless there is a need that overrides the need to protect the countryside and adverse effects can be avoided or fully mitigated*". Paragraph 55 NPPF 2012 provides for

sustainable development in rural areas and provides for housing that enhances or maintains the vitality of rural communities, its restrictions apply only to isolated dwellings in the countryside (except in the special circumstances outlined). As discussed in Question 1 above, paragraph 28 of the NPPF 2012 is supportive of economic growth in rural area, however, the application of Policy SP21 in its current form could be used to curtail and significantly restrict all development in the rural area including agricultural uses, farm diversification, rural businesses and tourism.

High Court decisions have not supported this approach to development in the countryside the Judge in *Braintree DC* [2017] EWHC 2743 (Admin), Lang J (Appendix 2) commented:

> *"**24** - The word "isolated" is not defined in the NPPF. I agree with the Defendants' submission that "isolated" should be given its ordinary objective meaning of "far away from other places, buildings or people; remote" (Oxford Concise English Dictionary).[24]*
>
> ***25** - The immediate context is the distinction in NPPF 55 between "rural communities", "settlements" and "villages" on the one hand, and "the countryside" on the other. This suggests that "isolated homes in the countryside" are not in communities and settlements and so the distinction between the two is primarily spatial/physical. [25]*
>
> *As to the broader context, in my judgment, NPPF 55 seeks to promote the economic, social and environmental dimensions of sustainable development, and to strike a balance between the core planning principles of "recognising the intrinsic character and beauty of the countryside" and "supporting thriving rural communities within it" (NPPF 17). … [26]*
>
> *NPPF 55 cannot be read as a policy against development in settlements without facilities and services since it expressly recognises that development in a small village may enhance and maintain services in a neighbouring village, as people travel to use them. The PPG advises that "all settlements can play a role in delivering sustainable development in rural areas", cross-referencing to NPPF 55, "and so blanket policies restricting housing development in some settlements and preventing other settlements from expanding should be avoided….[28].*

It is submitted that for Policy SP21 to be consistent with the NPPF it should be amended to support sustainable economic development including housing in rural communities and should only restrict the development of isolated dwellings as outlined in the NPPF.

Requested changes

Policy SP21 - **Development in the Countryside**

Development in the countryside outside of the urban and village confines will be supported where it is ~~, as~~ identified on the Policies Map ~~and not otherwise allocated~~ for development or is sustainable development of a form and type which is compatible with and respects the character of the countryside, including:

- the growth and expansion of all types of business in rural areas,
- the development and diversification of agricultural and other land-based rural businesses,
- rural tourism and leisure developments, or,
- ensures the retention and development of accessible local services and community facilities.

The development of isolated homes in the countryside will be permitted in the following circumstances:

a) there is an essential need for a rural worker, including those taking majority control of a farm business, to live permanently at or near their place of work in the countryside;
b) the development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets;
c) the development would re-use redundant or disused buildings and enhance its immediate setting;
d) the development would involve the subdivision of an existing residential dwelling; or
e) the design is of exceptional quality.

~~___, will not be permitted unless there is a need for the~~ Development in the countryside ~~that overrides the need to~~ should protect the countryside and any adverse environmental effects should ~~can~~ be avoided or fully mitigated subject to the provisions of other policies within the Local Plan.

Appendix 1 excerpt from the representation on behalf of Friend Growers as it relates to Policy SP21

1. **Paragraph 4.4** of the draft plan sets out the Council's view that the countryside should be protected through planning policy but acknowledges that *"essentially rural development"* can be accommodated within the countryside.

   The following sentence states:

   > *"The only exception to this will be proposals for development that meet the criteria set out in Paragraph 55 of the NPPF…"*

   and then setting out the "special circumstances" as specified in Paragraph 55 of the 2012 NPPF.

   However, Paragraph 55 clearly relates only to **housing** in rural areas and in particular **new isolated homes in the countryside.**

   We submit that **Paragraph 4.4** does not reflect the Paragraph 55 Guidance by applying the *"Paragraph 55 text"* to **any and all** development proposals in the countryside.

   Paragraph 4.4 should therefore be revised to clarify that the *"acceptable development criteria"* relate solely to housing.

   In addition, the line beginning *"such a design should"* followed by four bullet points – to follow Paragraph 55 - should relate only to the case of *"the exceptional quality or innovative nature of the design of the dwelling"* – see extract from NPPF 2012 – the design requirements are indicated by a dash rather than solid bullet point.

   In addition, and despite Paragraph 214 of the 2018 NPPF, the text should now be revised to reflect Paragraphs 77 to 79 of the 2018 NPPF and in particular **Paragraph 79** and the *"circumstances"* whereby isolated new homes can be permitted.

2. We would also submit that **Section 4** of the draft plan should also reflect paragraphs 83 and 84 of the 2018 NPPF entitled **'Supporting a Prosperous Rural Economy'**.

Inclusion of this NPPF text would enable application proposals for the following developments to be considered against up to date planning guidance and thus in accordance with **Paragraph 83** which states that:-

"Planning policies and decisions should enable".

The 2018 NPPF recognises that the **following economic developments** are appropriate in rural areas:

- Businesses
- Agricultural and other land based rural businesses
- Rural tourism and leisure developments
- Local services and community facilities

3. ***Policy SP21 – Development in the Countryside***

We submit that this policy does not accord with Paragraphs 83 and 84 of the 2018 NPPF entitled **Supporting a Prosperous Rural Economy**.

Paragraph 83 states that *"planning policies and decisions should enable …."*

However, the wording of Policy SP21 requires the demonstration of need for a particular development that would override the need to protect the countryside.

We submit that the wording of Policy SP21 is negative in requiring a need for development to be proven.

Paragraph 83 notes that the following are appropriate developments in rural areas:

- Businesses
- Agricultural and other land based rural businesses
- Rural tourism and leisure developments

Appendix 2 - Case Law

Sienkiewicz v South Somerset District Council [2013] EWHC 4090 (Admin), Lewis J

Dignity Funerals Limited v Breckland District Council [2017] EWHC 1492 (Admin), Holgate J

Braintree DC [2017] EWHC 2743 (Admin), Lang J

Neutral Citation Number: [2013] EWHC 4090 (Admin)

Case No: CO/8296/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2013

Before :

MR JUSTICE LEWIS

- -

Between :

R (on the application of) TERESA SIENKIEWICZ	**Claimant**
- and -	
SOUTH SOMERSET DISTRICT COUNCIL	**Defendant**
- and -	
PROBIOTICS INTERNATIONAL LIMITED	**Interested Party**

- -
- -

Gregory Jones QC and Sarah Sackman (instructed by **James Smith Planning**) for the **Claimant**
Stephen Whale (instructed by **South Somerset District Council**) for the **Defendant**

Hearing date: 9th December 2013

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Judgment

Mr Justice Lewis :

INTRODUCTION

1. This is a claim for judicial review of a decision of the Defendant, the local planning authority, granting planning permission to the Interested Party, Probiotics International Limited ("Probiotics") for the erection of a building for B1, B2 and B8 uses with associated infrastructure, parking and landscaping on land forming part of the former Lopenhead Nursery ("the application site") in Lopenhead, South Somerset. Frances Patterson Q.C. (as she then was) ordered that the application for permission to apply for judicial review be considered at an oral hearing with the hearing itself to follow immediately after if permission were granted.

BACKGROUND

The Application

2. The application site covers an area of approximately 0.69 hectares and contains a large derelict greenhouse, a mobile phone mast and a large earth mound. It forms part of what was the former Lopenhead nursery.

3. Part of the former nursery is allocated for employment use under the South Somerset Local Plan ("the Local Plan") which forms part of the Defendant's statutory

development plan. That part of the former nursery is divided into four plots. Industrial buildings have been constructed and are now used by Probiotics for the production of human and animal health care products on two of those plots.

4. The application site itself falls outside the area of the former nursery which is allocated for employment use under the Local Plan. Probiotics wished to expand its operations and to erect, and operate from, another building on the application site (but outside the area allocated for employment use). The business reasons why Probiotics wish to do so were that its operations had grown significantly in recent years. It needed to expand its production facilities, storage and office infrastructure and it wished to separate the production of human from animal health care products.

5. Prior to the application being considered, the Council considered whether or not the proposed development fell within the definition of "EIA development" in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations") in which case the application needed to be accompanied by an environmental statement. In broad terms, development will be EIA development if either (1) it falls within one of the categories of development listed in Schedule 1 to the EIA Regulations or (2) it falls within one of the categories listed in Schedule 2 to the EIA Regulations and is likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

6. On 6 February 2012, the Council issued a screening opinion indicating that although the development fell within one of the descriptions in Schedule 2 it was not likely to have significant environmental impacts. It concluded therefore that the proposed development was not EIA development and an environmental statement was not required. The Claimant requested the Secretary of State to give a direction on whether the proposed development was EIA development. By letter dated 13 April 2012, the Secretary of State gave a direction that the development was not EIA development. He considered that it did not fall within Schedule 1 to the EIA Regulations and, although it fell within Schedule 2, the proposed development would not be likely to have significant environmental effects. He was asked to reconsider the matter. He sought further information including, in particular information on whether the manufacture of the products involved the use of chemical conversion processes. That was relevant as installations manufacturing products using such processes fall within paragraph 6 of Schedule 1 to the EIA Regulations and would be EIA development and an environmental statement would be required to be submitted with an application for planning permission. Having received information from Probiotics' planning consultant on 13 June 2012, the Secretary of State determined that the application did not fall within paragraph 6 of Schedule 1 to the EIA for the reasons set out in his letter of 31 August 2012. He decided that there was no reason to reconsider the earlier direction that the application for planning permission was not EIA development.

The Report

7. The application was considered by the relevant committee who had a report from officers. That report set out a description of the site and the proposed development. It set out the planning history of the site. The report then turned to the relevant policies and expressly referred to and summarised the effect of section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), that is that decisions must be made in accordance with the development plan unless material considerations indicate

otherwise. The report referred to the development plan, and in particular the relevant policies contained in the Local Plan. It referred to national policy and, in particular, to the National Planning Policy Framework ("the Framework"). That Framework is not part of the development plan but it is a material consideration.

8. The report summarised the responses to the consultations and the objections that had been made to the grant of planning permission by, amongst others, the local parish councils, the Campaign to Protect Rural England and individuals. The report noted the comments of others including the Defendant's landscape officer. He had no objection in principle to the extension of employment use over this part of the former nursery and made detailed comments explaining why the negative impact of the proposed building would not be so great that it could not be dealt with by way of planting trees and other measures to mitigate its effect. The Defendant's economic officer also commented. He considered that the fact that a manufacturing business was looking to develop their business was a positive feature. The report also summarised the comments from other officers and agencies. The report then addressed the question of whether or not planning permission should be granted. First it considered the need for development and said this;

> "The applicant has outlined within the supporting documents the reasons for the additional building. Probiotics relocated their business to the adjacent allocated employment site in early 2010, having moved from premises at Stoke Sub Hamdon. The company has grown significantly in recent years and exports to over 50 countries. It is now looking to increase their current production facilities, storage and office infrastructure in order to meet the needs of a growing business.
>
> The additional building will provide additional production space to enable the manufacturing of animal welfare products to be separated from human welfare products. The agent has outlined that 'export controls within the industry require that human and animal welfare products are both manufactured and stored in separate buildings'. It is important to stress that there is no legal requirement for the products to be manufactured and stored in different premises. However, from a business perspective, the company wishes to grow its export business and the separation of the animal from human products is driven on ethical grounds. A number of those countries/customers will seek the total separation for the human and animal products.
>
> Moreover, the development will provide significantly more site storage of their goods and to satisfy the need for additional office accommodation. The company presently employ 80 people (includes 15 sales people who are rarely on site) with an expected increase to 130 by 2015. Based on this information, it is apparent that, despite the general poor state of the economy over the last few years, the company is performing very well and is expanding at an increasing rate. Allied to the fact that there is a business case to separate the animal and human manufacturing processes, it is considered that there is a need

> for an additional building. The officer has asked the MD about the need for the building and whether the extra capacity required could be accommodated either within the 2 existing buildings, via an extension to the buildings or within land still available on the allocated employment site. The clear response was that these options were not acceptable either in providing the physical capacity required or to provide the separate buildings required for the human and animal products. In addition, it is not considered that the company are building this 3rd facility as a speculative form of development. It is costly to construct such a building and it is not considered that the company would be seeking consent if there were other cheaper or more practical solutions."

9. Then it considered whether the proposed development was acceptable in planning terms. First, it considered that the proposal would have a positive economic impact by increasing the number of employees (from about 80, 65 of which were based at the Lopenhead Nursery site, to about 130). It noted that the Framework supported growth in rural areas in order to create jobs. Next, the report considered the environmental impact. It considered the impact on the landscape and, for a variety of reasons, concluded that the visual impact was not considered to be significantly harmful. The report considered the wider sustainability issues in terms of accessibility to services, facilities and the fact that public transport links serving the site were poor and travel by private vehicle was likely. The report set out a number of reasons why permission should not be refused on sustainability issues. It then referred to the Council's screening opinion and the Secretary of State's direction that the proposed development was not EIA development and attached the two letters from the Secretary of State. The report noted that the view of the Council remained that the proposed development was not EIA development. The report considered the availability of other sites. It then considered landscaping and design and said this:

> "Associated with the scale of the development, it is considered that, whilst SSLP policy ME4 supports the expansion of businesses in the countryside, and that this development would meet the various criteria outlined under this policy, it is more difficult to accept that this constitutes a small scale expansion of the existing business. However, it is considered that this policy is now superseded by the policy support contained in the NPPF for the expansion of all types of business in rural areas."

10. The report then dealt with highways, parking, the environmental impact assessments and other issues. In that regard, the report said this:

> "Following on from the last point, it is considered that if the application was for general outline consent with no identified end users, then it could rightly be treated as speculative and to all intents and purposes as a strategic employment site. This was the case with the application for outline consent submitted in 2009 which included the current application site and land to the front of the site. Third parties have correctly referred to this earlier application. This was withdrawn as it was considered

> premature as other plots were available on the allocated site and would have been refused. As this current application is for an identified end user and 2 additional plots have subsequently been developed on the allocated site, and plot B is not available to the applicant, it is a fundamentally different application to the earlier outline application. In addition, the NPPF has now been introduced with its support for economic growth in rural areas.
>
> The site is located on Grade 1 agricultural land. Objections have been raised that this will remove land from agricultural use and this is contrary to national and local policies that seek to protect such quality agricultural land. It is accepted that this application will result in the loss of prime agricultural land. However, given the fact that it has been disused for a number of years, the small area of land involved and given its physical orientation sandwiched between employment uses and residential properties thus questioning whether it would actually be used for agricultural purposes, it is not considered that the application should be refused on the basis of a loss of Grade 1 agricultural land."

11. The conclusion is in the following terms:

> "It is fully acknowledged that there are a number of valid planning concerns about this proposal. However, for the reasons outlined in the report above, it is considered that the application is in accordance with the NPPF and is recommended for approval. The views of third parties have been carefully assessed and taken into account by the case officer and a number of consultees. However, for the reasons given above, it is not considered that the impacts of the development are so adverse that they significantly and demonstrably outweigh the benefits of the scheme."

12. The report therefore recommended the grant of planning permission.

13. On 17 April 2013, the Claimant's solicitor sought to access the committee report on the Council's website but he was unable to obtain a legible version of the report. He e-mailed a planning officer at the Council and was sent an electronic version of the report at 16.44 on 19 April 2013.

14. On 24 April 2013, the Claimant's solicitor wrote a four-page letter repeating objections made previously.

The Grant of Planning Permission

15. The matter was considered by the relevant Council committee on 24 April 2013. The Claimant's solicitor attended the meeting and requested that the matter be deferred as he wanted his letter of 24 April 2013 circulated in full. He also made observations about the application. The committee decided they would not defer consideration of

the matter. There was a short debate during which several members expressed their support for the proposal. They resolved to accept the officer's recommendation and grant planning permission. It can be inferred that the committee adopted the reasoning in the officers' report. On the 30 April 2013, planning permission was issued. The notice sets out the summary of reasons for granting the permission in the following terms:

> "The proposed development by reason of its design, scale, siting and materials, is considered to respect the character and appearance of the area, will provide employment opportunities, will provide a satisfactory means of vehicular access and will also provide a satisfactory landscaping scheme. It is also considered that there is adequate justification to allow an expansion of Probiotics on land outside of the allocated employment site. The scheme accords with Policy ST5, ST6 and EC3 of the South Somerset Local Plan, Policy 49 of the Somerset and Exmoor National Park Joint Structure Plan Review and to policy in the NPPF."

16. There were a number of conditions attached. For present purposes, the relevant one is condition 8 which is in these terms:

> "The building hereby permitted shall only be carried out by Probiotics International Ltd (or any successor company) during its occupation of the land subject to this permission.
>
> Reason: The Local Planning Authority wishes to control the uses on this site to accord with the NPPF. "

LEGAL FRAMEWORK

17. Planning permission is required for development including, as here, the erection of a building and the making of a material change of use of land: see section 57 of the Town and Country Planning Act 1990 ("the 1990 Act").

18. Section 70(1) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that a local planning authority:

> "(a) … grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) … refuse permission".

19. Section 70 (2) of the 1990 Act provides that where an application for planning permission is made to a local planning authority, then:

> "(2) In dealing with such an application the authority shall have regard to
>
> (a) the provisions of the development plan, so far as material to the application,

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations."

20. The development plan is defined in section 38(3) of the 2004 Act. Further, section 38(6) of that Act provides that:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

21. The development plan in the present case included certain saved polices contained in the South Somerset Local Plan ("the Local Plan"). For present purposes the relevant policies include ME/LOPE/1. That allocates land at Lopenhead Nursery amounting to 1.8 hectares for employment use. The application site, however, does not fall within that area of land and is not allocated for employment use. The next significant relevant policy is Local Plan Policy ME4. That provides that:

> "Proposals for the small scale expansion of existing businesses (classes B1, B2 and B8 of the use classes order) outside defined development areas shown on the proposals map will be permitted provided that they satisfactorily meet the following criteria…"

22. A list of criteria is then set out. Furthermore, Policy ST3 also provides that development outside defined development areas of towns, rural centres and villages will be strictly controlled and restricted to that which benefits economic activity, maintains or enhances the environment and does not foster growth in the need to travel. Policy ST5 provides that proposals for development are to be considered against certain specified criteria. Policy ST6 provides that proposals for development which is otherwise acceptable in principle will be permitted if certain specified design criteria are met.

23. The Framework sets out the government's planning policies for England. The Framework is a material consideration to which the Defendant must have regard in considering applications for planning permission.

THE ISSUES

24. The Claimant seeks to challenge the grant of planning permission on five grounds. The grounds raise the following issues:

(1) Did the Defendant adopt an unlawful approach to the consideration of the application for planning permission in that the Defendant failed to recognise the primacy of the development plan and considered that the Framework had superseded or replaced the relevant provisions of the development plan (ground 2)?

(2) Was condition 8 limiting the permission to Probiotics (or a successor company) unlawful because it was ambiguous and unenforceable, or irrational or did not fairly and reasonably relate to the development (ground 1)?

(3) Did the Defendant fail to give adequate reasons for the grant of planning permission (ground 3)?

(4) Did the Defendant breach the EIA Regulations by granting planning permission without requiring the submission of an environmental statement pursuant to the EIA Regulations (ground 4)?

(5) Was there a failure to comply with the requirements of section 100B of the Local Government Act 1972 ("the LGA") or the requirements of procedural fairness (ground 5)?

GROUND 2 - THE APPROACH OF THE DEFENDANT

25. I consider first ground 2 and whether the Defendant adopted an unlawful approach to the grant of planning permission. The Claimant contends that the Defendant failed to recognise the primacy of the development plan and assumed, wrongly, that the Framework superseded the relevant policies contained in the development plan.

26. First, in general terms, one could expect a planning officer or an experienced planning committee to be familiar with the basic principles underlying section 38(6) of the 2004 Act, namely that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. Furthermore, in the present case, the report to committee expressly referred to section 38(6) of the 2004 Act and summarised its effect. In addition, the structure and content of the report clearly reflects a careful consideration of the relevant development plan policies and other material considerations, such as the Framework. In my judgment, the committee would therefore have been well aware of the provisions of section 38(6) of the 2004 Act and the need to determine the application in accordance with the development plan unless material considerations indicated otherwise.

27. Secondly, the report itself, read as a whole, and in context, makes it clear that the proposed development would conflict with the development plan. The allocation site was not in the area of Lopenhead nursery allocated for employment use. Development in rural areas would otherwise be restricted. Furthermore, as the discussion of Local Plan Policy ME4 makes clear, the development would not meet the requirements of that policy as the proposed development would not involve "small scale expansion". In my judgment, therefore, the report (and by implication the Committee) were well aware that planning permission would be refused, in accordance with the development plan, unless material considerations indicated otherwise. Mr Whale for the Council submitted, correctly, that conflict with one or more particular policies in the development plan does not necessarily mean that the proposal is not in accordance with the development plan as a whole. That may be the case, for example, when policies point in different directions. In the present case, however, all the development plan policies to which reference was made indicate that the proposed development on this site (i.e. large scale business expansion in a rural area) would not be permitted. In

my judgment, the report proceeds on the basis that the proposed development would not be permitted applying the provisions of the development plan alone.

28. For that reason, the report does go on to consider material considerations which might justify the grant of permission. In particular, the Framework supported the expansion of all types of business in rural areas. In other words, the approach in Policy ME4 of only permitting expansion in rural areas if they were "small scale" was not the approach adopted by the Framework. The Framework would support the grant of planning permission for even a large scale expansion of a business in a rural area assuming, of course, that any adverse effects of the proposed development were considered acceptable and the proposed development was otherwise acceptable in planning terms. That approach appears, for example, from paragraph 28 of the Framework which says planning policies should support economic growth in rural areas in order to create jobs and prosperity. That policy would, in my judgment, be a material consideration which is capable in principle of justifying the grant of planning permission.

29. Mr Jones QC submits that the report erred by stating that the Framework "superseded" the policies in the development plan. It is correct that the Framework cannot change the development plan. The Framework is, however, a material consideration and may provide the reasons why an application for planning permission should be granted notwithstanding the development plan. Furthermore, the provisions of a development plan may become outdated as national policy changes, or particular development plan policies may no longer meet current needs, or other changes may have occurred which make the particular provisions of the development plan less relevant. In such circumstances, other material considerations, such as more recent national policies, may assume greater importance and indicate that the application for planning permission should be approved (see the comments of Lord Hope of Craighead in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at 1450B-E). In my judgment, read as a whole and in context, the report was merely saying that the approach of permitting only small-scale development in rural areas was no longer up to date as the Framework recognised that it may be appropriate to support business expansion more generally. The report then goes on to consider whether or not permitting a larger scale business expansion would be acceptable in planning terms. That is a lawful approach. The committee would have understood that to be the approach set out in the report and, given that they resolved to accept the recommendation, it can be inferred that they adopted that approach.

30. The Claimant also submitted that the Council should have consulted the Secretary of State pursuant to Article 9 of the Town and Country Planning (Consultation) (England) Direction 2009 ("the Direction") before granting planning permission. That article provides that where a local planning authority in England does not propose to refuse an application for planning permission to which the Direction applies, it shall consult the Secretary of State. The material provision is Article 5 of the Direction which provides:

> "For the purposes of this direction, "development outside town centres" means development which consists of or includes retail, leisure or office use, and which –

(a) is to be carried out on land which is edge-of-centre, out-of-centre or out-of-town; and

(b) is not in accordance with one or more provisions of the development plan in force in relation to the area in which the development is to be carried out; and

(c) consists of or includes the provision of a building or buildings where the floor space to be created by the development is:

(i) 5,000 square metres or more; or

(ii) Extensions or new development of 2,500 square metres or more which, when aggregated with existing floor space, would exceed 5,000 square metres."

31. The Claimant submits that the proposed development includes office use which meets the criteria in Article 5(1)(a) and (b). She also submits that the area of the floor space of the proposed development exceeds 2,500 square metres and taken together with the existing floor space of the existing Probiotics developments on the nursery site, the total floor space exceeds 5,000 square metres so that Article 5(1)(c) is met. In calculating the relevant floor space, the Claimant submits that Article 5(1)(c) requires the entire floor space of the proposed development (whether or not intended to be used for office use) has to be aggregated with the other areas on the nursery site which are used by Probiotics. Furthermore, she submits, it is not just the area of the rest of the former nursery site occupied by Probiotics which is actually used for office use which is to be included in the calculation. Rather it is the floor space of the entire area for which planning permission has been granted. That entire area could be used for office use even if it is not being used for that purpose at present.

32. I understand the argument that Article 5(1)(c) deals with "the floor space to be created by the development" and is not expressly limited to the floor space intended to be used for office use. But without ruling on whether that interpretation of Article 5(1)(c) is correct, as a minimum, in my judgment, Article 5(2) is looking at the area of existing floor space in another development which is actually used for office purposes. The calculation is to include "retail, leisure or office floor space". That is consistent with looking at the amount of existing floor space actually used for that purpose and assessing whether that, together with the floor space in the proposed development, exceeds 5,000 square metres. The Direction is not intended to require consultation on a development which depends on aggregating the floor space of that development with the floor space of an existing development which is not being used (but could theoretically be used at some stage in the future) for office use. I understand that the Claimant accepts that she had no evidence to suggest that even taking the floor space of the proposed development, together with the area of the existing Probiotics developments on the former nursery site actually used for office use, the floor space would not exceed 5,000 square metres. In those circumstances, there was no obligation to consult the Secretary of State on the application for planning permission before granting it.

THE VALIDITY OF THE PLANNING CONDITION

33. Mr Jones Q.C. for the Claimant submitted that condition 8 was invalid as it was so ambiguous as to be unenforceable. He further submitted that the condition limiting the benefit of the permission to Priobitics (and a successor company) was not a valid condition as it did not fairly and reasonably relate to the development, was irrational and did not serve any planning purpose.

34. The law governing the exercise of the power to impose conditions is conveniently summarised in the judgments of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578. At page 599 Viscount Dilhorne said this:

> "The power to impose conditions is not unlimited. In *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* [1958] 1 Q.B. 554 Lord Denning said, at p. 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."
> >
> > …..
> >
> > "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…".

35. Advice about the circumstances in which conditions may be imposed is also given in Circular 11/95: Use of conditions in planning. That, as Mr Jones Q.C. recognises, is primarily an expression of view on the relevant law and how the law applies in particular circumstances rather than being guidance on matters of planning policy. The Circular itself recognises that it is a guide and is not intended to be definitive and that an authoritative statement of the law can only be made by the courts. At paragraph 92 and onwards, the Circular begins consideration of conditions restricting the occupancy of buildings and land. Under the heading "Occupancy: general considerations", paragraph 92 says this:

> "Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission."

36. In dealing with personal permissions, that is the grant of planning permission which is limited to the benefit of a named person, paragraph 93 of the Circular says this:

> "Unless the permission otherwise provides, planning permission runs with the land and it is seldom desirable to provide otherwise. There are occasions, however, where it is proposed exceptionally to grant permission for the use of a building or land for some purpose which would not normally be

> allowed at the site, simply because there are strong compassionate or other personal grounds for doing so. In such a case the permission should normally be made subject to a condition that it shall enure only for the benefit of a named person-usually the applicant (model condition 35): a permission personal to a company is inappropriate because its shares can be transferred to other person's without affecting the legal personality of the company. This condition will scarcely ever be justified in the case of a permission for the erection of a permanent building."

37. Paragraph 94 of the Circular deals with conditions which are intended to confine the occupation of commercial or industrial premises to local firms and generally indicates that such conditions are not appropriate. Paragaph 95 says this:

> "However, where the need of a local firm to expand is sufficiently exceptional to justify a departure from a general policy of restraint it will be essential to ensure that such a permission is not abused. It may be reasonable to impose a "local occupancy" condition in such circumstances, provided it is for a limited period (10 years is considered to be a suitable maximum), covers a large catchment area (for example, the area of the relevant county) and clearly defines the categories of persons or firms who may occupy the premises. Occupancy conditions should be imposed only where special planning grounds can be demonstrated and where the alternative would normally be to refuse the application. It would not normally be appropriate to impose such conditions on small buildings of less than 300 square metres of office floor space (or 500 square metres of industrial floor space). Occupancy conditions should not be imposed which provide for a system of vetting by the local planning authority or the use of a vague test such as "needing to be located in the area"."

38. Against that background, I turn to consider the proper interpretation of condition 8 and whether or not it is valid. I bear in mind the principles summarised in the judgment of Elias L.J. in *Hulme v Secretary of State for Communities and Local Government* [2011] EWCA Civ 638 at paragraphs 13 and 14:

> "13 ….
>
> a) The conditions must be construed in the context of the decision letter as a whole.
>
> b) The conditions should be interpreted benevolently and not narrowly or strictly: see *Carter Commercial Development Limited v Secretary of State for the Environment* [2002] EWHC 1200 (Admin) para 49, per Sullivan J, as he was.
>
> c) A condition will be void for uncertainty only "if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results" per Lord Denning in *Fawcett Properties v Buckingham County* [1961] A.C. 636, 678. This seems to me to be an application of the benevolent construction principle.

> d) There is no room for an implied condition …..
>
> "14 Accordingly, whilst there must be a limit to the extent to which conditions should be rewritten to save them from invalidity, if they can be given a sensible and reasonable interpretation when read in context, they should be.

39. Two questions arise in relation to the interpretation of condition 8. The first concerns the fact that it states that the "The building hereby permitted shall only be carried out by Probitics". The question is whether it is concerned with the use of the building or whether it applies the erection of the building itself, or possibly, applies to both the erection and use of the building. Mr Whale, for the Defendant submits that read reasonably the condition is intended to relate only to the use of the building. In my judgment, that interpretation is correct. The condition, read as a whole, is intended to apply during the occupation of the land. That is more consistent with a condition concerning use (i.e. what is to happen while Probiotics is on the land) rather than a condition concerning the erection of the building. Furthermore, the reason for imposing the condition is that the Defendant wishes to control the uses on the application site. That again points to the condition being concerned with the use to be made of the application site.

40. The second question arises from the fact that the benefit of the planning permission is only to be enjoyed by Probiotics and any successor company. The question is what is meant by "any successor company". Mr Whale for the Defendant submitted that there were three possibilities. The condition could be dealing with situations where the name of Probiotics was changed. It could be dealing with situations where someone acquired the shares in the company. Or it could be dealing with a company which was the successor in title to the land. Mr Whale submitted that the phrase encompassed the first and second meanings. He submitted that the intention underlying the condition was to prevent a company which was unconnected with Probiotics from obtaining the benefit of the planning permission. Mr Jones QC, for the Claimant, submitted that the first two interpretations were in effect meaningless and that the ambiguity over what the condition meant had the result that the condition could not be enforced. For completeness, I note that a further possibility is that the phrase means a successor company in the sense of a company that takes over the business of Probiotics, i.e. a company that acquires its buildings, plant, other assets and staff. Neither Mr Whale nor Mr Jones QC submit that that is the correct meaning of condition 8.

41. It is not easy to give meaning to the words "any successor company" in condition 8. On a literal interpretation it would not include a situation where there was a change in the name of the company. The company would remain the same legal entity but would have a different name. Nor, on a literal interpretation, would the phrase include a change in the share ownership. The company would remain the same legal entity but it would be owned by a different person. A "successor company" implies a different company from the original company and so would not be expected to embrace a situation where the legal entity does not change but its name changes or the ownership is transferred to a different person. Equally, the phrase is unlikely to mean to a successor in title to the land. Such a condition would not be necessary as planning permission would, in normal circumstances, pass with the land in any event. Further, if the condition was meant to include a successor in title to the land it could easily have said so. The reference to successor company must have been intended to have some other meaning.

42. I assume, for present purposes, that the condition could be read as meaning it applies to Probiotics and to any company or individual that acquires the shareholding in Probiotics, as Mr Whale submits. The question then arises as to whether or not such a condition is imposed for a planning purpose and fairly and reasonably relates to the development.

43. The reason given for the condition is that the local planning authority wishes to control the use of the land. In my judgment, however, a condition such as condition 8, will not enable the local planning authority to control the use of the land. Nor has any rational planning reason been advanced to restrict the benefit of the planning permission to Probiotics or a successor company.

44. The usual position is that planning permission is concerned with the use of the land, rather than the identity of the user, as paragraph 92 of the Circular recognises. First, there is nothing in condition 8 which enables the Defendant to limit the use to which the land may be put. Permission has been granted for any B1, B2 or B8 use. Limiting the benefit of the planning permission to Probiotics (or a successor company, whatever that means) does not enable the Defendant to impose any control on the use of the application site. It simply seeks to control the identity of the person carrying on the permitted use.

45. Secondly, no planning reasons explain why an unconnected company should not be allowed to use the building and land for the permitted purposes. The rationale underlying the grant of planning permission was that use of that site for employment purposes would be beneficial as it would generate jobs. It is difficult to see on what basis the use of the land for B1, B2 or B8 purposes by a different company, with different employees, would raise any planning issues.

46. It was suggested in argument that the condition would promote sustainability. The report to the committee does refer to the fact that there would be some benefit in employees from Probiotics not having to travel to the Lopenhead nursery site from other sites when considering sustainability in terms of travel journeys. But the condition does not, in fact, contribute to that purpose. Probiotics could use the application site for any B1, B2 or B8 purpose: it is not limited by the condition to using the application site in connection with its existing business on the other part of the nursery site (although that was the original rationale for its planning application).

47. The report also refers to the fact that if the application was for a general outline consent with no end users, it could be regarded as speculative and intended to obtain permission for the application site as a strategic employment site. That may explain why this application was granted. But once permission is granted, and it is accepted that a building should be erected on the application site, and that the site is suitable for B1, B2 or B8 use as that supports economic growth, there is no rational planning reason for saying that only Probiotics (or a company which buys the shares of Probiotics) should have the benefit of a planning permission to enable them to use the site for the permitted purposes.

48. Standing back from the details, the position is that planning permission is to be granted for the erection of a building. There will be a permanent structure on the application site, irrespective of the identity of the present user. The condition does not, and does not seek to, control any land use impact resulting from the presence of

the building. The condition is said to be imposed to enable the Defendant to control the use of land but it does not in fact enable the Council to do so. The land may be used only for B1, B2 and B8 purposes. That will be the situation whether the land is occupied by Probiotics, a successor company (however interpreted) or some other company. No other sensible planning reason has been suggested to limit the range of person who are able to use the building for B1, B2 or B8 purposes.

49. For those reasons, in my judgment, however interpreted, condition 8 is invalid as it does not serve a planning purpose, it is not fairly and related to the development and is irrational. Both parties accepted that the condition was not capable of being severed from the planning permission and that the planning permission itself would therefore need to be quashed. The Council would then have to consider the application for planning permission. It could, in principle, grant planning permission without condition 8, or it could refuse planning permission. If the Defendant could identify some relevant planning purpose for limiting the permission, and drafted an appropriately worded condition, it could grant conditional planning permission. Those matters are ultimately planning issues for the Council to determine.

THE REASONS CHALLENGE

50. The Claimant contends that the Defendant has failed to give an adequate summary of reasons for the grant of planning permission or for the imposition of condition 8 as required by Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the Order"). That provided that where planning permission was granted, the notice shall

> "i. include a summary of their reasons for the grant of planning permission
>
> ii. include a summary of the policies and proposals in the development plan which are relevant to the decision to grant permission; and
>
> iii. where the permission is granted subject to conditions 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.

51. Summary reasons may be brief where the relevant committee agree with the reasoning of the report: see *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] J.P.L. 571 at paragraph 16. Article 31 of the Order has since been amended.

52. The summary reasons given in this case, in my judgment, clearly set out the reasons for granting the application. The proposed development would provide employment opportunities and by reason of its design, scale, siting and materials was considered to respect the character and appearance of the area. Similarly, the reason for condition 8 is clear. It was imposed as the Council wished to control the use of the site. For the reasons given above, the condition does not in fact achieve that aim and is invalid. However, the reason for imposing the condition is set out in the notice. There has not been any failure to give reasons contrary to Article 31 of the Order.

53. Furthermore, even if there were a breach of that Article, I would refuse to quash the decision to grant planning permission on this ground. Article 31 of the Order has since been amended. If the decision were quashed, planning permission could be granted again without the need to give summary reasons.

THE EIA REGULATIONS

54. The Claimant contends that the Defendant acted unlawfully in failing to treat the proposed development as EIA development. The Claimant submitted that the proposed development fell within Schedule 1 of the EIA Regulations. She contends that a precautionary approach should be taken and the Defendant could not be sure on the information available that the use of the site did not involve chemical conversion processes and, therefore, it could not rule out the possibility that the development fell within paragraph 6 of Schedule 1 to the EIA Regulations. Alternatively, the Claimant submits the decision that the proposed development would be unlikely to have significant environmental effects and so did not fall within Schedule 2 to the EIA regulations was unlawful.

55. The report relied upon the fact that both the Council (in its screening opinion) and the Secretary of State (in his direction) had formed the view that the proposed development was not EIA development. The report drew attention to the fact that the Council was able to review the position particularly if new information became available. However, the report noted that the view remained that an environmental statement was not required for the proposed development. The minutes of the committee meeting note that the committee members were given an overview of issues relating to, amongst other matters, the EIA issue. The natural inference is that the committee accepted the view expressed in the report when deciding to approve the officers' recommendation to grant planning permission without requiring submission of an environmental statement.

56. In my judgment, there is no basis for challenging the view that the proposed development did not fall within Schedule 1 to the EIA Regulations and no basis upon which the application of the precautionary principle meant that the Council had to proceed on the basis that it did fall within Schedule 1. The fact is that the point was expressly raised with the Secretary of State. He sought and obtained information from the planning consultants on the nature of the processes being used by Probiotics. In a long and detailed e-mail dated 13 June 2012, the consultants explained how Probiotics products were produced and why it was that no chemical conversion processes were used. The Secretary of State was entitled, in my judgment, to conclude in the light of that information that the proposed development did not fall within the definition of EIA development. The committee were entitled to proceed, as they did, on the basis that the proposed development did not fall within Schedule 1 to the development. Similarly, the committee were entitled to proceed on the basis that the Council's screening opinion and the Secretary of State's direction was to the effect that the proposed development was not EIA development because although it fell within Schedule 2, it was unlikely to have significant environmental effects. The Secretary of State gave his reasons for that conclusion in his letter of 13 April 2012. The Council, in its screening opinion of 21 February 2012, had concluded that the impacts of the proposed development would not be significant. There is no basis for contending that the screening opinion or the direction are unlawful. The committee were therefore entitled to proceed, as they did, on the basis that the proposed development was not EIA development and no environmental statement was required.

THE LOCAL GOVERNMENT ISSUE

57. The Claimant contends that there has been a breach of section 100B of the LGA in that the officers' report was not made available five clear days before the committee meeting of 24 April 2013 and that led to unfairness as the Claimant and third party objectors did not have the documents in time to make fully informed representations before the committee meeting on 24 April 2013. The Claimant also says that she was deprived of the opportunity to instruct an expert in relation to the screening direction.

58. First, on the evidence, there has been no breach of section 100B of the LGA. That provision requires that copies of a report shall be open to inspection by members of the public at the Council offices. There is simply no evidence from the Claimant that copies were unavailable at the offices. Secondly, the Claimant contends that she and her advisers relied upon electronic versions and the version on the Council's website was not legible. I accept the evidence of Mr Andrew Gunn, one of the Defendant's officers, on this matter. He says that the committee report had been uploaded in both Word and pdf formats onto the Council's planning website and that the Word version was legible but the pdf one was not. He further says that the report was also uploaded in both formats onto the committee meetings section of the Council website which is accessible by the public and both formats were legible. As a matter of fact, therefore, the officers' report was electronically available 5 days before the meeting. It is correct that the Claimant's solicitor e-mailed Mr Gunn on 18 April 2013 asking for an electronic copy as when he accessed the website the version was not legible. Mr Gunn replied apologising that the website was not working and saying he would report it and would send a copy electronically, which he did the next day. In fact, the website was working, as it subsequently transpired, and the Claimant's advisers could have accessed the report electronically.

59. Furthermore, there was no unfairness in the present case. Third party objectors could (and some did) make objections to the proposals. Those objections are summarised in the report. Third parties did have access to the officers' report and could have made further representations if they wished. Indeed, it is clear from the minutes of the meeting and the Claimant's consultant's own notes of the meeting that some individuals had commented on the report and those comments were referred to at the meeting. The Claimant, and her planning consultants, were well aware of the proposal and had been so for some months and had made detailed comments on it by letter dated 14 December 2012. The solicitor had corresponded with the Secretary of State about the EIA screening issues and had been told about the information provided by Probiotics in the Secretary of State's letter of 31 August 2012. The planning consultants set out further representations to the Council by letter dated 24 April 2013 and that information was relayed to the councillors at the meeting. The Claimant's planning consultant attended the meeting and was allowed to speak about the proposal. In my judgment, there was no breach of the relevant statutory requirements and no procedural unfairness in the present case.

CONCLUSION

60. In the circumstances, I grant permission to apply for permission for judicial review on all five grounds. I do not consider that the complaints in grounds 2, 3, 4 or 5 are established. There was no unlawful approach on the part of the Council to the grant of planning permission in this case, and this ground of challenge does not succeed. The Defendant did give an adequate summary of the reasons for its decision to grant planning permission. The Defendant did not act in breach of the EIA Regulations as

there is no basis for challenging the decision that the development was not EIA development and that an environmental statement was not required. There was no breach of the statutory provisions governing access to copies of the report and no unfairness.

61. However, the complaint in ground 1 is, in my judgment, established. Condition 8 of the planning permission is invalid as it does not serve a planning purpose, is not fairly and reasonably related to the proposed development and is irrational. The condition is not capable of being severed from the planning permission and that the planning permission itself must therefore be quashed. The Council would then have to consider the application for planning permission and decide whether to grant planning permission without condition 8, or to refuse it, or to grant it but with an appropriately revised condition if it could identify a proper planning purpose for such a condition and the condition was otherwise valid.

Neutral Citation Number: [2017] EWHC 1492 (Admin)

Case No: CO/497/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2017

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

DIGNITY FUNERALS LIMITED	**Claimant**
- and -	
BRECKLAND DISTRICT COUNCIL	**Defendant**
- and -	
THORNALLEY FUNERAL SERVICES LIMITED	**Interested Party**

- -
- -

James Strachan QC and Philippa Jackson (instructed by **Clyde & Co LLP**) for the **Claimant**
Christopher Lockhart-Mummery QC and Zack Simons (instructed by the **Solicitor to Breckland District Council**) for the **Defendant**

Hearing dates: 7th June 2017

- -

Judgment Approved

Mr Justice Holgate:

Introduction

1. The Claimant, Dignity Funerals Limited, challenges the decision of the local planning authority, Breckland District Council ("BDC"), dated 22 December 2016 to grant planning permission for the erection of a new crematorium, car park, gardens of remembrance, access roads and ancillary buildings on land at Norwich Road, Scoulton ("the site"). At its meeting held on the 17 October 2016 BDC's Planning Committee resolved to accept a recommendation by its Officers to grant permission.

2. The site is owned by the Interested Party, Thornalley Funeral Services Limited. The Claimant is the owner and operator of Norwich Earlham Crematorium and Norwich Saint Faith Crematorium. It is also promoting a new crematorium on a site located between Weeting and Brandon within Breckland District ("the Weeting site").

3. The Interested Party's planning application was originally submitted to BDC on 13 November 2014. The Claimant made an objection to the application. On 27 August 2015 BDC granted planning permission pursuant to a resolution of its Planning

Committee. The Claimant then issued a claim for judicial review challenging BDC's decision on the grounds of a failure to interpret planning policy correctly. BDC stated that it would not contest the claim and the planning permission was quashed by the High Court by consent. Accordingly the planning application fell to be re-determined by BDC.

4. On 13 January 2016 BDC once again granted planning permission for the development following a resolution of its Committee. This decision was the subject of a second claim for judicial review, brought on this occasion by a local resident. In May 2016 BDC indicated that it would not contest the claim and the council's decision was again quashed by an order of this Court by consent. Accordingly, the planning application had to be determined by BDC for a third time.

5. It is submitted by Mr Strachan QC that the Court should take a cautious approach to the grounds of challenge in this third judicial review in view of the failure by BDC to reach lawful determinations of the planning application on two previous occasions, one of which involved misinterpreting a policy in the development plan. However, the parties have not thought it appropriate to show the court either of the two earlier quashing orders, because they agree that the grounds upon which the earlier decisions were quashed are irrelevant to the legal issues raised by the present claim.

6. On 17 June 2016 the Claimant submitted a further objection to the planning application. It raised concerns on such matters as the absence of any pedestrian access to the proposed development, the failure by the applicant to carry out any proper search for alternative sites closer to larger centres of population, and the existence of a number of potential areas in the vicinity of Thetford which would provide a more suitable and sustainable location for a new crematorium. However, at that stage the Claimant did not identify any alternative sites.

7. In September 2016 BDC's Planning Officer produced a lengthy and detailed report to the Planning Committee recommending that approval be granted. On 16 September 2016 consultants acting for the Claimant wrote to BDC elaborating upon their client's objections. They contended (inter alia) that BDC was obliged to consider alternatives to the location proposed by the Interested Party and they put forward the Weeting site as an alternative. On this point the objection letter simply stated:-

> "Our client has agreed commercial terms for the acquisition of land between Weeting and Brandon. The land is a short distance to the north of Brandon station; it is screened by existing trees and hedgerow, it has access to public transport (bus and train services) and is close to the A11 corridor and accessible to Watton and Swaffham via A 1065. This site is a far more sustainable location for a crematorium compared to the application site at Scoulton. Our client will be preparing a planning application for consideration by the council over the coming weeks; pre-application discussions will be held with the Council Officers very shortly."

The objection also contended that the Interested Party's proposal conflicted with policies SS1, CP11, CP13, DC1, DC12 and DC16 of BDC's Core Strategy and Development Control Policies (adopted in 2009) and also that the proposal did not

represent sustainable development within the National Planning Policy Framework ("the NPPF").

8. In October 2016 a revised version of the Officer's report together with an addendum was issued. At its meeting on 17 October 2016, the Committee again resolved to grant planning permission for the proposed development. Following that decision the application was referred to the Secretary of State to enable him to consider whether the application should be called in. He subsequently informed BDC that he would not recover the application for determination under section 77 of the Town and Country Planning Act 1990 ("TCPA 1990").

9. This judgment is set out under the following headings:

(i) Relevant planning policies
(ii) The Officer's report to the Planning Committee
(iii) The grounds of challenge
(iv) General legal principles
(v) Ground 1
(vi) Ground 2
(vii) Ground 3

Relevant Planning Policies

10. The Core Strategy contains three types of policy. Chapter 2 sets out the spatial strategy for the whole district and contains one policy SS1. This is followed by chapter 3 which contains fourteen core strategy policies or "CP" policies. Chapter 4 sets out the strategy's Development Control policies or "DC" policies of which there are twenty one.

11. Paragraph 2.33 of the Core Strategy states that the "Spatial Strategy identifies the different types of place within the District and how they will develop. It shows how and where the growth in housing, employment and retailing will be accommodated and sets out priorities for areas that will be protected from development pressures. It explains how the different places of the District will be shaped over the period to 2026".

12. Policy SS1 sets out the spatial strategy at some length. The opening text states:-

> "Breckland comprises seven types of place:
>
> - The Key Centre for Development and Change; Thetford
> - The Market Town for Substantial Growth; Attleborough
> - The three market towns; Dereham, Swaffham and Watton
> - The Local Service Centre Villages
> - The Snetterton Heath Employment Area

- The rural settlements; and,
- The countryside"

The policy indicates in broad terms the level and distribution of development across the whole district as between these seven types of place.

13. Under the heading "the Countryside", policy SS1 states:-

> "In addition to the rural settlements, Breckland contains large areas of predominantly un-developed agricultural land. Sustainability Appraisal indicates that these areas do not represent a sustainable option for development.
>
> Minimal development predominantly comprising the diversification of rural enterprises will be accommodated in the countryside. Some other employment uses may be accommodated in the countryside where a rural location is necessary for the functioning of the business or it utilises a particular attribute and is a sustainable solution to an identified need."

14. Policy CP11 deals with the protection and enhancement of the landscape. It states (inter alia):-

> "The landscape of the District will be protected for the sake of its own intrinsic beauty and its benefit to the rural character and in the interests of biodiversity, geodiversity and historical conservation. Development should have particular regard to maintaining the aesthetic and biodiversity qualities of natural and man-made features within the landscape, including a consideration of individual or groups of natural features such as trees, hedges and woodland or rivers, streams or other typographical features.
>
> The release of land in Breckland will have regard to the findings of the Council's Landscape Character Assessment (LCA) and Settlement Fringe Landscape Assessment to ensure land is released, where appropriate, in areas where the impact on the landscape is at a minimum. Development should also be designed to be sympathetic to landscape character, and informed by the LCA.
>
> High protection will be given to the Brecks landscape, reflecting it's role as a regionally significant green infrastructure asset. Proposals within the Brecks Landscape Character Areas will not be permitted where these would result in harm to key visual features of the landscape type, other valued components of the landscape, or where proposals would result in a change in the landscape character."

As paragraph 24 of the Claimant's skeleton notes, the application site lies within the Wayland Plateau LCA.

15. Policy CP13 deals with accessibility. It provides (inter alia):-

> "New growth in Breckland will be delivered to promote accessibility improvements. This principle is promoted through the balanced distribution of housing and employment throughout the District, but will also be delivered through the following mechanisms set out below …
>
> In addition to education facilities, health, community, sports and recreation facilities (including public open space) will also need to be provided to meet the needs of the growing population. These developments should also be sited in areas that allow for ease of access by a variety of methods."

16. Policy CP14 deals with "rural communities". Under the heading "Employment in the Countryside", the policy states:-

> "The diversification of existing rural enterprises and the development of new enterprises where a rural location is either environmentally or operationally justified will be supported, provided there are no significant detrimental environmental, landscape, conservation or highway impacts."

Paragraph 3.104 of the explanatory memorandum states:-

> "Also allied to the achievement of sustainable rural communities is the support for appropriately located economic development, including rural tourism. The promotion of economic development will need to be tempered against the necessity to protect the countryside and the environment, and promote sustainable modes of transport. Therefore economic development in the countryside will only be supported where the operation of the business necessitates the locations, represents a sustainable solution to an identified need and is in line with national policy. Specific criteria for economic development in the countryside and the diversification of farming enterprises is contained in the Development Control Policies."

17. Policy DC1 deals with the "protection of amenity". It provides that:-

> "For all new development consideration will need to be given to the impact upon amenity. Development will not be permitted where there are unacceptable effects on the amenities of the area or the residential amenity of neighbouring occupants, or future occupants of the development site. When considering the impact of the development in terms of the amenities of the area

> and residential amenity, regard will be had to the following issues; …
>
> f. Quality of the landscape or townscape."

18. Policy DC7 deals with "Employment Development Outside of General Employment Areas". It was common ground at the hearing that a crematorium does not fall within the definition of "employment development" used in the Core Strategy.

19. Policy DC12 deals with "Trees and Landscape". It provides (inter alia) that:-

> "Any development that would result in the loss of, or the deterioration in the quality of an important natural feature(s), including protected trees and hedgerows will not normally be permitted. In exceptional circumstances where the benefit of development is considered to outweigh the benefit of preserving natural features, development will be permitted subject to adequate compensatory provision being made. The retention of trees, hedgerows and other natural features *in situ* will always be preferable. Where the loss of such features is unavoidable, replacement provision should be of a commensurate value to that which is lost."

20. Policy DC16 deals with design principles. It provides (inter alia) that:-

> "All new development should achieve the highest standards of design. In assessing any proposed development consideration will be given to the following design principles:
>
> **Local Character:** All design proposals must preserve or enhance the existing character of an area. Particular regard should be given to reinforcing locally distinctive patterns of development, landscape and culture and complimenting existing buildings. Additionally contemporary design, where it enhances sustainability will be encouraged in the District.
>
> …
>
> **Form and Character:** Development should compliment the natural landscape, natural features and built form that surround it. In considering development proposals consideration will be given to the shape and configuration of a building or buildings, and its or their style, design and arrangement. Regard will also be had to the distinctive features or qualities of a proposed building and its surroundings and the contribution new development makes to these features or qualities."

21. Paragraph 109 of the NPPF provides (inter alia) that:-

> "The planning system should contribute to and enhance the natural and local environment by:

- protecting and enhancing valued landscapes, …"

22. Paragraph 118 of the NPPF provides (inter alia) that:-

> "When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:
>
> - if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;
>
> …
>
> - planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including … the loss of aged or veteran trees found outside ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss; …"

The Officer's Report to the Planning Committee

23. The report described the site and surrounding area as follows:-

> "12. The application site is situated within an area of open countryside, around ½ mile from the village of Scoulton and 1 ½ miles from the small town of Hingham. The site forms part of a larger field and is set within an agricultural landscape. The site adjoins the B1108 Norwich Road, but built development in the locality is sparse and dispersed. The nearest residential properties are located around 250-300 metres away. Scoulton Mere, a Site of Special Scientific Interest (SSSI), is located approximately 400 metres to the west.
>
> 13. The site extends to approximately 4.4 hectares, with a frontage of around 220 metres to Norwich Road. The site is under arable cultivation. The land is bounded by further farmland to the south and east, an area of woodland to the west, and by the Norwich Road to the north. The roadside boundary is delineated by an established hedgerow and trees, including two oak trees which are subject to a Tree Preservation Order (TPO)."

Under BDC's scheme of delegation, the application was referred to the Planning Committee because it constituted a "major development" and had generated significant community interest. However, the application was screened as not amounting to EIA development because it would not be likely to have significant effects on the environment, a decision which has not been challenged.

24. Paragraphs 14 to 50 of the report contained a detailed summary of the consultation responses which had been received by BDC.

25. The report dealt with the need for a crematorium between paragraphs 70 to 74 as follows:-

> "70. There are no crematoria in Breckland. Existing facilities in the wider area are located at Norwich (Earlham and Horsham St Faiths), King's Lynn and Bury St Edmunds. Permission was granted on appeal last year for a crematorium at Cromer. Travel distances to these facilities are such that large parts of Breckland fall outside the industry standard 30 minute drive-time to a crematorium at cortege speed. This standard is widely accepted as an appropriate guideline for assessing the adequacy of local provision, and has been referenced in a number of appeal decisions.
>
> 71. Taking into account death rates in Breckland, which has a higher than average number of elderly residents, and applying national average cremation rates, it is estimated that around 1,086 potential cremations per annum are likely to be generated within the District. The proposed crematorium would have the capacity to meet this need, and due to its relatively central location, would provide a convenient facility for many residents in Breckland. Whilst the proposal would be unlikely to handle all Breckland cremations, further cremations would be likely to arise from areas close by in South Norfolk.
>
> 72. Evidence has also been provided to demonstrate that existing local crematoria are operating at or over capacity, resulting in extended waiting times and short turn around times for funerals. The additional capacity secured by the proposal would provide a better and more convenient service for local residents, as well as reducing pressure on existing crematoria, thereby potentially improving the experience for mourners at those facilities.
>
> 73. Whilst the need for a crematorium in this location has been questioned by a number of those objecting to the application, no substantive evidence has been provided to contradict that provided by the applicant.
>
> 74. Taking these matters into account, it is concluded that there is currently an unmet need for additional crematorium facilities in the area which the proposal would help to address. This is a material consideration that weighs in favour of the proposal."

26. The report dealt with the principle of development in the countryside between paragraphs 56 and 69. Paragraph 56 stated:-

> "56. Policy SS1 of the Breckland Core Strategy & Development Control Policies DPD sets out the overall approach to development in the District, and indicates that the open countryside is not considered generally to represent a sustainable option for development. Accordingly, Policy SS1 makes provision only for minimal development in the countryside outside defined settlements, predominantly comprising the diversification of rural enterprises. Provision is also made for some other employment uses to be accommodated, where a rural location is necessary for the functioning of the business or it utilises a particular attribute and is a sustainable solution to the identified need."

The Claimant made no criticism of that summary of policy SS1.

27. Paragraph 58 of the report summarised the effect of paragraph 28 of the NPPF in so far as it was relevant to the determination of the application:-

> "58. The National Planning Policy Framework (NPPF) promotes economic growth in the countryside, stating in paragraph 28 that the sustainable growth and expansion of all types of business should be supported in rural areas. It is also a core principle of the NPPF to recognise the intrinsic character and beauty of the countryside. However, the support for rural economic development applies to development in the open countryside as well as rural settlements. Additionally, the NPPF states as a core principle that planning should deliver sufficient community and cultural facilities and services to meet local needs."

The Claimant made no criticism of that summary either.

28. Paragraphs 60 to 61 of the report assessed the need for the development to be in an open countryside location:-

> "60. As far as the need for a countryside location is concerned, the requirements of the Cremation Act 1902 are directly relevant insofar as they stipulate that a crematorium should be at least 200 yards (around 183 metres) from any dwelling and at least 50 yards (43 metres) from a public highway. Published Government guidance entitled 'The Siting and Planning of Crematoria' (DoE, 1978) is also of relevance. This says that sufficient land should be available to provide an appropriate setting for a crematorium, adequate internal access roads, car parking and space for the disposal of ashes. Reference is made to sites of 2 to 4 hectares in size and larger, although no minimum is stated. The reasonable expectation of mourners and visitors to gardens of remembrance for a place of quiet contemplation is also an important consideration in relation to site selection.

> 61. Given these particular site selection and locational requirements detailed above, it is considered to be most unlikely that suitable land of sufficient size would be found within a defined settlement boundary. This is due to the more or less continuously built up nature of towns and villages in the District. Larger sites that are remote from housing are perhaps more likely to be found within existing and allocated employment areas, but such sites can be discounted due to the busy commercial nature of such areas and the likelihood of conflicting activities. It can reasonably be concluded therefore that a rural location outside a defined settlement is likely to be required for the development of a crematorium."

29. Paragraph 62 expressed the Officer's overall conclusion on the application of policy SS1 and paragraph 28 of the NPPF:-

> "On this basis, it is considered that the proposal would not conflict with Policy SS1 … as it has been demonstrated that the proposal would represent a sustainable solution to an identified need. This is considered further below. The proposal would also be fully consistent with the NPPF's support for the sustainable growth of rural businesses as set out in paragraph 28."

This conclusion drew upon both the assessment of the sustainability of the proposed development contained in the following paragraphs of the report as well as upon the preceding paragraphs.

30. The report dealt with the effect of the proposal on the character and appearance of the area between paragraphs 76 to 83. The Officer's conclusion in paragraph 83 was:-

> "For these reasons, it is also considered that whilst the proposal would cause some harm to the rural character and appearance of the area and loss of protected trees in conflict with Core Strategy Policies CP11 and DC12, this effect would be localised and would be mitigated to an extent by sensitive building design and extensive planting. Nevertheless, landscape impact considerations, in part, weight against the proposal. "

31. The impact of the proposal on the landscape had been described at paragraphs 78 to 79 of the report:-

> "78. The proposal would introduce built development into an area of largely undeveloped open countryside. The proposed buildings, together with associated access, parking, servicing areas, pedestrian islands and signage would inevitably result in a loss of openness and increase activity, and would thus have an urbanising effect. This would be harmful to the character and appearance of the area. The removal of existing roadside hedging and trees (including up to two oak trees subject to a TPO) to facilitate access improvements would also cause some

> harm in itself, as well as opening up short distance views into the site and thereby increasing the visual impact of the proposed development.
>
> 79. However, in medium distance views the proposed development would be well screened by adjacent dense woodland when approaching from the west and roadside and field boundary hedging would filter views of the development when approaching from the east. Close to the site, the development would be clearly visible from the Norwich Road, but would be set well back from the road and would in large part be seen set against a wooded backdrop."

32. On the other hand paragraph 82 of the report advised that:-

> "82. Consequently, and for the above reasons, it is considered that the proposal would comply with Policy DC16 in accordance with the design principles detailed therein which seeks, amongst other things, to ensure that new development is built to a high standard of design."

This conclusion was based upon paragraphs 80 and 81 of the report which commented favourably and in some detail on the design principles of the proposed landscaping and the proposed buildings.

33. Paragraphs 84 to 93 of the Officer's report addressed transport, highway safety and accessibility and concluded that if CP13 were to be treated as applicable to the proposed development, the policy was complied with.

34. Paragraphs 94 to 97 of the report dealt with the effect of the development on residential amenity. In paragraph 97 the following conclusions were drawn:-

> "97. Consequently, it is considered that the proposal would not result in any material harm to the amenities of local residents taking into above the above factors and issues. In terms of effect on the quality of the landscape, such considerations are detailed at paragraphs 76 to 83 above. Whilst it is considered that the proposals may result in some localised harm to the quality of the landscape which weighs against the proposal, it is considered that the scheme complies with Core Strategy Policy DC1 in all other respects."

35. Paragraphs 98 to 103 considered the effect of the proposed development on trees and landscaping. Paragraphs 99 to 101 stated:-

> "99. The proposal would result in the loss of some existing trees and hedging at the site frontage, including two oak trees to the east and west of the site frontage that are subject to a TPO. This loss of trees and vegetation is necessary to provide suitable visibility splays in accordance with the recommendation of the Highway Authority.

> 100. To compensate for the loss of trees and hedging, replacement planting is proposed together with a comprehensive landscaping scheme. The replacement planting would comprise of a new native hedgerow and 18 trees, including 6 beech trees, 6 oak trees and 6 field maple trees. The proposed landscaping scheme would introduce additional planting by way of tree belts to the site frontage and to the north eastern corner of the site. The tree belts would consist of a variety of species, including field maple, silver birch, hazel, beech, crab apple, native white cherry, English oak, and small leaved lime. …. The Tree Consultant does not support the removal of the TPO trees, but recommends that any new planting should be predominantly of native species to more appropriately respond to the existing landscape character of the locality.
>
> 101. As already noted, the loss of the TPO trees and the remainder of the planting to the site frontage would cause harm to the character and appearance of the landscape. However, it is considered that this particular landscape impact would be ameliorated by the substantial planting proposed by the landscaping scheme. The number and location of the trees, on balance, would be of more than commensurate value, providing an appropriate replacement and additional planting. The proposed landscaping would also mitigate to an extent against the visual impact of the built form on the wider landscape."

36. As a result in paragraph 103 of his report, the Officer concluded that:-

> "103. Taking these matters into account, it is considered that the proposal would result in some harm due to the loss of roadside hedging and trees in conflict with Core Strategy Policy DC12. However, such loss of trees and hedging is unavoidable due to access requirements and to achieve the development proposed. Moreover, the harm caused would be localised and mainly short-term, and could be mitigated satisfactorily by a comprehensive scheme of new planting. It is considered that the public benefits of the development as summarised in this report would outweigh this limited harm, and, due to the compensatory provision, it is considered that these amount to exceptional circumstances under this policy."

37. Paragraphs 104 to 114 addressed ecological issues. The Officer summarised the information and reports which had been received from the developer and other parties. He stated that there had been no signs of any protected species on the site. Paragraphs 105 and 112 expressed the opinion that the proposal provided opportunities for enhancing biodiversity. Paragraph 114 concluded:-

> "114. Accordingly it is considered that the proposal is acceptable in ecological terms and would not conflict with Core Strategy Policy CP10 or the guidance set out in paragraph 118 of the NPPF."

38. Paragraphs 115 to 118 of the report dealt with the effect of the proposal on the historic environment. Paragraph 118 concluded:-

> "118. Consequently the proposal is considered to be acceptable in heritage terms and would not conflict with Core Strategy Policy DC17 or the guidance set out in section 12 of the NPPF."

39. Paragraphs 119 to 121 explained why there were no objections to the proposal as regards loss of agricultural land, drainage and ground conditions.

40. The report dealt with the overall planning balance between paragraphs 122 and 126:-

> "122. The paragraphs above have assessed the individual policies of the development plan. It is considered that Polices SS1, CP10, CP13 (if it applied) DC1 (save for landscape considerations), DC7 (if it applied), DC16 and DC17 are complied with in full. Whilst for the reasons explained above, it is considered that there is some degree of conflict with Policy DC1 and CP11 in terms of landscape impact, the effects of the proposal would be localised and would be mitigated to an extent by sensitive building design and extensive landscaping, as noted in paragraphs 76 to 83. Some harm would also arise due to the loss of trees and hedging, but Policy DC12 is complied with as it allows for the loss of natural features in 'exceptional circumstances', such as is the case here where the loss cannot be avoided and compensatory measures are provided, as explained in paragraphs 98 to 103 above. It is therefore considered that the proposals comply with the development plan as a whole.
>
> 123. In addition, *and in any event*, the proposed development would provide a crematorium facility in the District for which there is a need. The qualitative improvement to service provision provided by the proposal in reduced waiting times for funerals and, in many cases, reduced travelling distances represents a significant public benefit which weighs in favour of the proposal. The proposal would also create some rural employment and would support indirectly other associated business activities in the area. Safe access to the development could also be achieved. The economic and social roles of sustainable development, as defined in the NPPF, would thus be supported.
>
> 124. Although the proposal would not be close to any main centre of population, it would nonetheless be relatively

> conveniently located for many residents in mid-Norfolk who currently have to travel further afield to access cremation facilities. The proposal would be served by public transport, and whilst most visitors would be likely to arrive by car, travel distances for many local residents would be less than they are currently. Any harm arising in terms of transport sustainability would be small therefore.
>
> 125. In relation to environmental considerations, as detailed above, some harm to the character and appearance of the area would result, but the effects would be localised and would be mitigated by the layout and design of the scheme and proposed landscaping, which would also mitigate fully against the loss of protected trees. The proposal would not result in any significant adverse effects on the amenity of local residents, ecological interests or the historic environment. The proposed development is appropriate in a countryside location due to the nature of the use and the requirements of legislation and Government guidance.
>
> 126. In summary therefore, it is concluded on balance that the proposal complies with the development plan as a whole and would represent sustainable development as defined in the NPPF. In addition, *and in any event*, there are also a number of other material considerations that support the proposal including meeting the need for a crematorium and other community and economic benefits. It is recommended that the application should be approved therefore." (emphasis added)

The grounds of challenge

41. On 2 May 2017 Ouseley J granted permission to apply for judicial review restricted to three grounds, which had been "summarised" by the Claimant as follows (see paragraph 8 of its skeleton):-

> "(1) In advising the Committee that the Development was capable of being acceptable in principle in this location and in accordance with the Development Plan ("DP") for the purposes of s38(6) Planning and Compulsory Purchase Act 2004 ("the 2004 Act") the OR fundamentally misdirected Members in three main respects:
>
> > (i) Firstly, the Officer erred in the correct legal interpretation of policies SS1 and DC07 of the Council's own Core Strategy, which establish the spatial strategy for development in the area. On a proper interpretation of those policies, and of the DP as a whole, the Officer was bound to advise Members that the Development was in conflict with those policies of the DP, and consequently with the DP as a whole, so that the statutory presumption in s38(6) did not apply. These were fundamental errors of

approach, which vitiated Members' subsequent decision to grant the PP.

(ii) Secondly, the Officer necessarily erred in his direction as to the weight to be given to policy SS1, because he directed that the weight it could carry was reduced due to an alleged inconsistency with paragraph 28 of the NPPF. On a proper legal construction of paragraph 28 of the NPPF and policy SS1, paragraph 28 of the NPPF is entirely consistent with policy SS1. By the same token, it clearly cannot be said that the Committee's decision would have been "highly likely" to be the same, had it not been misdirected concerning the proper interpretation of policy SS1 and paragraph 28 of the NPPF.

(iii) Thirdly, whatever the position in respect of the Officer's advice concerning policy SS1, the Officer also seriously misled Members as to the conformity of the Development with the DP as a whole. Given that the Officer was unable to identify any policies which provided any positive support for the Development, to be balanced against the policies which clearly militated against the grant of permission, he could only lawfully and/or rationally have advised Members that the Development conflicted with the DP as a whole and so did not benefit from the statutory presumption under s38(6) of the 2004 Act ("**Ground 1**").

(2) As a matter of law, the Council was required to have regard to the merits of the Weeting Site as one which would overcome, or at least mitigate, the clear planning objections to locating major development in the open countryside and outside any development boundary, while satisfying an identified, district-wide need for a crematorium: see *Derbyshire Dales DC v. Secretary of State* [2009] EWHC 1729 (Admin) and *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin). However, despite being urged to consider the Weeting Site, as an identified and available alternative being promoted by a rival commercial operator, Members were unlawfully directed to ignore this alternative location and to determine the application solely on its own merits ("**Ground 2**").

(3) The Officer also fundamentally erred and/or reached inconsistent conclusions, concerning the proper interpretation of other relevant DP policies, specifically policies DC16 and CP11, as well as CP13 and DC12 of the Core Strategy, and/or failed to take into account, properly or at all, paragraphs 109 and 118 of the NPPF. These errors undermined still further the Committee's conclusion that the development complied with

> the DP and benefitted from the statutory presumption in section 38(6). They also compound the seriousness of the failure to consider the Weeting Site as a potential alternative, in order to avoid or reduce the harmful impacts of this important development. ("**Ground 3**")."

General legal principles

42. Section 70(2) of TCPA 1990 provides that in dealing with a planning application the authority must have regard to (inter alia) "(a) the provisions of the development plan, so far as material to the application, … and (c) any other material considerations." Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") further provides that:-

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

It is well established that, in order to comply with these provisions, the decision-maker must proceed upon a proper interpretation of the relevant policies in the development plan (City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1459).

43. In Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 Lord Reed JSC, with whom the other members of the Supreme Court agreed, stated in paragraph 18 that:-

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

Thus, the Court held that as a matter of principle statements of planning policy should be interpreted objectively according to the language used, but *always* reading that language *in its proper context*. He continued in paragraph 19:-

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of fact requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

44. This subject was revisited by the Supreme Court in Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 WLR 1865. Lord Carnwath JSC, with whom the other members of the Court agreed, stated at paragraph 24:-

> "In the first place, it is important that the role of the court is not overstated. Lord Reed JSC's application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any "suitable site" within or linked to the existing centres (para 5). The short point was the meaning of the word "suitable" (para 13): suitable for the development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed JSC identified as one of textual interpretation, "logically prior" to the exercise of planning judgment (para 21). As he recognised (para 19), some policies in the development plan may be expressed *in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis*." (emphasis added)

He continued in paragraphs 25 and 26:-

> "25.It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. …
>
> 26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that

> exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matter of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

45. Lord Gill (with whom Lord Newburger PSC and Lord Clark and Lord Hodge JJSC agreed) added that "the proper context" for the interpretation of a planning policy "is provided by the overriding objectives of the development plan and the specific objectives to which the policy statement in question is directed" (see paragraph 72).

46. Mr Strachan QC urged caution in the present case in the application of one part of paragraph 25 of Lord Carnwath's judgment in Hopkins where he stated that the Courts should respect the expertise of the specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly. He asserted that that presumption should not be taken to apply to decision-making by local planning authorities, but that would appear to conflict with the earlier statement of the Court of Appeal in R (Lensbury Limited) v Richmond upon Thames LBC [2016] EWCA Civ 814 at paragraph 8. At all events, I have not found it necessary to rely upon this presumption in order to resolve the issues raised by the grounds of challenge.

47. In certain parts of the Claimant's case it is asserted that BDC acted irrationally. It is well-established that a complaint of irrationality does not give a Claimant an opportunity to revisit the planning merits of the application or of the local planning authority's decision. "[The] Court must be astute to ensure that such challenges are not used as a cloak for … a rerun of the arguments on the planning merits"; see R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74 at paragraph 6. In planning cases the threshold for *Wednesbury* unreasonableness (see Associated Provincial Picture Houses Ltd v Wednesbury Cooperation [1948] 1 KB 223) is a high and difficult hurdle for a Claimant to surmount. This is greatly increased in most planning cases because the decision-maker is not simply determining questions of fact, it is also concerned with making a planning judgment or a series of planning judgments. Because a substantial degree of judgment is involved, there will usually be scope for a broad range of possible views by different decision-makers presented with the same materials, none of which could be categorised as unreasonable in the *Wednesbury* sense; see the Newsmith Stainless Ltd case, at paragraph 7. Against this background, a Claimant alleging that a decision-maker has reached an irrational or perverse conclusion on matters of planning judgment "faces a particularly daunting task"; see the Newsmith Stainless Ltd case, at paragraph 8. However, irrationality challenges are not confined to the relatively rare example of a "decision which simply defies comprehension". They also include a decision which proceeds from flawed logic: see R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at paragraph 65.

48. The principles to be applied to the review of decisions by local planning authorities and to criticisms of the content of reports by officers to planning committees have been summarised in a number of cases (see for example R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) paragraphs 90 to 95;

[2015] EWCA Civ 537 paragraph 78; R (Plant) v Lambeth LBC [2017] PTSR 453 paragraphs 66 to 69).

Ground 1

49. This ground falls into three parts. In the first part, the Claimant submits that the Officer's report misinterpreted policy SS1 of the Core Strategy. It is common ground that the decision of the Committee was based upon the reasoning and advice given by the Officer in that report. According to paragraph 36 of the Claimant's skeleton, policy SS1 contains an express restriction on development within the countryside subject to only two limited exceptions. These are said to be firstly, the diversification of rural enterprises and secondly, "some other employment uses" where a rural location is necessary for the functioning of the business or it utilises a particular attribute and is a sustainable solution to an identified need. The Claimant submits that even if a proposal falls within those two exceptions, policy SS1 only permits a proposal which itself represents a "minimal" level of development.

50. The Claimant submits that, on this interpretation of policy SS1, because the Officer's report considered the extent of the need for the development, BDC must have treated the proposal as an "employment use" within the second so-called exception. But at paragraph 63 of the Officer's report, the Committee was advised that the proposal is not an employment use for the purposes of policy DC7 and therefore BDC has misinterpreted policy SS1 by treating its second "exception" as extending to a non-employment use, namely a crematorium. It is also suggested that the term "minimal development" could not apply to the level of development involved in a crematorium.

51. Mr Lockhart-Mummery QC accepted on behalf of BDC that, according to the definition in footnote 3 to policy DC6 of the Core Strategy, the Interested Party's planning application did not relate to "employment development". But he nonetheless submitted that the Claimant's interpretation of policy SS1 is misconceived. I agree.

52. Policy SS1 sets out in broad terms the authority's spatial strategy for the whole of its district, or "the overall approach to development in the district" (see the undisputed summary in the Officer's report quoted in paragraph 26 above). It is not, for example, a detailed development control policy containing very specific criteria for the assessment of individual proposals. As I have already noted, according to paragraph 2.33 of the Core Strategy, the spatial strategy in policy SS1 identifies "different types of place" or areas within the District and how they will develop. It shows where growth will be accommodated and sets out priorities for areas to be protected from development pressures over the period up to 2026. The seven "areas of place", arranged as a descending hierarchy, are Thetford, followed by Attleborough, then three market towns, the local service centre villages, the Snatterton Heath Employment Area, the rural settlements and, lastly, "the countryside". The broad strategy for each of the seven different "areas of place" is then described one by one in policy SS1. It indicates the overall level of development that is distributed to each settlement or type of area as a whole. Read properly in context, policy SS1 does not set out to describe the level of development that could be acceptable on individual application sites.

53. So in relation to, for example, the penultimate tier in the hierarchy, SS1 states that the "rural settlements" do not represent a sustainable option for "significant expansion".

As with the other tiers, that text describes, albeit using negative language, a level of expansion which would be appropriate for a rural settlement in *overall* terms. It is difficult to see how a question as to what would or would not amount to "significant expansion", where that question truly does arise, could be a suitable issue for judicial interpretation or analysis (applying paragraphs 24 and 26 of Hopkins). Instead the scope of that term depends upon *the use of judgment by the planning authority* in the *application* of that language to the circumstances of a settlement. That judgment could not be challenged by judicial review unless shown to be irrational, which is a particularly difficult hurdle to overcome. Much the same considerations apply to the expression "minimal development".

54. When dealing with "the countryside", SS1 begins by referring to the Sustainability Appraisal for the Core Strategy, which had explained that these large areas of predominantly undeveloped agricultural land are not a sustainable option for development. That, of course, is a conclusion expressed at a strategic, rather than a site-specific, level. It is in that context, that SS1 goes on to state that "minimal development" will take place in the countryside. Once again, that language is a description of the *overall* level of development distributed by the plan to the area of "the countryside" over the plan period. That minimal level of development which the countryside will accommodate will "predominantly" comprise the diversification of rural enterprises, but plainly is not limited to such activities. Read properly, that type of development does not represent an "exception" to a policy restriction, but forms part of the broad description of the level and type, *or purpose*, of development distributed by the spatial strategy to "the countryside".

55. SS1 also indicates that the minimal level of development that will be accommodated in the countryside may also include employment uses for which a rural location is necessary for the functioning of a business or a business which (inter alia) involves "a sustainable solution to an identified need". Here SS1 relies upon the concept of sustainable development as, once again, part of a broad description of the level and purpose of development distributed by the spatial strategy to the countryside, and not as part of a restrictive "exception" as Mr Strachan QC would have it. This *purpose* or *objective* is also to be found in several of the more detailed policies in the Core Strategy.

56. Mr Lockhart-Mummery QC accepted that this part of policy SS1 also operates as a general policy for the protection of the countryside. There is no other policy of that nature in the Core Strategy, for example one containing a specific list of criteria against which individual proposals may be assessed. Instead, this protective *purpose* of SS1 has been expressed in much broader terms, in the spirit of a policy which explains the overall level and objectives of development which may be accommodated in the countryside.

57. Thus, the language used in policy SS1 has to be understood in the context of its purposes and spirit. The legalistic construction of SS1 advocated on behalf of the Claimant does not accord with the approach to interpretation of policy laid down by the Supreme Court in Tesco and Hopkins, especially for a broad, strategic policy of this kind. It is plain from the judgments in Hopkins that arguments of the kind put forward in the present case are firmly discouraged.

58. In my judgment, the advice given to the Committee in the Officer's report reflected a proper understanding of the strategic, countryside policy in SS1. That area is not a sustainable location for development in general. The report advised that there are large parts of the district which do not have adequate access within a reasonable distance to a crematorium, existing facilities are operating at or above capacity, there is an unmet need for an additional facility and the relatively central location proposed in this case would be convenient "for many residents of the district" (paragraphs 70 to 74). Given the site requirements for a facility of this kind, and the characteristics of Breckland District, a new crematorium would be likely to need a rural location outside a defined settlement (paragraphs 60 to 61). The proposal was assessed to be sustainable in a number of respects (see eg. paragraphs 62, 84 - 85, 93, 97, and 122 - 126). These conclusions all involved *judgment* in the *application* of the policy *objectives* of SS1. It has not been suggested, nor could it be, that any one of those planning judgments was "irrational" in the public law sense.

59. For these reasons I reject the first part of ground 1.

60. The second part of ground 1 criticises paragraph 59 of the Officer's report which stated that policy SS1 should carry less weight because, applying paragraph 215 of the NPPF, it adopted a more restrictive approach to rural development than paragraph 28 of the NPPF, by requiring the need for proposed development to be shown. Mr Strachan QC submits that the legality of this approach depends upon whether both paragraph 28 of the NPPF and policy SS1 have been correctly interpreted when they were compared in the Officer's report, and that properly understood, the two policies are entirely consistent as a matter of substance. They differ only as to form.

61. The effect of paragraph 215 of the NPPF was that "due weight" should be given to policy SS1 according to the degree of its consistency with the NPPF, that weight increasing as that consistency increases. Here a comparison was made between two policies expressed in very broad, purposive terms. Mr Lockhart-Mummery QC submits, and I accept, that paragraph 28 of the NPPF distinctly encourages "a positive approach to sustainable new development" in "rural areas" (and does not require need to be shown) in contrast with the more cautiously worded objectives of policy SS1.

62. A comparison of two policies of this nature, expressed in very broad terms, is not primarily an exercise in linguistic analysis. Planning judgment is involved as to how the policies *apply* in practice. Even a comparison of the language used may be a matter of impression.

63. Although paragraph 59 of the Officer's report could have been more felicitously expressed, an application for judicial review does not involve the marking of an examination paper. The thrust of paragraph 59 is that, as a matter of judgment and degree, the terms of policy SS1 are more restrictive than the more pro-active objectives of paragraph 28 of the NPPF. I do not consider that that assessment is open to judicial criticism. However even if I were to be wrong on this point, Mr Strachan QC very fairly accepted that if the challenge under the first part of ground 1 (misinterpretation of policy SS1) were to fail, success under the second part of ground 1 could not justify the quashing of the planning permission, because the commission of this assumed error has only had the effect of reducing, and not increasing, the weight to be given in BDC's decision to the proposal's compliance with policy SS1.

64. The third part of ground 1 challenges the conclusion in paragraph 122 of the Officer's report that the proposal accorded with the development plan as a whole when applying section 38(6) of PCPA 2004..

65. In the City of Edinburgh case, Lord Clyde stated (at page 1459E):-

> "He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it."

This question involves an exercise of judgment by the decision-maker (R v Rochdale MBC ex parte Milne (No. 2) [2001] 1 Env LR 22 at paragraph 48). Where policies pull in different directions the decision-maker is entitled to give greater weight to some rather than others (R (Laura Cummins) v Camden LBC [2001] EWHC 1116 (Admin)).

66. However, Mr Strachan QC submitted that because BDC found that the proposal conflicted with policies DC1 and CP11 as regards its impact upon the landscape, a negative factor, it was *legally impossible* for the authority to conclude that the proposal accorded with the development plan as a whole, unless it identified compliance with one or more policies providing *positive support* for the type of development proposed, and therefore capable of outweighing the *negative* effect of the conflict with policies DC1 and CP11 (paragraph 51 of the Claimant's skeleton). He submitted that BDC was only able to point to compliance with policies which had a neutral effect for the purposes of section 38(6) of PCPA 2004, being policies which simply require that a proposed development should avoid causing harm to the interests they are designed to protect.

67. Initially, Mr Strachan QC accepted that he was unable to point to any authority to support his argument. Subsequently, he sought to rely upon a dictum of Lord Clyde in City of Edinburgh at page 1459E, but the issue raised by Mr Strachan in his submissions did not arise for decision in that case. The passage cited was simply making the point that the question under section 38(6), whether a proposal accords with the development plan, has to be assessed by reference to the plan as a whole, recognising that in some cases there may be certain points in the plan which support the proposal and other points in the plan which tell against the proposal. So, for example, it cannot be said that a proposal does not accord with the development plan simply because it conflicts with one of the relevant policies in the plan (see also paras 49 – 50 of Sullivan J in ex parte Milne (no. 2). No part of the reasoning expressed by the House of Lords in the City of Edinburgh case can be taken to support Mr Strachan's novel gloss on the language of section 38(6).

68. For my part I am unable to accept the Claimant's approach. It is too mathematical or mechanistic. Conflict with one particular policy may be treated as having an adverse impact and yet of relatively little weight. At the same time, the decision-maker may consider that compliance with other policies designed to secure that development in general takes place without causing significant harm to a range of environmental

factors, does involve a greater degree of compliance with the development plan than the non-compliance. The decision-maker is entitled to regard compliance with those policy considerations (even in the sense of simply avoiding harm) as having a greater priority or importance than the non-compliance with a policy designed to protect one other aspect, such as the landscape. As Sullivan J pointed out in the Rochdale case at paragraph 48 (approved in paragraph 21 of SSCLG v BDW Trading Limited [2016] EWCA Civ 493) :

> "The local planning authority has to make a judgment bearing in mind such factors as the *importance* of the polices which are complied with or infringed, and the *extent* of compliance or breach." (emphasis added)

The Claimant's argument is inconsistent with that principle, not least because it fails to allow any proper room for the decision-maker to assess the importance or weight to be attached to any compliance or non-compliance with a particular policy or policies. The above reasons are sufficient to dispose of the third part of ground 1 of the claim.

69. I would add that the above analysis is even clearer in the case of development plans, such as BDC's Adopted Core Strategy, prepared in accordance with PCPA 2004 and which are designed to promote sustainable development overall. Section 39(2) of PCPA 2004 requires an authority exercising its plan-making functions to do so with the objective of contributing to the achievement of sustainable development. The authority is also required to carry out a "sustainability appraisal" of the proposals in any development plan they prepare (section 19(5) of PCPA 2004). Generally, sustainable development is referred to as development which meets the needs of the present, without compromising the ability of future generations to meet their own needs. Sustainability has a pervasive effect on most of the development control policies of a modern development plan. It is not limited to those policies which seek to meet the need for specific types of development or to allocate sites for those specific purposes. The Claimant's insistence that compliance with policies in a post 2004 Act plan designed to promote sustainability by avoiding environmental harm can only be treated, as a matter of law, as having a merely neutral, rather than positive or beneficial, effect, has no legal foundation in the legislation or case law and is unprincipled.

70. I should also mention that it is incorrect for the Claimant to say that all of the policies with which the proposal was judged to comply simply had a neutral outcome. For example, BDC determined that the development would provide bio-diversity enhancement (see paragraphs 114 and 112 of the Officer's report and policy CP10). But quite apart from that, I see nothing illogical or irrational in the approach taken by BDC to the application of section 38(6) of PCPA 2004.

71. For these reasons I reject the third part of ground 1. It follows that the claim cannot succeed under ground 1.

Ground 2

Introduction

72. In his oral submissions Mr Strachan QC confirmed that the Claimant's complaint that BDC failed to comply with an obligation to consider alternative sites is solely

concerned with the Claimant's Weeting site. It is submitted that as a matter of law BDC was required to have regard to the merits of the Weeting site as one which would overcome, or at least mitigate, the clear planning objections to locating the crematorium development in the open countryside and outside any development boundary, whilst satisfying an identified, district-wide need for a crematorium. He accepted that no complaint is made by the Claimant about BDC's decision to accept the existence of this need or the fact that no other alternative sites were considered.

73. Mr Strachan QC also accepted that the Claimant has to show that BDC was legally obliged to take the Weeting site into account and that no such obligation could have arisen simply because the Weeting site had been identified or because the authority was asked by the Claimant to take that location into account. Mr Strachan accepted that in order to succeed under ground 2 the Claimant has to establish (i) that either an obligation to take an alternative site into account arose from a requirement of national or local policy, or that it was an "obviously material" factor in this case and therefore irrational for the council not to have taken it into account and (ii) the Committee did not take the Weeting site into account because they were directed not to do so (see paragraphs 8, 16-17, 56 and 62 of the Claimant's skeleton). It is convenient to review the relevant case law before going on to deal with point (ii).

Case law

74. Mr Strachan placed a good deal of reliance upon the decision of Mr Justice Sullivan (as he then was) in R (on the application of Bovale Ltd) v SSCLG [2008] EWHC 2538 (Admin). But in that case the challenge was made by an unsuccessful appellant against a refusal of planning permission in which a planning Inspector had decided to take alternative sites into account. Accordingly, the issue for the Court in that case was whether the decision-maker had been *permitted* to take that consideration into account, and not whether he had been *obliged* to do so. The Inspector found that the proposal for a "total care village" conflicted with development plan policies for the retention of the site for employment purposes and also by failing to provide affordable housing. Accordingly, by section 38(6) of PCPA 2004 the appeal fell to be dismissed unless material considerations indicated otherwise. The developer had contended that these considerations included the need to provide such a facility within the Hereford area. The court held that it had been relevant and *permissible* for the Inspector to take into account the availability of alternative sites to meet that need, in order to assess how much weight to give to the developer's claim that the appeal site needed to be released for that purpose. Sullivan J also made it plain that he was not purporting to lay down any general principle to that effect, as each case would turn on its own facts, a point which has been endorsed in several decisions of the courts.

75. In Derbyshire Dales District Council v SSCLG [2010] 1P&CR 19 Carnwath LJ (as he then was but sitting in the High Court) considered Bovale in the context of a review of the more important cases on alternative sites. He held that in terms of legal analysis there is a clear distinction between challenges to a decision to have regard to alternative sites, as opposed to a challenge to a failure or a refusal to take alternative sites into account. Bovale fell into the former category. A further point of distinction was that in Bovale the local planning authority had identified alternative sites to meet a need for a particular facility within a defined area, whereas in Derbyshire Dales no alternative sites had been identified. But it is plain nevertheless that the fundamental

distinction is between circumstances where a decision-maker is simply permitted to take alternative sites into account as opposed to those where he is obliged to do so.

76. In R (Luton Borough Council) v Central Bedfordshire Council [2015] 2 P&CR 19 (at paragraph 71) the Court of Appeal endorsed the analysis by Carnwath LJ as summarised below:-

> "(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, *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 and were before the decision-maker (paragraphs 21, 22 and 35 and see *Secretary of State v Edwards* (1995) 68 P&CR 607 where that factor was treated as having 'crucial' importance in the circumstances of that case)."

Mr Strachan QC accepted that these principles are binding upon the High Court, but he reserved the Claimant's position to argue in the Supreme Court that, by virtue of section 70(2) of TCPA 1990, the Findlay principle does not apply, agreeing with the stance taken by Mr Robert McCracken QC in R (Lucas on behalf of Save Diggle Action Group) v Oldham MBC [2017] EWHC 349 (Admin) at paragraph 86.

77. It is helpful to consider point (iv) of the passage in Luton in more detail. In paragraph 19 of Derbyshire Dales Carnwath LJ pointed out that the only case in which a decision had been quashed because of a failure to comply with an obligation to have regard to alternative sites was Secretary of State for the Environment v Edwards [1995] 68 P&CR 607, which he said illustrated the special circumstances needed to

support such an argument. There, a motor service station needed to be provided on either side of a trunk road. Planning applications had been made in respect of seven competing sites, four of which were the subject of appeals to the Secretary of State. The Claimant, Mr Edwards, was the appellant in respect of one of the appeal sites. He asked the Secretary of State to hold a joint public inquiry into all of the outstanding planning appeals. The Secretary of State was minded to agree with that request but, following strong objections from one of the other appellants, decided not to pursue that course. Eventually the Secretary of State decided to grant planning permission in respect of the appeal promoted by that party and Mr Edwards successfully applied to the High Court to quash that decision.

78. The Court of Appeal upheld the decision of the High Court. Applying four criteria derived from the judgment of Oliver LJ in Greater London Council v Secretary of State for the Environment [1986] 52 P&CR 158, the Court decided that because (i) of the need for the facility, (ii) the adverse effects of each proposal on open countryside, (iii) the existence of alternative sites with potentially lesser effects, (iv) a situation in which only one or a very limited number of planning permissions could be granted, the relative merits of alternative sites had been a material consideration which the Secretary of State had been obliged to take into account.

79. Under point (iii), Roch LJ relied upon representations made by the successful developer to the Secretary of State that it had fully addressed the alternative sites in its evidence and that the Inspector would have received sufficient material to enable him to determine its appeal, having "full regard" to the existence of the alternative sites (pp 609-610). In the same vein Roch LJ stated that it was crucial to his conclusion that the other sites had been the subject of planning applications and in several cases planning appeals before the Secretary of State (pages 615-6). This point was specifically highlighted by Carnwath LJ in the Derbyhire Dales case at paragraph 22. Luton confirms that this factor was "crucial" *in the circumstances of* the Edwards case. It was crucial for two reasons. First, in Edwards the decision-maker had adequate material to be able to compare the alternative sites identified; neither the Secretary of State nor anyone else suggested the contrary. It was not a case where the decision-maker considered that the information available on alternative sites was insufficient to enable a comparison to be made. Second, the Secretary of State had already reached a provisional decision to hold a joint inquiry into the competing sites so that he could make that comparison. Mr Edwards complained that he had been treated unfairly because the Secretary of State changed his mind on this point and effectively decided not to compare the alternatives, which had the effect of pre-empting the determination of Mr Edward's appeal (pp 611-2). This explains why Kerr J in Save Diggle Action Group said (at paragraph 82) that "there was a whiff of procedural unfairness" (or as Carnwath LJ put it in paragraph 22 of Derbyshire Dales, irrationality) about the Edwards case. By contrast no allegation of procedural unfairness has been advanced by the Claimant in the present case at all.

What decisions did the Defendant in fact reach and can they be impugned?

80. Mr Lockhart-Mummery QC submits that ground 2 fails in any event on the facts of this case. The starting point is the letter of 16 September 2016 from the Claimant's planning consultants to which I have already referred (see paragraph 7 above). This was in part a response to the report which the Officer had originally prepared for the planning committee meeting in September 2016. It is not suggested that any further

information about the Weeting site was provided at that stage. On 6 October 2016 the planning officer prepared a revised report for the committee meeting which in due course took place on 17 October 2016. At paragraph 67 he advised members:-

> "In addition, it is noted from [the] letter of 16 September 2016 (on behalf of Dignity Funerals) that Dignity has identified a site it intends to develop as a crematorium facility between Weeting and Brandon. However, in the absence of sufficient further details, assessment or formal proposals, it is premature to consider this any further at this juncture, and it remains for the current application to be assessed for its suitability."

On the same date, the Claimant submitted through its consultants a formal request for pre-application advice from BDC in respect of its Weeting site. It also submitted a site plan and an initial sketch design.

81. On 13 October 2016 the Claimant's solicitor sent an email to BDC's solicitor responding to paragraph 67 of the Officer's report. He sent again a copy of the location plan for the Weeting site together with a site layout plan. He stated that it was "important that the *existence* of an alternative site is properly and accurately dealt with by the Officer …". The council's solicitor responded on 14 October 2016. He stated that as requested he would ensure that members would be informed at the meeting of the committee on 17 October that BDC had received further details of the Claimant's proposed site at Weeting, including an indicative site layout and site plan. It is not suggested that BDC's solicitor failed to comply with this assurance. He added that members would also be told that these details had not yet been informally assessed by planning officers. He stated that members would be formally advised that in the absence of any formal proposals or a planning application, officers were not legally required to assess the proposals as regards their suitability in planning terms and that they therefore had not done so. Consequently the Committee would be advised that only limited weight could be attached to the proposals for the Weeting site "at this early stage".

82. It is not suggested that the Claimant or its representatives ever asked that the Planning Committee's consideration of the planning application by the Interested Party should be deferred to enable further information to be obtained on the proposals for the Weeting site.

83. The meeting of the planning committee did in fact take place on 17 October 2016. According to the minutes of the meeting, BDC's solicitor advised members that officers had recently received information on the Weeting site. He continued:-

> "these details had not been either formally or informally assessed. Mr Horn further advised that officers were not required to assess this proposal and therefore, had not done so. Accordingly, limited weight should be attached to this proposal, and the current proposal before committee should be assessed on its own planning merits".

A local resident spoke on behalf of herself and a number of neighbours living in the vicinity of the proposed development. She also referred to the Weeting proposal and

she urged the planning committee to refuse or to defer their consideration of the Interested Party's application so that the other proposal could be "fully explored". It is apparent from the resolution passed by the members to approve the planning application that they did not consider that it would be appropriate to further defer their decision on the application.

84. Following the meeting of the committee, but before BDC issued the planning permission in respect of the application site, pre-application discussions on the Weeting site took place between the Claimant and the authority's officers.

85. The planning permission was not issued until 22 December 2016. In the meantime, on 8 November 2016 the Claimant's solicitor sent an email to BDC's solicitor. He noted that the planning application had not yet been determined by the local authority because it had been referred to the Secretary of State for consideration of a possible call-in. He referred once again to paragraph 67 of the Officer's report to the meeting of the planning committee on 17 October 2016 and in particular to the absence of sufficient details of the Weeting scheme. It is plain from that email that the meeting to discuss pre-application advice on the Weeting site had yet to be scheduled at that stage. The Claimant's solicitor suggested that because of this extant pre-application request, it was incumbent on BDC to properly consider the comparative merits of the proposals by the two developers. It was argued that this could only reasonably be achieved by referring the Interested Party's application back to the Planning Committee for further consideration, applying the decision of the Court of Appeal in R (Kides) v South Cambridgeshire District Council [2003] 1 P&CR 19. The Claimant's solicitor made a formal request that that be done.

86. On 21 December 2016, the day before the planning permission the subject of these proceeding was issued, BDC's solicitor responded to the email of 8 November 2016. By this stage it had become known that the Secretary of State had decided not to call-in the planning application for his own determination. BDC's solicitor maintained that the advice given in the Officer's report at paragraph 67 remained correct. He continued:-

> "As at the committee date, the only details received by the Council in respect of your Client's request for pre-application advice were a location plan and an indicative plan of your Client's proposal. For this reason – and taking into account that at the time, the proposal had not been either informally or formally assessed – I believe that both I and the Officer's report were entirely correct to state that limited weight should be attached to the existence of your Client's proposal.
>
> In the intervening period between the Committee date and today, your Client has not made a formal application to the Council for planning permission. The only advancement in this matter so far as your Client's proposal is concerned is that the Council has now completed the pre-application advice process. And having done so, the Council has now informed your Client that its proposal has a number of constraints that make it impossible for Officers at this stage to give an informed view

> (whether informally or formally) as to whether or not your Client's proposal would be likely to receive Officer support.
>
> This being the case, I conclude that nothing has happened in the intervening period between the Committee date and today which might rationally be regarded as a "material consideration" for the purposes of section 70(2). Accordingly, as I do not consider that there are any new factors that might rationally be regarded as a "material consideration", I do not consider that there is any reason whatsoever now to refer this application back to Planning Committee."

The email concluded by stating that BDC intended to grant planning permission in respect of the Interested Party's application shortly.

87. Mr Strachan QC confirmed that the Claimant brings no challenge to the grant of planning permission in this case on the grounds that the application should have been referred back to Committee applying the Kides principle. Like Edwards, Kides was based upon the application of "principle 2" in the judgment of Glidewell LJ in Bolton MBC v Secretary of State for the Environment (1991) 61 P&CR 343, 352.

88. Instead, in its pre-action protocol letter to BDC dated 12 January 2017 the Claimant contended at paragraph 8.14 that the authority had failed to assess whether the proposal for the Weeting site firstly, would represent a more sustainable location to meet the need for a new crematorium, secondly, would not suffer from the site-specific disadvantages of the permitted development such as the loss of two protected oak trees and harm to a valued landscape, and thirdly, would accord with the Core Strategy as a whole including the spatial strategy set out in policy SS1.

89. On that third point, I note that the Weeting site is also located in open countryside and beyond any defined development boundary for a settlement. No explanation has been given by the Claimant as to how its site, but not the application site, could be considered to be in accordance with policy SS1. Furthermore, paragraph 32 of BDC's Detailed Grounds of Defence, which explained the constraints affecting the Weeting site (to which its solicitor referred in his email of 21 December 2016) has not been contradicted by the Claimant. In addition to lying within open countryside, the Weeting site is located partly within an area of high flood risk and is only 400 metres from the Breckland Forest SSSI and the Breckland SPA. The SPA is concerned with the protection of the Stone Curlew, a rare and protected species. As Mr Lockhart-Mummery QC pointed out by reference to the Key Diagram for the Core Strategy, the Weeting site lies within an area comprising land within 1500 metres of the SPA and where development constraints apply.

90. BDC submits that, unless and until the Claimant provides the suite of materials necessary to inform a full application for planning permission on the Weeting site, including a design and access statement, a traffic impact assessment, a flood risk assessment, and Habitats Regulations assessment and detailed plans, the council was entitled to form the judgment that the site could not be the subject of any useful assessment.

91. It is plain from paragraph 67 of the Officer's report to Committee that the members were advised that the local planning authority had received insufficient information on the Weeting site for that proposal to be assessed "*any further*" at that stage. Thus, it was taken into account. Unlike the Diggle case, there was no direction to members to treat the Weeting site as an irrelevant consideration. The effect of the advice given to the Committee, which it accepted, was that because of the inadequacy of the information on the Weeting site, there was no sufficient basis for BDC to compare the merits of the application it had to determine and the Weeting site as an alternative. That was a matter of judgment for the local planning authority. Given the paucity of the information contained in the letter from the Claimant's planning consultants dated 16 September 2016, I see no basis upon which that judgment could be impugned as irrational.

92. The information subsequently supplied with the email of 6 October 2016 was still very limited. The site was identified and a "sketch scheme" provided. No assessment was provided of the various aspects of that location or the "scheme" which would go to the issues of sustainable development, environmental impacts and compliance with policy.

93. The email from the Claimant's solicitor sent on 13 October 2016 simply referred to that same information and asked that the "*existence*" of the Weeting site as an alternative be properly dealt with. At that stage the Claimant's team must have read the Officer' report and known that the Planning Committee would consider the Interested Party's planning application on 17 October. Although they knew that the Officers were preparing to advise the Committee that there was insufficient information for the Weeting site to be "considered further" as an alternative, the email did not suggest that that judgment was incorrect or that the sparse information supplied by the Claimant towards the beginning of October 2016 meant that that opinion was no longer tenable. The email did not suggest that the Committee should defer consideration of the application so that further information could be supplied on the Weeting site. It gave no indication that further information would be supplied, the nature of any such information or when it would be provided. Instead, the email focused on the "existence" of the Weeting site as an alternative. At that point in time the Claimant had simply requested pre-application discussions on the Weeting site.

94. It is necessary for the response from BDC's solicitor of 14 October 2016 to be read in this context. In effect, he agreed to make sure that members of the Committee were made aware of the "existence" of the proposed site at Weeting including confirmation that an indicative site plan and layout had been received. The thrust of his proposed advice was that only limited weight could be given to the Weeting proposal at that stage. Once again, he did not suggest that it was legally irrelevant. His reasons for taking that stance are to be found in his response read in conjunction with the Officer's report. It would be misleading to read the email in isolation. Plainly, the Officer's report had taken the view that there was insufficient information for the Weeting site to be considered further as an alternative. The response in the email added that the indicative sketch layout had not been assessed and that in the absence of formal proposals *or* an application there would be no obligation to make an assessment. Read fairly and in context, Officers took the view that they did not expect the lack of information on the Weeting site to enable a sensible assessment to be made until the Claimant provided substantially more detailed information, typically the

level of information that would accompany formal proposals or a planning application.

95. The addendum to the Officer's report, contained in the minutes for the Committee meeting on 17 October 2016, was to the same effect. It is clear that the email dated 8 November 2016 from the Claimant's solicitor focused on paragraph 67 of the Officer's report, rather than the email from BDC's Solicitor dated 14 October 2016 (which formed the basis for the addendum to the Officer's report), as the key advice given to members.

96. The only explicit criticism made in the email dated 8 November 2016 of BDC's judgment that there was insufficient information on the Weeting site for it to be considered further at that stage as an alternative, was that on 6 October 2016 pre-application discussions had been requested and that process was still ongoing. Not surprisingly, the response from BDC's solicitor dated 21 December 2016 continued to rely upon paragraph 67 of the Officer's report, in conjunction with the addendum recorded in the minutes, as a legally proper response to the suggestion that the Weeting site be considered as an alternative to the Interested Party's application. Because of the inadequacy of the information received by the authority on the Weeting site, BDC had been entitled to give limited weight to it, and by definition had not disregarded the existence of that site as an alternative (see also Tesco Stores Ltd v Secretary of State for the Environment [1995] 1WLR 759, 764G and 780F).

97. The email went on to add that that judgment had in effect been confirmed by what had happened subsequently. The only change in circumstance was that BDC's Officers, having completed the pre-application advice process, had informed the Claimant that its proposal had a number of constraints, making it impossible at that stage for Officers to express a view as to whether the Weeting site might be acceptable. In other words, some 2 months after the meeting of the Planning Committee and just before the grant of planning permission, the position remained that there was insufficient information on the Weeting site for the merits of that site to be assessed, and in particular, to be able to see whether constraints affecting that site could be overcome. Given that no challenge is made to the decision not to refer the matter back to the Planning Committee, that was a matter for the judgment of the Officers during the period from the meeting on 17 October and the grant of planning permission on 22 December 2016. There is no basis for saying that the series of judgments I have described was irrational and no attempt was made to argue otherwise.

98. In R (Mount Cook Limited) v Westminster City Council [2004] 2 P&CR 22 the Court of Appeal accepted that "inchoate or vague alternative" schemes may be given little or no weight, even if treated as relevant (paragraph 30). "Vagueness" may include lack of detail sufficient to enable a judgment to be made on the merits or acceptability of an alternative. Of course, if that is the judgment reached by a planning authority, it may also follow that there is doubt about the likelihood of an alternative coming to fruition. The Court of Appeal went on to express its concern that planning authorities should not have to look over their shoulders before granting any planning permission against the possibility of some alternative proposal, however ill-defined and unlikely of achievement (paragraph 32). Mr Strachan QC sought to draw factual distinctions between the circumstances in the Mount Cook case and the present case. But that does not alter the principle, established in Mount Cook and upon which the BDC is entitled to rely, that it was a matter for the authority to consider the adequacy of the

information available on the Weeting proposal and how much weight to give to that alternative in the light of that judgment.

99. It is well-established that it is for the decision-maker to decide how far to go in seeking or obtaining information on a factor which it has not excluded as legally irrelevant. That decision may only be challenged on grounds of irrationality (see eg. R (Khatun v Newham LBC [2005] QB 37 paragraphs 34-5; R (Plant) v Lambeth LBC [2017] PTSR 453 at paragraphs 62-3).

100. In paragraph 59 of its skeleton the Claimant simply asserts that BDC could and should have considered the Weeting site as an alternative on the information it had before it. But that is what the Defendant did. The Officers formed the judgment and advised members that in the absence of formal proposals there was insufficient information for the merits of the Weeting site to be assessed. That additional material would have included (inter alia) information in connection with the nearby SPA and the likely effect of the Habitats Regulations.

101. Then in paragraph 60 of its skeleton the Claimant asserts that if BDC considered that necessary information was lacking, which it plainly did, then all it had to do was to request the Claimant to provide it and to allow "a short further period of time" for that purpose. It is also suggested that BDC could have waited for "the short period of time" for the Claimant's planning application to be submitted. Those submissions pay no regard at all to the principle laid down in Khatun and subsequent authorities that BDC's decisions not to defer the determination of the Interested Party's application and on the adequacy of the information on the Weeting site may only be challenged if shown to be irrational.

102. BDC would have been well aware of the statutory requirement to determine the application, the possibility of an appeal being made by the Interested Party against non-determination (Article 34 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 – SI 2015 No 595 and section 78(2) of TCPA 1990) and the delays which had occurred in the determination of that application since it was submitted in December 2014. It is plain from the Claimant's skeleton that it accepts that any further information would have had to be supplied by the Claimant (or its consultants). It is also plain that the Claimant does not dispute the rationality of BDC's view that information of the kind necessary for a proper planning application would have been expected in order to deal with the Weeting site. Despite that, nothing has been shown to the Court to explain what the Claimant now means in its skeleton argument by a "short period of time". More importantly, this information was not given by the Claimant to the planning authority at the time, nor was it suggested that their consideration of the planning application should be deferred. The suggestion during the hearing that BDC's approach was irrational, in the sense of being beyond the range of rational responses which could be given by an authority presented with the circumstances as they existed in the latter part of 2016, is hopeless.

103. For completeness, I should also record that the relevant part of the Claimant's Statement of Facts and Grounds was also oblivious to the principle laid down in Khatun and the need to demonstrate irrationality in BDC's response. Paragraph 115 raised a completely different point, which was not pursued at the hearing, namely that it was "illogical" for BDC not to consider the *principle* of the Weeting site because of the absence of further details about the proposal. An allegation of flawed logic

concerns a different aspect of irrationality (see R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 paragraph 65). Plainly a planning authority's decision that it cannot assess whether a site would be acceptable for a particular type of development because of a lack of information can embrace the "principle" of the proposal. This is simply a matter of judgment for the decision-maker and does not give rise to any legal issue upon which the Court could intervene.

Whether there was any legal obligation on the Defendant to assess the Weeting site

104. Thus far, I have addressed ground 2 on the basis that, in my judgment, BDC did not consider the Weeting site to be an irrelevant factor, but dealt with the issue of the Weeting site as an alternative to the application proposal as a matter of weight. But the Claimant insists that BDC instead treated the Weeting site as an irrelevant consideration and it thereby failed to comply with a legal duty to assess alternative sites. For completeness I will address the issue whether any such obligation arose in the circumstances of this case and, even if it did, whether that could affect the lawfulness of the approach taken to the alternative put forward by the Claimant.

105. By reference to the principles summarised in paragraph 71 of Luton, the Claimant submits that BDC was under a legal obligation to assess alternatives to the application proposal by virtue of polices SS1, CP11, DC12 and DC18 of the Core Strategy and paragraph 118 of the NPPF. Mr Strachan QC confirmed that the Claimant no longer relies upon policy DC7 for this purpose, because it is the Claimant's principal case under ground 1 (which is accepted by BDC to this extent) that the proposed development does not fall within the employment uses to which DC7 applies. The same analysis must apply to policy CP14, which was mentioned in passing in this context.

106. I put to one side the policy in the first bullet point of paragraph 118 of the NPPF because that only applies where a proposal would cause "significant harm" to bio-diversity. There is no dispute that in the present case the Officer's assessment, which was accepted by the Committee, was that there would be no such harm, but instead some enhancement.

107. Mr Strachan QC identified these policies because they require development to be sustainable, and/or they require environmental impact to be minimised and/or need to be demonstrated and/or the loss of protected trees to be justified by exceptional circumstances. During oral submissions I drew the attention of Mr Strachan QC to paragraphs 36 to 37 of the judgment of Carnwath LJ in Derbyshire Dales which give examples of types of policy which are insufficient to impose a legal duty on a planning authority to consider alternative sites. Thus, the statutory provisions and policies relating to National Parks and Conservation Areas require special regard to be paid to their protection, but they fall short of imposing a positive obligation to consider alternatives which do not have the same effects. Similarly, policies which require environmental and social impacts to be *minimised* through the careful consideration of (inter alia) *location*, do not give rise to any legal obligation to consider alternative sites.

108. Mr Strachan QC did not quarrel with this analysis by Carnwath LJ, with which I also agree. On this basis, in my judgment, the language of the policies upon which Mr Strachan QC relied under ground 2 *cannot* be distinguished from the policies which

Carnwath LJ held could *not* result in a planning authority becoming under a legal obligation to consider alternative sites. Plainly the mere fact that a party identifies a site which he would like the planning authority to consider as a preferable alternative, can make no difference to that legal analysis.

109. I am unable to accept Mr Strachan's alternative submission that BDC was under an obligation in the present case to consider alternative sites because this was an "obviously material" consideration (an expression of the irrationality principle). The factors relied upon in paragraph 56(4) of the Claimant's skeleton are simply matters which go to the question whether a decision-maker is permitted, not obliged, to have regard to alternative sites (see Derbyshire Dales and Luton). The only other point advanced by the Claimant was that in the present case the Weeting site was identified by the Claimant to the planning authority for consideration as a preferable alternative to meet the need for an additional crematorium. But, whether by itself, or in conjunction with the other points to which I have referred, this factor did not in the circumstances of this case give rise to a legal obligation to consider alternative sites for the reasons already explained above.

110. I have therefore reached the clear conclusion that on the facts of this case the decision-maker was under no legal obligation in any event to consider alternative sites. Even if I had reached the opposite conclusion, I do not think that ground 2 could succeed. The Claimant has pursued this challenge *solely* on the basis that BDC failed to assess the Weeting site as an alternative and *not* on the footing that the authority failed to consider alternative sites more widely, for example, throughout its district. Even where an obligation to consider alternative sites exists, it must remain a matter for the planning authority's judgment as to (i) how much information should be sought on alternative sites (whether a particular site or sites in general) and (ii) how much weight to give to any alternative site or proposal for that site. It must also be a matter of judgment for the planning authority as to when it is appropriate for the planning application before it to be determined and whether further time should be allowed for an alternative scheme to be worked up. For the reasons I have already given there are no public law grounds upon which the approach taken by BDC in the circumstances of this case could possibly be impugned.

Conclusion

111. Accordingly, ground 2 must be rejected.

Ground 3

112. Mr Strachan QC accepted that if ground 3 had been the only cause for complaint his client would probably not have applied for judicial review. It adds little to the grounds already considered and it can be dealt with more briefly.

113. First, it is submitted for the Claimant that there was an internal inconsistency in the Officer's report (paragraphs 78, 82, 83 and 122), and hence in the decision, between concluding that the proposal would breach policy CP11 by causing some harm to the rural character and appearance of the area and yet would accord with policy DC16. There is no inconsistency at all. On the one hand paragraph 78 sets out the extent of the harm that would be caused to the open countryside by the introduction of the built development, activity, and urbanising influences of the proposal. Paragraph 79 then

described how to some extent those effects would be mitigated. On the other hand policy DC16, as its heading makes clear, is concerned with various aspects of "design" and goes on to set out a number of design principles and issues. For example, the policy deals with the form and character of proposed built development, including the design of buildings, and also "building detailing and materials" which can have a significant effect upon the overall appearance of a development. Policy DC16 also addresses the qualities of the landscaping proposed and whether it would "preserve or enhance the character of an area" or reinforce "locally distinctive patterns" of "landscape".

114. Paragraphs 80 and 81 of the Officer's report gave a positive assessment of the proposals for the design of the built development and the additional landscaping. Reference was made to "the extensive planting" proposed "to help assimilate the development into its landscape setting and fully mitigate the loss of any existing trees and hedgerow". This includes native tree planting and blocks of woodland. It was concluded that "this landscape treatment would be sympathetic to the character of the area …".

115. There is plainly a distinction to be drawn between a landscaping design which is appropriate to the character of the area and one which is not. It was perfectly permissible for BDC to make a judgment that details of the design for the building and landscaping proposed accorded with the design principles in policy D16, whilst at the same time concluding that the nature of the development and uses proposed would be harmful to the character and appearance of the area in terms of the loss of openness, increased activity and urbanising effect. In addition, paragraph 83 explained how the harm to the rural character of the area "would be localised and would be mitigated to an extent by sensitive building design and extensive planting". Thus, although to that extent the proposal did not comply with policy CP11, it accorded with relevant design principles in DC16. There was no inconsistency between these two statements and this was simply a matter of planning judgment.

116. Next, the Claimant criticises paragraphs 103 and 122 of the Officer's report because it was concluded that despite the loss of two protected trees, the proposal complied with policy DC12 in that the policy allows for such a loss in exceptional circumstances where the loss is unavoidable and there are overriding benefits. The Officer's report explained that the loss of the trees and hedging was unavoidable because of (inter alia) access requirements and that the public benefits of the development would outweigh the limited harm involved. As paragraph 74 of the Claimant's skeleton makes clear, this criticism relates to the existence of the Weeting site as an alternative and is therefore dependent upon ground 2, which I have already rejected.

117. Next, the Claimant complains that BDC wrongly treated policy CP13 as not applying to the application proposed because it was not to be regarded as a "community facility". The Claimant criticises the reasoning in paragraph 92 of the Officer's report that a "community facility" is a local facility which broadly falls within the D1 use class and not a facility serving a district-wide need. However, the complaint is completely hollow because in paragraph 93 the proposal was assessed on the basis that policy CP13 did apply and was found to be compliant. BDC's view that accessibility by public transport and by car (see also paragraphs 84 and 85) would suffice to meet the requirement for a location that allows for "ease of access by a

variety of methods" was a matter of judgment and is not susceptible to any public law challenge.

118. The Claimant then relies upon paragraph 109 of the NPPF, which states that the planning system should contribute to and enhance the natural and local environment by protecting and enhancing (inter alia) "valued landscapes". That expression is not defined in the glossary to the NPPF and is not a term of art. It is not limited to landscapes which have been formally designated (Stroud District Council v SSCLG [2015] EWCA 488 (Admin) at paragraphs 13-16). The Claimant's criticism is that BDC failed to make a finding on whether the proposal would harm a "valued" landscape. Like other criticisms under ground 3 this is simply nitpicking. BDC gave adequate consideration to paragraph 109 of the NPPF by applying the parallel policy in the Core Strategy, policy CP11 and by assessing the landscape qualities of the area by reference to the relevant Landscape Character Area and the characteristics of the landscape in the vicinity of the application site. These are qualities which CP11 seeks to protect "for their own sake and intrinsic beauty". The Officer's report then assessed the effect of the proposal on that character (paragraphs 76 to 78). In substance therefore, BDC applied the relevant part of paragraph 109 of the NPPF and reached conclusions which cannot be impugned.

119. Likewise the Claimant's complaint that BDC failed to deal with that part of paragraph 118 of the NPPF which relates to the protection of "veteran trees" is without foundation. The matter was adequately dealt with in paragraphs 98 to 103 of the Officer's report by reference to the parallel policy in the Core Strategy, policy DC12. This complaint is also hopeless.

120. For all these reasons ground 3 must be rejected.

Conclusion

121. All of the grounds of challenge fail and the application for judicial review must be dismissed.

Consequential matters.

122. I am grateful to the parties for the written submissions they have provided on costs and the Claimant's application for permission to appeal.

Costs

123. It is accepted by the Claimant that BDC is entitled to an award of costs as the successful party and I am asked to make a summary assessment of costs. BDC has put forward a schedule claiming a total figure of £37,650, but the schedule does not comply with CPR PD44 para 9.5 and does not contain a breakdown as to how time has been spent. Certain items are disputed.

124. The first issue concerns costs amounting to £4,400 which were incurred in attending the oral hearing of the renewed application for permission. I agree with BDC that, having regard to R (Davey) v Aylesbury Vale DC [2008] 1 WLR 878, in particular paragraphs 19-21 and 29-30, the Court may award a successful defendant preparation costs incurred before the grant of permission, which may include the costs of

attending the renewal hearing. In this case I am persuaded that such an order is justified for a number of reasons. First, the renewal hearing was listed for 3 hours rather than the standard 30 minutes. This was because it was envisaged that the renewed application would be contested, fully argued by the parties and would deal with the many grounds (and sub-grounds) pursued by the Claimant. Second, BDC was successful in persuading Ouseley J to refuse to grant permission on ground 4. Third, the claim for judicial review has been brought wholly, or at least mainly, for commercial reason. Fourth, because the claimant has been unsuccessful in the claim, the costs have been imposed on a public body with the effect of diverting funds from its primary public functions. Fifth, if the Claimant had been successful it would have been entitled to recover from BDC its costs of the renewal hearing.

125. I consider the reductions proposed by the Claimant for the fees of leading and junior counsel to be unjustified for a case of this nature and the work which the defence of BDC's decision against the claim necessitated. However, I accept the Claimant's submission that BDC's schedule has not been particularised sufficiently and therefore its ability to check and contest specific items has been compromised to a degree. For that reason alone a modest reduction is appropriate. In all the circumstances of this case, in my judgment the reasonable and proportionate amount to be awarded for BDC's costs is £34,000.

The Claimant's application for permission to appeal

126. The Claimant seeks permission to appeal on certain of the arguments it raised under grounds 1 and 2. I refuse the application because the proposed grounds do not have a real prospect of success and there is no other compelling reason why the appeal should be heard.

127. The first proposed ground of appeal relates to the third part of ground 1, in which it was contended that on the findings contained in the officer's report, and which were treated as having been adopted by the Planning Committee, BDC could not lawfully have concluded that the proposal accorded with the statutory development plan taken as a whole. This argument was rejected in paragraphs 67 – 71 of the judgment.

128. The proposed of ground of appeal depends upon the novel proposition that, as a matter of law, no proposal which conflicts with even only one policy in a development plan can be considered to "accord with" the development plan as a whole under section 38(6) of PCPA 2004 unless it complies with at least one policy "providing positive support" for that particular development or type of development (see also paragraph 51 of the Claimant's skeleton). Read properly in context, Lord Clyde's dictum in City of Edinburgh did not deal with any such gloss on the language of section 38(6) (see paragraph 67 above).

129. The application then goes on to misunderstand paragraph 68 of the judgment and does not address paragraph 69. Plainly a development plan can contain support for a development of a kind which is not specifically dealt with in a plan. There is no legal requirement for a plan to deal with every conceivable type of development which might be proposed during the duration of the plan.

130. The second ground of appeal relates to the correctness of the decision of the Court of Appeal in the Luton case on the tests for determining when a planning authority

becomes legally obliged to take into account an alternative site or sites for the development proposed. This ground does not arise because the challenge failed in any event on the facts of the case, for the reasons given in detail between paragraphs 80 – 102 of the judgment. The Claimant has made no attempt to explain why that analysis is wrong. In addition, even if the Claimant were to succeed in persuading the Court of Appeal that its statement in Luton is not good law, and that BDC failed to comply with an obligation to take the Weeting site into account as an alternative to the application site, the claim would still fail for the reasons set out in paragraph 110 above which have not been challenged.

131. In any event the decision in Luton is based on the judgment at first instance of Carnwath LJ in Derbyshire Dales which (at paragraph 18) expressly referred to Lord Hoffman's speech in Tesco at [1995} 1 WLR 780 and other related authorities, and so could not possibly be said to have been *per incuriam*.

Case No: CO/1207/2017

Neutral Citation Number: [2017] EWHC 2743 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 November 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

BRAINTREE DISTRICT COUNCIL **Claimant**

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) GREYREAD LIMITED
(3) GRANVILLE DEVELOPMENTS LIMITED **Defendants**

- -
- -

Ashley Bowes (instructed by **Sharpe Pritchard**) for the **Claimant**
Gwion Lewis (instructed by the **Government Legal Department**) for the **First Defendant**
John Dagg (instructed under the **Direct Access Scheme**) for the **Second and Third Defendants**

Hearing date: 24 October 2017

- -

Judgment

Mrs Justice Lang :

1. The Claimant ("the Council") applied under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant, made by an Inspector on his behalf, on 3 February 2017, in which he allowed an appeal by the Third Defendant against the Council's refusal of planning permission.

2. The Third Defendant applied for planning permission to erect two detached single-storey dwellings on land east of Lower Green Road, Blackmore End, Wethersfield, Essex (hereinafter "the appeal site"). Previously there had been two agricultural buildings on the appeal site, which had been demolished.

3. On 4 March 2016, the Council refused planning permission. Its reasons for refusal were that the appeal site lay within an area of countryside beyond any defined settlement boundaries, and the development failed to accord with policies in the Council's Core Strategy and Local Plan Review and planning principles in the National Planning Policy Framework ("NPPF") at 49, 55 and 111. Policy RLP2 of the Braintree District Local Plan Review stated that new development was to be confined to areas within town development boundaries and village envelopes. Outside of those areas, countryside policies applied. Policy CS5 of the Council's Core Strategy stated that development outside town development boundaries and village envelopes was to be strictly controlled to uses appropriate to the countryside, in order to protect and enhance landscape character and biodiversity, geodiversity and amenity of the countryside. Policy CS7 of the Core Strategy stated that future development was to be in accessible locations to reduce the need to travel.

4. The Inspector (Mr K. Williams BA MA MRTPI) held a site visit and determined the appeal by way of written representations. He found that, on the most favourable analysis, deliverable housing sites fell well below the 5 year supply required by NPPF 47, and so the provisions of NPPF 49 were engaged. Policies CS5 and RLP2 were to be treated as out-of-date when applying NPPF 14. He concluded that permission should be granted in accordance with the Framework's presumption in favour of sustainable development. His key finding, for the purposes of this application, was in paragraph 9 of the Appeal Decision ("AD"):

> "9. I conclude that subject to appropriate conditions the development would not result in material harm to the character and appearance of the surrounding area. The site is not within a settlement boundary and the development would therefore conflict with policies CS5 and RLP2. It would not accord with the development plan's approach of concentrating development in towns and in village envelopes. On the other hand there are a number of dwellings nearby and the development would not result in the new isolated homes in the countryside to which Framework paragraph 55 refers."

5. Collins J. granted permission on the papers on 15 May 2017.

Ground of challenge

6. The sole ground of challenge was that the Inspector misunderstood and therefore misapplied NPPF 55 by not appreciating that, when considering the policy against granting planning permission for "new isolated homes in the countryside unless there are special circumstances", the meaning which should be given to the term "isolated homes" was "homes which were remote from services and facilities".

7. The Defendants submitted that, when applying NPPF 55, the word "isolated" should be given its ordinary objective meaning of "far away from other places, buildings or people; remote". They submitted that the Inspector correctly understood and applied the term "isolated homes" in his decision.

Legal and policy framework

(i) Applications under section 288 TCPA 1990

8. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

9. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

10. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

11. The Court should respect the expertise of Inspectors, and at least start from the presumption that they will have understood the policy framework correctly. Their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence: *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, per Lord Carnwath at [25].

12. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v*

Secretary of State for the Environment (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

(ii) Decision-making

13. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

14. The NPPF is a material consideration for these purposes, but it is policy not statute, and does not displace the statutory presumption in favour of the development plan: see NPPF 11 to 13. It must be exercised consistently with the statutory scheme giving primacy to the development plan, and not displace or distort it: *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, per Lord Carnwath at [21].

15. In *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed), rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said:

> "18. … The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that, in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

16. In *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, the Supreme Court accepted that these principles also applied to the interpretation and application of national policy in the NPPF (per Lord Carnwath at [23]; per Lord Gill at [72] – [74]).

(iii) National Policy

17. NPPF 6 explains that the purpose of the planning system is to contribute to the achievement of sustainable development. NPPF 7 summarises the three dimensions to sustainable development: economic, social and environmental.

18. NPPF 17 sets out the core land-use planning principles which should underpin decision-taking. They include the principle that planning should:

> "take account of the different roles and character of different areas, promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it;"

19. NPPF 28 sets out the policies to support economic growth in rural areas, including promoting the retention and development of local services and community facilities in villages.

20. NPPF 55 provides:

> "55. To promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. For example, where there are groups of smaller settlements, development in one village may support services in a village nearby. Local planning authorities should avoid new isolated homes in the countryside unless there are special circumstances such as:

- the essential need for a rural worker to live permanently at or near their place of work in the countryside; or

- where such development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets; or

- where the development would re-use redundant or disused buildings and lead to an enhancement to the immediate setting; or

- the exceptional quality or innovative nature of the design of the dwelling. Such a design should:

    - be truly outstanding or innovative, helping to raise standards of design more generally in rural areas;

    - reflect the highest standards in architecture;

    - significantly enhance its immediate setting; and

    - be sensitive to the defining characteristics of the local area."

21. The Planning Practice Guidance ("PPG") states:

> "How should local authorities support sustainable rural communities?
>
> …..
>
> A thriving rural community in a living, working countryside depends, in part, on retaining local services and community facilities such as schools, local shops, cultural venues, public houses and places of worship. Rural housing is essential to ensure viable use of these local facilities.
>
> Assessing housing need and allocating sites should be considered at a strategic level and through the Local Plan and/or neighbourhood plan process. However, all settlements can play a role in delivering sustainable development in rural areas and so blanket policies restricting housing development in some settlements and preventing other settlements from expanding should be avoided unless their use can be supported by robust evidence…..
>
> The [NPPF] also recognises that different sustainable transport policies and measures will be required in different communities and opportunities to maximise sustainable transport solutions

will vary from urban to rural areas [NPPF Part 4 Promoting Sustainable Transport para 34]"

Conclusions

22. The Claimant submitted that NPPF 55 had to be interpreted in the context of national policy on rural development which enjoined decision takers to support the rural economy by supporting local services and facilities within it: see NPPF 28 and 55, and the PPG. According to the PPG, housing had an "essential" role to play in ensuring the vitality of those facilities and services. Housing should therefore be located where it would "enhance or maintain" them. Housing which did not enhance or maintain those facilities or services by reason of being "isolated" from them should be avoided unless there are "special circumstances". Thus, in applying NPPF 55, and considering whether proposed development amounted to "new isolated homes in the countryside", it was irrelevant that the development was located proximate to other residential dwellings. The key question was whether it was proximate to services and facilities so as to maintain or enhance the vitality of the rural community.

23. In my judgment, the Claimant's submission was incorrect. The sentence in NPPF 55 guiding local authorities to avoid granting planning permission for "new isolated homes in the countryside unless there are special circumstances" should be "interpreted objectively in accordance with the language used, read … in its proper context" (per Lord Reed in *Tesco Homes* at [18]).

24. The word "isolated" is not defined in the NPPF. I agree with the Defendants' submission that "isolated" should be given its ordinary objective meaning of "far away from other places, buildings or people; remote" (Oxford Concise English Dictionary).

25. The immediate context is the distinction in NPPF 55 between "rural communities", "settlements" and "villages" on the one hand, and "the countryside" on the other. This suggests that "isolated homes in the countryside" are not in communities and settlements and so the distinction between the two is primarily spatial/physical.

26. As to the broader context, in my judgment, NPPF 55 seeks to promote the economic, social and environmental dimensions of sustainable development, and to strike a balance between the core planning principles of "recognising the intrinsic character and beauty of the countryside" and "supporting thriving rural communities within it" (NPPF 17). The Claimant's analysis of the policy context is far too narrow in scope.

27. The policy in favour of locating housing where it will "enhance or maintain the vitality of rural communities" is not limited to economic benefits. The word "vitality" is broad in scope and includes the social role of sustainable development, described in NPPF 7 as "supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations". The Claimant's restriction of an "isolated home" to one that is isolated from services and facilities would deny policy support to a rural home that could contribute to social sustainability because of its proximity to other homes.

28. NPPF 55 cannot be read as a policy against development in settlements without facilities and services since it expressly recognises that development in a small village may enhance and maintain services in a neighbouring village, as people travel to use them. The PPG advises that "all settlements can play a role in delivering sustainable development in rural areas", cross-referencing to NPPF 55, "and so blanket policies restricting housing development in some settlements and preventing other settlements from expanding should be avoided….". Moreover, in rural areas, where public transport is limited, people may have to travel by car to a village or town to access services. NPPF 17 penultimate bullet point identifies as a core planning principle to "actively manage patterns of growth to make the fullest possible use of public transport, walking and cycling, and focus significant development in locations which are or can be made sustainable". But as the PPG states, NPPF 29 and 34 recognise that the general policy in favour of locating development where travel is minimised, and use of public transport is maximised, has to be sufficiently flexible to take account of the differences between urban and rural areas. The scale of the proposed development may also be a relevant factor when considering transport and accessibility. As Mr Dagg rightly pointed out, the policy in NPPF 17 in favour of focusing development in locations which are or can be made sustainable applies in particular to "significant development".

29. For these reasons, I agree with the Defendants that the Claimant was seeking to add an impermissible gloss to NPPF 55 in order to give it a meaning not found in its wording and not justified by its context.

30. The First Defendant drew my attention to *Dartford Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 141 in which Lewison LJ said, at [15], in relation to para. 55 of the NPPF:

> "… the definition of previously developed land, in the context of the present case, takes as its starting point that the proposed development is within the curtilage of an existing permanent structure. It follows that a new dwelling within that curtilage will not be an 'isolated' home."

31. Although the context in that case was quite different, my conclusion is consistent with Lewison LJ's observations.

32. In AD 8 & 9, the Inspector correctly applied NPPF 55 by concluding that, since the proposed new homes would be located on a road in a village where there were a number of dwellings nearby, it would not result in "new isolated homes in the countryside".

33. The undisputed evidence before the Inspector was that Blackmore End was a village, which had linear development extending along several roads. There was a dispersed pattern of development along Lower Green Road (the location of the appeal site). Lower Green Road was a road leading out of the village, heading north. There were dwellings immediately to the south and north of the appeal site. There was also a dwelling to the west, on the other side of the road.

34. It was common ground that the appeal site was to be treated as outside any village envelope, and therefore within the countryside. Until 2014, no settlement boundary

existed for Blackmore End, in common with some other villages in this rural district. A settlement boundary was introduced in 2014 in the Site Allocations and Development Management Policies document, which was an interim measure whilst the new Local Plan was prepared, but it was never formally adopted as part of the development plan. In June 2016, a draft Local Plan was published for consultation, which included the same or very similar settlement boundary, but it only had the status of an emerging plan. In both documents, the settlement boundary (referred to as a "village envelope") was drawn around the two main clusters of housing in the centre of the village, excluding development, such as Lower Green Road, located on the edge of the village. This was a material consideration for planning purposes.

35. It was agreed that the village of Blackmore End had very limited facilities and amenities, comprising a village hall, public house and playing field. Blackmore End was within the parish of Wethersfield. Wethersfield village was about 2 miles away, and it had a post office, village store, public house, a nursery and pre-school. The village of Sible Hedingham, identified as one of five "Key Service Villages" in the draft Local Plan was about 4 miles away. In assessing accessibility, the Inspector concluded, at AD 14:

> "It is likely that those occupying the dwellings would rely heavily on the private car to access everyday services, community facilities and employment. While this weighs against the development, it is consistent with the Framework that sustainable transport opportunities are likely to be more limited in rural areas."

36. Under the sub-heading "The Overall Balance and Sustainable Development", the Inspector said:

> "16. Accessibility to services, facilities and employment from the site other than by car would be poor. On the other hand, the development would make a modest contribution to meeting housing need. In addition, subject to appropriate conditions, there would not be material harm to the character and appearance of the surrounding area or to the setting of listed buildings. A minor economic benefit would arise from developing the site and the economic activity of those occupying the buildings. There would be conflict with policies CS5 and RLP2 but those policies are out-of-date and are worthy of limited weight. Applying the tests set out in Framework paragraph 14, I find that there are not adverse impacts of granting permission which would significantly and demonstrably outweigh the benefits, when assessed against Framework policies as a whole. Nor are there specific policies in the Framework which indicate that the development should be restricted. The proposal would amount to sustainable development. Permission should be granted in accordance with the Framework's presumption in favour of sustainable development."

37. When the Inspector referred to "the minor economic benefit … from developing the site and the economic activity of those occupying the dwellings", he was referring, first, to the economic benefit of providing local builders etc. with work at the appeal site, and, second, to the economic benefit of two new households who would be likely to use businesses in the surrounding area (e.g. for services to their homes and shopping etc.). This was a point expressly raised in the Appellant's case, which the Inspector was entitled to accept. In my view, it was obvious that households would be likely to use services in the surrounding area to some extent. I cannot agree with the Claimant's submission that the Inspector made no finding on this point or that there was insufficient evidence of such use to enable him to do so.

38. In conclusion, I consider that the Inspector correctly interpreted NPPF 55, and applied it properly to the facts and matters which arose in this appeal. Therefore the Claimant's application is dismissed.